

MISSISSIPPI SUPREME COURT DECISIONS – MAY 14, 2021***SUPREME COURT - CIVIL CASES*****BUTLER V. WATSON****CIVIL - OTHER**

CONSTITUTIONAL LAW - INTERPRETATION - PLAIN LANGUAGE - The State Constitution's plain language is to be given its usual and popular signification and meaning; if that meaning lacks ambiguity, then there is no reason for legislative or judicial construction; the construction of a constitutional section is of course ascertained from the plain meaning of the words and terms used within it

CONSTITUTIONAL LAW - INTERPRETATION - HARMONY - Constitutional provisions should be read so that each is given maximum effect and a meaning in harmony with that of each other

FACTS

In July 2018, Ashley Durval filed a petition for an initiative measure, enrolled as Initiative Measure 65, to establish a legal medical-marijuana program in the State of Mississippi. Within two weeks of filing, the Attorney General's Office acknowledged its receipt, certified that it had reviewed the petition, and sent the ballot title and summary of the ten-page measure to the then-Secretary of State. In September 2019, the initiative supporters completed and submitted sufficient signatures to the Secretary of State's Office, complying with constitutional requirements. In January 2020, the Secretary of State's Office delivered the initiative to the State Legislature, which then proposed its own alternative to Initiative 65. In September 2020, both initiatives were approved for placement on the November 2020 ballot by the State Board of Election Commissioners, a board of which the Governor, the Attorney General, and the Secretary of State are all composing members. On October 26, 2020, the City of Madison and its mayor, Mary Hawkins Butler, in both her individual and official capacities, ("Petitioners") filed an Emergency Petition, seeking review of the sufficiency of the petition for Initiative 65.

On election night in November 2020, an overwhelming majority of Mississippi voters signaled their approval of Initiative 65. Petitioners did not challenge the support for the initiative, but rather challenged the Secretary of State's approval of the initiative for inclusion on the ballot. Petitioners based their argument almost entirely on Miss. Const. art. 15, § 273(3) which states, in part, "signatures of the qualified electors from any congressional district shall not exceed one-fifth (1/5) of the total number of signatures required to qualify an initiative petition for placement upon the ballot." Section 273(3) also mandates that any signatures from a given congressional district that exceed twenty percent of the total number of required signatures "shall not be considered" when making the determination that the proposed amendment may be placed on the ballot. Petitioners asserted that, following the 2000 census, Mississippi has four congressional districts, not five, and therefore it would have been impossible for the Secretary of State to properly certify the petition as meeting the § 273 prerequisites. For the foregoing reasoning, Petitioners contended that all actions subsequent of the petition's filing in 2018, including its support and passage by a considerable number of voters, were void.

ISSUES

Whether (1) the Supreme Court had jurisdiction over the Petitioners' claims; (2) the Petitioners had standing; (3) the common meaning of "congressional district" supported the Petitioners' position; (4) interpreting § 273 as Mississippi having five congressional districts would satisfy the qualified-electors-signature requirement; and (5) Mississippi has five congressional districts for the purposes of state law.

HOLDING

(1) Because Miss. Const. art. 15, § 273(9) vests the Supreme Court with original and exclusive jurisdiction to review the sufficiency of petitions first decided by the Secretary of State, the Supreme Court had proper jurisdiction over the Petitioners' challenge. (2) Because any qualified elector has a right to question the sufficiency and validity of a petition, Butler, in her individual capacity, had standing to ask the Court for redress. Because the City of Madison alleged that its zoning authority would be adversely affected by Initiative 65, an allegation that constituted a present, actionable interest and an adverse effect different from that suffered by the general public from the implementation of Initiative 65, the City also had proper standing. (3) Because the Petitioners acted within a reasonable amount of time to file suit, because it is in the State's best interest to have erroneous and void actions declared as such, and because the Secretary had no vested interest in the petition beyond the constitutional conduct of his office, neither the public nor the Secretary were legally disadvantaged and the equitable doctrine of laches did not apply. (4) Because the changing, evolving nature of proportional representation is too much a part of the common and legal understandings of the phrase "congressional district," and because Mississippi law acknowledges the fluid nature of congressional representation, the plain language of § 273 tied the congressional districts therein mentioned to the actual, existing four congressional districts. (5) Because the existing congressional districts differed from those employed from 1992 to 2002, and because electors cannot aver to be qualified electors of an incorrect or nonexistent congressional district, the Secretary's interpretation of § 273 would have rendered the signature requirement impossible. (6) Because the text of § 273(3) ties the twenty-percent signature cap to Mississippi's congressional districts and not to preexisting congressional districts, and because Miss. Code Ann. § 23-15-1037, which delineated the old five congressional districts, is no longer in effect, the State has four congressional districts, not five. Therefore, the Supreme Court granted the Petitioners' petition.

