

MISSISSIPPI SUPREME COURT DECISIONS – JANUARY 23, 2020**SUPREME COURT - CRIMINAL CASES****MCGILBERRY V. STATE****CRIMINAL - FELONY**

CAPITAL MURDER - SENTENCING - JUVENILE - An offender under the age of eighteen cannot be sentenced to death and may only be sentenced to life in prison without parole if certain youth-related mitigating factors are considered

SENTENCING - JUVENILE - MILLER FACTORS - From the United States Supreme Court case, *Miller v. Alabama*, these youth-related mitigating factors include: chronological age and its hallmark features, family and home environment, circumstances of homicide offense, and whether offender could have been convicted of lesser offense if not for incompetencies of youth

CAPITAL MURDER - SENTENCING - JURY - A jury determines punishment in capital cases during a separate sentencing proceeding according to Miss. Code Ann. § 99-19-101, however, the statute does not entitle an offender to a *Miller* hearing in front of a jury

FACTS

Stephen McGilberry murdered four family members in 1994 when he was sixteen-years-old. The murder was premeditated and planned. A jury found him guilty of all four counts and sentenced him to death. However, in 2005, the United States Supreme Court invalidated the death penalty for crimes committed before the age of eighteen. His death sentence was subsequently vacated, and the Mississippi Supreme Court directed the trial court to resentence McGilberry to four terms of life in prison without parole. In 2012, the United States Supreme Court held in *Miller v. Alabama* that mandatory life sentences without parole for crimes committed before the age of eighteen constituted cruel and unusual punishment. Instead, courts should consider certain youth-related mitigating factors. McGilberry was granted permission to seek post-conviction relief (“PCR”) based on this decision. He then filed a motion for a jury to resentence him and a motion to impose life with parole. The trial court rejected both, ruling that he had no right to a jury trial for his *Miller* hearing and that a life sentence without parole was warranted based on the *Miller* factors. McGilberry petitioned for writ of certiorari.

ISSUES

Whether (1) sentencing a juvenile homicide offender to life without parole violated both the Eighth Amendment of the U.S. Constitution and Miss. Const. art. III, § 28, which prohibit cruel and unusual punishment; (2) McGilberry had a constitutional or statutory right to be resentenced by a jury; and (3) the trial court abused its discretion in sentencing McGilberry to life without parole.

HOLDING

(1) Because the *Miller* Court held that that the prohibition against cruel and unusual punishment forbade a sentencing scheme that mandates life in prison without parole for juvenile offenders, but did not take away the ability of a sentencer to impose life without parole on a juvenile if they consider mitigating factors, McGilberry’s sentence did not violate the Mississippi or United States constitutions. (2) Because McGilberry’s sentence should not have been vacated before considering his PCR motion, the substantial substantive right to a jury determination was rooted in state statute, and that statute provided no statutory right to a jury trial for a retroactive *Miller* hearing, therefore, the issue was not elevated to constitutional significance and McGilberry did not have a right to be resentenced by a jury. (3) Because the trial court’s order clearly demonstrated that all of the *Miller* factors were taken into account and it was up to the trial judge

to weigh conflicting expert testimony regarding rehabilitation, the trial court did not abuse its discretion in sentencing McGilberry to life without parole. Therefore, the Supreme Court affirmed the judgment of the Jackson County Circuit Court.

DISSENTS

Justice Kitchens argued, for the same reasons as Justice King, that he would affirm the trial court's vacation of McGilberry's sentence, reverse the trial court's imposition of a life without parole sentence, and remand for resentencing by a jury. Justice King argued that the language of Miss. Code Ann. § 99-19-101(1) clearly mandated that McGilberry had the right to be resentenced by a jury and that the trial court was required to vacate the life-without-parole sentence before considering the PCR motion as it would not comport with the *Miller* ruling to place the burden on juvenile offender to show that life without parole was inappropriate. Therefore, he would have reversed the decision of the trial court and remanded the case for resentencing by jury. Justice Coleman also joined with Justice King in part, adding that Miss. Code Ann. § 99-19-101 did not provide for any exceptions other than waiver and that the majority created an exception inconsistent with the statute.

