

**MISSISSIPPI SUPREME COURT DECISIONS – JUNE 6, 2019****SUPREME COURT - CIVIL CASES****CARR V. STATE****CIVIL - POST-CONVICTION RELIEF**

**CONSTITUTIONAL LAW - EIGHTH AMENDMENT - INTELLECTUAL DISABILITY** - The Eighth Amendment prohibits the execution of intellectually disabled persons, and an accused must prove the presence of an intellectual disability by a preponderance of the evidence, demonstrating that they possess significantly subaverage intellectual functioning, significant deficits in adaptive behavior, and a manifestation of such before age eighteen

**POST-CONVICTION RELIEF - WAIVER** - Under Miss. Code Ann. § 99-39-21, failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, constitutes a waiver thereof and the prisoner will be procedurally barred, but the court may grant relief from the waiver only upon a showing of cause and actual prejudice

**FACTS**

Anthony Carr was convicted of four counts of capital murder and sentenced to death for each. In 2004, the Supreme Court granted Carr leave to proceed in the circuit court on his post-conviction claim that he is intellectually disabled, thus, ineligible for the death penalty under the United States Supreme Court precedent of *Atkins v. Virginia* which held that the Eighth Amendment to the US Constitution prohibits the execution of mentally disabled persons. The trial court later denied Carr's petition for post-conviction relief, and Carr appealed. On appeal, the Supreme Court reversed and remanded with directions for the trial court to make new factual findings applying the correct legal standard. In September 2017, following the direction of the Supreme Court, the Quitman County Circuit Court entered a revised order, again denying Carr's petition for post-conviction relief, finding that Carr did not prove that he was intellectually disabled. The trial court entered the revised order more than one year after remand and did not hold an additional hearing, and the parties did not request one. Carr appealed.

**ISSUES**

Whether the trial court erred in (1) failing to hold a new evidentiary hearing and (2) holding that Carr did not prove by a preponderance of the evidence that he suffered from an intellectual disability that manifested prior to the age of eighteen.

**HOLDING**

(1) Because the Supreme Court's remand did not require a new evidentiary hearing to be held, and because Carr did not request a new hearing and thus waived the issue on appeal and Carr did not show the requisite cause and actual prejudice to overcome the waiver under Miss. Code Ann. § 99-39-21(1), the trial court did not err in failing to hold a new evidentiary hearing. (2) Because Carr did not establish that he suffered from a significantly subaverage intellectual function, significant defects in adaptive behavior, and a manifestation before age eighteen, the trial court did not err in finding that Carr did not prove by a preponderance of the evidence that he suffered from an intellectual disability. Therefore, the Supreme Court affirmed the judgment of the Quitman County Circuit Court.

**DISSENT**

Justice King argued that Carr had established an intellectual disability within the meaning of *Atkins* by a preponderance of the evidence because Carr had presented evidence from two experts stating that he was intellectually disabled,

presented school records that showed significant academic deficits, presented testimony indicating that Carr had to be told when to tie his shoes and when to bathe, and presented IQ tests showing significant intellectual deficits. Further, he argued that because the death penalty is final and cannot be reversed, all doubts should be resolved in favor of Carr.

**Affirmed - 2017-CA-01481-SCT (June 6, 2019)**

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

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

Alexander Kassoff & Jamila Alexander (Capital Post-Conviction Office) for Appellant - Jason L. Davis & Ladonna C. Holland (Att'y Gen. Office) for Appellee

Briefed by [Carson Phillips](#)

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## HENDERSON V. COPPER RIDGE HOMES, LLC

### CIVIL - CONTRACTS

**CIVIL PROCEDURE - MOTION TO AMEND - JUDICIAL DISCRETION** - A party may amend a pleading only by leave of court or upon written consent of the adverse party and should be given freely when justice so requires, unless to do so would prejudice the defendant

**CIVIL - BREACH OF CONTRACT - PLEADING** - To prevail on a breach-of-contract claim, the plaintiff is required to prove by a preponderance of the evidence only the existence of a valid and binding contract and that the defendant has broken or breached it without regard to the remedy sought or the actual damage sustained

### FACTS

Cindy and John Henderson entered into a construction contract for their new home with Copper Ridge Homes, LLC (“Copper Ridge”) and acquired financing for the home from First Bank. The Hendersons filed a law suit alleging that the contract was a fixed-price contract for \$320,000, not a cost-plus contract as Copper Ridge contended. The contract contained a provision requiring changes to the contract to be made in writing and the record reflects no evidence of such changes. The Hendersons received two invoices for overage charges from Copper Ridge and contend that First Bank paid \$4,000 less than the agreed financing. The Hendersons filed a complaint for breach-of-contract and tort claims against both parties. After filing their complaint, the Hendersons defaulted on their repayment to First Bank and First Bank amended its answer to include judicial foreclosure. The Hendersons then filed a motion for leave to amend their complaint to include wrongful foreclosure among other claims, but the judge disallowed the wrongful foreclosure claim and granted Copper Ridge and First Bank’s post-foreclosure summary judgment motions, finding that the claims arising from the faulty construction of the house traveled with the title to other property, which the Hendersons no longer possessed after foreclosure was complete. The Hendersons appealed.

### ISSUES

Whether the trial judge (1) erred by allowing First Bank to foreclose on the Henderson’s house; (2) erred in granting summary judgment for dismissal of all claims; and (3) abused his discretion by denying the Hendersons leave to amend their complaint to add wrongful foreclosure.

### HOLDING

(1) Because there was no genuine dispute of material facts in the record that the Hendersons had failed to pay on the promissory note, the trial court did not err by allowing First Bank to foreclose on the Henderson’s house. (2) Because the deed of trust did not convey the Hendersons’ contractual or common law rights related to the promissory note or its separate contract with Copper Ridge, the court erred in finding that the Hendersons’ claims traveled with the title to the property upon foreclosure and dismissing the claims. (3) Because allowing the Hendersons to amend their complaint would be prejudicial to First Bank and outside of the discretion of the trial judge, he did not abuse his discretion by denying the Hendersons leave. Therefore, the Supreme Court affirmed in part and reversed and remanded in part the judgment of the Pike County Circuit Court.

