

**MISSISSIPPI SUPREME COURT DECISIONS – JANUARY 30, 2020****SUPREME COURT - CIVIL CASES****BARBER V. BARBER****CIVIL - CUSTODY**

**CUSTODY - GUARDIAN AD LITEM - MANDATORY APPOINTMENT** - In child-custody cases where allegations of abuse and/or neglect rise to the level of a charge of abuse and/or neglect, Miss. Code Ann. § 93-5-23 requires the chancellor to appoint a guardian ad litem, whether the parties requested a guardian ad litem or not

**CUSTODY - GUARDIAN AD LITEM - RULING** - Chancellors must consider all of the information available to the guardian ad litem when considering whether to follow the recommendation made in child custody proceeding, and the result reached by the chancellor must be supported by admissible, competent evidence rather than hearsay, especially when a chancellor departs from the recommendation of the guardian ad litem

**FACTS**

Mark and Sylvia Barber married in 2008 and had four minor children together. In 2018, Mark Barber filed for divorce on the grounds of adultery or, in the alternative, irreconcilable differences. Mark asked for sole custody of the parties' minor children. A special family master conducted a temporary relief hearing and granted Mark immediate temporary custody of the children. Sylvia filed a motion for relief from this order and for a rehearing, alleging that Mark abused the children and feared for their safety in his custody. She requested legal and physical custody of the children and for a guardian ad litem to be appointed to "investigate the abuse." The chancellor heard the motion and appointed Jessica Culpepper as temporary guardian ad litem. Culpepper prepared a preliminary report stating, "the allegations before this Court, although unsubstantiated at this time, do rise to the level that the [guardian ad litem] should be appointed as a permanent [guardian ad litem]." The court appointed Culpepper as permanent guardian ad litem, and she prepared the final report, which was never entered into evidence. At the hearing, before the testimony of the guardian ad litem, Mark filed a "Motion to Strike Final Report of Guardian ad Litem and to Limit Testimony of Guardian ad Litem" on the grounds that the guardian ad litem could not conduct an *Albright* factors analysis and recommended a permanent custody determination without express authorization of the court. Further, he said the guardian ad litem could not use hearsay evidence in her report or in coming to her conclusions. Sylvia responded that the guardian ad litem was authorized to conduct a full investigation with the best interests of the child in mind and to prepare a report of her conclusions. She also argued that the *Albright* factors analysis was necessary and required by law. At the trial, the chancellor stated he had not read the report, but before he ruled on the motion, he asked the guardian ad litem to give a brief statement of her conclusions based on what she heard during the trial. She stated that there was some evidence of abuse, but that it did not rise to an alarming level. The chancellor then ruled that the grounds for abuse were unsubstantiated, the guardian ad litem testimony and report were not required, and the report should not be submitted as evidence. The court later entered a final judgment of divorce. Sylvia appealed.

**ISSUES**

Whether the trial court erred by failing to (1) allow the guardian ad litem to testify or to receive the guardian ad litem's recommendation and (2) refer to the guardian ad litem's report in its ruling.

**HOLDING**

(1) Because Miss. Code Ann. § 93-5-23 mandates that a guardian ad litem be appointed when contemplating abuse or neglect, the trial court erred in excluding the guardian ad litem report. (2) Because the guardian ad litem was a mandatory appointment, the chancellor must refer to it when making his judgment whether or not it is consistent with the guardian

ad litem's findings, therefore, it was reversible error for the chancellor not to address the guardian ad litem's findings in his ruling. Therefore, the Supreme Court reversed and remanded the judgment of the Madison County Chancery Court.

## **DISSENT**

Justice Ishee argued that Miss. Code Ann. § 93-5-23 was not invoked in this case because there were only mere allegations of abuse, which were found to be unsubstantiated and did not necessarily rise to level of the charge. Therefore, the chancellor did not err when he did not include the guardian ad litem's report. Further, since he believed the guardian ad litem should have been discretionary, there was no clear error in the chancellor's decision not to include the guardian ad litem's report.

