

MISSISSIPPI SUPREME COURT DECISIONS – APRIL 14, 2016

SUPREME COURT - CIVIL CASES

BESTER V. STATE

CIVIL - POST-CONVICTION RELIEF

SENTENCING - FORCIBLE RAPE - § 97-3-65(2) - According to Miss. Code Ann. § 97-3-65(2), upon conviction, [the defendant] shall be imprisoned for life in the State penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine

PRECEDENT - STARE DECISIS – CHANGE IN LAW - Stare Decisis is not an inexorable command if continuing to apply an incorrect interpretation is pernicious, impractical or mischievous in effect, and resulting in detriment to the public

FACTS

Charles Bester pleaded guilty to forcible rape, and the trial judge sentenced him to life imprisonment. The sentencing order acknowledged that the plea accepted by Bester was “mutually acceptable to all parties.” Bester petitioned for post-conviction relief and the Court of Appeals rejected his motion. Bester appealed to the Supreme Court.

ISSUE

Whether the trial judge had the authority to sentence Bester to life imprisonment, absent a recommendation from the jury.

HOLDING

Because the previous precedents requiring a jury to recommend a life imprisonment sentence are not consistent with the statute as written, and because the gradual change of the sentencing requirements based only on judicial precedent is detrimental to the public, the Court affirmed the life imprisonment sentence as imposed by the trial court judge without jury recommendation. Therefore, the Supreme Court affirmed the judgment of the Jones County Circuit Court.

DISSENTS

Justice Kitchens argued that the majority’s “plain interpretation” of the statute omits from consideration the phrase regarding the jury fixing the sentence. Additionally, Justice Kitchens argues that the majority attempted to circumvent a four decades long interpretation of the doctrine of stare decisis.

Justice King argued that the trial court was without authority to impose a life sentence and that it is improper for the Court to make a significant change in the law given that the state did not ask for nearly forty years of precedent to be overruled.

Affirmed - 2013-CT-00058-SCT (Apr. 14, 2016)

En Banc Opinion by Justice Lamar- Dissents by Justice Kitchens and Justice King

Hon. Billy Joe Landrum (Jones County Circuit Court)

Pro se for Appellant - Scott Stuart (Att’y Gen. Office) for Appellee

Briefed by [Autumn T. Breeden](#)

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BURGESS V. PATTERSON

CIVIL - OTHER

CORPORATIONS - DERIVATIVE ACTION - QUALIFIED DIRECTOR - Under Miss. Code Ann. § 79-4-7.43, a qualified director is a director who, at the time action is to be taken under: (1) Section 79-4-7.44, does not have (i) a material interest in the outcome of the proceeding, or (ii) a material relationship with a person who has such an interest

CORPORATIONS - DERIVATIVE ACTION - SHAREHOLDER COMPLAINT - Under Miss. Code Ann. § 79-4-7.44, the shareholder's complaint shall allege with particularity facts establishing either that a majority of the board of directors were not qualified at the time of determination was made or that the determination was not made in good faith following a reasonable inquiry

FACTS

William Burgess, a shareholder of BancorpSouth, Inc., sent a shareholder demand claiming that corporate management had caused BancorpSouth to issue a series of materially false and misleading statements that led to damages. In response, BancorpSouth formed a Special Committee to evaluate these claims. The Special Committee determined that a derivative suit was not in the best interest of the company. Burgess subsequently filed a derivative suit against certain current and former directors and officers of the company, claiming that the Special Committee lacked independence from BancorpSouth and sought damages sustained as a result of the defendants' breaches of fiduciary duties. The defendants filed a motion to dismiss on the basis that Burgess failed to cast reasonable doubt on the Special Committee's independence or the sufficiency of its inquiry. The defendants also filed a protective order in response to Burgess's motion to compel documents that included the report prepared by the Special Committee, arguing that no law permitted Burgess to obtain discovery or supplement his complaint at the pleading stage prior to a ruling on the motion to dismiss. The appointed special judge granted the defendants' motion to dismiss and also rejected Burgess's argument that discovery was needed at the pleading stage. Burgess appealed.

ISSUES

Whether (1) Burgess's complaint alleged with particularity facts establishing that the members of the Special Committee were not qualified under Mississippi Code Section 79-4-1.43; (2) the plaintiff or defendant bears the burden under Section 79-4-7.44 of proving or rebutting the good faith of the Special Committee and the reasonableness of its inquiry and if that burden was met; and (3) Burgess is entitled to the Special Committee's report.

HOLDING

(1) Because Burgess's complaint pled merely conclusory allegations of director partiality, Burgess failed to show the members of the Special Committee were unqualified under Sections 79-4-7.44 and 79-4-1.43. (2) Because Burgess failed to allege with particularity facts establishing that the members of the Special Committee were not qualified, Burgess had the burden to prove the Special Committee's decision was not made in good faith. Further, because Burgess did not raise any material issue of fact concerning the sufficiency or appropriateness of the procedures chosen by the Special Committee, Burgess failed to meet this burden. (3) Because a plaintiff who files a derivative suit is not entitled to discovery in order to assist him in meeting the pleading requirements and Burgess's demand was rejected, Burgess is not entitled to the Special Committee's report on his presuit demand. Therefore, the Supreme Court affirmed the judgment of the Lee County Circuit Court.

Affirmed - 2015-CA-00260-SCT (Apr. 14, 2016)

Opinion by Justice Kitchens

Hon. William R. Barnett (Lee County Circuit Court)

David M. McMullan, Jr., Kip Brian Shuman, Rusty E. Glenn, Robert B. Weiser, Brett Stecker, & James M. Ficaro for Appellant - James Patrick Caldwell & Kevin B. Smith for Appellees

Briefed by [Paul Wallace](#)

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CITY OF TUPELO V. McMILLIN

CIVIL - TORTS - OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

IMMUNITY - GOVERNMENT - PERMIT DETERMINATIONS - A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim arising out of the issuance, denial, suspense or revocation of any permit where the governmental entity or its employee is authorized to make such determinations

ADMINISTRATIVE LAW - ADMINISTRATIVE ACT - ARBITRARY AND CAPRICIOUS - An administrative act is arbitrary and capricious if the agency entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of any agency expertise

MISSISSIPPI TORT CLAIMS ACT - STATUTE OF LIMITATIONS - NOTICE OF CLAIM - All tort actions shall be commenced within one year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after, except that filing a notice of claim within the required one-year period will toll the statute of limitations for ninety-five days from the date the chief executive officer of the state entity or the chief executive officer or other statutorily designated official of a political subdivision receives the notice of claim

EQUITABLE ESTOPPEL - APPLICABILITY - FRAUDULENT CONDUCT - For the doctrine of equitable estoppel to apply, inequitable or fraudulent conduct must be established

FACTS

In 2006, Dr. Terry and Susan McMillin purchased a home in Tupelo, Miss. The McMillins found a failed home inspection card that listed the wrong name as the contractor for their home. They then discovered that the City of Tupelo erred in withdrawing the name of one licensed contractor and mistakenly substituting the name of another licensed contractor when a licensed contractor was not actually working on the home. The circuit court awarded \$9,319.23 in damages to repair the home and \$105,894.39 in legal fees related to another case involving the construction but denied the McMillins' request for attorneys' fees in the instant case. The City appealed, and the McMillins cross-appealed.

ISSUES

Whether (1) the trial court erred in failing to find the City immune from liability; (2) Mississippi Tort Claims Act's (MTCA) one-year statute of limitations bars the McMillins' complaint; (3) the trial court erred by awarding the McMillins more than \$105,000 in damages for legal fees in the suit involving the construction of the house, and (4) the trial court erred in denying the McMillins' request for attorneys' fees in the present case.

HOLDING

(1) Because the City's issuance of the building permit was not arbitrary and capricious, the City is immune from liability. (2) Because the notice of claim was filed over a year before the action commenced, the City did not waive its statute of limitation defense, and equitable estoppel does not apply here, the McMillins' claims were barred by the statute of limitations. (3) Because the City was immune from liability and the statute of limitations barred the McMillins' case, the circuit court erred in awarding more than \$105,000 in damages for legal fees in the McMillins' suit against Deas. (4) Because the statute of limitations has run and the City is immune from liability, analysis of the cross-appeal is unnecessary. Therefore, the Supreme Court reversed and rendered the direct appeal and affirmed the cross-appeal of the Lee County Circuit Court.

DISSENT

Justice Kitchens argues that the City was equitably estopped from raising the statute of limitations defense. He also believes that the City was not immune from liability under the MTCA.

