

MISSISSIPPI SUPREME COURT DECISIONS – MAY 20, 2021***SUPREME COURT - CIVIL CASES*****CROTWELL V. T & W HOMES ETC****CIVIL - REAL PROPERTY**

REAL PROPERTY - ADVERSE POSSESSION - TACKING - The adverse possession of successive occupants in privity with each other may be combined to reach the statutory period

REAL PROPERTY - ADVERSE POSSESSION - PRIVITY - in order that one adverse possession may be tacked to another, there must exist privity of possession between the holders thereof; as a general rule, it may be stated that the requisite privity may be created by any conveyance, agreement, or understanding, that has for its object the transfer of possession and is accompanied by a transfer in fact

REAL PROPERTY - ADVERSE POSSESSION - DIVESTING OWNERSHIP - Once property has been acquired by adverse possession, ownership cannot be divested without a conveyance or another adverse possession for the statutory period of time required to reacquire the title

FACTS

Gilbert Lum owned land in Scott County. In 1973, Lum conveyed, by warranty deed, a forty-acre tract of land to his daughter Lucille Crotwell, reserving unto himself a life estate in the land and all mineral interest coupled with full and absolute disposition as though he were the fee simple owner thereof. In 1998, Lum executed a warranty deed for one acre of the tract to his grandson, Richard Prestage, subject to his life estate for the mineral interests of that one acre, in addition to excepting all prior mineral rights. A month after Lum's death in 1998, Prestage executed a promissory note to First Family Financial Services Inc., ostensibly secured by a deed of trust on the acre of land. From 2000 to 2011, Prestage executed multiple deeds of trust on the land before a substituted trustee conducted a foreclosure sale at which T & W Homes ("T&W") was the successful bidder and received a Substitute Trustee's Deed. The Crotwells filed a complaint to confirm title, remove cloud on the title, and for ejectment. The parties filed competing motions for summary judgment. The chancellor found that Lum reserved a life estate only, and the reservation of the right to reconvey fee simple title was "an illegal and void restraint upon alienation and repugnant to the granting clause of the deed." T & W filed an interlocutory appeal as to whether the language used by Lum in the deed was an illegal and void restraint upon alienation and repugnant to the granting clause of the deed. The Court of Appeals determined that the Lum-Crotwell deed was not a gift but rather a completed transfer or conveyance of real property with no reference to a contingent remainder and that Lum could not subsequently convey to Prestage property he no longer owned. The Court of Appeals thus affirmed the judgment of the Chancery Court and remanded the case. On remand, T & W counterclaimed, alleging that it had acquired title to the property by adverse possession. T & W argued that it and its predecessor maintained adverse possession of the one-acre tract of land for thirteen years and six months prior to the cause of action being filed. The Crotwells claimed that T & W took title as a purchaser in a void foreclosure and had no privity with a predecessor in title to which to tack the time of possession. A hearing was set to address T & W's counterclaim. The day before the hearing, T & W obtained a quitclaim deed from the Prestages that conveyed all of the Prestages' right, title, and interest in and to the land. The chancellor concluded that Prestage adversely possessed the one-acre tract of land and therefore the tract deeded to Prestage became vested in him as the actual occupant or possessor and the Crotwells no longer had interest in the oneacre of land. Further, the chancellor concluded that whether the foreclosure was valid and enforceable was of no moment; assuming it to be void, the quitclaim deed from the Prestages to T & W conveyed the interest. The chancellor ultimately found that the property was vested in T & W. The Crotwells appealed.

ISSUES

Whether the court erred in finding the (1) foreclosure on the 2006 deed of trust established privity of possession and (2) 2018 quitclaim deed conveyed title to T & W.

HOLDING

(1) Because Lum only had a life estate after he deeded the entire forty acres to Crotwell, any interest Prestage had in the land expired at the end of Lum's life. Because Prestage had not completed the total ten years needed for adverse possession when he entered into the deed of trust, he did not have title to the property at the time and, therefore, the substituted trustee was not vested with any title to convey. (2) Because Prestage obtained full and complete title via adverse possession, his title could only be lost by a conveyance from him or by another adverse possessor's satisfaction of the statutory period. Because Prestage did not lose his title to the property until he conveyed it away by means of the quitclaim deed, T & W acquired title to the property by means of the quitclaim deed. Therefore, the Supreme Court affirmed the judgment of the Scott County Chancery Court.

Affirmed - 2020-CA-00331-SCT (May 20, 2021)

Opinion by Presiding Justice Kitchens

Hon. Michael H. Ward (Scott County Chancery Court)

Richard M. Lingle for Appellants - Thomas D. Lee for Appellee

Briefed by [Rachel Fewell](#)

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SUPREME COURT - POST-CONVICTION RELIEF

AMBROSE V. STATE

CIVIL - DEATH PENALTY - POST CONVICTION

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF -

Ineffective-assistance-of-counsel claims involve a two-pronged inquiry: the defendant must demonstrate (1) that his counsel's performance was deficient, requiring a showing that his attorney's representation fell below an objective standard of reasonableness and (2) that the deficiency prejudiced the defense of the case, requiring a showing that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - DEFERENCE -

Reasonableness is based on prevailing professional norms and a court's review is highly deferential to the attorney, with a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance

CRIMINAL PROCEDURE - JURY SELECTION - DISCRIMINATION -

All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination

CIVIL PROCEDURE - RES JUDICATA - LITIGATION -

Res judicata extends to those claims that could have been raised in prior proceedings but were not

FACTS

A jury convicted Abdur Rahim Ambrose Sr. of the capital murder of Robert Trosclair. During the sentencing phase, the defense presented testimony from nine of Ambrose's friends and family members. Cumulatively, the mitigation witnesses testified that Ambrose grew up impoverished, faced many challenges as a youth, was not a violent person, regularly held a job, and loved and supported his children. The mitigation witnesses also testified that they loved Ambrose and that they would write and visit Ambrose in prison. The jury returned a verdict finding that Ambrose should receive the death penalty. The Harrison County Circuit Court sentenced Ambrose to death. The Supreme Court affirmed Ambrose's conviction and sentence on direct appeal. Ambrose's motion for rehearing was subsequently denied

on October 18, 2018, and his petition for writ of certiorari to the United States Supreme Court was denied on March 25, 2019. Ambrose timely filed his application for postconviction relief on October 25, 2019.

