

THIS WEEK:

- **Jury Charges; Ineffective Assistance of Counsel**
- **Jury Charges; Mutual Combat**
- **Hearsay; Rule 803 (4)**
- **Medical Examiners; Juror Misconduct**
- **Sentencing; Merger**
- **Ineffective Assistance of Counsel; Right to Withdraw Plea Prior to Sentencing**
- **Juveniles; Sentencing for Murder Convictions**

Jury Charges; Ineffective Assistance of Counsel

Frazier v. State, S20A0088 (6/29/20)

Appellant was convicted of malice murder and other offenses arising out of the shooting death of the victim. The evidence showed that appellant drove up next to the vehicle driven by the victim and then shot him. Afterwards, the police engaged in a high speed chase of appellant's vehicle. Appellant crashed the vehicle and got away, but was eventually arrested. At trial, he claimed that he was coerced into shooting the victim by two masked gunmen who were in the car with him, but also got away when his car crashed.

Appellant contended that he received ineffective assistance of counsel because his trial attorney failed to ask for a charge to support a justification defense and instead sought a charge to support a coercion defense. The Court disagreed.

The record showed that defense counsel's requested charge on coercion was given to the jury. But, under OCGA § 16-3-26, "[a] person is not guilty of a crime, *except murder*, if the act upon which the supposed criminal liability is based is performed under such coercion that the person reasonably believes that performing the act is the only way to prevent his imminent death or great bodily injury." (Emphasis supplied). The Court noted that although the statute expressly provides that coercion is not a defense to murder, appellant was also charged with crimes other than murder, including aggravated assault and fleeing and attempting to elude. Since coercion is a valid defense to those crimes, trial counsel's requested jury charge was appropriate. Moreover, appellant failed to show that the requested coercion charge was prejudicial to his defense because the jury was never instructed that coercion was not a valid defense to murder. Therefore, the charge given could only have served to support appellant's defense that he was involved in the incident resulting in the victims' death because he was being held at gunpoint.

Nevertheless, appellant argued, with regard to the murder charges, trial counsel should have also requested a jury charge under OCGA § 16-3-20 (5), which provides: "The defense of justification can be claimed . . . [w]hen the person's conduct is justified for any other reason under the laws of this state[.]" However, the Court found, this theory of justification necessarily relies on principles of law found outside OCGA § 16-3-20, and appellant's only stated basis for a justification

defense was that he was coerced by the two masked gunmen to participate in the shooting of the victim. But a defense that appellant was justified in participating in the murder because he was under an immediate threat from the masked gunmen is identical to a defense that he was coerced into participating in the crime because he reasonably believed that performing the act was the only way to prevent his imminent death or great bodily injury. Therefore, the Court found, appellant failed to show that an unspecified justification charge under OCGA § 16-3-20 (5) would have been more beneficial to him than the coercion charge given by the trial court. Consequently, because appellant failed to show either that trial counsel was deficient in failing to request a justification charge or a reasonable probability that the outcome of his trial would have been different if his counsel had made such a request, the Court concluded that appellant's claim of ineffective assistance of counsel was without merit.

Jury Charges; Mutual Combat

Williams v. State, S20A0078 (6/29/20)

Appellant was convicted of the felony murder of Karim. The evidence, very briefly stated, showed that appellant was married, but having an affair with Karim. They both lived in the same apartment complex, but in different buildings. Appellant showed up at Karim's apartment early one morning, apparently to have sex with Karim. Karim, however, wanted to end her affair with appellant. An argument ensued and Karim got into her SUV and tried to drive away. Her window was down and appellant punched her in the face. As Karim kept driving, albeit slowly through the parking lot, appellant kept pace and kept arguing with her and punching her. Eventually, appellant got hold of a gun, apparently brought to him by his wife, and shot and killed Karim.

Appellant contended that the trial court erred in denying his request for a jury instruction on mutual combat as a basis for voluntary manslaughter. The Court stated that a finding that a defendant was engaged in mutual combat at the time the victim was killed may authorize the jury to find the defendant guilty of voluntary manslaughter and not malice murder. Mutual combat occurs when there is combat between two persons as a result of a sudden quarrel or such circumstances as indicate a purpose, willingness, and intent on the part of both to engage mutually in a fight. Evidence that the victim attacked the defendant, such that would give rise to justification based on self-defense, is not a basis for an instruction on mutual combat.

Appellant argued in the trial court that a jury instruction on mutual combat was warranted because there was evidence that "what we have here is not a duel with two guns or a knife fight, but a car and gun. And both were used as weapons." The trial court instructed the jury on voluntary manslaughter generally but refused appellant's request to charge the jury on mutual combat.

