

**MISSISSIPPI SUPREME COURT DECISIONS – OCTOBER 26, 2017****SUPREME COURT - CIVIL CASES****DARNELL V. DARNELL****CIVIL - DOMESTIC RELATIONS**

**EVIDENCE - WITNESSES - CREDIBILITY** - The chancellor is the finder of fact, and the assessment of witness credibility lies within his sole province

**FAMILY LAW - CUSTODY - ALBRIGHT FACTORS** - Where a chancellor considers all *Albright* factors and makes findings of fact in the record with regard to these factors, and his decision is supported by the evidence, an appellate court will not reverse his decision

**CIVIL PROCEDURE - RES JUDICATA** - Res judicata is fundamental to the equitable and efficient operation of the judiciary and reflects the refusal of the law to tolerate a multiplicity of litigation

**FACTS**

Carla and Duff Darnell married in 2004, had a child (C.D.) in 2006, and separated in 2010. Carla filed for divorce. The chancellor awarded custody to Duff. Carla appealed, and the Supreme Court remanded to the chancellor, instructing him to conduct an *Albright* analysis that considered two statements made by C.D. to his daycare teacher and principal. These statements had prompted the teacher and principal to report the incidents to the Department of Human Services. The statements were not hearsay because they were offered to show their effect on C.D.'s teacher and principal, who acted accordingly. On remand, the chancellor determined the parents should share joint-legal custody of the child, with physical custody assigned to Duff for each school year until further order of the court. Carla was permitted standard non-custodial parent visitation, every other weekend. Carla appealed.

**ISSUES**

Whether the chancellor (1) failed to consider the additional admissible evidence as part of his findings of fact and conclusions of law, (2) erred in his *Albright* analysis, (3) erred when he found that C.D. was unavailable under the tender-years exception to the hearsay rule, and (4) failed to take into account the facts of the case pertaining to child custody at the time of remand.

**HOLDING**

(1) Because the chancellor did consider the additional admissible evidence in his final judgment, the issue was without merit. (2) Because the chancellor considered all *Albright* factors and made findings of fact in the record with regard to these factors, the chancellor did not err in his *Albright* analysis. (3) Because the Supreme Court originally upheld the chancellor's findings that C.D. was unavailable under the tender-years exception of the hearsay rule, and because of the fundamental principle of res judicata, the Supreme Court refused to reconsider the previously ruled upon issue. (4) Because the Supreme Court did not instruct the chancellor to hold a new hearing, change his findings and conclusions, or consider new evidence of C.D.'s current condition, the issue was without merit. Therefore, the Supreme Court affirmed the judgment of the Jefferson Davis County Chancery Court.

**Affirmed - 2016-CA-01573-SCT (consolidated with 2015-CA-00764-SCT) (Oct. 26, 2017)**

Opinion by Presiding Justice Randolph

Hon. David Shoemake (Jefferson Davis County Chancery Court)

Mark A. Chinn for Appellant - S. Christopher Farris for Appellee

Briefed by [William L. Moorer](#)

## MILLER V. SMITH

### CIVIL - DOMESTIC RELATIONS

**FAMILY LAW - CUSTODY - IN LOCO PARENTIS** - In loco parentis means in place of a parent; any person who takes a child of another into his home and treats it as a member of his family—providing parental supervision, support, and education as if it were his own child—stands in loco parentis

**CONSTITUTIONAL LAW - SIXTH AMENDMENT - RIGHT TO CONFRONTATION** - Under the Sixth Amendment of the United States Constitution, the accused shall enjoy the right to be confronted with witnesses against him in all criminal prosecutions

**CONSTITUTIONAL LAW - MISSISSIPPI CONSTITUTION - RIGHT TO BE PRESENT** - Under Art. 3, § 25 of the Mississippi Constitution, “[n]o person shall be debarred from prosecuting or defending any civil cause for or against him or herself . . . by him or herself, or counsel, or both”

