



Supreme Court of Georgia

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SUMMARIES OF OPINIONS

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IN RE: JUDICIAL QUALIFICATIONS COMMISSION'S FORMAL ADVISORY OPINION NO. 241 (S15Z1597)

Under an opinion today, the Supreme Court of Georgia has ordered the Judicial Qualifications Commission to reconsider an advisory opinion that prohibits judges' councils from filing amicus briefs in pending court cases.

With today's unanimous opinion, the Council of State Court Judges has won its request to get the JQC's Formal Advisory Opinion No. 241 withdrawn.

"Having carefully considered the arguments of both parties, we conclude that the Code of Judicial Conduct permits judges' associations to submit amicus briefs in pending litigation," the opinion says.

Opinion No. 241 stemmed from a private probation case brought by 13 individual plaintiffs against Sentinel Offender Services, a private probation company. In November 2014, this Court upheld as constitutional the Georgia statute that allows state courts to contract with private probation companies for the supervision of misdemeanor probationers. But it also ruled that state courts may no longer lengthen the probationers' sentences beyond what was originally ordered – a practice called "tolling."

Prior to the Court's decision and before the case was argued before the Justices, in July 2014 the Council of State Court Judges filed an "amicus curiae" brief, arguing that state law gives trial courts the authority to use private probation companies to supervise misdemeanor probationers. (An "amicus curiae" brief is a legal brief filed by a person or organization seeking to influence the outcome of a lawsuit while not being a party to the lawsuit.)

In response to the amicus brief, lawyers for the 13 probationers sent a letter to the JQC asking whether the Council could ethically file amicus briefs in pending cases. On Sept. 2, 2014, the JQC issued Opinion No. 241, concluding “that filing amicus curiae briefs by judges, councils of judges or any other organization of judges in cases pending in any trial or appellate court would be improper and prohibited by the Georgia Code of Conduct.” In June 2015, the Council asked the Supreme Court to review the JQC’s opinion. The high court granted the request and asked the parties to answer the following questions: “Under Georgia law and the Georgia Code of Judicial Conduct, may individual judges or groups or councils of judges file amicus curiae briefs in pending cases? If so, under what circumstances?”

In October 2015, the JQC filed a motion asking the high court to dismiss the proceedings related to JQC Opinion No. 241, arguing that the high court had no authority to review the Commission’s formal advisory opinions. In today’s opinion, the high court disagrees.

“For the same reasons as explained by this Court in *In re: Judicial Qualifications Commission Formal Advisory Opinion No. 239*, that motion is denied,” the opinion says. In its opinion related to the JQC’s Advisory Opinion No. 239, which stated judges were prohibited from restricting certain groups, such as children, from their courtrooms, the high court ruled: “Our Constitution establishes the Commission and vests it with the power to discipline judges, but the constitutional authority of the Commission does not put its advisory opinions beyond the review of this Court.”

As to the merits of Advisory Opinion No. 241, in today’s opinion, the Supreme Court agrees with the Judges Council that the JQC lacks the authority to issue the Advisory Opinion because it attempts to regulate the Council’s institutional conduct and it is unrelated to judicial discipline.

Based upon the Constitution and the Georgia Code of Judicial Conduct, “the scope of the Commission’s authority is limited to reviewing alleged improper actions of individuals performing judicial functions and potentially imposing disciplinary action for the same. “

“Here, the Council is not an individual judge,” the opinion says. “It did not perform a judicial function by submitting an amicus brief to this Court for consideration and the Council is not facing a potential disciplinary action based upon these activities; instead, the Council is a constitutionally-created body which was established in order ‘to effectuate the constitutional and statutory responsibilities conferred upon it by law and to further the improvement of the state courts, the quality and expertise of the judges thereof, and the administration of justice.’ The filing of amicus briefs by the Council may fulfill these purposes and is part of the long tradition of judicial organizations, including the Conference of Chief Justices, filing amicus briefs in State and Federal courts around the country. Therefore, the Commission does not have the authority to regulate the Council’s conduct as an institution.”

However, today’s opinion cautions individual judges, stating that the Code of Judicial Conduct generally prohibits full-time judges from filing individual amicus briefs, although “they may, on a rare occasion and while exercising extreme caution, file such briefs in pending matters.” And while judicial organizations such as the Council may file amicus briefs in pending matters, “we caution the individual judges involved in similar organizations to be circumspect with regard to their own roles in, and public affiliation with, the briefs filed by these organizations.”