### **Reversed & Remanded - 2018-CA-01282-SCT (Jan. 30, 2020)**

Opinion by Presiding Justice Kitchens - Dissent by Justice Ishee

Hon. James Christopher Walker (Madison County Chancery Court)

Kenneth Trey O'Cain for Appellant - John Robert White and Pamela Guren Bach for Appellee

Briefed by [Liza Linginfelter](#)

[Click here to view the full opinion](#)

## **IN RE CONSERVATORSHIP OF YOUNG V. KENNEDY**

### **CIVIL - WILLS, TRUSTS, & ESTATES**

**GUARDIANSHIPS - CONSERVATORSHIPS - PROPERTY OF ESTATE** - Upon termination of a conservatorship, a court should relinquish all control of the property in question

**COSTS - AWARDS & DAMAGES - ATTORNEY'S FEES** - Attorney's fees are not to be awarded unless the state or some other authority so provides

**COSTS - ATTORNEY'S FEES - INDIGENCE** - Attorney's fees are not generally awarded unless the requesting party has established the inability to pay

### **FACTS**

Carolyn Young was an elderly woman with medical problems affecting her ability to make financial decisions. She was appointed a conservator by the Lee County Chancery Court after a lengthy legal battle between her children and husband. When the conservatorship was no longer needed, the chancery court terminated the conservatorship after an agreement between her sons, husband, conservator, and guardian ad litem. Despite the termination, the judgment made provisions that retained certain funds in the registry of the court and included a clause which allowed payment of the children's attorney's fees from the funds. Carolyn subsequently requested the release of the entirety of her funds. The chancery court denied this request. Carolyn died shortly thereafter, and the court allowed her husband, Jim Young, as a substitute party. Young appealed.

### **ISSUES**

Whether the chancery court erred by (1) refusing to release Carolyn's funds after terminating her conservatorship and (2) awarding attorney's fees in favor of her sons.

### **HOLDING**

(1) Because Carolyn was no longer under a conservatorship, the trial court erred in restricting her access to the funds.  
(2) Because the chancery court had no legal basis to award attorney's fees to the sons, it abused its discretion in sua sponte ordering that the sons' attorney's fees be paid from Carolyn's funds held in the court registry. Therefore, the Supreme Court reversed the judgment of the Lee County Chancery Court.

### **CONCURRENCE**

Presiding Justice King argued that while the appellate court reached the correct result, the inference that the chancellor acted properly by terminating the conservatorship without a full hearing was in error. Because Carolyn was under a

conservatorship, the chancellor had a duty to terminate the conservatorship only if he had determined Carolyn was of sound mind; however, because Carolyn was deceased, this was a moot point.

**On Direct Appeal: Reversed & Rendered. On Cross-Appeal: Dismissed as Moot - 2017-CA-01457-SCT (Jan. 30, 2020)**

Opinion by Justice Beam - Concurrence Presiding Justice King  
Hon. John Andrew Hatcher (Lee County Chancery Court)  
Richard Shane McLaughlin for Appellant - Rhett R. Russell for Appellees  
Briefed by [Cristofor Taylor](#)

[Click here to view the full opinion](#)

---

## ***SUPREME COURT – ORDERS***

### **BROWN V. STATE**

#### **EN BANC ORDER**

#### **ORDER**

The Mississippi Court of Appeals affirmed Eddie Joseph Brown's conviction and sentence as a habitual drug offender on August 21, 2014. Since his appeal, Brown has filed pro se six petitions for post-conviction collateral relief, all of which were subsequently denied or dismissed by the Mississippi Supreme Court. The court denied Brown's current Application for Leave to Proceed in the Trial Court because his claim was time barred, successive writ barred, failed to meet any exceptions, and furthermore was without merit. The court had previously issued a warning to Brown that any frivolous future filings may result in monetary sanctions and/or restrictions on filing applications for post-conviction relief in forma pauperis. Because his current application was deemed frivolous, the court further ordered the clerk to deny any further filing applications by Brown unless he paid the applicable docket fee.

#### **OBJECTION**

Presiding Justice Randolph disagreed with the court's order to impose onto Brown restrictions on filing applications for post-conviction relief in forma pauperis, arguing that restrictions on future filings would only serve as a way to punish a convicted defendant or to preclude a defendant from his fundamental right to appeal. Rather, the court should only deny or dismiss motions based on their merit.