### FACTS

In 2004, six years into Dale Miller and Jessica Smith’s relationship, Jessica conceived a child named Smitty. After a few years, during which time Smith’s mother retained temporary custody of the children (Smitty and Kristen, Smith’s daughter from a previous marriage), Miller and Smith married in 2009. Smith gave birth to a daughter, Morgan, a year later. A month after Morgan’s birth, Smith regained custody of Kristen and Smitty. Later that year, the couple separated after Smith accused Miller of sexually abusing her daughter Kristen. Two years later, in 2012, Smith went to prison for violating the terms of her probation and her children returned to live with Smith’s mother. Miller had no contact with the children, nor did he assist Smith’s mother financially. Later that year, Miller filed for divorce from Smith and requested custody of Smitty and Morgan. Smith’s parents fought back, insisting on a DNA test which revealed that Miller was only the father of Morgan. Finding this out, Miller amended his complaint arguing he stood in loco parentis because there was no other father claiming paternity and he had taken responsibility for the child from birth. A court-appointed guardian ad litem recommended that Miller have custody of Morgan but not Smitty. In September 2013, the chancellor ordered Smitty and Morgan to remain with Smith’s parents, granted Miller visitation, and ordered Miller to pay monthly child support for both. Kristen testified that Miller had sexually abused her, and because of the sensitive nature of her testimony, the chancellor removed Miller from the courtroom. Miller’s attorney objected to his removal because the chancellor did not provide Miller with any method to observe Kristen’s testimony. The objection was overruled, but Miller’s attorney was allowed to remain in the courtroom. Smith was awarded sole physical and legal custody of Smitty and Morgan. Miller’s parental rights as to Smitty were terminated, and Miller was only granted supervised visitation with Morgan, due to sexual abuse concerns. However, in a separate action, the chancery court awarded Miller custody of Morgan. Miller filed motions for rehearing and extraordinary relief to supplement the record with a copy of the custody order from the chancery court. The Court of Appeals denied supplementation because the motion was filed ten days after its decision was handed down. Miller petitioned for writ of certiorari.

### ISSUES

Whether (1) the trial court erred in terminating Miller’s parental rights to Smitty; and (2) Miller’s right to confrontation under the Sixth Amendment to the U.S. Constitution and his right to be present under Art. 3, § 25 of the Mississippi Constitution were violated when the chancellor removed Miller during the testimony of Kristen’s testimony.

### HOLDING

(1) Because Miller was not a constant presence in Smitty’s life, either physically or financially, and because he did not successfully rebut the natural-parent presumption, Miller did not stand in loco parentis. (2) Because the Confrontation Clause of the Sixth Amendment in plain language states that it is meant for criminal cases, Miller’s right to confrontation was not violated in the proceeding. The Supreme Court clarified that the Sixth Amendment right to confrontation does not apply to civil proceedings, including youth court cases in which a parent is accused. Conversely, because Art. 3, § 25 provides that no person should be debarred from defending any civil cause “against himself,” the chancellor erred

in removing Miller from the courtroom. However, because Miller’s attorney was allowed to be present during Kristen’s testimony and Miller was unable to prove he had been prejudiced by his removal, it was a harmless error. Therefore, the Supreme Court affirmed the judgment of the Tate County Chancery Court.

### **CONCURRENCE**

Presiding Justice Randolph concurred with the findings under the first issue, but considered the second issue moot.

### **DISSENT**

Presiding Justice Kitchens argued that the chancellor’s removal of Miller during Kristen’s testimony was not harmless because Miller lost the ability to hear the testimony and consult with his attorney about it. Presiding Justice Kitchens would find that Miller’s rights under Art. 3, § 25 were violated, and he would reverse and remand for a new trial.

#### **Affirmed - 2015-CT-00330-SCT (Oct. 26, 2017)**

En Banc Opinion by Chief Justice Waller Concurrency by Presiding Justice Randolph Dissent by Presiding Justice Kitchens  
Hon. Vicki B. Daniels (Tate County Chancery Court)  
Jerry Wesley Hisaw & William Bolton Seale for Appellant - Charles E. Hodum for Appellee  
Briefed by [Nikki Breeland](#)

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## **PEDIGO V. ROBERTSON**

### **CIVIL - CONTRACT**

**CONTRACTS - ARBITRATION AGREEMENT - VALIDITY** - In determining the validity of an arbitration agreement, the court considers whether (1) a valid arbitration agreement exists, and (2) the parties’ dispute is within the scope of that arbitration agreement

**CONTRACTS - ARBITRATION AGREEMENT - SCOPE** - Arbitration is a matter of contract and a party is not required to submit to arbitration in any dispute which he has not agreed to submit