Reversed & Rendered on Direct Appeal/Affirmed on Cross Appeal - 2014-CA-01378 (Apr. 14, 2016)

En Banc Opinion by Justice Coleman - Dissent by Justice Kitchens

Hon. James Seth Andrew Pounds (Lee County Circuit Court)

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MISS. COMM'N ON JUD. PERFORMANCE V. SHOEMAKE

CIVIL – JUDICIAL PERFORMANCE

CIVIL PROCEDURE - JUDICIAL PERFORMANCE - APPROPRIATE SANCTION - The Court has the power upon recommendation of the commission on judicial performance to remove from office, suspend, fine or publicly censure or reprimand any justice or judge of this state for willful misconduct in office or conduct prejudicial to the administration of justice which brings the judicial office into disrepute

CIVIL PROCEDURE - CHANCERY COURT RULES - PROBATE MATTERS - All pleadings to be filed by a fiduciary regarding a probate matters are required to be personally signed and sworn to by the attorneys and must consider all of the facts at hand when a ward is involved

CIVIL PROCEDURE - CLEAR AND CONVINCING EVIDENCE - DEFINITION - Clear and convincing evidence is that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case

CIVIL PROCEDURE - JUDICIAL MISCONDUCT - SANCTIONS - The primary purpose of judicial sanctions is to restore and maintain the dignity and honor of the judicial office and to protect the public against future excesses rather than punishment of the individual

JUDICIAL MISCONDUCT - SANCTIONS - FACTORS TO CONSIDER – The court must consider (1) the length and character of the judge's public service; (2) whether there is any prior caselaw on point; (3) the magnitude of the offense and the harm suffered; (4) whether the misconduct is an isolated incident or evidences a pattern of conduct; (5) the extent to which the conduct was willful, and the extent to which the conduct exploited the judge's position to satisfy his or her personal desires or was intended to deprive the public of assets or funds rightfully belonging to it; and (6) the presence or absence of mitigating or aggravating factors

FACTS

On October 11, 2013 the Commission found probable cause to file a Formal Complaint against Chancellor David Shoemake of the Thirteenth Chancery Court District for contributing to the mismanagement of the conservatorship of Victoria Denise Newsome. Judge Joe Dale Walker was assigned Victoria's conservatorship and he assigned Victoria's mother as the conservator. Judge Walker ordered that the chancery court's law clerk Keely McNulty, serve as both the attorney for the conservator and as guardian ad litem for Victoria Newsome. Walker ordered that a house be built for the use and benefit of Victoria Newsome and tasked McNulty with soliciting a minimum of four construction bids. McNulty sent Shoemake a seventeen-page fax with the petition and the bids. Shoemake, after reviewing the petition and bids, approved the lowest bid for the amount of \$273,075.14. Shoemake then transferred the case to Walker. Over the course of seven months, Shoemake executed and filed four more orders affecting the Newsome Conservatorship. After these events, Marilyn demanded that McNulty cease representing her as the attorney for the conservator and filed a complaint alleging that Walker and Shoemake had worked in concert to siphon money from the conservatorship, to allow the poor construction of the handicapped-accessible home for Victoria, protect McNulty, and generally to cover up their misconduct. At a Show Cause Hearing the Commission found by clear and convincing evidence that Shoemake had signed the orders at issue and he knew or should have known that his testimony at the Show Cause Hearing had been misleading. The Commission recommended to the Supreme Court that Judge Shoemake be removed from office, fined \$2,500, and assessed costs in the amount of \$5,882.67. Judge Shoemake appealed.

ISSUES

Whether (1) the signing of the five ex parte orders constitutes judicial misconduct under the Code of Judicial Conduct and Section 177A of the Mississippi Constitution of 1890, (2) the commission presented clear and convincing evidence to the Court that Shoemake gave false and misleading testimony at his Show Cause Hearing and (3) Judge Shoemake's judicial misconduct warrants removal from office.

HOLDING

(1) Because Judge Shoemake accepted unsworn petitions and failed to conduct further inquiry into the matters presented to him for relief and Judge Shoemake failed to act as Victoria's superior guardian, his actions constituted judicial misconduct. (2) Because the plain text of the show cause and formal hearing transcripts cast doubt upon the Commission's findings of false and misleading conduct, the Commission failed to present clear and convincing evidence to the Court that Shoemake gave false and misleading testimony at his show cause hearing. (3) Because the existing caselaw supports suspension and reprimand over removal for issues more severe than this and Judge Shoemake has never been investigated before, his misconduct does not warrant removal from office. Therefore, the Mississippi Supreme Court accepted in part the recommendation of the Mississippi Commission on Judicial Performance.

CONCURRING IN PART AND DISSENTING IN PART

Justice Randolph agreed with the Court's decision not to dismiss Judge Shoemake. He disagrees with the amount of suspension, fines and costs that were assessed against Judge Shoemake. Justice Randolph believes those sanctions should have been reduced by one-half.

Justice King agreed with the Court's sanctions against Judge Shoemake in part. He dissents because he believed that Judge Shoemake should be required to make Victoria's estate whole in addition to the other sanctions laid out by the majority.

Accepted in Part – 2015-JP-00996-SCT (Apr. 14, 2016)

En Banc Opinion by Justice Coleman – Concurrences by Justice Randolph and Justice King - Dissents by Justice Randolph and Justice King

Hon. Lee J. Howard (Mississippi Commission on Judicial Performance)

Darlene D. Ballard, Bonnie H. Menapace & Meagan Courtney Brittain for Appellant - William H. Jones and Andrew J. Kilpatrick, Jr. for Appellee

Briefed by [Darlan Etienne](#)

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ROBINSON V. CORR

CIVIL – MEDICAL MALPRACTICE

MEDICAL MALPRACTICE - EXPERT TESTIMONY - DOCTOR AS DEFENDANT & WITNESS - A defendant doctor may testify as a fact witness if the opinion was acquired through the care and treatment of the patient *during* the illness; however, if the testimony is based on a hypothesis, it crosses from lay testimony to expert testimony and must comply with the requirements of M.R.E. 702 and *Daubert*

MEDICAL MALPRACTICE - EXPERT TESTIMONY - SUFFICIENT NOTICE - The substance of every fact and every opinion which supports or defends the party's claim or defense must be disclosed and set forth in meaningful information which will enable the opposing side to meet it at trial

EXPERT WITNESS - INTERROGATORIES - INSUFFICIENCY - If opposing counsel deems that an answer to an interrogatory regarding an expert witness who will testify at trial as insufficient, notice of insufficiency must be given to the opposing party in order to let them know more information is desired

EXPERT WITNESS - TESTIMONY - BEYOND EXPERT DESIGNATION - An expert witness may testify outside the scope of their expert designation if a party "opens the door" to inquire about otherwise inadmissible evidence

JURY VERDICT - DAMAGES - REMITTITUR - The Supreme Court may order a remittitur on a case by case basis if the Court finds that the damages are excessive, inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence

FACTS

In May 2000, Regina Corr sued Dr. Charles Robinson for medical malpractice for negligently suturing her uretes while repairing a laceration to the uterus incurred during a C-Section procedure. During a July 2001 deposition, Dr. Robinson denied suturing the ureter and his position did not change until the day of opening statements at trial. In May 2003, Corr designated Dr. Duboe, an OB/GYN to testify as to the standard of care and causation. In 2014, Dr. Robinson filed his Second Supplemental Designation of Experts, which identified himself as an expert in obstetrics and gynecology. Trial begin in Sept. 2014. Dr. Robinson's counsel raised pretrial motions objecting to portions of Dr. Duboe's testimony as outside the scope of his expert designation and expertise. The trial court overruled these objections finding that Dr. Duboe was responding to a direct question posed by Dr. Robinson's counsel. Corr filed a motion in limine to exclude Dr. Robinson's testimony. The trial court ruled that this testimony was expert testimony, which had not been disclosed, and sustained Corr's motion to exclude it. Both Corr, and her husband Brian, testified as to Corr's injuries and medical treatment. The jury awarded Corr \$55,634.78 in past medical expenses, \$8,507.20 in lost wages, and \$420,000 in pain and suffering. Dr. Robinson filed a motion for judgment notwithstanding the verdict, motion for remittitur, or in the alternative, motion for new trial. The trial court denied all motions. Robinson appealed.

ISSUES

Whether the trial court (1) abused its discretion in preventing Dr. Robinson from testifying that he would not have removed the stitch in Corr's uterus during surgery because of Corr's blood loss and friability of the stitched tissue; (2) abused its discretion in allowing Corr's expert, Dr. Duboe, to testify beyond his expert designation and outside his field of expertise that Corr's post-surgery hemoglobin levels indicate Dr. Robinson overestimated Corr's blood loss; and (3) committed reversible error in refusing to grant Dr. Robinson's motion for remittitur.