With today's opinion, "we direct the Commission to reconsider Opinion No. 241 in a manner consistent with the opinion of this Court."

Attorneys for Council of State Court Judges: Michael Terry, Jeremy Farris

Attorneys for JQC: Norman Fletcher, Lee Carter

THE STATE V. HARRIS (S17A0117)

Under an opinion today by the Georgia Supreme Court, a young man convicted of murder for his role in the shooting death of a taxi driver when he was 17 years old may have lost his chance for a new trial.

A **Fulton County** court had granted him a new trial on the ground that his trial lawyer had been ineffective, in violation of his constitutional rights, for failing to try to get the teen's damaging text messages suppressed as evidence. On appeal, the District Attorney argued for the State that the trial court was wrong.

In today's unanimous opinion, **Justice Carol Hunstein** writes for the court, "We agree and therefore reverse the trial court's grant of a new trial."

According to the facts at trial, on April 22, 2009, Atlanta Police discovered the body of Stephen Anim, 57, slumped over in the driver's seat of his cab. He had been shot to death. The vehicle had apparently crashed into the gate of the Big Bethel Village retirement facility on Richard Allen Blvd. in Atlanta. The investigation led officers to Quantavious Harris, 17, and Samuel Ellis, 16. According to state prosecutors, Harris and Ellis got into Anim's cab at the Hamilton E. Holmes MARTA Station while Anim was waiting for potential passengers and directed him to a secluded dead end street behind a closed hospital. There they demanded Anim's property, then shot him in the back of the head. Anim died holding \$17 in cash, according to briefs filed in the case. Investigators later discovered that \$700 and a GPS system were missing from the vehicle. Harris and Ellis fled the scene but surveillance video showing them entering the cab led to their arrests after it was aired on television. Both were indicted for malice murder, felony murder based on aggravated assault with a deadly weapon, aggravated assault, attempted armed robbery and possession of a firearm during the commission of a felony. Harris was tried first and convicted in September 2011 of all but malice murder. He was sentenced to life plus five years in prison, according to the brief filed by the District Attorney. (Ellis was later convicted and sentenced to life plus five years' probation.) Harris then filed a motion requesting a new trial.

At issue in Harris's case is a series of text messages that were on his phone. As part of his defense, Harris acknowledged being in the cab with Ellis at the time of the killing but denied being involved in the shooting and said he had already left the cab when he heard the gunshot. No gun was recovered from the scene, and according to his attorney for his appeal, the only evidence disputing Harris's defense of merely being present, were the text messages he had sent earlier in the day to his girlfriend, stating he would have to rob someone and may have to shoot him. In one text message to his girlfriend, Harris said he was about to "hit dis lick," meaning in street slang that he was about to commit a robbery. "I thought u been did dat," she responded. "Naw but I'm gon have 2 kill dis n****r," Harris texted back. "Baby plz dnt do dat," she wrote. "I need da money," Harris texted.

Investigators recovered the messages not from Harris's phone but from his cellular service provider. However, in doing so, they obtained them with only a court order as opposed to a search warrant. State and federal law require a warrant for records less than 180 days old.

At trial, while Harris's attorney objected to the introduction of the text messages on other grounds, she did not challenge the records based upon the State's failure to obtain a search warrant as required by Georgia and federal statutes, and the text messages were subsequently admitted as evidence.

At his hearing on his motion for new trial, Harris's new attorney argued among other things that his trial attorney had provided "ineffective assistance of counsel" for failing to file a motion to suppress the text messages. Under the U.S. Supreme Court's 1984 decision in *Strickland v. Washington*, to prove "ineffective assistance of counsel," a defendant must show not only that his trial attorney provided deficient performance, but also that the attorney's deficient performance "prejudiced" – or damaged – his case because except for that unprofessional performance, there is a reasonable probability the outcome of the proceeding would have been different.

Here, the trial judge ruled that the attorney's failure to move to suppress the text messages for failing to obtain a warrant was professionally unreasonable, and that had the text messages been excluded as evidence, the outcome of his trial likely would have been different. Following the hearing, State prosecutors immediately obtained a warrant for the text messages and attached it to a motion asking the judge to reconsider the ruling granting Harris a new trial. The court denied the motion, and the State then appealed to the state Supreme Court.

"On appeal, the State continues its uncanny effort to snatch defeat from the jaws of victory by echoing its unsupported argument that its post-motion for new trial attempts to obtain a search warrant show that the State could have corrected its initial error in obtaining the text messages, therefore making them admissible at trial," today's opinion says. "However, because the search warrant and supporting affidavit were not introduced as evidence at the motion for new trial, they are not a proper part of the record before us on review."