**Denied - 2014-M-01276 (Jan. 29, 2020)**

En Banc Order by Justice Coleman - Objection by Justice Randolph  
Briefed by [Charles Matranga](#)

[Click here to view the full opinion](#)

### **SANDERS V. STATE**

#### **EN BANC ORDER**

#### **ORDER**

Keir D. Sanders was convicted of murder and sentenced to life in prison as a habitual offender. The Mississippi Supreme Court affirmed his sentence. Sanders filed an application for leave to proceed in trial court. This was his fifth application for leave and this particular application alleged that he received an illegal sentence. The court found that the issues Sanders raised lacked sufficient merit to warrant an evidentiary hearing, and the court found that his application for leave was barred by time and as a successive application. Additionally, the court found that Sanders successive

Application for Leave was frivolous. The court warned Sanders that future filings that are deemed frivolous may result in monetary sanctions and restrictions on filing applications for post-conviction collateral relief in forma pauperis.

### **OBJECTION IN PART**

Presiding Justice Kitchen agreed that Sanders’s application for post-conviction relief did not merit relief; however, he disagreed that Sanders application was frivolous. Additionally, he disagreed with the court’s warning to Sanders that future filings that are deemed frivolous may result in monetary sanctions and restrictions on filing applications for post-conviction collateral relief in forma pauperis. He argued that weak arguments are not equivalent to frivolous arguments. Further, he argued that imposing monetary sanctions on a criminal defendant proceeding in forma pauperis only punishes the defendant and precludes them from their lawful right to appeal. He stated that, by seeking to punish Sanders by restricting future filings for post-conviction relief, the court was violating Sanders’s constitutional right of access to the court.

#### **Denied - 2012-M-00350-SCT (Jan. 29, 2020)**

En Banc Opinion by Justice Coleman - Objection in Part by Presiding Justice King

Briefed by [Matthew Russ](#)

[Click here to view the full opinion](#)

## **WINDING V. STATE**

### **EN BANC ORDER**

#### **ORDER**

James Winding’s conviction and sentence were affirmed by the Court of Appeals in 2005. He has since applied for the Court to file a petition for post-conviction relief six times, including this motion. The court previously warned that future filings deemed frivolous may not only result in monetary sanctions, but also restrictions on future post-conviction relief filings in forma pauperis. Hence, the court denied his present motion for being both time-barred and successive with no exceptions to the procedural bars. Further, owing to the frivolous nature of the motion, the court restricted Winding from further filings for post-conviction relief without paying the applicable docket fee.

#### **OBJECTION**

Presiding Justice King argued that the court was effectively prioritizing efficiency over justice because “the imposition of monetary sanctions against indigent defendants and the restriction of access to the court system serve only to punish those defendants and to violate rights guaranteed by the United States and Mississippi Constitutions.”

#### **Denied & Sanctions Imposed - 2012-M-01135 (Jan. 28, 2020)**

En Banc Opinion by Justice Chamberlin - Objection by Presiding Justice King

Briefed by [Frank Wood](#)

[Click here to view the full opinion](#)

---

## ***SUPREME COURT - CRIMINAL CASES***

## **REDMOND V. STATE**

### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - NEW TRIAL - SUFFICIENCY OF EVIDENCE** - A trial court may grant a new trial when, viewed in the light most favorable to the verdict, the verdict is against the overwhelming weight of the evidence

### **FACTS**

Stephen Redmond and his wife, Hope Allen, separated. Redmond was taken in by a man named Robert Walters. Shortly after, Allen also came to stay at Walters's home. Another man, Christopher Weaver, joined this group a few days later. Not long after, Redmond became argumentative and routinely confronted Walters about his growing relationship with Allen. One day Walters and Allen took a trip, and in their absence, Weaver found Redmond lying on the ground in the backyard with Walters's rifle. When the couple returned home, Redmond shot and killed Walters. Redmond was found guilty of first-degree murder and sentenced to life in prison. Redmond appealed.

### **ISSUE**

Whether the trial court abused its discretion in denying Redmond's motion for a new trial.

### **HOLDING**

Because conflicting evidence allowed a reasonable inference of Redmond's intent, the evidence does not weigh overwhelmingly against the verdict and thus, the circuit court did not abuse its discretion by denying Redmond's motion for a new trial. Therefore, the Supreme Court affirmed the judgment of the Harrison County Circuit Court.

