

**MISSISSIPPI SUPREME COURT DECISIONS – APRIL 12, 2018****SUPREME COURT - CIVIL CASES****CROSSGATES RIVER OAKS HOSP. V. MISS. DIV. OF MEDICAID****CIVIL - STATE BOARDS & AGENCIES**

**ADMINISTRATIVE LAW - REGULATORY INTERPRETATION - DEFERENCE** - Though the court generally affords great deference to an agency's interpretation of its regulations, they will not agree with an interpretation that is arbitrary, capricious, or in violation of unambiguous language

**HEALTHCARE LAW - MEDICAID RATES - RATE DETERMINATION** - Hospitals participating in Medicaid are reimbursed for outpatient procedures based on that hospital's own cost report from previous years

**HEALTHCARE LAW - STATE PLAN - MEDICAID RATES** - Though Medicaid is a federal program, rates for reimbursement in Mississippi are set in the State Medical Plan

**FACTS**

Twelve hospitals participating in the state Medicaid program were notified in 2010 that they would receive a lump sum settlement for outpatient rates for fiscal year 2001. According to the State Plan, these rates for 2001 were determined by the 1999 hospital cost report for each respective hospital. Upon notification of the settlements, the hospitals requested appeals and formal hearings due to the Division of Medicaid (DOM) not following the requirements of the State Plan. The Hearing Officer found that the claims of the hospitals were without merit. The hospitals then appealed to the chancery court, challenging DOM's calculation for outpatient rates for 2001. The chancery court affirmed DOM's decision, finding that DOM interpreted its own regulation reasonably. The hospitals appealed.

**ISSUES**

Whether the trial court erred in affirming that DOM's decision to include a portion of laboratory and radiology charges in the denominator of the cost-to-charge ratio and the decision to use certain Medicare blended payment amounts for ambulatory surgical care and other services in the outpatient rate calculation was not arbitrary, capricious, or in violation of the State Plan.

**HOLDING**

Because DOM clearly violated the plain, and there was unambiguous language in Attachment 4.19B of the State Plan that clearly sets the formula for calculating outpatient rates, the settlement amounts distributed to each of the hospitals were incorrect. Therefore, the Supreme Court reversed and remanded the judgment of the Hinds County Chancery Court.

**Reversed & Remanded - 2016-CC-01693-SCT (Apr. 12, 2018)**

En Banc Opinion by Presiding Justice Randolph

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

George H. Ritter, John P. Sneed, Jonathan Robert Werne, & P. Scott Phillips for Appellants - Dion Jeffery Shanley & Janet D.

McMurtray for Appellees

Briefed by [Jacob Swatley](#)

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## DAVIS V. CITY OF JACKSON

### CIVIL - OTHER

**CIVIL PROCEDURE - JURISDICTION - STANDING** - Standing is a jurisdictional issue and may be raised by the Court *sua sponte* or by any party at any time; the standard of review is *de novo*

**CIVIL PROCEDURE - STANDING - COLORABLE INTEREST** - In Mississippi, parties have standing to sue when they assert colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant or as otherwise provided by law

**CONSTITUTIONAL LAW - STANDING - INJURY** - When challenging the constitutionality of a city ordinance containing permit regulation, a party must first apply for a permit because a party not affected by the enforcement of a statute or ordinance cannot question its constitutionality

### FACTS

John Davis and Shad Denson are taxicab drivers in Jackson, MS. Both Davis and Denson own their own taxicab vehicles, but due to certain Jackson ordinances, were required to pay fees to existing taxicab companies in order to use their vehicles as taxicabs. Davis and Denson wanted to start their own business but were never able to because they do not have a Certificate of Public Necessity (CPNC). Davis alleged that he never filed an application to obtain a CPNC because a department official told him Jackson did not need another taxicab company. Denson did not complete his application to obtain a CPNC due to depleted capital while waiting for his application to be ruled on. On March 2, 2016, Davis and Denson filed a complaint in the Hinds County Chancery Court challenging the constitutionality of the Jackson ordinance. The city of Jackson filed a motion to dismiss for lack of subject matter jurisdiction because the plaintiffs failed to file a bill of exception in circuit court according to Miss. Code Ann. § 11-51-75. The chancellor granted the motion to dismiss. Plaintiffs appealed.

### ISSUES

Whether (1) the plaintiffs lacked standing to challenge the constitutionality of Jackson's taxicab ordinances; and (2) the chancery court erred in ruling that it lacked subject matter jurisdiction based on Miss. Code Ann. § 11-51-75.

### HOLDING

(1) Because the plaintiffs failed to file or complete applications for CPNCs, they cannot demonstrate a colorable interest in the City's taxicab ordinances, therefore the plaintiffs do not have standing and the court lacked subject matter jurisdiction. (2) Because this issue is case-dispositive, the Court did not further discuss the issue of lack of subject matter jurisdiction based on Miss. Code Ann. § 11-51-75. Therefore, the Supreme Court affirmed the judgment of the Hinds County Chancery Court.

**Affirmed - 2017-CA-00057-SCT (Apr. 12, 2018)**

Opinion by Presiding Justice Randolph

Hon. William H. Singletary (Hinds County Chancery Court)

Monte L. Barton for Appellants - Monica Davis Joiner & Kristen Najwana Blanchard for Appellee

Briefed by [D. Hunter V. Robertson](#)

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## KEYES V. DOLLAR GENERAL CORP.

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

**ARBITRATION AGREEMENTS - FACTUAL ALLEGATIONS - COVERED CLAIMS** - If the factual allegations underlying a claim touches the matters covered by the parties in the arbitration agreement, then that claim must be arbitrated.

**ARBITRATION AGREEMENTS - JUDICIAL PROCESS - WAIVER** - Swearing out a criminal affidavit does not invoke the judicial process, and therefore does not constitute a waiver of the right to arbitrate.