HOLDING

(1) The trial court did not abuse its discretion in preventing Dr. Robinson from testifying that he would not have remove the stitch in Corr's uterus during surgery because the testimony was expert opinion testimony, rather than lay testimony, acquired after the surgery had ended and could not have been part of his thought process during or immediately after the surgery. Based on Dr. Robinson's expert designation, the opinion was not meaningfully disclosed during discovery, and Corr's appeal is not procedurally barred for failing to seek an order compelling discovery due to insufficiency of Dr. Robinson's expert designation and interrogatory responses. (2) Because he was answering questions asked by Dr. Robinson's counsel as to Corr's blood loss, the trial court did not abuse its discretion in allowing Dr. Duboe to testify beyond his expert designation. (3) The trial court did not commit reversible error in refusing to grant Dr. Robinson's motion for remittitur because Corr offered credible and substantiated testimony and Dr. Robinson did not present any evidence that the jury verdict was influenced by bias, prejudice, or passion, or that it was contrary to the overwhelming weight of credible evidence. Therefore, the Supreme Court affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2015-CA-00051-SCT (Apr. 14, 2016)

Opinion by Chief Justice Waller

Hon. Lisa P. Dodson (Harrison County Circuit Court)

Brett K. Williams, James E. Lambert, III, & Joshua Wesley Danos for Appellant - Joe Sam Owen & Robert P. Myers, Jr. for Appellee

Briefed by [Katherine M. Portner](#)

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SUPREME COURT - CRIMINAL CASES

GRAVES V. STATE

CRIMINAL - FELONY

APPELLATE PROCEDURE - NO ARGUABLE ISSUE - LINDSEYDOCTRINE - If counsel for an indigent client does not believe his or her client's case presents any arguable issues on appeal, counsel must comply with Miss.

R. App. P. 28(a)(1)-(4), (7), which states: counsel must certify that there are no arguable issues supporting the client's appeal, and he or she has reached this conclusion after scouring the record thoroughly, specifically examining: (a) the reason for the arrest and the circumstances surrounding arrest; (b) any possible violations of the client's right to counsel; (c) the entire trial transcript; (d) all rulings of the trial court; (e) possible prosecutorial misconduct; (f) all jury instructions; (g) all exhibits, whether admitted into evidence or not; and (h) possible misapplication of the law in sentencing. Counsel is then required to forward a copy of the brief to the client and inform the client of his or her right to file a pro se brief

CRIMINAL PROCEDURE - INDICTMENTS - REQUIRED INFORMATION - An indictment must contain a clear and concise statement of the elements of the crime charged against the defendant

APPEAL - INEFFECTIVE ASSISTANCE OF COUNSEL - REQUIREMENTS FOR REVIEW ON DIRECT APPEAL - Ineffective assistance of counsel claims will be reviewed on appeal only if (1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge

APPEAL - INEFFECTIVE ASSISTANCE OF COUNSEL - FAILURE TO PROPERLY PREPARE - An allegation of ineffective assistance of counsel for failure to properly prepare must state whether any additional investigation, such as interviewing witnesses or investigating facts, would have significantly aided or altered the outcome of the defendant's case at trial

CRIMINAL PROCEDURE - DISCOVERY - DISCOVERY VIOLATIONS - Discovery violations are harmless unless it affirmatively appears from the entire record that the violation caused a miscarriage of justice

CRIMINAL PROCEDURE - INDICTMENTS - SEVERANCE - In trials concerning multi-count indictments, severance of indictments is unnecessary if the acts or transactions are connected together as part of a common scheme or plan and if the indictment was otherwise proper

FACTS

On two separate occasions, Marshall Graves sexually assaulted his friend's minor daughter. Graves was indicted on two counts of fondling and one count of sexual battery. Graves was convicted of all counts. The trial court sentenced Graves as a habitual offender to terms of fifteen years for each count of fondling and life as to one count of sexual battery—all to be served concurrently. Graves's appellate counsel filed a brief in compliance with *Lindsey v. State*, certifying to the Supreme Court that the record presented no arguable issues for appeal. Graves subsequently filed a pro se brief, asserting numerous errors.

ISSUES

Whether (1) Graves's indictment was defective; (2) Graves's counsel provided ineffective assistance; (3) the trial court erred in allowing evidence of Graves's prior bad acts to be admitted at trial; (4) the trial court erred in allowing the victim's father to testify at trial; (5) the trial court erred in allowing statements to be introduced at trial pursuant to the "tender years" exception; (6) the evidence presented at trial was sufficient to sustain a conviction; (7) the various witnesses' statements were conflicting such that the jury's verdict should be called into question; (8) the verdict was against the overwhelming weight of the evidence; (9) Graves was denied a fair trial due to prosecutorial misconduct; (10) the trial court abused its discretion in denying Graves's motion to sever the indictment; (11) the trial court abused its discretion in denying Graves's objection regarding the State's reference to a jury instruction during closing arguments; and (12) the cumulative errors warrant a reversal.

HOLDING

(1) Because Graves's indictment contained a clear and concise statement of the elements of the crimes with which he was charged, the indictment was not defective. (2) Because Graves failed to demonstrate any deficient performance by counsel, his ineffective assistance of counsel claim was without merit. (3) Because the errors alleged by Graves regarding prior bad acts were invited or induced by Graves (i.e., he submitted the evidence in question), his alleged errors are not attributable to the trial court. (4) Because Graves was on notice that the victim's father may be called as a witness and because even if the admission of his testimony was a discovery violation such violation would have been harmless, the trial court did not err in allowing the testimony. (5) As Graves's counsel did not object to the State eliciting tender-years hearsay, that issue was waived on appeal. (6) Because the victim testified in detail as to Graves's crimes, and because such testimony was not substantially contradicted, the evidence was sufficient to convict Graves. (7) Because the evidence presented was sufficient to convict Graves, the conflicting-witness-statements claim is without merit. (8) Because Graves's conviction was not an unconscionable injustice, his verdict was not against the overwhelming weight

of the evidence. (9) Graves's failure to contemporaneously object to the State's closing-argument references to him as a "pedophile" and to a specific jury instruction procedurally barred him from raising a prosecutorial misconduct claim on appeal. (10) Because the State presented a prima facie case that Graves's crimes were part of a common scheme or plan and because Graves made no showing that the crimes were separate and distinct transactions, the trial court did not abuse its discretion in denying Graves's motion to sever the indictment. (11) Because Graves failed to contemporaneously object to the State's arguments during closing arguments, he was procedurally barred from arguing prosecutorial misconduct on appeal. (12) Because no error was found as to any of Graves's assignments of error, there were no errors to accumulate, and Graves's cumulative error argument was without merit. Therefore the Supreme Court affirmed the decision of the Lamar County Circuit Court.

Affirmed - No. 2014-KA-00464-SCT (Apr. 14, 2016)

Opinion by Presiding Justice Randolph

Hon. Prentiss Greene Harrell (Lamar County Circuit Court)

W. Daniel Hinchcliff (State Pub. Defender Office) for Appellant - Ladonna C. Holland (Att'y Gen. Office) for Appellee

Briefed by [J. Matthew Orr](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – APRIL 12, 2016

COURT OF APPEALS - CIVIL CASES

BRASSO V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - UNIFORM CIRCUIT AND COUNTY RULES - COMPETENCY TO STAND TRIAL - Uniform Rule of Circuit and County Court 9.06 requires a court to order a defendant to undergo a mental examination if, upon its own motion or upon motion of an attorney, the court has reasonable ground to believe that the defendant is incompetent to stand trial

CRIMINAL PROCEDURE - COMPETENCY TO STAND TRIAL - TRIAL COURT'S RESPONSIBILITY - Even when the issue of competency to stand trial has not been raised by defense counsel, the trial judge has an ongoing responsibility to prevent the trial of an accused unable to assist in his own defense

CRIMINAL PROCEDURE - COMPETENCY TO STAND TRIAL - REQUIREMENTS - A defendant is competent to enter a guilt plea as long as he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him

FACTS

Jeffrey Brasso pled guilty to sexual battery of a child, his adopted sister. Before he pled guilty, the prosecution, Brasso's attorney and the judge had a conversation in chambers about the need for Brasso to undergo a mental evaluation. At the plea hearing, Brasso told the court that he was enrolled in the special education program at high school, he had a history of mental illness, he was on antidepressant medication, and he has had organic brain damage. The court did not inquire into Brasso's answer stating that he had a history of mental illness and mental disease. The court accepted his plea as voluntary and intelligently entered. The court deferred sentencing to obtain a presentence investigation report and to allow Brasso to undergo a mental evaluation. The evaluation conducted by Dr. Massong found that Brasso had a generally normal mental status, likely low-average intelligence, was fully oriented, had adequate cognitive efficiency, and no psychosis. The report also stated that Brasso had an extensive and pervasive mental health and behavior dysfunction. Dr. Massong found that Brasso never became a fully independent adult because of the organic brain syndrome from which he suffered. He had been hospitalized for psychiatric treatments, including three civil commitments. He had received multiple psychiatric diagnoses and been prescribed psychoactive medications. At the

sentencing hearing, Brasso's uncle testified that there was little activity in the damaged part of his brain, Brasso had been diagnosed with schizophrenic and bipolar disorder, which ran in his family, and stated that he was a "simple-minded" man with mental deficiencies who could not be taught even a simple task. Just before issuing its sentence of 25 years in prison, the court stated: "[Brasso] might not quite fully understand everything, but he knew better." Brasso filed a postconviction relief motion, which the court denied. Brasso appealed.

