

**MISSISSIPPI SUPREME COURT DECISIONS – JANUARY 17, 2019****SUPREME COURT - CIVIL CASES****IN RE CITY OF CLARKSDALE****CIVIL - MUNICIPAL BOUNDARIES & ANNEXATION**

**PROPERTY LAW - ANNEXATION - INDICIA OF REASONABLENESS** - The twelve indicia, which must be considered together under the totality of the circumstances, to guide a chancellor's determination of whether a proposed annexation is reasonable are: (1) the municipality's need to expand, (2) whether the area sought to be annexed is reasonably within a path of growth of the city, (3) potential health hazards, (4) the municipality's financial ability to make the improvements, (5) need for zoning and overall planning in the area, (6) need for municipal services in the area sought to be annexed, (7) whether there are natural barriers between the city and the proposed annexation area, (8) past performance, (9) economic or other impact of the annexation, (10) impact of the annexation upon the voting strength of protected minority groups, (11) whether the property owners and other inhabitants of the areas will enjoy economic and social benefits of the municipality without paying taxes, and (12) any other factors

**PROPERTY LAW - ANNEXATION - STANDARD OF REVIEW** - Appellate review in annexation matters is limited to the question of whether annexation is reasonable, under the totality of the circumstances; the court will not reverse the chancery court's findings on reasonableness unless the decision was manifestly wrong and lacked the support of substantial, credible evidence

**PROPERTY - RESTRICTIVE COVENANTS - ENFORCEABILITY** - If the covenant sets forth the restriction in clear and unambiguous language, it will be enforced, but restrictive covenants that are void as against public policy will not be enforced

**FACTS**

The City of Clarksdale ("Clarksdale") is located in the Mississippi Delta and bordered on the northeast by Lyon. In late 2014, Clarksdale adopted an amended ordinance enlarging, extending, and defining its corporate boundaries. The amended ordinance specified the improvements to be made in the annexed area and defined the city's new boundaries. Clarksdale later filed a second amended petition for ratification, approval, and confirmation of the amended ordinance in chancery court. Clarksdale sought to annex five areas adjacent to its current municipal limits. Proposed Annexation Areas ("PAA") 1 and PAA 2 lie north of the city and are primarily residential, while PAAs 3, 4, and 5 include the Highway 61 bypass to the south and east of the city and contain land used for commercial, residential, and rural purposes. PAAs 3, 4, and 5 also include the planned Interstate 69 corridor that is expected to overlap with the existing Highway 61 bypass. The Town of Lyon and Coahoma County filed answers opposing Clarksdale's annexation petition. After a hearing and inspection tour, the chancellor found that, considering the twelve indicia of reasonableness, Clarksdale's annexation of PAAs 3, 4, and 5 was reasonable, but that its annexation of PAAs 1 and 2 was unreasonable. The chancellor entered a final decree approving, ratifying, and confirming the enlargement and extension of Clarksdale's boundaries in accordance with his findings. Coahoma County appealed and Clarksdale cross-appeals, arguing that the chancellor manifestly erred by finding that the annexation of PAAs 1 and 2 was unreasonable.

**ISSUE**

Whether the trial court erred in finding (1) Clarksdale's annexation of PAAs 3, 4, and 5 was reasonable; and (2) Clarksdale's annexation of PAAs 1 and 2 was unreasonable.

**HOLDING**

(1) Because the chancellor rendered his decision after carefully considering all evidence, presented in the light of the twelve indicia of reasonableness, and personally viewing the PAAs during the inspection tour, and because there was credible evidence and the chancellor's decision was not manifestly erroneous, the chancellor did not err in finding that the annexation of PAAs 3, 4, and 5 was reasonable under the totality of the circumstances. (2) Because the chancellor appreciated the differences in character of PAAs 1 and 2 as being primarily rural and residential as compared to PAAs 3, 4, and 5 containing businesses and residences, and because there was credible evidence, the chancellor did not err in finding that the annexation of PAAs 1 and 2 was unreasonable. Therefore, the Supreme Court affirmed the judgment of the Coahoma County Chancery Court.

### **DISSENT**

Justice Maxwell argued that if Clarksdale's annexation of PAAs 1 and 2 was unreasonable, then Clarksdale's annexation of PAAs 3, 4, and 5 was even more unreasonable as Clarksdale is experiencing a declining population and possesses an abundance of undeveloped land, and Clarksdale's annexation of PAAs 3, 4, and 5 amounted to nothing more than a tax grab. As such, Justice Maxwell maintained that the judgment of the Coahoma County Chancery Court should be affirmed with regards to their determination that Clarksdale's annexation of PAAs 1 and 2 as unreasonable, and reversed with regards to their determination that Clarksdale's annexation of PAAs 3, 4, and 5 was reasonable.

### **Affirmed - 2016-AN-01696-SCT (Jan. 17, 2019)**

Opinion by Presiding Justice Kitchens

Hon. L. Breland Hilburn (Coahoma County Chancery Court)

Jerry L. Mills & John P. Scanlon for Appellant - J. Chadwick Mask, Jacob E. Stutzman & Margarette Meeks for Appellee

Briefed by [Carson Phillips](#)

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## **JACKSON COUNTY V. KPMG, LLP**

### **CIVIL - CONTRACT**

**CONTRACTS - PUBLIC BOARDS - MINUTES** - Miss. Code Ann. § 41-13-35(3) provides that where a public board engages in business with another entity, no contract can be implied or presumed, it must be stated in express terms and recorded on the official minutes and the action of the board, and it may be enforced where enough of the terms and conditions of the contract are contained in the minutes for determination of the liabilities and obligations of the parties

**EVIDENCE - PUBLIC BOARDS - MINUTES** - Public boards, including boards of trustees for community hospitals, speak only through their minutes, and their acts are evidenced solely by entries on their minutes

**ARBITRATION - CONTRACTS - CONTRACT FORMATION** - Whether a contract containing an arbitration provision was ever formed in the first place is a question of law for the trial court, and not the arbitrator, to decide