## CONCURRENCE

Justice Kitchens argued that the Hendersons could have terminated the contract with First Bank since they alleged that First Bank breached the contract first, in which case the trial judge would have erred in permitting the foreclosure. However, the Hendersons failed to show that the breach by First Bank was material or that they gave First Bank an opportunity to cure the breach. Because the appellate requires legal authority and meaningful arguments, and because the Hendersons failed to offer such to its claim for breach of contract, the issue was considered waived, and the trial judge did not err in granting the judicial foreclosure.

### **Affirmed in Part; Reversed & Remanded in Part - 2017-CA-00959-SCT (June 6, 2019)**

Opinion by Justice Beam - Concurrence by Presiding Justice Kitchens

Hon. Michael M. Taylor (Pike County Circuit Court)

Macy Derald Hanson for Appellants - Dennis L. Horn, W. Brady Kellems, & Shirley Payne for Appellees

Briefed by [Jack Schultz](#)

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## **IN RE GORDON V. WALL**

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

**EVIDENCE - OBJECTION - PROFFER REQUIREMENT** - Although it may be apparent from the context what a witness's excluded testimony would be about, a reviewing court has no way to know what the witness would have actually said and whether there was error in excluding this evidence unless a party informs the trial court of its substance by an offer of proof

**EVIDENCE - PRIVILEGES - EX PARTE CONTACT RULE** - The ex parte contact rule, predicated on Miss. R. Evid. 503(f), has only ever been applied to physicians and does not apply to attorneys

**CIVIL - EQUITY - NEW TRIAL MOTION** - Even though a chancery court's power to grant a new trial is broad, a motion to alter or amend the judgment under Miss. R. Civ. P. 59(e) cannot be used to raise arguments which could, and should, have been made before the judgment issued

### **FACTS**

Brenda and Craig Gordon were deeded 39.25 acres of land fronting Highway 6 near Oxford by Brenda's mother, Mary Saunders Waller. Ms. Waller, now deceased, was ninety years of age, legally blind, and hard of hearing. She required assistance with some daily activities, including bathing, with which Brenda usually helped. Brenda and one of her sisters had a joint power of attorney for Waller. The Gordons drove Waller, who could not drive, to the attorney's office and were present when she executed the deed, but they did not bring the magnifying device she needed to read it. The Gordons admitted to not telling other family members about the transfer. A conservatorship was later opened, and the conservator filed a petition to set aside the deed for undue influence. At the start of trial, the chancellor granted an oral motion to exclude the testimony of Waller's physicians and attorney on the basis of ex parte contact by the Gordons' attorney. During trial, the soundness of Waller's mental capacity was challenged, and the Gordons were unable to rebut the presumption of undue influence. The court entered a final judgment setting aside the deed. The Gordons appealed.

### **ISSUES**

Whether the chancery court erred by (1) excluding the testimony of Waller's physicians because the Gordons' attorney engaged in ex parte communications with them and (2) excluding the testimony of Waller's attorney, based on applying the ex parte contact rule to attorneys.

### **HOLDING**

(1) Because a party claiming error in a ruling to exclude evidence must inform the court of its substance by an offer of proof unless the substance was apparent from the context, and because even though it may have been apparent from the context that the physicians would have testified about Waller's mental capacity and health, the Gordons' failure to proffer gives the Supreme Court no way to know what they would actually have said and the issue was barred from

review. (2) Because the Gordons' attorney conceded at trial that the ex parte contact rule of privilege between patient and physician applied to attorneys, even though it does not, the issue was waived. Further, because the first time the Gordons ever presented a substantive argument and proffer regarding the exclusion of the attorney's testimony was in a new trial motion, and because the motion was denied despite the chancery court's exceedingly broad discretion to grant a new trial, there was no abuse of discretion. Therefore, the Supreme Court affirmed the judgment of the Lafayette County Chancery Court.

**Affirmed - 2018-CA-00531-SCT (June 6, 2019)**

Opinion by Justice Ishee

Hon. Glenn Alderson (Lafayette County Chancery Court)

Robert Quentin Whitwell Jr. and Derek Heath-Essex Moreton for Appellants - Michael N. Watts, R. Bradley Best, & Geoffrey

Felix Calderaro for Appellee

Briefed by [Tucker Hood](#)

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## NISSAN N. AM., INC. V. TILLMAN

### CIVIL - OTHER

**STATUTORY INTERPRETATION - AMBIGUITY - PLAIN TERMS** - Where a statute is unambiguous and conveys a clear and definite meaning, the Court follows its plain terms

**STATUTORY INTERPRETATION - CANNONS OF CONSTRUCTION - LEGISLATIVE INTENT** - Whether a statute is ambiguous, or not, the ultimate goal of the Court in interpreting a statute is to discern and give effect to the legislative intent

**MOTOR VEHICLES & TRAFFIC REGULATION - MANUFACTURE, SALE & DISTRIBUTION - PROSCRIBED CONDUCT** - Under Miss. Code Ann. § 63-17-73(1)(d)(iii), a dealer may file its verified complaint within the sixty-day notice period, i.e., the sixty days preceding the effective date of termination

### FACTS

On November 23, 2016, Nissan North America, Inc. ("Nissan") notified Great River Nissan ("Great River"), principally owned by Ann C. Tillman, of its intent to terminate its dealership agreement with Great River. Miss. Code Ann § 63-17-73(1)(d)(iii) requires at least sixty days' notice before the effective date of termination, but the parties' dealership agreement required at least ninety days' notice. Therefore, the effective termination date was set for February 21, 2017. On February 17, 2017, Great River challenged the notice of termination by filing a verified complaint with the Mississippi Motor Vehicle Commission (the "Commission"). Nissan filed a motion to dismiss the complaint as untimely, claiming that the deadline to file the complaint was within sixty days after Great River received the notice, not within sixty days of the effective date of termination. The Commission found that Great River had filed its complaint outside the statutory window and dismissed the complaint. Great River appealed to the chancery court, which found that the Commission incorrectly interpreted the statute and reversed its decision. Nissan appealed.

### ISSUE

Whether Great River's complaint was timely under Miss. Code Ann. § 63-17-73(1)(d)(iii).