As to the trial court's order, "we agree with the State that the trial court's prejudice analysis is flawed, as Harris failed to show that, but for trial counsel's deficiency, there is a reasonable probability that the outcome of his trial would have been different," the opinion says. Contrary to Harris's assertion, the State's case did not center on the text messages. "Instead, they were a small piece of many moving parts utilized by the State to establish Harris's guilt."

Considering that the jury heard similar transaction evidence of Harris's prior armed robbery and aggravated assault of a pizza delivery man, that Harris and Ellis ran from the scene, that video surveillance showed them entering the victim's cab, and Harris's own admission that he was seated behind the victim during the cab ride – after which the victim was shot in the back of the head – "the trial court erred in finding that Harris was prejudiced by his counsel's deficient performance," the opinion concludes. "Accordingly, we reverse the trial court's order granting Harris a new trial and remand the case with direction that the trial court consider the remaining grounds in Harris's motion for new trial."

Attorneys for Appellant (State): Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., Marc Mallon, Sr. Asst. D.A.

Attorney for Appellee (Harris): Kevin Anderson

JONES V. THE STATE (S17A0301)

The Supreme Court of Georgia has upheld the conviction and prison sentence of life without parole given to a young man in **Richmond County** for the child abuse murder of his 4-year-old daughter.

Willie Clifford Jones, who was 23 at the time of his trial, claimed on appeal that he deserved a new trial because his conviction for felony murder had as its predicate felonies both cruelty to children in the first degree and cruelty to children in the second degree. But the jury did not specify which predicate felony was the basis of its guilty verdict on the felony murder charge, and the evidence was insufficient to support cruelty to children in the second degree.

In today's unanimous opinion, "we conclude that he would not be entitled to a new trial even if he were right that there was sufficient evidence to support a conviction based on only one of the two predicate offenses," **Justice Nels S.D. Peterson** writes for the court.

According to briefs filed in the case, 4-year-old Ty'Asia Michelle Phillips lived with her mother, Chelsea Phillips, her grandmother and other family members. Jones, the child's father, lived separately in a trailer. While the grandmother normally took care of Ty'Asia, she was scheduled to have gastric bypass surgery so Chelsea Phillips arranged for the little girl to stay for a while with her father beginning in late February 2012. Chelsea Phillips later testified that the child did not have any injuries when she left her with Jones. On March 6, 2012, Emerson Cohen, who had dated Jones' mother, visited Jones at his trailer. Ty'Asia was standing in the corner, crying, and told Jones her daddy had spanked her, according to briefs filed by the Attorney General. Cohen said Jones told him he had spanked her because he was trying to teach her the alphabet and instead of reciting the ABCs, the child was singing a rap song with curse words. However, Cohen later testified that he too did not observe any bruising on the child and saw her running around and playing with other children as late as March 10. Janice Williams testified that on March 9, she saw Ty'Asia when she dropped off Jones' sister at his trailer. Williams said that while she was there, Jones got angry at the child and put her on top of the refrigerator. When Williams told Jones to get Ty'Asia down, he intentionally dropped her to the floor.

The evening of March 11, 2012, Jones called Cohen, crying, and saying he could not wake Ty'Asia up. Cohen urged Jones to call 911. Nolan Hogues, who was Jones' cousin, also came by that night and later testified he found Jones sitting in the living room, crying, with his daughter in his lap. Hogues said the child was breathing but limp when he picked her up. He told Jones to call an ambulance, which Jones did. Paramedics arrived and found the little girl unresponsive and cool to the touch. She had multiple markings, bruises, abrasions, face swelling, and what was apparently an older burn injury on her back in a pattern like a railroad track. On the way to the hospital, the child's respiratory rate dropped and a paramedic had to breathe manually for her. She began to draw up in a fetal position, then arched her back and pointed her toes, which was indicative of neurological problems and head trauma.

At Jones' trailer, law enforcement officers found a portable heater with a pattern consistent with the burn injury on Ty'Asia's back. They also found numerous portions of venetian blind rods throughout the trailer. A broken belt was found in the washing machine. At the hospital, Jones initially denied to an investigator that he had hit or spanked his daughter. He said he had let her out to play earlier that day, she came inside, he went to the bathroom, and when he came out, she was unresponsive. He later said the child had called him a "bitch" and he had punished her by striking her with his hand. He said he had also used a blind rod and whipped

her with it while she was moving around. He said that while he was attempting to restrain her, she got loose and fell on the heater. He thought that while he was trying to punish her, she may have hit her head on a shelf in the hallway.

