

**MISSISSIPPI SUPREME COURT DECISIONS – SEPTEMBER 7, 2017*****SUPREME COURT - CIVIL CASES*****MAYOR OF COLUMBUS V. THE COMMERCIAL DISPATCH****CIVIL - STATE BOARDS & AGENCIES**

**BOARDS & AGENCIES - OPEN MEETINGS ACT - PUBLIC POLICY** - Miss. Code Ann. § 25-41-1 states that it is essential to the fundamental philosophy of the American constitutional form of representative government and to the maintenance of a democratic society that public business be performed in an open and public manner, and that citizens be advised of and be aware of the performance of public officials and the deliberations and decisions that go into the making of public policy

**BOARDS & AGENCIES - OPEN MEETINGS ACT - PUBLIC BODY** - Pursuant to Miss. Code Ann. § 25-41-3, “public body” means any executive or administrative board, commission, authority, council, department, agency, bureau, or other policy-making entity, or committee thereof, of the State of Mississippi, or any political subdivision or municipal corporation of the state, whether such entity be created by statute or executive order, which is supported wholly or in part by public funds or expends public funds, and any standing interim or special committee of the Mississippi Legislature

**BOARDS & AGENCIES - OPEN MEETINGS ACT - CITIZEN SPECTATOR** - Miss. Code Ann. § 25-41-5 states that every member of every public board and commission in the State should always bear in mind that the spirit of the Open Meetings Act is that a citizen spectator, including any representative of the press, has just as much right to attend the meeting and see and hear everything that is going on as has any member of the board or commission

**FACTS**

The Mayor of Columbus and its six City Council members held four pairs of gatherings over the course of two months that were not open to the public. At each prearranged gathering, there was a subquorum group of three City Council members present—a quorum consists of four—in the Mayor’s conference room. The gatherings were between the City representatives and the Golden Triangle Development Link who, after the gatherings, announced their decision to renew their retail development partnership with the City of Columbus. On the last pair of gatherings, Robert Nathan Gregory, a reporter for The Commercial Dispatch newspaper (“The Dispatch”), requested to sit in on the gatherings but was denied entry. Subsequently, Gregory filed an Open Meetings Act Complaint with the Mississippi Ethics Commission detailing the four pairs of gatherings. The Ethics Commissions found that the subject of the gatherings had circumvented the Open Meetings Act, and in doing so, the Mayor and City Council had violated it. The Mayor and City Council appealed to the Chancery Court of Lowndes County. On appeal, The Dispatch stepped in as the petitioner in place of Gregory. The trial court upheld the Commission’s ruling. The Mayor and City Council appealed.

**ISSUE**

Whether the City’s prearranged, nonsocial, and subquorum-sized gatherings regarding economic development and maintenance of a public building were required to be open to the public by the Open Meetings Act.

**HOLDING**

Because the gatherings were preplanned and the invited councilmen purposely constituted less than a quorum, the City acted with the express intent of circumventing the Open Meetings Act. Further, the gatherings were for the express goal of discussing City business, and they did not fall under any of the exceptions specified in the Act. Therefore, the Supreme Court affirmed the judgment of the Lowndes County Chancery Court.

**Affirmed - 2016-CC-00897-SCT (Sept. 7, 2017)**

Opinion by Justice Chamberlin  
Hon. Kenneth M. Burns (Lowndes County Chancery Court)  
Michael D. Chase & Jeffrey J. Turnage for Appellants - D. Michael Hurst Jr. & Clay B. Baldwin for Appellee  
Briefed by [Maggie Vinzant](#)

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## NEWSOME V. SHOEMAKE

### CIVIL - WILLS, TRUSTS, & ESTATES

**CIVIL PROCEDURE - JUDICIAL IMMUNITY - LIABILITY** - In order to be protected under the judicial immunity doctrine and to escape liability, the judge must have had subject-matter jurisdiction over the challenged action

**CIVIL PROCEDURE - JURISDICTION - ACTIONS IN EXCESS** - If a judge acts without having jurisdiction at all, he is not immune from liability for such actions; however, if a judge acts in excess of his jurisdiction, he would be immune from civil liability

**CIVIL PROCEDURE - ATTORNEY DISQUALIFICATION - STANDARD OF REVIEW** - In order to disqualify an attorney, one must show that there was an actual attorney-client relationship between the movant and the attorney and that there was a substantial relationship between the subject matter of the prior and current representation

**APPELLATE PROCEDURE - APPELLATE RECORD - INFORMATION NOT CITED** - Mississippi appellate courts may not consider information that is outside of the record