### **FACTS**

In fiscal years 2008 through 2012, KPMG, LLP performed auditing services for Singing River Community Hospital ("Singer River") in Jackson County. A different firm performing the 2013 audit informed Singing River that KPMG's prior annual audits had resulted in an \$88 million overstatement of Singing River's accounts receivable. As owner of Singing River and its bond guarantor, Jackson County filed suit against KPMG in March 2016, claiming it breached its contractual and professional duties to Singing River and proximately caused damage to Jackson County. Specifically, it asserted that Singing River was left with a massive financial deficit and an underfunded pension plan, and was out of compliance with its bond covenants. Further, Jackson County asserted it would never have guaranteed certain bonds in Singing River's benefit, which led to a downgrade in its bond rating. In a separate lawsuit, Singing River sued KPMG in Hinds County Circuit Court alleging similar claims. In both lawsuits, KPMG filed motions to compel arbitration, asserting that the parties were bound by the arbitration provisions, including the delegation clauses, found in the audit engagement letters between KPMG and Singing River. In response, Singing River and Jackson County argued that the engagement letters were not spread on the hospital board's minutes, and therefore, no enforceable contract containing

an arbitration agreement ever came into existence. The ruling by the Hinds County Circuit Court denying KPMG's motion to compel arbitration against Singing River was affirmed by the Supreme Court in October 2018. However, the Jackson County Circuit Court ruled in favor of KPMG, finding Jackson County's argument based on the minutes was for the arbitrator, not the court, to decide. Jackson County appealed.

### ISSUE

Whether the trial court erred in granting the motion to compel arbitration by failing to determine if the engagement letters containing the arbitration clauses were enforceable through application of Mississippi's minutes rule for public boards.

### HOLDING

Because a public board's minutes must contain enough terms and conditions for determination of the liabilities and obligations of the contracting parties without having to resort to other evidence, and because the board's minutes relating to the engagement letters with KPMG for fiscal years 2008 through 2012 did not sufficiently evidence the terms and conditions, the engagement letters were unenforceable, and the trial court erred in delegating arbitrability questions to an arbitrator. Therefore, the Supreme Court reversed and remanded the judgment of the Jackson County Circuit Court.

#### **Reversed & Remanded - 2018-CA-00071-SCT (Jan. 17, 2019)**

Opinion by Justice Maxwell

Hon. James D. Bell (Jackson County Circuit Court)

William Lee Guice III & Maria Martinez for Appellant - R. David Kaufman, Taylor Brantley McNeel, Lauren Oaks Lawhorn, Amelia Toy Rudolph, & Patricia Anne Gorham for Appellee

Briefed by [Tucker Hood](#)

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## LAND HOLDINGS I, LLC V. GSI SERVICES, LLC

### CIVIL - OTHER

**CONSTRUCTION - LITTLE MILLER ACT - CREATION OF LIEN** - A subcontractor has only three months to file a lien after the claimant's last work performed, labor, services or materials provided

**CONSTRUCTION - LITTLE MILLER ACT - LAST WORK PERFORMED** - "Last Work Performed" should be given its plain meaning without consideration of whether the project was substantially complete

### FACTS

Land Holdings I, LLC (the "Casino") sought to expunge a lien filed by GSI Services, LLC ("GSI"). GSI was a subcontractor that performed work for the Casino but did not receive full payment from the main contractor. Subsequently, GSI filed a lien against the Casino within ninety days of its last work. The chancellor denied the Casino's petition to expunge the lien. The Casino appealed.

### ISSUE

Whether the trial court erred in failing to apply the terms of Mississippi's Little Miller Act to Mississippi's construction-lien-statute requirement of filing a lien within ninety days of the lien claimant's last work performed.

### HOLDING

(1) Because the statute's plain language states that a subcontractor only has three months to file after the claimant's last work performed, labor, services, or materials provided, there is no consideration of whether the project was substantially complete, and the lien met the statute's requirement of being filed within ninety days of the "last work performed." Therefore, the Supreme Court affirmed the judgment of the Harrison County Chancery Court.

#### **Affirmed - 2017-CA-01620-SCT (Jan. 17, 2019)**

Opinion by Presiding Justice Randolph  
Hon. Jennifer T. Schloegel (Harrison County Chancery Court)  
Cable Matthew Frost & Samuel Deucalion Gregory for Appellant - Vincent J. Castigliola Jr. for Appellee  
Briefed by [Karen Lott](#)

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## LATHAM V. LATHAM

### CIVIL - OTHER

**CIVIL PROCEDURE - CONTEMPT - DISCRETION** - Contempt is an issue of fact to be decided on a case-by-case basis, and the chancery court has substantial discretion in deciding whether a party is in contempt

**CIVIL PROCEDURE - APPEALS - WAIVER** - One of the most fundamental and long-established rules of law in Mississippi is that the Mississippi Supreme Court will not review matters on appeal that were not raised at the trial court level

### FACTS

Michele Latham and Roger Latham divorced on February 5, 2016. On March 24, 2017, Michele filed a petition for contempt against Roger, claiming that he had failed to comply with the divorce judgment. The chancellor found Roger in constructive criminal contempt for failing to comply with several terms of the divorce judgment. Roger appealed.

### ISSUE

Whether the chancellor erred when he did not recuse himself before finding that Roger was in constructive criminal contempt.

### HOLDING

Because Roger did not properly preserve the issue of the chancellor's lack of recusal and raised it for the first time on appeal, the issue was waived. Therefore, the Supreme Court affirmed the judgment of the Rankin County Chancery Court.

### CONCURRENCE

Justice Maxwell argued that recusal was discretionary, and the chancellor can hardly be said to have abused his discretion by not recusing himself when he was never asked to do so.

### DISSENT

Presiding Justice Kitchens argued that Roger received no notice that he might be held in constructive criminal contempt and thus had no reason to seek recusal of the trial judge.

### **Affirmed - 2017-CA-00856-SCT (Jan. 17, 2019)**

Opinion by Justice Coleman - Concurrence by Justice Maxwell - Dissent by Presiding Justice Kitchens

Hon. John S. Grant III (Rankin County Chancery Court)

David Bridges for Appellant - Marc Edward Brand for Appellee

Briefed by [Katie Humphries](#)

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## MISS. GAMING & HOSPITALITY ASSOC. V. DIAMONDHEAD REAL ESTATE, LLC

### CIVIL - OTHER

**ADMINISTRATIVE LAW - APPEAL - JUDICIAL AUTHORITY** - Under *Miss. Gaming Comm'n v. Freeman*, a right of appeal is statutory and a circuit court has no authority to judicially create one from an administrative agency in the absence of clear statutory authority

**APPEAL - PROCEDURE - REVIEW OF DISCRETION** - Miss. Code Ann. § 75-76-121(3) states that copies of the petition must be served upon the executive director and all other parties of record, or their counsel of record, either personally or by certified mail

