

MISSISSIPPI SUPREME COURT DECISIONS - JANUARY 28, 2016

SUPREME COURT - CIVIL CASES

WILSON V. HOSEMANN (FEB. 26, 2016) (WITHDRAWING FEB. 25, 2016 OPINION)

CIVIL

ELECTION LAW - DUE PROCESS - TIMING - Granting due process after it is too late is not due process. As the United States Supreme Court has explained, “[i]f the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented”

ELECTION LAW - MEEKS - RIGHT TO BE HEARD - The rule from *MEEKS* creates no requirement of a formal hearing and is not the right to procedural formality but rather the right to be heard in a meaningful way at a time when redress can be provided

ELECTION LAW - MEEKS - REMEDY - The appropriate remedy when a qualified candidate was excluded from a ballot was a writ of mandamus ordering that his name be added to the ballot

FACTS

Dr. Willie Wilson submitted his petition and qualification papers to the Mississippi Democratic Party to run for President in the 2016 democratic primary on January 14, 2016. State and federal statutory deadlines require the Party to submit the names of qualified candidates to the Secretary of State by January 19. The Party concluded on January 19 that Dr. Wilson was not qualified, but did not notify him of the decision until the following day. Dr. Wilson retained an attorney and appealed to the Party to reconsider its decision. The Party admitted its mistake to Dr. Wilson’s attorney on January 25, three days after the deadline to inform the Secretary of State to correct the error. The Party did not inform the Secretary of State of its mistake until delivering a letter to the Secretary of State on January 27 after Dr. Wilson threatened a lawsuit. On January 29, the Secretary of State informed the Party it would not add Dr. Wilson to the ballot because the Party failed to submit his name by the January 19 deadline and because sample ballots had been created and absentee voting had begun. Dr. Wilson filed a complaint in the Hinds County Circuit Court that ordered the Secretary of State add his name to the ballot and argued his constitutional rights to due process, freedom of speech, and freedom of association had been violated. The Secretary of State argued statutory deadlines precluded Dr. Wilson’s name from being added, and the court ruled in favor of the Secretary of State. Dr. Wilson appealed.

On Feb. 25, 2016, the Supreme Court handed down an opinion granting injunctive relief to Wilson and ordering the Secretary of State to place his name on the new ballots. Mississippi Secretary of State, Delbert Hoseman, made a motion to recall the mandate established by the Supreme Court’s decision on February 25, 2016.

ISSUES Whether (1) a political candidate’s constitutional rights were violated when he was denied a place on the ballot when the Democratic Party failed to give his name to the Secretary of State by the statutorily required date, (2) whether federal law precludes a state court from providing injunctive relief to remedy the wrong by issuing new ballots with the candidate’s name while not recalling the ballots already sent overseas.

HOLDING

(1) The Democratic Party’s failure to timely inform Dr. Wilson that it found his petition insufficient and to timely respond to his attorney’s request to reconsider, coupled with the January 19 and 23 statutory deadlines to submit names and send ballots to overseas and military voters, denied Dr. Wilson a meaningful opportunity to be heard by the Party and deprived him of due process of law. (2) Agreeing with the Middle District of Pennsylvania instead of the 4th Circuit Court of Appeals, the Court held that the federal law prohibition on creating inconsistent ballots did not preclude Dr.

Wilson from waiving his right to have his name of the ballots already sent overseas. The Secretary of State was therefore ordered to print Dr. Wilson's name on the ballot and is not required to recall and reprint the ballots already sent overseas.

DISSENT

Chief Justice Waller dissented. Based on the premise that the state has an important interest in protecting the integrity of the political process and ensuring that their election processes are efficient, the chief justice opined that the remedy created by the Court's opinion cannot be justified as Dr. Wilson created too much delay in formally challenging the Democratic Party's failure to place him on the ballot.

Reversed and Rendered - 2016-IA-00148-SCT (Feb. 26, 2016)

En Banc Opinion by Presiding Justice Dickinson- Dissent by Chief Justice Waller

Hon. Winston L. Kidd (Hinds County Circuit Court)

Samuel L. Begley for Appellant - Harold E. Pizzetta, III (Office of Att'y Gen.) for Appellee

Briefed by [Jacob A. Bradley](#)

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WILSON V. HOSEMANN (FEB. 25, 2016) (OPINION WITHDRAWN)

CIVIL

ELECTION LAW - DUE PROCESS - MEEKS - When one files the proper qualifying papers and pays the requisite filing fee to become a candidate for public office, neither the state nor, in the case of a primary election, a political party may arbitrarily or capriciously deprive him or her of a place on the ballot. The candidate is entitled to due process protections on two levels. First, he is entitled to the opportunity to be heard. Second, he is entitled that his name not be finally stricken from the ballot except that result be required by law

ELECTION LAW - DUE PROCESS OF POLITICAL CANDIDATE – MEEKS - Under *MEEKS v. Tallabatchie County*, a potential candidate must be granted an opportunity to be heard when the deprivation could still be prevented

ELECTION LAW - ELECTION CONTESTS - ELIGIBILITY DETERMINATIONS - Under Sections 23-15-923 and 23-15-961, a contesting candidate is required to seek recourse with the party executive committee before seeking a judicial remedy

FACTS

Dr. Willie Wilson submitted his petition and qualification papers to the Mississippi Democratic Party to run for President in the 2016 democratic primary on January 14, 2016. State and federal statutory deadlines require the Party to submit the names of qualified candidates to the Secretary of State by January 19. The Party concluded on January 19 that Dr. Wilson was not qualified, but did not notify him of the decision until the following day. Dr. Wilson retained an attorney and appealed to the Party to reconsider its decision. The Party admitted its mistake to Dr. Wilson's attorney on January 25, three days after the deadline to inform the Secretary of State to correct the error. The Party did not inform the Secretary of State of its mistake until delivering a letter to the Secretary of State on January 27 after Dr. Wilson threatened a lawsuit. On January 29, the Secretary of State informed the Party it would not add Dr. Wilson to the ballot because the Party failed to submit his name by the January 19 deadline and because sample ballots had been created and absentee voting had begun. Dr. Wilson filed a complaint in the Hinds County Circuit Court that ordered the Secretary of State add his name to the ballot and argued his constitutional rights to due process, freedom of speech, and freedom of association had been violated. The Secretary of State argued statutory deadlines precluded Dr. Wilson's name from being added, and the court ruled in favor of the Secretary of State. Dr. Wilson appealed.

ISSUE

Whether (1) Dr. Wilson was denied due process of law and (2) state and federal statutes preclude Wilson from obtaining injunctive relief because of his being denied a position on the Presidential ballot.

HOLDING

(1) Because the Party did not inform Dr. Wilson of the decision that he was not qualified until after the statutory deadline to submit his name to the Secretary of State had passed, he was denied an opportunity to be heard when the deprivation can still be prevented. Therefore, Dr. Wilson was denied due process of law. (2) Because Sections 23-15-923 and 23-15-961 require a contesting candidate to seek recourse with the Party prior to seeking a judicial remedy, Wilson complied with the applicable statutes. Therefore, Wilson's petition for interlocutory appeal was granted. The Supreme Court mandated that Dr. Wilson's name be added to the ballots. However, Dr. Wilson's name will not be added to any absentee ballots.

DISSENTS

Chief Justice Waller argued that Dr. Wilson's appeal was untimely and that he should have sought judicial intervention with the Secretary of State immediately. Therefore, the Court should have denied Dr. Wilson's appeal.

Justice Maxwell argued the majority's reliance on *Meeks* is misplaced because in *Meeks* the potential candidate sued the Party while Dr. Wilson sued the Secretary of State. Further, Justice Maxwell argued the remedy to prepare paper ballots with Dr. Wilson included was wrong because Dr. Wilson only asked for his name to be added to the electronic ballot. Therefore, the Court should have denied Dr. Wilson's appeal.