ISSUES

Whether (1) the investigation and presentation of mitigation evidence were constitutionally inadequate; (2) the trial judge made rulings during voir dire that demonstrated impermissible gender bias, resulting in an unfair pool of prospective jurors; and (3) Mississippi's death penalty statute is arbitrary and capricious as applied.

HOLDING

(1) Because the investigation was thorough, and because the psychologist employed by the defense concluded that Ambrose needed no further psychological evaluation, the trial counsel's performance regarding mitigation was not deficient, and the ineffective-assistance-of-counsel claim was without merit. (2) Because the second issue was capable of being raised at trial or on direct appeal, it was procedurally barred. Even if the Court were to assume that the trial court exhibited bias in the manner of questioning potential jurors, because Ambrose failed to establish a legal claim that would warrant postconviction relief, the claim was without merit. (3) Because the third issue was capable of being raised on direct appeal, it was procedurally barred. While claims may be excepted from the waiver bar upon a showing of cause and actual prejudice, because Ambrose could not show either, the claim was without merit. Therefore, the Supreme Court denied the application for postconviction relief.

Postconviction Relief Denied - 2018-DR-01525-SCT (May 20, 2021)

En Banc Opinion by Justice Coleman

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

Alexander D. M. Kassoff & Treasure R. Tyson (Cap. Post-Conviction Counsel Office) for Petitioner - Ladonna C. Holland (Att'y Gen. Office) for Respondent

Briefed by [Mckenzie Williamson](#)

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SUPREME COURT - CRIMINAL CASES

BODY V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - BURGLARY OF A DWELLING - FACTORS - Burglary of a dwelling has two elements: (1) unlawful breaking and entering and (2) intent to commit a crime therein

CRIMINAL PROCEDURE - BURGLARY OF A DWELLING - CLASSIFICATION - The intent to commit a crime, whether it be a felony or a misdemeanor, is an element of the crime of burglary; the word "crime" in Mississippi burglary statutes includes misdemeanors as well as felonies

CRIMINAL PROCEDURE - EIGHTH AMENDMENT - CRUEL AND UNUSUAL PUNISHMENT - The Eighth Amendment requires prison officials to provide humane conditions of confinement with due regard for inmate health and safety

FACTS

In November 2018, officers of the Madison County Sheriff's Department arrested Tyrone Body in response to a disturbance involving a gun. The evening of the arrest, Body had picked up his mistress, Kanosha Brown, and her four minor children at her apartment. Body and Brown visited while her children watched television until Brown told Body she wanted to leave. Body refused, prompting Brown to call her ex-boyfriend to come take her and her children home. About ten minutes after Brown returned to her apartment, Body kicked in her door with a shotgun and accused her of sleeping with other men. Brown's ex-boyfriend fled out of a window, and Body seized Brown's phone and searched the apartment. A physical altercation ensued between Brown and Body, prompting a neighbor to report the incident. The

arresting officer noticed the latch to the door was broken, discovered Brown’s four minor children inside, and found a loaded .12-gauge firearm under the couch. In March 2019, a grand jury indicted Body for burglary of a dwelling place and possession of a firearm by a convicted felon. A month later, Body pled guilty in the Madison County Justice Court to a misdemeanor charge of domestic violence that occurred the same day as the burglary. The jury found Body not guilty of possession of a firearm by a convicted felon but found him guilty of burglary of a dwelling. The circuit court sentenced Body to twenty-five years without parole in the custody of the Mississippi Department of Corrections. Body’s attorney filed for a new trial or judgment notwithstanding the verdict (“JNOV”) on the grounds that the lack of evidence of breaking and entering was insufficient to support the jury verdict, the reference to assault in Count I of the indictment was not further defined, the sentence was excessive and violated Body’s state and constitutional rights, and there was improper documentation of Body’s old convictions. The trial court found the evidence was sufficient and the indictment was not defective, and thus denied Body’s motion for a new trial or JNOV. Body appealed.

ISSUES

Whether (1) the evidence was sufficient to support Body’s conviction; (2) Body’s Fifth Amendment right against self-incrimination was violated; (3) Body’s indictment was legally sufficient; and (4) Body’s twenty-five-year sentence constituted cruel and unusual punishment.

HOLDING

(1) Because Body lacked explicit consent to enter Brown’s apartment, because there was sufficient eye-witness testimony to prove Body broke into the apartment, and because there was sufficient information to find that Body entered to the apartment with requisite intent, the evidence was sufficient to support Body’s conviction. (2) Because Body’s decision not to testify was of his own volition, his Fifth Amendment rights were not violated. (3) Because Body’s indictment fully notified him of the charges against him by the language “with the intent to commit an assault herein,” and because the word “crime” in Mississippi burglary statutes includes misdemeanors as well as felonies, Body’s argument was meritless. (4) Because Body’s sentence did not exceed the maximum term allowed by statute, and because Body was not exposed to inhumane conditions of confinement, Body’s Eighth Amendment claim failed. Therefore, the Supreme Court affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2020-KA-00190-SCT (May 20, 2021)

Opinion by Justice Griffis

Hon. John H. Emfinger (Madison County Circuit Court)

Cynthia A. Stewart for Appellant - Brittney S. Eakins (Att’y Gen. Office) for Appellee

Briefed by [Jacob D. Hamm](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – MAY 18, 2021

COURT OF APPEALS - CIVIL CASES

CHRISTMAS V. CHRISTMAS

CIVIL - WILLS, TRUSTS & ESTATES

WILLS AND ESTATES - PROBATE - PROVING EXECUTION - Miss. Code Ann. § 91-7-7 provides that if none of the subscribing witnesses can be produced to prove the execution of the will then it may be established by proving the handwriting of a testator and of the subscribing witnesses, or of some of them

WILLS AND ESTATES - PROBATE - SUBSCRIBING WITNESS - Under Miss. Code Ann. § 91-7-7, the phrase “or of some of them” means verification of the testator’s handwriting and the handwriting of at least one of the attesting witnesses