### **FACTS**

Rebecca Keyes was an employee of Dollar General in Mize, Mississippi. On May 28, 2015, Rebecca performed a cash reload to a money network card in the amount of \$500, which did not go through properly. Keyes informed her manager of the problem and was told not to worry and that the problem would be fixed. On June 2, 2015, Keyes was arrested for embezzlement, but was found not guilty of the charges. Keyes then filed a lawsuit against Dollar General for malicious prosecution, infliction of emotional distress, defamation, false imprisonment, fraud, deceit, and misrepresentation. Dollar General filed a motion to dismiss and compel arbitration, pursuant to the arbitration agreement she signed as terms of her employment. The trial judge found that Keyes's claims most likely related back to the agreement and that Dollar General had not waived its right to arbitration. Keyes appeals.

### **ISSUE**

Whether Keyes's claims are covered claims within the scope of the arbitration agreement and whether Dollar General waived its right to arbitrate by filing criminal charges in municipal court.

### **HOLDING**

(1) Because Dollar General did not specifically include claims of malicious prosecution, infliction of emotional distress, false imprisonment, fraud, deceit, and misrepresentation as covered claims, Keyes's defamation claim was the only action covered under the arbitration agreement. Further, Dollar General did not waive all arbitration claims by filing a criminal complaint against Keyes. Therefore, the Supreme Court affirmed the judgment as to Keyes's defamation claim and reversed the judgment as to all other claims.

### **DISSENT**

Chief Justice Waller dissented in part, arguing that the parties did not intend that Keyes would be forced to arbitrate a defamation claim based on Dollar General's filing of a criminal complaint for embezzlement, and therefore the defamation claim should be considered outside of the scope of the arbitration agreement.

#### **Affirmed in Part: Reversed and Remanded in Part - 2017-IA-00010-SCT (April 12, 2018)**

Opinion by Presiding Justice Randolph - Dissent by Chief Justice Waller

Hon. Stanley Alex Sorey (Smith County Circuit Court)

Mark K. Tullos & Craig N. Orr for Appellant - Edward Francis Harold & Jaklyn Leigh Wrigley for Appellee

Briefed by [Jay Michael Patterson](#)

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## **MAY V. AUSTIN**

### **CIVIL - PERSONAL INJURY**

**CIVIL PROCEDURE - SANCTIONS - DISCRETIONARY AUTHORITY** - Miss. R. Civ. P. 37 gives trial court the discretionary authority to impose upon any party or counsel such sanctions as may be just

**DISCOVERY - SANCTIONS - PIERCE STANDARD** - In analyzing whether trial-discovery violations are appropriate, the court should consider the following factors: whether (1) failure to comply with the court's order resulted from willfulness or bad faith, and not from the inability to comply; (2) the deterrent value of Miss. R. Civ. P. 37 cannot be substantially achieved by the use of less drastic sanctions; (3) the other party's preparation for trial was substantially prejudiced; and (4) the neglect was plainly attributable to an attorney rather than a blameless client, or a party's simple negligence was grounded in confusion or sincere misunderstanding of the court's orders

**DISCOVERY - VIOLATIONS - SANCTIONS** - Courts, trial or appellate, should not condone lies or mollify penalties for lying or discourage trial judges from protecting courts from those who would seek to abuse the judicial process in pursuit of lucre

## **FACTS**

Vehicles driven by Victor May and Kenneth Austin collided in Jackson, Mississippi. Claiming that the wreck produced injuries to his neck, lower back, and right shoulder, May filed suit in Hinds County Circuit Court. Shortly after May filed his complaint, the parties engaged in discovery. A year and a half later, due to May's inconsistent and deliberately false testimony throughout the discovery process, the defendants filed a motion to dismiss with prejudice. The defendants cited the plaintiff's interrogatory and production responses compared to testimony later provided at deposition to support their contentions. The defense referenced medical records independently obtained via subpoena, which indicated that the plaintiff previously suffered from significant, unrelated injuries to his neck and back, and that he was treated four months prior to the accident for issues related to his right shoulder. The trial court denied this motion, reasoning that dismissal as a sanction for the discovery violations would not be warranted. In a subsequent motion for reconsideration by the defendant, the trial court learned of further misrepresentations from the plaintiff, and granted the motion. In finding that the plaintiff willfully concealed his past injuries and accidents, the trial court found the defendant's ability proceed with their case was prejudiced. The Hinds County Circuit Court dismissed the plaintiff's claims with prejudice. May appealed.

## **ISSUE**

Whether the trial court was justified in dismissing the case after making factual findings concerning May's repeated and unequivocal misrepresentations throughout discovery.

## **HOLDING**

Because the plaintiff repeatedly engaged in misleading conduct by continuously providing false answers and failing to disclose relevant information, the trial court did not err in finding his behavior constituted willful discovery violations made in bad faith. Because the nature of the lies and omissions by May and his counsel were so ongoing that they warranted more than a fine or penalty affecting the ability to cross-examine, the court did not err in determining that the deterrent value of Miss. R. Civ. P. 37 could not be achieved by lesser sanctions. Because the defendants were significantly prejudiced by the plaintiff's costly refusal to cooperate with the procedural rules, the trial court did not err in concluding that the wronged party had suffered prejudice as a result of the discovery violation. Because the trial court properly analyzed May's discovery violations, applied appropriate weight to each misrepresentation, and arrived at a justifiable conclusion, the trial court did not err in dismissing the plaintiff's claims with prejudice. Therefore, the Supreme Court affirmed the judgment of the Hinds County Circuit Court.