Reversed and Rendered - 2016-IA-00148-SCT (Feb. 25, 2016)

En Banc Opinion by Presiding Justice Dickinson - Dissents by Chief Justice Waller and Justice Maxwell
Hon. Winston L. Kidd (Hinds County Circuit Court)
Samuel L. Begley for Appellant - Harold E. Pizzetta, III (Att'y Gen. Office) for Appellee
Briefed by [Paul Wallace](#)

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BLAKENEY V. MCREE

CIVIL - ADOPTION

ADOPTION - DENIAL OF COURT APPOINTED COUNSEL - LASSITER FACTORS - The following factors are to be relied on when examining a trial court's denial of an indigent parent's request for court-appointed counsel: (1) Whether the case involves allegation of neglect or abuse upon which criminal charges could be based; (2) whether expert testimony will be offered; (3) whether the case involves especially troublesome points of law, either procedural or substantive; and (4) whether the presence of counsel would result in a determinative difference in the proceedings

ADOPTION - TERMINATION OF RIGHTS - STATUTORY GROUNDS - Miss Code Ann. Section 93-17-7(1) states that no infant shall be adopted by any person if either parent, after having been summoned, shall appear and object thereto before the making of a decree for adoption, unless it shall be made to appear to the court from the evidence touching such matters that the parents so objecting had abandoned or deserted such infant or is mentally, or morally, or otherwise unfit to rear and train it, including, but not limited to, those matters set out in subsection (2) of this section, in either of which cases the adoption may be decreed notwithstanding the objection of such parent, first considering the welfare of the child, or children sought to be adopted

ADOPTION - TERMINATION OF RIGHTS - CONSIDERING ALTERNATIVES - Miss. Code Ann. Section 93-15-103(4) provides that legal custody and guardianship by persons other than the parents as well as other permanent alternatives which end in the supervision of the Department of Human Services should be considered as alternatives to the termination of parental rights, and these alternatives should be selected when, in the best interest of the child, parental contacts are desirable and it is possible to secure such placement without termination of parental rights

FACTS

In July 2006, John Blakeney and his wife were arrested for the murders of Willie Earl and Anita Kitchens. Blakeney confessed to the murders. Blakeney, his wife, and their minor children A.B. and C.B. lived with Willie Earl and Anita at the time of the murders. A.B. and C.B. were present for the murders. Blakeney was convicted of one count of

murder and sentenced to two consecutive life sentences. Since the arrest, A.B. and C.B. have lived with the McRees. Carolyn McRee is Willie Earl and Anita's biological daughter and A.B. and C.B.'s biological aunt. On April 5, 2012, the McRees filed a petition in the Jones County Chancery Court to adopt A.B. and C.B. The McRees' adoption petition did not request the termination of Blakeney's parental rights. In response, Blakeney and his wife requested the chancery court to issue a summons requiring the Miss. Dept. of Corrections ("MDOC") to secure their appearance before the court to answer the adoption petition. The chancellor entered an order instructing MDOC personnel to transport Blakeney to the Jones County Chancery Court for the trial. Blakeney and his wife participated in the trial, but neither were represented by counsel. The McRees testified and Blakeney and his wife were allowed to cross-examine them. The Guardian Ad Litem ("GAL") reported at trial that she believed the children were happy with the McRees and were being raised properly. The GAL interviewed Blakeney at the South Mississippi Correctional Facility in Leakesville. Blakeney maintained that he had no part in Willie Earl and Anita's murders, even though he had confessed to the crimes when he was arrested, had been convicted, and had lost his state-court appeal. Blakeney thought Carolyn McRee was using the adoption to exact revenge on him for killing her parents, but the GAL did not find any evidence to support this fear. Blakeney also had concerns about Carolyn's ex-husband, Garth Brewer, who Blakeney claimed was a child molester. The GAL also interviewed the McRees. She found that A.B. and C.B. had their own rooms at the McRees home and seemed to bond well with the McRees' children. The GAL opined that the McRees appeared to have the financial and emotional resources needed to raise A.B. and C.B. Carolyn McRee asserted that she maintains only minimal phone contact with her ex-husband regarding their own children, and that he was allowed to be in contact with A.B. and C.B. only under adult supervision. When the GAL interviewed A.B. and C.B., both children seemed to understand the adoption process and seemed to be excited about the prospect of being adopted. At the conclusion of her report, the GAL recognized Blakeney had been convicted of murder, was serving a life sentence, and had exhausted his state appeals. From these observations, the GAL concluded that there was no alternative other than to terminate the parental rights of the Blakeney's and allow the children to be adopted by the McRees. The GAL also recommended that restrictions be put in place so Brewer could not visit the children. At the end of the trial, the chancellor entered an order granting the adoption, terminating the Blakeney's parental rights and changing the children's last names to McRee. Blakeney appealed.

ISSUES

Whether the chancellor erred in (1) failing to appoint an attorney to represent Blakeney, (2) terminating Blakeney's parental rights, (3) failing to address Blakeney's pretrial motions and failing to consider alternatives to the adoption, (4) prohibiting Blakeney from calling witnesses at trial; and whether (5) the guardian ad litem failed in her duty to fully investigate the matter.

HOLDING

(1) Because Blakeney was given a fair and adequate hearing and the presence of an attorney would not have made a difference, the chancellor did not err in denying Blakeney counsel. Further, the case did not involve allegations of abuse or neglect, expert testimony, or especially troublesome points of law, so the chancellor did not violate Blakeney's due process rights. (2) Because clear and convincing evidence, including the incarceration, supported a finding that Blakeney was mentally, morally, or otherwise unfit to rear and train his children, the chancellor did not err in granting the adoption. (3) Because the record reflects that the chancellor considered alternative outcomes and because no other party came forward to adopt the children, the chancellor did not err in failing to explicitly mention alternative outcomes. Because Blakeney's pre-trial motions failed to supply any reason supporting why modification of visitation would be in the best interest of the children, the chancellor did not err in failing to grant Blakeney's request for visitation. (4) Blakeney did not attempt to call witnesses at trial or secure any witness before trial, so the lack of authority in support of his argument precluded consideration on appeal. (5) Blakeney cited no alleged deficiencies in the GAL's conduct, so the issue was precluded from consideration on appeal. Therefore, the Supreme Court affirmed the judgment of the Jones County Chancery Court.

DISSENT

Presiding Judge Dickinson argued that the due process language of the Mississippi Constitution required the appointment of counsel in proceedings to terminate parental rights. Therefore, the trial court abused its discretion in denying counsel.

Affirmed - 2014-CP-00296-SCT (Feb. 25, 2016)

En Banc Opinion by Chief Justice Waller - Dissent by Presiding Justice Dickinson

Hon. Franklin C. McKenzie Jr. (Jones County Chancery Court)

Pro se for Appellant - Michael D. Mitchell for Appellee

Briefed by [Sean Doran](#)

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BROWN V. COLLECTIONS, INC.

CIVIL - OTHER

CIVIL PROCEDURE - APPEALS - FINAL JUDGMENT - A final, appealable judgment adjudicates all the merits of the controversy and settles all issues as to all the parties and requires no further action by the trial court

CIVIL PROCEDURE - APPEALS - FINAL JUDGMENT EXCEPTION - Under Miss. R. Civ. P. 54(b), if more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct entry of a final judgment as to one or more but fewer than all of the claims or parties if the court finds there is no just reason for delay and directs the entry of the judgment

CIVIL PROCEDURE - FINAL JUDGMENT - CERTIFICATION - Pursuant to Miss. R. Civ. P. 54(b), for an order or judgment to qualify for Rule 54(b) finality, the case must include: (1) either multiple claims, multiple parties, or both; and (2) either one or more but fewer than all claims must have been decided or all rights and liabilities of at least one party must have been adjudicated

FACTS

Memorial Hospital at Gulfport treated John Brown for stroke-like symptoms in 2008. Brown incurred charges of \$45,074.05 in medical expenses, which he agreed to pay. Instead of paying his medical bills when he received his insurance check from Blue Cross/Blue Shield, Brown cashed it and kept the money. Brown's failure to pay Memorial prompted the hospital to assign Brown's account to Collections, Inc., a third-party collection agency. Collections, Inc. sued Brown for his nonpayment. After initially answering with a set-off defense, Brown filed to amend his answer with a recoupment defense. The county court denied the amendment and entered what it called a "partial final judgment" under Miss. R. Civ. P. 54(b). This was done so that Brown could file an interlocutory appeal with the Mississippi Supreme Court. Rather than filing his appeal with the Supreme Court, Brown filed his appeal with the circuit court. The circuit court also ruled against Brown's amendment to his initial answer finding no just reason for delay. Brown appealed.

ISSUE

Whether the Mississippi Supreme Court had jurisdiction to hear a case certified as a final judgment by a county court and appealed to the circuit court.