FACTS

In February 1987, Luke Beard executed a will, leaving everything, including thirty-two acres, to his grandson, Antonio Christmas. Beard told Antonio that he had prepared the will, but Beard did not tell his only child, Diane Christmas. Beard died in February 2001. After Beard's death, Diane continued to pay the taxes on the land, and Antonio maintained Beard's house, where he was living at the time of the trial. Sometime in 2003, Antonio found Beard's will but took no action and did not tell his mother about it. Having no knowledge of the will, Diane filed a petition to open an estate and settle her father's affairs in December 2002. In that proceeding, Diane was adjudicated to be Beard's only heir. Years later, in June 2014, Diane opened a second estate. Antonio was unaware of either of these proceedings, only learning of the estate actions by Diane after he attempted to stop a company from cutting timber on the land. Antonio then filed an action in 2018 to probate Beard's will. In the will, there was no separate attestation clause for the witnesses to sign to attest that they witnessed Beard sign the will and that he was of sound mind. Diane contested the will, alleging that Beard lacked testamentary capacity and was not of sound mind at the time he signed the will. At trial, Antonio testified that he was familiar with Beard's signature and identified it on a "Marital Agreement As To Property," which was entered into evidence. Diane testified that at the time of the execution of the will, Beard knew who she was and conducted his own affairs. Also, no doctor had ever said Beard's mind was not sound. Further, she agreed that the signature of the testator on the will was Beard's and that she did not make a diligent attempt to locate a will in her petitions for administration of the estate. Because both witnesses of the will were deceased at the time of trial; Antonio called a local attorney to testify about them. The local attorney verified that one of the witness's signature on the will was genuine but was not asked about the other. The chancery court judge entered an order, finding that there had been a failure to present required evidence of attestation of the purported will as required by Mississippi law and dismissed the case. Antonio appealed.

ISSUES

Whether Antonio (1) was barred from presenting his arguments on appeal and (2) presented sufficient evidence to admit Beard's will to probate.

HOLDING

(1) Because the issue presented on appeal was virtually the same as the one presented to the chancery court, the argument was not barred on appeal. (2) Because Miss. Code Ann. § 91-7-7 provides that if none of the subscribing witnesses can be produced to prove the execution of the will then it may be established by proving the handwriting of a testator and of the subscribing witnesses, or of some of them, and because "or of some of them" means verification of the testator's handwriting and at least one of the attesting witnesses' handwritings, Antonio presented sufficient evidence of due execution, and the will should have been admitted to probate. Therefore, the Court of Appeals reversed and remanded the judgment of the Lincoln County Chancery Court.

DISSENT

Presiding Judge Wilson argued that if "them" in "or of some of them" in Miss. Code Ann. § 91-7-7 referred to "the subscribing witnesses," rather than collectively the testator and subscribing witnesses, then Antonio failed to prove proper execution of the will because he only proved the handwriting of one of the subscribing witnesses, not "some of them." He reasoned that the Supreme Court in *Willis v. Willis* held that proof of two signatures of witnesses is required to prove due execution where the witnesses to a will are deceased, and therefore, Antonio had not met his burden. He continued further by arguing that even if *Willis* was not controlling, the best reading of the statute requires proof of the signatures of at least two of the subscribing witnesses.

Reversed & Remanded - 2019-CA-01821-COA (May 18, 2021)

Opinion by Judge McDonald

Hon. Nathan P. Adams Jr. (Lincoln County Chancery Court)

Bernard C. Jones Jr. & Ashley D. Jones for Appellant - W. Brady Kellems for Appellee

Briefed by [William "Jack" Simpson](#)

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CIVIL - STATE BOARDS & AGENCIES

ADMINISTRATIVE LAW - APPELLATE REVIEW - AGENCY CONCLUSIONS - An agency's conclusions must remain undisturbed unless the agency's order (1) is not supported by substantial evidence, (2) is arbitrary or capricious, (3) is beyond the scope or power granted to the agency, or (4) violates one's constitutional rights

ADMINISTRATIVE LAW - REGULATIONS - VAGUENESS - Under *Wilcher*, a regulation is unconstitutionally vague only if it forbids or requires the doing of an act in terms so vague that persons of common intelligence must guess at its meaning

ADMINISTRATIVE LAW - APPELLATE REVIEW - AGENCY CONCLUSIONS - Under *Breland*, so long as substantial evidence exists, an agency's finding must be allowed to stand even though there might room for disagreement on that issue

ADMINISTRATIVE LAW - AGENCY CONCLUSIONS - DUE PROCESS - Pursuant to *Loudermill*, process requires some kind of a hearing prior to discharge of a public employee who has a constitutionally protected property interest in his employment

FACTS

Nathan Fisher responded to Samantha Ransom's domestic disturbance call regarding the behavior of her estranged husband, Michael Ransom. While at Samantha's home, Fisher hugged Samantha and allowed her to hold his unloaded gun. Following Nathan Fisher's response to the domestic disturbance call, the Jackson County Sheriff's Department ("Department") terminated Fisher's employment after finding that Fisher violated the Department's policy ("Policy 5.05") regarding security of firearms by relinquishing control of his firearms to a civilian. The Civil Service Commission ("Commission") upheld the dismissal and found that the Department terminated his employment in good faith for cause. Fisher appealed the decision to the circuit court, and the circuit court held that the Commission's decision was supported by substantial evidence and was not arbitrary or capricious. Fisher appealed.

ISSUES

Whether (1) Fisher waived his constitutional challenge to Policy 5.05; (2) Policy 5.05 was unconstitutionally vague; (3) the Commission's findings that Fisher violated Policy 5.05 and was dismissed in good faith for cause were not supported by substantial evidence and were arbitrary and capricious; (4) the Department violated Fisher's right to due process by denying him a hearing or opportunity to respond to the charges against him prior to his termination; and (5) Fisher was entitled to reinstatement, backpay, or any other remedy.