### FACTS

As the senior chancellor at the time for the Thirteenth Chancery Court District, Joe Dale Walker appointed Marilyn Newsome as the conservator of the person and estate of her adult disabled daughter, Victoria. Following a medical malpractice lawsuit on Victoria's behalf, Newsome filed a petition to disperse the settlement proceeds. Judge Walker authorized the distribution of the settlement proceeds, but he did not approve Newsome's request to purchase a home she had selected. Instead, he allocated more money to Keely McNulty, the attorney employed to handle Victoria's custody. Newsome alleged that McNulty prepared and Judge Walker authorized ex parte orders that related to the purchase of real property, the purchase of a mobile home, and the construction of a "special needs home" as well as an award of attorney's fees to McNulty without itemized statements of time. Additionally, after ordering McNulty to obtain at least four construction bids, Judge Walker transferred the case to Judge David Shoemake, the other chancellor in the district, to approve and accept them for construction of the home for Victoria. Once a bid was accepted, the case was to be transferred back to Judge Walker. Judge Shoemake authorized Newsome to take the lowest construction bid, which happened to be from a construction company owned by Judge Walker's nephew, and he signed an ex parte order that authorized her to make payments to the construction company. Also, after he had already transferred the case back to Judge Walker, Judge Shoemake signed an order directing payment for materials that had allegedly been stolen from the construction site. Both Judges Walker and Shoemake eventually recused themselves from this conservatorship case. While being investigated by the Commission on Judicial Performance (the "Commission"), Judge Walker was suspended from his office and later removed once he pled guilty to obstruction of justice. The Commission recommended that Judge Shoemake be removed from office as well. However, the court held that instead of removal, Judge Shoemake's negligence and inattention while executing ex parte orders concerning Victoria's conservatorship warranted a fine, payment of court costs, a public reprimand, and a thirty-day suspension. Dissatisfied with the outcome, Newsome filed a complaint and a request for full accounting and inventory, return of funds, attorney's fees, and other relief. Judge Shoemake filed a motion to dismiss and a motion for stay of discovery based on judicial immunity, which Judge Walker joined. Newsome filed a motion to disqualify Jim Hood, the Attorney General of the State of Mississippi, as counsel for Judge Shoemake because he should have represented Victoria and herself. The trial court granted dismissal under Miss. R. Civ. P. 54(b) and denied Newsome's motion to set aside and vacate the orders. Newsome appealed.

### ISSUES

Whether the trial court erred in (1) granting dismissal pursuant to Miss. R. Civ. P. 54(b) to Walker and Shoemake on the basis of judicial immunity; (2) granting a stay of discovery to Walker and Shoemake; (3) denying Newsome's motion to disqualify the Attorney General; and (4) denying Newsome's motion to vacate.

### **HOLDING**

(1) Because no plain error appeared on the face of the trial court's decision to dismiss the action based on Miss. R. Civ. P. 54(b), there was no abuse of discretion, and any objection to the Rule 54(b) certification was procedurally barred. In order to have judicial immunity, judges must have had subject matter jurisdiction over the challenged action, regardless of whether they act in excess of their jurisdiction or with malice. Since Judges Walker and Shoemake exercised jurisdiction over the subject matter of the conservatorship, they are immune from civil action. (2) Because a motion to dismiss for failure to state a claim under Miss. R. Civ. P. 12(b)(6) and judicial immunity are issues of law, the trial court did not err in staying discovery proceedings. (3) Because there was no evidence that an attorney-client relationship existed between Newsome and the Attorney General or that Newsome had reasonable belief that such a relationship existed, the trial court did not err in denying Newsome's motion to disqualify the Attorney General. (4) Because Judges Walker and Shoemake qualified for judicial immunity, and Newsome failed to present evidence of an attorney-client relationship with the Attorney General, the trial court did not err in denying Newsome's motion to set aside and vacate the orders granting stay of discovery and denying disqualification of the Attorney General. Therefore, the Supreme Court affirmed the judgment of the Simpson County Chancery Court.

### **ADDITIONAL RULING**

The Supreme Court also addressed McNulty's Motion to Strike Allegation, which sought to strike an allegation that McNulty previously agreed to plead guilty to a misdemeanor involving her conduct as attorney for the conservatorship. Because Newsome failed to provide a specific citation from the record to support her allegation of misconduct by McNulty, the Supreme Court granted McNulty's motion to strike the language from Newsome's Brief.

### **CONCURRENCE**

Justice King argued that in judicial immunity cases, the Supreme Court should provide an alternative remedy of a complaint with the Commission. Otherwise, Newsome has no remedy.

#### **Affirmed - 2016-CA-00280-SCT (Sept. 7, 2017)**

Opinion by Justice Kitchens - Concurrence by Justice King

Hon. James D. Bell (Simpson County Chancery Court)

Lauren Cavalier Stubbs & W. Terrell Stubbs for Appellant - Krissy Casey Nobile & Harold Edward Pizzetta III (Att'y Gen. Office) & Robert E. Evans for Appellees

Briefed by [Katherine Farese](#)

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## **REGAN V. S. CENT. REG'L MED. CTR.**

### **CIVIL - MEDICAL MALPRACTICE**

**CIVIL PROCEDURE - DISMISSAL - FAILURE TO PROSECUTE** - Pursuant to Miss. R. Civ. P. 41(b), a court is authorized to dismiss an action for plaintiff's failure to prosecute

**CIVIL PROCEDURE - SANCTIONS - JUDICIAL DISCRETION** - While dismissal for lack of prosecution should be employed reluctantly, courts will uphold a Rule 41(b) dismissal when there is a record of dilatory or contumacious conduct by the plaintiff and a finding that lesser sanctions would not serve the interests of justice

**MISSISSIPPI TORT CLAIMS ACT - STATUTE OF LIMITATIONS - TOLLING** - The statute of limitations for a cause of action is not tolled after the claim is dismissed for failure to prosecute pursuant to Miss. R. Civ. P. 41(b)

### **FACTS**

In December 2003, Shelia Regan was allegedly injured during treatment at South Central Regional Medical Center. She filed her first medical negligence suit against South Central in March 2005. The first medical negligence suit was dismissed in November 2007 due to Regan's failure to attach a required expert's consultation certificate. Regan subsequently refiled her suit but in 2008 voluntarily dismissed her second suit. She filed a third suit against South Central. South Central then filed a motion to dismiss due to the statute of limitations under the Mississippi Tort Claims Act, and Regan's third suit was dismissed in May 2008. The trial judge considered a Rule 59(e) motion in Regan's third suit, reversed his decision, and reinstated Regan's third lawsuit in November 2010. In the subsequent six years, Regan took no initiative to proceed with the third lawsuit except for one deposition. The trial judge dismissed the lawsuit due to inactivity in February 2016. Regan appealed.