HOLDING

The Supreme Court held that they did not have jurisdiction to hear this case for a variety of reasons and dismissed the appeal. The first reason was that the county court order did not decide a claim between two parties as required under Rule 54(b). Instead it merely decided an issue concerning a defense. The second reason is that Brown's appeal concerned recoupment as a defense, and in the absence of a statute, a purely defensive claim cannot be used offensively in the courts. Third, rulings addressing defenses are not appropriate for certifying entries of final judgments under Rule 54(b). The fourth, final, and dispositive reason the Supreme Court lacked jurisdiction was because Brown's interlocutory appeal was handled by the wrong court (circuit court). Interlocutory appeals from county court can only be made to the Supreme Court, and thus the only procedure available to Brown was an interlocutory appeal to the Supreme Court. Therefore, the Supreme Court dismissed Brown's appeal.

Appeal Dismissed - 2015-CA-00029-SCT (Feb. 25, 2016)

Opinion by Justice Maxwell

Hon. Michael H. Ward (Harrison County Circuit Court)
L. Christopher Breard for Appellant - William V. Westbrook III & David C. Frazier for Appellee
Briefed by [Reginald R. Lewis](#)

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KILPATRICK V. WHITE HALL ON MS RIVER, LLC

CIVIL - OTHER

BUSINESS ENTITIES - MISSISSIPPI LIMITED LIABILITY COMPANY ACT - LLC FORMATION - Miss. Code Ann. § 79-29-301, supra, does not require LLC agreements to be in force at the time of filing the certificate of formation, or that all potential members of the LLC be accounted for at the time of the certificate's filing; the Act provides two avenues by which membership may be established: by the date of the certificate of formation, or by the written agreement of all members

BUSINESS ENTITIES - MISSISSIPPI LIMITED LIABILITY COMPANY ACT - ABSENCE OF OPERATING AGREEMENT - In the absence of an LLC operating agreement, the court looks to the provisions of the Mississippi Limited Liability Company Act, but a person must be a member for the MLLCA to apply

CONTRACT - EXTRINSIC EVIDENCE - UNAMBIGUOUS CONTRACT - Extrinsic evidence may not be admitted in order to contradict the terms of an unambiguous contract

EQUITY - REMEDIES - CONSTRUCTIVE TRUST - A constructive trust is: one that arises by operation of law against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy

FACTS

Five men, one of whom was Dennis Kilpatrick, created a gentlemen's deal whereby each would contribute \$500,000 to purchase land from International Paper for which to use as a hunting camp. The men eventually named the venture White Hall on MS River LLC. In order to receive the bargain price of \$2,050 an acre, the group had to close the sale by December 31, 2007. Kilpatrick and Moran failed to pay their full share (\$100,000 for Kilpatrick and \$400,000 for Moran). Because they only had \$2 million available at closing, the interest rate at which the purchase could be made was substantially increased, and the entire acreage sought by White Hall would be encumbered by deeds of trust, thus making no collateral available, thus making the ability to use the timber on the land unavailable. The sale closed on December 17, 2007. The LLC Certificate of Formation was filed with the Secretary of State on the same day. The LLC "Agreement" was executed by only three of the men (not including Kilpatrick) in early 2008. The agreement stated the requirement for membership in the LLC was "a cash contribution of Five Hundred Thousand dollars (\$500,000.00) for membership interest or two (2) shares." Kilpatrick paid only the initial \$100,000 plus interest payments until 2009. White Hall informed Kilpatrick that he could no longer use the land until he paid his share. Kilpatrick removed his belongings from the camp. Unable to pay off in cash the deed of trust owed to International Paper, White Hall sold 1,269 acres of the hunting camp. In December 2010, Kilpatrick filed a complaint alleging that he was a member of the LLC, that White Hall was obligated to allow him access to company records, that the agreement was not valid as all members of the LLC did not sign it, and that White Hall had been unjustly enriched by retaining Kilpatrick's capital contribution of \$186,500. The chancellor found that Kilpatrick was not a member of White Hall, that he had come before a court of equity with unclean hands, and that he had no right to the return of his capital contribution. Kilpatrick appealed.

ISSUES

Whether the trial court erred in finding that Kilpatrick (1) was not a member of White Hall on MS River, LLC, and (2) was not entitled to his capital contribution of \$186,500.

HOLDING

(1) Because the White Hall operating agreement unambiguously stated that a \$500,000 contribution was required for membership, the agreement was valid and Kilpatrick was not a member of White Hall. (2) Because White Hall committed no fraud, duress, wrongdoing, or other unconscionable conduct in denying membership to Kilpatrick, a constructive trust was not a proper remedy and Kilpatrick not entitled to his capital contribution. Therefore, the judgment of the Harrison County Chancery Court was affirmed.

DISSENT

The Chief Justice’s dissent opined that Kilpatrick was a member of White Hall LLC and that Kilpatrick was entitled to the fair value of his interest in the LLC. The dissent states that Kilpatrick was a member because the LLC was formed on Dec. 17, 2007 when there had yet to be an operating agreement and Kilpatrick had contributed capital to the LLC. The operating agreement was therefore not enforceable because the Mississippi Limited Liability Company Act requires that the agreement “must initially be agreed to by all of the members.”

Affirmed - 2014-CA-01485-SCT (Feb. 25, 2016)

Opinion by Justice Coleman - Dissent by Chief Justice Waller

Hon. Carter O. Bise (Harrison County Chancery Court)

Robert Thomas Schwartz, Christian Jane’t Strickland & Jeffery Ward Bertucci for Appellant - John G. McDonnell & Courtney McDonnell Snodgrass for Appellee

Briefed by [Jacob A. Bradley](#)

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RAMSEY V. AUBURN UNIV.

CIVIL - PERSONAL INJURY

CIVIL - VENUE - DOMICILE OF PERSONS - Intent is the foundation of determining a person’s place of domicile

CIVIL - VENUE - LOCATION OF ACTS OR OMISSIONS - Merely experiencing the results of a tortfeasor’s acts or omissions in a particular jurisdiction is an insufficient basis to establish venue in that jurisdiction

CIVIL - VENUE - ESTABLISHMENT UNDER STATUTE - The determination of venue under Miss. Code Ann. § 11-11-3(1)(b) is only relevant when venue cannot be established under § 11-11-3(1)(a)

CIVIL - TRANSFER OF VENUE - AUTHORITY OF COURTS - Mississippi state courts lack the authority to transfer cases to courts of other states

JUDICIAL POLICY - ADVISORY OPINIONS - CASES DISMISSED WITHOUT PREJUDICE - As a matter of judicial policy, when a case has been dismissed without prejudice the Court will not issue advisory opinions because it would preemptively resolve issues at the trial level

FACTS

As a high school student in Madison County, Miss., Austin Chaz Ramsey was offered a full scholarship to play college football at Auburn University in Alabama. Ramsey suffered a back injury in high school, but made a full recovery. Ramsey signed his letter of intent in February 2007, and moved to Alabama to join the Auburn football team the following summer. He was fully cleared to participate in varsity football by medical professionals. During his freshman year, Auburn’s strength and conditioning staff advised Ramsey to perform “power cleans,” an Olympic weightlifting exercise that Ramsey’s own doctors had warned him against doing. He nonetheless participated in the exercise, but reinjured his back. He underwent surgery in April 2008, and gradually resumed training in May 2008. In June 2008, the Auburn strength and conditioning staff instructed Ramsey to perform a weighted, one-legged box squat that caused another back injury, ultimately leading to the end of Ramsey’s football career.

Ramsey sued the Auburn University and athletic trainer Arnold Gamber in federal court in Alabama in 2009. After summary judgment was granted to the defendants, Ramsey sued Auburn and head strength and conditioning coach Kevin Yoxall in Madison County Circuit Court in 2011. Ramsey alleged his injuries were the result of complying with

the strength and conditioning plan sent to him to perform while still living in Miss.; the complaint also stated that Ramsey was a resident of Alabama. Auburn University filed a motion to dismiss arguing improper venue in Madison County, Miss., and sovereign immunity under Alabama law. Kevin Yoxall filed a motion to dismiss arguing improper venue and the doctrine of *forum non conveniens*. Ramsey attempted to amend his complaint and compel discovery on the venue issue. The Madison County Circuit Court denied Ramsey’s motion to amend and—finding venue improper—dismissed the case without prejudice. Ramsey appealed.

ISSUES

Whether the trial court (1) abused its discretion in determining venue was improper pursuant to Miss. Code Ann. § 11-11-3(1)(a)(I), and (2) erred in denying Ramsey discovery for purposes of establishing venue in Madison County, Miss. (3) Whether additional legal issues are appropriate for the Supreme Court to consider given the dispositive nature of the venue issue.

