

Dear Subscribers,

This week's Brief*Serv* Newsletter is attached. The cases included are:

Supreme Court - Civil

Fisher v. Drankus – Statutory Interpretation – Parole Case Plan – Retroactive Operation – Drankus, an inmate in the custody of the M.D.O.C., requested an order to reverse an adverse decision by MDOC's Administrative Remedy Program (ARP), arguing that Mississippi Code Section 47-7-3.1 entitled him to a case plan as a parole-eligible inmate. 47-4-3.1 was added to the Code in 2014; Drankus was sentenced in 1987. The trial court ruled that he was entitled to receive a case plan pursuant to the statute. M.D.O.C. appealed that decision, contending that the language of the statute required issuance of parole case plans to apply prospectively rather than retroactively.

The Supreme Court found that Section 47-7-3.1 contains operative mandates indicating the parole-case-plan directive was intended to apply prospectively. Such mandates in the section include the following: "Within ninety days of admission, the department shall complete a case plan on all inmates," and "The department shall ensure that the case plan is achievable prior to the inmate's parole eligibility date." None of these provisions can be met in Drankus's case, as those dates have all passed. And because that section does not clearly and unequivocally express an intention for retroactive application, it cannot apply to Drankus. Therefore, the Court reversed the trial court's order that Drankus be issued a case plan.

Presiding Justice Dickinson concurred, arguing that the statute refers to all parole-eligible offenders to whom the statute can be applied and that this case involved no question of retroactive application.

Justice Kitchens dissented, arguing that lawmakers left gaps in the statutory scheme intending M.D.O.C. to develop its own time limitations and content requirements. He argues that this statutory reading ensures that all parole eligible inmates, including Drankus, receive a case plan.

McAdams v. Perkins- Municipalities – Public Donations – Legal Counsel – Carolyn McAdams won the City of Greenwood's election for mayor. Sheriel Perkins filed an action in federal court to contest the election. McAdams hired Butler Snow LLP to represent her. An attorney's general opinion stated that the city council could not indemnify her for the legal fees when being sued in her individual capacity. The city council also hired Butler Snow to represent its own legal interests. Perkins filed a bill of exceptions to the city council's resolution. The circuit court found that the city council could not employ Butler Snow to represent their interest in the election contest which is tantamount to using public funds for a private interest.

A municipality may lawfully hire its own legal counsel, at its discretion, to represent its interests, even if no city officials are party to the suit. Although municipalities may not indemnify election candidates for legal fees incurred in an election contest, they are not barred from hiring the same counsel as a candidate. Because the city council's resolution did not explicitly state that it donated public funds to pay McAdam's legal fees but rather hired the same counsel as her, the city council had discretion to hire the same attorney as McAdams.

Justice Kitchens dissented, claiming that precedent required the city council's approval before the mayor files an appeal. A mayor is limited to the powers specifically granted and lacked power to appeal in this case.

Mississippi ex rel. Hood v. Louisville Tire Center, Inc. - Price Gouging - Want of Prosecution - Motion to Dismiss - In this appeal for price gouging, the State asserted error on behalf of the chancellor in granting Louisville Tire Center, Inc.'s motion to dismiss for want of prosecution. After Hurricane Katrina the State began investigating the business for price gouging during a state of emergency. The State failed to prosecute from June 2011 to December 2014. After the State's action in 2014, Louisville Tire filed a motion to dismiss. The chancellor granted the motion to dismiss. The State appealed.

Because there was a clear record of delay, the chancellor was not bound to grant lesser sanctions and the appellee was prejudiced by the delay, the Chancellor did not abuse his discretion in granting the motion to dismiss. Therefore, the Supreme Court affirmed the chancellor's dismissing the action for failure to prosecute.

Stratton v. McKey – Due Process – Replevin Statutes – Remedies – Robert Stratton brought a truck to John Shivers for the purposes of restoring the vehicle. No work was completed, and the vehicle remained on Shivers' property. A storage contract did not exist between the parties. Thereafter, Shivers sold his business to Jerry McKey. Stratton requested to take the truck from McKey, and McKey agreed, conditioned upon Stratton paying a storage fee for keeping the truck on the property. Stratton declined because no agreement existed. Stratton filed a replevin action for the vehicle. The trial court orally held for Stratton, conditioned upon Stratton paying McKey \$880 within 30 days. If Stratton did not pay, the property would be considered abandoned. Stratton interjected a question as to whether there was a basis to award damages when McKey did not file a responsive pleading. The trial court indicated a replevin action did not require a responsive pleading. Stratton filed his motion for relief from judgment and a judgment notwithstanding the verdict, which the court both denied. The Court of Appeals affirmed the decision of the trial court. Stratton appealed, and the Supreme Court granted certiorari.