**Affirmed - 2017-CA-00211-SCT (Apr. 12, 2018)**

Opinion by Justice Beam

Hon. Jeff Weill Sr. (Hinds County Circuit Court)

Don H. Evans & Christie Evans Oden for Appellant - Steven James Griffin & Joe S. Deaton III for Appellees

Briefed by [Caroline Loveless](#)

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## **PRESBYTERY OF ST. ANDREW, PRESBYTERIAN CHURCH U.S.A., INC. v. FIRST PRESBYTERIAN CHURCH PCUSA**

### **CIVIL - OTHER**

**CIVIL - EXPRESS TRUST - CREATION** - Miss. Code Ann. § 91-8-407 states that no trust in any real property can be created except by written instrument signed by the party who declares or creates such trust

**CIVIL - CONSTRUCTIVE TRUST - UNJUST ENRICHMENT** - A constructive trust is a judicially imposed remedy used to prevent unjust enrichment when one party wrongfully retains title to property

**CIVIL - RESULTING TRUST - INTENT** - A resulting trust is designed to give effect to the unwritten but actual intention of the parties at the time of the acquisition of title to the affected property

## FACTS

First Presbyterian Church PCUSA of Starkville, MS, (“FPC”) has occupied the same piece of land in central Starkville for more than 160 years and holds title to six additional parcels of real property in Starkville. The main church facility is the most significant, which FPC acquired by deed in 1837. In 1924, the church constructed its current sanctuary on the property. FPC had joined and left multiple Presbyterian denominations before joining the Presbyterian Church in the United States (“PCUS”). PCUS merged with another Presbyterian denomination in 1983 to create the Presbyterian Church in the United States of America (“PCUSA”), which FPC has been affiliated with since its inception. When PCUSA was formed, the Book of Order contained a trust clause that required member churches to obtain permission before selling, mortgaging or otherwise encumbering the property of the church. The book also contained a clause allowing members to opt out of the trust clause by holding a regularly scheduled meeting and voting to be so exempt and notify the Presbytery—the Presbyterian central governing unit—of the vote. FPC held such a meeting in response to the opt-out clause and voted to exempt itself by passing a resolution and opting out of the trust clause. FPC reaffirmed this intent to be exempt in 2003 when it incorporated and subsequently adopted bylaws that expressed that the church would retain ownership of the property, not the Presbytery. Due to an increasing disagreement with PCUSA, FPC voted to look into the possibility of joining another Presbyterian denomination. The Presbytery notified FPC that it had appointed a committee, the Administrative Commission, to inquire into and settle difficulties. The commission was authorized to take over FPC’s property. FPC filed a legal action to determine the property rights of FPC, the Presbytery, and the PCUSA. FPC sought a declaratory judgment recognizing FPC’s exclusive ownership of all property held by it or in its name, free of any trust claimed by the PCUSA. The chancellor found that no express or constructive trust existed and that FPC clearly intended to hold title to its property. Presbytery appealed.

## ISSUE

Whether the chancery court erred as a matter of law in determining that the Presbytery did not have a trust interest in the real and personal property of FPC.

## HOLDING

Because no signed writing existed creating an express trust between FPC and the Presbytery, no evidence existed that the Presbytery invested any funds into the acquisition of any of the parcels of land, and FPC expressed no intention of creating a trust, even exercising their right to opt out of a provision in the Presbytery’s constitution creating a trust, no express or implied trust existed between the parties. Therefore, the Supreme Court affirmed the judgment of the Oktibbeha County Chancery Court.

## DISSENT

Justice King argued that Presbytery had a trust interest because the opt-out provision specifically provided that in opting out of the PCUSA property provision, a church shall exercise its privileges of incorporation and property ownership under the provisions of the Constitution to which it was subject immediately prior to the establishment of the PCUSA. According to FPC’s own resolution to become a member of PCUSA, the Constitution was that of PCUS. Justice King further argued that FPC participated in the process to pass PCUS’s amendments to their Constitution, including the trust provision that explicitly states that all property held by a particular church is held in trust for the use and benefit of the PCUS.

### **Affirmed - 2016-CA-01275-SCT (Apr. 12, 2018)**

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

Hon. H. J. Davidson, Jr. (Oktibbeha County Chancery Court)

P. Scott Phillips & Andrew Frank Tominello for Appellant - Ryan K. French, Lloyd J. Lunceford, & Dolton W. McAlpin for Appellee

Briefed by [Maggie Vinzant](#)

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**MISSISSIPPI COURT OF APPEALS DECISIONS – APRIL 10, 2018**

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

## AVAKIAN V. WILMINGTON TR. NAT'L ASS'N

### CIVIL - CONTRACT

**CIVIL PROCEDURE - RES JUDICATA - ELEMENTS** - In order for res judicata to apply, the following four identities must be present: (1) identity of the subject matter of the action; (2) identity of the cause of action; (3) identity of the parties of the cause of action; and (4) identity of the quality or character of a person against whom the claim is made

**CIVIL PROCEDURE - RES JUDICATA - FINAL JUDGMENT ON THE MERITS** - In order for res judicata to apply, the prior judgment must be a final judgment adjudicated on the merits, meaning that the judgment was based on the evidence rather than on technical or procedural grounds

**CONTRACTS - EQUITABLE RELIEF - UNJUST ENRICHMENT** - An unjust enrichment action applies to situations where there is no contract, and is based on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another

### FACTS

In 2002, Norair and Burnette Avakian purchased a house in Columbus, Mississippi with title to the property vested in both their names as joint tenants. In 2004, Norair executed a deed conveying title to the property to Burnette alone. In 2006, the Avakians refinanced the mortgage with EquiFirst Corporation. Norair executed a promissory note in favor of EquiFirst, and took out a loan in his name only. Because title was vested in Burnette alone, EquiFirst required both Burnette and Norair to execute a deed of trust. Norair was out of state at the time of the closing, so Burnette and Norair each signed separate deeds of trust on the property. This resulted in two deeds of trust on the property—one executed by Norair and one executed by Burnette. Each deed was recorded as a separate instrument with the Lowndes County Chancery Clerk. EquiFirst sold Norair's promissory note to Citibank N.A. in its capacity as trustee of the Bear Sterns Asset Backed Securities Trust. J.P. Morgan became the servicing agent for Citibank. In 2012, Wilmington Trust replaced Citibank as the trustee for Bear Sterns. J.P. Morgan served as the servicer for the loan, and EquiFirst, Citibank, and Wilmington Trust were the successive creditors. In 2010, Norair defaulted on the promissory note and soon thereafter died. In 2012, Citibank, the trustee/creditor at that time, noticed Burnette its intention to foreclose on the house and set the foreclosure sale. The day before the scheduled foreclosure sale, Burnette filed suit in the chancery court against Citibank seeking to enjoin the foreclosure. Wilmington Trust made the following claims: (1) judicial foreclosure; (2) breach of contract; (3) unjust enrichment; (4) declaratory judgment. Wilmington Trust moved for partial summary judgment as to judicial foreclosure, breach of contract, and declaratory judgment. Burnette opposed the motion, arguing a genuine issue of material fact as to whether Wilmington Trust was the true owner and holder of the promissory note and deeds of trust. The trial court found that res judicata barred this defense. The trial court granted partial summary judgment in favor of Wilmington Trust as to judicial foreclosure, breach of contract, and declaratory judgment. The trial court granted partial summary judgment in favor of Burnette on Wilmington Trust's unjust-enrichment claim. Burnette appealed, and Wilmington Trust cross-appealed.