### **FACTS**

Brian Pedigo rented a television from Rent-A-Center. Upon renting the television, Pedigo signed an arbitration agreement. When Pedigo failed to make payments, the Rent-A-Center manager, Kristopher Robertson<sup>1</sup> attempted to recover the television. Robertson then discovered that Pedigo had sold it to a pawn shop. Robertson and Rent-A-Center filed a police report. Pedigo was arrested, but the State later dropped the felony charge. Pedigo then filed a civil action claiming that Rent-A-Center filed a false report to the police, amounting to malicious prosecution. Rent-A-Center responded with a motion to compel arbitration pursuant to the consumer arbitration agreement between Pedigo and Rent-A-Center. The Prentiss County Circuit Court ruled that the arbitration agreement was binding. Pedigo appealed.

### **ISSUE**

Whether the trial court erred in finding the arbitration agreement applicable to a dispute arising out of criminal charges.

### **HOLDING**

Because the arbitration agreement did not contemplate Pedigo having to arbitrate his claim that Rent-A-Center maliciously swore out a criminal affidavit, causing his wrongful incarceration, the arbitration agreement could not compel either party to arbitrate this dispute arising from a criminal complaint. Accordingly, the circuit court erred when it determined that this dispute was within the scope of the arbitration agreement. Therefore, the Supreme Court reversed and remanded the judgment of the Prentiss County Circuit Court.

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<sup>1</sup> The style of the case uses “Kristopher Robertson,” but the text of the opinion refers only to “Kristopher Robinson.” For the purposes of this *BriefServe* Newsletter, we refer to the appellee as “Robertson.”

**Reversed & Remanded - 2016-CA-00572-SCT (Oct. 26, 2017)**

Opinion by Justice Beam

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

Greg E. Beard & Thomas H. Comer Jr. for Appellant - Christopher Daniel Meyer for Appellees

Briefed by [Zachary Harper](#)

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**MISSISSIPPI COURT OF APPEALS DECISIONS – OCTOBER 25, 2017**

**COURT OF APPEALS - CIVIL CASES**

**MASON V. MISS. DEP'T OF CORRS.**

**CIVIL - STATE BOARDS & AGENCIES**

**CRIMINAL SENTENCE - MERITORIOUS EARNED TIME - ELIGIBILITY** - Pursuant to Miss. Code Ann. § 47-5-142(1), any offender shall be eligible to receive meritorious earned time, subject to the provisions of this section  
**CRIMINAL SENTENCE - MERITORIOUS EARNED TIME - SEX CRIME EXCEPTION** - Pursuant to Miss. Code Ann. § 47-5-139(d), an inmate shall not be eligible for the earned time allowance if the inmate was convicted of a sex crime

**FACTS**

Richard Mason was convicted of sexual battery in 2005 and was sentenced to thirty years in prison. Mason contended that he was eligible for meritorious earned time, a conditional reduction in sentence that operates as an incentive for offenders to achieve positive and worthwhile accomplishments for their personal benefit or the benefit of others. The Mississippi Department of Corrections (MDOC) disagreed. Mason filed suit against the MDOC. Finding that Mason's conviction of a sex crime barred him from reduction, the circuit court dismissed his complaint. Mason appealed.

**ISSUE**

Whether the trial circuit court erred in dismissing Mason's complaint seeking meritorious earned time.

**HOLDING**

Because Mason was convicted of a sex crime and statutorily barred from meritorious earned time by Miss. Code Ann. § 47-5-139, the circuit court did not err in dismissing Mason's complaint. Therefore, the Court of Appeals affirmed the judgment of the Sunflower County Circuit Court.

**Affirmed - 2017-CP-00179-COA (Oct. 24, 2017)**

Opinion by Judge Fair

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

*Pro se* for Appellant - Darrell Clayton Baughn (Att'y Gen. Office) for Appellee

Briefed by [Allison A. Bruff](#)

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**WILLIAMS V. STATE**

**CIVIL - OTHER**

**APPELLATE PROCEDURE - MOOTNESS - DISMISSAL** - An appeal is moot and must be dismissed when an appellant is unable to show that a ruling in his favor would be of any practical benefit to him

**CRIMINAL LAW - SEX CRIMES - INCEST** - According to Mississippi case law, incest is classified as a sex crime, so a conviction for incest makes one ineligible for parole or earned time