The Court found that evidence that appellant and Karim were arguing shortly before he shot her did not support a jury instruction on mutual combat. Moreover, appellant claimed that he did not want to fight Karim and instead shot her in self-defense. But, evidence of self-defense also does not support a jury instruction on mutual combat as a basis for voluntary manslaughter. Thus, the Court found, there was no evidence from which a jury could find that appellant and Karim had mutually agreed "to resolve their differences" through an SUV-versus-gun fight. Accordingly, the trial court did not err in denying appellant's request to instruct the jury on mutual combat.

Hearsay; Rule 803 (4)

Smith v. State, S20A0119 (6/29/20)

Appellant was convicted of felony murder and possessing a firearm during the commission of a felony in connection with the shooting death of her husband, Cory Smith. The evidence, briefly stated, showed that Cory had been physically violent with appellant during their relationship. In January 2015, they separated, appellant filed for divorce, and obtained a handgun. By April 2, 2015, they began dating again. On the night of the crimes, appellant went to Cory's apartment, where they argued. Appellant used her handgun to shoot Cory three times, striking him in the right thigh, next to his left eye, and behind his left ear, killing him. According to neighbors, the first shot was followed 30 to 60 seconds later by the second shot, which was followed 20 to 60 seconds later by the third shot. More than an hour later, appellant called 911. Appellant later told the police that when she attempted to leave Cory's apartment, he started walking toward her aggressively, at which point she brandished her handgun, told him that he would never threaten or hurt her again, and then fired at him once. She stated that Cory then backed up and screamed expletives, at which point she started firing again.

Appellant contended that the trial court erred in refusing to permit her expert witness, Dr. Loring, to testify to statements that five of appellant's family members made to Dr. Loring that Dr. Loring considered in determining whether appellant suffered from mental health issues, including post-traumatic stress disorder (PTSD) and battered person syndrome (BPS). Appellant argued that the statements were admissible under OCGA § 24-8-803 (4) (hereinafter "Rule 803 (4)") because they were made for the purposes of medical diagnosis or treatment, and under OCGA § 24-7-703 ("Rule 703") because Dr. Loring relied on those statements in concluding that appellant suffered from BPS.

Citing *State v. Almanza*, 304 Ga. 553 (2018), the Court stated in order to determine if the hearsay statements are admissible under Rule 803 (4), a court must determine whether (1) the declarant's motive in making the statement is consistent with the purposes of treatment; and (2) the content of the statement is the type reasonably relied upon by a physician in treatment or diagnosis. Assessing the validity of the declarant's motive is critical under this test.

Initially, the Court noted that the federal appellate courts to have addressed the specific issue in this case have concluded that statements made for medical purposes to experts hired in anticipation of litigation generally are admissible under Rule 803 (4). But, the Court stated, it had two main reservations about these cases. First, even though the *Almanza* Court adopted the Eighth Circuit's two-part Rule 803 (4) admissibility test, it was unclear the extent to which the federal courts that have had occasion to apply that test have meaningfully focused on whether the declarants' motives in making the statements were consistent with the purposes of diagnosis or treatment, and that assessment is the "critical" first step in a Rule 803 (4) analysis. And, the Court stated, while it remains convinced that the Rule 803 (4) test it adopted in *Almanza* is the right test and that statements made to an expert consulted to testify at trial are not categorically excluded under Rule 803 (4), the Court found the federal cases unpersuasive to the extent that they suggest that the question of admissibility under Rule 803 (4) is anything other than a case-specific, fact-intensive inquiry. Secondly, and more critically, these federal criminal cases were decided prior to the United States Supreme Court's landmark decision in *Crawford v. Washington*, 541 U. S. 36 (124 SCt 1354, 158 LEd2d 177) (2004).

Nevertheless, the Court stated, it need not decide whether the trial court erred in ruling that appellant's family members' statements were inadmissible under Rule 803 (4), because it concluded that any such error was harmless. Specifically, the Court found that in light of the substantial evidence admitted at trial showing that Cory had abused appellant quite severely on numerous occasions, and given that other properly admitted evidence significantly undermined appellant's justification defense, it was highly probable that any error in the trial court's exclusion of the statements at issue did not contribute to the verdicts.

