

MISSISSIPPI SUPREME COURT DECISIONS – MAY 14, 2020***SUPREME COURT - CIVIL CASES*****MISS. DIV. OF MEDICAID V. WINDSOR PLACE NURSING CTR., INC.****CIVIL - STATE BOARDS & AGENCIES**

ADMINISTRATIVE LAW - DECISIONS - REVERSAL STANDARD - An administrative decision may be reversed if the decision (1) was not supported by substantial evidence; (2) is arbitrary or capricious; (3) was beyond DOM's power to adopt; or (4) violates a constitutional or statutory provision

ADMINISTRATIVE LAW - MEDICAID - FEE FIXATION - The Mississippi Division of Medicaid shall fix those fees, charges, and rates for drugs at the minimum levels absolutely necessary to provide the medical assistance authorized by this article, and shall not change any of those fees, charges, or rates except as may be authorized by Miss. Code Ann. § 43-13-117

FACTS

In 2008, the Mississippi Division of Medicaid ("DOM") contracted with Clifton Gunderson, LLP ("Gunderson") to perform audit reviews of Long-Term Care's ("LTC") annual cost reports submitted by LTC providers. Gunderson informed the DOM that certain providers were claiming legend drug costs on their cost reports for per diem reimbursement. The DOM adjusted the cost reports filed by Windsor for 2005, 2007, and 2008 and the cost reports filed by Senior Care in 2007. These adjustments disallowed the prescription-drug costs that Windsor and Senior Care ("the providers") had claimed they incurred in providing resident care. After the adjustments, the DOM sought to regain the amounts from the providers, arguing that the amounts were overcharged due to their interpretation of the cost reporting requirements. The providers filed an administrative appeal of these adjustments. The providers argued that the cost report instructions and the plain language of the Medicaid State Plan require that all prescription drug costs not paid for by Medicaid are an allowable cost. Further, they argued that the costs the providers incurred were material in caring for residents and that their interpretation was correct and consistent with the DOM's practice. On the contrary, Medicaid hearing officers found that the DOM had correctly disallowed the prescription drug costs and that the only prescription drugs that could be claimed as an allowable cost on a provider's cost report were drugs "not covered" by Medicaid. The providers appealed to the Hinds County Chancery Court, claiming that it was not until Gunderson's audit that the DOM made the decision to change its policy for allowing prescription-drug costs. In turn, the chancery court found that the DOM arbitrarily changed its policy without properly amending the State Plan and cost-report instructions. DOM appealed.

ISSUE

Whether the chancery court erred in reversing the DOM's decision to disallow the drug costs that the providers claimed.

HOLDING

Because the providers wrongly interpreted the State Plan and the Medicaid Providers Policy Manual to mean that all prescription drug costs "not covered" by the Medicaid drug program meant drug costs "not paid for" by Medicaid, and because this meaning was not found in the plain language of controlling statutes, the State Plan, or Medicaid's policy, the chancery court erred in reversing the DOM's decision to disallow the legend drug costs, and the DOM's decision was supported by substantial evidence, was not arbitrary or capricious, and was within the DOM's authority. Therefore, the Supreme Court reversed the judgment of the Hinds County Chancery Court.

CONCURRENCE

Justice Coleman argued that, while the majority reached the correct decision regarding the plain language of the Medicaid State Plan and the Provider Policy Manual, the practice of extending judicial deference to an executive agency's interpretation of its own rules and regulations should end. Specifically, he argued that when it comes to pure questions of law, the Court should review agency interpretations of rules and regulations de novo.

DISSENT

Justice Griffis argued that based on the testimony of DOM's own employees, there was no evidence that DOM had ever taken the position that legend drugs were not an allowable cost. Also, he dissented with the majority's reading of the State's plan and the DOM's instructions. From this, he argued that under the Medicaid policy, drugs covered by the Medicaid drug program must be billed directly to Medicaid and are non-allowable costs on a provider's cost report. Thus, he determined that the chancellor properly held that there was a lack of evidence to support the decision that legend drug costs had never been accepted by the DOM as an allowable cost.

Reversed - 2018-SA-01263-SCT (May 14, 2020)

Opinion by Justice Beam - Concurrence by Justice Coleman - Dissent by Justice Griffis

Hon. Patricia D. Wise (Hinds County Chancery Court)

Janet McMurtray, Samuel Philip Goff, T. Hunt Cole Jr., & Dion Jeffrey Shanley (Att'y Gen. Office) for Appellants - Randall Elliott Day III, Julie Bowman Mitchell, Ellen Patton Robb, & Philip Joseph Chapman for Appellees

Briefed by [Brittany Brewer](#)

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WILL REALTY, LLC. V. ISAACS

CIVIL - OTHER

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - FOREIGN JUDGMENT - Under Mississippi law, an action to enforce a foreign judgment shall be brought within seven years after the rendition of the judgment

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - RENEWED JUDGMENT - To the extent that a judgment is separate from a prior judgment under the laws of a foreign jurisdiction such that a new, separate ruling is issued, our statute of limitations would be calculated from the date of entry of that renewed judgment

FACTS

Mainsource Bank, Inc., obtained a judgment against Mark and Sally Isaacs, which included a large monetary sum and interest in Kentucky. The judgment was assigned to Will Realty, LLC. ("Will Realty"). Will Realty enrolled the judgment in the judgment rolls of Hancock County, Mississippi. Will Realty then filed writs of garnishment directed to multiple banks and Sally Isaacs's employer. The Isaacs then sought relief under Miss. R. Civ. P. 60(b), claiming the judgment was void. Will Realty argued that the judgments had been removed and that the statute of limitations had reset. After receiving the argument, the circuit court granted the Isaacs' requested relief. Will Realty appealed.

ISSUES

Whether (1) renewal of a judgment in a foreign jurisdiction resets the running of Mississippi's statutes of limitation period and (2) Will Realty's judgment was renewed under Kentucky law.

HOLDING

(1) Because the judgment was not separate from the prior judgment under the foreign laws, Mississippi's seven-year statute of limitations was not reset. (2) Because the judgment in Kentucky was not renewed, and because Will Realty enrolled the judgment three years after the statute of limitations in Mississippi had expired, the judgment was unenforceable. Therefore, the Supreme Court affirmed the judgment of the Hancock County Circuit Court.

Affirmed - 2019-CA-01440-SCT (May 14, 2020)

Opinion by Chief Justice Randolph

Hon. Lawrence Paul Bourgeois Jr. (Hancock County Circuit Court)

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SUPREME COURT - ORDERS

IN RE COMM'N ON CONTINUING LEGAL EDUC. & IN RE ADMIN. ORDERS OF THE SUPREME COURT OF MISS.

EMERGENCY ADMINISTRATIVE ORDER

ORDER

The Mississippi Commission on Continuing Legal Education (“the Commission”) petitioned the Supreme Court to temporarily remove the limit on CLE credit earned through online programs due to concerns related to the Coronavirus. Specifically, the Commission asked the Supreme Court to temporarily amend Rule 3 of the Rules and Regulations for Mandatory Continuing Legal Education to waive the in-person requirement for attorneys' continuing legal education obligation for the 2019-2020 reporting year so that attorneys will be allowed to earn CLE credits in the method of their choosing, either online, webinars or live, in-person programs. The Commission further asked the Supreme Court for an extension to September 30, 2020 for any attorney not able to meet the CLE credit hours requirement during the compliance period. In an emergency order related to the Coronavirus (COVID-19), the Supreme Court and the Chief Justice, in his capacity as chief administrative officer of all courts in the State, found that the Commission's motion should be granted. Moreover, the Supreme Court and Chief Justice found additional actions were warranted, including: (1) temporarily amending the Rule 3b requirements for newly licensed attorneys to allow new attorneys to complete the new lawyer program through the method of their choosing, either online, webinars or live, in-person programs, as approved by the Commission and (2) extending the completion deadline for the new lawyer program until September 30, 2020. The Court also found that any attorney who is unable to complete the temporarily amended requirements set forth in this Order may seek a hardship exemption and/or extension from the Commission.

Ordered - 2020-AD-00001-SCT & 89-R-99011-SCT (May 5, 2020)

Emergency Administrative Order by Chief Justice Randolph

Briefed by [Allison Middleton](#) & [Frank Wood](#)

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

IN RE JUDICIAL MANDATORY CONTINUING LEGAL EDUC. & IN RE ADMIN. ORDERS OF THE SUPREME COURT OF MISS.

EMERGENCY ADMINISTRATIVE ORDER

ORDER

This en banc Order by the Mississippi Supreme Court temporarily suspended Regulation 3.9 of the Rules and Regulations for Mandatory Continuing Judicial Education as required to hinder the spread of Coronavirus (“Covid-19”). This temporary suspension allows judges to complete 2019-2020 Continuing Judicial Education (“CJE”) requirements through a method of their choosing, either online webinars or live, in person programs, as approved by the Committee on Continuing Judicial Education. This order also temporarily amended Rule 5 to allow judges to report their compliance with the Rules and Regulations for Mandatory Continuing Judicial Education on or before September 30, 2020. Additionally, the Order allowed judges unable to complete the temporarily amended requirements to seek a hardship exemption and/or extension of CJE requirements from the Committee on Continuing Judicial Education.

Ordered - 2020-AD-00001-SCT & 89-R-99019 (May 5, 2020)

Emergency Administrative Order by Chief Justice Randolph
Briefed by [Joshua Crownover](#) & [Charles Matranga](#)

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IN RE JUSTICE COURT RULES

EN BANC ORDER

ORDER

Three petitions were filed with the Mississippi Supreme Court. The first, was the Proposed Uniform Rules of Justice Court, filed by the Justice Court Rules Committee. The second petition was the Petition to Repeal the Mississippi Uniform Rules of Procedure for Justice Court and to Adopt the Proposed Mississippi Uniform Rules of Justice Court as Endorsed by the Mississippi Justice Court Judges Association, filed by the Mississippi Justice Court Judges Association. Lastly, the third petition was the Petition to Amend the Mississippi Uniform Rules of Procedure for Justice Court to Improve the Uniformity, Efficiency, and Clarity of Justice Court Procedures, filed by the Board of the Mississippi Justice Court Judges Association. The third petition withdrew all prior petitions to repeal or amend the Mississippi Uniform Rules of Procedure for Justice Court.

The Mississippi Supreme Court found that the Mississippi Uniform Rules of Procedure for Justice Court should be amended as set forth in the attached [Exhibit A](#) of the third petition. The Supreme Court granted in part the third petition with the Mississippi Uniform Rules of Procedure for Justice Court amended as set forth in Exhibit A and ordered the dismissal of the first and second petitions.