### **ISSUES**

Whether the trial court erred in (1) failing to consider Regan's lawyer's communications with defense counsel, (2) failing to consider lesser sanctions, and (3) dismissing without prejudice.

### **HOLDING**

(1) Because Regan had three separate periods of inactivity from 2010 to 2015, the trial court did not err due to Regan's counsel's communication with defense counsel. (2) Because the Supreme Court may uphold a Rule 41(b) dismissal when there is a finding that lesser sanctions would not serve in the interests of justice, the trial court did not err by not instituting a lesser sanction. (3) Because Miss. R. Civ. P. 41(b) authorizes a court to dismiss an action for failure of the plaintiff to prosecute, the trial judge did not err in dismissing Regan's lawsuit. Therefore, the Supreme Court affirmed the judgment of the Jones County Circuit Court.

**Affirmed - 2016-CA-00696-SCT (Sept. 7, 2017)**

Opinion by Justice Maxwell

Hon. Richard W. McKenzie (Jones County Circuit Court)

Norman William Pauli Jr. for Appellant - Richard O. Burson, Peeler Grayson Lacey Jr., & Shirley M. Moore for Appellee

Briefed by [Jacob Swatley](#)

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

### **BOSTON V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - PRE-ARMING** - According to *Dew v. State*, a pre-arming instruction is "a peremptory instruction for the prosecution, impairing or precluding the defendant's right to self-defense"

**CRIMINAL PROCEDURE - PRE-ARMING - EVIDENTIARY SUPPORT** - Pre-arming instructions should be given only in exceedingly rare circumstances where evidence suggests that the defendant armed himself or herself with the intent to initiate a confrontation

### **FACTS**

On May 13, 2014, Kevin Boston went to Trigg Elementary to fix a flat tire on the car of Barbara Boston, his estranged wife and employee of the school. Boston could not fix the tire because the jack was bent. While walking to the main school office to tell his wife, Boston met Willie Dean. Dean was reporting for a work order at the school as a contract maintenance worker, but Dean and Barbara had a romantic relationship while Barbara was separated from Boston. State witnesses testified that Boston approached Dean first. However, Boston claimed Dean first approached him. Boston testified that Dean was upset that Boston was in Barbara's car, possibly indicating that Boston and Barbara had reconciled. Boston further testified that Dean yelled that he was going to kill Boston and then attacked him with a pair

of pliers, hitting Boston on the wrist. Boston claimed that he pushed Dean away; Dean came running back toward him, at which point he fatally stabbed Dean once with a pocketknife. The pocketknife had been purchased from Auto Zone a month before the altercation between the parties. Eyewitness testimony only verified the two men “got a little loud” and the school surveillance cameras did not capture the physical or verbal altercation between the parties. An ambulance took Dean to the hospital, where he died. Boston was convicted for capital murder on educational property grounds. Boston appealed.

### ISSUE

Whether the “pre-arming” jury instruction, stating, “the Court instructs the jury that if a person provokes a difficulty, arming himself in advance, and intending, if necessary, to use his weapon and overcome his adversary, he becomes the aggressor and cannot claim the right of self-defense,” was contrary to Mississippi case law.

### HOLDING

Because pre-arming instructions should only be given in exceedingly rare circumstances and there was no evidence proving that Boston armed himself with the intent to initiate a confrontation, the jury instruction was improper. Therefore, the Supreme Court reversed and remanded the judgment of the Washington County Circuit Court.

#### **Reversed & Remanded - 2016-KA-00047-SCT (Sept. 7, 2017)**

Opinion by Chief Justice Waller

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

Brandon Isaac Dorsey for Appellant - Billy L. Gore (Att’y Gen. Office) for Appellee

Briefed by [Jay Michael Patterson](#)

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

### **IN RE: MISSISSIPPI RULES OF APPELLATE PROCEDURE**

#### **COURT ORDER**

#### **ORDER**

This en banc Order by the Mississippi Supreme Court, made in consideration of the court’s own motion, amends Rule 11 of the Mississippi Rules of Appellate Procedure to allow trial court clerks to transfer exhibits electronically. This amendment will be effective October 2, 2017.

[Exhibit A](#), referenced in and attached to the Order, shows edits to Rule 11. Rule 11(d)(1)(iii)(b) now provides that the trial court clerk shall—if the document or photograph can be scanned—scan an exhibit designated by the parties, convert the file to PDF, and retain the original unless directed otherwise. If an exhibit cannot be scanned, the clerk should photograph the exhibit if possible. Following the time for attorney’s examination and proposed correction under Rule 10(b)(5), the trial court clerk shall send all PDF exhibits to the Supreme Court using the Mississippi Electronic Court (MEC) system and shall include a list of all designated exhibits. This list shall indicate those exhibits scanned, those photographed, those submitted conventionally, and those retained by the trial court clerk.