ISSUES

Whether the circuit court had reasonable grounds to believe that Brasso was potentially incompetent to stand trial.

HOLDING

Because the trial court was advised of Brasso's special education background, his history of mental illness and disease, his organic brain damage, and that he had been taking medications, and the court was aware that the prosecution and Brasso's attorney had agreed to have Brasso undergo a mental evaluation for sentencing purposes that concluded Brasso has an extensive history of mental health and behavioral dysfunction that continued to the present, and the court even stated that Brasso "might not quite fully understand everything." The record contained sufficient proof that gave the circuit court reasonable grounds to believe that Brasso was incompetent to stand trial. A mental evaluation followed by a competency hearing was warranted before Brasso could have entered his guilty plea. A retroactive mental evaluation to determine a defendant's competency is not sufficient under Rule 9.06. Therefore, the Court of Appeals reversed the Jackson County Circuit Court and remanded the case for further proceedings.

DISSENT

Judge Wilson argued that the trial court did not abuse its discretion in not ordering a competency hearing sua sponte because the Court was not presented with any information that called into question Brasso's understanding of the charges against him or his ability to consult with his lawyer, pointing out that Brasso coherently responded to questions at his plea hearing, his attorney stated that she did not have trouble communicating with him, Brasso confirmed that he understood the charges against him and the consequences of pleading guilty, Brasso did not act unusual or erratically, and Brasso's attorney did not express any concerns as to his competency. Judge Wilson further pointed out that Dr. Massong's report also showed that Brasso tried to manipulate people for his own benefit and to receive sympathy, that Brasso's self-descriptions of psychosis were not clinically verified, that Brasso had not been hospitalized for psychiatric reasons for five years prior to his arrest, and that he had a generally normal mental status, with low-average intelligence, fully oriented, adequate cognitive deficiencies and no psychosis. In Justice Wilson's view, Brasso's organic brain syndrome and simplemindedness was not enough to require the trial court to order a competency hearing.

Reversed & Remanded - No. 2014-CA-010614-COA (Apr. 12, 2016)

Opinion by Judge James – Dissent by Judge Wilson

Hon. Dale Harkey (Jackson County Circuit Court)

Raymond Osborn Boutwell Jr. for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [Abby Abide](#)

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BROWN V. STATE

CIVIL - POST CONVICTION RELIEF

CRIMINAL PROCEDURE - SENTENCING - REASONABLENESS REVIEW - Sentencing lies within the sole discretion of the trial court, and generally will not be disturbed on appeal so long as it does not exceed the maximum term allowed by statute

CRIMINAL PROCEDURE - SENTENCING - RANGE - The total of the sentences may exceed the actuarial life expectancy of the defendant

CRIMINAL PROCEDURE - CONTROLLED SUBSTANCES - PENALTIES - Drug offenses are very serious, and the public has expressed grave concern with the drug problem, to which the legislature has responded in kind with stiff penalties for drug offenders

FACTS

In 2011, Vernon Brown was indicted for two counts of possession of a controlled substance. In 2012, Brown was indicted for seven counts of the sale or transfer of narcotics. He was also separately indicted of two counts of possession of a controlled substance. As part of the plea agreement, the prosecution agreed to not seek sentence enhancements as a habitual offender. Brown plead guilty to all eleven counts. The total sentences in the separate indictments were ordered to be served consecutively, for a total of seventy-one years in custody of the Mississippi Department of Corrections. On August 4, 2014, Brown filed a PCR motion. Brown, who was fifty-seven years old at the time of his sentencing, argued that the combined total sentence was excessive because it exceeded his life expectancy, and that the trial court erred because it did not consider his actuarial life expectancy. The trial court dismissed the PCR motion. Brown appealed.

ISSUE

Whether the trial court erred by sentencing Brown to a combined number of years that exceeded his life expectancy and not consulting the actuarial life expectancy.

HOLDING

Because the total of the sentences may exceed the actuarial life expectancy of the defendant, the trial court did not err when sentencing Brown.

Dismissed - 2014-CP-01338-COA (April 12, 2016)

Opinion by Judge James

Hon. Lee J. Howard (Lowndes County Circuit Court)

Vernon Brown Jr. (Pro se) for Appellant - Alicia Marie Ainsworth (Att’y Gen. Office) for Appellee

Briefed by [Madison Coburn](#)

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DR. ARENIA C. MALLORY COMM. HEALTH CENT., INC. V. DAVIS-CORNELIUS

CIVIL - CONTRACT

CONTRACT - ARBITRATION - SEVERABILITY - So long as neither party attacks the validity of the arbitration clause itself, an arbitration clause between the parties is enforceable even while other elements of the contract are in dispute

CONTRACT - ARBITRATION - SCOPE OF ARBITRATION - Claims that disputes fall outside the scope of a contract’s arbitration clause must be decided by the arbitrator, not the court

CONTRACT - ARBITRATION - PROCEDURAL ISSUES - Issues surrounding procedural matters that affect the arbitrability of a claim are to be decided by the arbitrator

FACTS

In 2008, the chairman of the board of directors of the Dr. Arenia C. Mallory Community Health Center signed a multi-year employment contract with Stellanda Davis-Cornelius to serve as the Health Center’s chief executive officer. Davis-Cornelius was fired for cause in 2014. Her employment contract required an arbitration panel to be convened within sixty days upon her termination. The arbitration panel was not formed within sixty days, and Davis-Cornelius – asserting she was not fired for cause – sued to collect the balance of her contracted compensation. In response, the Health Center filed a motion to compel arbitration, arguing the issue of whether she was fired for cause or not was within the scope of the arbitration agreement. The Holmes County Circuit Court denied the Health Center’s motion on the

grounds the arbitration provision was only valid within the sixty-day window from the time of Davis-Cornelius' termination. Dr. Arenia C. Mallory Community Health Center appealed.

ISSUES

(1) Whether a valid arbitration agreement existed when the Health Center disputes the enforceability of the contract as a whole. (2) Whether the determination of the for cause nature of the firing was within the scope of the arbitration agreement, despite the Health Center violating the sixty-day deadline.

HOLDING

(1) Because neither party specifically attacked the validity of the arbitration clause, issues surrounding the contract's overall enforceability do not preclude arbitration. (2) Because the terms of the arbitration agreement specifically addressed one issue – termination for cause – the underlying substance of Davis-Cornelius' claim falls within the scope of the arbitration clause. Procedural matters concerning arbitrability outside of the sixty-day time period are for the arbitrators to decide. Therefore, the Court of Appeals reversed and remanded the judgment of the Holmes County Circuit Court.

Reversed and Remanded - 2014-CA-01622-COA (Apr. 12, 2016)

En Banc Opinion by Judge Wilson

Hon. Jannie M. Lewis (Holmes County Circuit Court)

Laura Ford Rose & Jessica Iris Morris for Appellant - Steven Todd Jeffreys for Appellee

Briefed by [John G. Archer](#)

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ELKINS V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PAROLE REVOCATION - CRIMINAL PROCEEDINGS - A parolee is not precluded per se from a parole revocation because the criminal charge giving rise to the proceedings were dropped
POST-CONVICTION RELIEF - PAROLE REVOCATION - ACQUITTAL - When there is an acquittal or dismissal of the underlying criminal charges, the State must proffer that he committed an act violating his parole
POST-CONVICTION RELIEF - PAROLE REVOCATION - ARREST - The mere fact that a parolee was arrested and charged with a crime may hardly suffice actual proof that he committed an act violating his parole
POST-CONVICTION RELIEF - PAROLE REVOCATION - BURDEN OF PROOF - The State must be shown that reasonable grounds existed for revocation of parole outside of the charge itself

FACTS

In 1995, Courtney Elkins pled guilty to murder and was sentenced to life imprisonment. Twelve years later, Elkins was released on conditional parole and relocated to Chicago, Illinois. While in Illinois, Elkins was arrested and charged with domestic battery, which prompted a preliminary parole hearing to determine whether Elkins violated the conditions of his parole. Although the parole officer concluded there was probable cause to warrant a parole-violation hearing, the Chicago Police Department dismissed the charges against Elkins. Despite the dismissal, Elkins was extradited to Mississippi where the Mississippi Parole Board revoked Elkin's parole, and he returned to prison for life. Elkins filed a motion for post-conviction relief on April 29, 2011, alleging his parole was unlawfully revoked. The trial court dismissed Elkin's PCR motion without conducting a hearing. Elkins appealed. The Court of Appeals remanded the case back to circuit court to conduct an evidentiary hearing regarding the evidence the Parole Board relied on in revoking Elkin's parole. Elkin's former girlfriend, Nadeja Beasley testified that Elkins did not hurt her, and that she only called the police to report domestic abuse because she knew Elkin's parole could be harmed. Stephanie Skipper, an employee of the Parole Board testified that the Board considered another arrest in Chicago, where Elkin's stabbed his father with a knife. While Elkin's was allowed to continue on parole, he admitted to the allegations in both arrests while testifying before the Parole Board. Based on the evidence, the trial court denied Elkin's PCR motion. Again, Elkins appealed.