Granted In Part, Dismissed In Part - 89-R-99024-SCT (May 5, 2020)

En Banc Order by Chief Justice Randolph
Briefed by [Philip Lott](#)

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IN RE LOCAL RULES

EN BANC ORDER

ORDER

The Chancellors of the Fourth Chancery District of Mississippi filed a Motion to Amend by Deletion the Local Rules of the Fourth Chancery District of Mississippi. The Chancellors asked the Supreme Court to strike the Local Rules, and the Court found that the motion should be granted. Therefore, the Local Rules of the Fourth Chancery District of Mississippi are repealed effective upon entry of this Order.

Ordered - 89-R-99015-SCT (May 5, 2020)

En Banc Order by Chief Justice Randolph
Briefed by [Winston Hudson](#)

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IN RE MISS. R. APP. P.

EN BANC ORDER

ORDER

Miss. R. App. P. 1 has been amended to extend to appeals from county court to circuit court. Further, the comments section of Miss. R. App. P. 1 has been amended to state that appeals from county court to circuit court are governed under the Mississippi Rules of Appellate Procedure pursuant to *Van Meter v. Alford*. The amendments to Miss. R. App. P. 1 and its Comment are effective upon entry of this Order.

Ordered - 89-R-99027-SCT (May 5, 2020)

En Banc Order by Chief Justice Randolph

Briefed by [Liza Linginfelter](#)

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IN RE R. CIV. P.

EN BANC ORDER

ORDER

This en banc Order by the Mississippi Supreme Court, filed by the Advisory Committee on Rules, amends Miss. R. Civ. P. 1 to emphasize that the parties and the court share responsibility to employ the rules in order to secure the just, speedy, and inexpensive resolution of each action. This amendment to the Rule takes effect on July 1, 2020.

[Exhibit A](#), referenced in and attached to the Order, amends Rule 1 to emphasize that the parties share responsibility with the court to employ the rules so as to secure the just, speedy, and inexpensive resolution of every action.

Ordered - 89-R-99001-SCT (May 5, 2020)

En Banc Order by Chief Justice Randolph

Briefed by [David Boydston](#)

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IN RE R. CIV. P.

EN BANC ORDER

ORDER

This en banc Order by the Mississippi Supreme Court, made in consideration of the motion filed by the Advisory Committee on Rules, amended Miss. R. Civ. P. 15 to reorganize and renumber subsection 15(c), as well as provide additional Advisory Committee Notes pertaining to: (1) when an amendment is improper; (2) adding additional parties and relating back to the original pleading; and (3) changing or substituting the names of parties. This amendment to the Rules becomes effective July 1, 2020.

[Exhibit A](#), referenced in and attached to the Order, shows that Rule 15 is amended to conform with the recommendations of the Advisory Committee.

Ordered - 89-R-99001-SCT (May 14, 2020)

En Banc Order by Chief Justice Randolph

Briefed by [Melissa Fenwick](#)

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IN RE R. CIV. P.

EN BANC ORDER

ORDER

The Advisory Committee on Rules filed a motion to amend Miss. R. Civ. P. 43. After due consideration, the Supreme Court granted the motion. Rule 43 was amended to re-designate former Rule 43(d) [Affirmation in Lieu of Oath] as Rule 43(b); to re-designate former Rule 43(e) [Evidence on Motions] as Rule 43(c); and to re-designate former Rule 43(f) [Interpreters] as Rule 43(d). This amendment to the Rules became effective upon entry of the Order on May 5, 2020.

Ordered - 89-R-99001-SCT (May 5, 2020)

En Banc Order by Chief Justice Randolph
Briefed by [Nicole Broussard](#)

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IN RE R. CIV. P.

EN BANC ORDER

ORDER

The Mississippi Supreme Court granted the Motion to Amend Miss. R. Civ. P. 63 filed by the Advisory Committee on Rules. Therefore, the Court ordered that the caption for Rule 63 be amended to refer to a judge's "inability to proceed" rather than a judge's "disability" and that the amendment shall be effective July 1, 2020.

[Exhibit A](#), referenced in and attached to the Order, shows that Rule 63 is amended to conform with the recommendations of the Advisory Committee.

Ordered - 89-R-99001-SCT (May 14, 2020)

En Banc Order by Chief Justice Randolph
Briefed by [Kaitlin Bethay](#)

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IN RE R. CIV. P.

CORRECTED EN BANC ORDER

ORDER

This en banc Order by the Mississippi Supreme Court, made in consideration through the Advisory Committee on Rules, amends Miss. R. Civ. P. 71A by striking out "[Reserved]" and replacing it with "[Omitted]". This amendment to the Rules will become effective on July 1, 2020.

[Exhibit A](#), referenced in and attached to the Order, shows that Rule 71A is is amended to conform with the recommendations of the Advisory Committee.

Ordered - 89-R-99001-SCT (May 6, 2020)
En Banc Order by Chief Justice Randolph
Briefed by [Jack Byrd](#)

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SUPREME COURT - CRIMINAL CASES

GARCIA V. STATE

CRIMINAL - DEATH PENALTY - DIRECT APPEAL

CRIMINAL PROCEDURE - COMPETENCY - ELEMENTS - The standard for competency to stand trial is whether the defendant has sufficient present ability to consult with their lawyer with a reasonable degree of rational understanding, and has a rational as well as a factual understanding of the proceedings against them

CRIMINAL PROCEDURE - IMPARTIAL JURY - IRREBUTTABLE PRESUMPTION - In determining whether the presumption that a defendant cannot obtain a fair jury trial in a particular venue due to media coverage is irrebuttable, the court considers the following elements: (1) capital cases based on considerations of a heightened standard of review; (2) crowds threatening violence toward the accused; and (3) an inordinate amount of media coverage, particularly in cases of (a) serious crimes against influential families; (b) serious crimes against public officials; (c) serial crimes; (d) crimes committed by a black defendant upon a white victim; (e) where there is an inexperienced trial counsel

CIVIL PROCEDURE - MOTIONS - CHANGE OF VENUE- A motion for a change of venue is not automatically granted in a capital case; there must be a satisfactory showing that a defendant cannot receive a fair and impartial trial in the county where the offense is charged

CIVIL PROCEDURE - MOTIONS - RECUSAL - In determining whether a judge should recuse themselves, the reviewing court must consider the trial as a whole and examine every ruling to determine if those rulings were prejudicial to the complaining party

EVIDENCE - ADMISSIBILITY - DISCRETION - Relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused

CONSTITUTIONAL LAW - DEATH PENALTY - PROPORTIONALITY - Neither the United States Supreme Court nor the Fifth Circuit has held that mental illness removes a defendant from the class of persons who are constitutionally eligible for a death sentence

APPELLATE REVIEW - CUMMULATIVE ERROR - REVERSAL - The cumulative-error doctrine permits a reviewing court, which finds harmless errors or any error that is not specifically found to be reversible in and of itself, to reverse when the cumulative effect of all errors committed during the trial deprived the defendant of a fundamentally fair and impartial trial

FACTS

In July 2014, police found the half-naked body of five-year-old JT in the bathroom of an abandoned trailer about fifty yards from JT's apartment. She had been hanged with a pair of socks tied around her neck and fastened to the shower window, and there were signs of sexual penetration of her vagina and anus. Based on a tip, investigators developed a person of interest—one of JT's neighbors in the apartment complex, Julian Casper Gray. As police searched Gray's apartment, Alberto Garcia, Gray's friend and neighbor, volunteered information relevant to the investigation. On the ride to the police station, Garcia told the officers he had stolen some items from the trailer a few days earlier, and that he had masturbated there, so his fingerprints and possibly DNA and semen would be in the trailer. At the station, Garcia was read and waived his *Miranda* rights and repeated this information to the interviewing detective. He also claimed he might have blacked out around the time of JT's disappearance, but that he woke up with feces, which Garcia stated was not his, on his penis and inner thighs. Based on this information, police obtained a search warrant for Garcia's apartment, and found an Xbox 360 game console, which was connected to the internet. A digital forensic examiner recovered the internet searches made on the console in the days leading up to JT's rape and murder and discovered evidence of child pornography. A grand jury indicted Garcia for capital murder in the commission of felony sexual

battery. Garcia later moved to suppress the Xbox search and his statements to the police. He claimed his apartment was illegally searched because he was not read his *Miranda* rights before being recorded in the police car. The detective claimed that Garcia volunteered, without being asked, that his fingerprints would be found in the trailer because he had been there just days before. Additionally, the trial court ruled that the search warrant for Garcia's apartment had been supported by probable cause based on statement Garcia gave to investigators at the police station after he voluntarily waived his *Miranda* rights. Garcia also moved to change venue, arguing that an impartial jury could not be impaneled because the disappearance and death of JT was "sensational, front-page news throughout the Gulf Coast region." The trial court brought in thirty prospective jurors and questioned them about their knowledge of the pretrial publicity surrounding JT's murder and Garcia's arrest. From their responses, the trial court concluded that, given proper and thorough voir dire, a fair and impartial jury could be seated and thus, denied Garcia's motion to change venue. A few months later, the trial court heard testimony from a forensic psychologist, Dr. Storer, on a possible competency issue. After evaluating Garcia, Dr. Storer testified that, in his expert opinion, Garcia was not competent to stand trial due to a constant theme of anxiety. Dr. Storer was also concerned about Garcia's ability to make rational decisions given that Garcia stated he would prefer death over a life sentence due to the solitary confinement of death row. However, he determined that Garcia's intellectual functioning was fine and that his anxiety disorder was not a severe and persistent mental illness of the type that would alter someone's perception of reality. While Dr. Storer expressed concern that Garcia's decision-making ability was impacted by his anxiety disorder, he could not say this to a reasonable degree of psychological certainty. The trial judge did not find the desire for death over life without parole irrational and held that Garcia was not incompetent in terms of intellectual functioning or his ability to understand and appreciate what was going on. However, the trial judge did recognize that Garcia's anxiety could potentially interfere with trial, and thus suggested following Dr. Storer's recommendation that Garcia be treated for his anxiety for thirty days before the judge would reassess the situation. A month later, the trial court took up Garcia's motion in limine to exclude the explicit searches found on the Xbox 360, based on lack of authentication and unfair prejudice, but the trial judge found no proof that anyone else actually accessed the Xbox during the relevant time period and thus, denied Garcia's motion in limine. The trial court then held a pretrial omnibus hearing, in which Garcia's counsel agreed that there was no claim of incompetency to stand trial. The week before the scheduled trial, the trial court held a hearing to follow up on Dr. Storer's earlier testimony concerning the anxiety issue. Dr. Storer testified that the medial treatment Garcia had received for his anxiety had been effective and there was no longer significant interference with Garcia's competency-related abilities. Dr. Storer found Garcia competent either to stand trial or to enter a guilty plea and waive his constitutional rights. The trial judge held that Garcia was fully competent and fully able to go forward in his matter. The day before his scheduled trial, Garcia filed a motion for sentencing by the judge without a jury present. The trial judge advised Garcia of the rights he would be giving up and made sure that Garcia understood the difference between having a jury of twelve of his peers versus one judge sentence him. Garcia confessed that he killed JT in the course of raping her, pled guilty to capital murder, and waived his right to a jury for sentencing. The trial court accepted Garcia's guilty plea and granted his motion to waive jury sentencing. The trial judge sentenced Garcia to death, finding two statutory aggravating circumstances beyond a reasonable doubt: (1) the killing of JT occurred while Garcia was engaged in the commission of a sexual battery and (2) the capital murder of JT was especially heinous, atrocious, and cruel. While the judge did find a few mitigating factors, such as Garcia's lack of significant criminal history, young age at the time of the crime, and troubled childhood, these mitigating circumstances were insufficient to outweigh the aggravating circumstances. Garcia only appealed his sentence.