### HOLDING

Because Miss. Code Ann. § 63-17-73(1)(d)(iii) plainly provides that the dealer may file a verified complaint within the sixty-day notice period, and because the only defined sixty-day notice period involving the termination of a dealership agreement is the minimum sixty days preceding the proposed termination date, Great River's complaint was timely filed within the sixty days immediately preceding the effective date of termination. Therefore, the Supreme Court affirmed the judgment of the Adams County Chancery Court.

### DISSENT

Justice Griffis argued that the disputed language of Miss. Code Ann. § 63-17-73(1)(d)(iii), “sixty-day notice period,” clearly contemplated “notice.” Therefore, the operative event which started the count down for Great River to challenge the termination was written notice. He further argued that, under the majority’s interpretation, a dealer may wait until the final day before termination to file its complaint, regardless of how soon notice was given, which would extend the contract without reason and prevent disputes from being resolved in a timely and reasonable manner. Therefore, he would have reversed the chancellor’s judgment and reinstated the Commissioner’s decision.

**Affirmed - 2018-CC-00462-SCT (June 6, 2019)**

Opinion by Justice Coleman - Dissent by Justice Griffis

Hon. E. Vincent Davis (Adams County Chancery Court)

Jason H. Strong, S. Keith Hutto, & Christopher C. Genovese for Appellant - Glenn Gates Taylor, Christy M. Sparks, & R. Kent Hudson for Appellees

Briefed by [Baxter Geddie](#)

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## **GULF COAST HOSPICE LLC V. LHC GROUP INC.**

### **CIVIL - CONTRACT**

**CONTRACTS - ELEMENTS - FORMATION** - The elements of contract are (1) two or more contracting parties, (2) consideration, (3) a sufficiently definite agreement, (4) parties with legal capacity, (5) mutual assent, and (6) no legal prohibition precluding contract formation

**CONTRACTS - INTENT TO BE BOUND - EXECUTION** - If a party communicates no intent to be bound until a fully executed document, no amount of oral agreement to specific terms will make create a binding contract

### **FACTS**

In December of 2010, LHC Group Inc. (“LHC”) and Gulf Coast Hospice LLC (“GCH”) entered into preliminary negotiations over LHC’s proposed acquisition of GCH. Through March of 2011, acquisition negotiations continued, but a key manager responsible for GCH’s growth and success chose not to remain employed once LHC took over. Other employees of GCH followed her lead, and the acquisition plans eventually collapsed. LHC had proffered a \$1.75 million purchase price, but after the failed employment negotiations, GCH eventually sold to another purchaser for \$500,000. GCH filed several claims against LHC alleging breach of contract, but the trial court found that the preliminary purchase agreements required a final asset agreement, which was never executed. The Harrison County Circuit Court granted summary judgment in favor of LHC. GCH appealed.

### **ISSUES**

Whether there was sufficient evidence to support a jury question that (1) plaintiff and defendant formed an enforceable contract through words, actions and manifestation of intent, even though previously expressed intent was to be bound by a written agreement; (2) even in the absence of a written contract, defendant is estopped from denying the existence of a contract; (3) defendant made intentional and/or negligent misrepresentations or fraudulent inducement for which it may be liable for damages; (4) defendant breached the letter of intent and its duty of good faith; and (5) defendant tortiously interfered with contracts of plaintiff.

### **HOLDING**

(1) Because an agreement must be definite and certain to be enforceable and terms were uncertain in the draft purchase agreement and it was never executed, there was not an enforceable contract through words, actions or manifestation of intent. (2) Because the parties manifested clear intent that a final agreement was necessary and estoppel should only be used in exceptional circumstances, it did not apply here. (3) Because plaintiff did not present sufficient evidence to show defendant made a representation with present intent not to perform, there was no misrepresentation or fraudulent inducement. (4) Because plaintiff did not present sufficient evidence to show defendant acted in bad faith by exercising its right to refuse to close the transaction under the letter of intent, there was no breach of the letter of intent or the

duty of good faith. (5) Because plaintiff failed to present evidence of defendant's malicious intent, there was no tortious interference. Therefore, the Supreme Court affirmed the judgment of the Harrison County Circuit Court.

### **DISSENT**

Justice King would have found that there was sufficient evidence to support a jury question regarding whether the parties formed an enforceable contract through words, actions, and performance. Justice King pointed out that defendant even took over operation of plaintiff's operation before the acquisition fell through. He would have found that plaintiff presented sufficient evidence of genuine issues and would have remanded the case for a trial.

#### **Affirmed - 2017-CA-01634-SCT (June 6, 2019)**

En Banc Opinion by Justice Coleman - Dissent by Presiding Justice King

Hon. Christopher L. Schmidt (Harrison County Circuit Court)

Michael B. Holleman & Patrick Williams for Appellants - Taylor B. McNeel, Stephen J. Carmody, & L. Kyle Williams for Appellees

Briefed by [Karen Lott](#)

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## ***SUPREME COURT - ORDERS***

### **THE MISS. BAR V. OSWALD**

#### **COURT ORDER**

#### **ORDER**

This order by the Mississippi Supreme Court revoked June A. Oswald's license to practice law in Mississippi. The instant order constituted notice of permanent disbarment. The Court barred Oswald from seeking reinstatement to the privilege of practicing law in Mississippi in the future. The order of disbarment was entered on May 30, 2019.