The Supreme Court disagreed with the trial court's awarding of damages to the defendant in the replevin action because he did not submit anything prior to the trial advising that he was seeking damages. Further, the replevin statutes do not contain a provision providing a damage remedy outside of court costs if the judgment was to be entered for the defendant. Further, because the plaintiff did not provide any evidence of damages, and the statute did not permit damages. Therefore, the Supreme Court reversed the decision of the Court of Appeals and denied the plaintiff's motion for damages.

Supreme Court - Court Orders

Supreme Court – Post-Conviction Relief

Jordan v. State – Death Penalty – Post Conviction Relief – Ineffective Assistance of Counsel - Kelvin Jordan was convicted of two counts of capital murder in 1996. The Court affirmed the convictions and death sentences, and Jordan sought post-conviction relief (PCR), which the Court denied. He filed a successive petition relief, arguing that his attorney was constitutionally ineffective, that the death sentence was disproportionate, and that the trial judge erred in evidentiary decisions at trial.

Failing to file a post-conviction claim within the limitations period amounts to waiver of relief unless the claim presented meets an exception to the time bar, and Jordan's claim did not. Further, certain issues raised in the petition were raised in prior proceedings. When claims have been substantially reviewed in prior proceedings, they are procedurally barred by the doctrine of res judicata. Consequently, the claims that trial counsel was ineffective; that the death sentence was disproportionate; and that the trial judge erred in evidentiary decisions at trial were barred by res judicata. Moreover, Jordan's ineffective assistance of counsel claim could not proceed because Jordan could not claim that his trial counsel was ineffective when the same attorney represented him during the proceedings in question. A self-ineffectiveness claim is absolutely inappropriate and must not be presented to the Court. Therefore, the Court denied the petition for post-conviction relief.

Supreme Court – Criminal

Willie v. State – Criminal – Felony – Expert Testimony – Supplemental Jury Instructions – James Douglas Willie was convicted of deliberate design murder, and challenged his conviction based on the fact that the trial court improperly answered a question asked by the jury. A man was found dead on US Interstate 55 in Panola County on May 8, 2012. The victim had suffered multiple gunshot wounds, and four nine-millimeter casings were found at the crime scene. A forensic analyst testified that in their expert opinion, the bullets found at the scene had the same characteristics as the bullets fired in a

laboratory from a gun owned by Willie. The expert was unable to conclusively say that the bullets found on the scene were fired from Willie's gun. The jury struggled in their deliberations, and asked the judge if they could find Willie guilty of "having the gun without saying he is guilty of murder." The judge responded to this question with a simple, "No," afraid that anything further would confuse the jury. Willie contended that the trial judge's answer led the jury to believe that they could not find Willie guilty of possessing the gun without also convicting him of murder. After being convicted, Willie appealed.

The Supreme Court vacated Willie's conviction and remanded the case back to the trial court for further proceedings. Ultimately, they found that the trial court allowed the jury to convict Willie of murder simply because he possessed the firearm in question. Citing *Girton v. State*, the Court discussed two recommendations to trial courts when juries make further inquiries after retiring to deliberate. First, the court should determine whether it is absolutely necessary to give any further instruction. Second, the court should ensure they understand precisely what is meant by the jury's inquiry. Only then can the court properly respond to the jury's question. Because the trial court failed to follow the *Girton* recommendations, the Court reversed and remanded the trial court.

Justice Kitchens concurred in part and dissented in part, arguing that Willie received ineffective assistance when the trial counsel failed to object to the conclusory statements of the State's expert.

Justice Randolph concurred in part and dissented in part, arguing that the trial court did not err in answering the question of the jury.

