

**MISSISSIPPI SUPREME COURT DECISIONS – JUNE 25, 2020****SUPREME COURT - POST-CONVICTION RELIEF****WALKER V. STATE****CIVIL - POST-CONVICTION RELIEF**

**CRIMINAL LAW - INEFFECTIVE ASSISTANCE OF COUNSEL - ADEQUACY OF REPRESENTATION** - The standard for assessing an ineffective-assistance-of-counsel claim is whether counsel's conduct undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result

**CRIMINAL LAW - POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL** - In order to successfully establish an ineffective-assistance-of-counsel claim, the defendant must prove that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced the defense of his case

**POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF** - At a post-conviction-relief hearing, the burden of proof is on the defendant to persuade the trial judge by a preponderance of the evidence that his trial attorney failed to provide constitutionally adequate representation

**CRIMINAL LAW - COUNSEL - ADEQUACY OF REPRESENTATION** - A strong presumption exists that counsel's conduct fell within the wide range of reasonable professional assistance and in assessing counsel's performance

**FACTS**

Alan Dale Walker was convicted of the capital murder of Konya Edwards during the commission of sexual battery and was sentenced to death. He was also convicted of forcible rape and kidnapping, for which he was sentenced to thirty and thirty-five years, to run consecutively. The case was remanded to the trial court for a hearing to determine whether Walker's trial counsel was ineffective under the standard set forth in *Strickland v. Washington*. After a hearing on remand, the circuit court held that Walker failed to meet his burden of proof that his trial counsel had rendered ineffective assistance that prejudiced him. Walker appealed.

**ISSUES**

Whether the trial court erred in (1) finding that Walker was not denied effective assistance of counsel in the penalty phase and (2) denying Walker's request to reopen the evidentiary hearing.

**HOLDING**

(1) Because of the highly deferential standard of review given to the trial court's factual findings, and because of the high burden placed on Walker at the post-conviction-relief hearing, the trial court did not err by finding that Walker's counsel's strategy was reasonable. (2) Because of the limited usefulness of additional testimony from Walker's counsel, who exhibited memory problems throughout his testimony, and because the circuit court correctly considered the report from the perspective of Walker's counsel, the trial court did not err by denying Walker's request to reopen the hearing. Therefore, the Supreme Court affirmed the judgment of the Harrison County Circuit Court.

**CONCURRENCE**

Justice Kitchens argued that the circuit court erred by finding that Walker failed to meet his burden to prove deficient performance by a preponderance of the evidence because Walker's trial counsel did almost no investigation relevant to the trial's penalty phase. However, he also argued that the circuit court did not clearly err by finding that Walker incurred no prejudice from the deficiency.

**Affirmed - 2018-CA-01059-SCT (June 25, 2020)**

En Banc Opinion by Justice Coleman - Concurrence by Presiding Justice Kitchens  
Hon. Christopher Louis Schmidt (Harrison County Circuit Court)  
James W. Craig, David P. Voisin, & Hannah Loomers-Johnson for Appellant - Lodonna C. Holland, Marvin L. White Jr., & Brad A. Smith (Att'y Gen. Office) for Appellee  
Briefed by [Haley Nutt](#)

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

---

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

### **IN RE: MISS. R. EVID.**

#### **EN BANC ORDER**

**EVIDENCE - LAWYER-CLIENT PRIVILEGE - WORK-PRODUCT PROTECTION** - Pursuant to Miss. R. Evid. 502, work-product protection means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial

**EVIDENCE - HEARSAY EXCEPTIONS - ABSENCE OF A PUBLIC RECORD** - Pursuant to Miss. R. Evid. 803(10)(B), testimony – or a certification under Rule 902 – that a diligent search failed to disclose a public record or statement if in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least fourteen days before trial, and the defendant does not object in writing within seven days of receiving the notice – unless the court sets a different time for the notice or the objection

**EVIDENCE - SELF-AUTHENTICATING EVIDENCE - CERTIFIED RECORDS** - Pursuant to Miss. R. Evid. 902(12), the following items of evidence are self-authenticating and require no extrinsic evidence of authenticity in order to be admitted: a record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification and notice requirements of 902(11)

#### **ORDER**

This en banc Order by the Mississippi Supreme Court, made in consideration of the motion filed by the Advisory Committee on Rules, amends Mississippi Rules of Evidence 502, 803(6)-(8), 803(10), 803(16), 804(b)(3)(B), and 902(12)-(13). The amendments shall be effective on July 1, 2020.

[Exhibit A](#), referenced in and attached to the Order, amends Rule 502. Lawyer-Client Privilege; Rule 803. Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant is Available as a Witness; Rule 804(b)(3). Exceptions to the Rule Against Hearsay – When the Declarant is Unavailable as a Witness: Statement Against Interest; Rule 902. Evidence That is Self-Authenticating.