#### **Granted - 2018-BD-01637-SCT (May 30, 2019)**

En Banc Order by Presiding Justice Kitchens

Briefed by [Whitney Jackson](#)

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## **MISSISSIPPI COURT OF APPEALS DECISIONS – JUNE 4, 2019**

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

### **ADAMS V. MBA FOUND.**

#### **CIVIL - PERSONAL INJURY**

**CIVIL PROCEDURE - SERVICE OF PROCESS - TIME EXTENSION** - After the expiration of the 120 days during which plaintiff must service process on defendant, an extension of time to service continues to toll the statute of limitations only if granted for good cause



**CIVIL PROCEDURE - TIME EXTENSION - GOOD CAUSE** - To establish good cause, the plaintiff must demonstrate at least as much as would be required to show excusable neglect, or in the alternative, that a diligent effort was made to effect timely service

### **FACTS**

Joshua Adams worked as a referee during a May 2014 basketball tournament at MBA Foundation's ("MBA") facility. Adams and Justin Griffin, a basketball coach, argued and fought in the parking lot of the facility. Griffin's injuries led to his death; Adams also suffered injuries. Adams filed a complaint against MBA for negligent hiring, retention, and supervision or control of Griffin. Adams filed his complaint May 1, 2017, three days before the end of the three-year statute of limitations. He filed two pre-trial motions: to transfer the case from county to circuit court and to extend the time to service notice on MBA. Adams filed the time-extension notice after the 120-day period to serve notice had passed. Several attempts had been made to serve process on MBA's registered agent, Jeffrey Lewis, at his home address listed with the Secretary of State. The county court granted Adams's motion to extend time. After the case was transferred to circuit court, MBA moved to set aside the county court's order extending Adams's time to service process and for summary judgment passed on the statute of limitations. The circuit court granted the motions, and Adams appealed.

### **ISSUES**

Whether (1) the circuit court abused its discretion by setting aside the county court's 120-day extension of time and (2) the circuit court erred in granting MBA's motion for summary judgment.

### **HOLDING**

(1) Because Adams had established good cause in his motion to extend time, the circuit court erred in granting MBA's motion to set aside the time extension for Adams. (2) Because a good-cause time extension tolls the statute of limitations, the circuit court erred in granting the motion for summary judgment on the basis of the statute of limitations. Therefore, the Court of Appeals reversed and remanded the judgment of the Hinds County Circuit Court.

### **DISSENT**

Presiding Judge Carlton argued that Adams's motion for a time extension lacked good cause. Adams's evidentiary support for his motion was the affidavit of his process server, which to Presiding Judge Carlton lacked specific information, like dates and times of day, such that the circuit court did not abuse its discretion in setting aside the time-extension. Concomitantly, the motion for summary judgment was properly granted.

#### **Reversed & Remanded - 2018-CA-00497-COA (June 4, 2019)**

En Banc Opinion by Judge McDonald - Dissent by Presiding Judge Carlton

Hon. Jeff Weil Sr. (Hinds County Circuit Court, First Judicial Dist.)

Dennis C. Sweet III & Dennis Charles Sweet IV for Appellant - Crane D. Kip & Rex Morris Shannon III for Appellee

Briefed by [Michael Lambert](#)

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## **BENITEZ V. WALLACE**

### **CIVIL - TORTS - OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE**

**MISSISSIPPI TORT CLAIMS ACT - APPELLATE REVIEW - QUESTIONS OF LAW** - The court reviews question of law, including the application of the Mississippi Tort Claims Act, de novo

**MISSISSIPPI TORT CLAIMS ACT - FILING - STATUTE OF LIMITATIONS** - All actions brought under Miss. Code Ann. § 11-46-11(3)(a) must be commenced within one year after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based

### **FACTS**

In 2011, Ruben Orlando Benitez was arrested and charged with murder. On June 29, 2017, Benitez sued Joel Wallace under the Mississippi Tort Claims Act (“MTCA”), alleging that Wallace committed several torts against him during the investigation into the murder. Wallace was served with process on November 1, 2017, but did not file an answer and affirmative defense until December 8, 2017. On December 4, 2017, Benitez filed a motion for default judgment. Wallace filed a motion to dismiss. The trial court granted Wallace’s motion to dismiss, finding the alleged tortious conduct occurred in 2011, and the one-year statute of limitations barred Benitez’s claim. Benitez appealed.

### **ISSUE**

Whether the trial court erred in granting Wallace’s motion to dismiss.

### **HOLDING**

Because Benitez filed suit six years after the alleged torts occurred and Miss. Code Ann. § 11-46-11(3)(a) requires actions to be commenced within a year after the date of the tort’s occurrence, Benitez’s claim was barred by the statute of limitations. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

#### **Affirmed - 2018-CP-00577-COA (June 4, 2019)**

Opinion by Judge McCarty

Hon. Steve S. Ratcliff III (Rankin County Circuit Court)

*Pro se* for Appellant - Daniel Burnham Smith (Att’y Gen. Office) for Appellee

Briefed by [Katelin Davis](#)

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## **BROWN V. BLUE CANE COWART TIPPO WATER ASSOC. INC.**

### **CIVIL - OTHER**

**CIVIL - MOTION TO AMEND OR ALTER JUDGMENT - TIMELINESS** - The lack of an objection to an untimely Miss. R. Civ. P. 59 motion procedurally bars an appellee from raising the issue of timeliness on appeal

**CIVIL - DEFAULT JUDGMENTS - MOTION TO SET ASIDE** - Miss. R. Civ. P. 60(b) is for extraordinary circumstances, for matters collateral to the merits; the motion should be denied where it is merely an attempt to relitigate the issues

**CIVIL - APPEAL - CHANCELLOR’S DECREE** - A chancellor’s decree will not be set aside on appeal unless it is inequitable to let it stand

### **FACTS**

Willie and Carolyn Brown owned a house connected to two water lines, one connected to a private well and one connected to the system owned by Blue Cane Cowart Tippo Water Association (“Blue Cane”). The Browns had a backflow prevention device to prevent contamination between the systems. The Browns tested their private well system and found contamination, so the Browns notified Blue Cane. Blue Cane disconnected the Browns from the Blue Cane water system and informed the Browns that Blue Cane needed to enter the property to test their water. The Browns denied Blue Cane access to the property, so Blue Cane tested their water line right outside the Browns’ property. The test results came back uncontaminated. The Blue Cane Board of Directors subsequently voted to terminate the Browns’ membership to the association. The Browns filed a complaint in the Tallahatchie County Chancery Court for wrongful termination of their water services and moved for a temporary restraining order and permanent injunction. Following a hearing, the Tallahatchie County Chancery Court ordered Blue Cane to test the Browns’ backflow preventer. The Browns filed a motion for contempt, claiming that Blue Cane had not tested the water. Blue Cane presented uncontaminated test results from further down the system, and the parties were told to undergo mediation. The Tallahatchie County Chancery Court ordered the Browns to pay Blue Cane their expenses, minus the Browns’ expenses. The Tallahatchie County Chancery Court denied the Browns’ Miss. R. Civ. P. 59 motion for a new trial. The Browns appealed.