Court of Appeals - Civil

Bell v. Bell – Civil Domestic Relations – Divorce Agreement – Modification of Child Support and Student Loan Payment – In March 2010, the chancery court entered a final judgment of divorce based on irreconcilable differences for Lori and Jack Bell. In the original divorce agreement, Jack was to pay Lori \$1,700 a month in child support, not subject to reduction as long as Lori was making payments on the couple's student loan debt. Jack was also ordered to pay school tuition, healthcare, and provide a college fund for the party's minor daughter. After losing his job, Jack petitioned the chancery court to modify the party's final judgement of divorce. The chancellor found a material change in circumstances regarding Jack's earnings since the entry of the judgment of divorce. The chancellor reduced Jack's child support. However, because Jack had agreed to pay private school tuition for the parties' minor daughter, the chancellor included this cost in the child support calculation. Additionally, the chancellor awarded Lori a lump sum of \$30,500 for Jack's portion of the student loan debt because Jack was no longer paying the \$1,700. Finally, the chancellor awarded Lori \$1,000 in attorney fees after finding there was willful contempt by Jack.

Chancellors are given broad discretion in modifying child support. The Court will not disturb the findings of a chancellor supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. Here, the Court of Appeals affirmed the modification of child support because the chancellor provided a sufficient explanation to deviate from the statutory guidelines of child support and include private school tuition. The Court reversed and rendered judgment for Lori regarding the student loans because the chancellor incorrectly calculated the total student loan debt. Finally, the Court reversed the award of attorney fees because there was no finding of willful contempt on Jack's behalf. Therefore, the Court of Appeals affirmed in part and reversed and rendered in part the decision of the chancery court.

City of Meridian v. Meadors – State Boards and Agencies – Standard of Review – Delegation of Authority – Police officer Adam Meadors was fired by the City of Meridian after he posted an inappropriate photo on his Facebook account while on duty, which was found to be in violation of the City's rules and regulations. The Meridian Civil Service Commission affirmed the termination on appeal despite the notice of dismissal's lacking the mayor's signature. However, the Lauderdale County Circuit Court reversed the decision and ordered Meadors reinstated. Meridian appealed that decision, and Meadors also raised an alternative claim, asserting a violation of his First Amendment rights.

The City argued that the lower court failed to apply the proper standard of review and in doing so, improperly weighed and evaluated evidence and testimony determined by the Commission. The Court of Appeals agreed as the circuit court made a credibility determination based on the Commission's findings. The City argued that the circuit court failed to interpret binding precedent that would allow for the termination despite the absence of the mayor's signature. The Court of Appeals agreed finding that because the chief of police was given authority to sign by the mayor, the lower court erred. The Court of Appeals found the First Amendment argument to be without merit since Meadors had not spoken on a matter of public concern. Therefore, the judgment of the circuit court was reversed and rendered.

Hicks v. Dept. of Human Services - Child Support - Paternity Agreement - Child Support Termination – Petition to Disestablish Paternity – After having engaged in intimate relations with Jakeida Carter and the subsequent birth of Carter's Daughter, Danny Hicks agreed to be named as the legal father of the child. The agreement resulted in a child support obligation. In 2015, a DNA test revealed that Hicks was not the father. Hicks filed a Petition to Disestablish Paternity and end child support payment obligations. The trial court denied the motion, ruling that the governing statute, Mississippi Code Section 93-0-10(3)(c), precluded the court from setting aside a paternity determination if the legal father signed a stipulated agreement of paternity approved by order of the court. Hicks appealed.

The Court of Appeals affirmed, first explaining that the trial court did not err in refusing to disestablish paternity, pointing to the Supreme Court's opinion in *Jones v. Mallet*. The Court explained that Hicks's claim that the trial court erred for failing to swear in Carter was procedurally barred, as the objection was not originally addressed. Hicks's claim that Carter committed fraud was procedurally barred as not asserted by motion. Because of Hicks's involvement in the child's life since birth, disestablishment of paternity would not be in the best interest of the child. Therefore, the chancellor did not error in denying the appellant's petition to disestablish paternity.