DISSENTS

Justice Maxwell argued that this case did not involve a federal election or federal question and that, under Mississippi law, there are five congressional districts. Miss. Code Ann. § 23-15-1037, which lays out the five districts, has not been changed since § 273 was added to the State's Constitution, even following the 2000 census and subsequent reallocation of U.S. congressional seats. A federal injunction, which deals only with federal congressional elections, is the only reason the five congressional districts set forth in Miss. Code Ann. § 23-15-1037 have not been used for twenty years to elect representatives to Congress. The injunction does not consider, speak to, or preclude the State's ability to continue using the five statutory districts for other purposes, including the Secretary's use to determine if § 273(3)'s signature requirement has been met. He also lamented the fact that, based on the majority's holding, this constitutional ballot-initiative process may only be revived or proposed by a legislative push.

Justice Chamberlin argued that the plain language of § 273, when viewed as a whole, supports only a reading or interpretation that recognizes Mississippi's congressional districts as they existed in 1992. He asserted that interpretation should involve a joint effort between reading the actual words and the context in which they are found. The term "congressional district" when viewed in isolation is neither the best evidence of the legislative intent behind § 273(3) nor is it the only evidence, especially in light of other qualifying language and facts surrounding § 273(3)'s adoption. Because Miss. Code Ann. § 23-15-1037 explicitly defines, by county and precinct, the boundaries of each of the five congressional districts as they existed at the time § 273(3) was adopted, a person signing an initiative petition and the county clerk receiving the petition need only know their county and precinct to determine the congressional district of which they are a qualified elector. He also noted that the majority's holding effectively slammed the lid on the initiative process which could not be the intent of the Legislature and the people.

Granted - 2020-IA-01199-SCT (May 14, 2021)

En Banc Opinion by Justice Coleman - Dissents by Justice Maxwell & Justice Chamberlin

Kaytie M. Pickett, Adam Stone, Andrew S. Harris, & Chelsea H. Brannon for Petitioners - Justin L. Matheny (Att'y Gen. Office) for Respondent

Briefed by [Greyson Young](#)

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MISSISSIPPI SUPREME COURT DECISIONS – MAY 13, 2021

SUPREME COURT- ORDERS

WALLACE V. STATE

ORDER

ORDER

Antonio Daniel Wallace filed a request for leave to seek post-conviction relief in the trial court. The Supreme Court denied Wallace's request. The Court issued a warning that future filings deemed frivolous may result not only in monetary sanctions, but also in restrictions on filing applications for post-conviction collateral relief or pleadings in that nature in forma pauperis. Wallace objected to the sanctions warning, arguing, in part, that it violated his due process. However, pursuant to Miss. R. App. P. 27(h)(1)-(8), motions for reconsideration, vacations or modification of rulings of the Supreme Court on motions are generally not allowed. Therefore, the Supreme Court denied Wallace's request for leave to seek post-conviction relief in the trial court.

OBJECTION IN PART

Presiding Justice King agreed that Wallace's application for post-conviction relief should be dismissed. However, he disagreed with the Court's warning that future filings may result in monetary sanctions.

Denied - 2019-M-01279 (May 10, 2021)

Order by Justice Coleman - Objection In Part by Presiding Justice King

Briefed by [Allison Payne](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – MAY 11, 2021

COURT OF APPEALS - CIVIL CASES

COLEMAN V. WGST

CIVIL - REAL PROPERTY

CIVIL PROCEDURE - FOREIGN JUDGMENTS - STATUTE OF LIMITATIONS - Pursuant to Miss. Code Ann. § 15-1-45, all actions founded on any judgment or decree rendered by any court of record without this state shall be brought within seven years after the rendition of such judgment or decree, and not after

