MISSISSIPPI SUPREME COURT DECISIONS – FEBRUARY 10, 2022

SUPREME COURT - CRIMINAL CASES

ALEXANDER V. STATE

CRIMINAL - FELONY

EVIDENCE - EXPERT WITNESS - ENTITLEMENT - Under *Bishop*, a defendant is not entitled to retain an expert psychologist unless he raises insanity as a defense or it is expected that the State will use psychological evidence against him

SENTENCING - *MILLER* FACTORS - INCORRIGIBLE JUVENILE OFFENDERS - Under *Jones*, a finder of fact is not required to determine whether a minor defendant is an incorrigible juvenile offender before sentencing the defendant to life in prison without the possibility of parole

SENTENCING - HABITUAL OFFENDER - RIGHT TO JURY TRIAL - Pursuant to *Adams*, a defendant is not entitled to a jury trial on the issue of habitual offender status

FACTS

In 1993, seventeen-year-old Norris Alexander fatally stabbed his mother-in-law. In 1997, before the murder trial, Alexander was convicted on two felony counts of selling marijuana. In 1998, Alexander was found guilty of capital murder. Because it was his third felony conviction, he was deemed to be a habitual offender under Miss. Code Ann. § 99-19-81 and was sentenced to life in prison without parole. In 2014, Alexander was granted post-conviction relief ("PCR") based on U.S. Supreme Court decision in *Miller*. In 2015, his sentence was vacated, and a public defender was appointed to represent him in a *Miller* hearing to redetermine his sentence. Alexander then retained private counsel who filed two motions seeking the trial court's approval of $10,000 for a mitigation expert and $30,000 for an adolescent-development-psychology expert. During a hearing in March 2016, counsel for both the State and defense agreed that Alexander should be resentenced to life with the possibility of parole for his capital murder conviction; however, the State contended that Alexander was still a habitual offender and should still receive life without parole for his collective offenses. Alexander countered, claiming that *Miller* negated his habitual offender status because he was a juvenile at the time of his conviction. In June 2016, the trial court entered an order that denied a motion to resentence Alexander to life with the possibility of parole for his murder conviction and a motion to have Alexander resentenced by a jury. Instead, the trial court found that the *Miller* hearing would determine whether Alexander should be resentenced to life with or without parole. Further, the trial court instructed the State to submit a response to Alexander's motions for expert funds after noting that neither party had offered any arguments on the issue. In July 2016, the trial court instructed the attorneys to contact the court administrator about possible dates for the *Miller* hearing, but no further action was taken until August 2018 when the administrator contacted both the prosecution and defense. In March 2019, the trial court again directed both parties to contact the administrator to set up a date for the *Miller* hearing, and Alexander's counsel took this opportunity to request a date for a hearing on the motions for expert funds. In late April 2019, the trial court entered another order that denied the motions for expert funds, finding that Alexander had waived the issue and had failed to demonstrate his need for the experts. The *Miller* hearing finally took place in September 2019. Without the expert psychologist, Alexander's attorney moved to strike all the *Miller* testimony as he was unprepared to speak on the *Miller* factors, but the trial court denied the motion. After examining the *Miller* factors, the trial court again determined that Alexander was a habitual offender and sentenced him to life imprisonment without parole. Alexander appealed the decision to the Court of Appeals, arguing that the trial court erred by not granting his motions for expert funds, not analyzing whether he had the potential to be rehabilitated, and not allowing a jury to determine his sentence.

Only examining the issue of expert funds, the Court of Appeals reversed the trial court, holding that the trial court's complete denial of the motions prejudiced Alexander. The State petitioned for writ of certiorari.

ISSUES

Whether the trial court (1) erred by denying Alexander's motions for funds to retain expert assistance in the fields of mitigation investigation and adolescent-development psychology; (2) denied Alexander due process by not resolving whether Alexander was a rare, permanently incorrigible juvenile homicide offender; and (3) deprived Alexander of his constitutional right to have a jury impose his sentence.

HOLDING

(1) Because Alexander's reasons for needing expert funding never developed beyond the level of general speculation, because the State never presented any psychiatric evidence against Alexander during his capital murder trial, and because Alexander never displayed a compelling reason why a psychologist should be utilized, the trial court did not err when it denied Alexander's motion for funds to retain mitigation investigation and adolescent-development psychology experts. (2) Because the trial court analyzed all the *Miller* factors and still considered Alexander to be a habitual offender pursuant to Miss. Code Ann. § 99-19-81, there was no abuse of discretion in the trial court's decision. (3) Because Alexander was a habitual offender, and because a defendant is not entitled to a jury trial on the issue of habitual offender status, the issue was without merit. Therefore, the Supreme Court reversed the judgment of the Court of Appeals and reinstated and affirmed the judgment of the Panola County Circuit Court.

DISSENT

Presiding Justice Kitchens argued that the trial court's denial of Alexander's motion to retain expert funds caused his *Miller* hearing to be fundamentally unfair and deprived Alexander of due process of law. He argued that Alexander was not able to present his case without the aid of mitigation investigation and adolescent-development-psychology experts, and therefore, the trial court was unable to fully analyze Alexander under the *Miller* factors. Further, he opined that he would not hold indignant defendants to a standard that requires more specificity than that Alexander provided.