## ISSUES

Whether (1) appellate jurisdiction existed; (2) the chancery court abused its discretion in denying the Browns' motion for new trial; (3) the Browns' waived their argument of constitutional due process violations; and (4) the chancery court abused its discretion in its assessment of costs.

## HOLDING

(1) Because Blue Cane responded to the Browns' motion for a new trial but did not challenge its untimely filing, the Court of Appeals had jurisdiction to proceed to a ruling on the merits. (2) Because the Browns offered no new evidence and did not present any evidence that extraordinary circumstances existed, they were merely rearguing the case, and the trial court did not abuse its discretion by denying the motion for a new trial. (3) Because the Browns did not allege a denial of due process in the ruling court, the Browns' constitutional due process argument was waived on appeal. (4) Because Blue Cane acted reasonably in insisting to inspect the unit and the trial court equitably allowed both sides their expenses, the trial court did not abuse its discretion in its assessment of costs. Therefore, the Court of Appeals affirmed the judgment of the Tallahatchie County Chancery Court.

**Affirmed - 2018-CA-00242-COA (June 4, 2019)**

Opinion by Judge McDonald

Hon. Catherine Farris-Carter (Tallahatchie County Chancery Court, Second Judicial Dist.)

Azki Shah for Appellants - Melvin David Miller II for Appellees

Briefed by [Davis Pigg](#)

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## **CHISM V. CHISM**

### **CIVIL - DOMESTIC RELATIONS**

**CIVIL PROCEDURE - RIGHT TO COUNSEL - DENIAL OF CONTINUANCE** - There is no right to counsel in a civil proceeding and the reviewing court will not reverse the denial of a continuance absent a finding of prejudice

**DIVORCE - ASSET VALUATIONS - BUSINESS VALUATION** - The chancellor must determine the fair market value of the business, using one of the three approaches: an asset-based approach, a market-based approach, or an income-based approach

**CIVIL PROCEDURE - CONTEMPT OF COURT – ELEMENTS** - Failure to comply with a court order is prima facie evidence of contempt and to rebut a prima facie case of contempt, a defendant must show an 'inability to pay, that the default was not willful, that the provision violated was ambiguous, or that performance was impossible

## FACTS

Mark and Landaria Chism separated in June 2015 after five years of marriage. Mark filed for divorce and division of marital property in August 2015. Throughout the proceedings, Mark was continuously held in contempt of court and scolded by the court for failure to comply with court orders to pay temporary alimony and spousal support and Mark's insistence that he was earning approximately \$5,000 per month, despite his apparent lavish lifestyle. Mark had three separate attorneys withdraw from representing him due to his demeanor and actions and had to represent himself pro se at the hearing now on appeal. Further complicating matters, Mark and Landaria had previously owned a chicken wing business together and, at the hearing, the only evidence presented of the business's economic valuation was Landaria's opinion testimony that it was worth approximately \$1,000,000. In accepting this opinion-based evaluation, the court factored that value into its award of \$96,000 to Landaria in a lump-sum alimony. Ultimately, the court also awarded Landaria over \$27,000 in attorney's fees pursuant to an analysis of the *McKee* factors. Mark Chism appealed.

## ISSUES

Whether the trial court erred in (1) denying Mark Chism's motion for a continuance due to lack of counsel; (2) accepting Landaria Chism's evaluation of the couple's business; (3) awarding \$96,000 to Landaria in a lump-sum alimony due, in

part, to the evaluation of the business; (4) finding Mark Chism in contempt of court; and (5) awarding Landaria \$27,582.58 in attorney's fees.

### **HOLDING**

(1) Because there is no right to counsel in a civil proceeding and the denial of a continuance will not be overturned absent a finding of prejudice, and because Mark caused three separate attorneys to withdraw due to his own acts of contempt and his disagreeable nature, the chancery court did not err in denying Mark's motion for a continuance. (2) Because a chancellor must determine the "fair market value" of the business using one of three approaches: an asset-based approach, a market-based approach, or an income-based approach, and because the chancellor here only considered Landaria's own opinion testimony as to the business's evaluation, the chancery court erred in its evaluation of the business. (3) Because alimony and equitable division are considered together, and because the chancellor erred in its evaluation of the business, the chancery court erred in its overall award of alimony. (4) Because failure to comply with a court order is prima facie evidence of contempt, and because Mark was found to be improperly violating and ignoring a court order without sufficient reasoning, the chancery court did not err in holding him in contempt and jailing him temporarily. (5) Because a court should use the *McKee* factors in determining an award of attorney's fees in domestic cases, and because the court determined that the award was reasonable and necessary under those factors, the chancery court did not err in awarding attorney's fees to Landaria. Therefore, the Mississippi Court of Appeals affirmed in part, and reversed and remanded in part, the decision of the Desoto County Chancery Court.

### **Affirmed in Part; Reversed & Remanded in Part - 2018-CA-00955-COA (June 4, 2019)**

Opinion by Chief Judge Barnes

Hon. Percy L. Lynchard Jr. (Desoto County Chancery Court)

Jerry Wesley Hisaw for Appellant - A.E. (Rusty) Harlow Jr. & Kathi Crestman Wilson for Appellee

Briefed by [Corban Snider](#)

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## **GILL V. PROF'L AUTO COLLISION**

### **CIVIL - CONTRACT**

**TORTS - NEGLIGENCE - EXPERT TESTIMONY** - Under Miss. Code Ann. §15-1-36(2), expert testimony is needed for claims arising out of the course of medical, surgical, or other professional service

**TORTS - NEGLIGENCE - EXPERT TESTIMONY** - There is limited necessity of expert testimony in certain negligence cases where a layman can observe and understand the negligence as a matter of common sense and practical experience

### **FACTS**

Russell Gill purchased an antique truck and brought it to Professional Auto Collision to be restored. Gill paid them \$6,415.72 to restore the truck over the following months. Gill was not satisfied with the restoration, claiming that the paint job was bad and was allowing rust to come through the paint. After unsuccessful negotiations between the parties, Gill filed a complaint claiming breach of contract, negligence, and bad faith, among other allegations. Professional Auto Collision filed a motion for summary judgment or, in the alternative, a motion in limine that expert testimony was required to show that Professional Auto Collision's performance of professional services or occupational skills breached the custom and standard of the industry or otherwise breached the standard of care. The court granted the summary judgement and declared the motion in limine moot. Gill appealed.