ISSUES

Whether (1) the trial court unconstitutionally heard and decided material pretrial motions at a time when Garcia was incompetent to participate in the proceedings; (2) the trial judge erred by finding Garcia competent to waive a jury for sentencing; (3) the trial court abused its discretion by denying Garcia's motion to change venue; (4) the court relied on unconstitutionally admitted evidence when deciding Garcia's sentence; (5) the trial judge should have recused sua sponte after Garcia waived his right to a jury trial at sentencing based on either the judge's pre-sentencing exposure to information not ordinarily presented to the jury or her personal views on the death penalty and Garcia's mitigation theory (6) Garcia's imposed death sentence violated the United States Constitution; (7) Garcia's death sentence was constitutionally and statutorily disproportionate; (8) the trial judge committed multiple harmless errors that cumulatively require reversal; and (9) under the statutory proportionality review pursuant to Miss. Code Ann. § 99-19-105, the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; the evidence

supported the trial judge's finding of aggravating circumstances; and the sentence of death was excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

HOLDING

(1) Because Garcia's own mental health expert, Dr. Stover, testified that Garcia was competent, and could not say that Garcia's anxiety impaired his rational decision-making ability to a reasonable degree of psychological certainty, because defense counsel never objected to the omnibus hearing based on Garcia's incompetency and actually agreed with the trial judge that there was no claim of incompetency and Garcia's anxiety was not actually a competency issue, and because the trial judge emphasized that she never found Garcia to be incompetent, the record showed that the trial court found Garcia to be competent during the entire trial and court proceedings and this finding was not manifestly against the overwhelming weight of the evidence. (2) Because Garcia never claimed that he was incompetent on the day that he waived his right to a jury trial or that a lack of proper treatment contributed to his decision to waive jury sentencing, because Garcia's isolated procedural question regarding jury selection did not tip the scale against the trial judge's competency ruling, and because the trial judge's finding that Garcia was competent was supported by Garcia's ability to communicate with counsel, participate in proceedings, and by Garcia's own expert, the trial judge's competency finding was well supported and there was no reversible error on either of Garcia's competency claims. (3) Because the State rebutted the presumption of unfairness through the agreed-upon mock voir dire, thus demonstrating that an impartial jury could be drawn from Harrison County, the trial court did not abuse its discretion by denying Garcia's motion to change venue. (4) Because the State made a prima facie showing that the internet searches were searches made on Garcia's Xbox and thus properly authenticated and found relevant under Miss. R. Evid. 403, the probative value of the searches outweighed any prejudice to Garcia as the searches were for child pornography that mimicked the acts Garcia admitted carrying out just days before the incident. Further, because the video evidence of Garcia's statements during his car ride with police was done on a voluntary basis and while he was not in custody, the trial court did not err by denying his motion to suppress the video of the car ride and its fruits. Finally, because an expert pathologist called to give an independent opinion as to cause of death does not violate the surrogate-testimony prohibition, the trial court did not rely on unconstitutionally admitted evidence when deciding Garcia's sentence. (5) Because Garcia's claim was procedurally barred and he did not move for the trial judge's recusal, and because there was no evidence that the trial judge still should have disqualified herself sua sponte based on personal bias or an inability to be impartial, the trial judge did not err by failing to recuse herself. (6) Because Garcia provided no legal support that the trial court erred by denying Garcia's pretrial motion that the death penalty was unconstitutional on its face, there was no reversible error. (7) Because an anxiety disorder does not exempt individuals from the death penalty, and because Garcia did not prove that he was intellectually disabled, Garcia's death sentence was not constitutionally disproportionate. (8) Because Garcia failed to demonstrate any errors, the cumulative-error doctrine did not apply. (9) Because Garcia's sentence was not influenced by passion, prejudice, or any other arbitrary factor, because the evidence clearly supported the trial court's finding of both aggravating circumstances, and because the Court of Appeals has consistently held that the death penalty is not disproportionate when dealing with the capital murder of a young victim during the course of sexual battery, Garcia's death penalty sentence was not statutorily disproportionate. Therefore, the Supreme Court affirmed the judgment of the Harrison County Circuit Court.

CONCURRENCE

Presiding Justice King concurred in part and in result, disagreeing with the use of a mock jury in this case, or any criminal case, to determine whether a change of venue is warranted. However, he acknowledged that Garcia waived this issue and, as a result, any error was not reversible.

Affirmed - 2017-DP-00504-SCT (May 14, 2020)

En Banc Opinion by Justice Maxwell - Concurrence by Presiding Justice King

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

Alison R. Steiner & Angela Broun Blackwell (Pub. Def. Office) for Appellant - Cameron Leigh Benton & Joel Smith (Att'y Gen. Office) for Appellee

Briefed by [Jennifer Lee](#), [Cristofor Taylor](#), & [Matthew Russ](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – MAY 12, 2020

COURT OF APPEALS - CIVIL CASES

ALLSTATE INS. CO. V. MILLSAPS

CIVIL - CONTRACT

CIVIL PROCEDURE - MOTIONS - CHANGE OF VENUE - Improper venue must be either pleaded as an affirmative defense or raised in a timely filed motion

CIVIL PROCEDURE - VENUE - IMPROPER VENUE - If venue is improper, the court must honor timely objection and transfer to the correct venue, and, if it does not do so, must reverse the decision of the improper venue

CIVIL PROCEDURE - VENUE - RIGHT TO PROPER VENUE - In a civil case, the general venue statute applies, under which a party has the right to have its case tried in the proper venue

CIVIL PROCEDURE – IMPROPER VENUE- MOTION - If a party fails to raise improper venue or waives it, any court with jurisdiction can hear the case

FACTS

In 2012, Willie and Gloria Millsaps failed to pay their 2012 taxes, and their home was sold at a tax sale in August 2013 to Adair Asset Management Company (“Adair Asset”). Willie Millsaps purchased homeowner’s insurance from Allstate Vehicle in July 2015, and at the time of the underwriting inspection in August 2015, the Millsapses had not yet redeemed the property. The Millsapses had until August 26, 2015 to redeem the property. In September 2015, Gloria Millsaps contacted Kamesha Mumford, an attorney/agent for Adair Asset and discussed the amounts needed for the Millsapses to obtain Adair’s interest. In October 2015, the Millsapses sent Mumford a cashier’s check for \$16,912.50. On January 21, 2016, Adair quitclaimed its interest in the property back to the Millsapses. The Millsapses failed to report the tax sale, missed redemption date, and its aftermath to Allstate Vehicle. On the night of September 3, 2015, a grease fire erupted in the Millsapses home, which destroyed their home and a Lexus, which were both insured by Allstate. Allstate’s Investigator said that of the four debris samples tested, one tested positive for “an ignitable liquid residue in the range of medium petroleum distillates.” The report determined that the remaining physical evidence did not indicate the form of ignition and that the cause of the fire is classified as undetermined. The Millsapses submitted lengthy lists of personal property they claimed was lost in the fire, giving the value and approximate age of each item. They totaled the personal property lost at \$406,214.82. Allstate retained a forensic accountant, who reported that, the Millsapses could not have purchased items worth \$185,476 within the two years prior to the fire because their only reported income was from \$20,000 to \$30,000 and, by their testimony, they did not have loans or credit cards. Allstate had also paid for the Millsapses rehoming while the investigation was underway. The Millsapses rented a home for \$2,200 a month from their son. Later, Allstate found out that the home being rented was a part of a Section 8 housing program, and rent was an average of only \$450 to \$550. According to the denial letter, Allstate Vehicle said it had concluded the following: (1) that the Millsapses had made misrepresentations regarding their financial condition and regarding “material aspects” of their claim; (2) that there were discrepancies in the information provided by the Millsapses concerning their claim; (3) that the Millsapses intentionally overstated the value of the property damaged by the fire and overstated their claim for additional living expenses; and (4) that the Millsapses did not have an insurable interest in the house because the property was sold at a tax sale and not timely redeemed. Allstate Insurance removed the case to federal court in the Southern District of Mississippi, alleging fraudulent joinder of Mississippi defendants to defeat diversity jurisdiction. Although they denied venue, Allstate did not plead improper venue as an affirmative defense. The federal court remanded the case to the Jasper County Circuit Court and Allstate filed a motion for change of venue, arguing that the burned home was in Jones County and that there was no basis for venue in Jasper County. The trial court denied Allstate’s motion, claiming that Allstate had failed to plead the issue as an affirmative defense and that they had waived the defense by participating in litigation. Allstate filed a motion to bifurcate the trial to hear testimony of the breach of contract claims first (“phase one”) and then, if warranted, to hear the negligence, bad faith, ex-contractu and punitive damages evidence thereafter (“phase two”). The trial court granted this motion and the jury returned a unanimous verdict for the Millsapses against only Allstate Insurance Company and awarded them a total of \$970,000 for their dwelling, contents, additional

living expenses, and debris removal. During the second phase of the trial, the jury was instructed and returned a verdict in favor of the Millsapses, awarding them emotional damages of \$115,000 for each, and \$100,000 for punitive damages. Allstate appealed.

ISSUES

Whether (1) venue was proper in Jasper County; (2) Allstate waived its challenge to venue by not raising it as an affirmative defense; (3) Allstate waived its challenge to venue by participating in litigation; and (4) other issues raised by the parties were reviewable on appeal following a determination of improper venue.