ISSUE

Whether Elkins' parole should be reinstated because the charges were dropped that spurred the Parole Board to reconsider his parole.

HOLDING

Because Elkins failed to prove by the preponderance of the evidence that he is entitled to reinstatement of his parole and the State showed that reasonable grounds existed to revoke the parole, the court affirmed the judgement of the trial court. The court concluded that, while the charges were dropped against Elkins, the evidence that he admitted to both domestic violence and stabbing his father gave the State reasonable grounds to revoke the parole outside of the charges themselves. Furthermore, Elkins failed to refute this evidence and did not meet his burden of proof to show his parole should be reinstated. Therefore, the Court of Appeals affirmed the judgement of the Sunflower County Circuit Court.

Affirmed - 2013-CP-02023-COA (Apr. 12, 2016)

Opinion by Presiding Judge Griffis

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

Courtney Elkins (Pro se) for Appellant - Jeffrey A. Klingfuss (Att'y Gen. Office) for Appellee

Briefed by [Rachel Smith](#)

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EVANS V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PROBATION REVOCATION - STATUTE OF LIMITATIONS - The Uniform Post-conviction Collateral Relief Act excepts claims of unlawful parole revocation from its three-year limitations period

POST-CONVICTION RELIEF - PROBATION REVOCATION - RIGHT TO COUNSEL - A probationer has a right to appointed counsel at a revocation hearing only when the issues are complex

POST-CONVICTION RELIEF - PROBATION REVOCATION - DUE PROCESS - Where a defendant signs a waiver and is afforded a petition setting forth his probation violations and has opportunity to defend himself, the defendant properly receives notice of his alleged violations and no due-process violation occurs

POST-CONVICTION RELIEF - PROBATION REVOCATION - MOVANT'S BURDEN - The burden is on the PCR movant to show he is entitled to relief by a preponderance of the evidence; the PCR movant further bears the burden of presenting a record which is sufficient to undergird his assignments of error

POST-CONVICTION RELIEF - PROBATION REVOCATION - APPEALS - An order revoking probation is not appealable; the correct vehicle for legal redress is a PCR motion, not a direct appeal of the revocation

FACTS

On August 13, 2002, Evans pled guilty to armed robbery and the trial judge sentenced him to serve sixteen years in the custody of the MDOC, with eight years suspended and eight years to serve, followed by three years of PRS. On July 15, 2009, Evans was placed on PRS for a period of three years. On April 18, 2010, Evans was arrested for robbery and indecent exposure. On April 23, 2010, a petition to revoke Evans's PRS was filed due to Evans's arrest and his failure to pay supervision fees and court costs. Evans signed a waiver of his right to a preliminary probation-revocation hearing. The trial court held a revocation hearing on July 6, 2010. Evans admitted that he possessed awareness of his August 2010 charge for robbery and indecent exposure and admitted that he owed fees. Evans confirmed that he signed the document waiving his right to a preliminary probation-revocation hearing. After finding that Evans violated the terms of his PRS, the trial court entered an order revoking Evans's PRS and sentenced him to serve his original sixteen-year sentence in the custody of the MDOC, with credit received for time served. On November 12, 2013, Evans filed a PCR motion, claiming the trial court illegally revoked his PRS, that he was denied assistance of counsel at the revocation hearing, that the evidence against him was not disclosed at the hearing, that he was not given the opportunity to present witnesses and documentary evidence, and that he was not advised of his right to confront and cross-examine adverse witnesses. In the State's response to Evans's PCR motion, the State claimed that the motion was time-barred pursuant to Miss. Code Ann. § 99-39-5(2), explaining that Evans's probation was revoked on July 6, 2010 and Evans failed to file

his PCR motion until November 12, 2013. On December 17, 2014, the trial court entered an order denying Evans's PCR motion. Evans appealed.

ISSUES

Whether (1) Evans was denied legal representation at the probation-revocation proceedings, (2) Evans failed to receive an initial appearance, (3) Evans received an illegal sentence, and (4) the trial court failed to advise Evans he could appeal his sentence.

HOLDING

(1) Because the issues relevant to the revocation of Evans's PRS were neither complex nor difficult to develop and he failed to request counsel, Evans waived his right to a preliminary hearing. (2) Because Evans signed a waiver of his right to a preliminary probation-revocation hearing and possessed the opportunity to defend himself against allegations and question the witnesses, Evans voluntarily waived his right to preliminary hearing and no violation of due process rights occurred. (3) Evans failed to meet his burden of proof to show his sentence was illegal and Evans's sentence, falling within the statutory guidelines, was legally imposed. (4) There is no requirement that a trial court advise a defendant of his right to seek post-conviction relief from a probation-revocation hearing. Therefore, the judgment of the Harrison County Circuit Court was affirmed.

Affirmed - 2015-CP-00078-COA (Apr. 12, 2016)

Opinion by Judge Carlton

Hon. Michael H. Ward (Harrison County Circuit Court)

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

Briefed by [L. Morgan Eason](#)

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FERRARA V. FERRARA

CIVIL - DOMESTIC RELATIONS

PROPERTY - INTER VIVOS GIFT - REQUIRMENTS - To show that an inter vivos gift was made, the receiver must show by clear and convincing evidence that (1) the donor was competent to make a gift, (2) the donation was a voluntary act and the donor had donative intent, (3) the gift was complete and not conditional, (4) delivery was made, and (5) the gift was irrevocable

CONTRACTS - EQUITABLE LIEN - APPLICATION - An equitable lien may be impressed out of recognition of general equitable principles of right and justice, one being to prevent unjust enrichment

FAMILY LAW - MARITAL FAULT - IMPACT ON EQUITABLE DISTRIBUTION - Marital fault is relevant to the chancellor's consideration of equitable distribution when it impacts upon the harmony and stability of the marriage

FACTS

Clint and Melissa were married on October 26, 1996, and had two children: Amanda and Kayla. About a year after the marriage, Clint and Melissa borrowed money from Melissa's trust fund, of which Melissa's mother, Mary Carole Bowers, served as trustee. They used this money to purchase a house in South Carolina, where they lived until they decided to relocate to Brandon, Mississippi. Initially, they lived with Mary Carole and her spouse (Melissa's father) in a house located in Brandon. Later, the Bowerses moved and deeded the Brandon home to Clint and Melissa in exchange for \$125,000. Prior to this transfer the home was listed for sale through a realtor for \$350,000. There was no written agreement to pay the remaining \$225,000 to the Bowerses; however, there was testimony for Melissa and Mary Carole that there was a verbal agreement in place to do such. Clint and Melissa separated on July 5, 2011, after Clint learned that Melissa had an affair during the marriage. Clint filed for divorce shortly thereafter. Later, the Bowerses sent Clint and Melissa a letter demanding payment in the amount of \$225,000 for the balance owed on the Brandon home. In response, Clint filed a complaint for injunctive relief in a separate case against the Bowerses, asking the chancellor to find that he and Melissa owned the house. Melissa was later joined as a defendant. The chancellor consolidated the two cases, and a bifurcated trial ensued. After trial, the chancellor found that the Bowerses were entitled to an equitable

lien on the Brandon home and that the lien secured a marital debt in the amount of \$225,000 and the money borrowed from the trust constituted a marital debt in the amount of \$125,000. Clint was also awarded primary custody of the children and Melissa was ordered to pay child support in the amount of \$780 per month. Clint appealed.

ISSUES

Whether the chancellor erred in (1) finding that certain financial transactions resulted in the accumulation of marital debts, (2) failing to identify and classify all of Melissa's separate assets, and (3) failing to properly weigh Melissa's responsibility for the destruction of the marriage when dividing the marital estate.

HOLDING

(1) Because the \$225,000 balance on the house was not a gift, the chancellor did not err in placing an equitable lien on the home in the amount of \$225,000. The Court found evidence the Bowerses did not have donative intent, and furthermore, there was substantial evidence that transfer in possession was conditioned upon payment of the \$225,000. Second, the Court held that the chancellor was just to apply an equitable lean on the house to prevent the unjust enrichment of Clint and Melissa from the Bowerses. Finally, in regard to the marital debt to Melissa's trust, the court of appeals agreed with the chancellor's ruling. The court held that testimony coupled with Clint and Melissa's payments made toward reimbursing the trust supported this ruling. (2) The court held that there was almost no testimony or evidence regarding this claim made at trial, and thus Clint's claim is unsupported by the evidence. Therefore, the court held that the chancellor did not abuse his discretion by failing to identify and classify those alleged assets. (3) Because the record does not establish that the affairs caused Melissa to abandon her marital duties or affected her contribution to the accumulation of the marital assets, the chancellor did not err. Therefore, the Mississippi Court of Appeals affirmed the judgment of the Rankin County Chancery Court.