**Affirmed - 89-R-99002-SCT (June 25, 2020)**

En Banc Order by Chief Justice Randolph

Briefed by [Brittany Brewer](#)

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

---

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

### **WALTER V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - NO APPEALABLE ISSUES - LINDSEY BRIEF REQUIREMENTS** - Pursuant to *Lindsey v. State*, counsel must certify in their Miss. R. App. P. 28 brief that he or she reached this conclusion after thoroughly examining: (a) reason for and circumstances surrounding the arrest; (b) any possibly violations of client's right to counsel; (c) the entire trial transcript; (d) all trial court rulings; (e) possible prosecutorial misconduct; (f) all jury instructions; (g) all exhibits, whether admitted into evidence or not; (h) possible misapplication of the law in sentencing; (i) the indictment and all pleadings in the record; (j) any possible ineffective assistance-of-counsel issues; (k) any speedy trial issues; (l) any Fourteenth Amendment Due Process issues; (m) evidence of other bad acts; and (n) any other possible reviewable issues

**CRIMINAL PROCEDURE - NO APPEALABLE ISSUES - NOTICE REQUIREMENTS** - Pursuant to *Lindsey v. State*, counsel must send a copy of the Miss. R. App. P. 28 8 brief to the defendant, inform the client that counsel could not find any arguable issues in the record, and advise the client of their right to file a pro se brief

### **FACTS**

Darrell Walter was in a building where several men were gambling. Several shots were fired, and Kelvin Dwayne Blackburn was killed. At trial, Mack Riley testified he was shooting dice with Walter and Blackburn. Riley also testified that after a couple hours, Walter approached Blackburn with a gun and attempted to rob him. A struggle ensued, and Walter shot Blackburn several times before he fell to the ground. Walter continued to shoot Blackburn until his gun was empty. David Jackson, the building owner, testified he saw Walter pointing a gun at Blackburn earlier before running to hide during the struggle over the gun. Jason Roberson testified he saw Walter shoot Blackburn several times in the head before stealing his winnings. A fourth man, Elliott Hunt, testified Walter had attempted to rob Blackburn as well by brandishing a gun. The jury found Walter guilty of capital murder and aggravated assault, both with firearm enhancements, and he was sentenced to life without parole, ten years for aggravated assault, and an additional five years for the firearm enhancement. Walter's counsel filed a brief pursuant to *Lindsey v. State*, asserting he found no arguable issues for appeal. Walter's counsel also mailed Walter a copy of this brief and informed him of his right to file a pro se brief, which Walter did not file. Walter filed post-trial motions, arguing the evidence was insufficient to support the guilty verdicts and the weight of the evidence did not support the verdicts. Water also alleged juror misconduct. The trial court denied Walter's post-trial motions. Walter appealed.

### **ISSUES**

Whether (1) Walter's attorney complied with all of the requirements set forth in *Lindsey* and (2) whether the State proved the requisite elements of capital murder with firearm enhancement and aggravated assault with firearm enhancement.

### **HOLDING**

(1) Because Walter's attorney filed the appropriate brief stating he diligently searched the record and failed to find any arguable issues for appeal, and because Walter's counsel mailed Walter a copy of this brief and informed Walter of his right to file a pro se brief, Walter's attorney complied with all requirements set forth in *Lindsey*. (2) Because there was sufficient proof established that Walter shot and killed Blackburn during the commission of a robbery and that Walter shot Roberson with a deadly weapon, the State proved the requisite elements of capital murder with firearm enhancement and aggravated assault with firearm enhancement. Therefore, the Supreme Court affirmed the judgment of the Quitman County Circuit Court.

**Affirmed - 2019-KA-00682-SCT (June 25, 2020)**

Opinion by Chief Justice Randolph

Hon. Linda F. Coleman (Quitman County Circuit Court)

George T. Holmes & W. Daniel Hinchcliff (Pub. Def. Office) for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [Charles Ellzey](#)

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

**MISSISSIPPI COURT OF APPEALS DECISIONS – JUNE 23, 2020**

**COURT OF APPEALS - CIVIL CASES**

## ALSTON V. MISS. DEP'T OF EMP'T SEC.

### CIVIL - STATE BOARDS & AGENCIES

**TORTS - CIVIL CONSPIRACY - ELEMENTS** - The elements of civil conspiracy are (1) an agreement between two or more persons; (2) to accomplish an unlawful purpose or a lawful purpose unlawfully; (3) an overt act in furtherance of the conspiracy; (4) and damages to the plaintiff as a proximate result