CONTRACTS - STATUTE OF LIMITATIONS - ACCRUAL - In a contractual claim, a cause of action accrues on the date of actual injury, the date on which the facts occurred enabling the plaintiffs to bring a cause of action; having knowledge, regardless of whether that knowledge was actual or constructive, of the terms of the agreement begins the statute of limitations

FACTS

On April 12, 2010, Dorothy Coleman and Keith Coleman were divorced by final decree in the State of Tennessee. Almost two years after the divorce, Dorothy enrolled a foreign judgment from the divorce proceedings in Mississippi. Subsequently, Keith deeded real property in Mississippi to WGST, LLC ("WGST") on April 24, 2015. The deed was recorded three days later. Four years after the conveyance, on July 9, 2019, Dorothy filed a complaint against Keith, WGST, Fidelity National Fin. Inc., Keith's attorneys, and several others, alleging that she had a valid judgment lien on the property from the divorce. In her complaint, Dorothy asked the court to set aside the deed, issue a writ of execution, impose a constructive trust, and order the defendants to account for past rents. Furthermore, Dorothy alleged other causes of actions including but not limited to unjust enrichment, negligence, lack of consideration, civil conspiracy,

breach of contract, and promissory estoppel. The defendants responded by filing motions to dismiss, arguing that Dorothy's claims were barred by the statute of limitations. The chancery court granted the defendants' motions to dismiss. Dorothy appealed.

ISSUES

Whether Dorothy's (1) causes of action seeking to enforce the foreign judgment were time-barred and (2) remaining causes of action were time-barred.

HOLDING

(1) Because Dorothy had seven years from the date the judgment was rendered to file her cause of action, and because the date the judgment was rendered was on April 12, 2010, the date of the divorce decree, Dorothy's complaint filed on July 9, 2019 was time-barred. (2) Because the statute of limitations begins on the date the cause of action accrues, which was the date the deed was recorded, Dorothy's other causes of action were time-barred as well. Therefore, the Court of Appeals affirmed the judgment of the DeSoto County Chancery Court.

Affirmed - 2019-CA-01740-COA (May 11, 2021)

En Banc Opinion by Judge Greenlee

Hon. Percy L. Lynchard Jr. (DeSoto County Chancery Court)

John Thomas Lamar III & Taylor Allison Heck for Appellant - G. Dewey Hembree III, James Marshall Digmon, Frederick Natale Salvo III, Matthew Daniel Wilson & Joseph Lott Warren for Appellees

Briefed by [John Michael Sweatt](#)

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KLEYLE V. DEGRACIAS

CIVIL - CONTRACT

APPELLATE PROCEDURE - GENERAL PROVISIONS - COSTS - Miss. R. App. P. 36(d) provides, "A party who is not aggrieved by the opinion or mandate but who seeks relief as to any other matter involving costs shall seek relief in the trial court"

CONTRACTS - VALID CONTRACTS - NOTARY - Pursuant to *Union Healthcare Inc.*, it is basic contract law that a contract does not have to be notarized to be valid

CONTRACTS - ENFORCABILITY - MATERIAL TERMS - Under *Leach*, "Before a court may order specific performance of a contract, it must find the contract reasonably complete and reasonably definite on material points"

CONTRACTS - INTENT - AMBIGUITY - Pursuant to *Magnolia Const. Co.*, in construing a contract, the instrument as a whole will be looked to and its meaning determined for the entire agreement as written in order to ascertain the intentions of the parties from the contract

FACTS

Gordon Kleyle entered into an oral agreement to lease a building to Myrna and Philip Deogracias ("Deogracias"), who intended to use the building to operate their new restaurant, The Railroad Café, LLC ("LLC"). Kleyle contended that the lease was reduced to writing on February 1, 2008, and the Deogracias were to pay \$1,850 per month in rent. The lease was to run from February 2008 through February 2010 and the Deogracias could cancel the lease at any time by providing Kleyle with ninety days' written notice. Kleyle stated that the Deogracias stopped paying rent as of August 1, 2008. The Deogracias argued that they gave oral notice that they were vacating the building in September 2008, while Kleyle argued that they gave oral notice on June 23, 2009. In September 2009, Kleyle filed a complaint against the Deogracias and the LLC, alleging default under the lease agreement and requesting payment of past-due rent. Arguing that the lease was invalid, the Deogracias filed a motion to dismiss. The circuit court denied the Deogracias' motion to dismiss. In May 2011, Kleyle filed a new complaint in the circuit court against the Deogracias and/or the LLC, again claiming that they had defaulted on the lease agreement. Kleyle sought compensation for past-due rent, damages for personal property, and the cost of repairs to equipment and appliances. Attached was a copy of