#### **Granted - 89-R-99027-SCT (Aug. 30, 2017)**

En Banc Order by Presiding Justice Randolph

Briefed by [Allison A. Bruff](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – SEPTEMBER 5, 2017

COURT OF APPEALS - CIVIL CASES

COX v. SMG

CIVIL - PERSONAL INJURY

**CIVIL PROCEDURE - DEFENSES - INSUFFICIENCY OF PROCESS** - Miss. R. Civ. P. 12(h)(1) provides that a defense of insufficiency of process is waived if it is not raised in a pre-answer motion or in the answer

**CIVIL PROCEDURE - DISMISSAL - FAILURE TO SERVE PROCESS** - Miss. R. Civ. P. 4(h) requires a court to dismiss an action if the plaintiff, without good cause, fails to serve process within 120 days; this rule is applicable until the defendant waives the defense pursuant to Miss. R. Civ. P. 12(h)

**FACTS**

Teiawan Cox filed a personal injury lawsuit against SMG and Capital City Convention Center Commission alleging injury due to unsafe conditions at the Jackson Convention Center Complex. Cox initially did not have process issued for the defendants. After a year and a half, Cox filed a motion for an extension of time to serve process. On July 24, 2015, Cox filed an amended complaint and had process issued for SMG and the Convention Center; both defendants were served. SMG and the Convention Center filed answers on September 3, 2015, but they did not assert deficiency of service of process as a defense. On October 30, 2015, SMG and the Convention Center filed motions to amend their answers to raise that defense. The trial court entered an order denying the motion for an extension of time to serve process and further found the motions to amend the answers moot, entering a final judgment dismissing the case for insufficiency of process. Cox appealed.

**ISSUE**

Whether SMG and the Convention Center waived the defense of insufficiency of process.

**HOLDING**

Because SMG and the Convention Center failed to assert the defense of insufficiency of process, and filed an amended answer after the thirty days allowed under Miss. R. Civ. P. 15(a), that defense was waived pursuant to Miss. R. Civ. P. 12(h)(1). Therefore, the Court of Appeals reversed the judgment of the Hinds County Circuit Court and remanded the case for further proceedings.

**DISSENT**

Presiding Judge Irving argued that because Cox filed an amended complaint, without permission of the court, after the allotted 120-day time period specified in Miss. R. Civ. P. 4(h), her only remedy was to file a motion for extension and show good cause why service of process was not made within the 120 days. Failing to obtain an extension, Cox would have to voluntarily dismiss the complaint, and file a new complaint. Presiding Judge Irving would affirm the judgment of the circuit court.

**Reversed & Remanded - 2016-CA-00200-COA (Sept. 5, 2017)**

En Banc Opinion by Judge Fair - Dissent by Presiding Judge Irving

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

Jawanza Kobe Watson for Appellant - Michael D. Simmons for Appellees

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

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LADNER v. ZACHRY CONSTR.

## CIVIL - WORKERS' COMPENSATION

**WORKERS' COMPENSATION - PERMANENT PARTIAL DISABILITY BENEFITS - ELEMENTS** - A claimant will qualify for permanent partial disability benefits once the claimant has made out a prima facie case for disability and the employer does not prove the claimant's efforts constituted a mere sham or unreasonable effort

**WORKERS' COMPENSATION - DISABILITY - ELEMENTS** - To make a prima facie case for disability, the claimant must prove both his physical injury and his loss of wage-earning capacity

**WORKERS' COMPENSATION - PERMANENT PARTIAL DISABILITY BENEFITS - LOSS OF WAGE EARNING CAPACITY** - Lower wages in a different occupation coupled with an inability to obtain a job in the same industry may prove loss of wage-earning capacity

### FACTS

In December 2006, Ladner injured his lower back while working for Zachry Construction ("Zachry"). He returned to work a few days after the accident but still experienced discomfort. A month after the injury, Ladner sought medical assistance and was diagnosed with a lumbar strain; however, he was told he could return to work under light or regular work duties. An MRI was conducted upon follow-up visits, where results prompted an appointment with a neurosurgeon. The appointment with a neurosurgeon did not yield any further findings and reiterated that Ladner could return to work under light or regular work duties. Despite continuing medical examinations, Ladner's diagnosis never changed. A functional capacity exam indicated that Ladner could function in the medium range of physical ability for work duties, and his doctor concluded there was a five-percent impairment to his body. In 2008, Zachry laid off Ladner, along with others. Ladner was unemployed until June 2011 until he gained employment at King Construction. In January 2012, he voluntarily left King Construction and was hired full-time at Stennis Space Center. In 2009, Ladner filed a petition seeking permanent-partial-disability benefits with the Mississippi Workers' Compensation Commission. An administrative judge ("AJ") found Ladner was entitled to benefits. The decision was appealed to the Commission, which overturned the AJ's decision based on a two-year statute of limitations precluding his petition. Ladner appealed to the Harrison County Circuit Court, First Judicial District, which affirmed the Commission's findings. The Court of Appeals upheld this finding. The Mississippi Supreme Court reversed the decision of the Court of Appeals and held that, because Ladner received wages in lieu of compensation, the two-year statute of limitations was tolled. This appeal arose from the second set of proceedings after the Supreme Court remanded the case. On remand, the AJ found Ladner was entitled to permanent-partial-disability benefits. Zachry appealed to the Commission, which found that Ladner failed to prove a loss of wage earning capacity to sustain a claim for permanent-partial-disability benefits and that his termination from Zachry and his period of unemployment were causally related to his on-the-job injury. Ladner appealed.

### ISSUES

Whether (1) Ladner proved a prima facie case for disability; and (2) Zachry failed to rebut Ladner's prima facie case of disability.