The Judgment of the Court of Appeals is Reversed. The Judgment of the Jackson County Circuit Court is Reinstated & Affirmed - 2017-CT-00716-SCT (Jan. 23, 2020)

En Banc Opinion by Justice Maxwell - Dissents by Justice Kitchens, Justice King, & Justice Coleman

Hon. Robert P. Krebs (Jackson County Circuit Court)

George T. Holmes & Stacy L. Ferraro (Pub. Def. Office) for Appellant - LaDonna C. Holland (Att'y Gen. Office) for Appellee

Briefed by [Kaitlin Bethay](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – JANUARY 21, 2020

COURT OF APPEALS - CIVIL CASES

HAMMONS V. HAMMONS

CIVIL - CUSTODY

FAMILY LAW - CUSTODY MODIFICATION - THREE-PRONG TEST - Mississippi utilizes a three-prong test to determine whether custody modification is warranted: first, there must be a material change in circumstances of the custodial parent; second, the moving party must show that the change in circumstances has an adverse effect on the minor child; third, modification must be in the best interest of the minor child

CIVIL PROCEDURE - POST-TRIAL MOTIONS - FINAL JUDGMENTS - A final decree is one that makes an end of the controversy, determines the costs, and leaves nothing further for the court to act upon so far as the merits of the issue are concerned; however, when it is necessary to add or supply in a final judgment what was omitted therefrom, the supplemental judgment is not supplemental at all – it is itself the final judgment

CIVIL PROCEDURE - ABUSE OF DISCRETION - JUDICIAL RECUSAL - A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality; we presume that the judge, sworn to administer impartial justice, is qualified and unbiased

FACTS

After their divorce, Jessica Hammons was given sole custody of the couple's two children, Susan and B.H.H., and David Hammons was awarded visitation. Upon the completion of an agreed judgment modifying custody and visitation, Jessica retained sole custody, and David voluntarily gave up his week-day visitation. David later filed a motion of emancipation of Susan despite their tumultuous relationship. In addition, he filed a motion

for custody modification claiming that B.H.H. and Susan were experiencing issues relating to Jessica's faulty parenting. The court granted David temporary custody of B.H.H. After entering the temporary order, the original chancellor recused the case. It was then assigned to a second chancellor who also recused. After being reassigned to a trial judge, and upon conducting a thorough *Albright* analysis, the chancery court held that it was in B.H.H.'s best interest to return to Jessica's custody. The court also found that David had anger issues that affected his parenting skills. A few weeks after the revised judgment was entered, David filed a motion to set aside the judgment and/or a new trial. The lower court found David's motions to be untimely and dismissed for lack of jurisdiction. David appealed.

ISSUES

Whether (1) there were grounds to support a custody modification; (2) David's post-trial motion was time-barred; and (3) the first chancellor's recusal was an abuse of discretion.

HOLDING

(1) Because Susan moved out, graduated college, married, and became a mother, the chancery court made a factual finding Susan's conduct did not create an adverse environment for B.H.H. Further, because David failed to prove that there was a material change in the circumstances following the agreed order or that B.H.H. was in an inherently dangerous or unsuitable situation, the court did not find grounds warranting a modification of custody. (2) Because the revised judgment reset the clock on the ten-day deadline in Miss. R. Civ. P. 59, it was said to have superseded the prior judgment, and was considered timely. However, because the court had ruled on the merits of David's motions prior, the issue of timeliness was regarded as moot. (3) Because the original chancellor's decision to recuse himself was within his discretion based upon his circumstances, the court did not find that the chancellor abused his discretion. Further, because the presiding chancellor was objective and without bias, there was no error and the issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Chancery Court.

Affirmed - 2018-CA-00708-COA (Jan. 21, 2020)

Opinion by Judge McCarty

Hon. Carter O. Bise (Harrison County Chancery Court, First Judicial Dist.)

Renee M. Porter for Appellant - Alben Norris Hopkins Jr. for Appellee

Briefed by [Brittany Brewer](#)

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COURT OF APPEALS - CRIMINAL CASES

BANKHEAD V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - OBJECTION - PROCEDURAL BAR - Failure to make a contemporaneous objection generally constitutes waiver of the issue on appeal; however, if a party did not expect the issue to arise, the court may decline to find the issue procedurally barred

EVIDENCE - ADMISSIBILITY - OTHER CRIMES - Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character, but it may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident

EVIDENCE - ADMISSIBILITY - OTHER CRIMES - Where the witness refers briefly to another crime, and the testimony was not purposely elicited by the district attorney to prove the defendant's character, no reversible error occurs

CRIMINAL LAW - ADMISSIBILITY - CURING ERROR BY INSTRUCTIONS TO JURY - Absent unusual circumstances, where an objection is sustained to improper questioning or testimony, and the jury is admonished to disregard the question or testimony, the Court of Appeals will not find error

FACTS

In 2011, Derrick Bankhead, along with others, participated in a robbery which led to the death of Eddie "Meg" Bankhead, the target of the robbery. Following the incident, Bankhead voluntarily turned himself in at the Columbus police station. In an attempt to "clear his name," Bankhead waived his *Miranda* rights and participated in an interview with Officer Selvain McQueen. During Officer McQueen's examination at Bankhead's trial, a copy of Bankhead's video-recorded interview was entered into evidence and played before the jury, in addition to copies of its transcription. Towards the end of the video, Bankhead was heard saying he was a convicted felon; he did not, however, mention the nature of his felony. The transcript provided to the jury was properly redacted. Defense counsel did not object immediately, but later moved for a mistrial. Bankhead argued that the State agreed to skip over the portion of the video where Bankhead states he is a prior felon, and because of this error, he was not able to receive a fair trial. The trial judge decided that because there was no deliberate misconduct by the State and the court's initial instructions to the jury already said to disregard any evidence stricken from the record, he would deny the motion for a mistrial, give a curative instruction, and poll the jurors on their ability to follow the instruction and disregard the remark. After deliberations, the jury found Bankhead guilty of capital murder. Bankhead appealed.

