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This week's Brief*Serv* Newsletter, Exam Edition is below.

Thank you for your continued support of the *Mississippi Law Journal*. Due to our commitment to our studies during this two-week exam period, the Exam Edition of Brief*Serv* contains only summaries of the cases. The case summaries are longer and more detailed than the summaries that generally appear in the email, and are intended to balance our needs in preparing for exams and your needs as a subscriber. Thank you again for your support.

Supreme Court – Civil

Miss. Bar v. Johnson - Professional Conduct – Duty to Self-Report – Attorney Sanctions – Merry C. Johnson incorrectly interpreted a rule when she was employed as a paralegal while awaiting her Mississippi Bar results. When she realized her mistake, instead of informing her employer, Stephen L. McDavid, she forged an email purporting to be an amended text order, including a signature by Judge Virden. McDavid sent the email to opposing counsel who reported it to Judge Virden. Judge Virden entered a show-cause order, and it was only then that Johnson admitted her conduct. At the hearing, Judge Virden advised everyone to review their respective obligations to report their misconduct to the Mississippi Bar (“the Bar”).

Johnson claims she reviewed the Mississippi Rules of Professional Conduct but did not find that she had a duty to report her misconduct. Opposing counsel Mark A. Dreher reported Johnson's misconduct to the Bar, and the Committee on Professional Responsibility directed the filing of a formal complaint. The Bar filed the complaint, requesting Johnson's suspension. The Complaint Tribunal entered a judgment for Johnson to be issued a private reprimand for violating Mississippi Rule of Professional Conduct 8.1(b).

Upon appeal, the Court decided whether Johnson violated MRPC 8.1 and whether the appropriate sanction was imposed. The Court determined that Johnson interpreted the rule incorrectly and that the show-cause hearing was a disciplinary proceeding charged to her professional conduct and should have been reported as a change to her Bar application. After examining the *Leibling* factors, the Court suspended Johnson's practice of law for three years and determined that she would have to apply for reinstatement.

Briefed by [Andie Szabo](#)

Supreme Court – Orders

In Re: Judicial Mandatory Continuing Legal Education – The Mississippi Supreme Court is granting a Petition to Amend the Mississippi Rules and Regulations for Mandatory Continuing Judicial Education filed by the Mississippi Judicial College. The amendments that will be effective as of August 1, 2019, include amendments to Rule 3 regarding CJE Requirements, Rule 5 regarding Annual Reports, and Rule 6 regarding Noncompliance and Sanctions.

Briefed by [Corban Snider](#)

Supreme Court – Criminal

Stanfield v. State - Jury Instructions – Self-Defense – Defense of Necessity – David Lee Stanfield was indicted on three counts of aggravated assault and one count of felon in possession of a firearm. Stanfield was at his sister's house where people were drinking, smoking, and gambling when a shooting occurred. Terence Ford, Michael Ford, and Markel Weeks were all shot that night, and each of them testified that Stanfield shot them and that none of them saw Stanfield gambling that night. Conversely, Stanfield testified that he had been gambling but woke up to find that someone had stolen his winnings. Stanfield further testified that Terence had pulled a gun out when Stanfield approached the men about his stolen winnings and that the gun went off and struck Terence as they were wrestling, resulting in Stanfield shooting once or twice then dropping the gun and leaving because he was scared. The trial court instructed the jury on both self-defense and the defense of necessity, and Stanfield was subsequently convicted as to one count of aggravated assault and one count of felon in possession of a firearm. Stanfield appealed, claiming that the trial court erred in instructing the jury that self-defense is not a defense to felon in possession of a firearm because the defense of necessity encompasses the right to act in self-defense.

In *Williams v. State*, the Court of Appeals held that possession of a firearm by a convicted felon is a criminal act void of a third party against whom to defend. Further, in the drafting of the aggravated assault statute, the Legislature chose not to include the absence of self-defense as an element nor did it include any element requiring an absence of necessity in the statute criminalizing the possession of a firearm by a felon. Accordingly, self-defense and the defense of necessity are two distinct affirmative defenses, and the trial court correctly instructed the jury as to each of them. Therefore, the Supreme Court affirmed the judgment of the Chickasaw Country Circuit Court.

Presiding Justice King dissented, arguing that the trial court abused its discretion in granting both instructions. He argued that simultaneously instructing the jury that Stanfield legally may have possessed a firearm out of necessity but that self-defense could not be part of that necessity caused conflict and confusion, creating an injustice to Stanfield by denying his fundamental right to assert his lawful defense.