**TORTS - INTENTIONAL MISREPRESENTATION - ELEMENTS** - The elements of intentional misrepresentation are (1) a representation; (2) that is false; (3) and material; (4) that the speaker knew was false or was ignorant of the truth; (5) combined with the speaker's intent that the listener act on the representation in a manner reasonably contemplated; (6) combined with the listener's ignorance of the statement's falsity; (7) and the listener's reliance on the statement as true; (8) with a right to rely on the statement; and (9) the listener's proximate injury as a consequence

**TORTS - DUTY OF LOYALTY - FIDUCIARY DUTY** - The duty of loyalty is fiduciary in nature

**TORTS - FRAUD - ELEMENTS** - The elements of fraud are identical to the elements of intentional misrepresentation

**TORTS - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS - ELEMENTS** - The elements of intentional infliction of emotional distress are (1) the defendant acted willfully or wantonly toward the plaintiff by committing certain described actions; (2) the defendant's acts are ones which evoke outrage or revulsion in civilized society; (3) the acts were directed at, or intended to cause harm to, the plaintiff; (4) the plaintiff suffered severe emotional distress as a direct result of the acts of the defendant; and (5) such resulting emotional distress was foreseeable from the intentional acts of the defendant

**TORTS - NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS - DEMONSTRABLE HARM** - In order to recover emotional distress damages resulting from ordinary negligence, a plaintiff must prove some sort of physical injury or demonstrable harm, and that harm must have been reasonably foreseeable to the defendant

### FACTS

Jason Alston was an employee with the Mississippi Department of Transportation ("MDOT") from September 1, 2012, until October 26, 2015. Once his employment ended, Alston filed for unemployment benefits with the Mississippi Department of Employment Security ("MDES"), and an administrative law judge denied his request. On August 21, 2017, Alston filed a pro se complaint against MDES in the Hinds County Circuit Court, alleging the following tort theories stemming from his denial of unemployment benefits: civil conspiracy, intentional misrepresentation, breach of duty and loyalty, fraud, intentional infliction of emotional distress, and negligent infliction of emotional distress. The circuit court granted MDES's motion to dismiss for failure to state a claim pursuant to Miss. R. Civ. P. 12(b)(6) because Alston's claims contained nothing other than conclusory allegations and unsupported legal theories. Alston appealed.

### ISSUES

Whether the circuit court judge erred in denying Alston's claim for (1) civil conspiracy; (2) intentional misrepresentation; (3) breach of duty of loyalty; (4) fraud; (5) intentional infliction of emotional distress; and (6) negligent infliction of emotional distress.

### HOLDING

(1) Because Alston did not set forth any specific facts that would substantiate an agreement between MDES and MDOT, the circuit court's ruling was correct as to civil conspiracy. (2) Because no evidence was presented that MDES made any misrepresentations to Alston that were false, the circuit court's ruling to dismiss Alston's claim for intentional misrepresentation was correct. (3) Because no facts were presented that would indicate that MDES had any actionable fiduciary duty to Alston, and because Alston did not plead with particularity what regulation or statute MDES failed to comply with, the circuit court's ruling as to breach of a duty of loyalty was correct. (4) Because Alston did not present any evidence that MDES made any representations to Alston that were false, the circuit court's ruling to dismiss Alston's claim of fraud was correct. (5) Because Alston did not offer any facts to support his conclusory statements, his claim for intentional infliction of emotional distress was correctly dismissed. (6) Because Alston failed to set forth sufficient facts linking his treatment at a hospital to any wrongdoings of MDES, his claim of negligent infliction of emotional

distress was correctly denied. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

**Affirmed - 2019-CC-01220-COA (June 23, 2020)**

En Banc Opinion by Judge Lawrence

Hon. Winston L. Kidd (Hinds County Circuit Court, First Judicial Dist.)

*Pro se* for Appellant - Robert E. Sanders for Appellee

Briefed by [Luke Seymour](#)

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

## **MABUS V. MUELLER INDUS.**

### **CIVIL - WORKERS' COMPENSATION**

**WORKERS' COMPENSATION - RECONSIDERATION OF CLAIM - REQUIREMENTS** - Pursuant to Miss. Code Ann. § 71-3-53, the Mississippi Workers' Compensation Commission only has the authority to review or reconsider a claim if the claimant meets the burden of proving a change of condition or a mistake in determination of fact since the original claim

**WORKERS' COMPENSTATION - PROCEDURE - ADMITTING EVIDANCE** - According to Miss. Workers' Compensation Procedural Rule 2.9, the Mississippi Workers' Compensation Commission has discretion to admit any additional evidence offered on review

**WORKERS' COMPENSATION - RES JUDICATA - EXCEPTION** - In the context of workers' compensation, the Commission has discretionary authority to terminate, continue, reinstate, increase, or decrease such compensation or award compensation in an otherwise final case if there is a change in condition or a mistake in determination of fact