HOLDING

(1) Because Fisher did not make a void-for-vagueness argument until his appeal before the circuit court, Fisher waived his challenge to Policy 5.05. (2) Because the policy did not proscribe or regulate constitutionally protected activity but merely regulated the manner in which an officer secured his firearms, and because its language that required officers to "provide maximum security of all firearms in his custody" gave Fisher fair notice that his conduct was contrary to policy, Policy 5.05 was not unconstitutionally vague. (3) Because the Commission considered the testimony of Fisher, Sheriff Mike Ezell, the officers who conducted the internal investigation of Fisher, and other witnesses, and because the witnesses testified about the importance of the policy and the Department's concerns regarding Fisher's actions during the call to the Ransom's home, which were corroborated by Fisher's own testimony, the Commission's findings that Fisher violated Policy 5.05 and that he was dismissed in good faith for cause were supported by substantial evidence and were not arbitrary or capricious. (4) Because the Department did not provide Fisher an opportunity to respond to the charges against him prior to his termination, and because he was denied the minimum pre-termination process required by *Loudermill*, which entitled Fisher to at least a fair notice of the charges against him and an opportunity to respond, "either in person or in writing," the Department violated Fisher's right to procedural due process by denying him a hearing or opportunity to respond to the charges against him prior to his termination. (5) Because Fisher failed to raise the issue of possible recovery of compensatory or nominal damages before the Commission, in the circuit court, and in his opening brief or reply brief in the Court of Appeals, because there was no legal basis for an award of nominal or compensatory damages, and because even if there were a legal basis for an award of nominal or compensatory damages, the proper defendant was not a party to this case, Fisher was not entitled to reinstatement, back pay, or civil service appeal damages. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Circuit Court.

CONCURRENCE IN PART & DISSENT IN PART

Chief Judge Barnes agreed that there was substantial evidence to support the Commission's finding that Fisher's termination was made in good faith and for cause. She argued, however, that the appropriate remedy was to reverse and remand to the circuit court for determination of whether the denial of procedural due process resulted in injury to Fisher and whether he was entitled to compensatory damages.

Affirmed - 2019-CC-00556-COA (May 18, 2021)

En Banc Opinion by Presiding Judge Wilson - Concurrence In Part & Dissent In Part by Chief Judge Barnes
Hon. Stephen B. Simpson (Jackson County Circuit Court)
Joseph Richard Tramuta & Russell S. Gill for Appellant - H. Benjamin Mullen for Appellee
Briefed by [Mackinlee Rogers](#)

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HOLCOMB, DUNBAR, WATTS, BEST, MASTERS & GOLMAN, P.A. v. 400 SOUTH LAMAR OXFORD MAD HATTER PARTNERS

CIVIL - CONTRACT

CIVIL PROCEDURE - AFFIRMATIVE DEFENSE - WAIVER - Pursuant to Miss. R. Civ. P. 8(c), a party shall set forth affirmatively certain listed defenses; therefore, generally, if a party fails to raise an affirmative defense in its original answer, the defense will be deemed waived

CONTRACT LAW - DUTY OF GOOD FAITH - BREACH - According to the Restatement (Second) of Contracts § 205, the breach of good faith is bad faith characterized by some conduct that violates standards of decency, fairness, or reasonableness

CIVIL PROCEDURE - SUMMARY JUDGMENT - RESPONSE - Under *Hartford Cas. Ins. Cos.*, the party opposing a motion for summary judgment may not rest upon the mere allegations or denials of his pleadings, but his response must set forth specific facts showing that there is a genuine issue for trial, by affidavit or as otherwise provided

TORTS - LIBEL - STATUTE OF LIMITATIONS - Pursuant to Miss. Code Ann. § 15-1-35, libel claims must be sought within one year next after the cause of such action accrued

FACTS

In September 2015, Holcomb, Dunbar, Watts, Best, Masters & Golman, P.A. ("Holcomb Dunbar") renewed a lease of office space from 400 South Lamar Mad Hatter Partners, LLC ("Mad Hatter") for another three-year term expiring in December 2018, despite plans to vacate the property in November 2016. Prior to signing the renewal, Bradley Best, the managing partner at Holcomb Dunbar, and Blake Tartt III, owner and principal of Mad Hatter, discussed the possibility of Mad Hatter helping find a replacement tenant and subleasing with Mad Hatter prior to signing the lease renewal. Holcomb Dunbar vacated the office space, as planned, yet there was no replacement tenant. Holcomb Dunbar ran an advertisement for the property in the local newspaper for two weeks while Mad Hatter met with several potential lessees. In March 2017, Holcomb Dunbar surrendered the keys to the office space to Mad Hatter. The next month, following a secretly recorded phone call discussing the lack of a replacement tenant, Holcomb Dunbar stopped paying rent. In June and July 2017, Mad Hatter sent two letters to Holcomb Dunbar for notice of default. Next, Holcomb Dunbar sent Mad Hatter a notice of alleged breach of the lease and of its duty to conduct itself in good faith and to deal fairly with the firm in numerous and repeated respects. Mad Hatter followed with a "Three-Day Notice" letter, threatening a lawsuit for legal possession of the premises and past-due rent if the past-due rent was not paid in three days. In September 2017, Mad Hatter filed an "Amended Complaint in Ejectment, Breach of Contract and Associated Damages." Holcomb Dunbar filed an answer, a motion for partial summary judgment, and a motion to amend its counterclaim to add libel claims. Mad Hatter filed a motion for summary judgment and a motion to quash subpoenas for documents relating to a previously published news story about an unrelated Mad Hatter matter. The trial court found that (1) Mad Hatter had no duty to find or refer all inquiries about leasing to Holcomb Dunbar; (2) the lease was never modified by a prior conversation about finding a replacement tenant; and (3) no breach of the duty of good faith and

fair dealing. Therefore, the trial court concluded that no material facts were in dispute and Holcomb Dunbar breached the lease. The court granted Mad Hatter's motion to quash, finding that the subpoenas requested information irrelevant to the issues before the court. The court denied Holcomb Dunbar's motion for partial summary judgment, finding that Mad Hatter never forfeited or terminated the lease because no order of possession was ever entered. Lastly, the court denied Holcomb Dunbar's motion to amend, finding that an amendment adding libel would cause undue prejudice upon Mad Hatter. Mad Hatter prevailed accordingly, and any remaining counterclaims that went to trial are not at issue on appeal. Holcomb Dunbar appealed.