**Affirmed - 2018-KA-01757-SCT (Jan. 30, 2020)**

Opinion by Chief Justice Randolph

Hon. Roger T. Clark (Harrison County Circuit Court)

Justin Taylor Cook (Pub. Def. Office) for Appellant - Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Jennifer Lee](#)

[Click here to view the full opinion](#)

## **ROSS V. STATE**

### **CRIMINAL - FELONY**

**EVIDENCE - REASONABLENESS - TIME OF OFFENSE** - Within reasonable limits, proof of any date that is before the return of the indictment and within the statute of limitations is sufficient for the time of the offense

**CLAIM OF ERROR - REQUEST TO INFORM JURY - STRATEGIC DECISION** - A defendant cannot complain on appeal of alleged errors invited or induced by himself

**SIXTH AMENDMENT - INEFFECTIVE-ASSISTANCE-OF-COUNSEL - SOUND TRIAL STRATEGY** - There is a strong presumption that a counsel's conduct falls within the wide range of reasonable professional assistance, and the challenged act or omission might be considered sound trial strategy

### **FACTS**

Canary Johnson and James Ross were co-indicted on four counts—three counts of sexual battery and one count of statutory rape. Additionally, Johnson was indicted on two counts of child neglect. Before trial, the State entered a nolle prosequi regarding the sexual battery and statutory rape counts against Johnson. During trial, Johnson decided to plead guilty to just one count of child neglect as a part of a plea deal. Thereafter, Ross's counsel requested that the trial court inform the jury of Johnson's guilty plea to child neglect. The jury convicted Ross of the three counts of sexual battery and the one count of statutory rape. The trial court sentenced Ross to three concurrent thirty-year terms for the sexual-battery convictions and a consecutive term of thirty years for the statutory-rape conviction with five years suspended. Ross filed a motion for a new trial or, in the alternative, a judgment notwithstanding the verdict, and the trial court denied the motion. Ross appealed.

### **ISSUES**

Whether (1) the State presented sufficient evidence that the crimes occurred within a reasonable time frame of the dates alleged in the indictment; (2) Ross's trial was rendered unfair by the trial court's informing the jury of Johnson's guilty plea; and (3) Ross's counsel was constitutionally ineffective for requesting that the jury be informed of Johnson's guilty plea.

### **HOLDING**

(1) Because a reasonable jury could have found that Ross did commit the crimes within a reasonable time frame of the dates alleged in the indictment, the State presented sufficient evidence on that matter. (2) Because Ross cannot complain on appeal of alleged errors invited or induced by himself, Ross's trial was not rendered unfair by the trial court's informing the jury of Johnson's guilty plea; (3) Because Ross did not overcome the strong presumption that counsel's request to inform the jury of Johnson's guilty plea was strategic and reasonable, Ross's counsel was not constitutionally ineffective for requesting that the jury be informed of the guilty plea. Therefore, the Supreme Court affirmed the judgment of the Warren County Circuit Court.

**Affirmed - 2019-KA-00029-SCT (Jan. 30, 2020)**

Opinion by Justice Chamberlin

Hon. M. James Chaney, Jr. (Warren County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee

Briefed by [Philip Lott](#)

[Click here to view the full opinion](#)

## **MISSISSIPPI COURT OF APPEALS DECISIONS – JANUARY 28, 2020**

### **COURT OF APPEALS - CIVIL CASES**

#### **BADGER V. STATE**

#### **CIVIL - POST-CONVICTION RELIEF**

**APPELLATE PROCEDURE - UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT - TIMING** - Under the Uniform Post-Conviction Collateral Relief Act, a post-conviction relief motion following a guilty plea must be filed within three years after the judgment of conviction is entered

**APPELLATE PROCEDURE - UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT - PROCEDURAL BAR EXCEPTION** - The movant in a post-conviction relief claim has the burden of demonstrating his claims are not procedurally barred because of an exception

**APPELLATE PROCEDURE - UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT - CONSTITUTIONAL RIGHT EXCEPTION** - Errors affecting fundamental constitutional rights are excepted from the procedural bars of the Uniform Post-Conviction Collateral Relief Act

#### **FACTS**

Craytonia Badger was indicted for possession of a cell phone while in the Covich County Detention Center and was also indicted for burglary. Badger filed a petition to enter a guilty plea on the cell-phone-possession charge. His guilty plea petition provided that the district attorney would recommend an open plea with respect to sentencing. Badger was found guilty of the burglary charge in a jury trial. The circuit court held a joint sentencing hearing for both convictions and entered separate sentencing orders in each cause. Badger was sentenced to seven years in the cell-phone-possession case, and life in prison without parole in the burglary case as a habitual offender. Badger moved for reconsideration of his seven-year sentence for cell phone possession, claiming his guilty plea was made unknowingly and involuntarily. The circuit court denied the motion, and Badger appealed. In the course of record preparation for Badger's appeal, the court reporter discovered her stenographic machine had malfunctioned, and her notes from the joint sentencing hearing were unreadable. Badger filed a motion, requesting that the Court of Appeals grant jurisdiction to the circuit court to