**APPEAL - INTERVENTION - REVIEW OF DISCRETION** - Miss. Code Ann. § 75-76-121(4) states that the court, upon a proper showing, may permit other interested persons to intervene as parties to the appeal or as friends of the court

## **FACTS**

After RW Development, LLC (“RW”) and Diamondhead Real Estate, LLC (“Diamondhead”) each filed applications for gaming site approval with the Mississippi Gaming Commission (the “Commission”), the Mississippi Gaming & Hospitality Association (the “Association”) filed a request for information related to both applications and later filed a letter in opposition to the applications. During the Commission’s two separate hearings on the site applications, the Association presented documentary evidence and argument in opposition to the two petitions. Both RW’s and Diamondhead’s applications were denied, and each appealed the decisions. RW and Diamondhead each served the Association with their notice of appeal, with each notice of appeal stating that RW and Diamondhead did not believe that the Association had standing to be a party in the appeal, despite its involvement in the hearings. The Association filed motions to intervene, and the Harrison County Circuit Court denied both motions but granted the Association friend of the court status. The Association appealed.

## **ISSUE**

Whether the circuit court erred in denying the Association’s motion to intervene in RW’s and Diamondhead’s appeals as a respondent/appellee.

## **HOLDING**

Because it is not mandated that all “parties of record” be named in the petition for review and it is within the court’s discretion to permit intervention either as a party or as a friend of the court, the circuit court did not err in denying the Association’s motion to intervene as a respondent/appellee. Therefore, the Supreme Court affirmed the judgment of the Hancock County Circuit Court.

**Affirmed - 2017-IA-01076-SCT (Jan. 17, 2019)**

Opinion by Justice Beam

Hon. Christopher Louis Schmidt (Hancock County Circuit Court)

Kathryn H. Hester, Thomas B. Shepherd III, Scott E. Address, & Michael E. Bruffey for Appellant - Michael F. Cavanaugh, Louis Frascogna, & Gerald Henry Blessey for Appellees

Briefed by [Lauren Rogers](#)

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## **SMITH V. HICKMAN, GOZA & SPRAGINS, PLLC**

### **CIVIL - OTHER**

**CIVIL PROCEDURE - DISCOVERY - SPECIFIC** - Under Miss. R. Civ. P. 37(b), the court shall require a party failing to obey a discovery order or the attorney advising him to pay the reasonable expenses, including attorney’s fees, caused by the failure

**CRIMINAL LAW - PROFESSIONAL RESPONSIBILITY - UNAUTHORIZED PRACTICE OF LAW** - Miss. Code. Ann. § 73-3-55 provides that any person who shall for fee or reward or promise, directly or indirectly, write or dictate any paper or instrument of writing to be filed in any cause or proceeding pending, or to be instituted in any court in this state, or give any counsel or advise therein shall be held to be engaged in the practice of law

## **FACTS**

During the course of discovery in a case between Dr. Arnold Smith and Lee Abraham, Smith filed an Expert Report containing salacious allegations about Abraham. The circuit court sealed all discovery documents that had been filed through an agreed order, which Smith did not appeal. Smith then filed a report with the same essential information in multiple proceedings in other courts. The circuit court determined that Smith violated the agreed order to seal the discovery documents and sanctioned Smith's attorney, William C. Bell, under Miss. R. Civ. P. 37(b). The court instructed Abraham's attorneys to produce a fee bill for their work pursuing the claims regarding the published sealed document, and ordered Bell to pay those fees. Bell appealed.

## **ISSUES**

Whether (1) the circuit court's imposition of sanctions was an abuse of discretion; (2) Miss. R. Civ. P. 37(b) applied to Bell's actions; (3) ordering sanctions be paid to the attorneys was appropriate; (4) the fee bill should have been struck pursuant to Miss. R. Civ. P. 11 because it was not signed; (5) the trial court erred in failing to make Miss. R. Civ. P. 52(a) findings; (6) a paralegal engaged in the unauthorized practice of law; (7) credible evidence supported the sanctions; (8) the sanctions can stand without a reasonableness determination; (9) the record was sealed unlawfully; (10) cumulative error deprived Bell of due process.

## **HOLDING**

(1) Because there was not a definite and firm conviction that the trial court committed a clear error of judgment, there was no abuse of discretion. (2) Because Miss. R. Civ. P. 37 provides the court power to sanction counsel who abuse the discovery process and Bell was subject to the sealing order, Bell was properly sanctioned. (3) Because the attorneys incurred reasonable expenses, it was acceptable to order attorney's fees paid directly to the attorneys. (4) Because the fee bill was not a pleading or motion, Miss. R. Civ. P. 11 does not apply to the fee bill and the issue was without merit. (5) Because the trial court is not required to make particularized findings of fact or conclusions of law under Miss. R. Civ. P. 52, the trial court did not err by making generalized findings of fact and conclusions of law. (6) Because the paralegal's correspondence did not amount to the practice of law or require any knowledge of law, the paralegal did not engage in the unauthorized practice of law. (7) Because Abraham provided exhibits to show Bell had filed in other venues, Abraham provided credible evidence to support the sanctions. (8) Because the sanctioned party did not allege that the fees were actually unreasonable nor give any reasons why the fees were unreasonable, and the awards were for the purpose of sanctions, the sanctions were permissible without a reasonableness determination. (9) Because Smith agreed to the order sealing the record and did not timely appeal that order, this issue was waived. Further, because discovery documents have no independent right of public access, the record was not unlawfully sealed. Therefore, the Supreme Court affirmed the judgment of the Leflore County Circuit Court.

**Affirmed - 2017-CA-00129-SCT (Jan. 17, 2019)**

Opinion by Justice King

Hon. L. Breland Hilburn (Leflore County Circuit Court)

William Charles Bell for Appellants - H. Scot Spragins, Ralph Edwin Chapman, Lawrence John Tucker Jr., & Dana J. Swan for Appellees

Briefed by [Jack Schultz](#)

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## **STANFORD V. THE MISSISSIPPI BAR**

### **CIVIL - BAR MATTERS**

**STATE BAR - REINSTATEMENT - BENSON REQUIREMENTS** - A petition for reinstatement must satisfy the following jurisdictional requirements: (1) state the cause or causes for suspension or disbarment; (2) give the name and address of all persons, parties, firms, or legal entities who suffered pecuniary loss due to the improper conduct; (3) make full amends and restitution; (4) show that the petitioner has the necessary moral character for the practice of law; and (5) demonstrate the petitioner's requisite legal education to be reinstated to the privilege of practicing law