### **ISSUE**

Whether the trial court erred in granting summary judgment because expert testimony was necessary.

### **HOLDING**

Because the painting of an antique car is not to the level of the "professional service" required by Miss. Code Ann. §15-1-36(2) and *Chitty*, expert testimony was not needed for the negligence claim. Additionally, a genuine issue of material

fact remained, and summary judgement was improper. Therefore, the Court of Appeals reversed and remanded the judgment of the Jackson County Circuit Court.

**Reversed & Remanded - 2017-CA-01490-COA (June 4, 2019)**

Opinion by Judge Greenlee

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

Stephen W. Mullins for Appellant - Mark Edward Norton for Appellees

Briefed by [Zachary Flowers](#)

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## FLOWERS V. STATE

### CIVIL - POST-CONVICTION RELIEF

**CRIMINAL PROCEDURE - GUILTY PLEA - WITHHOLDING ACCEPTANCE** - Providing that upon entry of a guilty plea by a criminal defendant, a circuit court “shall be empowered . . . to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court” pursuant to subsection (2) of the statute. Miss. Code Ann. § 99-15-26(1)

**CRIMINAL - CONVICTION - GRAND LARCENY** - Every person who shall be convicted of taking and carrying away, feloniously, the personal property of another, of the value of five Hundred Dollars (\$500.00) or more, shall be guilty of grand larceny, and shall be imprisoned in the Penitentiary for a term not exceeding ten (10) years; or shall be fined not more than Ten Thousand Dollars (\$10,000), or both; the total value of property taken and carried away by the person from the single victim shall be aggregated in determining the gravity of the offense

**CRIMINAL PROCEDURE - SENTENCING** - A trial court shall sentence an offender under a sentencing statute in place at the time of the crime

### FACTS

Justin Flowers was charged with committing larceny on December 20, 2012 in violation of Miss. Code Ann. § 97-17-41 and pled guilty. Withholding the acceptance of the guilty plea, adjudication of guilt, and imposition of a sentence pursuant to Miss. Code Ann. §99-15-26(1), the circuit court sentenced Flowers to two years of non-adjudicated probation pending successful completion of the probation conditions. In August 2015, the court revoked Flowers probation and sentenced him to ten years in the custody of the Mississippi Department of Corrections (“MDOC”), with ten years suspended for successful completion of the Therapeutic Drug and Alcohol Program. Upon completion of the drug program, the court resentenced Flowers to ten years in the custody of MDOC, with ten years suspended and three years of post-release supervision. In October 2017, the court revoked Flowers’ post-release supervision and sentenced him to his original term of ten years in the custody of MDOC. Flowers filed a motion for reconsideration, contending that at the time of his adjudication of guilt, the sentence for grand larceny was five years. The motion was denied. Flowers appealed.

### ISSUE

Whether the circuit court erred in sentencing Flowers to ten years under the prior version of Miss. Code Ann. § 97-17-41(1).

### HOLDING

Because the prior version of Miss. Code Ann. § 97-17-41(1) was in effect at the time of the crime, the court did not err in imposing the ten-year sentence. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

**Affirmed - 2018-CA-00607-COA (June 4, 2019)**

Opinion by Chief Judge Barnes

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

Jim L. Davis III for Appellant - Alicia Marie Ainsworth (Att’y Gen. Office) for Appellee

Briefed by [Catherine Pettis](#)

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

### **CLARK V. STATE**

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

**POST-CONVICTION RELIEF - DEFECTIVE INDICTMENT** - Whether an indictment is defective is an issue of law, and therefore deserves a relatively broad standard of review, or de novo review

**CRIMINAL PROCEDURE - SENTENCING - HABITUAL OFFENDER** - Although both Miss. Code Ann. § 99-19-81 and § 99-19-83 provide for habitual offender sentencing, an essential element of § 99-19-83 is that the defendant must have served at least one year under each sentence

#### **FACTS**

In 1998, Patrick Clark was indicted for burglary, grand larceny, and capital murder. The following year, Clark pled guilty to capital murder and was sentenced to life in prison without parole as a habitual offender because of previous convictions of sexual battery and robbery pursuant to Miss. Code Ann. § 99-19-81. Clark filed a motion for PCR, arguing that the capital murder indictment was defective because it did not include the element of intent for the underlying burglary felony. The State conceded, and the court set aside Clark's plea and dismissed the indictment without prejudice. In 2012, Clark was indicted a second time by a different grand jury and convicted of capital murder and sentenced as a habitual offender pursuant to Miss. Code Ann. § 99-19-83. Clark appealed and the Court of Appeals affirmed. Clark then filed an "Application for Leave to Proceed in Panola County Circuit Court with his Petition for Post-Conviction Collateral Relief to Vacate Judgment and Sentence in the Supreme Court," arguing that he did not waive his right to be indicted by a grand jury and that the indictment failed to include the essential elements of the capital murder with the underlying burglary felony. The Supreme Court granted Clark's leave to proceed in part and denied in part, finding that Clark should only be granted leave to proceed in the trial court to determine whether his indictment included the essential elements of capital murder, with the underlying felony of burglary. The circuit court concluded that Clark's conviction was not based on the indictment, but on the newer, valid indictment. Clark appealed.

#### **ISSUES**

Whether (1) Clark received proper notice of the specific accusation against him in cause number CR98-69BP1 and (2) Clark waived his right to be indicted by a grand jury.

#### **HOLDING**

(1) Because the defects in cause number CR98-69BP1 were corrected in the newer indictment, and because Clark's conviction was based on the updated indictment that included the essential elements of capital murder with the underlying felony of burglary, the issue was without merit. (2) Because the Supreme Court denied Clark's application for leave to proceed in the trial court on his waiver of indictment by the grand jury issue, the court did not address whether Clark was actually indicted by the grand jury. Therefore, the Court of Appeals affirmed the judgment of the Panola County Circuit Court.