HOLDING

(1) Because Ramsey was registered to vote and held an Alabama drivers’ license, Ramsey’s complaint did not articulate sufficient facts to demonstrate the injury occurred in Madison County, state courts lack authority to transfer cases to neighboring states, and because merely experiencing the effects of an act or omission is insufficient to establish venue (*i.e.* Ramsey’s receipt of a workout plan in Miss.), the trial court did not abuse its discretion in finding venue in Madison County improper. (2) Because Ramsey had the burden to obtain a ruling on his motion to compel discovery, his argument is considered abandoned, and the trial court did not err in denying discovery on the venue issue. (3) Because of the judicial policy against issuing advisory opinions, and the lower court dismissed the case without prejudice, the Supreme Court did not peremptorily resolve issues related to the doctrine of *forum non conveniens*, choice of law, and personal jurisdiction. Therefore, the Supreme Court affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2014-CA-01420-SCT (Feb. 25, 2016)

Opinion by Justice Kitchens

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

Wayne E. Ferrell Jr., Adrienne P. Frascogna, & Stephen Don Heninger for Appellant - Donald Alan Windham Jr., William L. Smith, Benjamin Gilbert Bryant, Wynn M. Shuford, William H. King III, S. Andrew Kelly, & John G. Smith for Appellees

Briefed by [John G. Archer](#)

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SUPREME COURT - CRIMINAL CASES

GRAHAM V. STATE

CRIMINAL - FELONY

CRIMINAL - INDICTMENT – NOTICE OF CHARGES - An indictment that contains the essential elements of the charges against the defendant sufficiently places him on notice of the nature of the charges against him

CRIMINAL - INDICTMENT - CONSTRUCTIVE AMENDMENT - An amendment is permissible as long as the variance between indictment and jury instructions does not materially alter facts that are the essence of the offense or materially alter a defense to the indictment as it originally stood in a way that would prejudice the defendant's case

CRIMINAL - RIGHT TO A SPEEDY TRIAL - BALANCING TEST - In determining if a violation of the right to a speedy trial has occurred, an appellate court must balance the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant

FACTS

The victim met Jamonious Inge at her mother's house. Inge offered the victim cocaine and they went to Inge's house. When leaving Inge's apartment, Dewayne Graham met them. The three walked toward a nearby Cefco convenience store and then down a pathway behind the Cefco. The victim believed the car was on the other side of the trees. Once within the trees, Inge punched the victim and told her to pull her clothes down. Inge blocked the victim from leaving with Graham on the other side, so that she could not run away. Graham and Inge then raped the victim, which included forcing the victim to perform oral sex on one of the men while the other vaginally penetrated the victim from behind. The victim was crying and talking to Graham and Inge to make them feel guilty. Once they left the woods, the victim ran to the Cefco that they had passed. Inside the store, she asked the clerk to call the police and ran behind the counter. Graham and Inge entered and acted concerned for the victim. Officer David Creel arrived at the Cefco. The victim was sent to the hospital via ambulance, where a rape kit was performed. A Lauderdale County grand jury returned a multiple-count indictment against Graham, which alleged kidnapping, forcible rape, and sexual battery. The court reset the trial date five times over the next sixteen months due to continuances dealing with acquiring the State's witnesses and the victim whom was imprisoned in Arkansas. After a two-day trial, the jury returned a guilty verdict and the Circuit Court of Lauderdale County sentenced Graham to thirty years' imprisonment. Graham appealed.

ISSUES

Whether (1) the trial court erred when it denied Graham's motion for a directed verdict as to Count III, when the State presented no evidence that Graham had performed fellatio on the victim; (2) the State impermissibly amended Count III of the indictment when it issued jury instruction S-3; (3) the State presented insufficient evidence to convict Graham; and (4) Graham's speedy trial rights were violated when the court reset the date of trial five times over sixteen months.

HOLDING

(1) Because Graham was sufficiently on notice regarding the nature of the charge against him, the trial court did not err when it denied a motion for directed verdict as to Count III of the indictment. (2) Because the amendment did not alter the factual bases of the offense charge and because Graham's overarching defense was one of consent, Jury Instruction S-3 did not constructively amend Count III of the indictment. (3) Because rational jurors could have found that Graham was guilty, the State produced sufficient evidence to convict Graham on all three counts of his indictment. (4) Because four of the five continuances constitute valid reasons for delay and Graham failed to establish that he suffered actual prejudice, Graham's right to a speedy trial was not violated by the continuances granted by the trial court. Therefore, the Supreme Court affirmed the judgment of the Lauderdale County Circuit Court.

CONCURRENCE IN PART AND DISSENT IN PART

Justice Kitchens concurs in part and dissents in part. He would reverse and render Graham's convictions of sexual battery and kidnapping, and he would affirm Graham's conviction of forcible rape. He dissents in part because Count III of Graham's indictment incorrectly recited the material facts constituting the offense of sexual battery and this

deprived Graham of his federal and state constitutional right to notice of the crime charged. Because the State failed to prove the facts actually alleged in Count III, Graham was entitled to a directed verdict on that count. Further, because Graham's confinement of the victim was merely incidental to his crime of forcible rape, the evidence was insufficient to support Graham's kidnapping conviction.

Affirmed - 2013-KA-02165-SCT (Feb. 25, 2016)

Opinion by Justice Coleman - Concurrence in Part and Dissent in Part by Justice Kitchens

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

Office of the State Public Defender by: Justin Taylor Cook & George T. Holmes for Appellant - Office of the Attorney General
by: Ladonna C. Holland for Appellee

Briefed by [Addie Clark](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – JANUARY 26, 2016
COURT OF APPEALS - CIVIL CASES

BRAZIEL V. STATE

CIVIL - POST-CONVICTION RELIEF

SENTENCING AND PUNISHMENT - POST-RELEASE SUPERVISION - REVOCATION - Violation of any condition of post-release supervision is sufficient for revocation

FACTS

Billie Braziel pled guilty to possession of cocaine in 2009, and was sentenced to sixteen years in the custody of the MDOIT, with thirteen years suspended and three years to serve followed by an additional five years of post-release supervision (“PRS”). Braziel was arrested in March 2013 for possession of a controlled substance with the intent to distribute. The State subsequently petitioned to revoke Braziel’s PRS, alleging that he had conditions of his PRS. These conditions (a) prevented Braziel from committing a crime, and required Braziel to (b) avoid injurious or vicious habits and (c) persons or places of disreputable or harmful character. A revocation hearing was held in May 2013, where a narcotics investigator testified that Braziel, along with his neighbor Buckley, arrived at a controlled drug purchase set up by law enforcement. Braziel denied being in Buckley’s car, although officers watched him exit it and found his pill bottle inside. Braziel had a bag of marijuana on his person and cocaine was found in the vehicle. Braziel admitted to violating four of the alleged conditions, but denied any commission of a crime. Braziel also admitted he possessed marijuana and had tested positive for cocaine, opiates, and marijuana. The court found Braziel violated conditions of his PRS. In March 2014, a grand jury returned a “no true bill,” declining to indict Braziel on the charge of possession to with intent. In October 2014, Braziel filed a post-conviction relief (“PCR”) motion. Braziel argued his PRS should not have been revoked because there was insufficient evidence to show that he committed a crime, he was not “hanging out” with Buckley, and even though he failed a drug test, he was seeking help for substance abuse and his probation officer was in the process of placing him in treatment. On December 1, 2014, the circuit court denied Braziel’s motion, and pointed out that the State was not required to prove that Braziel committed a crime, only that “it was more likely than not” that Braziel had violated a condition of his PRS. Braziel appealed.

ISSUES

Whether the trial court erred in denying Braziel’s PCR motion because (1) there was insufficient evidence to show that he committed a crime given the grand jury’s no true bill, (2) there was insufficient evidence to show he violated the condition that dictated he avoid persons of disreputable or harmful character, and (3) his probation officer recommended that he be placed in drug treatment, not prison.