Affirmed - 2014-CA-01043-COA (April 12, 2016)

Opinion by Judge Irving

Hon. Edward C. Priscock (Rankin County Chancery Court)

James Christopher Walker for Appellant - G. Michael Massey & Matthew Stanley Easterling for Appellees

Briefed by [Reginald R. Lewis](#)

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McLAURIN V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - GUILTY PLEA - VOLUNTARINESS - Courts may consider whether the defendant was aware of the nature of the charges against him, the rights which he would waive by pleading guilty, the maximum sentences that he could receive for the crimes charged, and whether he was satisfied with the advice and counsel of his attorney in determining whether a guilty plea is made voluntarily

APPEALS - PLEA-HEARING TRANSCRIPT - PREJUDICE AFTER GUILTY PLEA - After a defendant pleads guilty and loses the right to a free transcript, a defendant has the burden of proving on appeal that he has been prejudiced by not having prior access to such transcript through showing specific need or proving that the transcript was necessary to decide a specific issue

FELONY - SHOPLIFTING - SENTENCE - Pursuant to Miss. Code Ann. § 97-23-93(1)(6), (5) A person convicted of shoplifting merchandise for which the merchant's stated price is less than or equal to Five Hundred Dollars (\$ 500.00) shall be punished as follows: ... Upon a third or subsequent shoplifting conviction the defendant shall be guilty of a felony and fined not more than Five Thousand Dollars (\$ 5,000.00), or imprisoned for a term not exceeding five (5) years, or by both such fine and imprisonment

CRIMINAL PROCEDURE- POST CONVICTION - EVIDENTIARY HEARING - Pursuant to Miss. Code Ann. § 99-39-11(2) (Rev. 2015), If it plainly appears from the face of the motion, any annexed exhibits, and the prior proceedings in the case, that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified

CRIMINAL PROCEDURE- POST CONVICTION - INEFFECTIVE ASSISTANCE OF COUNSEL - A voluntary guilty plea waives claims of ineffective assistance of counsel except insofar as the alleged ineffectiveness relates to the voluntariness of the giving of the guilty plea

FACTS

On July 15, 2013, Charles McLaurin pleaded guilty, as a habitual offender, to two felony-shoplifting offenses that occurred in 2010. McLaurin was already serving a four-year sentence in Louisiana, and the judge agreed to allow McLaurin’s Mississippi sentence to run concurrently. McLaurin misunderstood this sentence and thought that (1) he would receive credit for the time he had already served in Louisiana and (2) that he would be returned to Louisiana to serve the remainder of his Mississippi sentence. He filed multiple motions and pleadings with the circuit court seeking to be transferred to Louisiana and to clarify his sentence. The circuit court issued orders denying relief and clarified that the Mississippi and Louisiana sentences were to run concurrently during the time that the sentences overlapped, from the date that the Mississippi sentence began. The circuit court also issued an order stating that the circuit court could not issue an order to another state to house a Mississippi inmate. McLaurin then filed a motion for post-conviction collateral relief, which was denied. McLaurin appealed.

ISSUES

Whether (1) McLaurin’s guilty plea was voluntary, (2) McLaurin received an illegal sentence, (3) McLaurin was entitled to a free copy of the plea-hearing transcript or, in the alternative, should have received an evidentiary hearing, and (4) McLaurin received ineffective assistance of counsel.

HOLDING

(1) Because the plea-hearing transcript revealed that the court never agreed to send McLaurin to Louisiana and because McLaurin’s claims that his guilty plea was based on the understanding that he would be sent back to Louisiana and would receive time served for a previous conviction in that state are not supported in the record, McLaurin’s guilty plea was voluntary. (2) Because the court never discussed the possibility of McLaurin being sent back to Louisiana and because the sentence McLaurin received was within the maximum allowable punishment under Mississippi law for the offense of felony shoplifting, McLaurin did not receive an illegal sentence. (3) Because McLaurin failed to show on appeal specific need for the plea-hearing transcript or that the transcript was necessary to decide a specific issue, McLaurin’s request for a free transcript of the plea hearing was properly denied. Because the trial judge has discretion in allowing an evidentiary hearing and the trial judge in this case decided an evidentiary hearing would not be proper after reviewing the record, the circuit court was correct in denying McLaurin’s request for an evidentiary hearing. (4) Because McLaurin’s offered no more than his bare assertions, this claim is without merit. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2014-CP-01389-COA (Apr. 12, 2016)

Opinion by Presiding Judge Griffis

Hon. Roger T. Clark (Harrison County Circuit Court)

Pro se for Appellant - Billy L. Gore & John R. Henry Jr. (Att’y Gen. Office) for Appellee

Briefed by [Wes Bulgarella](#)

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MOORE V. STATE

CIVIL - OTHER

STATUTORY INTERPRETATION - STANDARD OF REVIEW - DE NOVO - The standard of review for statutory interpretation is de novo

STATUTORY INTERPRETATION - CONSTRUCTION - PLAIN MEANING - If the words of a statute are clear and unambiguous, the court should apply the plain meaning of the statute and refrain from using principles of statutory construction

STATUTORY INTERPRETATION - CONSTRUCTION - HARMONY - It is a well-settled rule of statutory construction that when two statutes pertain to the same subject, they must be read together in light of legislative intent, and they should if possible be construed in harmony with each other to give effect to each

STATUTORY INTERPRETATION - CONSTRUCTION - LESSER OFFENSE - A lesser included offense by definition is one in which all essential ingredients are contained in the offense for which the accused is indicted, because the accused could not be guilty of the offense for which he is indicted without at the same time being guilty of the lesser-included offense

FACTS

Jamar Moore delivered pizzas for Domino's Pizza in Clarksdale. Unbeknownst to Moore, one of his coworkers was also a confidential informant ("CI") for the Clarksdale Police Department. On a day that the CI and Moore were both working, the CI told the police that Moore had two ounces of marijuana in his car. Moore picked up a large order of pizzas from the store and was on his way to deliver them when he was stopped for failing to signal a turn. The officer who approached his car noticed a strong odor of marijuana emanating from it, so he searched the car and Moore's person. No drugs were found in the car, but Moore had two sandwich bags of marijuana and eleven pills in his pants. Moore was released without arrest after agreeing to work off his charges as a CI, but he did not adequately assist law enforcement as a CI, so he was prosecuted. The grand jury indicted him for possession of hydrocodone, a Schedule II controlled substance, and possession of marijuana. The jury convicted Moore of possession of hydrocodone, a Schedule II controlled substance, but acquitted him of possession of marijuana. Moore was sentenced as a habitual offender to serve sixteen years in the custody of the Mississippi Department of Corrections without the possibility of parole or probation, pursuant to Miss. Code Ann. §§ 41-29-139(c)(1)(C) (Rev. 2.13) and 99-19-81 (Rev. 2015). The Court of Appeals affirmed his conviction and sentence on appeal. Moore subsequently discovered a Mississippi Crime Laboratory report showing that his pills were actually a Schedule III preparation of hydrocodone and acetaminophen, not Schedule II hydrocodone. Possession of eleven dosage units of the Schedule III substance is a misdemeanor punishable by imprisonment of not more than one year. The State had produced the crime lab report in discovery, but its significance apparently was overlooked, and it was not introduced at trial. Upon discovering the report, Moore filed a PCR motion. By the time he did so, he had already served more than two and a half years of his sentence. In his motion, Moore expressly admitted that he committed the misdemeanor offense of possession of a Schedule III substance, and he moved to amend his judgment of conviction to show conviction of a misdemeanor, to be resentenced for that offense, and to be released immediately. The State did not oppose Moore's PCR motion, and the circuit court granted the motion, vacated the conviction, and ordered Moore's immediate release. When he was released, Moore had served two years and 235 days in prison. Rather than pursuing a misdemeanor charge, the State moved to nolle prosequi Moore's indictment for possession of hydrocodone. The circuit court granted the State's motion and adjudged the indictment nolle prosequi. After he was released from prison, Moore filed a civil complaint under the provisions of chapter 44 of title 11 of the Mississippi Code Annotated, which provides compensation for persons wrongfully convicted. The State answered by denying that Moore was entitled to a compensation, and the parties subsequently filed cross-motions for summary judgment. The circuit court denied Moore's motion and granted summary judgment in favor of the State. The court reasoned that because Moore admitted that he was guilty of misdemeanor possession of a Schedule III controlled substance, he could not show that his conviction was vacated on grounds consistent with innocence, as required by Mississippi Code Annotated section 11-44-3(1)(b)(ii). As the court put it, Moore was guilty of a controlled substance crime, but he was convicted of the wrong controlled substance crime. Moore appealed.

ISSUE

Whether Moore's conviction was vacated on grounds not inconsistent with innocence, pursuant to Miss. Code Ann. § 11-44-3 (Rev. 2012).