### ISSUES

On direct appeal, (1) whether the trial court, finding that res judicata applied, properly granted Wilmington Trust's motion for partial summary judgment on its claims for judicial foreclosure, breach of contract, and declaratory judgment. On cross-appeal, (2) whether the trial court properly granted Burnette Avakian's motion for partial summary judgment on Wilmington Trust's claim for unjust enrichment.

### HOLDING

(1) Because the appellate court's review of the record identified the four identities required for res judicata to apply, and because the prior federal action was based on evidence, and not on technical or procedural grounds, the trial court did not err in applying res judicata granting Wilmington Trust's motion for partial summary judgment on its claims for judicial foreclosure, breach of contract, and declaratory judgment. (2) Because a claim of unjust enrichment only applies to situations where there is no legal contract, and because there was a contract between the parties,



damages based on unjust enrichment were not an appropriate remedy and the trial court did not err when it granted Burnette Avakian's motion for partial summary judgment on Wilmington Trust's claim for unjust enrichment. Therefore, the Mississippi Court of Appeals affirmed the judgment of the Lowndes County Circuit Court on direct appeal, and affirmed its judgment on cross-appeal.

**On Direct Appeal: Affirmed. On Cross-Appeal: Affirmed - 2017-CA-00291-COA (Apr. 10, 2018)**

Opinion by Chief Judge Lee

Hon. H.J. Davison Jr. (Lowndes County Chancery Court)

Steven Craig Panter for Appellant - William Jacob Long IV & Christopher Daniel Meyer for Appellee

Briefed by [William L. Moorer](#)

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## BENNETT V. BENNETT

### CIVIL - DOMESTIC RELATIONS

**DIVORCE - CHILD CUSTODY - CHILD'S PREFERENCE** - Miss. Code Ann. § 93-11-65(1)(a) provides that a child's preference may be considered in determining child custody

**DIVORCE - CHILD CUSTODY - CHILD'S PREFERENCE** - The chancellor is not bound by the election of a minor child

**DIVORCE - CHILD CUSTODY - CHILD'S PREFERENCE** - If a chancellor declines to follow a child's election, he must place the reasons in the record

### FACTS

Andre and Julia Bennett are divorced and share joint custody of their two daughters, with Julia maintaining physical custody. Julia made plans to move to St. Louis, Missouri. Andre then petitioned to modify physical custody so his daughters could stay with him in Rankin County. A family master was appointed and held a modification hearing. The eldest daughter testified that if her mother moved, she wished to go with her. After weighing the *Albright* factors, including the eldest child's preference, the family master determined the evidence favored modification of custody to Andre. The chancellor adopted the family master's findings. Julia appealed.

### ISSUE

Whether the chancery court complied with Miss. Code Ann. § 93-11-65(1)(a) by declining to honor the eldest child's stated preference to live with her mother.

### HOLDING

Because the chancellor adopted the findings of the family master explaining the deviation from the child's preference, the chancery court complied with Miss. Code Ann. § 93-11-65(1)(a) by declining to honor the child's stated preference. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Chancery Court.

**Affirmed - 2016-CA-01779-COA (Apr. 10, 2018)**

Opinion by Judge Fair

Hon. John M. McLaurin Jr. (Rankin County Chancery Court)

William P. Featherston Jr. for Appellant - Tameika Ladanya Bennett for Appellee

Briefed by [Nathan Simpson](#)

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## O'BRIEN V. WESTEDT

## CIVIL - REAL PROPERTY

**FAMILY LAW - DIVORCE - PROPERTY SETTLEMENT AGREEMENTS** - In Mississippi, property settlements under divorce actions are binding on the parties if fair, equitable, and supported by consideration  
**APPELLATE PROCEDURE - SCOPE OF REVIEW - QUESTIONS OF LAW** - In Mississippi, an appellate court will not review issues raised on appeal that were not first raised at the trial court level

### FACTS

In 1972, Carroll O'Brien ("Carroll") and his then wife, Susan Westedt, ("Westedt"), purchased 104 acres of land in Simpson County using money that Westedt had inherited from her family. Title to the property was conveyed to Carroll and Westedt as joint tenants with full rights of survivorship and not as tenants in common. Upon their divorce, the parties agreed in the property settlement agreement that any jointly owned property would remain jointly owned, with each party retaining one-half undivided interest. In 1995, Carroll used a twenty-five-year-old power of attorney that Westedt had signed in 1970, while she was still his wife, to quitclaim title of the 104 acres from Westedt and himself to himself and his new wife, Socorro O'Brien ("Socorro"). In 2007, Carroll and Socorro executed a quitclaim deed, conveying the subject property to Socorro. Carroll died in 2012. Westedt subsequently filed a complaint to void the deeds and remove cloud of title to the land. The chancery court granted summary judgment for Westedt, finding that no written agreement existed that would have allowed Carroll convey the property and that all attempts by Carroll to convey the property after the divorce were invalid. Socorro appealed.

### ISSUES

Whether (1) the chancery court erred in finding that the joint tenancy was terminated and Westedt's undivided one-half interest in the property was void or voidable by the 1995 quitclaim deed; and (2) Westedt's complaint should have been dismissed because it was filed after the expiration of the applicable statute of limitations and Socorro's statutory homestead right to undisturbed possession and use of the property should have been considered by the court when ruling on Westedt's motion for summary judgment.