determine how to cure the missing-transcript situation. The Court of Appeals granted the motion, and the circuit court judge decided to resolve the problem by making another transcript. The circuit court proceeded to resentence Badger, and Badger filed a motion to voluntarily dismiss his appeal. In August 2017, Badger filed a “Motion to Correct the Records.” Badger asserted that the circuit court should correct the date of the November 23, 2009 sentencing order to reflect that Badger was resentenced on July 6, 2010 to address the transcript issue. Badger also asserted that he did not plead guilty in the July sentencing. The circuit court denied Badger’s motion, stating that no correction to the sentencing order was necessary. Badger appealed.

## **ISSUES**

Whether the circuit court erred (1) in failing to vacate the 2009 sentencing order because there was no evidence Badger pleaded guilty due to the missing transcript, and thus violating his due process rights; (2) or, in the alternative, abused its discretion by failing to correct the date of the sentencing order.

## **HOLDING**

(1) A post-conviction relief motion must be filed within three years following a guilty plea, but the court considered Badger’s first issue on the merits, because errors affecting constitutional rights are excepted from the procedural bar. Because the original sentencing order reflects in detail that Badger knowingly and voluntarily entered a guilty plea and nothing in the circumstances reflected that Badger was entitled to a new sentencing hearing at the 2010 proceeding, Badger’s due process rights were not violated, and the circuit court did not err in failing to vacate Badger’s sentence. (2) The second issue did not address a constitutional right. Because Badger’s appeal was not timely, it was procedurally barred, and the circuit court did not abuse its discretion in denying Badger’s motion to correct the record. Therefore, the Court of Appeals affirmed the judgment of the Covich County Circuit Court.

**Affirmed - 2017-CP-01489-COA (Jan. 28, 2020)**

Opinion by Presiding Judge Carlton

Hon. Lamar Pickard (Covich County Circuit Court)

*Pro se* for Appellant - Scott Stuart (Att’y Gen. Office) for Appellee

Briefed by [Allison Middleton](#)

[Click here to view the full opinion](#)

---

## ***COURT OF APPEALS - POST-CONVICTION RELIEF***

### **WILLIAMS V. STATE**

#### **CRIMINAL - POST-CONVICTION RELIEF**

**POST-CONVICTION RELIEF - DISMISSAL - PREMATURE FILING** - The filing a motion for post-conviction relief, while a direct appeal is still pending, will be deemed premature

**POST-CONVICTION RELIEF - PROPER VENUE - CONVICTION** - The proper venue for a post-conviction relief motion is the circuit court where the defendant is convicted

## **FACTS**

Merlin L Kent Williams was convicted for aggravated assault and sentenced to twenty years in the custody of the Mississippi Department of Corrections. Williams appealed. On August 1, 2018, while his appeal was pending before the Mississippi Court of Appeals, Williams, *pro se*, filed various motions with the Harrison County Circuit Court. Williams’s motions centered on the fact that his middle name was purportedly misspelled during the proceedings of his earlier conviction. Thus, he claimed he was wrongfully convicted and was serving an illegal sentence. Treating Williams’s “Motion for Evidentiary Hearing” and “Petition for Writ of Habeas Corpus” as one motion for post-conviction collateral relief (“PCR”), the circuit court denied his request for relief. Williams appealed.

## **ISSUE**

Whether the circuit court erred in dismissing Williams’s PCR motion.

## **HOLDING**

Because Williams’s PCR motion was filed while his direct appeal was pending before the Mississippi Court of Appeals, his request for PCR relief was premature. Further, because Williams failed to seek leave from the Mississippi Supreme Court in accordance with Miss. Code Ann. § 99-39-7 before filing his PCR motion in the circuit court, the trial court did not err in dismissing his PCR motion. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

**Affirmed - 2018-CP-01401-COA (Jan. 28, 2020)**

Opinion by Judge Wilson

Hon. Christopher Louis Schmidt (Harrison County Circuit Court, First Judicial District)

*Pro se* for Appellant - Matthew Wyatt Walton (Att’y Gen. Office) for Appellee

Briefed by [David Boydston](#)

[Click here to view the full opinion](#)