HOLDING

Because the two offenses involved different controlled substances, a defendant who is guilty of the greater offense cannot, by definition, be guilty of the lesser. The two offenses, here, contained elements that were mutually exclusive. The misdemeanor offense that Moore committed was not a lesser-included offense of the offense of which he was convicted. Therefore, the Court of Appeals reversed, rendered, and remanded the judgment of the Coahoma County Circuit Court.

DISSENT

Judge Carlton argued that jurisprudence establishes that where a greater conviction is reversed on sufficiency-of-evidence grounds, but the record establishes guilt of a lesser-included offense, the defendant should fail to prove grounds not inconsistent with innocence. Moore admitted that he possessed not prescription for the controlled substances he unlawfully possessed, and the record reflected his guilt of a misdemeanor for his unlawful possession of the schedule III controlled substance. Therefore, Moore failed to meet his burden of proof of showing grounds not inconsistent with innocence.

Reversed, Rendered, & Remanded - 2015-CA-00357-COA (April 12, 2015)

Opinion by Judge Wilson - Dissent by Judge Carlton

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

Richard Brooks Lewis, Jr. for Appellant - Wilson Douglas Minor (Att'y Gen. Office) for Appellee

Briefed by [Peter H. Liddell](#)

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SINKO V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PAROLE ELIGIBILITY - MANUFACTURE OF CONTROLLED SUBSTANCE - According to Miss. Code Ann. 47-7-3(h), an offender who was convicted of the sale or manufacture of a controlled substance after June 30, 1995 may be eligible for parole

POST-CONVICTION RELIEF - PAROLE ELIGIBILITY - SALE OF CONTROLLED SUBSTANCE - According to Miss. Code Ann. 77-7-3(h), an offender who was convicted of possession of a controlled substance after July 1, 1995 may be eligible for parole

APPELLATE PROCEDURE - JURISDICTION - JUDICIAL ECONOMY - In the interest of judicial economy, the Court of Appeals has discretion to address important issues that deserve prompt resolution, even if they were waived and never properly presented to the trial court

FACTS

In May 2012, Nathan Sinko pled guilty to manufacturing and possessing methamphetamine. At that time, Sinko's conviction for manufacturing a controlled substance other than marijuana made him ineligible for parole. Despite his ineligibility, the Miss. Dept. of Corrections ("MDOC") classified Sinko and similarly situated offenders as parole-eligible. However, before he was paroled, Sinko was informed by MDOC that his conviction for manufacturing methamphetamine rendered him ineligible for parole. Sinko challenged MDOC's determination by filing a motion for post-conviction relief in the Oktibbeha County Circuit Court. In his initial PCR motion, Sinko did not raise any statutory arguments to support his claim that MDOC erroneously denied him parole. Accordingly, the circuit court denied Sinko's motion for post-conviction relief. Sinko appealed.

ISSUE

Whether Sinko's conviction for manufacturing a controlled substance other than marijuana rendered him ineligible for parole.

HOLDING

Although Sinko did not raise his statutory argument in his initial motion for post-conviction relief, the Court of Appeals deemed that it could still hear the issue. During the 2014 legislative session, the Miss. Legislature amended the parole eligibility statute making it applicable to offenders convicted of selling or manufacturing a controlled substance other than marijuana on or after July 1, 2014. The amended statute established weight and unit-based sentences for all controlled substances. Because Sinko was not convicted of manufacturing and possessing any specific amount of methamphetamine, the Court of Appeals reasoned that Sinko was eligible for parole under the parole eligibility statute. Therefore, the Court of Appeals reversed the judgment of the circuit court.

Reversed - 2015-CA-00107-COA (Apr. 12, 2016)

Opinion by Judge Jack L. Wilson
Hon. Lee J. Howard (Oktibbeha County Circuit Court)
Jim Waide for Appellant - Barbara Wakeland Byrd & Anthony Louis Schmidt Jr. (Att’y Gen. Office) for Appellee
Briefed by [William H. Holley](#)

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STOKES V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF – PROCEDURAL BAR - STATUTE OF LIMITATIONS - A motion for post-conviction relief must be filed within three years following the entry of judgment of conviction, and failure to file within the three-year period procedurally bars appeal of the dismissal of the motion

POST-CONVICTION RELIEF - PROCEDURAL BAR - DISMISSAL - Under the Uniform Post-Conviction Collateral Relief Act, any order denying or dismissing a post-conviction relief (PCR) motion is a bar to all successive PCR motions

POST-CONVICTION RELIEF - PROCEDURAL BAR - EXCEPTIONS - When a convicted defendant files a subsequent PCR motion after the initial one was denied, the burden falls on the movant to demonstrate he or she has met a statutory exception or has shown an error that affected a fundamental constitutional right

POST-CONVICTION RELIEF - PROCEDURAL BAR - INEFFECTIVE ASSISTANCE OF COUNSEL - The Uniform Post-Conviction Collateral Relief Act’s procedural bars apply to ineffective assistance of counsel claims

POST-CONVICTION RELIEF - PROCEDURAL BAR - DEFECTIVE INDICTMENT - A convicted defendant may raise a defective indictment claim for the first time on appeal unless such a claim is procedurally barred

FACTS

Derrick Stokes pled guilty to gratification of lust and exploitation of a child. Stokes received a fifteen-year sentence for the gratification of lust conviction and a ten year sentence (with five years suspended and five years to serve) for the exploitation conviction, followed by five years of post-release supervision; the sentences were ordered to run consecutively. In a subsequent motion for post-conviction relief (PCR), Stokes claimed: his guilty pleas were involuntary; he had found newly discovered evidence; and he pled guilty due to misrepresentation and duress. The trial court dismissed the motion. On appeal, Stokes claimed: the trial court erred by dismissing his motion without an evidentiary hearing; the trial court erred by accepting his guilty plea without appointing an interpreter during the plea, as he alleged he was legally deaf; and that he received ineffective assistance of counsel. As Stokes’ notice of appeal was untimely filed, his appeal was dismissed. Stokes filed another motion for PCR, again claiming that the trial court erred by not providing him with a sign language interpreter and that he would not have pled guilty if an interpreter had been present at the hearing. The trial court denied the motion, holding Stokes’ claims were time-barred and successive-writ barred. Stokes appealed, arguing that his due process rights were violated when the trial court refused to provide an interpreter at the plea hearing. The appellate court affirmed, holding Stokes’ claims were barred by res judicata, he willingly and voluntarily entered a guilty plea, and he had not provided sufficient evidence to meet one of the exceptions to the procedural bars of the Uniform Post-Conviction Collateral Relief Act (UPCCRA). Stokes subsequently filed a third PCR motion with the trial court, which again denied his motion as time-barred and successive-writ barred. Stokes did not appeal. Before the trial court had ruled on Stokes’ third PCR motion, he had filed a fourth PCR motion, which again claimed his guilty plea was involuntary due to his deafness, and requested DNA testing. The trial court dismissed the fourth motion, holding the motion was time-barred, successive-writ barred, and that Stokes was not entitled to any relief from the procedural bars. Stokes appealed.

ISSUES

Stokes argues that the trial court erred in: (1) holding his claims were excepted from the UPCCRA’s procedural bars; (2) refusing him an evidentiary hearing; (3) holding he received effective assistance of counsel; and (4) holding his indictment was fatally defective.

HOLDING

(1) The trial court did not err in holding Stokes' subsequent PCR motions were procedurally barred because he failed to meet his burden of showing that any statutory or fundamental-right exception applies to his claims. (2) The trial court did not err in dismissing Stokes' motion without an evidentiary hearing because it was prima facie clear that he was not entitled to any relief, thus, no evidentiary hearing was required. (3) Because Stokes' claim of ineffective assistance of counsel was time-barred, successive-writ barred, and barred by res judicata, the trial court did not err in dismissing his PCR motion. (4) Because Stokes' did not file his PCR motion within three years of his conviction, his defective indictment claim was time-barred, thus, the trial court did not err in dismissing his claim.

Affirmed - No. 2014-CP-01811-COA (Apr. 12, 2016)

Opinion by Judge James

Hon. John Huey Emfinger (Madison County Circuit Court)

Pro se for Appellant - Ladonna C. Holland (Att'y Gen. Office) for Appellee

Briefed by [J. Matthew Orr](#)

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COURT OF APPEALS - CRIMINAL CASES

HAMPTON V. STATE

CRIMINAL - FELONY

APPEAL - STANDARD OF REVIEW - GUILTY VERDICT - All evidence supporting the guilty verdict is accepted as true, and the State must be given the benefit of all reasonable inferences that can reasonably be drawn from the evidence

CRIMINAL - THEFT - ROBBERY - Pursuant to Miss. Code Ann. § 97-3-73, every person who shall feloniously take the personal property of another, by violence to his person or by putting such person in fear of some immediate injury, is guilty of robbery

CRIMINAL - HOMICIDE - FELONY MURDER - Pursuant to Miss. Code Ann. § 97-3-19(2)(e), the killing of a human being without the authority of law by any means or in any manner is capital murder when done by any person engaged in the commission of the crime of robbery

CRIMINAL PROCEDURE - MISTRIAL – MANIFEST NECESSITY - Mistrials should only be declared sua sponte under our 'manifest necessity' rule and whether the manifest necessity standard has been met turns on the facts and circumstances of each case

FACTS

After approaching David Melton, who allegedly owed Gerod Nellum money, Nathaniel Hampton handed Nellum a padlock for him to beat Melton with. While Melton was unresponsive on the street, Hampton went through Melton's wallet. When informed that there was blood on his shirt, Hampton removed the shirt and tossed it aside. Hampton was convicted of capital murder and sentenced to life imprisonment without the possibility of parole. Hampton filed a motion for a judgment notwithstanding the verdict or in the alternative a motion for a new trial. The court denied Hampton's post-trial motions. Hampton appealed.