**Affirmed - 2018-CP-01232-COA (Jun. 4, 2019)**

Opinion by Judge McDonald

Hon. James McClure III (Panola County Circuit Court)

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

Briefed by [Ryan Overturf](#)

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## COURT OF APPEALS - CRIMINAL CASES

### ELLIS V. STATE

#### CRIMINAL - FELONY

**JURY - BIAS & PREJUDICE - INEFFECTIVE ASSISTANCE OF COUNSEL** - Under *Brown v. State*, actual bias is presumed when a juror makes a statement that he or she thinks they can be fair but immediately qualifies it with a statement of partiality and proper juror rehabilitation and juror assurances of impartiality are absent

**REVIEW - CREDIBILITY OF WITNESSES - PROVINCE OF JURY** - Under *McCarty v. State*, unless testimony necessary to support the jury's verdict is so implausible or so substantially impeached as to be unworthy of belief, the jury's decisions in such matters are beyond the authority of a reviewing court to disturb

**REVIEW - EVIDENCE - STATEMENTS, CONFESSIONS, & ADMISSIONS** - Under *Scott v. State*, a trial court's denial of a motion to suppress can only be reversed if the incorrect legal principle was applied; if there was no substantial evidence to support a voluntary, knowing, and intelligent waiver of *Miranda* rights; and if the denial was a result of manifest error

#### FACTS

Robert Ellis was indicted on three counts of sexual battery of his daughter Kelly. Before the trial, Ellis's wife had become suspicious of the relationship between Ellis and Kelly. Subsequently, Ellis and Kelly were told that they needed to leave, and the sexual abuse was reported to law enforcement. Ellis and Kelly went to the home of Brad and Melanie Lott. That night, Detective David Garrison contacted Brad and instructed him to have Ellis and Kelly report to the sheriff's department. At the sheriff's department, Ellis was read his rights, and he signed two *Miranda* waivers and gave a statement that he had sex with Kelly twice. At trial, Kelly testified that Ellis had sex with her in his car in a secluded area in the woods twice and in the family home once. Garrison testified that Kelly took investigators to the location in the woods – although Kelly denied this – and they found condoms with DNA matching Ellis. Ellis was found guilty on all counts and later filed a motion for judgment notwithstanding the verdict or a new trial, which was denied. Ellis appealed.

#### ISSUES

Whether (1) Ellis's trial counsel provided ineffective assistance for not objecting to a juror who disclosed mid-trial that he had taught Kelly in school; (2) Ellis was denied an initial appearance; (3) Ellis's due process rights were violated because he was not allowed to make a phone call after his arrest; (4) Ellis's attorney waived arraignment and entered a plea without his consent; (5) Ellis was denied a preliminary hearing; (6) the trial court erred by allowing Garrison to testify about two packages of cigarettes and Ellis's cell phone; (7) Detective Garrison and the sheriff's department tampered with evidence; (8) Ellis's indictment was insufficient because the specific dates alleged therein were incorrect; (9) the trial court erred by allowing Phyllis Crump to testify as an expert witness because she was never offered or qualified as an expert; (10) the evidence was insufficient; (11) various witnesses who testified against Ellis were not credible; (12) the trial court erred by not holding a competency hearing; (13) the trial court erred by denying Ellis's motion to suppress his statements to law enforcement; and (14) Ellis received ineffective assistance of counsel at trial.

#### HOLDING

(1) Because the juror stated that he had no close or personal relationship with Kelly and could be fair, and because Ellis's counsel stated that he had no objection to the juror remaining on the jury, his trial counsel's decision to not object was a matter of trial strategy, not ineffective assistance. (2) Because Ellis failed to raise as an issue at trial that he was denied an initial appearance, the issue was procedurally barred. (3) Because Ellis failed to raise due process violations as an issue at trial, the issue was procedurally barred. (4) Because Ellis waived arraignment, entered a guilty plea, and failed to raise this issue at trial, the issue was without merit. (5) Because Ellis was indicted, he was not entitled to a preliminary hearing. (6) Because Ellis failed to raise this testimonial issue at trial and failed to cite authority for his argument, the issue was procedurally barred. (7) Because Ellis failed to cite evidence to support his claim of evidence tampering and

failed to raise it as an issue at trial, the issue was procedurally barred. (8) Because the indictment’s “on or about” allegations were specific enough to put Ellis on notice of the charges against him and the approximate dates of the crime, Ellis’s claim of an insufficient indictment was without merit. (9) Because Ellis did not object to any of Crump’s testimony, the issue was procedurally barred. (10) Because a reasonable juror could have rationally said that the State proved the elements, the evidence was more than sufficient to sustain Ellis’s convictions. (11) Because the witnesses’ credibility was for the jury to evaluate and determine, the issue was without merit. (12) Because Ellis underwent a mental evaluation prior to trial which found him to be competent, Ellis and the State stipulated to the report, and the trial judge found that Ellis was competent after reviewing the report, Ellis did have a pretrial competency hearing. (13) Because Ellis voluntarily waived his rights and voluntarily gave oral and written statements to law enforcement, his motion to suppress his statements was properly denied. (14) Because the record did not affirmatively show ineffectiveness of constitutional dimensions, the court declined to address this issue. Therefore, the Court of Appeals affirmed the judgment of the Union County Circuit Court.

**Affirmed - 2017-KA-00682-COA (June 4, 2019)**

En Banc Opinion by Presiding Judge Wilson

Hon. John Andrew Gregory (Union County Circuit Court)

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Laura Hogan Tedder (Att’y Gen. Office) for Appellee

Briefed by [Lauren Rogers](#)

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## FORD V. STATE

### CRIMINAL - FELONY

**CONSTITUTIONAL LAW - SPEEDY TRIAL - PRESUMPTION** - A delay of more than 270 days raises a presumption that a defendant’s right to a speedy trial has been violated

**APPELLATE PROCEDURE - MULTIPLE CHARGES - SEPARATION** - Courts are prohibited from considering other sentences when testing if a conviction was against the great weight of the evidence

### FACTS

Darosky Ford was indicted for kidnapping Mardess Toney and on four counts of possession of a firearm by a convicted felon. Ford and Toney had dated on and off for about seven and a half years, when after a night of dinner, sex and smoking meth, Ford accused Toney of cheating on him. According to Toney, Ford started to beat her and then hogtied her with her shoelaces. Ford would eventually untie Toney and they drove to Ford’s father’s home where Ford searched for guns. When he found the guns, he drove to a wooded area but buried the guns because he was informed the police were looking for him. Ford would turn himself in the same day. At his trial, although indicted on five counts, Ford was convicted of two of the firearm charges. Ford appealed.