**STATE BAR - REINSTATEMENT - RESTITUTION** - Restitution is (1) an act of restoring the proper owner of something taken away, lost, or surrendered; (2) an act of repaying or compensating for loss, damage, or injury; or (3) a return to a former state or position

### **FACTS**

In September 2017, M. Reid Stanford received a three-year suspension to be composed of a six-month suspension with two and a half years of probation. Based on Stanford's conduct, the complaint tribunal concluded that he violated Mississippi Rules of Professional Conduct 1.15(a), 1.15(b), 5.3, and 8.4. The suspension prohibited Stanford from the practice of law or holding himself out as a lawyer until he sought and was granted reinstatement. In April 2018, Stanford filed a petition for reinstatement with the Court. In his petition, he explained the underlying conduct for which he was disciplined. He also represented that he had complied with the requirements imposed upon him by the agreed order. The Mississippi Bar investigated Stanford's petition and concluded that it supported his reinstatement, conditioned upon the Court determining whether restitution by a third party, such as an insurance company, satisfies the *Benson* requirement that an attorney petitioning for reinstatement must make full amends/restitution, in the affirmative.

### **ISSUE**

Whether restitution by a third party satisfied the *Benson* requirement that an attorney petitioning for reinstatement must make full amends and restitution.

### **HOLDING**

Because the execution of a release by the injured party does not release Stanford from the full restitution duty imposed by the reinstatement process, Stanford failed to satisfy each *Benson* jurisdictional requirement. Therefore, the Supreme Court denied Stanford's petition for reinstatement to the practice of law.

#### **Reinstatement Denied - 2018-BR-00587-SCT (Jan. 17, 2019)**

En Banc Opinion by Justice Coleman

Andrew J. Kilpatrick Jr. & B. Sean Akins for Appellant - Melissa S. Martin for Appellee

Briefed by [Natalie McCarty](#)

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## **WILLIAMS V. WILLIAMS**

### **CIVIL - DOMESTIC RELATIONS**

**DOMESTIC RELATIONS - VISITATION - PRESUMPTION** - The presumption that a non-custodial parent is entitled to visitation can be overcome by substantial evidence that would justify doing so

**DOMESTIC RELATIONS - CHILD SUPPORT - ADDITIONAL INCOME** - A chancellor may impute additional income to a parent for the purposes of calculating child support when there is evidence that parent is not being honest about their finances

**DOMESTIC RELATIONS - VALUATION - EXPERTS** - Chancellors are not required to appoint experts to value the marital assets if neither party requests such an expert

### **FACTS**

Brent and Tracy Williams were married on March 5, 1993 and separated on September 1, 2013. They had three children, two of whom are emancipated and the youngest of which was fourteen when the divorce began and was seventeen by the time of the chancellor's ruling. The child is now attending IMG Academy in Florida, living with neither parent. Brent filed the complaint for divorce on October 3, 2013, and the chancellor ruled from the bench on January 9, 2017 and entered the judgment for divorce on February 1, 2017. Tracy filed a motion to alter or amend the judgment, Brent filed a response and counter-motion, and the chancellor denied the motions. Tracy appealed and Brent cross-appealed.

### **ISSUES**

Whether the chancellor erred (1) in not providing Tracy a set visitation schedule with their teenage son; (2) in requiring Tracy to pay child support; (3) in the valuation of business interests; (4) in finding an airplane and a boat to be marital property; and (5) by not ordering Tracy to make monthly payments to Brent on his \$1 million judgment award.

### **HOLDING**

(1) Because the strained relationship between mother and son constituted substantial evidence such that can overcome the presumption of entitlement to visitation, the chancellor did not err in declining to set a visitation schedule. (2) Because the record did not support Tracy's claim of a gross income too low for child support, the chancellor acted properly in imputing additional income to Tracy and requiring her to pay child support. (3) Because only Brent attempted to provide the chancellor with evidence of the valuations of the marital property and the court was not required to appoint an expert, the chancellor did not err in the valuation of assets. (4) Because there was conflicting evidence as to who bought the boat and airplane and with what manner of funds, the chancellor's finding of fact was not manifestly wrong or clearly erroneous. (5) Because ordering monthly payments would cause Tracy's business to go bankrupt, and Tracy was ordered to keep Brent named as beneficiary on her \$1 million life insurance policy, the chancellor did not err in failing to order monthly payments. Therefore, the Supreme Court affirmed the judgment of the DeSoto County Chancery Court.

**Affirmed - 2017-CA-01476-SCT (Jan. 17, 2019)**

Opinion by Justice Beam

Hon. Vicki B. Daniels (DeSoto County Chancery Court)

Jerry Wesley Hisaw & Vanessa Winkler Price for Appellant - Luther Putnam Crull Jr. for Appellee

Briefed by [James Adamoli](#)

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## ***SUPREME COURT - POST-CONVICTION RELIEF***

### **FORKNER V. STATE**

#### **MISCELLANEOUS**

**POST-CONVICTION RELIEF - PROCEDURAL BAR - STATUTE OF LIMITATIONS** - Under Miss. Code Ann. § 99-39-5(2) a prisoner has three years following conviction in which to apply for post-conviction relief under the Uniform Post-Conviction Collateral Relief Act

**POST-CONVICTION RELIEF - PROCEDURAL BAR - WAIVER** - Under Miss. Code Ann. § 99-39-21(1) any unused defenses objections, claims, questions, issues, or errors, either in law or in fact, capable of determination at trial or direct appeal will be held waived in later proceedings for post-conviction relief

**POST-CONVICTION RELIEF - PROCEDURAL BAR - FINAL JUDGMENTS** - Under Miss. Code Ann. § 99-39-27(9) dismissal or denial of an application under the Uniform Post-Conviction Collateral Relief Act is a final judgment

#### **FACTS**

In 2001 Winfred Forkner was convicted of burglary of a storehouse in Wilkinson County and was sentenced, as a habitual offender, to life imprisonment without the possibility of parole. After multiple motions and appeals, Forkner filed an Application for Leave to Proceed in the Trial Court in January 2018. On April 4, 2018, a panel order of the Supreme Court granted Forkner's Application for Leave to Proceed in the Trial Court and found Forkner's indictment to be defective. The State filed a motion seeking an en banc rehearing of the panel decision. Forkner opposed the State's motion and countered by filing a Motion to Remand the Petitioner to the Wilkinson County Jail and a Petition for Immediate Release.

#### **ISSUE**



Whether to uphold the panel decision granting Forkner’s Application for Leave to Proceed in the Trial Court.