**CIVIL PROCEDURE - APPEALS - FRIVOLOUS APPEALS** - In a civil case, if the Supreme Court or Court of Appeals determines that an appeal is frivolous, it shall award just damages and single or double costs to the appellee; an appeal is frivolous when the appellant has no hope of success

### **FACTS**

Barry Mabus suffered a back injury while employed at Mueller Industries ("Mueller"). After finding that Mabus failed to show that he suffered a continuous work-related injury, the Mississippi Workers' Compensation Commission ("the Commission") denied permanent disability benefits and medical-treatment payments. Four years later, Mabus filed a motion for medical-treatment benefits, alleging that he needed medical treatment and that his condition had worsened since the administrative judge's ("AJ") order. Mueller filed a motion to dismiss, alleging that Mabus was attempting to re-litigate the same issue that the AJ previously denied. Mabus then filed a response, attaching an exhibit list with medical documentation that the prior AJ did not allow to be introduced into evidence at the first hearing. The AJ denied Mabus's motion for medical treatment, explaining that Mabus failed to meet his burden of proving a change in conditions or a mistake in determination of fact. The Commission held that Mabus was simply seeking to re-litigate a previously decided issue without the presentation of evidence to support his position. The Commission also remanded the case back to the AJ for the limited issue of the imposition of sanctions and/or attorney fees. Mabus appealed.

### **ISSUES**

Whether (1) Mabus failed to meet his burden to prove a change in condition or a mistake in determination of fact; (2) the Commission erred in denying Mabus's motion to depose Dr. Moizuddin; (3) the Commission erred in finding that Mabus was attempting to re-litigate a previously decided issue; and (4) Mabus filed a frivolous appeal.

### **HOLDING**

(1) Because the Commission correctly found that Mabus's medical condition had not changed between the first and second claim, Mabus failed to meet the burden of proving a change in condition or a mistake in determination of fact. (2) Because Mabus attempted to depose a new doctor on the eve of Mabus's motion hearing, and because the new doctor was not mentioned in his motions, the Commission did not err in denying Mabus's motions to depose the

doctor. (3) Because Mabus did not prove a change in condition or mistake in determination of fact, the Commission did not err in finding that Mabus was attempting to re-litigate a previously decided issue. (4) Because Mabus did show a little hope of appeal by attempting to bring in previously barred evidence, Mabus did not file a frivolous appeal. Therefore, the Court of Appeals affirmed the judgment of the Mississippi Workers' Compensation Commission.

**Affirmed - 2019-WC-00983-COA (June 23, 2020)**

Opinion by Presiding Judge Carlton

Mississippi Workers' Compensation Commission

Roy O. Parker Jr. for Appellant - David B. McLaurin for Appellees

Briefed by [Daniel Bond](#)

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

## WALKER V. CELLULAR SOUTH, INC.

### CIVIL - PERSONAL INJURY

**EVIDENCE - EXPERT OPINIONS - DAUBERTSTANDARD** - The modified *Daubert* standard involves a two-prong inquiry: (1) whether the expert opinion is relevant, in that it will assist the trier of fact and (2) whether the proffered opinion is reliable

**TORTS - PREMISES LIABILITY - BUSINESS INVITEE DUTY OF CARE** - Under Mississippi law, there are three theories under which a party can prove a breach of the duty owed a business invitee by showing that (1) some negligent act of the defendant caused his injury; (2) the defendant had actual knowledge of a dangerous condition and failed to warn the plaintiff; or (3) the dangerous condition existed for a sufficient amount of time to impute constructive knowledge to the defendant, in that the defendant should have known of the dangerous condition

**EVIDENCE - SPOILIATION - SANCTIONS** - Whether missing evidence is an "integral component" or was conclusive evidence that would have resolved the plaintiff's case is determinative of sanctions for spoliation of evidence

**EVIDENCE - SPOILIATION - INTENT** - In order to warrant a negative jury instruction regarding spoliation, failure to preserve evidence must be intentional or grossly negligent

**CIVIL PROCEDURE - POST-JUDGMENT MOTIONS - ALTER OR AMEND** - To succeed on a Rule 59(e) motion to alter or amend judgment, the movant must show (1) an intervening change in controlling law; (2) availability of new evidence not previously available; or (3) need to correct a clear error of law or to prevent manifest injustice