### HOLDING

(1) Because property settlements under divorce actions are binding on the parties if fair, equitable, and supported by consideration, and because Socorro did not claim that the property-settlement agreement entered into by Carroll and Westedt was unfair, inequitable, and not supported by consideration, the contract was enforceable and the conveyances were void. (2) Because the court will not review matters on appeal that were not raised at the trial court level, and because both the statute of limitations and homestead arguments were raised for the first time on appeal, Socorro was not entitled to litigate those issues on appeal. Therefore, the Court of Appeals affirmed the judgment of the Simpson County Chancery Court.

**Affirmed - 2016-CA-01326-COA (Apr. 10, 2018)**

Opinion by Presiding Judge Irving

Hon. David Shoemake (Simpson County Chancery Court)

L. Wesley Broadhead for Appellant - Laura McKinley Glaze for Appellee

Briefed by [Luke Kelly](#)

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## VOSS V. DOUGHTY

### CIVIL - CUSTODY

**FAMILY LAW - VISITATION - MODIFICATION** - A modification of custody is warranted when the moving parent successfully shows that a material change of circumstances has occurred in the custodial home since the most recent custody decree, that the change adversely affects the child, and that modification is in the best interest of the child



**CHANCERY COURT - VISITATION REQUIREMENTS - CONTEMPT** - Whether a party is in contempt is a question of fact to be decided on a case-by-case basis; a chancellor has substantial discretion in deciding contempt matters because of the chancellor's 'temporal and visual proximity' to the litigants

### **FACTS**

Amy Voss and Daven Doughty had a child, Aqua, in November 2014. Voss and Doughty never married. By order in November 2015, the chancery court granted Voss and Doughty joint legal custody, granted Voss physical custody, and granted Doughty visitation in the first and third weekend of each month and on certain holidays. The court also ordered Doughty to pay child support of \$150 per month. The court ordered the parties not to smoke in Aqua's presence and to follow any of Aqua's doctors' recommendations. Voss worked shifts at FedEx from 10 p.m. to 3:30 a.m. during the week and from 10 a.m. to 2 p.m. on Sundays. Voss's mother, Diana Christopher, cared for Aqua while Voss worked. Doughty was unemployed and lived with his wife, mother-in-law, and friend. He applied for disability benefits, but was denied twice. Voss filed a petition to modify visitation, to increase child support, and to hold Doughty in contempt for violating the November 2015 order by exposing Aqua to second-hand smoke. Doughty filed a counterclaim for modification of custody or visitation and for contempt. He alleged that Voss failed to inform him of Aqua's doctors' appointments. The chancellor denied Voss's petition to modify visitation, increase child support, and to hold Doughty in contempt. The chancellor granted Doughty's petition to modify custody and awarded him joint physical custody with Voss, alternating on a weekly basis. The chancellor also terminated Doughty's child support obligation and made each parent responsible for the cost of Aqua's care alternating custody. Voss appealed.

### **ISSUES**

Whether the chancellor erred in (1) modifying custody because there was no change in circumstances and because the chancellor did not perform an *Albright* analysis; and (2) denying Voss's petition to modify visitation and to find Doughty in contempt.

### **HOLDING**

(1) Because modification of child custody is warranted only when the moving parent shows that a material change of circumstances has occurred in the custodial home, and Doughty did not prove that there had been a material change in circumstances that adversely affected Aqua's well-being, the chancellor erred in modifying the custody order. (2) Because the trial judge has wide discretion to grant or deny a motion to hold a party in contempt, and because Voss presented no evidence that the visitation schedule was not working or that Doughty's habits adequately warranted contempt, the chancellor did not err in denying Voss's petition to modify visitation and to find Doughty in contempt. Therefore, the Court of Appeals affirmed the Desoto County Chancery Court.

**Affirmed in Part, Reversed and Rendered in Part - 2016-CA-01799-COA (April 10, 2018)**

Opinion by Judge Wilson

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

Margaret Anna Reid for Appellant - *Pro Se* for Appellee

Briefed by [Andrew P. Cicero, III](#)

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## **WILLIS V. BROOKS**

### **CIVIL - STATE BOARDS & AGENCIES**

**CIVIL PROCEDURE - JURISDICTION - AGENCY ORDERS** - Miss. Code Ann. §§ 47-5-801 through 47-5-807 confer jurisdiction to circuit courts to entertain rule violation report appeals from inmates once they exhaust administrative remedies

**CIVIL PROCEDURE - APPEALS - TIMELINESS** - Under Miss. Code Ann. § 47-5-807, any offender aggrieved by an adverse decision may seek judicial review within thirty days after receipt of the MDOC's final decision

## FACTS

Mac Kenzie Willis is an inmate with the Mississippi Department of Corrections. In detention, Willis was issued a rule violation report for possession of a cell phone and battery. A disciplinary hearing was held where the hearing officer, Latisha Brooks, found Willis in possession and revoked all privileges for eighteen months. Reviewing the incident, Warden Wendell Banks found Willis received a fair and impartial hearing and denied Willis's appeal. Following requisite procedures, Willis exhausted administrative remedies and filed a complaint for judicial review with the Rankin County Circuit Court, which dismissed the complaint for lack of jurisdiction. Willis appealed.

## ISSUE

Whether the circuit court erred in dismissing Willis's case for lack of jurisdiction.

## HOLDING

Because circuit courts have original jurisdiction over appeals from Mississippi Department of Corrections disciplinary hearing, and because Willis filed an appeal to the Rankin County Circuit Court, notwithstanding failing to produce documentation of timely filing, the circuit court erred in dismissing Willis's appeal for lack of subject matter jurisdiction. Therefore, the Court of Appeals reversed and remanded the judgment of the Rankin County Circuit Court.

## DISSENT

Presiding Judge Irving argued that the majority erred in finding that the Rankin County Circuit Court had jurisdiction because the record suggests that Willis failed to obtain proper process as required under Rule 4(d)(5) of the Mississippi Rules of Civil Procedure. Because Willis failed to properly serve the Mississippi Attorney General, he did not file a timely appeal to the circuit court.