---

## **COURT OF APPEALS - CRIMINAL CASES**

### **DEHART V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL LAW - AGGRAVATED ASSAULT - ELEMENTS** - A person is guilty of aggravated assault if he or she attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm

**APPELLATE REVIEW - NEW TRIAL - WEIGHT OF THE EVIDENCE** - A jury verdict on appeal will be disturbed only when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

#### **FACTS**

Kevin Dehart fired a shotgun three times at Mac Craven. Craven was crouched between the front of his car and his employer’s above-ground swimming pool and was not struck or injured. Dehart was indicted under Miss. Code Ann. § 97-3-7(2)(a)(ii) for aggravated assault. The indictment alleged that Dehart “did purposefully, knowingly, and feloniously attempt to cause bodily injury” to Craven “with a firearm.” At trial, Craven and another witness testified that Dehart was shooting towards Craven when he fired his shotgun, and photographs taken at the scene showed bullet holes in the back of Craven’s car, as well as the employer’s above-ground pool. The jury received instructions on the elements of attempted aggravated assault and an instruction on the lesser-included offense of simple assault. Dehart was convicted of attempted aggravated assault and moved for a judgment notwithstanding the verdict (“JNOV”) or, in the alternative, a new trial. The Jones County Circuit Court denied the motions. Dehart appealed.

#### **ISSUES**

Whether (1) the evidence was insufficient to support the verdict of attempted aggravated assault and (2) the verdict was against the overwhelming weight of the evidence, resulting in an unconscionable injustice.

#### **HOLDING**

(1) Because a rational trier of fact could have found the essential elements of attempted aggravated assault beyond a reasonable doubt, the evidence was sufficient to support the jury’s verdict. (2) Because the jury had the ability to find Dehart guilty of simple assault, and because, based on the evidence presented, the jury did not err in finding Dehart guilty of attempted aggravated assault, the verdict was not so contrary to the overwhelming weight of the evidence that



to allow it to stand would sanction an unconscionable injustice. Therefore, the Court of Appeals affirmed the judgment of the Jones County Circuit Court.

**Affirmed - 2018-KA-01580-COA (Jan. 28, 2020)**

Opinion by Judge McCarty

Hon. Dal Williamson (Jones County Circuit Court, Second Judicial Dist.)

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Billy L. Gore (Att’y Gen. Office) for Appellee

Briefed by [Melissa Fenwick](#)

[Click here to view the full opinion](#)

## GALES V. STATE

### CRIMINAL - FELONY

**CRIMINAL PROCEDURE - DUE PROCESS - PROSECUTORIAL MISCONDUCT** - To constitute a due process violation, prosecutorial misconduct must be of sufficient significance to result in the denial of a defendant’s right to a fair trial

**CRIMINAL PROCEDURE - PROSECUTORIAL MISCONDUCT - IMPROPER COMMENTARY** - An improper comment by a prosecutor requires reversal if the natural and probable effect of the improper argument created unjust prejudice against the accused resulting in a decision influenced by prejudice

**CRIMINAL APPEALS - STANDARD OF REVIEW - SUBSTANTIVE RIGHTS** - An appellate court may employ plain-error review if a defendant’s substantive or fundamental rights are affected

### FACTS

While checking on his father’s home and surrounding property and fixtures, Gerald Holliman heard a noise coming from the property’s detached, enclosed two-car garage. Holliman called the police and armed himself with a machete. While Holliman was waiting for police to arrive, he approached the garage and shouted that he was armed. Gene Gales crawled out of the garage, and Holliman warned Gales not to move until police arrived. Once police arrived, Gales took off running. Holliman pursued Gales and noticed Gales had a jacket and boots similar to those owned by Holliman’s father. Gales was taken to the hospital to treat his hand, which was cut by the machete. While at the hospital, Gales gave a different name to an officer. Gales was also photographed while in his hospital bed. At trial, a police officer testified to Gales’s multiple aliases. The State explained that Gales was indicted as a habitual offender and introduced into evidence a Mississippi Department of Corrections “pen-pack” and several certified convictions from the Forrest County Circuit Court for prior burglary-related offenses. During closing, the prosecutor made comments regarding Gales past convictions and his failure to call his brother as a witness. Gales was found guilty of burglary and sentenced to seven years as a nonviolent habitual offender. Gales appealed.