Medical Examiners; Juror Misconduct

Burney v. State, S20A0216 (6/29/20)

Appellant was convicted of malice murder and other offense in connection with the death of Kitchens, a 76 year old, who lived alone. The evidence, briefly stated, showed that appellant and his codefendant broke into Kitchens home in October 2008. They ransacked the place, looking for guns and other property to steal. When Kitchens came back home, they duct-taped him to a chair and left him there. On October 17, 2008, after not hearing from him for several days, Kitchens' sister went to the house. When Kitchens didn't respond, she called the police to do a welfare check. The officers found Kitchens' body inside the house. He was wrapped in duct tape, which attached him to an overturned dining room chair. The duct tape wrapped his hands behind his back and covered his body from his shoulders to his stomach.

An October 18 autopsy of Kitchens revealed that he died due to prolonged physical restraint, and that the lack of access to food, water, and his prescribed medications complicated the hypertension and diabetes from which he suffered. The medical examiner testified that there were no signs that Kitchens suffered any gunshot wound, stab wound, or blunt force trauma. The medical examiner testified that the body's state of decomposition indicated that he had been dead for five to six days at the time of the October 18 autopsy. The medical examiner determined that the manner of death was homicide.

Appellant contended that the trial court erred by denying his motion to exclude the testimony of the medical examiner as to the cause of Kitchens' death. The Court disagreed.

Specifically, appellant argued that in determining the cause of death, the medical examiner relied on medical records that Kitchens' doctor provided. However, those medical records were not provided to appellant and were at some time before trial, destroyed by the State. Thus, he argued, he was deprived of the ability to effectively cross-examine the medical examiner or to challenge the State's theory that Kitchens died because appellant denied him access to nourishment and medication. But, the Court stated, because both the medical examiner and Kitchens' physician testified about Kitchens' medical history and were subject to cross-examination, he failed to show that his right to confront these witnesses was violated.

Nevertheless, appellant argued, the destruction of the medical records by the State constituted a *Brady* violation. However, the Court stated, evidence is not regarded as "suppressed" by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence. And here, the record showed that appellant received the medical examiner's report sometime between March 27, 2012, and February 21, 2013, and he learned that the State planned to call the medical examiner as a witness at trial on June 13, 2013. But appellant did not inquire about the medical records referenced in the report until February 20, 2014. The record thus showed that appellant waited at least a year to request Kitchens' medical records from the latest date he could have received the medical examiner's report and over eight months

after the State indicated that the medical examiner would be called as a witness. The record thus showed that appellant was not reasonably diligent in seeking access to the medical records. Moreover, the Court noted, appellant merely speculated as to how the medical records would have aided him, and he offered no evidence that anything contained in the medical records might have differed from the testimony about those records or Kitchens' medical history that was presented at trial.

Appellant also argued that he was entitled to a new trial as a result of juror misconduct. Specifically, he argued that the trial court erred by not granting him a new trial after it was discovered that one of the jurors, L.F., accessed an online search engine from her phone and looked up the terms "malice" and "malice murder" during the jury's deliberations. The Court again disagreed.

Here, the Court found, although L.F. clearly engaged in misconduct, the evidence received by the trial court regarding her actions, including her own statements to the independent investigator appointed by the court without objection by the parties, the statements of the other 10 jurors who were interviewed by the investigator, and the testimony presented at the hearing, authorized the trial court to find that L.F. did not share what she learned with other jurors and to determine that her misconduct did not impact any juror's assessment of the charges against appellant, including her own. Thus, no evidence was presented that the juror's conduct contributed to the conviction such that the verdict was inherently lacking in due process. Consequently, because the State carried its burden of establishing beyond a reasonable doubt that the misconduct was harmless, a new trial was not required.

Sentencing; Merger

Priester v. State, S20A0444, S20X0445 (6/29/20)

Priester was convicted of murder, two counts of criminal attempt to commit murder, two counts of aggravated battery, and a number of other offenses in the shooting death of Heyward and the wounding of Heyward's two parents. The State filed a cross-appeal, arguing that the trial court erred when it merged the attempted murders of Heyward's parents into the aggravated batteries upon them. The Court agreed.

The Court stated that no one disputed that each of the attempted murders and each of the aggravated batteries are predicated upon the same conduct—the shooting and wounding of each of Heyward's parents—and that the attempted murders and aggravated batteries merge. The question was which offenses merged into the other two.

The Court noted that the trial court was bound by Court of Appeals precedent that an attempted murder merges into an aggravated battery. In *Hernandez v. State*, 317 Ga. App. 845, 852 (3) (2012), the Court of Appeals reasoned that "attempted murder requires a less serious injury to the person [than aggravated battery], as personal injury is not a required element of attempted murder," and it concluded that an attempted murder is, therefore, a lesser offense than aggravated battery for purposes of merger under OCGA § 16-1-6 (2). Although the Court of Appeals acknowledged in a subsequent decision that an attempted murder involves the risk of an injury (death) that is more serious than the actual injury required for an aggravated battery, it declined to revisit and instead reaffirmed *Hernandez*. See *Zamudio v. State*, 332 Ga. App. 37, 48 (771 SE2d 733) (2015). See also *Dobbs v. State*, 2020 Ga. App. LEXIS 279 (Case No. A20A0738, decided May 15, 2020) (declining to revisit *Hernandez* and *Zamudio*).