The Judgment of the Court of Appeals is Reversed. The Judgment of the Panola County Circuit Court is Reinstated & Affirmed - 2019-CT-01612-SCT (Feb. 10, 2022)
En Banc Opinion by Justice Beam - Dissent by Presiding Justice Kitchens
Hon. James McClure III (Panola County Circuit Court)
George T. Holmes, Zakia Butler, & Erin Briggs (Pub. Def. Office) for Appellant - Allison Elizabeth Horne (Att'y Gen. Office) for Appellee
Briefed by John McDonald

Click here to view the full opinion

AUGUSTINE V. STATE

CRIMINAL - FELONY

EVIDENCE - WITNESSES - CREDIBILITY - It is well established that it is within the province of the jury to determine the credibility of witnesses; the jury may believe or disbelieve, accept or reject the utterances of any witness
EVIDENCE - IMPEACHMENT- PRIOR INCONSISTENT STATEMENT - Extrinsic evidence of a witness's prior inconsistent statement is admissible within the judge's discretion for impeachment purposes if the witness has the opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it
EVIDENCE - ADMISSIBILITY - JURY INSTRUCTIONS - Prejudicial effect is alleviated upon instruction as jurors presumably follow instructions
CRIMINAL PROCEDURE - REVERSIBLE ERROR - HARMLESS ERROR - The standard for harmless error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained;

even if error occurs at trial, the verdict will not be reversed where the overwhelming weight of the evidence supports the guilty verdict

FACTS

Kobe Augustine was convicted of second-degree murder for the killing of Nigel Poole. During the investigation, Augustine stated he "wasn't even there" when Poole was shot. Later, he said someone shot at Poole from a car before ultimately confessing that he and Poole had a confrontation. At trial, the State called Irby Jules as a witness who testified that he had not given a prior statement to the police. In an effort to impeach Jules, the State then called Officer Keyhoe who testified that Jules had told the officer he had talked to Augustine and that Augustine said he wanted to "catch a body," that Augustine had offered to sell him a .38 caliber revolver one week before the shooting, and that he believed Augustine and Poole were having relations with the same girl. Augustine objected to Officer Keyhoe's testimony, arguing that it was hearsay and prejudicial. The circuit court allowed Officer Keyhoe to testify to the specifics of Jules's statement and issued a limiting instruction to the jury. On appeal, the Court of Appeals reversed the conviction and remanded the case for a new trial, finding that Officer Keyhoe's testimony was admissible for impeachment purposes but that the content regarding Jules's statement was hearsay and highly prejudicial to Augustine, thus constituting error. The State petitioned for writ of certiorari.

ISSUES

Whether the (1) circuit court abused its discretion by allowing Officer Keyhoe to testify for the limited purpose of impeachment; (2) circuit court made an error of law by finding that the prejudicial effect failed to substantially outweigh the probative value of Keyhoe's testimony; and (3) abuse of discretion, if any, was harmless.

HOLDING

(1) Because the circuit court did not establish that the purported purpose of impeachment for offering the statement was in bad faith or was subterfuge to mask the true purpose of the statement to prove truth of the matter asserted, the circuit court did not abuse its discretion by allowing Officer Keyhoe's testimony for the limited purpose of impeachment. (2) Because Augustine had ample opportunity to use cross-examination to confront Keyhoe and Jules about the inconsistent testimony, and because the jury was properly instructed to assess the statements not for their truth but for the credibility of the witness, no error of law occurred. (3) Because the evidence adduced at trial, along with numerous inconsistencies in Augustine's account of the incident and the obvious flaws in his self-defense claim, supported a guilty verdict, any error found would be harmless. Therefore, the Supreme Court reversed the judgment of the Court of Appeals and reinstated and reaffirmed the judgment of the Harrison County Circuit Court.

DISSENT

Presiding Justice Kitchens argued that Officer Keyhoe's testimony about the contents of Jules's statement was so prejudicial that its admission could not be cured by a limiting instruction and that it was not a harmless error. He contended that he could not say beyond a reasonable doubt that the admission of Officer Keyhoe's rendition of Jules's statements did not contribute to the verdict. Therefore, the case should be reversed and remanded for a new trial.

The Judgment of the Court of Appeals is Reversed. The Judgment of the Harrison County Circuit Court is Reinstated & Affirmed - 2019-CT-01467-SCT (Feb. 10, 2022)

En Banc Opinion by Chief Justice Randolph - Dissent by Presiding Justice Kitchens

Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court, First Judicial Dist.)