HOLDING

(1) Because no substantial act or event occurred in Jasper County, venue was improper. (2) Because Allstate denied proper venue in its answer and filed a motion for change of venue, Allstate did not waive its challenge to venue by inadequately pleading. (3) Because Jasper County was an impermissible venue and Allstate timely filed a motion for change of venue, Allstate did not waive its challenge to venue by participating in litigation. (4) Because venue was improper and required remanding of the case, the other issues raised by the parties were not reviewable by the Court of Appeals. Therefore, the Court of Appeals reversed and remanded the judgment of the Jasper County Circuit Court.

CONCURRENCE IN PART/DISSENT IN PART

Judge Barnes agreed that venue was improper, but argued that the Court of Appeals should address the other dispositive issues on appeal. She further argued that the issue of whether venue was improper does not preclude the Court from addressing the breach of contract claim, which she argued fails on the merits. She also stated that the majority's decision did not address the merits of the contract and that misrepresentation issues fail to promote judicial economy and result in needless litigation, as it allowed the Millsapses to relitigate all of the claims against both Allstate and Allstate Vehicle and Property Insurance Company.

DISSENT

Judge Lawrence argued that venue was proper in Jones County because Allstate's refusal to pay the Millsaps' living expenses in Jones County represented a substantial act or event of the tort. Further, Allstate did waive its venue challenge by failing to raise it as an affirmative defense in its answer, pursuant to Miss. R. Civ. P. 12(b)(3). Additionally, by not raising the issue for two months during discovery, Allstate waived its venue challenge. In closing, Judge Lawrence argued that the trial court erred by disallowing voir dire questions related to punitive damages because parties should be able to screen jurors for personal bias against punitive damages—an emotional and publicly debated issue.

Reversed & Remanded - 2017-CA-01380-COA (May. 12, 2020)

En Banc Opinion by Judge McDonald - Concurrence In Part/Dissent In Part by Chief Judge Barnes - Dissent by Judge Lawrence Hon. Eddie H. Bowen (Jasper County Circuit Court, Second Judicial Dist.)

J. Collins Wohnr Jr., David Garner, Michael B. Wallace, & Robert R. Stephenson Jr. for Appellant - Samuel Steven McHard & Paul Manion Anderson for Appellees

Briefed by [Eli Scott](#) & [Daniel Bond](#)

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CARROLL V. CITY OF CANTON

CIVIL - STATE BOARDS & AGENCIES

ADMINISTRATIVE LAW - APPELLATE REVIEW - AGENCY CONCLUSIONS - An agency's conclusions must remain undisturbed unless the agency's order (1) is not supported by substantial evidence; (2) is arbitrary or capricious; (3) is beyond the scope or power granted to the agency; or (4) violates one's constitutional rights

APPELLATE PROCEDURE - STANDING - MOOTNESS - A case becomes moot when an actual controversy that existed at trial has expired at the time of review

CIVIL PROCEDURE - JURISDICTION - BILL OF EXCEPTIONS - An insufficient record does not rob the circuit court of jurisdiction

FACTS

Elizabeth Carroll and Thomas Butchart co-owned a 5.5-acre parcel of property in Canton, MS. In May 2002, the City of Canton (“the City”) approved the parcel for use as an RV Park. Since 2002, the RV Park operated under its “Special Exception/Conditional Use” permit. In 2015, Carroll and Butchart applied for a renewal of the permit, which the City of Canton’s Board of Aldermen denied. Instead, the City gave them sixty days to cease operations. Carroll and Butchart then initiated an appeal of the City’s decision by filing a “Bill of Exceptions,” but they withdrew the appeal and the Board agreed to a one-year moratorium to give residents more time to move out and close the RV Park. They were to wind down operations in one year, but instead decided to apply for another extension at the end of the term. The matter came before the City’s Planning Commission, which recommended that their renewal request be granted and that their permit be extended for two years. However, the Planning Commission had no authority to grant or deny the request, only to refer its recommendation to the City’s Mayor and Board of Alderman. The Board again denied the permit, giving them a ninety-day extension to cease operations. Carroll and Butchart appealed to the Madison County Circuit Court, presenting the mayor and the City with their “Bill of Exceptions.” The mayor then gave Butchart his own Addendum. In 2019, the circuit court issued its order finding that the Board’s denial of Carroll and Butchart’s application to renew or grant to them a special exception and/or conditional use permit was supported by substantial evidence and was not arbitrary or capricious. Carroll and Butchart timely appealed, claiming that the Board’s actions were arbitrary and capricious and not supported by evidence. The circuit court affirmed the Board’s decision. Carroll and Butchart appealed.

ISSUES

Whether (1) the Court of Appeals lacked jurisdiction because the record submitted to the circuit court went beyond the minutes and materials presented to the Board when it made its decision; (2) the case was moot because, had the Board accepted the extension, the permit would have already expired; and (3) the City’s decision was arbitrary or capricious or not supported by substantial evidence.

HOLDING

(1) Because the trial court twice heard motions to amend the Bill of Exceptions and later found that the Bill of Exceptions was proper, the City’s concern that the Bill of Exceptions may affect other issues of this appeal did not affect the jurisdiction of the Court of Appeals. (2) Because the circuit court stayed the execution of the City’s order and therefore “froze” the applicable time period until resolution on appeal, this case was not moot. (3) Because Carroll and Butchart gave no explanation for their failure to cease operations, and because they did not comply with a Board order that was not appealed and was final, the Board’s decision was founded on substantial evidence and was not arbitrary or capricious. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2019-CC-01146-COA (May 12, 2020)

Opinion by Judge McDonald

Hon. Dewey Key Arthur (Madison County Circuit Court)

James H. Herring for Appellants - Kimberly Celeste Banks for Appellee

Briefed by [Cristofor Taylor](#)

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

CARROLL V. SINGING RIVER LLC.

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - PREMISES LIABILITY - DANGEROUS CONDITION - Because a property owner cannot be found liable for a plaintiff’s injury where no dangerous condition exists, proof that a dangerous condition actually caused the invitee’s injury is an essential element of a premises-liability claim

CIVIL PROCEDURE - PREMISES LIABILITY - COMMON ARCHITECTURAL CONDITIONS - Common architectural features for a building are not considered unreasonably dangerous conditions

CIVIL PROCEDURE - LIABILITY - INVITEES - Mississippi law requires business owners to exercise reasonable care to keep the premises in a reasonably safe condition for invitees

FACTS

In August 2013, Anita and Roy Carroll traveled to Singing River shopping mall in Gautier, Mississippi. As Anita walked towards the entrance of the mall, she tripped over a seam in the concrete sidewalk and fell to the ground, injuring her left knee. Roy did not witness the incident. After receiving medical treatment for pain in her left knee, Anita and her husband returned to the scene of the incident the following day. Anita showed Roy the location where she fell. Roy later testified during a deposition that the concrete sections were improperly joined together, with one of the sections being approximately two-and-a-half to three inches lower than the other concrete section. Anita took pictures of the sidewalk. She also filed and signed an incident report at Singing River's customer service desk. Approximately three years later, the Carrolls sued Singing River for Anita's injuries, alleging that Singing River negligently failed to maintain its premises from a dangerous condition and had failed to properly warn customers of the dangerous condition. Roy also brought a claim for loss of consortium. Singing River moved for summary judgment, contending that the complained-of-defect was not unreasonably dangerous, and even if it was unreasonably dangerous, the defect was open and obvious. The circuit court granted Singing River's summary judgment motion. Anita and Roy Carroll appealed.

ISSUE

Whether the circuit court erred by granting Singing River's motion for summary judgment.

HOLDING

Because common architectural conditions for a building, such as unlevel sidewalks, are not considered unreasonably dangerous, and because the Carrolls failed to provide any additional evidence to support their contention that Singing River's exterior walkway constituted a dangerous condition, the Carrolls' premises liability claim failed as a matter of law. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Circuit Court.

Affirmed - 2019-CP-00531-COA (May 12, 2020)

Opinion by Judge Tindell

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

Robert Christopher Oetjens & Lewie G. "Skip" Negrotto IV for Appellant - Shelly Gunn Burns for Appellee

Briefed by [Charles Matranga](#)

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CURRY V. ASHLEY FURNITURE INDUS.

CIVIL - WORKERS' COMPENSATION

WORKERS' COMPENSATION - AUTHORITY - REOPENING A CASE - The Mississippi Workers' Compensation Commission has the authority to determine whether or not to reopen a case, and so long as it does not abuse its discretion, the Commission's decision will be affirmed if there is any reasonable basis upon which it may have been justified

WORKERS' COMPENSATION - DISCRETIONARY AUTHORITY - REOPENING A CASE - Miss. Code Ann. § 71-3-53 gives the Mississippi Workers' Compensation Commission discretionary authority to reconsider a claim and does not create a right for any interested party to reopen a claim

WORKERS' COMPENSATION - WITNESSES - EVIDENCE - The Mississippi Workers' Compensation Commission is the ultimate fact-finder and judge of the credibility of the witnesses and the appellate court may not reweigh the evidence before the Commission

FACTS

In February 2016, James Curry allegedly injured his back on his first day working at Ashley Furniture ("Ashley"). Curry reported the injury to the plant nurse, went to see a nurse practitioner, and returned to work the next day claiming that the pain had progressively worsened. The nurse practitioner ordered an MRI, which showed Curry had a slipped disc.

Curry relayed this information to Ashley’s “workers’ comp lady,” who responded that he “already had prior back problems” before this incident. Curry was referred to an orthopedic doctor, who prescribed physical therapy and pain injections. The doctor then recommended surgery on more than one occasion because Curry’s injections were not helping his back pain. In May 2016, Curry filed a petition to controvert, seeking workers’ compensation benefits for his back. Ashley responded, denying that he had sustained a compensable injury or was disabled because of any work-related injury. In January 2017, Curry accepted a settlement offer in the form of a lump sum payment of \$2,500. The administrative judge found that Curry knew and understood that the \$2,500 payment was a “full compromise settlement” of any claims arising out of his alleged injury at Ashley and that it was in his best interest. In October 2017, Curry filed a pro se motion, asking the Mississippi Workers’ Compensation Commission (“the Commission”) to reopen his case and award additional benefits because he had agreed to settle his claim believing his back pain was only the result of a “pulled muscle” or a natural progression of his prior injuries. Curry realized the difference between a “slipped disc” and a “pulled muscle” when a “Dr. Brown” explained it to him during Curry’s time spent incarcerated from July 2017 to April 2018. Additional medical records were introduced at the hearing on Curry’s motion to reopen, which showed injuries from a car wreck about six weeks after his alleged injury with Ashley. Following the hearing, the administrative judge ultimately found that there had been no mistake in a determination of fact or change in condition and denied Curry’s motion to reopen his case. Curry petitioned the full Commission for review, and the Commission affirmed the administrative judge’s ruling. Curry appealed.