### HOLDING

(1) Because Ladner proved his physical injury and his loss of wage-earning capacity, he proved a work-related injury which amounted to a prima facie case for disability. (2) Because Zachry's testimony contradicted neither Ladner's medical evidence nor the extent of the work after his injury, Zachry failed to rebut Ladner's case. Therefore, the Court of Appeals reversed the order of the Mississippi Workers' Compensation Commission, rendered the case, and reinstated the order of the AJ awarding Ladner permanent-partial-disability benefits.

### **Reversed & Rendered - 2015-WC-01044-COA (Sept. 5, 2017)**

En Banc Opinion by Presiding Judge Griffis

Mississippi Workers' Compensation Commission

James Kenneth Wetzel & Garner James Wetzel for Appellant - Walter J. Eades for Appellees

Briefed by [Caroline Loveless](#)

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## COURT OF APPEALS - POST-CONVICTION RELIEF

### DEARMAN V. STATE

#### CIVIL - POST-CONVICTION RELIEF

**POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS** - Miss. Code Ann. § 99-39-5(2) provides that a motion for post-conviction relief must be filed within three years after the entry of a judgment of conviction based on a guilty plea

**POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - GUILTY PLEA** - Mississippi case law states that a valid guilty plea waives a statute of limitations defense

#### FACTS

In 2011 Carol Dearman pled guilty to motor vehicle theft as a nonviolent habitual offender. The circuit court accepted her plea and sentenced her to ten years in the custody of the Mississippi Department of Corrections. In 2016, Dearman filed a petition for an “Order to Amend Sentencing per MS Code Section 99-1-5.” Dearman alleged that her conviction should be set aside because her indictment was returned outside of the applicable two-year statute of limitations. The circuit court dismissed Dearman’s petition because it was filed almost five years after Dearman pled guilty. Dearman appealed.

#### ISSUE

Whether the trial court erred in dismissing Dearman’s petition for post-conviction relief.

#### HOLDING

Because Dearman’s petition for post-conviction relief was filed more than 3 years after her guilty plea, the trial court did not err in dismissing Dearman’s petition for post-conviction relief. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

**Affirmed - 2016-CP-00965-COA (Sept. 5, 2017)**

Opinion by Judge Wilson

Hon. John H. Emfinger (Madison County Circuit Court)

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

Briefed by [Luke Kelly](#)

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### LOVERN V. STATE

#### CIVIL - POST-CONVICTION RELIEF

**POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS** - Under the Uniform Post-Conviction Collateral Relief Act (Miss. Code Ann. § 99-39-5(2)) a motion for post-conviction relief must be filed within three years after the entry of a judgment of conviction based on a guilty plea

#### FACTS

In December 2009, Anthony Earl Lovern pled guilty to counts of gratification of lust and statutory rape in Rankin County Circuit Court. The trial court accepted Lovern’s plea after finding that it was knowing, voluntary, and supported by a sufficient factual basis. On August 22, 2016, Lovern filed a petition for post-conviction relief in the Rankin County Circuit Court, alleging that his plea was “entered due to coercion and fear induced by his defense attorney,” and there was not a sufficient factual basis for his plea. Lovern’s petition was supported only by his own allegations and was refuted by his plea petition and the transcript of his plea hearing. The Rankin County Circuit Court concluded that



Lovern's petition was time-barred and did not fall within any of the exceptions to the statute of limitations of the Uniform Post-Conviction Collateral Relief Act. Lovern appealed.

### ISSUE

Whether the trial court erred in dismissing Lovern's PCR motion as time-barred.

### HOLDING

Because Lovern's motion was filed almost seven years after he pled guilty and did not fall within any of the exceptions to the statute of limitations of the Uniform Post-Conviction Collateral Relief Act, the circuit court correctly held that Lovern's motion was time-barred. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

**Affirmed - 2016-CP-01422-COA (Sept. 5, 2017)**

Opinion by Judge Wilson

Hon. William E. Chapman III (Rankin County Circuit Court)

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

Briefed by [William Moorer](#)

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

### **CARTER V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL - EVIDENCE - VERDICT** - In reviewing the denial of a motion for a new trial, evidence is weighed in the light most favorable to the verdict

**CRIMINAL - EVIDENCE - JURY INSTRUCTIONS** - Jury instructions may present a party's theory of the case, but the court can deny an instruction that is misstating the law, covered in another instruction, or is not supported by the evidence

### FACTS

On January 10, 2015, Madison County Sheriff's Deputy Sam Howard observed that Rodney Carter's car did not have a light illuminating its license plate. Carter and Deputy Howard were both traveling west on Highway 463 in Madison, albeit in different lanes when they stopped at a red light. Deputy Howard accelerated slowly in order to get a better look at Carter's license plate, but Carter slowed to a near stop. Deputy Howard began to follow Carter and activated his blue lights and siren when Carter entered the exit ramp for Interstate 55 southbound. It appeared Carter was going to stop because he applied his brakes, but Carter accelerated and sped away from Deputy Howard. In the pursuit, Carter maintained speeds between 88-124 miles per hour, weaved in and out of traffic, and occasionally drove on the shoulder of the road. A Mississippi Highway Patrolman set out spike strips bringing Carter's car to a slow stop. Deputy Howard saw an object being thrown from the passenger side of the vehicle before the car came to a stop. Carter said he had just picked up his wife from work and was heading to the hospital because he was having an asthma attack. Carter was indicted for felony evasion and possession of a firearm by a felon. After Carter became upset with his court appointed attorney, Carter represented himself at his trial on October 28, 2015. Yet, the judge ordered Carter's appointed counsel to remain and assist Carter. Carter was convicted of felony evasion but acquitted of possession of a firearm by a felon. He was sentenced to five years in the custody of the Mississippi Department of Corrections. Carter's motion for a new trial, or, in the alternative, a judgment notwithstanding the verdict was denied by the trial court. Carter appealed.