ISSUES

Whether (1) Bankhead's arguments on appeal were procedurally barred for his failure to make a contemporaneous objection at trial and (2) Bankhead's right to a fair trial was violated, because the jury inadvertently heard evidence of a prior crime.

HOLDING

(1) Because the State agreed to skip over that portion of the recording, and because the statement was not included in the trial transcript, Bankhead could not expect the issue to arise; thus, the court declined to find the issue procedurally barred. (2) Because there was no prosecutorial misconduct in playing that specific portion of the video and, because the curative jury instruction was deemed the best course of action to correct any prejudice that may have arisen from the video statement, the trial court's remedy did not result in an unfair trial. Therefore, the Court of Appeals affirmed the judgment of the Lowndes County Circuit Court.

DISSENT

Judge McCarty argued that the trial court's refusal to respect the trial strategy of the defense violated Miss. R. Evid. 105 and applicable precedent. Further, he argued that the curative instruction focused the jury's attention on the prejudicial evidence. For these reasons, reversal was warranted.

Affirmed - 2018-KA-01311-COA (Jan. 21, 2020)

En Banc Opinion by Chief Judge Barnes - Dissent by Judge McCarty

Hon. Lee Sorrels Coleman (Lowndes County Circuit Court)

W. Daniel Hinchcliff (Pub. Def. Office) for Appellant - Allison Elizabeth Horne (Att'y Gen. Office) for Appellee

Briefed by [Nicole Broussard](#)

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COLEMAN V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JUDICIAL INTERVENTION - UNFAIR ARGUMENT - The trial judge should intervene to prevent unfair argument only when counsel departs entirely from the evidence, makes statements intended solely to excite the passions or prejudices of the jury, or makes inflammatory and damaging statements of fact not found in the evidence

CRIMINAL PROCEDURE - CLOSING ARGUMENT - “GOLDEN RULE” ARGUMENT - Golden rule arguments, which ask the jury to put themselves in the place of one of the parties, are prohibited

CONSTITUTIONAL LAW - FIFTH AMENDMENT - RIGHT TO REMAIN SILENT - Prearrest silence is distinguished from post-*Miranda* silence because a *Miranda* warning implicitly assures the defendant that his post-*Miranda* silence will not be used against him

FACTS

On Thanksgiving Day 2014, Antrone Coleman shot Shaggery Jones in his neck and afterward fired additional shots into Shenique Gaddis’ house before fleeing the scene. Coleman turned himself in the next day after learning the police had identified him as the shooter. At trial, the State questioned Coleman’s claim of self-defense, arguing that someone acting in self-defense would have waited for the police, not left the crime scene. During the State’s closing argument, the prosecutor spoke about the people in the courtroom that work in Jackson and have to worry about invasions from drug addicts because of the business they are in. Defense counsel objected to this line of argument and, while the jury was deliberating, moved for a mistrial based on this argument. The trial judge denied this motion. The jury returned a guilty verdict for first-degree murder and shooting into a dwelling, and Coleman was sentenced to concurrent terms of life imprisonment and ten years in the custody of the Department of Corrections. Coleman appealed.

ISSUES

Whether the State (1) made an improper “golden rule” or “send a message” closing argument and (2) impermissibly commented on the exercise of Coleman’s Fifth Amendment right to remain silent.

HOLDING

(1) Because the prosecutor’s comments did not reach the level of a “golden rule” or “send a message” argument, the trial judge did not abuse his discretion in his handling of the State’s objection or by denying Coleman’s subsequent motion for a mistrial. (2) Because Coleman testified to a claim of self-defense, the State was entitled to argue that his decision to flee the crime scene was inconsistent with self-defense, and, therefore, the State permissibly commented on Coleman’s prearrest flight, not his post-*Miranda* silence. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - Docket Number (Jan. 21, 2020)

Opinion by Presiding Judge J. Wilson

Hon. William A. Gowan Jr. (Hinds County Circuit Court, First Judicial Dist.)

Justin Taylor Cook (Pub. Def. Office) for Appellant - Jeffrey A. Klingfuss (Att’y Gen. Office) for Appellee

Briefed by [Haley Nutt](#)

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