### FACTS

Pete Walker, an elderly man, went to a C Spire store (owned by Cellular South) to get his cellphone's voicemail fixed. While trying to sit on a tall, barstool-like chair, Walker slipped. A store employee watched a surveillance video of the incident and filled out a post-incident report, which indicated that Walker was sitting in the chair with it tilted forward. Walker sent the store a medical bill two months after the incident. A few months later, Walker retained counsel and requested surveillance video of the incident, but the store's surveillance cameras automatically deleted video recordings every three weeks. During discovery, Walker designated an expert witness, who created a report. The expert's report opined that the store's floor did not have enough traction to support the chair legs, based on a lower-than-average coefficient-of-friction ("COF"). Cellular South offered a contradictory expert opinion, which averred that the methodologies that Walker's expert used were improperly based on walking surface COF standards, whereas the chair was a stationary object. Cellular South moved to exclude Walker's expert based on his reliance on flawed methodology. Walker filed a motion for sanctions, asserting that Cellular South engaged in spoliation of evidence by deleting the surveillance video of the incident. Cellular South then moved for summary judgment. The trial court excluded Walker's expert, denied Walker's motion for sanctions, and granted Cellular South's motion for summary judgment. Walker appealed.

### ISSUES



Whether the trial court erred in (1) excluding Walker’s expert; (2) granting Cellular South’s motion for summary judgment; (3) denying Walker’s motion for sanctions regarding spoliation of surveillance video; and (4) denying Walker’s motion to alter or amend the judgment.

### **HOLDING**

(1) Because Walker’s expert relied on walking surface COF standards, his opinions were irrelevant to the facts at issue and would not assist the trier of fact and, as a result, the trial court did not err in excluding his opinions. (2) Because Walker offered no evidence outside of the excluded expert report, the trial court did not err in granting Cellular South’s motion for summary judgment. (3) Because surveillance video of Walker falling could not overcome evidentiary shortcomings related to whether a dangerous condition existed, and because Cellular South did not intentionally destroy the surveillance video, the trial court did not err in denying Walker’s motion for sanctions regarding spoliation of the surveillance video. (4) Because Walker merely reiterated prior facts and arguments, the trial court did not err in denying Walker’s motion to alter or amend the judgment. Therefore, the Court of Appeals affirmed the judgment of the Bolivar County Circuit Court.

**Affirmed - 2019-CA-00276-COA (June 23, 2020)**

Opinion by Presiding Judge Carlton

Hon. Albert B. Smith III (Bolivar County Circuit Court, Second Judicial Dist.)

Edward D. Lamar & Frank J. Dantone Jr. for Appellant - Sheldon G. Alston & Robert Lane Bobo for Appellee

Briefed by [Eli Scott](#)

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

---

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

### **CURTIS V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL LAW - JURY INSTRUCTIONS - LESSER-INCLUDED OFFENSE** - The jury should not be presented with a lesser-included-offense instruction unless the record provides an evidentiary basis for the instruction  
**CONSTITUTIONAL LAW - RIGHT TO COUNSEL - INEFFECTIVE ASSISTANCE OF COUNSEL** – Although there is a right to competent counsel, there is no constitutional right to errorless counsel

### **FACTS**

Gabriel Curtis was seventy-five-year-old Willis Cassidy’s live-in caretaker and handyman. One night, Cassidy announced that he intended to sell the house, which resulted in an argument. Curtis claimed that during this argument, Cassidy demanded oral sex from Curtis and pulled a gun on him when he refused. Curtis wrestled the gun away from Cassidy and hit him in the face with the gun three times. Curtis then choked Cassidy and shot Cassidy’s barking dog. This caused Cassidy to hit Curtis with a pool cue. Curtis claimed that he then accidentally shot Cassidy in the head. Curtis then dumped Cassidy’s body. The police quickly apprehended Curtis, who did not dispute that he killed Cassidy. At trial, the medical examiner testified that Cassidy had been strangled and suffered numerous blunt force injuries to his face and the back of his head, back, left arm, and neck. The cause of death was determined to be a combination of beating and strangulation. There were three blunt injuries to Cassidy’s face. The jury was instructed on first-degree (deliberate-design) murder, self-defense, and imperfect self-defense (manslaughter). The trial court declined to instruct the jury on second-degree (depraved-heart) murder or heat-of-passion manslaughter. The jury found Curtis guilty of first-degree murder and unlawful possession of a firearm by a felon. The trial court sentenced Curtis to serve life imprisonment for murder and a concurrent term of ten years on the firearm charge. Curtis appealed.

### **ISSUES**

Whether (1) the circuit court erred in refusing to instruct the jury on depraved-heart murder and heat of passion manslaughter and (2) Curtis received ineffective assistance of counsel.