ISSUES

Whether the trial court erred in (1) granting Mad Hatter's motion for summary judgment and awarding past due rent; (2) denying Holcomb Dunbar's counterclaims for material breach; (3) preventing Holcomb Dunbar from presenting a failure-to-mitigate defense to the jury; (4) granting Mad Hatter's motion to quash; and (5) denying Holcomb Dunbar's motion to amend its counterclaim.

HOLDING

(1) Because the lease was unambiguous, the "notice of default" letters did not amount to Mad Hatter's forfeiture or termination of the lease, and because Mad Hatter never ousted Holcomb Dunbar from the property, the trial court properly granted summary judgment and awarded all past-due rent in favor of Mad Hatter. (2) Because there was no provision in the lease obligating Mad Hatter to find a replacement tenant, and because the parties were not working together to find a subtenant, the trial court did not err in finding Holcomb Dunbar's claims of material breach were either immaterial or occurring prior to the most recent lease renewal. (3) Because Holcomb Dunbar raised the issue as an affirmative defense in its answer, which cannot be considered the same as raising it as a response to a motion for summary judgment, the matter was waived. (4) Because the information sought through the subpoenas was irrelevant to the lease dispute between Holcomb Dunbar and Mad Hatter, the trial court properly granted Mad Hatter's motion to quash. (5) Because the motion to amend was filed only six weeks prior to trial, which would have unduly prejudiced Mad Hatter, and because the libel claims were time-barred by the one-year statute of limitations, the trial court properly denied Holcomb Dunbar's motion to amend. Therefore, the Court of Appeals affirmed the judgment of the Lafayette County Circuit Court.

CONCURRENCE IN PART & DISSENT IN PART

Judge Lawrence agreed with the granting of Mad Hatter's motion for summary judgment but dissented with the majority's refusal to impose a duty to mitigate damages. Finding the modern and overwhelmingly majority view of states concerning mitigation of damages for leases more legally sound and supported by better public policy than those fashioned in 1891, he argued a duty to mitigate damages should be imposed in a breach of a commercial lease in the interest of justice and the efficient resolution of contract disputes.

Affirmed - 2019-CA-01702-COA (May 18, 2021)

Opinion by Chief Judge Barnes - Concurrence In Part & Dissent In Part by Judge Lawrence

Hon. Frank G. Vollor (Lafayette County Circuit Court)

Michael N. Watts & Bradley T. Golmon for Appellant - Joseph T. Getz & L. Clayton Culpepper III for Appellees

Briefed by [Ashley Pruitt](#)

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JONES V. MISS. DEP'T EMP. SEC.

CIVIL - STATE BOARDS & AGENCIES

ADMINISTRATIVE LAW - APPELLATE REVIEW - AGENCY CONCLUSIONS - An agency's conclusions must remain undisturbed unless the decision: (1) is not supported by substantial evidence; (2) is arbitrary or capricious; (3) is beyond the scope or power granted to the agency; or (4) violates one's constitutional rights

EMPLOYMENT LAW - UNEMPLOYMENT BENEFITS - DISQUALIFICATION FOR MISCONDUCT

- An individual is disqualified from receiving unemployment benefits if they are discharged for misconduct connected with their work; misconduct includes the failure to obey orders, rules, or instructions and the intentional disregard of an employer's interests as found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of them

EMPLOYMENT LAW - UNEMPLOYMENT BENEFITS - REPAYMENT OF BENEFITS - An individual must repay any unemployment benefits they have received if they are later deemed ineligible to receive them

FACTS

In 2016, Shirley Jones began working with Donelson Enterprises ("the Employer") in a janitorial capacity. The Employer terminated Jones in 2019, and she began filing for unemployment benefits. A claims examiner determined that Jones was not eligible to receive benefits because she was terminated for committing misconduct. Jones appealed the denial of her claim. At a telephonic hearing with an administrative law judge, the Employer stated that Jones was discharged from her position for failing to perform her duties to their expectations. The Employer received several complaints from their only client, a bank, concerning unsatisfactory cleaning and the presence of Jones's daughter, who was not employed by the Employer. Jones had allowed her daughter to perform Jones's janitorial duties in her absence. Jones received three warnings from the Employer, and the Employer instructed Jones to not allow her daughter to clean the bank in her absence. However, Jones continued to allow her daughter to do so. The bank subsequently terminated its contract with the Employer, and Jones was discharged. Based on these facts, the administrative law judge ("ALJ") upheld Jones's denial of benefits, finding that Jones had committed misconduct. Jones appealed the ALJ's decision to the Mississippi Department of Employment Security's Board of Review ("the Board"), which upheld the decision and adopted the ALJ's findings. She then appealed to the circuit court, which upheld the Board's decision. Jones appealed.

ISSUES

Whether the trial court erred by (1) affirming Jones's denial of unemployment benefits and (2) affirming the order requiring Jones to repay the unemployment benefits.

HOLDING

(1) Because Jones's termination was the result of her failure to obey the instructions of her employer, Jones's conduct constituted misconduct and she was properly disqualified from receiving unemployment benefits. (2) Because Jones was deemed ineligible to receive benefits, she was liable for repaying the unemployment benefits she received. Therefore, the Court of Appeals affirmed the judgment of the Choctaw County Circuit Court.