ISSUES

Whether (1) the administrative judge’s findings were supported by substantial evidence and (2) the Commission abused its discretion by denying Curry’s motion to reopen the case.

HOLDING

(1) Because Curry’s medical records showed that the orthopedic doctor and other medical providers “repeatedly discussed” his diagnosis of a ruptured disc and his options regarding surgery prior to his decision to settle his claim, because Curry testified that he told Ashley’s “workers’ comp lady” that he had a slipped disc, and because Curry reported that his back pain began as a result of uncomfortable sleeping conditions during his incarceration, the administrative judge’s findings were supported by substantial evidence. (2) Because the administrative judge’s findings were based on substantial evidence, the Commission did not abuse its discretion by denying Curry’s motion to reopen his case. Therefore, the Court of Appeals affirmed the judgment of the Mississippi Workers’ Compensation Commission.

Affirmed - 2019-WC-01464-COA (May 12, 2020)

Opinion by Presiding Judge J. Wilson

Mississippi Workers’ Compensation Commission

Pro se for Appellant - J. Andrew Hughes for Appellees

Briefed by [Matthew Rhea](#)

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GRIFFIN V. CITIMORTGAGE, INC.

CIVIL - CONTRACTS

CIVIL PROCEDURE - AFFIRMATIVE DEFENSES - FAILURE TO STATE A CLAIM - Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss

CIVIL PROCEDURE - PLEADINGS - AMENDMENTS - Although Miss. R. Civ. P. 15(a) provides that when a complaint is dismissed for failure to state a claim upon which relief may be granted, leave to amend shall be granted when justice so requires, the chancellor is within his or her discretion to deny the request if the proposed amendment would still render the claim futile

CIVIL PROCEDURE - PLEADINGS - AMENDMENTS - A court may deny a motion for leave to amend a complaint if the proposed amended complaint would still fail to state a claim upon which relief may be granted

FACTS

In 2001, the Griffins obtained a mortgage loan from CitiMortgage and granted CitiMortgage a deed of trust on their home. The parties executed a loan modification in 2006, but the document contained a mistake. CitiMortgage requested the Griffins to sign a corrected version of the document, but the Griffins refused and stopped making payments on the loan. CitiMortgage initiated foreclosure proceedings and litigation ensued. This appeal was from the third action in a series of lawsuits between the Griffins and CitiMortgage arising out of the Griffins' original failure to make payments on the loan. The Griffins filed their third action after a substitute trustee published notice of a foreclosure sale on the Griffins' home pursuant to the deed of trust. Their complaint alleged, among other things, that CitiMortgage and the substitute trustee interfered with the Griffins' lawsuit in a separate matter that was scheduled for mediation and was canceled due to the foreclosure notice. The Desoto County Chancery Court dismissed the Griffins' complaint for failure to state a claim upon which relief could be granted, and also denied the Griffins' motion for reconsideration. The Griffins appealed.

ISSUES

Whether (1) the chancery court erred in dismissing the complaint for failure to state a claim and (2) the chancery court abused its discretion by denying the Griffins leave to amend their second complaint.

HOLDING

(1) Because the Griffins did not point to any laws or contract provisions that would require CitiMortgage to refrain from foreclosing simply because the Griffins had scheduled a mediation in another lawsuit, the chancery court properly dismissed the complaint for failure to state any claim upon which relief could be granted. (2) Because the Griffins' proposed amended complaint did not change the underlying factual allegations from the original complaint, and because those factual allegations failed to state any claim for relief against CitiMortgage, the chancery court did not abuse its discretion in denying the Griffins leave to amend. Therefore, the Court of Appeals affirmed the judgment of the Desoto County Chancery Court.

Affirmed - 2019-CP-00304-COA (May 12, 2020)

Opinion by Presiding Judge J. Wilson

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

Pro se for Appellants - Richard Carlton Keller, Jason Bryon Tingle, & Bradley Barron Vance for Appellees

Briefed by [Breland Parker](#)

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MONK V. FOUNTAIN

CIVIL - CUSTODY

FAMILY LAW - GUARDIAN AD LITEM - JUDICIAL DISCRETION - Under Miss. Code Ann. § 93-5-23, the chancellor has discretion to determine if issues of abuse or neglect have sufficient factual basis to support the appointment of a guardian ad litem

FAMILY LAW - GUARDIAN AD LITEM - JUDICIAL DISCRETION - The chancellor is not required to appoint a guardian ad litem based merely on an unsubstantiated assertion found in the pleadings of one of the parties

FAMILY LAW - VISITATION - IN LOCO PARENTIS - A person who acts in loco parentis is one who stands in place of a parent, having assumed the status and obligations of a parent

FACTS

Karen Monk filed a petition for a guardianship or custody of her niece, K.F., whose legal and natural parents are Lisa and David Fountain. Monk alleged that K.F. was abused and neglected while in the Fountains' custody. Monk requested sole legal and physical custody of K.F. or, in the alternative, visitation. The Fountains answered Monk's petition and denied her allegations. Monk later filed a motion to appoint a guardian ad litem, but never attempted to set her motion for a hearing. Prior to trial, Monk did not produce any evidence to support her allegations of abuse or neglect. At trial Monk alleged that: (1) the Fountains failed to provide K.F. with food; (2) David spanked K.F. with a belt or a switch;

(3) David used racial slurs in K.F.'s presence; and (4) David once poured liquid soap into K.F.'s mouth. Monk only made these allegations after the chancellor warned her that there had been no evidence of parental unfitness presented. The Jackson County Chancery Court entered an opinion and final judgment denying Monk's petition for guardianship or custody. The chancellor also denied Monk's request for visitation because under Mississippi law, an aunt has no right to visitation. Monk appealed.

ISSUES

Whether the chancellor erred in (1) not appointing a guardian ad litem despite Monk's allegations of abuse and neglect and (2) not awarding Monk visitation under the doctrine of in loco parentis.

HOLDING

(1) Because Monk failed provide any evidence to corroborate or substantiate her allegations, the chancellor was not required to appoint a guardian ad litem and did not abuse his discretion. (2) Because Monk only visited K.F. frequently and never stood in the Fountains' place as a parent, Monk had no right to visitation with K.F. as K.F.'s aunt. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Chancery Court.

Affirmed - 2017-CA-01679-COA (May 12, 2020)

Opinion by Presiding Judge J. Wilson

Hon. D. Neil Harris Sr. (Jackson County Chancery Court)

Dianne Herman Ellis for Appellant - Calvin D. Taylor for Appellees

Briefed by [Bryant Carlton](#)

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MUBARAK V. SULLIVAN

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - DISCOVERY - DISMISSAL - Dismissal is authorized only when the failure to comply with discovery obligations results from willfulness or bad faith

CIVIL PROCEDURE - DISCOVERY - WILLFULNESS & BAD FAITH - Willfulness is defined as either a willful, intentional, and bad faith attempt to conceal evidence or a gross indifference to discovery obligations

FACTS

Bethany Sullivan rear-ended Darlene Mubarak after Mubarak stopped at a stop light. Mubarak and her mother sued Sullivan, seeking to recover damages for the injuries they claimed to have sustained as a result of the collision. During a deposition, Mubarak testified that she never saw a physician for her neck and back pain prior to the accident. However, Mubarak's medical and pharmaceutical records showed that she had a history of neck and back pain and that she had seen a physician about the pain before the accident. In addition, Mubarak was previously prescribed narcotics and other medication to help alleviate her pain. During trial, Sullivan filed a motion to dismiss Mubarak's claims with prejudice, alleging that Mubarak willfully and in bad faith concealed relevant information about her prior medical history. The trial court found that Mubarak did not provide Sullivan with all of the relevant medical records during discovery, and the undisclosed information presented evidence that contradicted Mubarak's testimony about her medical condition. The Forrest County Circuit Court granted Sullivan's motion to dismiss. Mubarak appealed.

ISSUE

Whether the trial court abused its discretion by dismissing Mubarak's claims.

HOLDING

Because Mubarak made misrepresentations in her deposition, and because Mubarak did not claim that she misunderstood her discovery obligations or assert that she was unable to recall the medical treatment referenced by Sullivan's motion to dismiss, the trial court did not abuse its discretion in granting Sullivan's motion to dismiss. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2018-CA-01414-COA (May 12, 2020)

Opinion by Judge Tindell

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

Paul Manion Anderson & Samuel Steven McHard for Appellant - Herman M. Hollensend Jr. for Appellee

Briefed by [Matthew Russ](#)

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NORWOOD V. NORWOOD

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - PROPERTY DIVISION - EVIDENCE - When a party fails to provide accurate information or cooperate in the valuation of assets, the chancery court is entitled to proceed on the best information available; and when a chancery court makes a valuation judgment based on proof that is less than ideal, it will be upheld as long as there is some evidence to support its conclusion

FAMILY LAW - DIVORCE - ALIMONY - Alimony awards are within the chancery court's discretion and alimony should only be considered if the property division leaves one spouse in a deficit

FAMILY LAW - ALIMONY - DEFICIT - The chancery court does not abuse its discretion in refusing to award alimony when awarding alimony would have left the payor with a deficit

FACTS

Randy and Missy Norwood were married and resided in Jones County. During the marriage, Randy worked as a poultry farmer and Missy worked at a dental clinic. After several years of marriage, Missy filed for and was granted a divorce on the ground of Randy's uncondoned adultery. During the division-of-assets at trial, both parties submitted Uniform Chancery Court Rule 8.05 financial statements. Randy disclosed that his net income was \$493.00 per month, and Missy disclosed that her net income was \$1,909.67 per month. Randy testified that his 129 acres of land and poultry houses were worth \$600,000.00 and that the fair market price of their marital home was \$240,000.00. Missy's statement valued the land and poultry houses at \$1,148,000.00 and the marital home and land on which it sat at \$261,000.00. However, Missy testified that she did not know the value of the land, poultry houses, or the house and surrounding land. The chancery court found Randy's testimony was uncontradicted by any other testimony in the record and took his values as the actual values of the tract of land, poultry houses, and marital home and surrounding land. The chancery court also specified Randy would be responsible for the entirety of the \$746,335.95 debt balance reflected in his Rule 8.05 financial statement. The chancery court awarded Randy all of the personal property he listed in his Rule 8.05 statement, except for the couple's guns, which were divided evenly. Randy was ordered to pay for Missy's car and the remaining debts were allocated between the parties. Missy was awarded the full balance of her retirement account the chancery court granted a judgment in her favor for half of her equity in the real estate. The total equity in the property equalled \$93,644.05, so Missy was awarded \$46,822.02. The chancery court evenly divided the remaining marital assets. Missy filed a "Motion to Set Aside or Reconsider Judgment or in the Alternative for a New Trial," claiming the chancery court's valuation lacked evidence and its failure to address alimony. After a hearing on the matter, the chancery court denied her requests. Missy appealed.