### **HOLDING**

Because the statute of limitations for post-conviction relief under the Uniform Post-Conviction Collateral Relief Act is three years, and because Forkner’s Application for Leave to Proceed in the Trial Court was made after the three-year statute of limitations, Forkner’s application was time-barred. Further, because prisoners waive defenses capable of determination at trial but not made at trial, and because Forkner’s application raised objections to the indictment capable of determination at trial, Forkner’s application was waived. Finally, because dismissal or denial under this section is a final judgment, and because Forkner’s application succeeded previous motions attacking the integrity of the indictment, Forkner’s application was successive. Therefore, the Supreme Court vacated the previous Court order and dismissed the Application for Leave to Proceed in the Trial Court, as well as the Motion to Remand and the Petition for Immediate Release.

### **DISSENT**

Justice Kitchens argued that because the Supreme Court has previously held that a challenge to an indictment for failure to charge an essential element of the crime is a fundamental right and may not be waived because errors affecting fundamental rights are not subject to the bars of the Uniform Post-Conviction Collateral Relief Act, and because Forkner’s post-conviction relief establishes such an error, the Supreme Court may entertain his untimely and successive post-conviction relief petition.

#### **Vacated & Dismissed - 2018-M-00115-SCT (Jan. 17, 2019)**

En Banc Opinion by Presiding Justice Chamberlin - Dissent by Justice Kitchens  
*Pro se* for Appellant - Jason Davis & Laura Tedder [Att’y Gen. Office] for Appellee  
Briefed by [Jon-Paul Bushnell](#)

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## **RONK V. STATE**

### **CIVIL - DEATH PENALTY - POST-CONVICTION RELIEF**

**POST-CONVICTION RELIEF - MOTION TO LEAVE - JUDICIAL DISCRETION** - Pursuant to Miss. Code Ann. § 99-39-27(5)-(6), the Court is empowered to grant a petitioner leave to proceed on his motion for post-conviction relief in the trial court if there is a substantial showing of the denial of a state or federal right

**INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - FACTORS** - Under *Strickland*, a claimant of ineffective assistance of counsel bears the burden of proof to show that: (1) counsel’s performance was deficient and (2) the deficiency prejudiced his defense; allegations of ineffective assistance of counsel must be made with specificity and detail, and are assessed by the totality of the circumstances

**DEATH PENALTY - APPELLATE REVIEW - PROPORTIONALITY CLAIMS** - Pursuant to *Lester*, courts are not obligated to consider all death-eligible cases in reviewing proportionality claims

### **FACTS**

On the morning of August 26, 2008, emergency crews responded to a house fire in Biloxi, Mississippi. In extinguishing the fire, they found Michelle Lynn Craite’s remains in the master bedroom. Authorities determined the fire had been set intentionally, with gasoline vapors as the ignition source. They also learned that Timothy Ronk had been living there. At the time, Ronk was on house arrest, having been convicted of grand larceny weeks earlier. Bank records showed that the morning Craite died, someone had used her debit card at a Walmart in D’Iberville. Surveillance confirmed it was Ronk. Authorities learned that Ronk used Craite’s debit card to purchase a ring for another woman, Heather Hindall. The morning of Craite’s death, Ronk texted Hindall that he was “loading up and coming to Florida.” Authorities arrested Ronk in Florida. After his arrest, Ronk told Hindall what happened with Craite. He admitted to stabbing Craite and later setting the house on fire. Ronk was indicted for armed robbery and capital murder with arson as the underlying

felony. The Supreme Court confirmed the convictions and sentences on September 24, 2015. On September 23, 2016, Ronk filed a motion for leave to seek post-conviction relief at the trial court.

### ISSUES

Whether (1) Ronk's ineffective-assistance claim was procedurally barred; (2) counsel's performance was both deficient and prejudicial; (3) Ronk's challenge to the disproportionality of his sentence was procedurally barred; (4) Mississippi's death-penalty statute is constitutional; (5) the cumulative effect of all the alleged errors required reversal; and (6) the trial court failed to preserve the record for review.

### HOLDING

(1) Because the Court dismissed Ronk's ineffective-assistance claim raised on direct appeal without prejudice to his right to raise it in post-conviction proceedings, the claim was not procedurally barred. (2) Because counsel's health problems and prescription-drug use do not constitute ineffective assistance per se, and because the way counsel presented Ronk's behavioral problems was acceptable trial strategy and was neither deficient nor prejudicial, counsel was effective. (3) Because the Court previously held on Ronk's direct appeal that his sentence was neither excessive nor disproportionate, the claim was barred by the doctrine of res judicata. (4) Because Ronk challenged the constitutionality of Mississippi's death-penalty on direct appeal and Ronk did not prove that the decision makers in his case acted with discriminatory purpose, the challenge was both barred by the doctrine of res judicata and waived. (5) Because all of Ronk's claims of error were either barred or unsubstantiated, the issue was without merit. (6) Because Ronk did not object to the jury's composition before it was empaneled and failed to present a substantial showing that the lack of record denied him a state or federal right, the claim was both waived and without merit. Therefore, the Supreme Court denied Ronk's Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief.

### DISSENT

Justice Coleman argued Ronk successfully contended that his counsel was ineffective. Due to the argument presented regarding the mitigation investigation and the similarities between the instant case and *Keller*, Justice Coleman would have granted the motion.

#### **Relief Denied - 2015-DR-01373-SCT (Jan. 17, 2019)**

En Banc Opinion by Chief Justice Waller

Hon. Lisa P. Dodson (Harrison County Circuit Court)

Alexander Dunlap Moorhead Kassoff for Appellant - Brad Alan Smith (Att'y Gen. Office) for Appellee

Briefed by [Whitney Jackson](#) & [Drey Rusell](#)

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

### **THOMAS V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL LAW - ATTEMPTED ROBBERY - ELEMENTS** - In Mississippi, a defendant is guilty of attempted robbery if he or she intended to commit armed robbery, made a direct but ineffectual act toward its commission, and failed to consummate the crime

**CRIMINAL LAW - ATTEMPTED ROBBERY - INTENT** - In order to determine intent, a jury may consider the defendant's actions coupled with the surrounding facts and circumstances

### FACTS

On December 15, 2014, Lennon Thomas entered the Discount Tobacco and Beer Convenience Store in Hattiesburg. The store's owners, Nga Tran and her husband Truc, were at the store. Nga was handling about \$80,000 under the

cashier's counter when Thomas entered, dressed in dark clothing and a bandana, and wielding a gun. Truc yelled out and pulled his own gun. Thomas gripped Nga by the throat and threatened to kill her if Truc did not put down the gun. Truc fled the store to seek aid from the police, and Thomas followed, dragging Nga. Thomas shot Truc in his back as he was fleeing, then shot Nga in the back. Thomas fled on foot and was later apprehended by nearby police. A jury found Thomas guilty of attempted robbery and aggravated assaults, to which he was sentenced to sixty-five years for all counts, to serve consecutively. Thomas filed a post-trial motion, which the trial court denied. Thomas appealed.