Court of Appeals – Post-Conviction Relief

Moore v. State – Post Conviction Relief – Time Bar – Retroactive Application – In 2010, an Oktibbeha County grand jury indicted Moore for two counts of selling a controlled substance within 1,500 feet of a park (Counts I and II), and for one count of possession of a controlled substance (Count III). As part of a plea agreement, the State agreed to only prosecute Counts I and III and only recommended a thirty-year sentence, with twenty-nine years suspended, for Count I and sixteen years as a habitual offender for Count III. At the plea hearing on May 4, 2010, the State moved to amend Moore's indictment to charge him as a habitual offender, per his plea agreement. Moore did not object to this amendment of the indictment and the circuit court sentenced Moore according to the State's recommendations.

On June 2, 2015, over five years after his sentencing, Moore filed a PCR petition with the circuit court arguing that his sentence was illegal and that his claim could not be procedurally barred. In support, Moore cited *Gowdy v. State* as an intervening petition that excepted his petition from the normal procedural bars. Essentially, Moore claimed that the circuit court erred by allowing his indictment to be amended. The circuit court denied Moore's petition, however, finding that it was procedurally barred. Under *Gowdy*, it is improper for the State to amend an indictment to charge a defendant as a habitual offender after the defendant's conviction by a jury. The rule in *Gowdy*, however, does not apply retroactively. Since Moore's petition was filed five years after sentence and *Gowdy* did not apply retroactively, Moore's petition still violates the three-year deadline and was thus time barred. Therefore, the Court of Appeals affirmed the decision of the trial court.

Nicolaou v. State – Post-Conviction Relief – Guilty Plea – Competency Hearing – Insanity Defense – In 1984, Nicolaou pled guilty to two counts of murder, two counts of kidnapping, and one count of armed robbery. In 2014, he filed a motion for post-conviction relief claiming that he was denied due

process of law because the trial court failed to conduct a “sanity hearing” prior to accepting his guilty pleas. Nicolaou also asserted that he received ineffective assistance of counsel. The trial court denied Nicolaou’s motion, and he appealed.

Nicolaou pled guilty, so he had three years to file a petition for post-conviction relief. Having failed to file a petition in that time, his petition was procedurally barred. Furthermore, at the time Nicolaou pled guilty, the rule in place stated that the trial court was obligated to order a competency hearing whenever a reasonable question of the defendant’s capacity arose. The determination of what is reasonable rests largely within the discretion of the trial judge. Additionally, the trial court already found that Nicolaou was competent to stand trial, and the trial court determined it was appropriate to proceed with the guilty plea, as was within the trial court’s discretion. The appropriate time to raise an affirmative insanity defense is at trial, not prior to trial. Therefore, the judgment of the trial court was affirmed.

Shavers v. State- Post-Conviction Relief – Ineffective Assistance of Counsel – Illegal Sentence – Shavers pleaded guilty to several offenses, including rape, kidnapping, and burglary, and was sentenced to a total of sixty-five years in prison. After being denied post-conviction relief at the trial level, Shavers appealed.

Shavers argued on appeal that he received ineffective assistance of counsel because his attorney declined to focus on the lack of DNA and medical evidence and led him to believe that if he accepted the plea deal his life expectancy would be taken into account at sentencing. He also claimed he was entitled to post-conviction relief because his sixty-five-year sentence was excessive and a violation of his fundamental rights. In de novo review, the Court of Appeals found that Shavers’ ineffective assistance of counsel claim failed because he presented no affidavits but his own and the record showed that his attorney explained the consequences of the guilty plea and the sentencing minimums and maximums. Shavers’s claim was time barred because he filed his petition for post-conviction relief seven years after entering a guilty plea, which was four years past the statute of limitations. The claim was also barred as a successive writ. Finally, his claim that the sentence was excessive lacked merit because all sentences applied were within the statutory limits. Therefore, the Court of Appeals affirmed the trial court’s denial of post-conviction relief.

Court of Appeals - Criminal

Bailey v. State – Grand Larceny – Good Faith Defense – Hearsay – Jury Instruction – Bailey was found guilty of grand larceny after he was discovered on private property using a forklift to move the owner’s items around without permission. Metal scaffolding was missing from the property and was later discovered to have been scrapped for money by Walters, the man under whose direction Bailey was acting. Bailey asserted that he believed he was helping Walters with a job he was hired for, involving the removal of metal scaffolding from the property. The State objected based on hearsay to Bailey’s testimony about an alleged conversation between Walters and Bailey discussing the job. The trial court found Bailey guilty and sentenced him to serve ten years in the custody of the M.D.O.C., with two years suspended, followed by five years of supervised probation. Bailey appealed.