Briefed by [Lauren Rogers](#)

Court of Appeals – Civil

Avants v. Hamilton - Domestic Relations – Child Custody – *Albright* Factors – Bryan Avants and Shawn Hamilton had a daughter in 2010. After an altercation in front of the child in 2016, Hamilton moved out. The child remained with Avants. Hamilton filed a petition for temporary and permanent child custody, to establish paternity, and other relief. After a hearing, the chancery court awarded the parties temporary joint legal and physical custody of the daughter, with alternating weeks of physical custody. At the conclusion of trial, the court awarded joint legal custody to both parties and primary physical custody to Hamilton, with Avants being awarded visitation on alternating weekends and holidays. Avants filed a motion for reconsideration, which was denied. Avants appealed.

On appeal, Courtney argued that the chancery court erred in awarding physical custody to Hamilton. In child custody cases, the court applies the *Albright* factors, which determine what is in the best interests and welfare of the child. In applying the factors, the court found that more of the factors favored Hamilton than Avants, while the remaining factors were neutral. Therefore, the Court of Appeals affirmed the judgment of the Pike County Chancery Court.

In his concurrence, Judge Tindell argued that because a number of the factors were neutral between the parties, a presumption that joint physical custody was in the best interest of the daughter existed. Further,

he argued that there is currently no standard by which such a presumption may arise in contested cases, but one should be adopted by the courts.

Briefed by [Zachary Flowers](#)

[Avery v. University of Mississippi](#) - Appellate Jurisdiction – Cost Bond – Extenuating Circumstances – Angela Avery was terminated from her employment with the University of Mississippi. After exhausting all procedures within the University system, Avery petitioned for a writ of certiorari to the Lafayette County Circuit Court, pursuant to Miss. Code Ann. § 11-51-93 & 95. Miss. Code Ann. § 11-51-93 requires a bond to be posted with the court within six months of the termination decision. After making numerous attempts to have a bond set by the court, Avery was informed that all judges in the circuit would be recusing themselves from the case. Once a special judge was appointed to the case, the University filed a motion to dismiss because Avery had not posted bond within 6 months of the decision to terminate. The University’s motion was granted. Avery appealed.

Avery argued that a bond was not required in this case, and even if it were required, extenuating circumstances excused her failure to post bond within the statutorily required period. Because Miss. Code Ann. § 11-51-93 requires a bond to be posted, the court found that a bond was required and that the bond posting was a jurisdictional requirement. However, because of the extenuating circumstances involving the recusal of all judges of the circuit and the appointment of a special judge, the court held that dismissal was inappropriate in the facts of this case. Therefore, the Court of Appeals reversed and remanded the judgment of the Lafayette County Circuit Court.

Briefed by [Catherine Pettis](#)

[Dorman v. Trustmark Nat'l Bank](#) - Foreclosure – Summary Judgment – Deficiency Judgment – The Dormans received a loan secured by several parcels of land from Trustmark National Bank (“Trustmark”). The land included the Dormans’ residence on six acres of land. However, the deed of trust did not have the legal description for these six acres of land. The Dormans were delinquent on payment, and Trustmark ordered them to vacate the residence. Trustmark filed a complaint for the remaining loan deficiency, and the Dormans filed an answer and counterclaim alleging wrongful foreclosure. Trustmark filed a motion to amend its complaint to include the six acres of land as collateral under the original agreement, asserting the defense of mutual mistake. The Dormans were deposed, and both asserted that they did not intend to pledge their residence as security for the loan. Trustmark filed a motion for summary judgment, requesting reformation of the deed due to mutual mistake of the parties. The Leake County Circuit Court granted the motion for summary judgment and awarded a deficiency judgment against the Dormans, finding that there was no legitimate dispute and that both parties intended for the Dormans’ residence to be collateral for the loan. The Dormans appealed, alleging that the Leake County Circuit Court (1) did not have subject matter jurisdiction; (2) erred in granting Trustmark’s motion for summary judgment; and (3) erred in awarding a deficiency judgment.

The Court of Appeals held that the Leake County Circuit Court had subject matter jurisdiction because Trustmark’s equitable claim was raised as a defense to the Dormans’ counterclaim. However, the Leake County Circuit Court erred by reforming the deed of trust and granting summary judgment because there was a genuine issue of material fact as to whether the parties agreed to include the house as collateral. Finally, the Court of Appeals held that while the deficiency judgment was moot based on the reversal of summary judgment, the deficiency judgment was improper because the property had not yet been sold at a foreclosure. Therefore, the trial court’s judgment was reversed and remanded.

Briefed by [Davis Pigg](#)

Easterling v. State - Post-Conviction Relief – Time Served – Calculations – In April 2017, Samuel Earl Easterling pled guilty and was sentenced on three counts of selling methamphetamine. The circuit court sentenced Easterling to serve consecutive terms of ten years, ten years, and thirty years with twenty-five years suspended, all in the custody of the Mississippi Department of Corrections (“MDOC”). In January 2018, Easterling filed a motion for post-conviction relief, alleging that MDOC failed to credit him for 311 days served prior to his plea and sentencing and that MDOC failed to grant him thirty days credit for every thirty days served from Sept. 1, 2016, to June 8, 2017. The circuit court dismissed Easterling’s PCR motion pursuant to Miss. Code Ann. §99-39-9(2).