HOLDING

(1) Even though the no true bill is inconsistent with the revocation of Braziel’s PRS in relation to the condition against his committing a crime, the State was only required to prove that Braziel “more likely than not violated the terms of his probation.” (2) Law enforcement observed Braziel and Buckley exiting the same car and found Braziel’s pill bottle in the car. Thus, there was sufficient evidence to find that Braziel more likely than not violated the condition that dictated he avoid persons of disreputable or harmful character. (3) The recommendation by Braziel’s probation officer was of little importance, as there was clear evidence Braziel violated the conditions against his committing crimes and engaging in injurious or vicious habits. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2015-CP-00026-COA (Feb. 23, 2016)

Opinion by Judge Wilson

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

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

Briefed by [Cody D. Samples](#)

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CROSBY V. MITTELSTAEDT

CIVIL - EMINENT DOMAIN

PROPERTY - NOTICE - *LIS PENDENS* - When any person shall begin a suit in any court to enforce an interest in any real estate, such person shall file a notice containing the nature of the interest

CIVIL PROCEDURE - APPEAL - TIMELY - Under Miss. R. App. Pro. 4(a), the notice of an appeal shall be filed within 30 days after the date of entry of the judgment or order appealed from

CIVIL PROCEDURE - APPEAL - REOPENING TIME FOR APPEAL - Under Miss. R. App. 4(h), the trial court, if it finds that a party entitled to notice of the entry of a judgment did not receive such notice, may reopen the time for appeal

CIVIL PROCEDURE - APPEAL - JURISDICTION - An appeal may be taken as a matter of right once the trial court has disposed of all claims against all parties

CIVIL PROCEDURE - REOPENING TIME FOR APPEAL - DISCRETION - The trial court retains some discretion to refuse to reopen the time for appeal even when the requirements under Miss. R. App. 4(h) are met

FACTS

While being adjoining landowners, the Crosbys took steps to fence off the Mittelstaedt's property from a road. Litigation ensued and a settlement was eventually reached. The Crosbys agreed to convey a non-exclusive, perpetual and unobscured right-of-way and easement to the Mittelstaedts to provide access to the road. In return the Mittelstaedts agreed to pay the Crosbys \$25,000 and erect a fence and gate at the front entrance of the property of sufficient strength to turn cattle. After claiming the erected fence violated the settlement, the Crosbys filed a *Lis Pendens* Notice encumbering the entirety of the Mittelstaedts' property. This notice adversely affected the property value and buyer interest. The Pearl River County Special Court of Eminent Domain found the fence in full compliance with the settlement agreement. However, the Crosbys' filing the *Lis Pendens* Notice without the court's approval violated the terms. The Mittelstaedts were awarded attorney's fees. Counsel for the Crosbys did not receive this court order in time to file a timely appeal. The Crosbys moved to reopen the time for appeal. The court denied this motion. The Crosbys appealed.

ISSUES

Whether (1) the trial court ever entered a final, appealable order, and (2) the trial court properly denied the motion to reopen the time for appeal.

HOLDING

(1) Because the trial court disposed of all claims against all parties, the order enforcing the settlement was final and appealable. (2) Because the trial court did not abuse its discretion by denying the Crosbys' motion, the motion was properly denied. Therefore, the Court of Appeals affirmed the judgment of the Pearl River County Special Court of Eminent Domain.

Affirmed - 2015-CA-00529-COA (Feb. 23, 2016)

Opinion by Judge Wilson

Hon. Prentiss Greene Harrell (Pearl River County Special Court of Eminent Domain)

Thomas H. Huval Sr. for Appellants - Joseph H. Montgomery, Gregory Paul Holcomb, & Elijah Bragg Williams III for Appellees

Briefed by [Daniel McDonald](#)

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CHANDLER V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PROCEDURE FOLLOWING APPEAL - SUPREME COURT PERMISSION TO FILE - When a prisoner's sentence or conviction has been affirmed on appeal or the appeal was dismissed, the prisoner can not file a motion for post-conviction relief in the trial court until the motion has been presented to the Supreme Court and an order granting the filing of such motion has been granted by the Supreme Court

POST-CONVICTION RELIEF - SUPREME COURT PERMISSION - JURISDICTION - Unless the Supreme Court grants defendant leave to file a motion for post-conviction relief, the trial court is without jurisdiction and must dismiss the motion

POST-CONVICTION RELIEF - APPELLATE PROCEDURE - EFFECT OF UNTIMELY FILING - The dismissal of an appeal because it was not perfected in the time and manner required by law has the effect of affirming the appellant's conviction and sentence

FACTS

In June 2012, Marshall Chandler was convicted of kidnapping, aggravated assault, and conspiracy to commit aggravated assault. Chandler was sentenced to serve forty-five years with five years of post-release supervision. In December 2012, Chandler filed a pro se motion for new trial or, in the alternate, for judgment notwithstanding the verdict. The circuit court denied his motion as untimely. Chandler then filed a notice of appeal from the final judgment on December 11, 2012, which the Court of Appeals also dismissed as untimely. Two months later, Chandler filed a motion to reinstate his appeal. The motion was denied because the previous appeal was dismissed as untimely. In September 2013, Chandler filed a motion for Post-conviction relief in the Madison County Circuit Court, which was dismissed. Chandler appealed.

ISSUE

Whether the trial court erred in denying Chandler's PCR motion.

HOLDING

Because Chandler's appeal had been dismissed and he did not receive an order granting the filing of a PCR motion, the trial court lacked jurisdiction to hear the case. Therefore, the Court of Appeals vacated and rendered the judgment of the Madison County Circuit Court.

Vacated & Rendered - 2014-CP-00114-COA (Feb. 23, 2016)

Opinion by Judge Wilson

Hon. John Huey Emfinger (Madison County Circuit Court)

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

Briefed by [Nash Gilmore](#)

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MINOR V. STATE

CIVIL - POST CONVICTION RELIEF

APPEALS - POST CONVICTION RELIEF - DISCOVERY DOCUMENTS - A prisoner who has filed a proper PCR motion and whose motion has withstood summary dismissal may be entitled to trial transcripts or other relevant documents under the discovery provisions of the Mississippi Code Annotated § 99-39-15

APPEALS - POST CONVICTION RELIEF - APPEAL - If a prisoner's request for documents is denied, and his overall petition is ultimately denied, then he may appeal the denial of his petition for collateral relief pursuant to Mississippi Code Annotated section 99-39-25, which provides that final judgments entered under the Uniform Post-Conviction Relief Act may be reviewed by the Court of Appeals on appeal brought by either the State or the prisoner

FACTS

In 2010, Andy Minor was convicted in the Jefferson County Circuit Court of shooting into an occupied dwelling, aggravated assault, and possession of a firearm by a convicted felon. The court sentenced him as a habitual offender, pursuant to Mississippi Code Annotated § 99-19-81 (Rev. 2015), and imposed consecutive sentences of imprisonment totaling forty years. This Court of Appeals affirmed on direct appeal. Minor has since filed multiple motions in the Mississippi Supreme Court requesting leave to file a PCR motion in the trial court. Said motions were denied as “unsupported” and/or procedurally barred. Undeterred, Minor filed a third such motion, which was also denied as procedurally barred and without merit. On November 3, 2014, Minor filed a “Motion for the Issuance of a Subpoena Duces Tecum” in the circuit court. The motion sought to compel the Mississippi Crime Laboratory to produce a spent cartridge found at the scene of the crimes of which Minor was convicted. Minor attached a portion of his trial transcript in which a deputy sheriff testified that he found a spent cartridge at the scene and sent it to the crime lab. Minor alleges that the results of any analysis of the cartridge were never disclosed to him. The circuit court found that Minor’s filing was in the nature of a PCR motion and dismissed for lack of jurisdiction because the Supreme Court had not granted Minor leave to file the motion. Minor appealed.

ISSUE

Whether the Court of Appeals has jurisdiction over Minor’s Motion for the Issuance of a Subpoena Duces Tecum.

HOLDING

Because nothing in the Uniform Post-Conviction Collateral Relief Act or elsewhere gives a prisoner the right to institute an independent, original action for a free transcript or other documents, and then if dissatisfied with the trial court’s ruling, to directly appeal that ruling to the Mississippi Court of Appeals as a separate and independent action, the Court of Appeals does not have jurisdiction over Minor’s motion. Therefore, Minor’s appeal was dismissed.