Affirmed - 2019-CC-01734-COA (May 18, 2021)

Opinion by Judge Greenlee

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

Pro se for Appellant - Albert B. White for Appellee

Briefed by [Glory Crocco](#)

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ROLEY V. ROLEY

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DIVORCE - HABITUAL CRUEL & INHUMAN TREATMENT - The conduct of the offending spouse must either endanger life, limb, or health, or create a reasonable apprehension of such danger, rendering the relationship unsafe for the party seeking relief or be so unnatural and infamous as to make the marriage revolting to the non-offending spouse and render it impossible for that spouse to discharge the duties of marriage

FAMILY LAW - CUSTODY - ALBRIGHT FACTORS - The polestar consideration in child custody cases is the best interest and welfare of the child

CIVIL PROCEDURE - MOTION PRACTICE - AMEND OR ALTER JUDGMENT - In order to succeed on a Miss. R. Civ. P. 59(e) motion, the movant must show: (i) an intervening change in controlling law, (ii) the availability of new evidence not previously available, or (iii) the need to correct a clear error of law or to prevent manifest injustice
CIVIL PROCEDURE - APPEALS - INVOLUNTARY WAIVER - An appellant waives his claim on appeal if he fails to assert appropriate authority in support of his proposition

EVIDENCE - TESTIMONY - PROCEDURAL BAR - If a proponent of excluded testimony fails to preserve the issue by making an offer of proof as to the contents of the proposed testimony, then the issue is procedurally barred from being raised on appeal

CONSTITUTIONAL LAW - STATUTES - CONSTITUTIONAL CHALLENGES - The constitutionality of a statute will not be determined unless absolutely necessary to determine the merits of the litigation in which the constitutional issue has been presented

FAMILY LAW - APPEALS - MODIFICATION - A chancellor may modify child support, custody, and visitation while a case is on appeal if a proper basis for doing so is shown; in doing so, chancellors should not freely or frequently consider motions for modifications of their domestic case decrees after they have been appealed, but addressing potentially legitimate pleas of material changes in circumstances beyond what is shown in the record on appeal may occasionally be necessary

FACTS

Chinelo and Veto Roley married in 2006 and had two children together. In 2017, Chinelo filed a complaint for divorce against Veto, alleging habitual cruel and inhuman treatment and, in the alternative, irreconcilable differences. Veto filed an answer and counterclaim. The chancellor bifurcated the trial and determined that the “fault” issue would be heard first. Chinelo testified in support of her claim and also called two corroborating witnesses. Chinelo testified about Veto’s inability to control his temper and derogatory comments and names directed to Chinelo, often in front of the children. Chinelo’s corroborating witnesses described their observations of Veto and Chinelo’s relationships and altercations between the two, including Veto’s abuse towards Chinelo which often occurred in front of the children. Following these testimonies, Chinelo rested; Veto also rested without calling witnesses. The chancellor then heard from both parties on whether Chinelo had proven grounds for divorce. An order was entered allowing both parties to submit proposed findings of fact and conclusions of law. Veto’s attorney withdrew as his counsel and Veto represented himself since. After considering the evidence and testimony presented by the parties and each side’s proposed findings, the chancellor entered a judgment of divorce granting Chinelo a divorce based on habitual cruel and inhuman treatment. Veto filed several post-trial motions including a Miss. R. Civ. P. 52 Motion for Additional Findings of Fact as well as a Miss. R. Civ. P. 59 Motion for a Rehearing and a Miss. R. Civ. P. 60 Motion for Relief from Judgment. Veto then filed an amended motion for rehearing, essentially seeking a new trial to reopen the case on the divorce grounds issue. At the post-trial motions hearing, Veto withdrew his Rule 52 motion for additional findings, but proceeded with arguing his other motions. The chancellor granted Veto’s amended Rule 59 motion for a rehearing to the extent the record was reopened for Veto and Chinelo to submit to the court testimony pertaining to new matters not addressed during the bifurcated trial on divorce grounds. Veto called Chinelo as an adverse witness and re-questioned her on essentially the same points that were covered in the original trial. After hearing the evidence, the chancellor found it appropriate to appoint a guardian ad litem and ordered Veto to undergo a psychological evaluation. The chancellor denied Veto’s Rule 59 motion for a new trial and entered his written order readopting the summary of law, findings of fact and conclusions of law set forth in the Judgment of Divorce. Veto filed an interlocutory appeal with the Supreme Court, which was denied. Veto then filed a Motion to Recuse or, in the Alternative, Seek a Continuance. The first chancellor presiding over the case retired and numerous motions were filed, and proceedings were held before the second chancellor. In his final judgment, the chancellor analyzed the *Albright* factors in determining custody of the couple’s two minor children and ultimately granted sole physical and legal custody of the minor children to Chinelo and ordered Veto to pay child support according to the child support guidelines. Regarding taxes, the chancellor ordered the parties to each claim one child as a dependent, unless Veto was not current on his child support, in which case Chinelo would claim both children. Because the chancellor found that Veto was not current on child support for 2018, he ordered that Chinelo could claim both children for 2018 taxes. Finally, the chancellor denied Veto’s request for alimony. Veto filed a post-trial motion to reconsider final judgment including a motion for a new trial or to alter or amend the judgment pursuant to Rule 59, as well as a “Rule 52(a) Motion for this Court to Memorialize in Writings its Findings of Law and Fact on Each Allegation Made by Defendant of Error and Judicial Misconduct.” Veto also filed a Motion for Clarity on Income Tax. The

chancellor denied these motions, among others. Veto appealed the chancellor's final judgment including a Petition to Proceed In Forma Pauperis. Veto then filed an Amended Petition to Proceed In Forma Pauperis. The chancellor denied the amended petition and did not address Veto's due process argument. After filing his notice of appeal, Veto filed numerous motions or notices with the Supreme Court Clerk challenging Miss. Code Ann. §§ 11-51-29, 93-11-65. Veto filed his appellant's brief and Chinelo filed her appellee's brief. The State filed its amicus curiae brief pursuant to Miss. R. App. P. 29 and 44 to defend the constitutionality of the statutes in question. The Supreme Court assigned this appeal to the Court of Appeals and thereafter Veto filed his reply brief responding to both the appellee's brief and the State's amicus curiae brief.