### ISSUES

Whether (1) there was sufficient evidence of Thomas's intent of armed robbery; and (2) the trial judge intended Thomas to serve his sentences concurrently.

### HOLDING

(1) Because a jury may infer guilty intent from the totality of the circumstances, the jury was free to find the intent element of the armed-robbery conviction satisfied despite the fact that no money was ultimately taken. (2) Because the written record from the trial judge is clear that the sentences are to be served consecutively, Thomas's argument that his sentences were to run concurrently was without merit. Therefore, the Supreme Court affirmed the judgment of the Forrest County Circuit Court.

**Affirmed - 2017-KA-00812-SCT (Jan. 17, 2019)**

Opinion by Justice Maxwell

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

Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Jeffrey A. Klingfuss (Att'y Gen. Office) for Appellee

Briefed by [Michael Lambert](#)

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## MISSISSIPPI COURT OF APPEALS DECISIONS – JANUARY 15, 2019

### COURT OF APPEALS - CIVIL CASES

#### BRITT V. C.B. EX REL HOLLOWAY

#### CIVIL - CUSTODY

**CIVIL PROCEDURE - APPEALS - FINAL JUDGMENT** - A final, appealable, judgment is one that adjudicates the merits of the controversy and settles all the issues as to all the parties' and requires no further action by the lower court

### FACTS

Kimberly Britt gave birth to a son, C.B., in May 2016. Britt's mother, Deborah Holloway, petitioned the chancery court for custody of C.B. on August 9, 2016. The child's father, Jessie Pitts, joined the petition. In May 2017, the court found that the natural parent presumption was rebutted due to Britt's illegal drug use, mental-health issues, prior criminal history, and inability to support C.B. on her income. Holloway was awarded permanent legal and physical custody. Britt was granted supervised visitation once a week. The court held the issue of child support in abeyance and stated Holloway could request the court to hold a hearing on the issue in six months. Britt filed a motion for reconsideration, which the court denied. Britt appealed.

### ISSUE

Whether an opinion "adopted as the judgment of the Court" but not certified as final under Miss. R. Civ. P. 54(b) is an appealable judgment.

### HOLDING

Because the trial court failed to make a definitive, unmistakable ruling on the issue of child support, the order was not an appealable final judgment. Therefore, the Court of Appeals dismissed the appeal from the Lee County Chancery Court.

**Dismissed - 2017-CA-01288-COA (Jan. 15, 2019)**

En Banc Opinion by Presiding Judge Barnes

Hon. C. Michael Malski (Lee County Chancery Court)

Chereka Lavo Witherspoon for Appellant - Christopher G. Evans for Appellee

Briefed by [Nathaniel Snyder](#)

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## WINTERS V. BILLINGS

### CIVIL - REAL PROPERTY

**REAL PROPERTY - TITLE DISPUTES - ADVERSE POSSESSION** - To establish title by adverse possession, the adversely possessing party must show, by clear and convincing evidence, that their occupancy of the challenged property was (1) under claim of ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; (6) peaceful; and (7) lasted for at least 10 years

**CIVIL PROCEDURE - PRIOR TESTIMONY - JUDICIAL ESTOPPEL** - A party will be judicially estopped from taking a subsequent position if (1) the position is inconsistent with one previously taken during litigation, (2) a court accepted the previous position, and (3) the party did not inadvertently take the inconsistent positions

**CIVIL PROCEDURE - SANCTIONS - ATTORNEY'S FEES** - Under Miss. R. Civ. P. 11(b), if any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, then a chancellor may order a party to pay expenses or attorney's fees

### FACTS

In 1984, the Preston and Almeta Billings purchased the land in question from Pearl Strickland. After having a survey done, and after confirming that a white picket fence Strickland had erected was within the bounds of their property, the Billingses replaced that fence with a chain link fence and maintained the fence and surrounding area until 1991. Willie Lee and Ophelia Winters purchased the neighboring land in 1991 and, without conducting a survey, relied on the seller's statement that the chain-link fence was the property line. Mr. Winters had a conversation with Mr. Billings regarding possible permission to use this area of land, but both sides dispute whether such permission was granted. The Winterses testified that, in 1994, they moved a trailer onto the disputed area of land and that trailer remained there until 2012. They further testified that they occasionally conducted social gatherings on the disputed land. In 2014, the Billingses removed the chain-link fence. The Winterses filed a claim in the Bolivar County Chancery Court claiming they had adversely possessed the land in question and requested several forms of relief, including a claim for judicial estoppel, damages for trespass, mental and emotional distress, and attorney's fees. The chancellor rejected the Winterses requests, and granted the Billingses requests for attorney's fees. The Winterses appealed.

### ISSUES

Whether the chancery court erred in (1) finding that the Winterses did not adversely possess the land; (2) denying the Winterses requests for judicial estoppel; and (3) awarding attorney's fees to the Billingses.

### HOLDING

(1) Because a claim of adverse possession requires the adverse possessor to show all six elements by clear and convincing evidence, and because the Winterses only satisfied that burden for the element of peacefulness, the court did not err in finding that the Winterses did not adversely possess the land. (2) Because the court found that Mr. Billings, at most, inadvertently took inconsistent positions on the existence of the aforementioned conversation, and because a claim for judicial estoppel requires that the opponent non-inadvertently take inconsistent positions, the court did not err in denying the Winterses requests for judicial estoppel. (3) Because the Winterses action was not frivolous and was not

brought in bad faith, and because the chancellor awarded fees to the Billingses on the basis of the claim being meritless and brought in bad faith, the court erred in awarding attorney's fees to the Billingses. Therefore, the Court of Appeals affirmed in part and reversed and rendered in part the judgment of the Bolivar County Chancery Court.