ISSUES

Whether (1) the division of assets was equitable and (2) the chancery court erred by failing to award alimony.

HOLDING

(1) Because the chancery court relied on the evidence, including the Rule 8.05 financial statements and in-trial testimony, provided by Randy and Missy in its valuation and distribution, and because it was Randy and Missy's duty, and not the chancellor's, to prepare and submit evidence for the valuation judgment, the chancery court did not abuse its discretion and the parties' choice to present slim proof did not result in reversal on appeal. (2) Because the chancery court awarded a judgment for Missy in the amount of \$46,822.02, and because Randy would have been left with a deficit due to their

unequal monthly incomes if Missy was awarded alimony, the chancery court did not abuse its discretion in refusing to award alimony. Therefore, the Court of Appeals affirmed the judgment of the Jones County Chancery Court.

DISSENT

Judge C. Wilson dissented, citing insufficient evidence in the record to support the chancery court's valuation of the poultry-business, which was the majority of the couple's marital estate. He argued that Randy's lay testimony that he had been in the business for twenty-five years was not enough to provide the sole support for the chancery court's valuation of the couple's poultry business assets. Accordingly, he would reverse the Jones County Chancery Court's valuation and division of marital assets and remand for further proceedings.

Affirmed - 2018-CA-01529-COA (May 12, 2020)

En Banc Opinion by Judge McCarty - Dissent by Judge C. Wilson

Hon. Franklin C. McKenzie Jr. (Jones County Chancery Court)

Kimberly-Joy Lockley Miri & Robert R. Marshall for Appellant - Terry L. Caves & Risher Grantham Caves for Appellee

Briefed by [Charles Ellzey](#)

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PEEBLES EX REL. PITALO V. BURNS EX REL. BURNS

CIVIL - PROPERTY DAMAGE

CIVIL PROCEDURE - SUMMARY JUDGMENT - AFFIDAVIT - An affidavit generates a genuine issue of material fact if it is sworn, based upon personal knowledge, and shows that the party giving the evidence is competent to testify

CIVIL PROCEDURE - SUMMARY JUDGMENT - PLEADINGS - Where one party relies on its unsworn answers to interrogatories, and the other party relies on sworn facts, the trial court does not err in finding that there are no genuine issues of material fact precluding summary judgment

CIVIL PROCEDURE - SUMMARY JUDGMENT - GENUINUE ISSUE OF MATERIAL FACT - When doubt exists as to whether there is a genuine issue of material fact, the trial court should deny the summary judgment motion and permit a full trial on the merits

FACTS

Judith Pitalo Peebles and her father, Mark Pitalo, lived in Ocean Springs, Mississippi. They resided in the adjoining property to Kevin Burns. One day, Peebles noticed a large puddle in her front yard. Several days later, a plumber informed Peebles that there was a break in Burns' underground water line. Over the next month, Peebles began to notice structural and foundational damage to her home, such as cracks and stress fractures. Structural Solutions, LLC inspected her property and determined the damage was caused by pressure build-up from water flow. Structural Solutions worked thereafter to remove the water, which cost Peebles a considerable amount of money. Pitalo and Peebles filed suit against Burns, alleging two counts of negligence, one count of private nuisance, one count of trespass, and they requested a declaratory judgment. Pitalo and Peebles argued that Burns' water line broke and released thousands of gallons of water onto their property, causing extensive damage. Burns moved for summary judgment, arguing that because the driveway extension was built on the water line before Kevin gained possession of the property over thirty years ago, the statute of limitations barred Peebles's claim. Peebles relied on her affidavit, rather than her pleadings, in response to Burns' motion for summary judgment. The trial court granted Burns's motion. Peebles appealed.

ISSUE

Whether the trial court erred in granting Burns's motion for summary judgment.

HOLDING

Because there was a genuine issue of material fact as to whether Burns owned the property at the time the driveway extension was built, and because there was conflicting evidence about the excess water on Peebles' property, this case

was not ripe for summary judgment. Therefore, the Court of Appeals reversed and remanded the judgment of the Jackson County Circuit Court.

Reversed & Remanded - 2018-CA-01554-COA (May 12, 2020)

Opinion by Judge Greenlee

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

Russell S. Gill & Joseph Richard Tramuta for Appellant - William Brian Atchison for Appellee

Briefed by [John Forrest Kelly](#)

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SPAN V. NICHOLS

CIVIL - MEDICAL MALPRACTICE

MEDICAL MALPRACTICE - STATUTE OF LIMITATIONS - MINORS - Under Miss. Code Ann. § 15-1-36(3)-(4), (6)-(8), the statute of limitations for a minor's medical malpractice claim is tolled until the minor's sixth birthday or—if the minor does not have a parent or legal guardian—until the minor is at least six years old and has a parent or legal guardian

CIVIL PROCEDURE - GOVERNING STATUTE - PARTICULARITY - Under *Townsend v. Estate of Gilbert*, where a special and particular statute deals with a special and particular subject, its particular terms as to that special subject control over general statutes dealing with the subject generally

FACTS

On June 18, 2013, Antheijah Span, then fifteen years old, had her wisdom teeth removed by Dr. Brantley Nichols at the North Sunflower Medical Center in Ruleville. On July 31, 2015, Antheijah's mother, Brenda Span, filed suit on Antheijah's behalf against Nichols in the Sunflower County Circuit Court. Brenda alleged that Antheijah experienced complications and suffered pain and permanent injuries because Dr. Nichols breached the standard of care when he extracted Antheijah's wisdom teeth. Brenda also alleged that she served Dr. Nichols with pre-suit notice pursuant to Miss. Code Ann. § 15-1-36(15). Dr. Nichols was allegedly served at his Hattiesburg clinic on November 24, 2015. When Dr. Nichols did not answer the complaint, the clerk entered a default on the docket, and the circuit court entered an order finding Dr. Nichols liable. Dr. Nichols then filed a motion to set aside the entry of default and the order adjudicating liability. He alleged that he was never served with pre-suit notice or the summons and complaint. In support, Dr. Nichols attached his affidavit and the affidavit of Sandra Britt, the administrative assistant at the North Sunflower Medical Center. In their affidavits, they stated that Dr. Nichols worked in Sunflower County on the date which he was allegedly served with pre-suit notice. The circuit court held a hearing on Dr. Nichols's motion on October 25, 2016, and neither side presented witness or additional evidence. On December 12, 2016, the circuit court granted Dr. Nichols's motion to set aside the entry of default and the court's prior order adjudicating liability. In June 2017, Dr. Nichols was served with a new summons from the clerk, but Brenda never filed a motion for additional time to serve him. Dr. Nichols then filed a motion for summary judgment and submitted his and Britt's affidavits. He argued that the statute of limitations had expired before he was served in June 2017. Brenda argued that the filing of the complaint tolled the statute of limitations. The circuit court granted Nichols's motion for summary judgment. Brenda appealed.

ISSUES

Whether (1) the general "minor savings clause," Miss. Code Ann. § 15-1-59, tolled the statute of limitations from the date of Antheijah's injuries until the filing of the complaint and (2) the circuit court erred by "prohibiting" Brenda from cross-examining Dr. Nichols and denying Brenda her "right to cross-examine" Dr. Nichols.

HOLDING

(1) Because Antheijah was fifteen years old at the time of the alleged malpractice, the specific savings provisions of Miss. Code Ann. § 15-1-36 did not toll the limitations period. (2) Because no witnesses were present at the hearing to be

cross-examined, the circuit court did not prohibit Brenda from cross-examining a witness. Therefore, the Court of Appeals affirmed the judgment of the Sunflower County Circuit Court.

Affirmed - 2018-CA-01332-COA (May 12, 2020)

En Banc Opinion by Presiding Judge J. Wilson

Hon. W. Ashley Hines (Sunflower County Circuit Court)

Ellis Turnage for Appellant - John A. Banahan & Michael Riley Moore for Appellee

Briefed by [Luke Seymour](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

COLEMAN V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF- GUILTY PLEA - MOTION FOR RELIEF - In the case of a guilty plea, a motion for relief must be made within three years after the entry of the judgment of conviction unless a statutory exception applies; the exceptions include (1) an intervening decision of either the Supreme Court of the United States or the State of Mississippi that would have adversely affected the outcome of the conviction or sentence; (2) new evidence that was not reasonably discoverable at the time of trial; or (3) the sentence has expired or a parole, probation, or conditional release has been unlawfully revoked

CRIMINAL PROCEDURE - GUILTY PLEA - FACTUAL BASIS - Before accepting a guilty plea, the circuit court must determine that the plea is knowingly, intelligently, and voluntarily made and that there is a factual basis for the plea; a defendant's admission alone may establish a factual basis for the guilty plea

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - In order to succeed on an ineffective assistance of counsel claim, the defendant must show that (1) his trial counsel's performance was deficient and (2) he was prejudiced by his trial counsel's deficiency

FACTS

In 2008, Terry Lee Coleman was playing dice with a group of people, which included Edward Charles Martin Jr.'s son. Coleman and Martin Jr.'s son got into an argument in which gunshots were exchanged, and Martin Jr.'s son fled. Upon hearing what happened, Martin Jr. drove to Coleman's house, unarmed. Coleman stopped Martin Jr.'s car at the end of the driveway and told him to get off of his property. Believing that Martin Jr. had come to the house to shoot him, Coleman shot Martin Jr. as Martin Jr. reached down for the gear switch. Coleman, with the assistance of counsel, signed and filed a guilty plea. At the plea hearing, Coleman was informed of his rights and agreed that there was enough proof in this case to enable the jury to unanimously find that Coleman murdered Martin Jr. Coleman also stated that he was satisfied with his counsel's representation and that he was fully aware that a life sentence accompanied a murder conviction in Mississippi. Afterwards, the circuit court accepted Coleman's guilty plea. Nearly ten years later, Coleman filed a post-conviction relief ("PCR") motion in the Marion County Circuit Court requesting to withdraw his guilty plea, claiming that there was no factual basis for his conviction, that he was not advised as to his right against self-incrimination, and his counsel was ineffective because she failed to file an appeal and did not inform him of the possibility of filing a PCR motion. The circuit court denied Coleman's PCR motion, stating that it was procedurally barred because it was not filed within three years of the date that Coleman pled guilty, and Coleman failed to prove an exception to the procedural bar. Coleman appealed.