### ISSUES

Whether (1) the prosecutor’s comments on Gales’s involvement in multiple burglaries and thefts constituted reversible prosecutorial misconduct; (2) the prosecutor’s questioning, regarding why Gales had not called his brother to testify in his defense, improperly influenced the jury’s decision; (3) there was a *Miranda* rights violation and subsequent testimony at trial regarding his false name; (4) there was inadequate proof of Gales’s habitual offender status; and (5) Gales had ineffective assistance of counsel.

### HOLDING

(1) Because their natural and probable effect did not create an unjust prejudice that influenced the jury’s conviction of Gales, the prosecutor’s comments regarding past offenses did not constitute prosecutorial misconduct. (2) Because of the jury instructions and the assumption that juries obey instructions, the prosecutor’s comments regarding Gales’s brother did not create an unjust prejudice against Gales. (3) Because Gales did not give a statement or confession to law enforcement while in the hospital, his *Miranda* rights were not violated. (4) Because of Gales’s “pen-packs,” there was no error regarding his habitual-offender status. (5) Because Gales requested relief due to ineffective assistance of counsel

on direct appeal, and not as post-conviction relief, it was denied without prejudice. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

**Affirmed - 2018-KA-01148-COA (Jan. 28, 2020)**

Opinion by Chief Judge Barnes

Hon. Robert B. Helfrich (Forrest County Circuit Court)

W. Daniel Hinchcliff, Pub. Def. Office for Appellant - Jeffrey A. Klingfuss, Att’y Gen. Office for Appellee

Briefed by [Joshua Crownover](#)

[Click here to view the full opinion](#)

## GUSS V. STATE

### CRIMINAL - FELONY

**CRIMINAL PROCEDURE - SENTENCING - STATUTE** - An individual must be sentenced under the same statute he or she was convicted of violating

**CRIMINAL LAW - POSSESSION OF A CONTROLLED SUBSTANCE - SUFFICIENCY OF THE EVIDENCE** - To support a conviction for possession of a controlled substance there must be sufficient facts to warrant a finding that the defendant was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it

**EVIDENCE - ADMISSIBILITY - FLIGHT** - It is well established that flight is admissible as evidence of consciousness of guilt

### FACTS

Law enforcement discovered a suspicious package being shipped through the United States Postal Service. They organized a controlled delivery of the package to the listed address and arrested Maurice Guss for possession of methamphetamine with intent to distribute. Guss was indicted for possession of more than 200 grams of methamphetamine with intent to distribute in violation of Miss. Code Ann. § 41-29-139(g), the “aggravated trafficking” statute. However, the jury was instructed on intent to distribute thirty or more grams of methamphetamine. Therefore, Guss was only convicted of violating the more lenient “trafficking” statute, Miss. Code Ann. § 41-29-139(f). The judge sentenced Guss under the “aggravated trafficking” statute. Guss appealed.

### ISSUES

Whether (1) the evidence was sufficient and (2) the sentence was illegal.

### HOLDING

(1) Because Guss accepted the package, fled the scene, and had a digital scale beside his bed, the State presented sufficient evidence for a jury to find beyond a reasonable doubt that Guss was aware the package contained drugs and intended to sell them. (2) Because Guss was convicted for possession of thirty grams or more of methamphetamine, he should have been sentenced for trafficking under Miss. Code Ann. § 41-29-139(f) and not aggravated trafficking under Miss. Code Ann. § 41-29-139(g). Therefore, the Court of Appeals affirmed Guss’s conviction but reversed and remanded the case to the Lincoln County Circuit Court for resentencing.

**Affirmed in Part; Reversed & Remanded in Part - 2018-KA-01138-COA (Jan. 28, 2020)**

Opinion by Chief Judge Barnes

Hon. David H. Strong Jr. (Lincoln County Circuit Court)

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Lisa L. Blount (Att’y Gen. Office) for Appellee

Briefed by [Winston Hudson](#)

[Click here to view the full opinion](#)

## TURNER V. STATE

### CRIMINAL - FELONY

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - TWO-THEORY INSTRUCTION** - A trial court may refuse a two-theory circumstantial-evidence jury instruction if it has granted a general circumstantial-evidence instruction

**CRIMINAL PROCEDURE - APPEALS - PROFFERED EVIDENCE** - Before a matter will be considered on appeal, the party must have somehow placed in the record the nature and substance of the proffered evidence for consideration

**SENTENCING - RESTITUTION FEES - REQUIREMENTS** - Mississippi law requires (1) evidence to support an award at the sentencing hearing and (2) that the defendant has an opportunity to object to the award