ISSUES

Whether (1) the trial court erred by failing to grant a mistrial after members of the jury were allowed to see Hampton shackled and behind bars; (2) the evidence was sufficient to support the guilty verdict.

HOLDING

(1) Because there is no evidence or finding that any juror actually saw Hampton in restraints or behind bars and Hampton failed to show that any prejudice or bias resulted from the possibility that jurors could have seen him in handcuffs and in the holding cell, this issue lacks merit. (2) Because the record contains sufficient evidence from which a rational juror could find, beyond a reasonable doubt, that Melton's murder and the removal of his wallet were part of a continuous

chain of events, Hampton can be found guilty of capital murder with the underlying felony of robbery. Therefore the Court of Appeals affirmed the decision of the Sunflower County Circuit Court.

Affirmed - 2013-KA-02110-COA (April 12, 2016)

Opinion by Judge Carlton

Hon. Betty W. Sanders (Sunflower County Circuit Court)

George T. Holmes & Benjamin Allen Suber (State Pub. Defender Office) for Appellant - Ladonna C. Holland (Att’y Gen. Office) for Appellee

Briefed by [Daniel McDonald](#)

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HOFFMAN V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE – JURY INSTRUCTIONS – LESSER NON-INCLUDED OFFENSE –

A defendant is not entitled to instruct the jury about a crime that was not charged by the State

EVIDENCE – PRIOR INCONSISTENT STATEMENT – CONTEMPORANEOUS OBJECTION– A

failure to make a contemporaneous objection waives the right of raising the issue on appeal

EVIDENCE -- CRIMINAL PROCEDURE – RIGHT TO NEW TRIAL– A verdict should be disturbed only where the evidence presented preponderates so heavily against the verdict that allowing it to stand would constitute an unconscionable injustice

FACTS

Jennifer Hoffman agreed to sexual intercourse with Henry Hood in exchange for \$100. Hoffman and Hood planned to carry out their arrangement in a suburban owned by a mutual friend. While the couple was in the suburban, three friends of Hoffman robbed Hood at knifepoint. After Hoffman’s arrest, she provided a statement to police that failed to include her arrangement with Hood, and stated the group was en route to McDonald’s when they were pulled over. Hoffman was indicted for armed robbery. During the trial, Hoffman admitted her arrangement to exchange sex with Hood for \$100, but maintained no knowledge of the co-defendant’s intention to rob Hood. The jury convicted Hoffman of armed robbery and sentenced her to serve three years in the MDOC. Hoffman appealed.

ISSUE

Whether the trial court (1) erred in allowing the State to present evidence of Hoffman’s prior inconsistent statement; (2) erred in denying Hoffman’s motion for a new trial; and (3) abused its discretion in denying Hoffman’s request to instruct the jury of the lesser-nonincluded offense of prostitution.

HOLDING

(1)Because Hoffman failed to object to the pretrial statement when it was admitted, this issue cannot be considered on appeal. (2) Because the State provided sufficient evidence to support the jury’s verdict, this issue holds no merit. (3) Because Hoffman was not entitled to instruct the jury about a crime that was not charged by the state, the trial court did not abuse its discretion in denying this request. Therefore, the Court of Appeals affirmed the judgment of the Attala County Circuit Court.

Affirmed - 2014-KA-00456-COA (Apr. 12, 2016)

Opinion by Judge James

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

George T. Holmes & Phillip Broadhead (Pub. Defender Office) for Appellant- Barbara Wakeland Byrd (Att’y Gen. Office) for Appellee

Briefed by [Alexandra Bruce](#)

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PROKASY V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - COMPETENCE - MENTAL EVALUATION - Trial courts are afforded broad discretion in determining whether to order a mental evaluation and competency hearing

CRIMINAL PROCEDURE - JURY - INSTRUCTIONS - Jury instructions are to be read together and taken as a whole with no one instruction taken out of context

CRIMINAL PROCEDURE - JURY INQUIRY - STANDARD OF REVIEW - When reviewing a trial court's response to the jury's inquiry, this Court's inquiry is not whether the trial court was 'right or wrong' in its response, but whether the trial court abused its discretion

FACTS

On March 31, 2013, Samantha Jo Brumfield robbed a convenience store in Poplarville, MS. Her husband, Joshua Prokasy was parked behind the store in the get-away car. Prokasy entered the store first and used the restroom. On his way out of the store, Brumfield entered the store and robbed the cashier at gunpoint, after which, the pair fled. Prokasy and Brumfield were later arrested in Louisiana for an unrelated incident. In Louisiana, Prokasy gave a written statement confessing to the robbery. At trial, Prokasy was convicted of armed robbery and conspiracy to commit armed robbery. Prokasy appealed.

ISSUES

Whether the trial court erred when it (1) denied his request for a mental evaluation, (2) failed to instruct the jury fully on the conspiracy charge, and (3) responded to the jury's question during deliberations.

HOLDING

(1) Because Prokasy articulated complete answers, explained his medical problems to the judge, and testified that he would be able to provide his attorneys everything they needed to defend him and because trial courts are afforded broad discretion in determining whether to order a mental evaluation, the trial court did not err in denying Prokasy's request for a mental evaluation. (2) Because the jury instructions, when taken as a whole, addressed venue and because jury instructions are to be read together and taken as a whole, the trial court did not err in not instructing the jury fully on the conspiracy charge. (3) Because the trial courts answers to the jury inquiry was not misleading or confusing, the trial court did not err in responding to the jury's question during deliberations. Therefore, the Court of Appeals affirmed the judgment of the Pearl River County Circuit Court.

Affirmed - 2014-KA-01793 (Apr. 12, 2016)

Opinion by Judge Griffis

Hon. Prentiss Greene Harrell (Pearl River County Circuit Court)

George T. Holmes & Hunter Nolan Aikens (State Pub. Defender Office) for Appellant - Scott Stuart & John R. Henry Jr. (Att'y Gen. Office) for Appellee

Briefed by [Andrew B. Lintner](#)

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TOWNSEND V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - INDICTMENT - FAIR NOTICE - An indictment is legally sufficient if from a reading of the indictment as a whole the accused is given fair notice of what he has been charged

CRIMINAL PROCEDURE - JURY SELECTION - PRESENCE OF MINORITIES - A defendant is not entitled to a specific racial or gender composition in the selected jury

FACTS

Maurice Townsend was arrested for simple assault on a law enforcement officer after a night out at The Locker Room in Oxford, MS. Townsend screamed at, punched, ran away from, and fought with Officer Sabin who chased, used mace on, and eventually arrested Townsend. A Lafayette County jury found Townsend guilty of simple assault on a law enforcement officer. Townsend appealed.

ISSUES

Whether (1) his indictment was fatally defective, (2) Mississippi should extend the holding of *Batson v. Kentucky*, to ensure the inclusion of minorities on juries, and (3) the circuit court erred by dismissing for cause certain potential jurors.

HOLDING

(1) Because the indictment clearly notified Townsend of the crime and the statutory section being charged, his indictment was not fatally defective. (2) Because the circuit court followed the procedure established in *Batson*, the reach of *Batson* was not extended to ensure inclusion of minorities on juries. (3) Because a defendant is not entitled to a specific race or gender composition in the selected jury and the dismissed potential jurors lacked competency, there was no abuse of discretion resulting from the circuit court's dismissal of the two potential jurors. Therefore, the Court of Appeals affirmed the judgment of the Lafayette County Circuit Court.

DISSENT

Judge James would reverse the judgment and remanded to the circuit court with instruction to sentence Townsend for basic simple assault not against a law-enforcement officer because the indictment omitted an essential element of the crime of aggravated assault of a law-enforcement officer and was therefore insufficient.

Affirmed - 2014-KA-01327-COA (Apr. 12, 2016)

En Banc Opinion by Judge Carlton - Dissent by Judge James

Hon. Andrew K. Howorth (Lafayette County Circuit Court)

Ralph Stewart Guernsey & Carnelia Pettis Fondren for Appellant - Jeffrey A. Klingfuss (Att'y Gen. Office) for Appellee

Briefed by [Addie Clark](#)

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