### **Reversed & Remanded - 2017-CP-00090-COA (April 10, 2018)**

En Banc Opinion by Presiding Judge Griffis - Dissent by Presiding Judge Irving  
Hon. William E. Chapman III (Rankin County Circuit Court)  
*Pro se* for Appellant - Darrel C. Baughn (Att'y Gen. Office) for Appellees  
Briefed by [D. Kirkwood Palmer](#)

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

### **BOLTON V. STATE**

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

**GUILTY PLEAS - VOLUNTARINESS - STANDARD** - A guilty plea is valid as long as it is entered voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences

**INEFFECTIVE ASSISTANCE OF COUNSEL - SENTENCING - PREDICTIONS** - Inaccurate sentencing predictions by defense counsel did not constitute ineffective assistance of counsel

**EVIDENTIARY HEARING - DISPOSAL - JUDICIAL DEFERENCE** - If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice shall require

## FACTS

Timothy Bolton was indicted for and subsequently pled guilty to two counts of felony child abuse, first-degree arson, sexual battery, and ten felony counts of simple assault on a law enforcement officer. The circuit court accepted Bolton's plea and sentenced him to two consecutive life sentences and additional term-of-years sentences to run concurrently with the second life sentence. Just under three years after he pled guilty, Bolton filed a motion for post-conviction relief alleging that his guilty plea was involuntary and that his former attorney provided ineffective

assistance of counsel. Bolton alleges that his former attorney, Judith Barnett, predicted (“informed [Bolton] that [she] anticipated”) that the judge would sentence him to only ten years in prison, with five years suspended and only five years to serve. The circuit judge, who also conducted Bolton’s plea hearing and imposed his sentence, denied Bolton’s motion for post- conviction relief without an evidentiary hearing. Bolton appealed.

### ISSUES

Whether (1) Bolton’s plea was involuntary; (2) Barnett provided ineffective assistance of counsel; and (3) the circuit court erred by denying his motion for post-conviction relief without an evidentiary hearing.

### HOLDING

(1) Because Barnett’s prediction did not come with any promise or guarantee and the circuit court thoroughly informed and warned Bolton of the possible sentences for his crimes if he pled guilty, Bolton’s plea was not involuntary. (2) Because inaccurate sentencing predictions by defense counsel do not constitute ineffective assistance of counsel, Barnett provided effective assistance of counsel. (3) Because Bolton’s post-conviction claims fail as a matter of law, it was unnecessary for the circuit court to hold an evidentiary hearing on his motion. Therefore, the Court of Appeals affirmed the judgment of the Lee County Circuit Court.

**Affirmed - 2016-CP-01399-COA (Apr. 10, 2018)**

Opinion by Judge Wilson

Hon. Paul S. Funderburk (Lee County Circuit Court)

*Pro Se* for Appellant - Abbie Eason Koonce (Att’y Gen. Office) for Appellee

Briefed by [Katie Berry](#)

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## WATTS V. STATE

### CIVIL - POST-CONVICTION RELIEF

**POST-CONVICTION RELIEF – GROUNDS FOR RELIEF - JURISDICTION** - One of the nine grounds for post-conviction relief under Miss. Code Ann. § 99-39-5 is that the trial court was without jurisdiction to impose sentence

**POST-CONVICTION RELIEF - PROCEDURE - JURISDICTION** - Where the conviction and sentence have been affirmed on appeal or the appeal has been dismissed, the petition for post-conviction relief shall not be filed in the circuit court until the petition shall have first been presented to a quorum of the Justices of the Supreme Court of Mississippi and an order granted allowing the filing of such petition in the circuit court

**POST-CONVICTION RELIEF - PETITION - MERIT** - When the trial court reviews a petition for post-conviction relief, the trial court has an obligation to review the original motion, together with all the files, records, transcripts and correspondence relating to the judgment under attack to determine whether the defendant has proven the merit of the allegations by a preponderance of the evidence

### FACTS

Albert Watts was convicted of armed robbery and sentenced to life imprisonment as a habitual offender under Miss. Code Ann. § 99-19-83. On appeal, the conviction was affirmed; however, the sentence was reversed and remanded. On remand, the sentence was reduced to twenty-three years in prison pursuant to Miss. Code Ann. § 99-19-81. Watts then filed a petition for post-conviction collateral relief (PCCR). The Circuit Court of Leake County found that it lacked jurisdiction to entertain the petition due to Watts’s failure to obtain leave from the Mississippi Supreme Court to proceed in the circuit court. Watts appealed.

### ISSUE

Whether the circuit court had jurisdiction to entertain the petition for PCCR.

### HOLDING

Because Watts's current conviction had not been appealed, he was not required to seek leave to proceed in the circuit court. Watts's petition for PCCR was properly filed in the circuit court pursuant to Miss. Code Ann. § 99-39-7. Therefore, the Court of Appeals reversed and remanded the judgment of the Leake County Circuit Court.

### **DISSENT**

Judge Irving argued that Watts's petition did not meet the pleading requirements of Miss. Code Ann. § 99-39-9(1)(e), thus the decision of the circuit court should be affirmed. He argued that while the majority was correct in asserting that the circuit court did have jurisdiction, there was no need to reverse and remand the issue. The appellate court could affirm the decision if the correct result is reached, even if the trial court reached the result for the wrong reasons.