But, the Court stated, whether the risk of death that is inherent in conduct that amounts to a “substantial step” toward the commission of a murder is more or less serious than the actual bodily harm that is inherent in an aggravated battery is a question that in the abstract is both difficult and debatable. However, it ultimately is a question of public policy, and it is a question on which our General Assembly—to which it generally must defer on questions of public policy, appears to have given an answer. The statutory penalty for attempted murder is imprisonment for up to 30 years, see OCGA § 16-4-6 (a); the statutory penalty for aggravated battery is imprisonment for up to 20 years, see OCGA § 16-5-24 (b). The range of punishments authorized for each of these crimes—both of which require malice—suggests that the General Assembly views the risk of injury in an attempted murder as more serious than the actual injury required for an aggravated battery. Thus, the Court concluded, an aggravated battery merges into an attempted murder in a case like this one. If it were otherwise, an attempted murder that caused no actual injury would be punishable by up to 30 years in prison, but an attempted murder that caused an injury serious enough to amount to aggravated battery would be punishable only by up to 20 years in prison.

Therefore, the Court held, aggravated battery merges into the greater offense of attempted murder when the crimes are predicated upon the same conduct, and *Hernandez, Zamudio*, and *Dobbs* are overruled to the extent that they hold otherwise. Accordingly, the Court reversed the merger of the attempted murders into the aggravated batteries, and remanded for the trial court to resentence Priester.

Ineffective Assistance of Counsel; Right to Withdraw Plea Prior to Sentencing

Nelson v. Wilkey, S20A0013 (6/29/20)

Warden Nelson appealed from the habeas court's order setting aside Wilkey's conviction for one count of possession of methamphetamine with intent to distribute. The relevant facts from the record showed that on the third day of trial, while one of his former co-defendants was testifying on behalf of the State, Wilkey elected to change his plea to a guilty plea. Two weeks later, at the sentencing hearing, and prior to the pronouncement of sentence, plea counsel stated as follows: “I just want the record to reflect and I have let Mr. Wilkey know that it has come to my attention that there was an outstanding warrant for [the] sale of methamphetamine, a felony warrant that had been outstanding on [Wilkey's female co-defendant] since August of last year. Even though she had come to court multiple times and sat in the courtroom for three days of trial, the warrant was not executed, nor was that information turned over to the defense at trial and that her testimony was that she was just a user, that she didn't sell drugs, and that's why the drugs [at issue in Wilkey's case] were not hers. I let Mr. Wilkey know that information since it came about after he took a plea. I've also let him know and that the record will reflect he has thirty days from today's date if he wanted to withdraw his plea because that certainly would have an effect on what we discussed.” These statements by Wilkey's plea counsel were not disputed by the State.

Wilkey filed a motion to withdraw his guilty plea within 30 days of his sentencing hearing. However, that motion was rejected as untimely on October 3, 2017, because the term court had ended on April 30, 2015, two days after Wilkey's sentencing hearing. Thereafter, Wilkey filed a habeas petition contending that he would have withdrawn his plea prior to sentencing if he had been advised that he had a right to do so. The habeas court, after an evidentiary hearing, found that plea counsel rendered ineffective assistance and granted his petition. Specifically, the habeas court's determined that Wilkey

received ineffective assistance from his plea counsel when plea counsel failed to advise Wilkey of his statutory right to withdraw his guilty plea prior to sentencing, and but for plea counsel's deficient performance, Wilkey's motion to withdraw his plea would have been granted by operation of law if made prior to sentencing.

The Warden argued that plea counsel's failure to inform Wilkey of his statutory right to withdraw his guilty plea prior to sentencing cannot form the basis of habeas relief because there is no federal or state constitutional provision stating that a criminal defendant may withdraw his or her guilty plea as a matter of right at any time prior to sentence being pronounced. However, the Court stated, although it recently held that a defendant has no constitutional right to be advised by the trial court that he cannot withdraw his guilty plea as a matter of right after his sentence is pronounced, that is a different question than whether a defendant has a constitutional right to effective assistance of counsel. A defendant's right to effective assistance of counsel regarding his guilty plea includes the right to be advised about his absolute right to withdraw his guilty plea prior to sentencing and whether he should pursue such a remedy. And here, the Court agreed with the habeas court's determination that no reasonable attorney providing constitutionally effective representation would fail to inform a client of an absolute statutory right to withdraw a plea when the attorney had obtained new information that changed the attorney's assessment of the client's case and had not yet fully discussed that information and its relevance with the client.