ISSUES

Whether (1) there was a factual basis for Coleman's guilty plea; (2) Coleman was informed of his right against self-incrimination; and (3) there was a basis for Coleman's claim of ineffective assistance of counsel.

HOLDING

(1) Because an affirmative confession to the charge was sufficient to establish a factual basis for the guilty plea, and because the plea hearing transcript showed Coleman agreeing to the facts of the case and admitting to shooting and killing the victim, the confession was sufficient to establish the factual basis for Coleman’s guilty plea, and thus his claim alleging a lack of a factual basis made his plea involuntary was without merit. (2) Because a trial court’s failure to advise a defendant, on the record, of his right against self-incrimination is not a constitutional violation sufficient to surmount the PCR procedural bars, because the judge thoroughly questioned Coleman prior to accepting his plea and explained his rights, including that he was waiving the right against self-incrimination by pleading guilty, and because Coleman responded affirmatively that he understood these rights, the trial court did not err in denying Coleman’s PCR motion on that claim. (3) Because Coleman pled guilty and waived his right to a direct appeal, because Coleman stated in his plea hearing that he was satisfied with his counsel and presented no specific details that his counsel made any error resulting in his guilty plea, and because Coleman failed to file any other affidavits or evidence to support his allegation of his counsel’s alleged failures or show good cause as to why he could not provide more than his own affidavit, there was no appeal that his counsel could have filed, his counsel’s failure to file an appeal did not constitute ineffective assistance of counsel, and the circuit court did not abuse its discretion in denying Coleman’s PCR motion on his claim of ineffective assistance of counsel. Therefore, the Court of Appeals affirmed the judgment of the Marion County Circuit Court.

Affirmed - 2019-CP-01110-COA (May 12, 2020)

Opinion by Judge McDonald

Hon. Anthony Alan Mozingo (Marion County Circuit Court)

Pro se for Appellant - Billy L. Gore (Att’y Gen. Office) for Appellee

Briefed by [Jennifer Lee](#)

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KELLY V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - GUILTY PLEA - When a petitioner has pled guilty to a crime, a post-conviction relief (“PCR”) motion must be filed within three years after the entry of the judgment of conviction

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - INEFFECTIVE ASSISTANCE OF COUNSEL - In order to escape the statute of limitations with respect to an ineffective assistance of counsel claim, a movant must show extraordinary circumstances that would explain his or her failure to assert PCR claims within the statutory three-year time limitation

FACTS

Deonta Kelly pled guilty to two counts of armed robbery in 2010. In 2016, Kelly filed a motion for post-conviction relief, claiming his guilty plea was not knowing, intelligent, and voluntary because his trial counsel told him that he would have eligibility for parole after the first ten years of his sentence and because the circuit court did not advise him that an armed robbery conviction included mandatory time in prison. Kelly also claimed that he received ineffective assistance of counsel. The trial court denied his motion and stated that, under the *Strickland* test, Kelly did not receive ineffective assistance of counsel. However, the circuit court did not address the statute of limitations for post-conviction relief. Kelly appealed.

ISSUES

Whether the statute of limitations was tolled because (1) Kelly’s sentencing orders were later amended and (2) Kelly presented an affidavit from his prior counsel supporting his ineffective assistance of counsel claim.

HOLDING

(1) Because Kelly filed a motion for PCR approximately six years after his conviction, and because he provided no authority stating that the amendment of his sentencing orders tolled the statute of limitations, his motion was time-

barred. (2) Because Kelly failed to show any extraordinary circumstances surrounding his right to effective assistance of counsel, his claim for ineffective assistance of counsel was not excepted from the statute of limitations. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

DISSENT

Judge McDonald agreed with the majority's holding in regards to the three-year statute of limitations for filing a PCR motion challenging a guilty plea, but she disagreed with the denial of PCR for ineffective assistance of counsel. She argued that, since Kelly had three affidavits supporting his claim of ineffective assistance of counsel, he was at least entitled to a hearing on his motion. She also argued that erroneous information concerning parole and a lack of sentencing at least entitled the petitioner to an evidentiary hearing on whether he relied on the erroneous information, especially when a party's own attorney puts his reputation at risk to agree with his client's claim of ineffective assistance of counsel.

Affirmed - 2018-CP-00993-COA (May 12, 2020)

En Banc Opinion by Judge C. Wilson - Dissent by Judge McDonald
Hon. Jeff Weill Sr. (Hinds County Circuit Court, First Judicial Dist.)
Pro se for Appellant - John R. Henry Jr. (Att'y Gen. Office) for Appellee
Briefed by [Reid Hudson](#)

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STATE V. CHILDS

CIVIL - POST-CONVICTION RELIEF

CIVIL PROCEDURE - AMENDED PLEADINGS - POST-CONVICTION RELIEF - Generally, under Miss. R. Civ. P. 15, leave to amend shall be freely given when justice so requires, but the PCR statutes do not provide an unfettered right to present claims not alleged in the PCR motion

UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT - POST-CONVICTION RELIEF MOTION - JURISDICTION - As applied to claims asserted under the UPCCRA, a circuit court lacks authority to adjudicate a PCR motion whenever the petitioner fails to first obtain permission from the Supreme Court to file her motion in circuit court

UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT - POST-CONVICTION RELIEF MOTION - PROCEDURE - When a petitioner's conviction and sentence have been affirmed on appeal or the appeal has been dismissed, the motion shall not be filed in the trial court until the motion has first been presented to a quorum of the Justices of the Supreme Court of Mississippi and an order granted allowing the filing of such motion in the trial court

FACTS

Verina Childs was sentenced to serve life in prison after a jury convicted her of murdering her husband. On direct appeal, the Supreme Court affirmed her sentence and conviction. Thereafter, Childs sought leave from the Supreme Court to file a motion for post-conviction collateral relief ("PCR") in the circuit court. The Supreme Court granted in part and denied in part. After filing the motion, Childs moved to amend the motion to assert a new claim based on the State's failure to instruct the jury on venue. The circuit court allowed the amendment and adjudicated the new claim, finding that the State's failure to instruct the jury constituted reversible error. The State appealed.

ISSUE

Whether the circuit court had jurisdiction to allow Childs to amend her PCR motion asserting a new claim and to adjudicate that new claim.

HOLDING

Because Childs must obtain leave from the Supreme Court to assert a new claim, the circuit court lacked jurisdiction to allow Childs to amend her PCR motion asserting a new claim. Therefore, the Court of Appeals reversed and remanded the judgment of the Oktibbeha County Circuit Court.

Reversed & Remanded - 2018-CA-00263-COA (May 12, 2020)

Opinion by Judge C. Wilson

Hon. Lee J. Howard (Oktibbeha County Circuit Court)

Scott W. Colom & Marc D. Amos for Appellant - Matthew W. Kitchens for Appellee

Briefed by [Philip Lott](#)

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WILSON V. STATE

CIVIL - POST-CONVICTION RELIEF

APPELLATE PROCEDURE - RULE 60(B) MOTION - APPROPRIATENESS - Rule 60(b) motions are reserved for “extraordinary and compelling circumstances” and should be denied where they are merely an attempt to re-litigate the case

APPELLATE PROCEDURE - POST-CONVICTION RELIEF MOTION - SPECIFIC - A pleading cognizable under the Mississippi Uniform Post-Conviction Collateral Relief Act (“UPCCRA”) will be treated as a PCR motion that is subject to the procedural rules promulgated therein, regardless of how the plaintiff has denominated or characterized the pleading

FACTS

Bobby Wilson, Jr. pled guilty to auto burglary in 1994. Wilson received a suspended sentence of five years and was ordered to serve probation during those five years. However, the circuit court revoked Wilson’s suspended sentence in 1995 after Wilson was charged with attempted grand larceny. Wilson was remanded into the custody of the Mississippi Department of Corrections and was later discharged from custody on August 1, 1997. In 2004, Wilson was convicted of bank robbery, and the State used his 1994 auto-burglary conviction to enhance his sentence to life imprisonment without eligibility for parole. In 2011, Wilson filed an “Application for Writ of Habeas Corpus” with the Sunflower County Circuit Court. The Sunflower County Circuit Court concluded that Wilson’s application was a PCR motion and dismissed it as being time-barred, as it was filed thirteen years after the entry of judgment. Wilson filed an unsuccessful motion to reconsider, in which he argued that his application was not actually a PCR motion. On appeal, the Court of Appeals held that the circuit court properly treated Wilson’s application as a PCR motion. The Court of Appeals found no error in the circuit court’s dismissal of Wilson’s PCR motion as time-barred because Wilson had pled guilty in 1994 and had filed his PCR motion thirteen years later. The Court further noted that Wilson had filed multiple prior PCR motions and that his current (2011) PCR motion was therefore also successive-writ barred. Accordingly, the Court affirmed the circuit court’s dismissal of Wilson’s 2011 PCR motion. On February 1, 2019, Wilson filed a “Motion for Relief from Judgment” under Miss. R. Civ. P. 60(b)(1). In the motion, Wilson stated that he sought to have the judgment of his 1994 auto-burglary conviction vacated because the State had “committed fraud upon the court.” According to Wilson, he was initially charged by sworn affidavit with attempted grand larceny of an automobile, but was later charged by a sworn bill of information with auto burglary, to which he pled guilty. In his 2019 “Motion for Relief from Judgment,” Wilson claimed that these facts showed the State had “omitted and with[h]eld critical facts from the Vicksburg Police Department[’s] investigation that would have exonerated [him] from the crime of burglary of an automobile.” The circuit court treated Wilson’s filing as a PCR motion because a Rule 60(b) motion is not an appropriate avenue for seeking relief from a criminal judgment. After finding that the 2019 motion was successive, time-barred, and frivolous, the circuit court summarily dismissed it. Wilson appealed.

ISSUES

Whether the circuit court erred by (1) treating Wilson’s filing as a PCR motion and (2) dismissing the motion as successive, time-barred, and frivolous.

HOLDING

(1) Because the Court of Appeals previously ruled in *Sanders v. State* that Rule 60(b) motions are reserved for “extraordinary and compelling circumstances” and should be denied where they are merely an attempt to re-litigate the case, and because a pleading cognizable under the UPCCRA will be treated as a PCR motion subject to the procedural rules promulgated therein, regardless of how the plaintiff characterized the pleading, the circuit court did not err in treating Wilson’s filing as a PCR motion. (2) Because Wilson filed his PCR motion outside the three-year time limit, had previously filed a PCR motion, and his motion did not raise errors affecting his fundamental rights, the circuit court did not err in dismissing the motion as time-barred, successive, and frivolous. Therefore, the Court of Appeals affirmed the judgment of the Warren County Circuit Court.