ISSUES

Whether (1) the chancellor erred when he granted Chinelo a fault-based divorce based upon habitual cruel and inhuman treatment; (2) the *Albright* analysis is scientifically valid to determine the custody of the couple's two minor children; (3) the chancellor erred when he abrogated a parol custody agreement between Veto and Chinelo and entered a temporary custody order; (4) the chancellor erred when he denied Veto's post-trial Miss. R. Civ. P. 59 motion "without a de novo hearing" and without issuing findings of fact and conclusions of law pursuant to Veto's Rule 52 request; (5) the chancellor erred when he allowed Chinelo a tax deduction for the couple's minor son for the year 2018; (6) the chancellor's ruling on the tax deductions was issued without notice; (7) the chancellor erred when he did not use the "required" five-factor test when determining who was entitled to a tax deduction; (8) the chancery court displayed "judicial bias" during a June 5, 2018 hearing; (9) the chancellor erred in denying Veto's request to proceed in forma pauperis on appeal; (10) the chancellor erred in denying Veto's motions requesting that his minor children be allowed to testify regarding their custody preferences, despite both of them being under the age of twelve; (11) Miss. Code Ann. § 93-11-65(1)(a) is prima facie unconstitutional as an arbitrary prior restraint to free speech to children of divorce; (12) the MEC filing system gives an unconstitutional advantage to represented litigants over pro se litigants, and thus, pro se litigants should be added to the system; (13) the chancellor erred in denying Veto's Post-Appeal Motion for Visitation Modification; and (14) the costs of the appeal should be assessed against the chancery court.

HOLDING

(1) Because it was within the chancellor's discretion to consider the particular nuances of a case, weigh the evidence, and determine that the proof meets or falls short of habitual cruel and inhuman treatment, and because the chancellor heard testimony about the harmful effects Veto's conduct had on Chinelo and the children's physical health and well-being, there was substantial evidence to support the chancellor's decision to support a divorce based on habitual cruel and inhuman treatment. (2) Because the Court of Appeals is an intermediate appellate court, it is not authorized to overrule or ignore Supreme Court precedent and is bound by *Albright* and its progeny. (3) Because the chancellor's final judgment set forth his detailed determination on all issues relating to custody and visitation, the questions regarding temporary custody were moot and not considered. (4) Because the chancellor stated he had reviewed Veto's extensive and thoroughly well-drafted pleadings, and because Veto failed to fulfill his duty to designate a sufficient record for the Court of Appeals' review, the Court was bound to presume the chancellor properly considered Veto's arguments and that the chancellor's decision was correct. Also, because Veto's Rule 52 motion was essentially a request to amend the judgments already rendered and such requests are discretionary, there was no abuse of discretion in the chancellor not issuing additional findings in support of his decision. (5) Because Veto did not cite any authority for the proposition that a chancellor must award a party a "credit for lost revenues" if that party is denied a tax deduction for not being permitted to claim the party's children on taxes resulting from failure to remain current on child support payments, the issue was waived. (6) Because the docket reflected the second half of the bifurcated trial was set for the very purpose of addressing "all remaining issues," Veto received notice of the chancellor's ruling on tax deductions. (7) Because Veto did not challenge the tax deduction allocation on appeal, whether the *Louk* test was applied was not relevant. (8) Because the chancellor granted Veto's motion for a rehearing, and because there was no indication that the chancellor was advocating for Chinelo, the manner in which the chancellor conducted the divorce trial and June 5, 2018 hearing in no way constituted the combative, antagonistic, discourteous, and adversarial conduct that would lead a reasonable person to conclude that Veto did not receive a fair hearing. (9) Because Veto's request related to proceedings on appeal, and because Veto's relationship with his children was not permanently severed, the chancellor did not err in denying Veto's request to proceed in forma pauperis. (10) Because Veto made no proffer of the children's testimony, this assignment of error was procedurally barred. Additionally, because Miss. Code Ann. § 93-11-65(1)(a) unambiguously requires a child

to be at least twelve years old to offer testimony regarding custody preference, this claim lacked merit. (11) Because courts should not address the constitutionality of a statute unless absolutely necessary to determine the merits of the litigation, because § 93-11-65(1)(a) does not apply to the facts of this case since there was no finding that both parents were fit and proper custodians, and because the custody preference testimony was unlikely to change the outcome of this case, Veto's constitutional challenge was barred. (12) Because it is without authority to promulgate rules or procedures relating to the MEC filing system, the Court of Appeals declined to address this assertion. (13) Because the matter was on appeal, and because Veto offered no evidence that a material change in circumstances occurred post-judgment, the chancellor properly found he was without authority to amend Veto's visitation rights. (14) Because no grounds for reversal were found within the chancellor's final judgment, because the Court of Appeals found no reason to otherwise order that Veto was entitled to avoid payment of Miss. R. App. P. 36 costs, and because Veto offered no support for his contention that the costs should be taxed to the chancery court, this claim was both procedurally barred and without merit. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Chancery Court.

Affirmed - 2019-CP-01863-COA (May 18, 2021)

Opinion by Presiding Judge Carlton

Hon. Mark A. Maples (Jackson County Chancery Court)

Pro se for Appellant - John Samuel Grant IV for Appellee

Briefed by [Brie Mansoor](#) & [Lynette Potter](#)

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COURT OF APPEALS - CRIMINAL CASES

McCOOL V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - SUFFICIENCY OF EVIDENCE - STANDARD - In evaluating the legal sufficiency of the evidence, “[t]he critical inquiry is whether the evidence shows beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that every element of the offense existed”

CRIMINAL PROCEDURE - HOMICIDE - EYEWITNESS - Pursuant to *Weathersby*, where the defendant or the defendant's witnesses are the only witnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or by facts of common knowledge

CRIMINAL PROCEDURE - NEW TRIAL - WEIGHT OF EVIDENCE - When reviewing a challenge to the weight of the evidence, the court will disturb a jury verdict only when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

FACTS

Jason McLemore and his wife Melanie owned a small gun store. While Melanie was working the store one day alone, Michael McCool, along with his father, Audy, came into the store to pick up a gun Michael had left for repair. According to Melanie's testimony at trial, Jason and Michael had discussed the status of Michael's gun over the phone a few days prior. When the McCools arrived at the store, Melanie told Michael he needed to pay the service charge according to the policy previously discussed, but Michael disagreed. Melanie's phone records indicate that the McCools argued with Melanie over the fee for at least ten minutes. She texted back and forth with Jason and had one phone call that lasted a minute. Melanie testified that Michael grew increasingly agitated as their conversation progressed. She described him as becoming more and more belligerent, screaming in her face and calling her curse words. Melanie also testified that Audy was “pumping” Michael up. Jason came in with their son, Jacob, and Michael immediately jumped on Jason and the altercation resulted in gunfire. Phone records show that Melainie and Audy both dialed 911. Before police arrived, Audy took Michael's gun, walked through the scene, exited the store, and placed Michael's gun on the floorboard of the