#### **Reversed & Remanded - 2017-CP-00025-COA (Apr. 10, 2018)**

Opinion by Presiding Judge Griffis - Dissent by Presiding Judge Irving

Hon. Christopher A. Collins (Leake County Circuit Court)

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

Briefed by [Zachary Harper](#)

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## **WEATHERSBY V. STATE**

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

**POST-CONVICTION RELIEF - PLEA - WAIVER** - Upon the entry of a valid guilty plea, certain challenges, including illegal searches, are waived by the defendant

**POST-CONVICTION RELIEF - EVIDENCE - STANDARD** - Bare assertions with no additional information or supporting authority will not be reviewed by appellate courts

### **FACTS**

In October 2015, Antonio Weathersby pled guilty to one count of possession of a firearm by a convicted felon. Weathersby was sentenced to seven years with three years to serve in the custody of the Mississippi Department of Corrections and four years of post-release supervision. In addition, Weathersby was convicted of two misdemeanor crimes—driving with a suspended license and first-offense DUI. All three convictions stemmed from a traffic stop conducted in 2013. Weathersby appealed his misdemeanor convictions to the Marion County Circuit Court. Weathersby also filed a motion to suppress, alleging the traffic stop was illegal. The trial court heard arguments and testimony regarding the motion to suppress, but denied the motion and ultimately convicted Weathersby of the two misdemeanor crimes after finding probable cause existed for the traffic stop. Weathersby filed a timely post-conviction relief (PCR) motion relating to his possession of a firearm by a convicted felon. The trial court determined the claim was without merit and denied Weathersby's PCR motion. Weathersby appealed.

### **ISSUES**

Whether (1) the traffic stop that led to the arrest was illegal; (2) recusal was appropriate by the trial judge after hearing testimony; and (3) there should have been a hearing on appellant's motion to suppress.

### **HOLDING**

(1) Because this issue was waived when a guilty plea to possession of a firearm by a convicted felon was entered, and because the illegal-traffic-stop issue by way of a motion to suppress in regard to his felony conviction was never raised, the court found this claim without merit. (2) Because this argument did not relate to the felony conviction that is the subject of this appeal, it was simply a bare assertion with no additional information or supporting authority. Thus, the court refused to review this claim. (3) Because the trial court conducted a hearing on the motion to suppress prior to the bench trial and found probable cause existed for the traffic stop which gave rise to the two misdemeanor

charges, the court found this issue to be without merit. Therefore, the Court of Appeals affirmed the judgment of the Marion County Circuit Court.

**Affirmed - 2017-CP-00422-COA (Apr. 10, 2018)**

Opinion by Chief Judge Lee

Hon. Prentiss Greene Harrell (Marion County Circuit Court.)

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

Briefed by [Nikki Breeland](#)

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## **COURT OF APPEALS - CRIMINAL CASES**

### **FAIRLEY V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - EXPERT WITNESS - TESTIMONY** - A testifying witness’s testimony does not violate a defendant’s Sixth Amendment rights when the testifying witness is a court-accepted expert in the relevant field who participated in the analysis in some capacity, such as by performing procedural checks

**CRIMINAL PROCEDURE - CONFRONTATION CLAUSE - EXPERT WITNESS** - In determining whether a witness satisfies the defendant’s right to confrontation, the court must consider (1) whether the witness has “intimate knowledge” of the particular report, even if the witness was not the primary analyst or did not perform the analysis firsthand and (2) whether the witness was “actively involved in the production” of the report at issue

#### **FACTS**

On July 15, 2015, Chris Fairley shot and killed Mark Fairley in Biloxi. The chief medical examiner for the State of Mississippi, Dr. Mark LeVaughn, testified that Mark had been shot three times with a fatal wound to the head. Fairley objected to Dr. LeVaughn’s testimony because he had not performed the autopsy, but the trial court denied Fairley’s objection. Fairley was convicted of murder and sentenced to life in the custody of the Mississippi Department of Corrections. Fairley appealed.

#### **ISSUES**

Whether (1) Fairley’s right to confront a witness against him was violated; and (2) the evidence was sufficient to support his conviction.

#### **HOLDING**

(1) Because a testifying witness is a court-accepted expert in the relevant field who participated in the analysis in some capacity, and because Dr. LeVaughn examined the actual autopsy procedures, reports, documents, and consulted with the performing doctor, there was no violation of Fairley’s right to confront a witness against him. (2) Because the jury was instructed on murder, heat-of-passion manslaughter, imperfect self-defense, and self-defense after hearing that Fairley and Mark argued, Fairley first shot mark from approximately 15 feet away, Mark ran toward his car, Fairley followed him and continued to shoot, Mark did not have a weapon in his car or near his body, and it was for the jury to decide whether the elements of murder were proven by the State, this issue was without merit and the evidence was legally sufficient to support the verdict. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

**Affirmed - 2017-KA-00482-COA (April 10, 2018)**

Opinion by Chief Judge Lee

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

Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd & Joel Smith (Att’y Gen. Office) for Appellee

Briefed by [Michael Farese](#)

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## MOORE V. STATE

### CRIMINAL - FELONY

**CRIMINAL PROCEDURE - APPEAL - LINDSEY BRIEF** - A *Lindsey* brief may be filed if, after scouring the record thoroughly, counsel reaches the conclusion that there are no arguable issues supporting the client's appeal

**CRIMINAL PROCEDURE - APPEAL - LINDSEY BRIEF** - Should the defendant raise any arguable issue after counsel files a *Lindsey* brief, or should the appellate court discover any arguable issue in its review of the record, the court must, if circumstances warrant, require appellate counsel to submit supplemental briefing on the issue, regardless of the probability of the defendant's success on appeal

### FACTS

Gerome Moore was confined at the Hinds County Detention Center for his arrest for capital murder and carjacking. Officer Willie Brown spotted three juveniles, including Moore, running from the jail. Moore was apprehended and charged with felony escape and malicious mischief. He was acquitted of the malicious mischief charge but convicted of felony escape. Moore appealed.

### ISSUE

Whether there are any arguable issues to support Moore's appeal.