### ISSUES

Whether (1) the verdict was against the overwhelming weight of the evidence; (2) the trial court erred in denying Carter’s defense instruction on “necessity and duress;” (3) the State produced false evidence in violation of Miss. R. Evid. 609; (4) law enforcement had probable cause to arrest Carter; and (5) Carter was denied effective assistance of counsel.

### **HOLDING**

(1) Because the evidence presented against Carter, which supported the verdict against him, is to be taken as true, the Court of Appeals did not find an abuse of discretion in the judge denying Carter’s motion for a new trial. (2) Because Carter was not under an unlawful threat, he had “reasonable alternatives” to driving himself, and the potential harm of Carter’s reckless driving at excess speeds over a span of twenty-two miles was disproportionate to the harm avoided in his asthma episode, the trial court’s refusal of his instruction on “necessity and duress” was not in error. (3) Because Carter failed to object at trial to the State’s admission of his prior conviction, Carter waived that issue on appeal. Further, he presented no evidence that the certified judgment of his conviction was false. (4) Because Deputy Howard witnessed Carter’s license plate not illuminated, Carter obstructing traffic, Carter failing to stop when Deputy Howard activated his lights, Carter exceeding the posted speed limit during pursuit, and Carter driving on the shoulder of the road, Carter’s claim that Deputy Howard lacked probable cause to arrest him was without merit. (5) Because there was no basis for a necessity defense instruction, there was no merit to Carter’s claim of ineffective assistance of counsel. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

#### **Affirmed - 2016-KA-00458-COA (Sept. 5, 2017)**

Opinion by Judge Barnes

Hon. William E. Chapman III (Madison County Circuit Court)

Benjamin Allen Suber (Pub. Def. Office) for Appellant - Jason L. Davis (Att’y Gen. Office) for Appellee

Briefed by [Michael Farese](#)

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## **GALE V. STATE**

### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - INFORMANT CREDIBILITY** - An instruction regarding the credibility of an informant is properly refused if the details of the informant’s pay arrangement are disclosed to the jury and the informant is subject to cross-examination

**EVIDENCE - WITNESSES - CREDIBILITY** - It is well established that it is within the province of the jury to determine the credibility of witnesses; the jury may believe or disbelieve, accept or reject the utterances of any witness

### **FACTS**

John Gale was convicted of selling less than two grams of methamphetamine during a filmed sting with a paid confidential informant and was sentenced to eight years in prison. Before beginning the sting, the police searched the confidential informant and his wife, gave him approximately \$120, and placed a camera disguised as a button on his shirt. The confidential informant then drove to a convenience store to set up the buy with Gale, and also interacted with the clerk and with another woman who told him her handbag was filled with “chocolates,” (which Gale contended on appeal was the genesis of the drugs, because “chocolates” is a street term for amphetamines). However, video evidence clearly showed Gale handing the confidential informant the baggy of methamphetamine that was placed into evidence. Gale requested a special jury instruction regarding the reliability of confidential informants, which the circuit court denied. Gale appealed.

### **ISSUES**

Whether (1) the overwhelming weight of the evidence is contradictory to the verdict, and (2) the trial court should have given a special jury instruction about confidential informants.

### **HOLDING**

(1) Because the interaction with the woman in the convenience store was unclear, the confidential informant testified he purchased the drugs from Gale, and the jury accepted the confidential informant's testimony, the verdict was not against the overwhelming weight of the evidence. (2) Because the circumstances surrounding the confidential informant's pay for the sting were disclosed, the confidential informant was cross-examined, and Gale was allowed to argue the jury should disregard his testimony as not credible, the jury was adequately instructed regarding their position as judge of credibility. Therefore, the Court of Appeals affirmed the judgment of the Winston County Circuit Court.

**Affirmed - 2016-KA-00735-COA (Sept. 5, 2017)**

Opinion by Judge Fair

Hon. Joseph H. Loper Jr. (Winston County Circuit Court)

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

Briefed by [Nikki Breeland](#)

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## HARRIS V. STATE

### CRIMINAL - FELONY

**CRIMINAL LAW - JURY INSTRUCTIONS - ESSENTIAL ELEMENTS** - Reversal is generally required where the jury had incorrect or incomplete instructions

**CRIMINAL LAW - FELONY - INEFFECTIVE ASSISTANCE OF COUNSEL** - To establish ineffective assistance of counsel, a defendant must demonstrate his attorney's performance was deficient and such deficiency was prejudicial

### FACTS

Henry Judd and his girlfriend Jasmine Polly were stopped at the end of their driveway. Troylanden Harris drove up alongside the pair, opened Polly's door and demanded that she get out of the truck. She refused, and then Harris held a handgun to her leg, which prompted her exit. Judd pinned Harris against the vehicle, which caused Harris's face covering to fall. Judd recognized Harris, and then Harris apologized and drove away. Judd called the Jackson Police Department and identified Harris as the suspect. Less than a month later, police arrested Harris when they responded to an unrelated incident. Detective Kenneth Dunn with the Jackson Police Department interviewed Harris. Harris signed a waiver and made a written confession, and the rest of the interview was audio taped. At the first and second pretrial hearings, defense counsel requested a copy of the audio tape; however, the State said there was no audio disk in the file. In a conversation with the judge and defense counsel, the State said, "...[I]f an audio was listed and we don't have it, the State would concede that and we won't get into a confession." During the course of the trial, the audio tape was referenced several times. Defense counsel argued the entire statement, audio and written, should be available for the jury to hear. The judge overruled and allowed the State to question Harris about the written confession. The jury found Harris guilty of attempted armed carjacking. Harris appealed.