**Affirmed in Part; Reversed & Rendered in Part - 2017-CA-01347-COA (Jan. 15, 2019)**

En Banc Opinion by Judge Greenlee

Hon. Watosia Marshall Sanders (Bolivar County Chancery Court)

Robert G. Johnston & John Marshall Alexander for Appellants - Ellis Turnage for Appellees

Briefed by [Corban Snider](#)

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

### **CAREY V. STATE**

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

**POST-CONVICTION RELIEF - GUILTY PLEA - FILING DEADLINE** - A motion for post-conviction relief must be filed within three years of entry of a guilty plea

**POST-CONVICTION RELIEF - DISMISSAL - FAILURE TO STATE A CLAIM** - A judge may dismiss a motion for post-conviction relief that plainly fails to state a claim

**POST-CONVICTION RELIEF - RELEASE FROM DETENTION - PROBATION** - Probation does not equate to time served and is not credited towards a suspended sentence

#### **FACTS**

In 2006, Donald Willie Carey was convicted of aggravated assault and armed robbery and sentenced to concurrent fifteen-year sentences. The court suspended nine years of each sentence conditioned upon completion of a five-year post-release supervision. Carey failed to complete the post-release supervision and pled guilty to a kidnapping charge during the post-release supervision term. The circuit court revoked the suspended sentences and ordered Carey to serve the full sentences. Carey filed a motion claiming his suspended sentences had been unlawfully revoked due to a lack of sufficient evidence of the new criminal act. The court dismissed the motion because it was filed more than three years after entry of Carey's guilty plea. Carey appealed.

#### **ISSUES**

Whether (1) there was sufficient evidence to revoke Carey's suspended sentences because of his guilty plea to a new crime; and (2) Carey's time spent in post-release supervision should be credited towards his concurrent sentences.

#### **HOLDING**

(1) Because Carey pled guilty to kidnapping during the period of post-release supervision, his motion failed to state a claim and was properly dismissed. (2) Because no credit is allowed against a suspended sentence for time spent in post-release supervision, this issue was without merit. Further, because this argument was raised for the first time on appeal it was procedurally barred. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

**Affirmed - 2018-CP-00303-COA (Jan. 15, 2019)**

En Banc Opinion by Judge Wilson

Hon. William E. Chapman III (Madison County Circuit Court)

*Pro se* for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Andie Szabo](#)

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## HANEY V. STATE

### CIVIL - POST-CONVICTION RELIEF

**POST-CONVICTION RELIEF - GUILTY PLEAS - INEFFECTIVE ASSISTANCE OF COUNSEL** - To obtain post-conviction relief, a petitioner who pled guilty must prove that her attorney's ineffective performance proximately caused the plea

**POST-CONVICTION RELIEF - GUILTY PLEAS - PAROLE INFORMATION** - A defendant does not possess a constitutional right to full parole information at or before her guilty plea

**POST-CONVICTION RELIEF - GUILTY PLEAS - INVOLUNTARINESS** - A plea may be rendered involuntary only if the defendant is affirmatively misinformed regarding the possibility of parole and pleads guilty in reliance on the misinformation

### **FACTS**

An Alcorn County grand jury indicted Jodi Haney and Stephen Pharr for a drive-by shooting. In a written statement given to law enforcement, Pharr identified Haney as the shooter and himself as the driver. Pharr also stated that the shooting occurred when he and Haney pursued a car containing two individuals with whom Pharr and Haney conducted a drug transaction on the day prior. Pharr pled guilty as an accessory after the fact to the drive-by shooting, affirmed that his previous written statement was true, and the court admitted the statement into evidence as the factual basis for Pharr's plea. Pharr also agreed to testify against Haney. Haney entered an open guilty plea after Pharr implicated her and claimed her attorney advised her that she would receive a lesser sentence. At her plea hearing, Haney stated that she understood that the judge could sentence her to the maximum sentence of thirty years. The judge accepted her guilty plea, finding that Haney pled guilty knowingly, intelligently, and voluntarily. The judge sentenced Haney to twenty years. Haney appealed.

### **ISSUES**

Whether (1) Haney's counsel was ineffective; and (2) Haney's plea was involuntary because she was not informed that she would be ineligible for parole.

### **HOLDING**

(1) Because Haney's in-court statements indicated that she was satisfied with counsel's performance and she provided nothing to support her argument, her counsel's assistance was not ineffective. (2) Because a defendant does not possess a constitutional right to full parole information at or before her guilty plea, Haney's failure to understand her eligibility for parole did not render her guilty plea involuntary or invalid. Therefore, the Court of Appeals affirmed the judgment of the Alcorn County Circuit Court.

### **SPECIAL CONCURRENCE**

Judge Tindell argued that the Supreme Court should readdress the rule that a defendant does not possess a constitutional right to full parole information at or before her guilty plea. He stated that parole eligibility is a direct consequence of a plea and one that defendants, trial judges, prosecutors, victims, and the general public should have knowledge of prior to sentencing. He also stated that parole eligibility sometimes determines whether one spends decades in prison.

### **Affirmed - 2017-CP-01711-COA (Jan. 15, 2019)**

En Banc Opinion by Judge Wilson - Special Concurrence by Judge Tindell

Hon. James Seth Andrew Pounds (Alcorn County Circuit Court)

*Pro se* for Appellant - Jeffrey A. Klingfuss (Att'y Gen. Office) for Appellee

Briefed by [Chadwick Lamar](#)

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## COURT OF APPEALS - CRIMINAL CASES

### HERBERT V. STATE

#### CRIMINAL - FELONY

**EVIDENCE - HEARSAY - TENDER YEARS** - Pursuant to Miss. R. Evid. 803(25), a statement by a child of tender years describing any act of sexual contact with or by another may be admissible if (1) the court finds the child was of tender years when the statement was made, (2) the court, after a hearing outside the jury's presence, determines the statement has substantial indicia of reliability, and (3) the child either testifies or is unavailable as a witness and other evidence corroborates the act

**CIVIL PROCEDURE - MOTION FOR NEW TRIAL - FILING** - Pursuant to Uniform Rule of Circuit and County Court Practice 10.05, a motion for a new trial must be made within ten days of the entry of judgment; the ten-day time limitation set forth in Rule 10.05 is measured from the date of conviction

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - CIRCUMSTANTIAL EVIDENCE** - A circumstantial-evidence instruction provides that the State must prove the defendant guilty beyond a reasonable doubt and to the exclusion of all reasonable hypotheses consistent with innocence

#### FACTS

In December 2012, eight-year-old Amy and her brother spent the night at her aunt Suzanne's house, where Suzanne lived with her husband, David Lee Herbert. The following day, Amy spent the night at her grandmother's house. Amy's grandmother, Sue, noticed that Amy was "fidgety" and kept tossing and turning in bed. When Sue asked Amy what was wrong, Amy responded "I think I was molested at auntie's house." Amy further explained that she felt someone kiss her breast and touch her. While Amy did not see the person, she explained that the person had big hands and smelled of smoke. At trial, Herbert was convicted of fondling and sentenced to serve ten years in the custody of the Mississippi Department of Corrections, with two years suspended, followed by two years' supervised probation. He was also ordered to register as a sex offender. Herbert filed a motion for a judgment notwithstanding the verdict or, alternatively, a new trial, which the circuit court denied. Herbert appealed.