Affirmed - 2019-CP-00412 (May 12, 2020)

Opinion by Judge Tindell

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

Pro se for Appellant - Lisa L. Blount (Att’y Gen. Office) for Appellee

Briefed by [Frank Wood](#)

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COURT OF APPEALS - CRIMINAL CASES

EDWARDS V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - MISTRIAL - A motion for a mistrial must be raised during the course of trial, or an objection must be made regarding the actions conducted to cause a mistrial

CRIMINAL PROCEDURE - FIREARM SENTENCING ENHANCEMENT - PROPER NOTICE - The specific firearm-sentencing enhancement does not need to be included in the indictment and only the facts pertaining to the sentencing enhancement are required

CRIMINAL PROCEDURE - HABITUAL OFFENDER - PROPER NOTICE - Adequate notice of the State’s intent to charge a defendant has a habitual offender is achieved through formal pleadings that (1) include the specific amendment to be offered and (2) are filed sufficiently in advance of trial to ensure that the defendant will have a fair opportunity to present a defense and will not be unfairly surprised

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - 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

FACTS

Lucas Edwards was indicted for possession of a firearm by a felon. He was originally indicted on five charges but the trial court granted nolle prosequi for four of the charges. Edwards, the subject of a felony warrant, was riding a bicycle down an Indianola street when he noticed a police officer who was dispatched to the area. After noticing the officer, Edwards took off through some individual houses. Multiple law enforcement officers reached the home that Edwards ran toward and asked to search the home. Two officers went around back to a shed. As they were trying to open the shed, two shots were fired from inside. The officers did not fire their weapons and they retreated. Thirty-minutes later, Sheriff James Haywood, a trained hostage negotiator, arrived after receiving a call that the “police department was going to kill” Lucas Edwards. Sheriff Haywood spoke with Edwards on the phone. After two hours, Edwards threw the firearm out of the shed and surrendered. The officers searched the shed and found no one else with him. The forensic lab could not find a fingerprint on the weapon that could be compared to Edwards’s, but a specialist did note that the shell casings from the firearm matched the firearm that Edwards surrendered. The State moved to add the charges of habitual offender under Miss. Code Ann. § 99-19-81, and they later gave notice that they would seek a firearm-sentencing enhancement pursuant to Miss. Code Ann. § 97-37-37(2). The trial lasted two days. On the first day of the trial, there

was an in-chambers conference among the trial court, Edwards, Edwards' attorney, and the attorney for Neshawndra Sims. Sims was Edwards' wife and the victim in the dismissed counts. During this conference, Sims stated on the phone that she would not come testify, because she would not lie on Edwards's behalf. This conversation was brought up on cross-examination. Edwards argued that Sims fired the weapon, was in the shed with him, and that she had lied. At the end of the trial, the trial court entered a guilty verdict. Edwards appealed.

ISSUES

Whether (1) the trial court erred in not granting Edwards a mistrial; (2) Edwards received proper notice of the firearm-sentencing enhancement; (3) Edwards received proper notice that he was being charged as a habitual offender; and (4) Edwards received ineffective assistance of counsel.

HOLDING

(1) Because Edwards did not ask for a mistrial during the course of the trial or object to the line of questioning on cross-examination regarding the in-chambers conference with Sims, and because Edwards's testimony on cross examination did not rise to the level of necessity required for a mistrial, the issue was procedurally barred and without merit. (2) Because the indictment was not required to include a reference to sentencing enhancements, but was only required to include the facts involved in such an applicable enhancement, and because Edwards's indictment included the facts necessary to support the sentence enhancement, Edwards knew or should have known that the firearm enhancement was a possibility with respect to the charged offense. (3) Because the State filed the motion to amend the indictment to charge Edwards as a habitual offender five months before trial, Edwards received sufficient notice of the State's intent to charge him as a habitual offender. (4) Because Edwards offered no arguments to prove exactly what his attorney should have done to prevent his criminal history from being used against him at trial, Edwards's ineffective assistance of counsel claim was without merit. Therefore, the Court of Appeals affirmed the judgment of the Sunflower County Circuit Court.

Affirmed - 2017-KA-00780-COA (May 12, 2020)

Opinion by Judge Lawrence

Hon. Margaret Carey-McCray (Sunflower County Circuit Court)

Pro se for Appellant - Abbie Eason Koonce (Att'y Gen. Office) for Appellee

Briefed by [Liza Linginfelter](#)

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FARMER V. STATE

CRIMINAL - FELONY

EVIDENCE - ADMISSIBILITY - RELEVANCE - Under Mississippi law, evidence is relevant when it has any tendency to make the existence of any fact that is of consequence more probable or less probable, and the trial judge has significant discretion in such determinations

EVIDENCE - CONFRONTATION CLAUSE - PRETRIAL EXAMINATION - Under Mississippi law, to assess whether a pretrial identification was impermissibly suggestive, courts consider the following factors: (1) the opportunity of the witness to view the criminal at the time of the crime and the witness' degree of attention; (2) the accuracy of the witness' prior description of the criminal; (3) the level of certainty demonstrated by the witness at the confrontation; and (4) the length of time between the crime and the confrontation

EVIDENCE - CONFRONTATION CLAUSE - PRETRIAL EXAMINATION - In order for a pretrial identification to be deemed impermissibly suggestive, it must be the product of police action

FACTS

Gregory Farmer was convicted by a jury of sexual battery in the Bolivar County Circuit Court. At trial, Farmer was identified as the victim's attacker based on written accounts of the incident from the victim's journal. Though the first journal entry named Farmer as the victim's attacker, a second entry from the victim's journal described a second instance

of sexual assault with a different perpetrator. Farmer argued that the victim misidentified her attacker and that he should be allowed to cross-examine her about the perpetrator named in the second entry, but the circuit court excluded the second journal entry. To resolve the identity discrepancy, the victim's mother showed the victim a photograph of Farmer and a photograph of the other named assailant on her cellphone. After viewing the men, the victim identified Farmer as her assailant. The circuit court sentenced Farmer to serve twenty years in the custody of the Mississippi Department of Corrections. Farmer appealed.

ISSUE

Whether (1) excluding evidence of the potential separate attacker deprived Farmer of his right to present a defense and (2) the victim's pre-trial identification of Farmer was impermissibly suggestive and tainted the in-court identification.

HOLDING

(1) Because it was abundantly clear that the two attacks were separate and distinct and the victim did not confuse the two incidents, excluding evidence of the potential separate attacker did not deprive Farmer of his right to present a defense. (2) Because an allegedly suggestive pretrial encounter must be the result of either police or prosecution action to have an effect on the admissibility of a subsequent in-court identification, the trial court did not err in failing to deem Farmer's in-court identification as tainted. Therefore, the Court of Appeals affirmed the judgment of the Bolivar County Circuit Court.

Affirmed - 2018-KA-01479-COA (May 12, 2020)

Opinion by Judge Greenlee

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

W. Daniel Hinchcliff (Pub. Def. Office) for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [Sarah Schofield](#)

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TAYLOR V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - EVIDENCE - VOLUNTARY STATEMENTS - When an accused has expressed a desire to deal with the police only through counsel, further interrogation is absolutely barred unless the accused himself initiates further communication

APPELLATE LAW - GROUNDS FOR APPEAL - ISSUE PRESERVATION - Asserting grounds for an objection on appeal that differ from the ground given for the objection at the trial level does not properly preserve the objection for appellate review

FACTS

Police authorities found the bodies of Willie Bass and Flora Watkins in Clarksdale, Mississippi. Over a year later, authorities interviewed Kelvin Taylor in regard to an unrelated crime, wherein Taylor implicated himself in the murders of Bass and Watkins after requesting to speak to Sheriff Jones. Taylor was indicted on two counts of first-degree murder and one count of possession of a firearm by a felon. Taylor was also charged as a violent habitual offender and pled not guilty to all three charges. Taylor moved to suppress his statements to the police. The circuit court denied the motions to suppress and Taylor's first trial ended in a mistrial. During the second trial, a recorded portion of Taylor's second interview was played for the jury. During that portion, Sheriff Jones speculated that Bass had been killed because he had been selling drugs and that someone else in the area did not want the competition. Taylor responded, "Nah, that wasn't it." When Sheriff Jones asked Taylor to elaborate, Taylor said that Bass "was endangering people's lives" because he was a snitch. Taylor later clarified that he had been "involved in something," and he had mentioned certain things only to Bass. Sheriff Jones asked Taylor why Watkins had been killed, to which Taylor answered that Watkins had been a witness to the crime. Taylor testified that he did not sign a Miranda waiver and was not given a Miranda warning before his interview with the police. Taylor also said authorities did not record the portion of his interview when he said

that Chris Anderson had paid an unspecified police officer to provide information about who was snitching in the neighborhood, and the officer told Anderson that Bass had set up Jimmy Huggins. Lieutenant Jones testified that Taylor never mentioned Anderson or Huggins during the interview. The jury found Taylor guilty on all three counts, and the State chose not to pursue sentencing as a habitual offender. Taylor was sentenced to life imprisonment for murdering Bass, life imprisonment for murdering Watkins, and ten years for possession of a firearm by a felon. The circuit court set each sentence to run consecutively. Taylor appealed.

ISSUES

Whether (1) the circuit court erred in not suppressing the portion of Taylor's statement that was played for the jury; (2) the prosecution suborned perjury; and (3) the jury instruction had an evidentiary basis.

HOLDING

(1) Because the prosecution disclosed Taylor's written Miranda waiver, the circuit court did not err in allowing the prosecution to present the brief excerpt of Taylor's interview. (2) Because Taylor's claims were plainly contradicted by the record and procedural history of the case, there was no proof of prosecutorial misconduct. (3) Because Taylor did not object at trial that the evidence did not support the jury instruction, the circuit court was not prompted to elaborate regarding the evidentiary basis for the instruction. Therefore, the Court of Appeals affirmed the judgment of the Coahoma County Circuit Court.

Affirmed - 2018-KA-00534-COA (May 12, 2020)

Opinion by Chief Judge Barnes

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

Mollie Marie McMillin (Pub. Def. Office) & *Pro se* for Appellant - Abbie Eason Koonce (Att'y Gen. Office) for Appellee

Briefed by [Michael Sturgus](#)

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