a different lease agreement between Kleyle and the LLC. The LLC answered Kleyle's complaint, asserting that: (1) the written lease contained a fraudulent and forged signature; (2) there was only an oral month-to-month lease; and (3) oral notice of cancellation was provided to Kleyle in September 2008 prior to the restaurant's ceasing operations. The Deograsiases filed a motion to dismiss. The circuit court granted the motion and dismissed the complaint. Kleyle appealed; the Court of Appeals reversed and remanded for further proceedings without ruling with regard to the validity of the lease agreement between Kleyle and the Deograsiases. On remand, the case was reassigned from Judge Harrell to Judge Mazingo, who presided over the bench trial in 2019. The Deograsiases moved for a dismissal and the circuit court granted the motion. Kleyle appealed.

ISSUES

Whether the court erred by (1) transferring the case from Judge Harrell to Judge Mazingo; (2) refusing to enter a judgment for the costs assessed in the first appeal and by allowing the Deograsiases to participate in the trial of this case; (3) granting the motion to dismiss on the basis that the subject lease agreement was invalid as to Myrna and the LLC; and (4) ruling that the Deograsiases were month-to-month, at-will tenants.

HOLDING

(1) Because nothing in the record indicated that Kleyle opposed the transfer of the case, this error was waived on appeal. (2) Because Kleyle never presented any cost bill incurred in pursuing the first appeal as required by Miss. R. App. P. 36(d), this issue lacked merit. (3) Because Myrna acknowledged that her signature was on the lease and there was nothing in the record to support that she did not possess the authority to enter into the lease individually and on behalf of the LLC, and because the lease did not have to be notarized, the circuit court erred in granting the motion to dismiss on the basis that the lease was invalid as to Myrna and the LLC. (4) Because it was evident that the parties' intended to enter into a two-year lease when viewing the agreement as a whole, the circuit court erred in ruling that the Deograsiases were month-to-month, at-will tenants. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Pearl River County Circuit Court.

CONCURRENCE IN PART & DISSENT IN PART

Judge Westbrook agreed with the majority that the trial court erred in finding the second lease invalid. She dissented with the majority's opinion regarding the term of the lease and the proper manner of cancellation of the lease.

Affirmed in Part; Reversed & Remanded In Part - 2019-CA-00671-COA (May 11, 2021)

En Banc Opinion by Chief Judge Barnes - Concurrence In Part & Dissent In Part by Judge Westbrook

Hon. Anthony Alan Mazingo (Pearl River County Circuit Court)

John D. Smallwood & William C. Walter for Appellant - Richard C. Fitzpatrick for Appellees

Briefed by [Muriel Collins](#)

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WARREN V. RHEA

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CUSTODY - CHILD ABUSE - Miss. Code Ann. § 93-5-23 states that chancery courts are required by law to appoint a guardian ad litem when allegations of child abuse or neglect are raised during custody proceedings

FAMILY LAW - CUSTODY - GUARDIAN AD LITEM - Under *Barber*, when the appointment of a guardian ad litem is mandatory, a chancellor must include a summary of the guardian ad litem's recommendations on his or her findings of fact and conclusions of law

FAMILY LAW - CUSTODY - GUARDIAN AD LITEM - Under *Barbaro*, when a chancellor's ruling is contrary to the recommendation of a statutorily required guardian ad litem, the reasons for not adopting the recommendation shall be stated by the court in the findings of fact and conclusions of law

FAMILY LAW - DIVORCE - ALIMONY - When awarding alimony, the chancellor is not required to analyze each *Armstrong* factor individually in his opinion, but is required to view the overall combination of the factors as a whole, opting to address individual factors at his discretion

