

MISSISSIPPI SUPREME COURT DECISIONS – JANUARY 28, 2021***SUPREME COURT - ORDERS*****TURNER V. STATE****CORRECTED EN BANC ORDER****ORDER**

In this corrected en banc order, made in consideration of a Motion for Leave that Johnny Turner filed pro se, the Supreme Court found Turner’s instant application for leave to be time-barred and successive pursuant to Miss. Code Ann. § 99-39-5(2) and § 99-39-27(9). Because Turner failed to present an arguable basis for his claim of newly discovered evidence, and because no exception to the procedural bars exists, Turner’s petition was denied. Additionally, Turner’s filing was found to be frivolous. The Supreme Court warned Turner that future filings deemed frivolous may result in monetary sanctions and restrictions on filing applications for post-conviction collateral relief in forma pauperis.

OBJECTION IN PART

Presiding Justice King disagreed with the Supreme Court’s warning that future filings deemed frivolous may result in monetary sanctions or restrictions on filing applications for post-conviction collateral relief in forma pauperis. He argued that justice should take priority over efficiency and to cut off an indigent defendant’s right to proceed in forma pauperis is to cut off his access to the courts and violates his constitutional rights.

Ordered - 2020-M-00961 (Jan. 26, 2021)

Corrected En Banc Order by Justice Coleman - Objection in Part by Presiding Justice King

Briefed by [Glory Crocco](#)

[Click here to view the full opinion](#)

MISSISSIPPI COURT OF APPEALS DECISIONS – JANUARY 26, 2021***COURT OF APPEALS - CIVIL CASES*****GREER V. AKERS****CIVIL - DOMESTIC RELATIONS**

FAMILY LAW - GRANDPARENT VISITATION - VIABLE RELATIONSHIP - Pursuant to Miss. Code Ann. § 93-16-3(3), a “viable relationship” is one in which the grandparent: (1) voluntarily and in good faith supported the child financially in whole or in part for a period six months or more before filing any petition for visitation rights with the child; (2) had frequent visitation including occasional overnight visitation with said child for a period of not less than one year; or (3) cared for the child over a significant period of time during the time the parent was in jail or on military duty that necessitates the absence of the parent from the home

FAMILY LAW - GRANDPARENT VISITATION - VIABLE RELATIONSHIP - A grandparent must establish a viable relationship with each grandchild at issue

FAMILY LAW - GRANDPARENT VISITATION - MARTIN FACTORS - When determining whether a grandparent should receive visitation and the amount of visitation that should be allowed, the chancellor must consider

the best interest of the child through ten factors: (1) the amount of disruption that extensive visitation will have on the child's life; (2) the suitability of the grandparents' home with respect to the amount of supervision received by the child; (3) the age of the child; (4) the age and physical and mental health of the grandparents; (5) the emotional ties between the grandparents and the grandchild; (6) the moral fitness of the grandparents; (7) the distance of the grandparents' home from the child's home; (8) any undermining of the parent's general discipline of the child; (9) employment of the grandparents and the responsibilities associated with that employment; and (10) the willingness of the grandparents to accept that the rearing of the child is the responsibility of the parent, and that the parent's manner of child rearing is not to be interfered with by them

FAMILY LAW - GRANDPARENT VISITATION - MARTIN FACTORS - The *Martin* factors for determining grandparent visitation are not all inclusive, the chancellor should weigh all circumstances and factors as he or she feels to be appropriate, and no one factor should be weighed more heavily than the others