Furthermore, plea counsel's actions resulted in the imposition of an unnecessary burden on Wilkey, as he had to show a manifest injustice in his motion to withdraw his guilty plea after sentencing. No reasonable lawyer would allow sentencing to go forward under these circumstances. In fact, the Court noted, the Warden conceded that plea counsel provided "bad advice about [Wilkey's] plea withdrawal options" at his sentencing hearing.

Nevertheless, the Warden argued, the habeas court erred in granting relief because Wilkey failed to show that his plea counsel's deficient performance was prejudicial. The Warden contended that because the trial was essentially over—the prosecution had rested, Wilkey's co-defendant had testified, and Wilkey was considering what evidence, if any, to present—Wilkey had not and could not show that he would have continued with trial, because any erroneous advice about his right to withdraw his guilty plea had nothing to do with Wilkey's decision two weeks earlier to forgo the remainder of his trial. The Warden further argued that the habeas court applied the wrong prejudice standard. The Court disagreed with each of these contentions.

Here, the habeas court credited Wilkey's testimony that he did not know about his statutory right to withdraw his guilty plea prior to sentencing, and that he took immediate steps to file a motion to withdraw his guilty plea as soon as he thought he could—after sentencing. The Court found that this credibility determination was not clearly erroneous. Moreover, the habeas court's findings were sufficient to show prejudice, as they supported a determination that Wilkey would have withdrawn his guilty plea prior to sentencing and continued with trial. The habeas court's determination—that Wilkey would have had his motion to withdraw his guilty plea granted and his right to a jury trial reinstated by operation of law—was simply a conclusion about the logical result of a motion to withdraw a guilty plea filed prior to sentencing. Accordingly, the Court affirmed the grant of the petition for writ of habeas corpus.

Juveniles; Sentencing for Murder Convictions

Raines v. State, S26A0183 (6/29/20)

Appellant was convicted of malice murder and other crimes. The trial court sentenced him to life in prison without the possibility of parole (“LWOP”) for malice murder. Appellant was 17 years old at the time of the crimes. Relying on *Apprendi v. New Jersey*, 530 U. S. 466, 490 (120 SCt 2348, 147 LE2d 435) (2000) and the Sixth Amendment, he contended that he had a constitutional right to have a jury (as opposed to a judge) make the requisite determination of whether he is “irreparably corrupt” or “permanently incorrigible” to allow an LWOP sentence.

The Court noted that in *Veal v. State*, 298 Ga. 691 (2016), it held that to ensure principles of proportionality were satisfied under the Eighth Amendment, as interpreted in *Miller v. Alabama*, 567 U. S. 460, 465 (132 SCt 2455, 183 LE2d 407) (2012), and as refined by *Montgomery v. Louisiana*, ___ U. S. at ___ (136 SCt at 734, 736), a trial court must make a “distinct determination” that the defendant is an “exceptionally rare” juvenile who is “irreparably corrupt” or “whose crimes reflect permanent incorrigibility” before sentencing a juvenile convicted of murder to life without parole. *Veal*, 298 Ga. at 701-703 (emphasis in original). And, appellant’s arguments assume the following: (1) that the statutory maximum sentence a juvenile can receive in Georgia is life in prison with the possibility of parole; (2) that juvenile LWOP is therefore an enhanced sentence; and (3) that a *Veal* determination of irreparable corruption is a factfinding that must be made by a jury.

In a long opinion, analyzing both U. S. Supreme Court precedent and Georgia precedent, the Court disagreed with all three assumptions. The Court held that in light of its previous holdings that OCGA § 16-5-1 (e) (1) comports with the Sixth Amendment and *Apprendi*, see *Babbage v. State*, 296 Ga. 364, 368 (768 SE2d 461) (2015); the Court’s interpretation in *Veal* of *Miller* and *Montgomery*’s Eighth Amendment requirements; and the absence of authority applying the Sixth Amendment and *Apprendi* to sentencing requirements imposed solely by the Eighth Amendment, the Court concluded that a Georgia defendant convicted of murder committed when he was a juvenile does not have a federal constitutional right under the Sixth Amendment to have a jury make the determination required by the Eighth Amendment of whether he is irreparably corrupt or permanently incorrigible before he is sentenced to serve life without the possibility of parole.