McCools' car, covering it with a plastic shopping bag. When officers arrived, Jason and Jacob were each lying dead with three gunshot wounds. Audy was also standing over his son who was injured. Audy himself was also injured, suffering a gunshot wound to the back. Investigation discovered that Michael, Jason, and Jacob were all armed during the fight. Michael had the gun that Audy placed in their car after the altercation. Evidence showed that Michael had fired the gun five times. Michael claimed he shot the McLemores in defense of his father and himself. When asked where the gun was, Michael told the officer that his father had put it in their car. When asked about the gun, Audy admitted without hesitation that he had placed it inside the McCools' car for safekeeping. Michael was indicted for two counts of second-degree murder, and Audy was indicted for accessory after the fact. At trial, Melanie, testified that she did not know or remember who shot first. The jury found both Michael and Audy guilty. Michael received two forty-year sentences, and Audy received a twenty-year sentence. The McCools appealed.

ISSUES

Whether (1) the evidence was sufficient to prove second-degree murder; (2) the evidence was sufficient to disprove the theory of self-defense; (3) evidence supported Audy's accessory-after-the-fact conviction; (4) the verdict against Michael was against the overwhelming weight of the evidence; (5) the verdict against Audy was against the overwhelming weight of the evidence; (6) the jury was properly instructed on the theory of self-defense; (7) the jury was properly instructed on depraved heart murder and heat of passion manslaughter; (8) the sentences constituted cruel and unusual punishment; (9) the ineffective-assistance-of-counsel claim was appropriate for direct appeal; and (10) there was a cumulative error.

HOLDING

(1) Because the jury could have found beyond a reasonable doubt that Michael intentionally fired his gun based on the evidence, and because the jury was not required to find intent to kill, the evidence was sufficient to prove second-degree murder. (2) Because the evidence was sufficient for a reasonable juror to determine that Michael did not act in necessary self-defense, because the consistency and credibility of Melanie's statements were questions for the jury, and because the *Weathersby* rule did not apply, sufficient evidence supported Michael's conviction. (3) Because a completed felony was committed, because Audy took steps to conceal the gun, and because evidence presented at trial indicated that Audy knew an illegal shooting had occurred, sufficient evidence supported Audy's conviction. (4) Because precedent allows the jury to decide how much weight to afford the evidence presented, and because the jury presented with ample evidence to support a finding of guilt, the conviction was not against the overwhelming weight of the evidence. (5) Because the jury was presented with evidence of Audy admitting to taking and concealing the gun, the conviction did not constitute an unconscionable injustice. (6) Because the McCools did not object to the jury instructions at trial, and because neither Michael nor Audy were deprived of a fundamental right, the trial judge did not commit any error by giving the jury instructions. (7) Because the instructions at issue closely followed the language of the relevant statutes, an additional defining instruction was not necessary and reversal was not warranted. (8) Because both sentences were within their respective statutory ranges, and because the trial judge weighed a number of factors and considered ample information prior to imposing the sentences, the sentences did not constitute cruel and unusual punishment. (9) Because the McCools did not stipulate that the record was adequate to determine whether they received ineffective assistance from their trial attorney, and because the record did not affirmatively show ineffective assistance rising to the level of a constitutional violation, the McCools' claim was not appropriately brought on direct appeal. (10) Because there was no reversible error in any part of this case, there was no merit to this argument. Therefore, the Court of Appeals affirmed the judgment of the Pearl River County Circuit Court.

Affirmed - 2019-KA-01343-COA (May 18, 2021)

Opinion by Judge McCarty

Hon. Claiborne McDonald (Pearl River County Circuit Court)

Harry B. Ward & Martin E. Regan Jr. for Appellants - Brittney Sharae Eakins (Att'y Gen. Office) for Appellee

Briefed by [Fatelia Avery](#)

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ROGERS V. STATE

CRIMINAL - FELONY

APPELLATE PROCEDURE - ARGUABLE ISSUES - LINDSEY BRIEF - When no appealable issues are apparent from the record on appeal, appellate counsel must take the following actions: (1) file and serve a brief in compliance with Miss. R. App. P. 28(a)(1)-(5), (8); (2) certify in the brief that there are no arguable issues supporting the client's appeal, and that the attorney has reached this conclusion after scouring the record thoroughly, specifically examining the reason and circumstances for arrest; and (3) send a copy of the brief to the defendant, inform the defendant that counsel could find no arguable issues in the record, and advise the defendant of his or her right to file a pro se brief

APPELLATE PROCEDURE - APPELLATE COUNSEL - SUPPLEMENTAL BRIEFINGS - If a court finds any arguable issue in the case record or brief, it will require appellate counsel to submit supplemental briefing on that issue regardless of the probability of the defendant's success on appeal, after which the court will consider the case on the merits and render a decision

FACTS

Kasey Rogers was indicted for possession of a firearm by a felon after he engaged in an altercation with his brother and sister-in-law at their residence. Rogers brought a shotgun with him but, after his sister-in-law called 911, he abandoned it in the residence and ran into the nearby woods. Law enforcement later apprehended Rogers, who admitted that the weapon was his. After trial, a jury found Rogers guilty and sentenced him to ten years in the custody of the Mississippi Department of Corrections. Rogers appealed.

ISSUE

Whether the trial court erred in Rogers's conviction and sentence.

HOLDING

Because Rogers's appeal presented no arguable or reversible issues, the trial court justifiably convicted and sentenced Rogers of possession of a firearm by a felon. Therefore, the Court of Appeals affirmed the judgment of the Jones County Circuit Court.

Affirmed - 2019-KA-01857-COA (May 18, 2021)

Opinion by Presiding Judge Carlton

Hon. Dal Williamson (Jones County Circuit Court, Second Judicial Dist.)

Mollie Marie McMillin (Pub. Def. Office) & *Pro se* for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [Rod Bridges](#)

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