Appeal Dismissed - 2014-CP-01650- (Feb. 2, 2016)

Opinion by Judge Wilson

Hon. Lamar Pickard (Jefferson County Circuit Court)

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

Briefed by [Madison Coburn](#)

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MYRICK V. MYRICK

CIVIL - DOMESTIC RELATIONS

DIVORCE - DIVISION OF MARITAL PROPERTY - *FERGUSON* FACTORS - When dividing marital property in a divorce case, courts should consider the *Ferguson* factors, which include: (a) contribution to the accumulation of the property, (b) the degree to which each spouse has disposed of marital assets, (c) the market and emotional value of the assets, (d) the value of the assets not ordinarily subject to distribution, (e) tax consequences, (f) the extent to which property division may be utilized to eliminate periodic payments, (g) the need of the parties for financial security, and (h) any other factor in which equity may be considered

DIVORCE - ISSUES FOR RESOLUTION - CONSENT BY PARTIES - A chancellor is limited to the resolution of issues specifically identified and agreed to in writing by the parties

DIVORCE - LUMP-SUMP ALIMONY - ALIMONY OR PROPERTY DIVISION - Lump-sum alimony is a fixed and irrevocable sum that may be used either as alimony or as part of property division

FACTS

Ken Myrick and Dee Myrick were married in 1981. Ken was employed from 1981 until 2005 when he retired due to a service-related disability and was declared one hundred percent disabled in 2007. Including his retirement, Social Security benefits, and Veterans Affairs benefits, Ken’s monthly income totaled \$5,241.50. Dee was employed by the United States Postal Service and her monthly income totaled \$3,887.73. The couple had a marital home valued at

\$184,000 and twelve acres of land valued at \$15,600. Dee's father gifted both of these properties to the couple. On May 29, 2013, Dee filed for divorce in the Perry County Chancery Court. Ultimately, the parties agreed to an irreconcilable-differences divorce and submitted the issues of property division and attorney's fees to the chancellor. After trial, the chancellor awarded Dee the marital residence, the twelve acres of land, her entire 401(k) account, and various personal items including household furniture, washer and dryer, lawn mower, and tractor. Ken was ordered to pay Dee the amount of \$72,000 in lump-sum alimony at a rate of \$600 per month for ten years. Dee was held responsible for the mortgage indebtedness on the home. Both parties filed motions to reconsider. Ken moved to reconsider the alimony award, arguing it was excessive. The chancellor entered an amended order that changed the nature of the alimony payment from lump-sum to periodic alimony (without a termination date or reason), and ordered Ken to maintain a life-insurance policy in the amount of \$72,000 with Dee as the beneficiary. Ken, asserting the chancellor erred in dividing the marital property and awarding alimony to Dee, appealed.

ISSUES

Whether the chancellor (1) erred in dividing the marital property and (2) erred in awarding Dee alimony.

HOLDING

(1) Under the *Ferguson* factors, because Ken and Dee attributed to the accumulation of the property, Dee had an emotional attachment to the marital home and the twelve acres, there was no evidence of any nonmarital assets, there was no evidence of waste by either party, Dee's health would effect her ability to work in the future, and Dee was held responsible for the mortgage on the home, there was substantial and credible evidence that supported the chancellor's division of the marital property. (2) Because a chancellor cannot resolve issues not consented to by the parties and because the parties did not submit the issue of alimony to the chancellor, the chancellor's award of periodic alimony was without authority and should be reserved. However, because lump-sum alimony may be considered part of the property settlement, the issue was remanded for further consideration regarding whether the lump-sum alimony was intended to be part of the property division or was intended to be alimony. Therefore, the judgment of the Perry County Chancery Court was affirmed in part and reversed and remanded in part.

DISSENT

Chief Judge Lee agreed with the majority regarding the division of marital property. However, he disagreed with the majority regarding the award of alimony despite the parties signed consent. He argued that because Ken failed to raise this issue on appeal and because alimony is considered collectively within all property division, the chancellor did not err in awarding alimony to Dee.

Affirmed in part; Reversed & Remanded in part - 2014-CA-00701-COA (Feb. 23, 2016)

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

Hon. Johnny Lee Williams (Perry County Chancery Court)

Nancy E. Steen for Appellant - Allen Flowers for Appellee

Briefed by [Wes Bulgarella](#)

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TRANSNATIONAL VENTURES, INC. V. DERR PLANTATION, INC.

CIVIL - CONTRACT

CIVIL PROCEDURE - DIRECTED VERDICT - BURDEN OF PROOF - A court should direct a verdict for the defendant if, even giving the plaintiff the benefit of all favorable inferences, no reasonable juror could find for the plaintiff

REAL ESTATE - AGENT - COMMISSION - Where the contract between an owner of property and an agent specifies the price and terms of sale, the agent is entitled to a commission when he/she procures a purchaser ready, willing and able to buy, even though the owner may then decline to sell, but where the price and terms are not specified in the contract between the owner and the agent, and the actual sale is made by the owner, the agent is entitled to his commission when he procures a purchaser to whom the principal sells

REAL ESTATE - BROKER - LICENSE - No person may act as a real estate broker in Mississippi without first obtaining a license, and a real estate broker must have been licensed at the time of the act or service in order to maintain an action

REAL ESTATE - BROKER - BURDEN OF PROOF - To prove that one has acted as a real estate broker, it is only necessary to show that one has negotiated or attempted to negotiate a real estate sale, or directed or assisted in procuring a purchaser or prospect calculated or intended to result in such real estate transaction

FACTS

Paul Pillat was the president of Transnational Ventures, Inc. and its wholly owned subsidiary, Transnational Associates, Inc. (together "Transnational"). Transnational and Pillat were licensed as real estate brokers in Georgia, but not in Mississippi. In 2002, Pillat received an offer to purchase a farm, which he forwarded to Derr. Derr responded that he would be willing to sell the farm for \$10.5 million, less a \$500,000 commission to Pillat, but the farm was not sold at that time. In 2004, Derr Plantation, Inc. ("DPI") contacted Pillat and asked him to do some consulting work related to the farm. Pillat testified that sometime in 2004, Derr asked him to help sell the farm. Pillat testified that initially some commission rates floated around, but eventually he told Derr that his minimum commission was five percent and that Derr responded that that should be no problem. Pillat testified that sometime between April and June 2004, he told Earl Eckerson that the farm was for sale. Eckerson was a finder who drove around the Mississippi Delta looking for farm properties for others. In August 2004, Eckerson faxed Pillat an informal handwritten proposal from W.L. Pointer to buy the farm. After meeting with Pointer and Eckerson, Pillat notified Derr of Pointer's offer by letter that stated that Pointer and Eckerson made a verbal offer of \$6 million, which he declined, and that they would return with another offer in two weeks. Eckerson followed up with a fax to Pillat in which he conveyed an offer from Pointer to buy the farm for \$6.5 million. Although Pointer did not buy the farm, Pillat contended that his contacts with Eckerson ultimately resulted in another offer to buy the farm. Eckerson told Trey Heigle that Pillat said the farm was for sale. Heigle then told Thomas L. Swarek about the farm, and Heigle and Swarek discussed buying it as partners. On December 2, 2004, Swarek faxed DPI an offer to purchase the farm and in response received a phone call from Joachim Witt, a DPI executive in Germany. According to Swarek, Witt assured him that no realtor was involved, and Derr and Witt sent Swarek a letter that stated that neither party would be obligated to pay a broker commission. Pillat testified that Derr asked him to sell the farm and that he would keep anything above the net proceeds of six and a half million dollars. After the meeting, Witt gave Pillat a copy of Swarek's offer. Pillat testified that Witt stated that Swarek was Pillat's deal and that Pillat should follow up with him. Witt also gave Pillat a copy of the letter from DPI to Swarek, which stated that neither side would be required to pay any commission to a broker. Pillat testified that after further discussions, Swarek decided to make a written offer, so Pillat obtained a Mississippi form contract from G.A. Robinson Land Company and gave it to Swarek. Swarek filled in the contract with a purchase of \$7 million, and around January 1, 2005, he sent the offer to DPI. After Swarek submitted this offer, he communicated directly with DPI. On January 9, 2005, Pillat faxed Derr a letter in which he asserted that DPI promised to pay him anything above the net proceeds of US \$6.5 million as compensation. The next day, Derr responded that he had told Pillat on December 8 only that DPI might have been willing to sell for at least a net price of \$6.5 million plus a commission. Derr also denied that Pillat was entitled to any commission for a sale to Swarek, since Pillat did not refer Swarek to DPI. Derr claimed Swarek approached DPI directly and had offered \$7 million to purchase the farm before Pillat ever spoke to him. Pillat never responded to Derr's letter in writing or confronted Derr or anyone else at DPI regarding the commission. Instead, he

told Swarek that DPI had taken the position that it did not owe Pillat a commission for any sale to Swarek, and he asked Swarek to write a new offer to purchase the farm under a different name. Swarek agreed and wrote an offer from Caspen Operating Company, which Pillat then submitted to DPI. Swarek and DPI never consummated a sale of the farm, but Transnational contended that Swarek was a ready, willing, and able buyer, while DPI contended that he was not. In June 2006, Transnational filed a complaint in the Issaquena County Circuit Court, alleging that it was entitled to a commission of \$500,000, as well as other compensatory damages, pre and post-judgment interest, punitive damages, and attorneys' fees. The circuit judge granted DPI's motion for a directed verdict for the three distinct reasons: (1) the alleged commission agreement was insufficiently specific as to the terms of an acceptable sale to require a commission in the absence of a sale, (2) Transnational was barred from recovering a commission because it acted as a real estate broker without a license, and (3) the evidence established that Transnational was not the procuring or predominant cause of the offer to buy the property. Transnational appealed.