FACTS

After nearly fifteen years of marriage, Jason Warren filed for divorce from his wife Ginger Rhea on the basis of habitual cruel and inhuman treatment and adultery. Rhea countered, alleging the same. Both parties requested full custody of their only child, Tim. During the proceedings, Warren raised allegations of abuse by Rhea against Tim. Finding a sufficient factual basis to support the allegations, the chancery court appointed a guardian ad litem (“GAL”) to investigate. In her report, the GAL found that it would be harmful for Tim to have visitation with Rhea without counseling. The GAL explicitly included in her report that it was detrimental to Tim’s best interest to have visitation with his mother. She recommended visitation only if a counselor could determine that it was in the child’s best interest and safety to spend time with his mother. The chancery court granted Warren the divorce after finding that he had proven the ground of habitual cruel and inhuman treatment with testimony about physical and domestic abuse. This judgment was corroborated from the testimony of Tim, as well as admissions by Rhea. The chancery court awarded Rhea rehabilitative alimony based on the length of the marriage, differences in income, income producing employment, and because Rhea was not paying child support. Warren was awarded primary physical and legal custody of Tim subject to reasonable visitation rights to Rhea. Warren appealed.

ISSUES

Whether the chancery court erred in (1) failing to address the mandatorily appointed GAL’s report in its final opinion; (2) failing to specify the reasons it deviated from the GAL’s recommendations; and (3) granting Rhea rehabilitative alimony.

HOLDING

(1) Because the chancery court found a sufficient factual basis to support the allegations of abuse and, therefore, the appointment of a GAL was mandatory, the chancery court erred in failing to address the mandatorily appointed GAL’s report in its final opinion. (2) Because, in the complete rejection of the GAL’s recommendation, the chancery court awarded Rhea “reasonable visitation” without any mention of the suggested requirement of counseling nor any explanation as to why it deviated from the GAL’s recommendation, the chancery court erred in failing to specify the reasons it deviated from the GAL’s recommendations. (3) Because the chancery court considered all applicable *Armstrong* factors in its judgment, including the length of the marriage, the differences in the parties’ incomes, and the contributions to the accumulation of assets by both parties, the chancery court did not err in granting Rhea rehabilitative alimony. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the DeSoto County Chancery Court.

Affirmed In Part; Reversed & Remanded In Part - 2020-CA-00591-COA (May 11, 2021)

Opinion by Judge McCarty

Hon. Mitchell M. Lundy Jr. (DeSoto County Chancery Court)

Byron Russell Mobley for Appellant - Jerry Wesley Hisaw for Appellee

Briefed by [Cecelia Hurt](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

DAVIS V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL LAW - POST-CONVICTION RELIEF - ILLEGAL SENTENCE - Errors affecting fundamental constitutional rights are excepted from procedural bars that would otherwise prevent their consideration; the right to be free from an illegal sentence is a fundamental right

CRIMINAL PROCEDURE - APPEALS - INEFFECTIVE ASSISTANCE OF COUNSEL - In exceptional circumstances, an ineffective-assistance claim might be excepted from the procedural bars; the defendant is required to prove that (1) defense counsel's performance was deficient and (2) he was prejudiced by counsel's deficient performance

CRIMINAL LAW - POST-CONVICTION RELIEF - INVOLUNTARY PLEA - Involuntary pleas are not fundamental rights that can survive PCR procedural bars

CRIMINAL PROCEDURE - STANDARDS OF REVIEW - PLAIN ERROR - Applying the plain-error rule, the court must determine: (1) whether the trial court deviated from a legal rule; (2) whether the error is plain, clear, or obvious; and (3) whether the error prejudiced the outcome of the trial

FACTS

Andre Davis was initially indicted for capital murder as a nonviolent habitual offender; however, the trial court allowed the State to amend its indictment to charge Davis as a violent habitual offender. The State indicated it would seek the death penalty if the case went to trial. Davis entered an *Alford* plea to capital murder. The trial court confirmed that Davis understood his rights, accepted the plea, and sentenced him to life without the possibility of parole. Davis filed his first post-conviction relief motion ("PCR") over ten years ago, arguing his plea was involuntary as well as alleging ineffective assistance of counsel, among other claims. This motion was denied, and Davis filed an appeal which was rejected because he could not afford the court costs. Several years later, Davis asked the trial court to vacate its prior order dismissing his PCR motion and for additional time to comply with relevant Mississippi statutes. The trial court again denied, and Davis appealed once more. The trial court then held that Davis was not entitled to relief as a result of the denial of his first PCR motion. However, both the trial and appellate courts agreed that Davis did not require permission to file a new PCR motion. Davis yet again filed another PCR motion. The trial court dismissed the motion as time-barred, successive, and barred by res judicata. Davis appealed.