### HOLDING

Because there was evidence to support the jury's finding that Moore was guilty of felony escape, there were no arguable appellate issues and a *Lindsey* brief was properly filed by the Office of the State Public Defender. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

**Affirmed - 2016-KA-01329-COA (Apr. 10, 2018)**

Opinion by Judge Barnes

Hon. Jeff Weill Sr. (Hinds County Circuit Court)

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Joseph Scott Hemleben (Att'y Gen. Office) for Appellee

Briefed by [Tyler Alcorn](#)

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## SAUNDERS V. STATE

### CRIMINAL - FELONY

**EVIDENCE - AUTHENTICITY - PRIMA FACIE SHOWING** - A party seeking to enter evidence must make a prima facie showing of its authenticity, but ultimate determination of authenticity is a question reserved for the jury, not the court

**EVIDENCE - AUTHENTICITY - SCOPE OF OBJECTION** - Mere objection to admissibility of evidence does not constitute an objection to testimony made to assert the authenticity of the evidence

**EVIDENCE - ADMISSIBILITY - TEXT MESSAGE CONTENTS** - Testimony on the content of a text message that a party seeks to introduce as evidence is not hearsay

### FACTS

Marquis Saunders moved from New York to D'Iberville, Mississippi to stay with his girlfriend, Shantile Torres, and



her daughter. Torres and daughter lived with Jamel Jones and his wife Maxine for four months prior to Saunders moving in with them. On January 31, 2015, Jones left to go a local store in his family's SUV. Shortly after he left their home, Jones's daughter Starquasha Colon heard gunshots, and was unable to reach Jones when she tried to call him. An autopsy confirmed that Jones's cause of death was multiple gunshot wounds. Colon testified that the family SUV was missing. Several neighbors testified hearing gunshot wounds, and one neighbor stated that he actually saw Saunders shoot Jones. Approximately thirty minutes after the shooting, Saunders was found driving the family SUV. Saunders's hands tested positive for gunshot residue. Among other evidence, a screenshot was admitted at trial that suggested Saunders was taking a Greyhound bus back to New York the night after Jones's death, as well as an officer's testimony regarding the authenticity of the text. Saunders was convicted of first-degree murder and car theft in the Second Judicial District of Harrison County. He was sentenced to life in prison for the murder conviction and five years for car theft, with sentences to run concurrently. Saunders filed a JNOV motion, or for a new trial, which the trial court denied. Saunders appealed.

### ISSUE

Whether the trial court erred in admitting a screenshot of a text message found on Saunders' phone as evidence and testimony from an investigating officer relating to the authenticity of the screenshot.

### HOLDING

While authentication or identification is a condition precedent to admissibility of evidence, and text messages found on one's phone are generally not sufficient to support authenticity, the investigating officer's testimony on the authenticity of the screenshot taken from the phone was sufficient for a prima facie showing of authenticity. Further, because Saunders failed to raise an objection at trial to the investigating officer's testimony authenticating the content of the text, Saunders was barred from raising this objection on appeal. The officer only testified why the screenshot was taken, and that she was present when it was taken. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

#### **Affirmed - 2017-KA-00188-COA (Apr. 10, 2018)**

Opinion by Judge Westbrook

Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court, Second Judicial Dist.)

Justin Taylor Cook (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Hale Neilson](#)

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## **THOMPSON V. STATE**

### **CRIMINAL - FELONY**

**MURDER - WEIGHT OF THE EVIDENCE - DELIBERATE DESIGN** - Deliberate design to kill a person may be formed very quickly, only moments before the act of consummating the intent

**MURDER - JURY INSTRUCTIONS - CAUTIONARY INSTRUCTION** - If all instructions taken as a whole fairly, but not necessary perfectly, announce the applicable rules of law, no errors result

**MURDER - MISTRIAL - DOUBLE JEOPARDY** - There must be an actual acquittal or conviction on the merits to bar another prosecution

### FACTS

In 2009, Dennis Thompson was indicted for one count of conspiracy to commit robbery and one count of capital murder. During the trial, Thompson requested the jury be instructed to consider simple murder if Thompson was found not guilty of conspiracy to commit robbery. The jury unanimously found Thompson not guilty on conspiracy to commit robbery, but was deadlocked on the lesser-included offense of murder. The trial court ordered a mistrial and held the retrial be limited to the lesser-included offense of murder. At the re-trial, Danny Starks testified that he, along with Thompson and David McLymont, was at a Double Quick when Thompson engaged Carlos Burford in a

conversation. Starks said Thompson asked Buford about a ride and they all got into Buford's car. Starks testified McLymont and Buford started to wrestle and Thompson pulled out a gun and shot Buford in the back of the head. Noah, an inmate with Thompson in the Coahoma County jail, also testified he talked to Thompson during their time in jail, and Thompson had told him he shot Buford in the back of the head. The court refused Thompson's requested cautionary instruction about jailhouse informants, but granted a cautionary instruction that advised the jury to view informant testimony with caution and suspicion. Thompson did not request a cautionary instruction as to Stark's testimony. The jury unanimously found Thompson guilty of murder. Thompson appealed.

### **ISSUES**

Whether (1) the weight and sufficiency of the evidence supported the conviction; (2) the trial court erred by admitting unreliable witness testimony; (3) the second trial violated double jeopardy; and (4) the indictment for capital murder was sufficient for the purpose of retrying him for murder.

### **HOLDING**

(1) Because deliberate design may be inferred from use of a deadly weapon, the evidence was sufficient for the jury to convict. Additionally, allowing the murder conviction to stand was not an unconscionable injustice, and the error was without merit. (2) Because the jury instruction fairly announced the applicable law and because any inherent unreliability in either Stark's or Noah's testimony was brought out on cross-examination, there was no error. (3) Because the judge granted a mistrial when the jury was hopelessly deadlocked, the subsequent retrial did not violate Thompson's right against double jeopardy. (4) Because a request for a lesser offense instruction applied to retrial, Thompson's request for a lesser-included offense waived any inadequacy or notice in the indictment. Further, the jury could convict him of any lesser-included offense, even if the lesser-included was not listed in a separate count of the indictment. Therefore, the Court of Appeals affirmed the judgment of the Coahoma County Circuit Court.

### **DISSENT**

Judge Carlton argued Thompson's verdict should be reversed and remanded for the trial court to reinstate the charged indictment. Because Thompson was not prosecuted in the subsequent trial for the offenses charged in the indictment, the jury should have been instructed on the charged offense before considering the lesser included offense.

#### **Affirmed - 2015-KA-00748-COA (Apr. 10, 2018)**

En Banc Opinion by Judge Greenlee - Dissent by Judge Carlton

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

Daniel Christopher Jones for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee

Briefed by [Sarah Raben](#)

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