FACTS

Luke and Brandi Greer resided in Senatobia, where they had their first child, Olivia. The Greers later moved to Bartlett, Tennessee, where their second daughter, Natalie, was born. Subsequently, the Greers moved to Blue Mountain, where they were closer to Brandi's family, including her mother, Sandra Akers. After moving to Blue Mountain, the Greers had a third daughter, Collins. Akers maintained a close, loving relationship with her granddaughters. She was present for their births and celebrated many birthdays and holidays with the Greers. When the Greers lived in Senatobia, Akers would pick up Olivia and take her back to her home in New Albany for visits. When the Greers lived in Bartlett, Akers regularly visited them and stayed with Olivia while Luke and Brandi went on date nights. When Natalie was born, Akers spent the night with Olivia so that Luke could stay with Brandi at the hospital. When Natalie was just ten months old and Olivia was three years old, Akers kept them both while Luke and Brandi went on a trip to Las Vegas. Akers became more involved in her granddaughters' lives near the end to 2014 after the Greers moved to Blue Mountain, which was only fifteen minutes away from Akers's home. Akers attended Olivia's pageants and softball games and when Brandi ran errands or had doctor's appointments, Brandi relied on Akers to keep Olivia and Natalie. After Collins was born, Akers came to see her in the Greers' home and kept her occasionally. Akers also kept Collins overnight while Collins was sick so that Luke, Brandi, Olivia, and Natalie could go to Alabama for a weekend. After an argument, Luke and Brandi refused to allow Akers to see her granddaughters. In response, Akers filed a petition for visitation with her granddaughters in the Tippah County Chancery Court. At trial, Brandi and Luke claimed Akers rarely visited, only came to a few softball games, and often canceled plans to keep the girls. However, relatives and family friends contradicted their testimony by testifying that the girls were often with Akers and spent the night at Akers's house. The chancellor found that Akers had a viable relationship with Olivia, Natalie, and Collins and that visitation was in the girls' best interest. The chancellor awarded Akers visitation with all three of her granddaughters for one weekend per month and ten consecutive days in the summer. The Greers appealed.

ISSUES

Whether: (1) Akers failed to establish a "viable relationship" with the children as required by the grandparent visitation statute, Miss. Code Ann. § 93-16- 3(2); (2) the chancellor awarded an excessive amount of visitation; (3) the Martin factors are "inadequate;" and (4) the award of visitation with Olivia and Natalie must be reversed because Akers was not entitled to visitation with Collins.

HOLDING

(1) Because Akers did not and could not meet the statutory prerequisites to award her visitation with Collins, Akers did not establish a viable relationship with her, but the chancellor did not clearly err or abuse his discretion by ruling that Akers established a viable relationship with Olivia and Natalie. (2) Because the chancellor awarded Akers visitation for one weekend per month, ten days in the summer, and no other holidays, the chancellor did not award an excessive amount of visitation. (3) Because the chancellor already had broad discretion to consider all relevant circumstances, including a parent's objections to visitation, and because the *Martin* factors are not all-inclusive, the chancellor did not abuse his discretion in applying the *Martin* factors. (4) Because the principle in *Holcomb v. Holcomb* was inapplicable in the context of grandparent visitation and has little significance in the context of separations lasting a weekend and ten days during the summer, the award of visitation with Olivia and Natalie was not reversed. Therefore, the Court of Appeals affirmed in part & reversed and rendered in part the judgment of the Tippah County Chancery Court.

CONCURRENCE

Judge Westbrook agreed with the majority, but argued that the Legislature should consider an amendment or revision of Miss. Code Ann. § 93-16-3(3) because there are possible detrimental effects on minors and their best interests.

Affirmed & Reversed & Remanded - 2019-CA-00745-COA (Jan. 26, 2021)

Opinion by Presiding Judge J. Wilson - Concurrence by Judge Westbrook

Hon. Robert Q. Whitwell (Tippah County Chancery Court)

B. Sean Akins for Appellants - L.N. Chandler Rogers for Appellee

Briefed by [Fatelia Avery](#)

[Click here to view the full opinion](#)

COURT OF APPEALS - POST-CONVICTION RELIEF

GAVA-HUDSON V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - PAROLE ELIGIBILITY - CRIME OF VIOLENCE - Pursuant to Miss. Code Ann. § 47-7-3(1)(g)(i), no person who, on or after July 1, 2014, is convicted of a crime of violence pursuant to Miss. Code Ann. § 97-3-2, a sex crime or an offense that specifically prohibits parole release shall be eligible for parole

CRIMINAL PROCEDURE - CRIME OF VIOLENCE - ATTEMPTED MURDER - Pursuant to Miss. Code Ann. § 97-3-2(1)(b), attempted murder is considered a crime of violence

CRIMINAL PROCEDURE - PAROLE ELIGIBILITY - CRIME OF VIOLENCE - Pursuant to Miss. Code Ann. § 97-3-2(2), a person convicted of a crime of violence is eligible for parole after completing one-half of their sentence