### ISSUES

Whether (1) Ford’s constitutional right to a speedy trial was violated and (2) the verdict is against the great weight of the evidence.

### HOLDING

(1) Because Ford only raised his right to a speedy trial twenty-four hours before the trial and failed to show any actual prejudice, despite the presumption in his favor, Ford’s constitutional right to a speedy trial was not violated. (2) Because the state put on evidence of Ford retrieving a handgun, burying guns and being previously convicted of a felony, Ford’s convictions are not against the overwhelming weight of the evidence. Therefore, the Court of Appeals affirmed the judgment of the Scott County Circuit Court.

### CONCURRENCE IN PART/DISSENT IN PART



Judge McCarty argued that the delay caused by the State created a presumption of a violation of Ford's right to a speedy trial. Therefore, because the State never overcame that presumption as it is their burden to do, Ford's convictions should have been overturned for that reason alone. Therefore, he agreed on the other issue but dissented because of the constitutional violation warranting a reversal.

**Affirmed - 2018-KA-00395-COA (Jun. 4, 2019)**

En Banc Opinion by Judge Greenlee - Concurrence in Part/Dissent in Part by Judge McCarty

Hon. Richard W. McKenzie (Scott County Circuit Court)

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [James Adamoli](#)

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## HASAIN V. STATE

### CRIMINAL - FELONY

**FAMILY LAW - CHILD SUPPORT - REFUSAL TO PAY** - Under Miss. Code Ann. § 97-5-3, a parent who refuses to provide child support payments is subject to criminal liability

#### FACTS

A judgment was entered against Abdalrahim Hasain in 2002 for child support payments for the daughter of Trina Johnson after a paternity test showed that Hasain was the father. Hasain was ordered to pay \$125 per month plus \$25 per month to cover a \$1,500 arrearage. Hasain made two \$20 payments in 2016 but made no other child support payments. After an investigation, Hasain was arrested and convicted for deserting, neglecting, or refusing to support a child under Miss. Code Ann. § 97-5-3. After trial, Hasain filed a motion for a new trial, which the Harrison County Circuit Court denied. Hasain appealed.

#### ISSUE

Whether the trial court erred in denying Hasain's motion for a new trial.

#### HOLDING

Because the evidence showed that Hasain failed to remit child support payments in violation of Mississippi law, the trial court did not err in denying Hasain's motion for a new trial. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

**Affirmed - 2018-KA-00150-COA (June 4, 2019)**

Opinion by Judge Westbrook

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

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Yance Falkner](#)

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## MOOTYE V. STATE

### CRIMINAL - FELONY

**CRIMINAL PROCEDURE - JURY SELECTION - BATSON CHALLENGE**- Peremptory strikes may not be used for the purpose of striking jurors based solely on their race or gender

**CRIMINAL PROCEDURE - JURY INSTRUCTION - ALIBI DEFENSE** - A defendant is entitled to a jury instruction supporting his alibi defense theory where the defendant asserts the defense of alibi and presents testimony in support of that defense

**CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - POST-CONVICTION RELIEF** - Where the record cannot support an ineffective assistance of counsel claim the court preserves the defendant's right to argue the same issue through a petition for post-conviction relief

### **FACTS**

Gregory Mootye was convicted of three counts of deliberate-design murder for the death of Angelica Twillie and her unborn child and Angelica's mother, Alesia Twillie. Mootye was rumored to be the father of the child. When police arrived at the house, a suspect fled, and two witnesses identified Mootye as being at the Twillies' house that night in addition to the officer at the scene believing it was Mootye. After the murder, Mootye told the detectives he was at his apartment on Sunday night watching a basketball game, and his roommate Deveium Tripp confirmed his alibi to Detective McLemore. Detective McLemore stated on the record that he had confirmed Mootye's alibi with Tripp's statement. Later, Tripp recanted and claimed that Mootye was at the Twillies' house that night and Mootye had admitted to Tripp that he committed the murders. Mootye appealed.

### **ISSUES**

Whether (1) the trial court committed reversible error by refusing Mootye's proposed alibi instruction; (2) the trial court failed to conduct a proper *Batson* analysis before overruling Mootye's *Batson* objection; (3) Mootye's counsel at trial was ineffective by failing to assert the trial court committed reversible error by not instructing the jury on the venue element alleged in the indictment; and (4) Mootye's counsel at trial was ineffective for failing to object to the State's expert witnesses who were damaging to Mootye's defense.

### **HOLDING**

(1) Because Detective McLemore's testimony was not sufficient to support the alibi defense since it came from Mootye's claim that he was not at the house that night, there was no abuse of discretion. (2) Because the State offered race-neutral reasons for striking the jurors, denial of Mootye's *Batson* challenge was not clearly erroneous. (3) Because the jury was instructed that in order to find Mootye guilty they had to find he killed the victims in Forrest County, Mississippi, his argument lacked merit. (4) Because the State made no stipulation as to the record for Mootye's ineffective assistance of counsel claim for failing to object to the State's expert witness, the court reserved his right to argue the issue in post-conviction relief. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

### **DISSENTS**

Chief Judge Barnes argued Detective McLemore's testimony was enough to support giving the defense's proposed alibi instruction and the court's refusal to provide the instruction constitutes reversible error. Further, Judge Westbrook also argued that Detective McLemore's testimony was enough to support giving the defense's proposed alibi instruction and the court's refusal to provide the instruction constitutes reversible error. She argued Detective McLemore's verification of Mootye's alibi through Tripp was enough to corroborate Mootye's alibi and force the alibi instruction to the jury.

#### **Affirmed - 2016-KA-01016-COA (Jun. 4, 2019)**

En Banc Opinion by Presiding Judge Carlton - Dissents by Chief Judge Barnes & Judge Westbrook

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

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

Briefed by [Andie Szabo](#)

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