### FACTS

Samantha Spates was driving down a dark highway in Tunica when her vehicle stalled. Upon exiting the vehicle on the side of the road to check on it, Spates was struck by a passing vehicle which subsequently left the scene of the accident. Eventually, the police were alerted to the accident, where Spates was found dead at the scene. A few miles down the road, a vehicle crashed into a ditch and resident Henry Williams went outside to investigate. He saw a man later identified as James Turner walking away from the vehicle in the ditch, and Turner said he would return later to get his car. Williams alerted the police of this accident, and Turner was subsequently investigated for the hit-and-run on Spates. During his questioning at the police station, Turner was interrogated twice by Lieutenant Katie Johnson, and Turner admitted to driving the silver Jaguar in the ditch but did not confess to striking Spates. After evidence from the two scenes involving Turner and Spates was processed and analyzed, the police determined that Turner's silver Jaguar was the vehicle that struck Spates. The State subsequently indicted Turner with a felony of leaving the scene of an accident resulting in death. At trial, Williams was the first to testify and a trace-evidence technician testified after him. The three investigators who conducted the interrogation of Turner testified as well, and defense counsel requested that Johnson's second interrogation of Turner be excluded, a request which the trial court accepted. At the conclusion of the trial, Turner's counsel requested a two-theory jury instruction, arguing that evidence was circumstantial. The trial court denied this request and gave a general circumstantial-evidence instruction. Ultimately, Turner was convicted and required to pay \$6,500 in restitution fees. Turner appealed.

### ISSUES

Whether (1) the trial court erred in denying the two-theory circumstantial-evidence jury instruction; (2) the trial court erred by excluding portions of Turner's statement to investigators; (3) the evidence was insufficient to sustain the jury's verdict; (4) the verdict was against the overwhelming weight of the evidence; and (5) the restitution portion of Turner's sentence was illegal.

### HOLDING

(1) Because a trial court may refuse a two-theory instruction if it has granted a general circumstantial evidence instruction, and because the trial court granted a general circumstantial evidence instruction, the trial court did not abuse its discretion by denying the two-theory instruction. (2) Because the party must have somehow placed in the record the nature and substance of proffered evidence for consideration on appeal, Turner's argument was waived because he did not do so. (3) Because the jury had ample evidence to consider through many different testimonies, rational jurors could have found that the State proved each element necessary to convict Turner. (4) Because the jury had ample evidence to consider, the verdict was not found to be against the overwhelming weight of the evidence. (5) Because Mississippi law requires both evidence to support a restitution award and an opportunity to object to the award, the trial court erred in ordering Turner to pay \$6,500 when no restitution amount was determined at the sentencing hearing and no evidence was presented as to why they came to that amount. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Tunica County Circuit Court.

### CONCURRENCE IN PART/DISSENT IN PART

Presiding Judge Carlton argued that a defendant must object to the imposition of restitution at the time of the sentencing hearing, and not just the amount, in order to preserve the issue for appeal. Because Turner failed to object to the imposition, he argued that the issue of restitution should have been waived on appeal.

**Affirmed in Part; Reversed & Remanded in Part - 2018-KA-00945-COA (Jan. 28, 2020)**

Opinion by Judge Lawrence - Concurrence in Part/Dissent in Part by Presiding Judge Carlton

Hon. Charles E. Webster (Tunica County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Abbie Eason Koonce (Att'y Gen. Office) for Appellee

Briefed by [Jack Byrd](#)

[Click here to view the full opinion](#)

**MISSISSIPPI CASES EDITOR**

**KATIE HUMPHRIES**

**ASSOCIATE CASES EDITORS**

**JAMES ADAMOLI**

**BAXTER GEDDIE**

**CORBAN SNIDER**

**BRANDON WILSON**

*Thank you for supporting the Mississippi Law Journal.*

*Questions or comments: Katie Humphries, [newsletter@mississippilawjournal.org](mailto:newsletter@mississippilawjournal.org)*

*All subscribers to BriefServ traditionally receive access to our website with archived case briefs since January 2007. Currently, our digital database is under construction. Requests for previous editions of the Newsletter can be made to Katie Humphries, [newsletter@mississippilawjournal.org](mailto:newsletter@mississippilawjournal.org). If you have questions about accessing or using the BriefServ website, please contact us at [support@mississippilawjournal.org](mailto:support@mississippilawjournal.org)*