FACTS

Nomatter Gava-Hudson pled guilty to the attempted murder of her son in March 2018. She was sentenced to serve twenty-five years in the custody of the Mississippi Department of Corrections (“MDOC”). The Harrison County Circuit Court entered the sentencing order stating that the sentence shall be non-mandatory and subject to MDOC rules regarding earned time, early release, or parole. A subsequent hearing was held to clarify the sentencing, and the corrected sentencing order removed the non-mandatory language. Gava-Hudson filed a motion for post-conviction relief (“PCR”), arguing that she was eligible for parole based on a conflict between Miss. Code Ann. § 47-7-3(1)(g)(i) and Miss. Code Ann. § 97-3-2(2). Gava-Hudson argued that Miss. Code Ann. § 97-3-2 controlled her parole eligibility despite her classification as a violent offender under Miss. Code Ann. § 97-3-2(1)(b). The circuit court relied on *Fogleman v. State*, in which the Supreme Court held that Miss. Code Ann. § 47-7-3(1)(g) applies to the per se crimes of violence in Miss. Code Ann. § 97-3-2(1). The circuit court denied Gava-Hudson’s PCR motion and held that in accordance with *Fogleman*, Miss. Code Ann. § 47-7-3 controlled and, thus, she was ineligible for parole. Gava-Hudson appealed.

ISSUE

Whether *Fogleman* should be overruled to allow Gava-Hudson to argue that her sentence was controlled by Miss. Code Ann. § 97-3-2(2) rather than by Miss. Code Ann. § 47-7-3(1)(g)(i).

HOLDING

Because the Court of Appeals cannot overrule Supreme Court precedent, it is a decision reserved solely for the Supreme Court to decide whether *Fogleman* should be overruled. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

CONCURRENCE

Judge McCarty argued that there should be alternative options for those suffering from severe mental and emotional distress rather than imprisonment. He reasoned that our legal system should be able to distinguish between the mens

rea of a person with criminal intent and someone who, like Gave-Hudson, was suffering from severe mental distress. However, he agreed that courts are confined to precedent as it stands.

Affirmed - 2020-CA-00246-COA (Jan. 26, 2021)

Opinion by Judge Lawrence - Concurrence by Judge McCarty

Hon. Roger T. Clark (Harrison County Circuit Court, First Judicial Dist.)

Christopher Edward Smith & Grady Morgan Holder for Appellant - Lauren Gabrielle Cantrell (Att’y Gen. Office) for Appellee

Briefed by [Allison Payne](#)

[Click here to view the full opinion](#)

HAYS V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PROCEDURAL BAR - FINAL JUDGMENT - The denial of a post-conviction relief motion is a final judgment and bars subsequent requests for post-conviction relief unless an exception applies

POST-CONVICTION RELIEF - PROCEDURAL BAR - FUNDAMENTAL RIGHTS EXCEPTION - Four types of fundamental rights have been expressly found to survive post-conviction relief procedural bars: (1) the right against double jeopardy; (2) the right to be free from an illegal sentence; (3) the right to due process at sentencing; and (4) the right not to be subject to ex post facto laws

POST-CONVICTION RELIEF - PROCEDURAL BAR - INEFFECTIVE ASSISTANCE OF COUNSEL - Under *Brown*, in extraordinary circumstances, an ineffective-assistance-of-counsel claim may trigger an exception to the UPCCRA’s procedural bars

FACTS

In 2015, Howard Hays pled guilty to one count of commercial burglary and one count of auto theft. The circuit court sentenced Hays to serve seven years, day for day, as a non-violent habitual offender for the burglary and five years, day for day, as a non-violent habitual offender for the auto theft. The circuit court also ordered that Hays’s sentences run consecutively. In March 2016, Hays filed his first post-conviction relief (“PCR”) motion in the circuit court, asserting (1) ineffective assistance of counsel, (2) failure to provide a timely initial appearance, (3) that the State unlawfully detained him for more than 180 days without a formal charge, and (4) that the State charged him with grand larceny based upon an affidavit for petit larceny. In July 2017, the circuit court summarily denied Hays’s PCR motion, finding it was not well taken. Hays did not file a timely notice of appeal. In September 2017, Hays filed a second PCR motion, making the same and additional assertions. The circuit court summarily dismissed Hays’s second PCR motion, finding it was barred as an impermissible successive writ. Following Hays’s appeal from the dismissal of his second PCR motion, the Court of Appeals found that his motion was successive and that he had failed to demonstrate an applicable exception to the procedural bar. In March 2019, Hays filed his third PCR motion, asserting that (1) his guilty pleas were involuntary, (2) he received ineffective assistance of counsel, and (3) the State failed to prove he was a habitual offender. The circuit court denied this motion. Hays appealed.