### ISSUES

Whether (1) the trial court erred in admitting Harris's written confession; (2) the trial court erred in failing to instruct the jury on the essential elements of the crime; (3) the trial court erred in refusing Harris's request for a lesser-included-offense instruction; and (4) Harris received ineffective assistance of counsel.

### HOLDING

(1) Because the State and defense counsel reached an agreement not to address the written confession if the audio tape was not located, the trial court erred when it allowed the State to question Harris about the written portion of the confession. However, the court found this harmless error since there was other evidence sufficient to sustain Harris's conviction. (2) Because Harris's counsel failed to instruct the jury on the essential elements of attempt, the court found the jury instructions as a whole did not fully and fairly instruct the jury as to the elements of attempted carjacking. (3)

Because Harris presented no evidence to rebut Polly's assertion that he used a gun when he attempted to carjack her, no reasonable jury could have found Harris was unarmed when he attempted the carjacking. (4) Because defense counsel never objected to the fact that Polly's statement was excluded from discovery, and since defense counsel, not the State, introduced the statement at trial, Harris's claim of ineffective assistance of counsel was without merit. Therefore, the Court of Appeals reversed and remanded the judgment of the Hinds County Circuit Court.

**Reversed & Remanded - 2016-KA-00122-COA (Sept. 5, 2017)**

Opinion by Presiding Judge Irving

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

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Katy Taylor Gerber (Att'y Gen. Office) for Appellee

Briefed by [Sarah Raben](#)

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## ROBERSON V. STATE

### CRIMINAL - FELONY

**EVIDENCE - ADMISSIBILITY - PREJUDICIAL** - Pursuant to Miss. R. Evid. 403, relevant evidence may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence

**EVIDENCE - PRIOR BAD ACTS - PERMISSIBLE USES** - Pursuant to Miss. R. Evid. 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith; evidence of these prior acts, however, may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

**CRIMINAL - GRATIFICATION OF LUST - POSITION OF TRUST** - Pursuant to Miss. Code Ann. § 97-5-23(2), any person above the age of eighteen years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, any child younger than himself or herself and under the age of eighteen years who is not such person's spouse, with or without the child's consent, when the person occupies a position of trust or authority over the child shall be guilty of a felony; a person in a position of trust or authority over a child includes a child's teacher or coach

**EVIDENCE - SUPPRESSION - REVERSIBLE ERROR** - Not all failures to disclose exculpatory evidence constitute reversible error; rather, the question is whether there is a reasonable probability that the verdict would have been different but for governmental evidentiary suppression which undermines confidence in the outcome of the trial

### FACTS

Ricky Roberson, the Clarkdale High School softball coach, was reported by S.E., a student-athlete, to school officials for inappropriate student-coach relations. The school board conducted an investigation for the allegations and concluded no further action necessary. S.E. then reported Roberson to the Lauderdale County Sheriff's Department, which led to an eight-count indictment against Roberson involving three students, including S.E. At trial, three students testified against Roberson regarding inappropriate relations had with him: S.E., L.B., and K.T. During her testimony, S.E. alleged that Roberson touched her inappropriately on five separate occasions, kissed her on three occasions, left her gifts in her athletic bag and car, and invited her to restaurants and his hunting camp. L.B. testified that Roberson invited her to engage in sexual relations with him and left her gifts in her athletic bag, car, and locker. K.T. testified as to her relations with Roberson as a student in 1983, where he flirted with and locked her in his classroom every day. She testified Roberson would further kiss, touch, hug, and rub her, until on one occasion K.T. declined to have sex with Roberson. Statements by another former student, A.M., were admitted into trial that alleged Roberson had sexual relations with her that led to her pregnancy and adoption of the child. Roberson was convicted by a jury of two counts of child exploitation as to victim L.B. and for one count of gratification of lust as to victim S.E. Roberson's motions for judgment notwithstanding the verdict and new trial were both denied by the trial judge. Roberson appealed.

## ISSUES

Whether the trial court erred in (1) allowing the State to constructively amend Roberson's indictment; (2) not requiring the State to prove that Roberson acted with specific intent to violate the law; (3) admitting evidence of prior bad acts; (4) admitting hearsay and opinion testimony and prior consistent statements of witnesses to bolster witnesses' credibility; (5) allowing the State to use bad-act evidence to argue propensity and vouch for the credibility of its witnesses; (6) denying Roberson's request to sever the indictment; (7) making comments that skewed evidence to favor the State; (8) denying Roberson's request for discovery of notes taken during the school board's investigation; (9) sustaining Roberson's gratification-of-lust conviction when evidence was insufficient to do so; and (10) failing to grant Roberson's motions for judgment notwithstanding the verdict or a new trial for cumulative error.