#### ISSUES

Whether the circuit court erred in (1) admitting Amy's hearsay statements under the tender-years exception; (2) denying Herbert's motion for a new trial; and (3) refusing Herbert's circumstantial-evidence and two-theory jury instructions.

#### HOLDING

(1) Because Amy was presumed to be a child of tender years under the age of twelve, she testified at trial, and evidence showed that her statements were reliable, the circuit court did not err in admitting Amy's statements under the tender-years exception. (2) Because Herbert did not file his motion until December 15, 2016, his motion for new trial was procedurally barred as untimely. Notwithstanding the procedural bar, the verdict was not so contrary to the overwhelming weight of the evidence to create an unconscionable injustice. (3) Because Amy testified that Herbert was the only male adult in the house and that she was touched with big hands, the court did not err in refusing Herbert's request for circumstantial-evidence and two-theory jury instructions. Therefore, the Court of Appeals affirmed the judgment of the Bolivar County Circuit Court.

**Affirmed - 2017-KA-01211-COA (Jan. 15, 2018)**

En Banc Opinion by Chief Judge Griffis

Hon. Linda F. Coleman (Bolivar County Circuit Court, Second Judicial Dist.)

Justin T. Cook (Pub. Def. Office) for Appellant - Alicia M. Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Catherine Pettis](#)

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## McGILBERRY V. STATE

### CRIMINAL - FELONY

**CRIMINAL PROCEDURE - SENTENCING - CAPITAL MURDER** - Miss. Code Ann. § 99-19-101 vests sentencing authority of a capital defendant solely with the jury, except in cases where the defendant pleads guilty

**CRIMINAL PROCEDURE - CAPITAL MURDER - MINOR DEFENDANT** - When the defendant is a minor in a capital murder case, a jury will be empaneled to decide the sentence of life without eligibility for parole or life with parole

**CRIMINAL PROCEDURE - SENTENCING - GUILTY PLEAS** - If a defendant enters a guilty plea, a jury is not required to hand down the sentence

#### FACTS

In 1994, sixteen-year old Stephen McGilberry was indicted on four counts of capital murder for the deaths of four family members. McGilberry was later convicted by a jury on all counts and sentenced to death. Following *Roper v. Simmons*, the trial court resentenced McGilberry to life without eligibility for parole. After the United States Supreme Court held in *Miller v. Alabama* that a mandatory sentence of life without eligibility of parole on an offender under the age of eighteen was unconstitutional, McGilberry appealed his sentence.

#### ISSUE

Whether McGilberry is entitled to a resentencing by a jury because he was convicted of capital murder under Miss. Code Ann. § 99-19-101.

#### HOLDING

Because under Miss. Code Ann. § 99-19-10, sentencing authority of a capital defendant rests solely with the jury, except in cases where the defendant pleads guilty, and because McGilberry was sentenced by a jury, he was entitled to a *Miller* resentencing by a jury. Therefore, the Court of Appeals reversed and remanded the judgment of the Jackson County Circuit Court.

#### **Reversed & Remanded - 2017-KA-00716-COA (Jan. 15, 2019)**

Opinion by Presiding Judge Barnes

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

George T. Holmes, Stacy L. Ferraro, & Robert Michael Cunningham (Pub. Def. Office) for Appellant - Katy Taylor Gerber & Joseph Scott Hemleben (Att’y Gen. Office) for Appellee

Briefed by [Zachary Flowers](#)

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## OLIVER V. STATE

### CRIMINAL - MISDEMEANOR

**CRIMINAL PROCEDURE - DE FACTO OFFICIAL - COLOR OF APPOINTMENT** - An officer de facto is one who exercises the powers and discharges the functions of an office, being then in possession of the same under color of authority, but without actual right thereto

**CRIMINAL PROCEDURE - DE FACTO OFFICIAL - AUTHORITY TO ADMINISTER** - An officer acting under color of appointment is a de facto official capable of swearing to a charging affidavit

#### FACTS

Charles Oliver was issued a citation for driving under the influence after he rear-ended a vehicle. Oliver and the other driver were taken to the hospital after the accident. Oliver's blood-alcohol content was registered at 0.153. Officer Joseph Garrett issued Oliver the citation, then appeared before Officer Cody Moak in justice court to swear to the citation. At the time, Officer Moak's appointment as deputy justice court clerk had not been approved by the Board of Supervisors of Hancock County. After pleading nolo contendere in justice court, Oliver appealed to the Hancock County Circuit Court. Oliver filed a pretrial motion to dismiss, citing lack of jurisdiction because the citation issued in justice court did not constitute a valid and sworn affidavit. The circuit court denied the motion, and Oliver was convicted of driving under the influence. Oliver then filed a motion to vacate the judgment and a motion for a judgment notwithstanding the verdict, or alternatively, for a new trial. The circuit court denied these motions. Oliver appealed.

### **ISSUES**

Whether (1) Deputy Moak was acting as a de factor officer of the court and possessed the authority to acknowledge Oliver's citation; and (2) the circuit court acquired jurisdiction from the justice court to adjudicate Oliver's case.

### **HOLDING**

(1) Because Deputy Moak was acting under the color of appointment at the time he issued Oliver's affidavit, any defects that may have existed in the appointment of Deputy Moak did not negate his acting under the color of appointment to administer and swear to the charging affidavit. (2) Because the citation issued to Oliver was a valid, properly attested, and sworn affidavit, the filing in justice court gave the circuit court jurisdiction over Oliver's case. Therefore, the Court of Appeals affirmed the judgment of the Hancock County Circuit Court.

**Affirmed - 2017-KM-01046-COA (Jan. 15, 2019)**

Opinion by Judge Westbrook

Hon. Christopher Louis Schmidt (Hancock County Circuit Court)

Donald Rafferty for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [Yance Falkner](#)

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