ISSUES

Whether Hays’s motion presented exceptions to Mississippi’s Uniform Post-Conviction Collateral Relief Act (“UPCCRA”) and was therefore not procedurally barred due to (1) the involuntariness of his guilty pleas; (2) the ineffective assistance of his counsel; and (3) the State’s failure to prove his habitual-offender status.

HOLDING

(1) Because the plea-hearing transcript contradicted Hays’s allegations regarding the involuntariness of his pleas, the circuit court did not err in denying his PCR motion without an evidentiary hearing on this issue. (2) Because Hays failed to prove his attorney’s performance was deficient and that the deficiency prejudiced him, the issue was without merit and was unable to overcome the UPCCRA’s procedural bars. (3) Because Hays knowingly, intelligently, and

voluntarily pled guilty to each charge as a non-violent habitual offender, he waived his argument regarding the State's failure to prove his habitual-offender status and the issue lacked merit. Therefore, the Court of Appeals affirmed the judgment of the Leflore County Circuit Court.

Affirmed - 2019-CP-01493-COA (Jan. 26, 2021)

Opinion by Chief Judge Barnes

Hon. Margaret Carey-McCray (Leflore Country Circuit Court)

Pro se for Appellant - Lauren Gabrielle Cantrell (Att'y Gen. Office) for Appellee

Briefed by [Claire Scott](#)

[Click here to view the full opinion](#)

MAPP V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - SENTENCING - PROPORTIONALITY - If the sentence that the trial court imposes falls within the applicable statutory sentencing limits, there is no inference of gross disproportionality

CRIMINAL PROCEDURE - SENTENCING - MULTIPLE SENTENCES - It is within the trial court's discretion to determine whether multiple sentences run concurrently or consecutively

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - Under *Strickland*, a claimant of ineffective assistance of counsel bears the burden of proof to show that: (1) counsel's performance was deficient and (2) the deficiency prejudiced his defense; allegations of ineffective assistance of counsel must be made with specificity and detail, and are assessed by the totality of the circumstances

FACTS

Gary Raymond Mapp Jr. was indicted on five counts: (1) armed robbery, (2) aggravated assault, (3) kidnapping, (4) burglary, and (5) attempted murder. Pursuant to a plea bargain, Mapp pled guilty to Count I and entered open pleas for Counts II through IV. Count V was nolle prosequed as part of the plea agreement. Mapp was sentenced to fifteen years for Count I, twenty years for Count II, thirty years for Count III, and twenty-five years for Count IV. The sentences in Counts I, II, and IV were set to run concurrently. The thirty-year sentence for Count III was set to run consecutively to Counts I, II, and IV – resulting in a cumulative sentence of fifty-five years. Mapp filed a motion for post-conviction relief (“PCR”), alleging that his sentences were grossly disproportionate in violation of the Eighth Amendment. He also asserted claims of ineffective assistance of counsel. The Rankin County Circuit Court entered a “Judgment of Dismissal,” finding Mapp had failed to support his ineffective assistance of counsel claim and to demonstrate he was entitled to any relief. Mapp subsequently filed a motion to reconsider, insisting the circuit court should have held an evidentiary hearing on his allegations of the disproportionality of his sentence and ineffective assistance of counsel. The circuit court denied the motion to reconsider. Mapp appealed.

ISSUES

Whether (1) the sentences that the circuit court imposed were grossly disproportionate and (2) Mapp was denied his right to effective assistance of counsel.

HOLDING

(1) Because the sentences that the circuit court imposed fell within the applicable statutory sentencing limits, and because determining whether multiple sentences run concurrently or consecutively was entirely within the circuit court's discretion, the sentences that the circuit court imposed were not grossly disproportionate. (2) Because Mapp did not include any supporting affidavits showing that but for his counsel's errors he would not have entered a guilty plea, and because his sworn testimony was in direct contradiction to his claims of ineffective assistance of counsel, the circuit court did not err in dismissing Mapp's motion for post-conviction relief. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2019-CA-01323-COA (Jan. 26, 2021)

Opinion by Chief Judge Barnes

Hon. John Huey Emfinger (Rankin County Circuit Court)