## HOLDING

(1) Because both the indictment and the jury instructions followed the statutory elements of the crimes and no facts were altered or added, the trial court did not allow an impermissible constructive amendment to the indictment. (2) Because gratification of lust under § 97-5-23(2) does not contain a specific mens rea requirement, the trial court did not err in denying jury instruction D-7, which sought to define the specific intent requirement. (3) Because the evidence of prior sexual acts with K.T. and A.M. were admitted for a limited purpose under Miss. R. Evid. 404(b)—after the judge found any unfair prejudice did not outweigh the probative value under Miss. R. Evid. 403—and were accompanied by a limiting instruction, the trial court did not err in admitting evidence of prior bad acts with regard to K.T. and A.M. The evidence regarding A.M. pregnancy, however, was irrelevant and inadmissible. As Roberson did not narrow his request to exclude this evidence of pregnancy and failed to object at trial, the issue regarding evidence of pregnancy and adoption was procedurally barred. (4) Because the statement regarding A.M.'s pregnancy and adoption, while hearsay, did not unduly prejudice Roberson, the issue was without merit. Further, S.W.'s opinion testimony was harmless error and cumulative of S.E.'s testimony. (5) Because Roberson only objected to one of the prosecutor's statements, which was supported by evidence, and the others were not so inflammatory that the trial judge should have objected on his own motion, the issue was without merit. (6) Because Roberson engaged in similar behavior with the victims during a similar time span, which evinced a common scheme or plan, the trial court did not abuse its discretion in denying Roberson's request to sever the counts. (7) Because Roberson did not timely object to the trial judge's comments, the issue was waived on appeal. In addition, the Court of Appeals found the issue without merit. (8) Because the failure to disclose the notes, while error, did not create a reasonable probability of changing the outcome of Roberson's trial, the trial court's denial of Roberson's discovery request was harmless error. (9) Because the jury had the power to evaluate the credibility of S.E. testimony, and because allowing the verdict to stand would not sanction an unconscionable injustice, the evidence was sufficient to sustain Roberson's gratification-of-lust conviction. (10) Because the three potential errors by the trial court were either harmless or procedurally barred on appeal, there was no cumulative error to mandate reversal. Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Circuit Court.

### **Affirmed - 2014-KA-00652-COA (Sept. 5, 2017)**

En Banc Opinion by Judge Barnes

Hon. Lester F. Williamson Jr. (Lauderdale County Circuit Court)

Julie Ann Epps for Appellant - Lisa L. Blount (Att'y Gen. Office) for Appellee

Briefed by [Allison A. Bruff](#) & [D. Kirkwood Palmer](#)

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## **ROBINSON V. STATE**

### **CRIMINAL - FELONY**

**CRIMINAL LAW - EVIDENCE - WITNESS TESTIMONY** - The jury acts as a final arbiter of a witness's credibility and has discretion in measuring the weight and worth of any conflicting testimony

**MOTION FOR A NEW TRIAL - STANDARD OF REVIEW - UNCONSCIONABLE INJUSTICE** - A jury verdict is only disturbed when the appellate court is convinced that the trial court has abused its discretion in failing to grant a new trial or if a final result constitutes an unconscionable injustice

**MOTION FOR NEW TRIAL - STANDARD OF REVIEW - WEIGHT OF EVIDENCE** - When reviewing a denial of a motion for a new trial based on an objection to the weight of evidence, the appellate court accepts the evidence presented in support of the verdict as true

### **FACTS**

Officers Frost, Jackson, and Hitt were dispatched to Melvon Fason's home in Eupora, Mississippi after Fason's home was burglarized by three men who entered through Fason's kitchen door. Upon determining that Fason did not have cash in his home, the intruders searched the home and departed with two of Fason's guns. After the officers secured the home as a crime scene, Officer Jackson left the home to search for the suspects based on a description provided by Fason. As he approached Southwood Apartments, he noticed three men matching Fason's description. Jackson arrested the suspects and brought them to Fason's home for identification; however, Fason was unable to identify any of the suspects and all three were released. The following day, one of the suspects, Joshua Johnson, was arrested after attempting to sell Fason's gun to a local pawn shop. While in custody, Johnson gave a statement portraying Rodney Robinson as a principal actor in the burglary. Robinson was then taken into custody and testified that he had met and smoked marijuana with two other suspects prior to the burglary but, during the burglary, Robinson never entered the home. This statement was transcribed by Officer Morton, signed by Robinson, and entered into evidence where it was read to the jury. Robinson was convicted of burglary of an occupied dwelling under circumstances likely to terrorize the occupant. Because Fason was over the age of 65 years old, Robinson's sentence was enhanced to 35 years in the custody of the Mississippi Department of Corrections pursuant Miss. Code Ann. § 99-19-351. Robinson filed motions for judgment notwithstanding the verdict (JNOV) and a new trial, both of which were denied by the trial court. Robinson appealed.

### **ISSUES**

Whether the trial court erred in (1) denying Robinson's motions for a new trial and JNOV when there was insufficient physical evidence linking Robinson to the scene; and (2) admitting Johnson's testimony given Johnson's motivation to testify against Robinson in order to receive a more lenient sentence.

### **HOLDING**

(1) Because the verdict was not contrary to such an overwhelming weight of evidence that it rendered Robinson's conviction an unconscionable injustice, the trial court did not abuse its discretion in denying Robinson's motions for new trial and JNOV. (2) Because Johnson's juvenile case had been concluded prior to Robinson's trial and the jury received instructions to regard Johnson's testimony with great care in the event that it was unsupported by other evidence, Johnson's testimony was not promoted by self-benefit or improperly submitted as evidence against Robinson. Therefore, the Court of Appeals affirmed the judgment of the Webster County Circuit Court.

**Affirmed - 2016-KA-01095-COA (Sept. 5, 2017)**

Opinion by Judge Ishee

Hon. Joseph H. Loper Jr. (Webster County Circuit Court)

Benjamin Allen Suber (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Kelsey Dismukes](#)

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