Bailey claimed that the trial court deprived him of his good faith theory of defense by sustaining the State’s hearsay objection. Because the exclusion of the evidence was within the trial court’s discretion and because Bailey’s good faith defense was incorporated into jury instructions, the trial court did not deprive Bailey of his theory of defense. Bailey asserted that his attorney’s failure to make a proffer of the excluded testimony and his attorney’s failure to object to statements in the prosecutor’s closing argument amounted to ineffective assistance of counsel. Ineffective assistance of counsel claims are more appropriately brought during post-conviction relief proceedings and the appropriate procedure is to deny relief on direct appeal if the record lacks sufficient information to address the issue. Because the State presented sufficient evidence as to all the elements to allow a reasonable juror to find beyond a reasonable doubt that Bailey was guilty of grand larceny, the trial court did not err by denying Bailey’s motion for a directed verdict and proposed peremptory jury

instruction. Because eyewitnesses at trial testified as to Bailey's presence and activity on the private property, the trial court did not abuse its discretion by denying Bailey's proposed circumstantial-evidence jury instruction. Because there were no reversible errors, Bailey's cumulative error argument was without merit. Therefore, the Court of Appeals affirmed the judgment of the trial court.

Sallie v. State - Criminal Procedure – Sentencing – Remand – Restructuring – In 2012, Sallie was convicted of aggravated assault and felony possession of a firearm after he shot an unarmed man in the back following an argument. The Madison County Circuit Court sentenced Sallie to twenty years for the aggravated-assault conviction and ten years for being a felon in possession of a firearm, with the sentences to run concurrently. The circuit court proceeded to enhance Sallie's sentence by ten years for his use of a deadly weapon in the commission of the aggravated assault. The ten-year sentence was ordered to run consecutively to the other sentences, for a total of thirty years. Sallie appealed the convictions and sentences. Ultimately, the Supreme Court affirmed the initial two convictions, but reversed the ten-year enhancement and remanded for resentencing, finding that Sallie did not receive timely or sufficient notice of the intent to enhance his sentence. The circuit court subsequently resentenced Sallie to twenty years for the aggravated-assault conviction and ten years for being a felon in possession of a firearm, but ordered the sentences to run consecutively instead of concurrently. Sallie appealed.

Because the Supreme Court vacated Sallie's entire sentence on remand, the circuit court was with authority to impose a new sentence within the thirty-year parameter. Moreover, because the circuit court did not alter the number of years to which Sallie was originally sentenced nor restructure the sentence to increase the number of years he would serve, the court did not err in ordering the sentences to run consecutively. Therefore, the judgment of the trial court was affirmed.

Chief Judge Lee dissented, finding that the Supreme Court had previously reversed only a portion of Sallie's sentence – namely the firearm enhancement – and, thus, the remaining portions of the sentence were not within the trial court's jurisdiction to alter upon remand. Additionally, Chief Judge Lee argued that the trial court's resentencing was illegal because once a circuit or county court exercises its option to impose a definite sentence, it cannot subsequently set such a sentence aside and impose a greater sentence.

Smith v. State – Criminal – Felony – Pro Se Defendant – Hybrid Representation – Smith was indicted for murder, and the court appointed counsel to represent him. After the doctor concluded that Smith could competently, knowingly, and intelligently participate in the proceedings, the court granted him permission to represent himself during portions of the trial. During the trial, both Smith and his appointed counsel participated in his representation. He was convicted of murder and sentenced to life in prison. Smith appealed, arguing that the trial court failed to inform him of the disclosures required to be given to a pro se litigant under U.R.C.C.C. 8.05.

Smith did not waive his right to counsel and was not a true pro se defendant. Instead, he proceeded under a hybrid representation whereby Smith and his attorney shared the responsibility of presenting his case at trial. Because of the nature of Smith's hybrid representation, the court was not required to appraise him of his rights under U.R.C.C.C. 8.05. Yet, the trial court fully informed Smith of all of his rights, including the significant risk he faced by representing himself, despite having no obligation to do so. Therefore, the judgement of the trial court was affirmed.

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