ISSUE

Whether the circuit court erred by granting Derr Plantation's motion for directed verdict.

HOLDING

There was no sale of the property, so there were no proceeds, and there could be no commission. In addition, Transnational was barred from maintaining an action to recover a commission because it acted as a broker without first being licensed in Mississippi. Therefore, the Court of Appeals affirmed the judgment of the Issaquena County Circuit Court.

Affirmed - 2014-CA-01361-COA (Feb. 23, 2016)

Opinion by Judge Wilson

Hon. M. James Chaney Jr. (Issaquena County Circuit Court)

David M. Sessums for Appellants - Kenneth B. Rector & Robert R. Bailess for Appellee

Briefed by [Peter H. Liddell](#)

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WARD V. HARRELL

CIVIL - REAL PROPERTY

CONTRACTS - CONSTRUCTION - AMBIGUITIES - An instrument is ambiguous if one or more terms or provisions are susceptible to more than one reasonable meaning

CONTRACTS - REMEDIES - REFORMATION - When a deed is unambiguous, the party asserting reformation must prove beyond a reasonable doubt (1) a mistake on the part of both parties; (2) a mistake on the part of one party with fraud or inequitable conduct on the part of the other; or (3) an error on the part of the scrivener

CONTRACTS - REFORMATION - MUTUAL MISTAKE - Mutual mistake occurs when both parties intended something other than was reflected in the instrument in question

PROPERTY - CONVEYANCE - RESERVATION - Only the grantor can make a reservation out of the estate granted

FACTS

On July 31, 1969 Mrs. Charles Denson conveyed – by warranty deed – a parcel of land to James L. Harrell. On November 27, 1977, James executed an oil, gas, and mineral lease over the parcel to Texas Pacific Oil Company. On August 18, 1979, James conveyed the parcel of land to L.L. Martin, granting mineral rights to the grantee. On April 25, 1997, Martin conveyed the parcel of land to Michael V. Ward and his wife, Amy S. Ward, subject to the exception that all oil, gas, and mineral rights were previously reserved or conveyed. On October 18, 2007, Ward executed an oil, gas, and mineral lease to Denbury Onshore LLC. On January 11, 2010, James executed an oil, gas, and mineral lease to Denbury. On January 19, 2010, James executed a special warranty mineral deed to himself and his second wife, Carolyn P. Harrell. After James's death, the Wards realized Harrell was receiving royalties from Denbury. Ward filed a complaint in the Chancery Court of Madison County. Harrell counterclaimed to remove Ward's lease as a cloud on her title. At

trial Harrell claimed the deed should have been reformed based on mutual mistake and a scrivener's error. Ultimately, the chancellor reformed the deed in favor of Harrell. Ward Appealed.

ISSUES

Whether the trial court erred in (1) applying an erroneous legal standard and (2) supporting the reformation of the 1979 deed.

HOLDING

(1) Because the language of the warranty deed was not ambiguous the trial court applied an erroneous legal standard.
(2) Because James Harrell intended to retain all the mineral rights on the parcel of land, constituting a mutual mistake, and because the scrivener erred by using the word grantee instead of grantor in describing a reservation, the trial court did not err in supporting the reformation of the 1979 deed. Therefore, the Court of Appeals affirmed the judgment of the Madison County Chancery Court.

Affirmed - 2015-CA-00101-COA (Feb. 23, 2016)

En Banc Opinion by Chief Judge Lee

Hon. Cynthia L. Brewer (Madison County Chancery Court)

Bentley E. Conner for Appellants - Otis Johnson for Appellee

Briefed by [Andrew B. Lintner](#)

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COURT OF APPEALS - CRIMINAL CASES

McCOLLUM V. STATE

CRIMINAL - FELONY

CRIMINAL - SIXTH AMENDMENT - RIGHT TO COUNSEL - Where a court forces a Defendant to proceed to trial without counsel, it will constitute reversible error

CRIMINAL PROCEDURE - RIGHT TO COUNSEL - FORFEITURE - Only the most egregious misbehavior will support forfeiture of the right to counsel without warning and an opportunity to modify behavior to the appropriate standard

CRIMINAL PROCEDURE - RIGHT TO COUNSEL - IMPLIED WAIVER - There is no basis for determining an implied waiver where the Defendant has not been warned and has not engaged in egregious misconduct such as physical violence

FACTS

In September of 2012, Bill Russell was assaulted and burglarized in his home. The attacker stole over \$2,000 in cash, beat Russell, and left in his Chevrolet Lumina. Following the burglary, Russell identified Charles McCollum as the assailant. In March of 2013, McCollum was indicted for burglary and kidnapping as a habitual offender. He was found indigent and counsel was appointed for him. In March of 2014, McCollum's attorney made a motion to withdraw and the judge continued the case until September 2014. Five days prior to the trial date, McCollum's counsel made a motion to withdraw due to a total breakdown in the attorney-client relationship that rendered it impossible to effectively represent McCollum. The district attorney argued the trial should continue as scheduled and that McCollum was possibly deliberately seeking to delay trial in the hopes Russell, the elderly victim, would die before being able to testify. The circuit court granted the defense counsel's motion to withdraw and the State's motion to proceed with trial, leaving McCollum to represent himself. The jury convicted McCollum on both counts. The court sentenced McCollum to consecutive sentences of twenty-five years for burglary and thirty years for kidnapping. McCollum appealed.

ISSUE

Whether McCollum’s conduct established an implied waiver of his Sixth Amendment right to Counsel.

HOLDING

Because McCollum was not given an express warning that he may waive his right to counsel if he continued in his course of conduct and his behavior failed to amount to the egregious misconduct necessary for an implied forfeiture, the trial court erred in stripping McCollum of his right to counsel. Therefore, the Court of Appeals reversed and remanded the judgment of the Simpson County Circuit Court.

Reversed and Remanded - 2014-KA-01522-COA (Feb. 23, 2016)

Opinion by Judge Wilson

Hon. Eddie H. Bowen (Simpson County Circuit Court)

Justin Taylor Cook (State Pub. Defender Office) for Appellant - Ladonna C. Holland (Att’y Gen. Office) for Appellee

Briefed by [Alexandra Bruce](#)

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PARVIN V. STATE

CRIMINAL - FELONY

CRIMINAL - EVIDENCE - SUFFICIENCY - Evidence is sufficient if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

CRIMINAL - DEFENDANT AS SOLE EYE WITNESS - WEATHERSBY RULE - Where the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge.

EVIDENCE - ADMISSIBILITY - ABUSE OF DISCRETION - The admissibility of evidence is largely within the discretion of the trial court and reversal may be had only where that discretion has been abused

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - ABUSE OF DISCRETION - If the instructions fairly announce the law of the case and create no injustice, no reversible error will be found

FACTS

David Parvin was convicted of the murder of his wife, Joyce and was granted a new trial on remand from the Supreme Court. In 2007, Parvin called 911 to report that he accidentally shot Joyce, and law enforcement found her dead upon arrival. Parvin told officers he rushed out of the house to shoot a beaver and, in his haste, he tripped, discharged the gun, and shot his wife who was seated at her desk. He was unsure about whether he tripped on the rug or the dog, whether the gun hit the armrest of Joyce’s chair, and whether he pulled one of the two triggers on the double barreled shotgun. After the initial investigation, Parvin gave several inconsistent accounts of the events surrounding Joyce’s death to officials and to his neighbor, when giving a statement, when testifying at the first trial, and again while awaiting retrial. At the second trial, the jury found Parvin guilty of murder. Parvin appealed.

ISSUES

Whether (1) the evidence was insufficient to prove that Parvin acted with “deliberate design” when he accidentally shot and killed his wife, (2) Parvin was entitled to a judgment of acquittal under the *Weathersby* rule, (3) Parvin was denied due process (4) the trial court erred in denying Parvin’s request to introduce telephone records into evidence, (5) the trial court erred in admitting Parvin’s prior testimony, (6) the trial court improperly instructed the jury, and (7) Parvin is entitled to a new trial.