Ty'Asia died on March 18, 2012. The autopsy revealed a double linear injury on her back consistent with a cut electrical cord, markings on her chest consistent with a blind rod, scattered scabs on her back and upper buttocks, bruising all over her body, and internal bruising on her scalp and head, including severe brain swelling and eye hemorrhages. The medical examiner ruled the child's death a homicide caused by traumatic head injuries and testified that "roughhousing" would not have accounted for the severity of her injuries.

Following a trial in September 2013, Jones was found guilty of felony murder and sentenced to life without parole. He then appealed to the Georgia Supreme Court, arguing that because Jones was convicted – by "general verdict" – on a count of felony murder that contained two predicates or underlying felonies, and there was insufficient evidence to support one of those predicates, he is entitled to a new trial.

Under Georgia statutory law, a person commits first degree child cruelty "when such person *maliciously* causes a child under the age of 18 cruel or excessive physical or mental pain." Malice means "an actual intent to cause a particular harm." A person commits second degree child cruelty "when such person with *criminal negligence* causes a child under the age of 18 cruel or excessive physical or mental pain." The State contended that Jones committed felony murder with both criminal intent and criminal negligence, but there was no evidence of negligence, Jones' attorney argued. The jury was instructed on each of the underlying offenses, but the verdict form did not specify which predicate felony was the basis for the finding of guilt on the sole count of felony murder. Jones' attorney argued that because the jury might have based its guilty verdict on the unproven predicate of second degree child cruelty, the verdict must be set aside.

But in today's opinion, the high court rejects the argument. In its 1991 decision in *Griffin v. United States*, the U.S. Supreme Court made clear "that a guilty verdict need not be set aside merely because one of multiple possible bases of conviction is unsupported by sufficient evidence," today's opinion says. Jones cannot obtain reversal of his conviction "on the basis that there was insufficient evidence for the jury to find him guilty of felony murder based on his commission of the crime of cruelty to children in the second degree, as long as there was sufficient evidence for the jury to find him guilty of felony murder based on his commission of the crime of first degree child cruelty."

And the evidence in this case "was legally sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that Jones beat Ty'Asia while either intending to cause her cruel or excessive physical or mental pain or acting in a wanton or willful fashion with awareness of a plain and strong likelihood that such harm would result, and that such actions caused Ty'Asia's death." Therefore, the evidence was sufficient to support a felony murder conviction based on the predicate of first degree cruelty to children.

Attorney for Appellant (Jones): Tyler Conklin

Attorneys for Appellee (State): Ashley Wright, District Attorney, Joshua Smith, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Elizabeth Haase, Asst. A.G.

IN OTHER CASES, the Supreme Court of Georgia has upheld **murder** convictions and life prison sentences for:

* Freedell Benton, III (Fulton Co.)

BENTON V. THE STATE (S17A0355)

(The Court has upheld Benton’s murder conviction and sentence to life in prison without parole, but for sentencing purposes, the trial court merged the possession of a firearm by a convicted felon count into the malice murder count. That was wrong, so the Court has vacated that portion of the sentence and is remanding the case to the trial court to add a sentence for the gun charge.)

* Damien Kinard Reddick (Gwinnett Co.)

REDDICK V. THE STATE (S17A0283)

* Robert Smith (Fulton Co.)

SMITH V. THE STATE (S17A0183)

(The Court has upheld Smith’s murder conviction and life prison sentence, but the trial court mistakenly merged the possession of a firearm count into the malice murder count for sentencing purposes and sentenced Smith to five consecutive years for aggravated assault. “In light of the fact that the aggravated assault count should have merged into the malice murder count and the possession of a firearm during the commission of a felony count should not have been so merged, we remand this case to the trial court for it to resentence Smith on possession of a firearm during the commission of a felony,” and vacate the sentence on aggravated assault.)

* Nicholas Wilson (Fulton Co.)

WILSON V. THE STATE (S17A0254)

IN DISCIPLINARY MATTERS, the Georgia Supreme Court has rejected a recommendation by the State Bar of Georgia that the following attorney be given a **public reprimand**. Finding that the record fails to show any clear-cut violation by the attorney, the high court instead has found that **no discipline is warranted** and ordered that none be imposed on:

* Demone Wyatt Lee

IN THE MATTER OF: DEMONE WYATT LEE (S16Y0832)