## **HOLDING**

(1) Because the record provided no evidentiary basis for depraved-heart murder and heat of passion manslaughter, the circuit court did not err in refusing to instruct the jury on the lesser-included-offenses. (2) Because Curtis's trial counsel's mistake did not deprive Curtis of a fair trial, Curtis did not receive ineffective assistance of counsel. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

**Affirmed - 2019-KA-00258-COA (June 23, 2020)**

Opinion by Presiding Judge J. Wilson

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

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Barbara Byrd (Att'y Gen. Office) for Appellee

Briefed by [Michael Sturgus](#)

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

## **GILES V. STATE**

### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - SIXTH AMENDMENT - SPEEDY TRIAL** - Courts analyze four factors when a defendant alleges that his or her constitutional right to a speedy trial has been violated: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right; and (4) prejudice to the defendant

**CRIMINAL PROCEDURE - SIXTH AMENDMENT - SPEEDY TRIAL** - Although a delay of more than eight months from the time of formal indictment or arrest and the trial is presumptively prejudicial, congested trial court dockets may constitute good cause for a trial's delay

**CRIMINAL PROCEDURE - SPEEDY TRIAL - STATUTORY RIGHT** - Under Miss. Code Ann. § 99-17-1, unless good cause is shown and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned

### **FACTS**

Anthony Giles was arrested for murder on April 15, 2015. Giles was indicted on June 1, 2016, arraigned six days later, and filed a demand for a speedy trial on June 30, 2016. Giles remained incarcerated at all times subsequent to his arrest. Following his indictment, Giles's trial was continued several times due to court congestion. The State offered sparse evidence in defense of its claim that the cause for the delay was overcrowded dockets. Giles nonetheless offered no evidence to contradict the State's position. Giles was ultimately tried on January 28, 2019, and a Coahoma County jury convicted him of two counts of first-degree murder. Giles filed a motion for judgment notwithstanding the verdict, or alternatively, a new trial, both of which were denied by the trial court. Giles appealed.

### **ISSUES**

Whether (1) Giles's constitutional right to a speedy trial was violated and (2) Giles's statutory right a speedy trial was violated.

### **HOLDINGS**

(1) Because the trial court's overcrowded docket constituted good cause for the delay, and because Giles was incarcerated for more than a year before asserting his right to a speedy trial and was otherwise unable to show actual prejudice, the trial court did not err in finding that Giles's constitutional right to a speedy trial was not violated. (2) Because the trial court's overcrowded docket constituted good cause for the delay, the trial court did not err in finding that Giles's statutory right to a speedy trial was not violated. Therefore, the Court of Appeals affirmed the judgment of the Coahoma County Circuit Court.

### **DISSENT**

Judge McCarty argued that the record was devoid of any evidence of good cause which would excuse the extensive forty-six-month period between Giles's arrest and the trial. He argued that, while overcrowded dockets can constitute



good cause for delay in bringing a defendant to trial, Giles's 1,386-day delay was nearly three times the length of the most analogous precedent to the facts of the case (321 days). Accordingly, Judge McCarty would reverse the conviction and render the defendant free to go.

**Affirmed - 2019-KA-00309-COA (June 23, 2020)**

Opinion by Judge C. Wilson - Dissent by Judge McCarty

Hon. Albert B. Smith III (Coahoma County Circuit Court)

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

Briefed by [Breland Parker](#)

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

## KENNEDY V. STATE

### CRIMINAL - FELONY

**EVIDENCE - JURY INSTRUCTION - CIRCUMSTANTIAL EVIDENCE** - If there is no confession or eyewitness testimony to the gravamen of the offense charged, the defendant is entitled to an instruction requiring the jury to exclude every other reasonable hypothesis other than that of guilt before a conviction can be had

**EVIDENCE - JURY INSTRUCTION - TWO-THEORY INSTRUCTION** - A two-theory instruction provides that when a jury has considered facts and circumstance, along with all other evidence, and every reasonable theory of innocence has been excluded, the jury must resolve the case in favor of the defendant

**EVIDENCE - JURY INSTRUCTION - TWO-THEORY INSTRUCTION** - To receive the two-theory instruction, the evidence must be purely circumstantial and two reasonable hypotheses or theories arising out of the evidence must be presented to the jury

**EVIDENCE - JURY INSTRUCTION - DIRECT EVIDENCE** - If any evidence qualifies as direct evidence, the court may refuse a circumstantial-evidence instruction

### FACTS

Andre Kennedy was convicted of armed robbery, attempted kidnapping, and burglary of a dwelling. Kennedy and his accomplice had their faces covered during the act. However, the victim testified as to Kennedy's appearance and his vehicle, which was caught on surveillance video. In addition, Kennedy's girlfriend and his accomplice's mother, as well as an employee at a glass repair shop, testified that Kennedy's vehicle was the one caught on surveillance video. Further, Kennedy's girlfriend testified that he told her he was present at the scene of the crime, but was not involved. At trial, the defense offered two-theory, circumstantial-evidence jury instructions. The trial court did not accept these jury instructions, but instead gave the State's circumstantial and direct evidence instruction. Kennedy objected and later moved for judgment notwithstanding the verdict ("JNOV") or, in the alternative, a new trial. Kennedy's motion was denied. Kennedy appealed.