The circuit court erred by dismissing Easterling’s PCR motion based on Miss. Code Ann. §99-39-9(2), because the court previously held that subsection to be an unconstitutional procedure rule. But, the court affirmed the circuit court’s holding on other grounds. Because a PCR motion is not a proper vehicle for challenging MDOC’s denial of credit for time served, the circuit court correctly dismissed Easterling’s PCR motion. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Briefed by [Katelin Davis](#)

Harmon v. Perry - Parental Rights – Terminating Parental Rights – Abandonment – Justin Harmon and Krystal Ingle were divorced in 2013, and the Scott County Chancery court awarded Ingle sole custody of the couple’s two children. Due to Harmon’s history of drug and alcohol abuse, the court ordered him to enter a rehabilitation program. Upon completion of the program, Harmon would be granted supervised visitation with the children for sixty days, with unsupervised visitation, provided that no additional incidents of alcohol consumption or abusive behavior occurred. After complying with the court’s orders, Harmon was allowed an unsupervised visit. Ingle reported that during the visit, Harmon became intoxicated and got into a fight with his girlfriend. After the children returned home, Krystal invoked the condition of the court’s order.

In 2015, Ingle married her boyfriend, Shaun Perry, and the couple sought to adopt the children and terminate Harmon’s parental rights. A guardian ad litem (“GAL”) was appointed, and the parties were tested for drugs, with Harmon testing positive for methamphetamine. The GAL’s report indicated that the children were happy and well-adjusted while living with the Perry family and that although Harmon was willing and able to care for the children, he had not contacted them for over a year, constituting abandonment. The GAL further noted that Harmon lacked financial support due to a lack of employment stemming from drug and alcohol abuse. In 2017, the chancery court terminated Harmon’s parental rights and entered a judgment for adoption for each child. Harmon appealed.

The Supreme Court has found that abandonment includes any conduct by a parent which evinces a settled purpose to forego all duties and relinquish all parental claims to the child. The court found that because there was clear and convincing evidence that Harmon made no serious effort to see his children or to provide financial support for them from 2014 to 2017, the chancery court made no manifest error in determining that Harmon had engaged in conduct constituting abandonment and that it would not be in the children’s best interest to be reunified with their natural father. Therefore, the trial court’s judgment was affirmed.

Briefed by [Ryan Overturf](#)

Hayes v. Hayes - Family Law – Custody Modification – Contempt – Jeremy Hayes divorced Shanna Hayes resulting in a custody determination for their daughter, K.H. The court granted Jeremy primary custody and found Shanna in civil and constructive criminal contempt, sentencing her to incarceration and to pay fines.

However, the court suspended execution of the sentence on the condition that Shanna not violate its order. Shanna filed a motion to amend or correct the court's findings of fact and conclusions of law, which the trial court denied. Shanna appealed.

The court held that the trial court did not err in finding Shanna in constructive criminal contempt because the evidence presented during the hearings supported the finding that Shanna willfully and maliciously withheld visitation from Jeremy and filed frivolous complaints against him. Additionally, the court upheld the trial court's decision declining to hold Jeremy in contempt for failure to pay attorney's fees, instead finding that the appropriate action for Shanna to take would be to file a writ of garnishment. Finally, the court upheld the finding that a material change in circumstances occurred, justifying a change of custody of K.H., because the trial court found by clear and convincing evidence that Shanna exhibited an alarming pattern of denying Jeremy's visitation of K.H. without cause. Therefore, the Court of Appeals affirmed the judgment of the Wayne County Chancery Court.

Briefed by [Natalie McCarty](#)

Huey v. Telapex, Inc. - Personal Injury – Slip & Fall – Summary Judgment – Betty Huey traveled to C-Spire to pay her telephone bill, despite the cold and icy conditions. Huey noticed that most of the parking lot was covered in ice and decided to park in a handicap spot close to the entrance. Upon stepping out of the vehicle, Huey slipped and fell. As litigation continued, Telapex, Inc. (“C-Spire”) filed for summary judgment, which was granted. Huey appealed the grant of summary judgment stating there was a genuine issue of material fact regarding whether (1) she fell in a remote area of the premises or an area immediately adjacent to the store's entrance; (2) she knew and appreciated the danger; and (3) C-Spire exercised reasonable care to keep its premises in reasonably safe conditions.

Overall, the Court of Appeals ruled that there was no genuine issue of material fact warranting the reversal of summary judgment. Because precedent states that a parking lot is the remote part of the business premises, summary judgment was proper on this issue. Because precedent states that ice in a parking lot, whether visible or not, is a natural condition that Huey could have expected to encounter after a winter storm, summary judgment was proper on this issue. Finally, because precedent states that business owners are not required to clear naturally accumulated ice and snow from their parking lots, summary judgment on this issue is proper. Therefore, the Court of Appeals affirmed the judgment of the trial court.