### FACTS

London Williams was convicted of incest under Miss. Code Ann. § 97-29-5 for engaging in sexual activity with his twenty-year-old daughter. The circuit court sentenced Williams to serve ten years in the custody of the Mississippi Department of Corrections (MDOC), with four years suspended and four years of post-release supervision. MDOC considered incest a sex crime, so it classified Williams as ineligible for parole and earned time. Williams disagreed, arguing that, although incest is a crime that involves sex, it is not a “sex crime” as defined in the definitions section of the chapter on sex offender registration, Miss. Code Ann. § 45-33-23(h). In addition, the Department of Public Safety confirmed Williams was not required to register as a sex offender. Williams pursued this issue through MDOC’s administrative remedy program and was denied relief. Williams then appealed the MDOC’s decision to the Sunflower County Circuit Court, which affirmed the MDOC’s denial. Williams appealed. During the pendency of this appeal, Williams was released on post-release supervision.

### ISSUE

Whether Williams’ appeal is moot, thus warranting dismissal.

### HOLDING

Because Williams was released on post-release supervision during the pendency of his appeal, his appeal is moot. Therefore, the Court of Appeals dismissed the appeal from the Sunflower County Circuit Court.

#### **Appeal Dismissed - 2015-CP-01155-COA (Oct. 24, 2017)**

Opinion by Judge Wilson

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

*Pro se* for Appellant - Darrell Clayton Baughn (Att’y Gen. Office) for Appellee

Briefed by [Luke Kelly](#)

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

### **KING V. STATE**

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

**GUILTY PLEA - VOLUNTARINESS - STANDARD** - To determine whether a plea is voluntarily and intelligently given, the trial court must advise the defendant of his rights, the nature of the charge against him, as well as the consequences of the plea

**GUILTY PLEA - CONSEQUENCES - PAROLE ELIGIBILITY** - It is not a prerequisite to a voluntary plea that a defendant understand his eligibility for parole, which is a matter of legislative grace rather than a consequence of a guilty plea; however, a plea is involuntary if the defendant is affirmatively misinformed regarding the possibility of parole and pleads guilty in reliance on the misinformation

**CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE - *STRICKLAND* STANDARD** - The two inquiries under the *Strickland* standard for judging a claim of ineffective assistance of counsel are (1) whether counsel’s performance was deficient, and, if so, (2) whether the deficient performance was prejudicial to the defendant in the sense that confidence in the correctness of the outcome is undermined

### FACTS

After Eddrick King was indicted for capital murder and kidnapping, Ray Charles Carter from the Office of Capital Defense was appointed to represent King. King then pled guilty to the charges of manslaughter, armed robbery, and kidnapping, and the trial court sentenced King to twenty years for manslaughter, thirty years for armed robbery, and five years for kidnapping. The manslaughter and kidnapping sentences were to run concurrently, and the kidnapping sentence was to run consecutively to the first two. In 2016, twelve years after he pled guilty, King filed a motion for post-conviction relief (PCR), arguing that his guilty plea to armed robbery was not voluntary and that he received ineffective assistance of counsel when his attorney “promised” King would be parole-eligible in ten years. At an evidentiary hearing, Carter testified that he does not make statements to clients about their parole eligibility and that he believed King to be competent at the time of the guilty plea. King testified that he wanted to go to trial to prove his innocence on the armed robbery charge and that Carter advised against it, inducing King to plead guilty for earlier parole. The trial court denied King’s PCR motion. King appealed.

### **ISSUES**

Whether (1) King’s guilty plea to armed robbery was involuntarily entered; and (2) King received ineffective assistance of counsel.

### **HOLDING**

(1) Because King’s plea petition listed his constitutional rights and the consequences of his plea, the trial court properly found that King failed to prove that his plea was involuntary. Further, King’s plea petition acknowledged his ineligibility for parole for armed robbery, and King signed it. (2) Because King failed to show deficiencies in Carter’s assistance or any resulting prejudice, King failed to rebut the presumption that Carter’s representation fell within the broad spectrum of reasonable professional assistance. The trial court also found Carter’s testimony more credible than King’s testimony. Therefore, the Court of Appeals affirmed the judgment of the Leflore County Circuit Court.

**Affirmed - 2016-CP-00915-COA (Oct. 24, 2017)**

Opinion by Judge Westbrook

Hon. Richard A. Smith (Leflore County Circuit Court)

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

Briefed by [Allison A. Bruff](#)

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