### ISSUE

Whether the trial court erred in failing to give Kennedy's circumstantial-evidence jury instructions.

### HOLDING

Because several individuals proffered eyewitness evidence, and because Kennedy admitted to being at the scene of the crime, there was direct evidence present even if the eyewitnesses could not positively identify Kennedy and the trial court did not err in denying Kennedy's two-theory jury instruction. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

### DISSENT

Judge McCarty argued that, contrary to the trial court's holding, there was no direct evidence presented at trial. The victim could not testify that he saw Kennedy do anything because he could not positively identify Kennedy. Moreover,

Kennedy did not confess, and his girlfriend's testimony only placed him in the vicinity of the crime. Judge McCarty concluded that, because there was no direct evidence, a circumstantial-evidence jury instruction was required.

**Affirmed - 2019-KA-00028-COA (June 23, 2020)**

En Banc Opinion by Chief Judge Barnes - Dissent by Judge McCarty

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

Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Lisa L. Blount (Att'y Gen. Office) for Appellee

Briefed by [Reid Hudson](#)

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

## MOORE V. STATE

### CRIMINAL - FELONY

**EVIDENCE - SUFFICIENCY - CREDIBILITY** - When reviewing a case for sufficiency of the evidence, all credible evidence that is consistent with guilt must be accepted as true, and the State is given the benefit of all favorable inferences that may be reasonably drawn from the evidence

**CRIMINAL PROCEDURE - JURY SELECTION - VOIR DIRE** - Voir dire is presumed sufficient to ensure a fair and impartial jury; to overcome this presumption, a party must present evidence indicating that the jury was not fair and impartial and show that prejudice resulted from the court's handling of the voir dire

**CONSTITUTIONAL LAW - DOUBLE JEOPARDY - SUCCESSIVE PROSECUTION** - To determine whether double jeopardy protections apply, the court determines whether each offense contains an element not present in the other; if not, they are labeled the same offense for double jeopardy purposes, and successive prosecutions and/or punishments are constitutionally barred

### FACTS

In September 2015, Everett Moore drove to Syncreon Industries, where Norris Smith was an employee. Moore waited in his vehicle until Smith walked out. Once Smith reached his vehicle, Moore moved his SUV to block Smith from exiting. The men confronted each other, and Moore suspected that Smith was having an affair with his wife. The conversation soon ended and Smith left in his vehicle. Shortly thereafter, Moore began erratically driving after Smith. Moore eventually caught up to Smith and began driving alongside Smith's vehicle before making a sudden right turn down a different road. Surveillance footage from nearby businesses captured Smith's vehicle running through a red light and then crashing nearby. Esau Fant, an employee of a business near the scene, stated he heard two gunshots and then saw Smith's vehicle roll through the intersection. Fant approached the vehicle to find Smith's driver's side window shattered and the driver having suffered two fatal gunshot wounds. Jonathan Young, an eyewitness, testified that a man in a "white or silver SUV" almost rear-ended him. Young was later able to identify Moore as the driver of the vehicle and he also remembered the tags on the vehicle. Moore was immediately made a suspect, and he later turned himself in. Moore was indicted for first-degree murder, and at trial he was convicted of second-degree murder. He appealed his conviction. The Supreme Court held he was entitled to a circumstantial-evidence jury instruction and reversed his conviction and remanded for a new trial. During his second trial, the trial court gave instructions to the jury on circumstantial evidence, second-degree murder, and manslaughter. The jury in Moore's second trial found him guilty of second-degree murder and sentenced him to serve thirty years, followed by ten years of post-release supervision. Moore appealed.

### ISSUES

Whether (1) the State's evidence was insufficient for conviction; (2) the verdict was against the weight of the evidence; (3) the circuit court abused its discretion by sua sponte striking a prospective juror; and (4) Moore's second trial under the original indictment for first-degree murder was a double-jeopardy violation.