Briefed by [Brandon H. Wilson](#)

Court of Appeals – Post-Conviction Relief

Herrin v. State - Non-Violent Habitual Offender – Nunc Pro Tunc Order – Court's Discretion – In 1994, Michael Herrin was indicted for rape, burglary of a dwelling, and armed robbery. The indictment also charged Herrin as being a non-violent habitual offender under Miss. Code Ann. § 99-19-81. Herrin had previously been convicted of grand larceny and possession of cocaine. Herrin pled guilty to all three counts and was sentenced, as a habitual offender, to serve twenty years for rape, fifteen years for burglary of a dwelling, and twenty years for armed robbery. In 2016, Herrin wrote a letter to inform the Leflore County Circuit Clerk that his sentencing order erroneously stated that he had been convicted for the sale of cocaine instead of the

possession of cocaine. The Leflore County Circuit Court entered a nunc pro tunc order, correcting the charge in the sentencing order to possession of cocaine. Thereafter, Herrin filed a PCR motion in the Hinds County Circuit Court, claiming that he was improperly sentenced as a habitual offender in 1994 because a possession of cocaine conviction was used to enhance his sentences. The PCR motion was dismissed. Herrin timely appealed under the prison mailbox rule, claiming that he was entitled to post-conviction relief and that the trial court erred by failing to make any findings of fact or conclusions of law before dismissing his PCR motion.

Because Herrin's sentencing order was corrected by the nunc pro tunc order, and possession of cocaine and sale of cocaine were treated the same for purposes of sentencing under Miss. Code Ann. § 99-19-81, the trial court did not abuse its discretion in dismissing Herrin's PCR motion. Further, under Miss. R. Civ. P. 52(a) and Miss. Code Ann. § 99-39-11, the trial court was under no obligation to render findings of fact and conclusions of law when it dismissed Herrin's PCR motion. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Briefed by [Luke Phillips](#)

Court of Appeals – Criminal

Harvell v. State - Motion for Continuance – Judgment of Acquittal – Procedural Bars – Roman Harvell was charged and convicted of trafficking in a controlled substance. Based on information given by a criminal informant, police conducted a search of Harvell's apartment and found almost 100 grams of meth. On the date of trial, Harvell was scheduled to appear as a defendant in two different criminal matters. After voir dire of the jury, Harvell's attorney motioned for a continuance because he thought the trafficking charge would not be tried on that day. The judge denied Harvell's motion, and Harvell was convicted. On appeal, Harvell contended that the judge committed abuse of discretion by denying the motion for continuance. Harvell also asserted that he was entitled to a new trial because an attorney for the state had a prior relationship with a defense witness and because there was insufficient evidence to support a conviction.

The Court of Appeals found that the trial judge did not commit abuse of discretion when denying the motion for continuance. The issue was procedurally barred since it was not raised with Harvell's motion for a new trial. Moreover, the court found that, regardless of the procedural bar, the judge did not abuse his discretion in denying the motion for a new trial. Further, Harvell was not entitled to a new trial based on the state attorney's relationship with a defense witness because the defense did not disclose the witness list to the state in a timely manner in order for the state's attorney to recuse and because Harvell did not raise a contemporaneous objection at trial. The court also found that sufficient evidence existed to support the conviction; thus, Harvell was not entitled to a judgment of acquittal. Therefore, the judgment of the Prentiss County Circuit Court was affirmed.

Briefed by [Yance Falkner](#)

Henderson v. State - Appellate Counsel – *Lindsey* Briefs – Contraband – Michael Henderson was convicted of possession of contraband after prison guards discovered a homemade knife in his cell. He was sentenced as a nonviolent habitual offender to serve fifteen years in prison, without eligibility for release. Finding no appealable issue, Henderson's counsel filed a brief, pursuant to *Lindsey v. State*, declining to appeal the case. The brief reviewed the following: (1) the circumstances of arrest; (2) any possible violation of right to counsel; (3) the entire trial transcript and contents of the record; d) all rulings of the trial court; (4) possible prosecutorial misconduct; (5) all jury instructions; (6) all exhibits, whether admitted into evidence or not; h) possible

misapplication of the law in sentencing; i) the indictment and all of the pleadings in the record; (7) any possible ineffective-assistance-of-counsel issues; and (8) whether the verdict was supported by the overwhelming weight of the evidence. After reviewing the record, the Court of Appeals agreed that there were no arguable issues warranting appeal. Therefore, the Court of Appeals affirmed the decision of the Oktibbeha County Circuit Court.

Briefed by [Jon-Paul Bushnell](#)

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