John G. Holaday for Appellant - Lisa L. Blount (Att’y Gen. Office) for Appellee

Briefed by [William “Jack” Simpson](#)

[Click here to view the full opinion](#)

COURT OF APPEALS - CRIMINAL CASES

ALLEN V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - PROSECUTORIAL MISCONDUCT - PREJUDICIAL EFFECT - The standard of review that appellate courts must apply to lawyer misconduct during opening or closing statements is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created

CRIMINAL PROCEDURE - PROSECUTORIAL MISCONDUCT - REVERSAL - Even when a prosecutor has made an impermissible comment, a showing of prejudice is required to warrant reversal

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - Under *Strickland v. Washington*, a claimant of ineffective assistance of counsel bears the burden of proof to show that: (1) counsel’s performance was deficient and (2) the deficiency prejudiced his defense; allegations of ineffective assistance of counsel must be made with specificity and detail, and are assessed by the totality of the circumstances

FACTS

In 2017, officers arrived at a house where two victims had been shot through a closed door. One of the victims identified Jamar Allen as the shooter, but neither of the victims saw Allen with a gun. A private security guard also arrived at the scene after hearing the gunshots and stated that he saw a man standing outside of the house “looking suspicious” earlier that morning. Investigators recovered eight spent shell casings from the crime scene and documented the bullet holes in the house, but did not find a gun. While an officer was inspecting the backyard of the home, he witnessed a car without its headlights on drive away. As the vehicle braked, the officer noticed the driver’s side taillight did not work. A few weeks before, another officer pulled over a similar vehicle with a broken taillight at a traffic stop. During the traffic stop, the officer arrested the driver, Allen, because there was a warrant out for his arrest, but Allen was released. Based on the officer’s previous identification, Allen was eventually located in custody in Milwaukee, Wisconsin. No weapon was ever found. After Allen’s arrest and transport back to Mississippi, a trial commenced in July 2019. During the State’s closing argument, the prosecutor stated, “There is no gun because [Allen] ran back off to Wisconsin, that’s why there’s no gun.” Allen’s attorney immediately objected and requested a mistrial, which the circuit court overruled and denied. A jury convicted Allen of two counts of aggravated assault, one count of shooting into a dwelling, and one count of being a felon in possession of a firearm. Allen appealed.

ISSUES

Whether (1) the prosecutor’s remarks during closing arguments warranted reversal and (2) Allen’s counsel was ineffective for failing to request a circumstantial-evidence jury instruction.

HOLDING

(1) Because the prosecutor’s comment was not evidence of Allen’s guilt and merely suggested that no weapon was recovered because Allen presumably took it with him to Wisconsin, and because even if the prosecutor’s comment was improper, the error would be harmless based on the overwhelming evidence of guilt, the prosecutor’s remarks during closing arguments did not warrant reversal. (2) Because there was no proof of prejudice caused by Allen’s counsel’s alleged deficiency or any indication that the outcome would have been different if a circumstantial-evidence instruction

had been given, Allen’s claim for ineffective assistance of counsel was without merit. Therefore, the Court of Appeals affirmed the judgment of the Alcorn County Circuit Court.

Affirmed - 2019-KA-01436-COA (Jan. 26, 2021)

Opinion by Judge Lawrence

Hon. John R. White (Alcorn County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Alicia Ainsworth & Ashley Sulser (Att’y Gen. Office) for Appellee

Briefed by [Cecelia Hurt](#)

[Click here to view the full opinion](#)

MISSISSIPPI CASES EDITOR

ANNA MCLEMORE

ASSOCIATE CASES EDITORS

MELISSA FENWICK

JOHN FORREST KELLY

MATTHEW RHEA

MATTHEW RUSS

LUKE SEYMOUR

FRANK WOOD

Thank you for supporting the Mississippi Law Journal.

Questions or comments: Anna McLemore, newsletter@mississippilawjournal.org

All BriefServ subscribers traditionally receive access to our website with archived case briefs since January 2007.

Our BriefServ Archive is available to subscribers at <https://mississippilawjournal.org/briefserv/>. Currently, our digital database is still being updated with previous editions of the Newsletter. Requests for previous editions of the Newsletter not yet available in the BriefServ Archive can be made to Anna McLemore, newsletter@mississippilawjournal.org. If you have questions about accessing or using the BriefServ website, please contact us at support@mississippilawjournal.org