### HOLDING

(1) Because the record reflected more than ample evidence to support Moore's conviction, and because a reasonable jury viewing this evidence in the light most favorable to the prosecution could find Moore guilty of second-degree murder beyond a reasonable doubt, the evidence was sufficient and Moore's contention to the contrary lacked merit. (2) Because Moore failed to support his position with any argument or authority, his assertion that the verdict was against the overwhelming weight of the evidence lacked merit for the same reason his challenge to the sufficiency of the evidence failed. (3) Because a defendant does not have a vested right to any particular juror, Moore failed to make any showing that his right to a fair and impartial jury was violated due to striking sua sponte juror 52 with cause after she indicated that she had been previously represented by one of the attorney's at Moore's trial. (4) Because Moore was never acquitted of any charge, and because he was convicted of second-degree murder during his first trial, there was no double jeopardy violation when the State proceeded with a new trial for second-degree murder under the original indictment after Moore's initial conviction for second-degree murder was reversed. Therefore, the Court of Appeals affirmed the judgment of the Desoto County Circuit Court.

**Affirmed - 2019-KA-00725-COA (June 23, 2020)**

Opinion by Judge C. Wilson

Hon. Celeste Embrey Wilson (Desoto County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Matthew Wyatt Walton & Ashley Sulser (Att'y Gen. Office) for Appellee

Briefed by [Matthew Rhea](#)

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

## MOORE V. STATE

### CRIMINAL - FELONY

**CRIMINAL PROCEDURE - ATTORNEY GENERAL - AUTHORITY** - The Attorney General has the right to institute, conduct, and maintain all suits necessary for the enforcement of the laws of the state

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - JUDICIAL DISCRETION** - When read together, if the jury instructions fairly state the law of the case and create no injustice, then no reversible error will be found

### FACTS

Ronald Moore owned the Junction Café in Shannon, Mississippi. In the café, there were several computer terminals that allowed customers to play simulated computer games resembling gambling programs, such as slot machines, keno, and poker. To play the games, the customer needed a sweepstakes code, which could only be obtained by purchasing something else in the store. If the customer won, the customer could choose to redeem a cash prize or receive additional sweepstakes codes. After the Mississippi Gaming Commission investigated, a Lee County grand jury indicted Moore on several counts, including racketeering and operating an illegal sweepstakes café. The Lee County District Attorney declined to prosecute the case and gave his blessing to the Attorney General to prosecute Moore on behalf of the State. Although Moore's case was initially tried in 2016, the jury was unable to agree on a verdict, which resulted in a mistrial. In 2017, Moore's case was tried a second time. At this trial, the jury found him guilty of both racketeering and operating an illegal sweepstakes café. Moore filed post-trial motions for judgment notwithstanding the verdict and for a new trial. The Lee County Circuit Court never ruled on Moore's post-trial motions, so the motions were deemed denied. Moore appealed.

### ISSUES

Whether (1) the Attorney General had jurisdiction to prosecute Moore and (2) Moore received a fair and impartial trial.

### HOLDING

(1) Because the Attorney General had both the authority vested in common law and statute as well as the district attorney's consent to prosecute this matter, Moore's contention that the Attorney General and the trial court lacked jurisdiction was without merit. (2) Because Moore was allowed to testify about the legal advice he received, because jury instruction S-10 tracked the language of the pertinent statutes, because the trial court allowed Moore to testify about his

reliance on the advice of counsel and placed the issue of criminal intent before the jury, and because Moore's counsel failed to object to the trial court not providing the jury with the requested law, any error from the trial court excluding other witness's testimony that Moore acted without criminal intent was harmless, jury instruction S-10 fairly stated the law applicable to the case, the trial court did not err in denying jury instruction D-7, and the alleged error was procedurally barred. Therefore, the Court of Appeals affirmed the judgment of the Lee County Circuit Court.

**Affirmed - 2018-KA-00851-COA (June 23, 2020)**

Opinion by Judge C. Wilson

Hon. Thomas J. Gardner III (Lee County Circuit Court)

Chuck McRae & Drew McLemore Martin for Appellant - Louis P. Frascogna (Att'y Gen. Office) for Appellee

Briefed by [Bryant Carlton](#)

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

**MISSISSIPPI CASES EDITOR**  
**ANNA MCLEMORE**

**ASSOCIATE CASES EDITORS**  
**MELISSA FENWICK**  
**JOHN FORREST KELLY**  
**MATTHEW RHEA**  
**MATTHEW RUSS**  
**LUKE SEYMOUR**  
**FRANK WOOD**

*Thank you for supporting the Mississippi Law Journal.*

Questions or comments: Anna McLemore, [newsletter@mississippilawjournal.org](mailto:newsletter@mississippilawjournal.org)

All subscribers to BriefServ traditionally receive access to our website with archived case briefs since January 2007. Currently, our digital database is under construction. Requests for previous editions of the Newsletter can be made to Anna McLemore, [newsletter@mississippilawjournal.org](mailto:newsletter@mississippilawjournal.org). If you have questions about accessing or using the BriefServ website, please contact us at [support@mississippilawjournal.org](mailto:support@mississippilawjournal.org) or [support@mississippilawjournal.org](mailto:support@mississippilawjournal.org)