HOLDING

(1) Because The State presented evidence that Parvin continuously made inconsistent statements, expert testimony showed that the gun would not misfire, that it was out of Parvin’s normal actions or habits to walk around with the shotgun, and that Parvin was involved in affairs with multiple women the evidence was sufficient to find Parvin guilty.

(2) The jury concluded that Hamblin’s testimony was consistent and therefore credible. Additionally, Parvin’s own testimony was inconsistent, so the court declined to apply the *Weathersby* rule. (3) Because the Court concluded there was sufficient evidence to affirm Parvin’s conviction and deny the application of the *Weathersby* rule, the Court concluded that there was no merit to Parvin’s claim that he was denied due process. (4) Just because Officer Knight was qualified to authenticate records received through a subpoena this did not mean that Knight was qualified to be a sponsoring witness under Miss. R. Evid. 803(6) in order to authenticate telephone records the trial court excluded. (5) Because Parvin’s own testimony was willingly given and constituted an admission, the trial court did not abuse its discretion in admitting his past testimony. (6) Because Parvin offered no authority that would indicate the trial court should have withheld his prior conviction when it was made in statements by both parties witnesses, the court concluded there was no abuse of discretion. Also, because the evidence presented at Parvin’s trial was not entirely circumstantial, the court concluded that the trial court appropriately denied Parvin’s request to include circumstantial-evidence jury instructions. (7) Because the court found no error, no new trial was not warranted. Therefore, the Court of Appeals affirmed the judgement of the Monroe County Circuit Court.

Affirmed - 2014-KA-00466-COA (Feb. 23, 2016)

Opinion by Presiding Judge Griffis

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

James Lawton Robertson, Jim Waide, Rachel Pierce Waide, William James Dukes & Edwin Poteat Lutkin Jr. for Appellant -

LaDonna C. Holland (Att’y Gen. Office) for Appellee

Briefed by [Rachel Smith](#)

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THOMAS V. STATE

CRIMINAL - FELONY

EVIDENCE - HEARSAY EXCEPTIONS - INFORMATION PROVIDED BY A CONFIDENTIAL INFORMANT - An officer may testify at trial about information provided to him by an informant if that information explains actions taken by an officer

EVIDENCE - OBJECTION - TIME OF OBJECTION - Any argument to exclude testimony prior to the defendant’s objection is procedurally barred

CRIMINAL - JURY INSTRUCTIONS - SUFFICIENCY OF INSTRUCTIONS - If all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law, no error results

FACTS

On Nov. 8, 2010, a confidential informant (CI) told Lt. Commander Joseph Moulds of the S. Miss. Narcotics Task Force that she had arranged to buy cocaine from Antwain Thomas. The next day, the CI made an unrecorded call to Thomas in the presence of Mould and Task Force agent Billy Lewis. Thomas arranged to meet the CI at Thomas’s girlfriend’s house later that morning. The agents gave the CI a small handheld video camera to record the buy. Fifteen minutes after meeting with Moulds and Lewis, the CI returned with the camera and 1.5 grams of crack cocaine.

At trial, the video made by the CI was not played in open court, but the jurors were instructed that they could watch it during deliberations. Both Moulds and Lewis testified that the video depicted the CI received crack cocaine from a man in exchange for money. Moulds testified that after comparing the video with pictures of Thomas, he could confirm that Thomas was the man in the video. Lewis also expressed that he had “no doubt” that the man in the video was Thomas. The CI also positively identified Thomas at trial.

Several months prior to buying cocaine from Thomas, the CI had been arrested for selling approximately \$20 worth of cocaine. Moulds gave her the opportunity to “work off the charge” by cooperating with the Task Force and assisting in the arrest of more significant drug dealers. Moulds denied that he made “any promises” about the outcome of the CI’s case, but acknowledged that she was not indicted because of her cooperation and assistance.

In August 2011, Thomas was indicted for sale of cocaine. At trial, the jury returned a guilty verdict. As a subsequent offender and habitual offender, Thomas was sentenced to sixty years, consecutive to eighteen years to serve on a prior sentence for possession of cocaine with intent to distribute. Thomas appealed.

ISSUES

Whether (1) the trial court erred by permitting Officer Moulds to testify, over a hearsay objection, that the CI told him that she had made contact with Thomas and arranged to buy drugs, (2) the trial court erred allowing Agent Lewis to describe what the video depicted, (3) Thomas was entitled to a cautionary jury instruction regarding the CI's testimony, and (4) there is sufficient evidence to sustain the conviction, or in the alternative, whether the jury's verdict was against the overwhelming weight of the evidence.

HOLDING

(1) Because the testimony given by Agent Lewis explained why he allowed the CI to initiate the buy from Thomas, that testimony was not deemed hearsay. (2) The Court of Appeals also dismissed defendant's claim that he was prejudiced by the judge's overruling of his objection Lewis's interpretation of video taken by the CI because the objection was only made after the prosecutor asked Lewis to reiterate his prior testimony. (3) The court also found that a cautionary instruction was unnecessary because the CI was thoroughly cross-examined about her arrangement with Officer Moulds and her possible motive to lie or fabricate evidence. (4) Because the CI's testimony was supported by the video and the cocaine, the trial court did not err in denying defendant's motion for directed verdict. Therefore, the judgement of the Clark County Circuit Court was affirmed.

Affirmed - 2014-KA-01078-COA (Feb. 23, 2016)

Opinion by Judge Jack L. Wilson

Hon. Robert Walter Bailey (Clark County Circuit Court)

George T. Holmes & Phillip Broadhead (State Pub. Defender Office) for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee
Briefed by [William H. Holley](#)

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WALLACE V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL LAW - POST-CONVICTION RELIEF - STANDARD OF REVIEW - A trial court's dismissal or denial of a post-conviction relief motion is reviewed for abuse of discretion and will only be reversed if the decision is clearly erroneous

CRIMINAL LAW - RIGHT TO CONFRONTATION OF WITNESSES - DOCUMENTARY EVIDENCE - Self-authenticating records of a defendant's prior convictions are not testimonial evidence and do not trigger a defendant's constitutional right to confront witnesses

CRIMINAL LAW - INDICTMENT - DATE OF CONVICTION - The failure of an indictment to list the date of conviction is not fatal

CRIMINAL LAW - SENTENCING- MAXIMUM PUNISHMENT - A trial court may sentence a defendant to a term of incarceration plus a term of post-release supervision for any felony crime, provided the term of incarceration plus the term of post-release supervision do not exceed the statutory maximum sentence for the crime committed

FACTS

Rosa Wallace was indicted on January 19, 2006 for possession of cocaine, more than thirty grams. On June 10, 2008, the State moved to amend Wallace's indictment to charge her as a habitual offender and a drug recidivist. After a hearing on August 18, 2008, the trial court entered an order amending the indictment. On September 8, 2008, Wallace pled guilty to the charge and was sentenced as a habitual offender to thirty years, with twenty years to be served in the custody of Mississippi Department of Corrections without the possibility for parole or probation, followed by ten years of supervised post-release supervision with five years of non-reporting supervision. She was also ordered to pay a

\$5,000 fine, along with other fees and court costs. On May 2, 2014, Wallace filed a motion for post-conviction relief with the Desoto County Circuit Court. The trial court noted that the motion was time-barred but addressed the merits of Wallace's claims and denied the motion on May 20, 2014. Wallace appealed.

ISSUES

Whether (1) Wallace's constitutional right to confront witnesses was violated by the introduction of certified copies of her prior convictions, (2) Wallace's amended indictment was defective, and (3) the trial court's imposition of ten years of post-release supervision subjected Wallace to an illegal sentence and double jeopardy.

HOLDING

(1) Because certified records of Wallace's prior judgments were not testimonial, they did not violate the Confrontation Clause. (2) Because Wallace was given sufficient notice of the prior convictions used to enhance her sentence, there was no defect in Wallace's indictment. (3) Because Wallace's thirty-year sentence does not exceed the maximum allowed by law and she was not sentenced to two separate terms for the same offense, Wallace was not subjected to an illegal sentence or double jeopardy. Therefore, the judgment of the Desoto County Circuit Court was affirmed.

Affirmed - 2014-CP-00806-COA (Feb. 23, 2016)

Opinion by Judge Barnes

Hon. Robert P. Chamberlin (Desoto County Circuit Court)

Pro se for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [L. Morgan Eason](#)

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