ISSUES

Whether (1) Davis was given an illegal sentence or denied due process at sentencing; (2) his plea counsel rendered ineffective assistance; and (3) his plea was involuntary.

HOLDING

(1) Because Davis's sentence would have been the same no matter how he was sentenced, and because there was sufficient evidence to find that Davis qualified for advanced sentencing as a nonviolent habitual offender, the trial court's sentencing error was harmless. (2) Because Davis's plea counsel filed a response in opposition to the amended indictment, and because Davis was not prejudiced by the amended indictment, the trial court did not err in rejecting Davis's claim for ineffective assistance of counsel. (3) Because Davis was fully advised of the nature of the charge, the effect of his plea, and was afforded the opportunity to ask questions and to discuss issues with his counsel in private, Davis's plea was not involuntary. Therefore, the Court of Appeals affirmed the judgment of the DeSoto County Circuit Court.

Affirmed - 2020-CP-00224-COA (May 11, 2021)

Opinion by Judge Westbrook

Hon. Gerald W. Chatham Sr. (DeSoto County Circuit Court)

Pro se for Appellant - Brittney Sharae Eakins (Att'y Gen. Office) for Appellee

Briefed by [Cameron Johnson](#)

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COURT OF APPEALS - CRIMINAL CASES

ROBERTS V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - FELONY - FIREARM DISCHARGE - Miss. Code Ann. § 97-37-29 states that it is a felony for anyone to willfully and unlawfully shoot or discharge any pistol, shotgun, rifle, or firearm of any nature or description into any dwelling, house, or any other building usually occupied by persons, whether actually occupied or not

CONSTITUTIONAL LAW - JUDICIAL REVIEW - CONSTITUTIONALITY - Statutes come before the Supreme Court with a heavy presumption of constitutional validity; the party challenging the constitutionality of a statute is burdened with carrying his case beyond all reasonable doubt before the court

FACTS

In 2017, Patty Roberts separated from her husband of over forty years, Howard, and filed for divorce. Because no decision was reached regarding the use or possession of the marital home, after their separation, Roberts would periodically return to the home to retrieve personal items. In October 2018, Roberts used her pistol to shoot through the glass door of the marital home when she was unable to get into the house because her attorney and officers told her that she could break into the home if the need arose. When police arrived at the scene, they found bullet holes in the curtains and in one of the adjacent walls of the home. After considering the evidence presented at trial, the jury convicted Roberts of shooting into a dwelling. Roberts appealed.

ISSUES

Whether Miss. Code Ann. § 97-37-29 is unconstitutionally vague (1) for lack of a mens rea element; (2) in violation of constitutional Due Process; and (3) when read in conjunction with Miss. Code Ann. § 27-33-17.

HOLDING

(1) Because the statute contains the language “willingly,” which has been classified as a mens rea element, this issue was without merit. (2) Because the statute contains the language “unlawfully,” suggesting that instances exist where a person may lawfully shoot into a home such as in the event of an emergency, and because Roberts was not presented with significant evil and an adequate alternative was available, the statute allows for a defense of necessity, but the elements were not met here. (3) Because § 97-37-29 does not implicate any First Amendment freedoms, and because no person of common intelligence would have to guess what actions were prohibited, the statute does not encourage arbitrary and erratic arrest; thus, § 97-37-29 is not constitutionally vague. Therefore, the Court of Appeals affirmed the judgment of the Holmes County Circuit Court.

Affirmed - 2019-KA-01647-COA (May 11, 2021)

Opinion by Judge Greenlee

Hon. Barry W. Ford (Holmes County Circuit Court)

James H. Powell III for Appellant - Barbara Wakeland Byrd (Att’y Gen. Office) for Appellee

Briefed by [Bess Fisher](#)

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RUSSELL V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - SENTENCING - HABITUAL OFFENDER - Miss. Code Ann. § 99-19-83 provides that every person convicted in Mississippi of a felony who shall have been convicted twice previously of any felony upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one year or more in any state and/or federal penal institution and where any

one of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation

CRIMINAL PROCEDURE - SENTENCING - PROPORTIONALITY - The *Solem* test for disproportionate sentencing gives three objective criteria to weigh: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions

FACTS

Allen Russell was a suspect in a felony investigation in November 2017 when the Hattiesburg Police Department arrived at Russell's apartment complex and confirmed the apartment in which he lived. The officers announced their presence with a bullhorn and gave Russell an opportunity to voluntarily exit his apartment. The efforts to make contact with Russell were unsuccessful. The officers then breached the windows of the apartment upon receiving a search warrant, which was another unsuccessful attempt to contact Russell. The officers then deployed a flash bang by the apartment's front door and eventually entered the apartment through the front door, without initially seeing Russell. However, the officers saw a closet with a stool that was positioned underneath the apartment attic's crawl space. The officers called to Russell to exit but were again unsuccessful. The officers proceeded to throw a chemical agent into the attic, and Russell finally exited and was subsequently arrested. Upon arrest, officers observed a pair of blue jeans through the hole leading to the attic crawl space. Inside the jeans, the officers found Russell's driver's license, Social Security card, and five bags of what appeared to be a marijuana. The Mississippi Forensics Laboratory performed an analysis on two of the five bags and confirmed the two bags contained marijuana with a combined weight of 43.71 grams. Russell was convicted of possession of marijuana in an amount greater than 30 grams but less than 250. At trial, the State presented evidence of Russell's prior felony convictions. Additionally, Russell had pled guilty to possession of a weapon by a convicted felon in October 2015 and had received a ten-year sentence in MDOC's custody, with two years to serve, eight years suspended, and five years of post-release supervision. Due to the two prior felony convictions, the circuit court found Russell to be a violent habitual offender and sentenced him to life imprisonment without eligibility for probation or parole. Russell unsuccessfully moved for a new trial or, alternatively, a judgment notwithstanding the verdict. Russell appealed.

ISSUE

Whether Russell's sentence as a habitual offender constituted cruel and unusual punishment and was grossly disproportionate to the crime committed.

HOLDING

Because a sentence will generally be upheld and not deemed cruel and unusual if it is within the statutory limits unless the sentence imposed is grossly disproportionate to the crime charged, because Russell's habitual offender sentence fell within statutory guidelines, because Russell failed to prove the threshold requirement of gross disproportionality, and because the State presented evidence that Russell was a violent habitual offender pursuant to Mississippi Code Annotated § 99-19-83, Russell's sentence as a habitual offender did not constitute cruel and unusual punishment and was not grossly disproportionate. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

DISSENTS

Presiding Judge Wilson disagreed noting that the United States Supreme Court held in *Solem v. Helm* that a life without parole sentence for a recidivist criminal convicted of a relatively low-level felony violated the Eighth Amendment; thus, Russell's life without parole sentence should be vacated. He disagreed that Miss. Code Ann. § 99-19-83 was properly applied because, in order for a defendant to be deemed a habitual offender and receive a mandatory sentence of life imprisonment, the defendant must have previously committed at least one crime of violence. He noted that the record does not show the facts of Russell's prior burglaries, and since he was sentenced to the Regimented Inmate Discipline ("RID") program and probation, it suggests that the burglaries did not involve acts of violence. He also importantly noted that *Solem* seemingly cannot be distinguished from Russell's case, and thus the Court of Appeals should be bound by *Solem* and vacate Russell's sentence.

Judge Westbrook disagreed on the grounds that a sentence that is grossly disproportionate to the crime committed should be subject to review under the Eighth Amendment. She deemed Russell's sentence to be grossly disproportionate to the non-violent crime he was convicted of. Further, she urged that it was time for those vested with responsibility within the criminal justice system to adjust sentencing mandates to ensure that the punishment is proportional to the crime. Thus, she noted that judges are not routinely given the ability to exercise discretion in sentencing habitual offenders and are not allowed to take into consideration all facts and circumstances surrounding prior offenses. Such inabilities of the judiciary, she noted, are completely at odds with the goals of the criminal justice system.

Affirmed - 2019-KA-01670-COA (May 11, 2021)

En Banc Opinion by Presiding Judge Carlton

Hon. Robert B. Helfrich (Forrest County Circuit Court)

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Allison Elizabeth Horne (Att'y Gen. Office) for Appellee

Briefed by [Madison Reightler](#)

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