George T. Holmes & Mollie Marie McMillin (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by Ansley McLellan

Click here to view the full opinion

BROWN V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - THEORY OF DEFENSE - A defendant is entitled to have jury instructions given which present his theory of defense; however, the court may refuse an instruction that misstates the law or is fairly covered elsewhere in the instructions
CRIMINAL PROCEDURE - JURY INSTRUCTIONS - DISCRETION - When reviewing the grant or denial of jury instructions, the court must review the instructions as a whole to determine whether an error has occurred
CRIMINAL PROCEDURE - JURY INSTRUCTIONS - CIRCUMSTANTIAL EVIDENCE - Under *Nevels*, a defendant is no longer entitled to a circumstantial evidence jury instruction

FACTS

Damian Brown, a convicted felon, was a passenger in a vehicle that was pulled over for faulty tag lights. When the officer approached the vehicle, he spotted a firearm on the floorboard behind Brown's legs and asked him to step out of the car. When he did so, the officer discovered the gun, two bags of cocaine, and nine multicolored tablets on Brown's side of the vehicle. Brown was later charged and convicted of felon in possession of a firearm and three counts of possession of a controlled substance. Brown appealed.

ISSUES

Whether the trial court (1) abused its discretion by denying Brown's jury instruction which encompassed his theory of defense and (2) erred in denying Brown's proposed instruction concerning circumstantial evidence.

HOLDING

(1) Because Brown's proposed jury instruction was fairly covered by the State's instruction that more completely and accurately stated the law, the trial court did not abuse its discretion by denying his instruction. (2) Because defendants are no longer entitled to circumstantial evidence instructions under *Nevels*, the trial court did not err by failing to grant Brown's circumstantial evidence instruction. Therefore, the Supreme Court affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2020-KA-01366-SCT (Feb. 10, 2022)
Opinion by Justice Coleman
Hon. Lisa P. Dodson (Harrison County Circuit Court)
Erin E. Briggs, George T. Holmes, & Zakia Butler (Pub. Def. Office) for Appellant **-** Allison Elizabeth Horne (Att'y Gen. Office) for Appellee
Briefed by Rachel Gholson

Click here to view the full opinion

COPES V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - SIXTH AMENDMENT - RIGHT TO COUNSEL OF CHOICE - A defendant's right to counsel of his choice must be reasonably balanced with the necessity for the trial court to control its proceedings and the conduct of attorneys appearing before it
CRIMINAL PROCEDURE - SIXTH AMENDMENT - REMOVAL OF COUNSEL - Removal of counsel should be a last resort of courts to maintain high standards of professional responsibility in the courtroom

FACTS

Anna and Betty, two young children, moved to the Palmer Home for Children and lived with Seth and Kara Copes in a residential cottage in 2006. The two children experienced difficulties with both Seth and Kara while they lived in the cottage. In 2013, Anna and Betty disclosed to their aunt that Seth had sexually abused them years earlier. Seth was later charged of two counts of sexual battery of two minors. Before his trial, Copes, by and through his local counsel Patrick Rand, filed a motion for admission of counsel pro hac vice for Thomas Pavlinic, an out of state attorney. Rand and Pavlinic represented Copes at trial, with Pavlinic taking the lead in Copes's defense. During the opening statements, Pavlinic told the jury that the victims had used a cell phone to send sexual, inappropriate messages. The State approached

the bench and asserted that these text messages had not been produced in discovery. The judge gave the State and Pavlinic a warning on how to proceed with potentially "problematic" statements, holding that Pavlinic could not mention the sexual nature of the messages. During cross examination of Anna, Pavlinic wanted to establish why Anna believed she was the "bad one" of the victims. He also wanted to question her about a 2007 incident when Anna allegedly urinated in juice and told another child to drink it, her past of sneaking out to meet boys, inappropriate use of electronic devices, and violations of other Palmer House rules. The court ruled that the juice incident was inadmissible because it was not disclosed in discovery. Pavlinic could question Anna about rule violations, but he could not question her about the sexual nature of any of the violations. Pavlinic reiterated that he wanted to question Anna on these issues because the defense's theory was that Anna made false allegations to leave the Palmer House, and the court again reminded him he could not question about anything sexual. During cross examination of Anna, Pavlinic asked her if she attempted to commit suicide. The State objected on relevance grounds; Pavlinic said that it showed Anna went to counseling without ever mentioning the sexual assault allegations. The court asked Pavlinic if he could ask this in a different manner that does not mention the suicide attempt. The court then told Pavlinic that he could no longer participate because he was not acting in good faith and was unethical. The court believed that Pavlinic intended to prejudice the jury against Anna. Pavlinic could sit with Copes's local counsel, Rand, at the table during the remainder of the trial. The court denied Pavlinic's request for a mistrial, and Rand continued with the case. The jury convicted Copes of two counts of sexual battery of two minors. Copes petitioned for writ of certiorari.

ISSUE

Whether the trial court denied Copes the right to counsel of his choice.

HOLDING

Because Copes's right to counsel of his choice must be reasonably balanced with the necessity for the trial court to control its proceedings and the conduct of attorneys appearing before it, because Pavlinic repeatedly committed violations of the court and showed disrespect, because Pavlinic still participated in the trial in a limited capacity by remaining at the table with Rand and Copes, and because Copes's defense presentation of the case to the jury continued with Rand, the trial court did not deny Copes the right to counsel of his choice. Therefore, the Supreme Court affirmed the judgment of the Lowndes County Circuit Court.

DISSENT

Presiding Justice King argued that Pavlinic did not violate any trial court rules when delivering his opening statement or during his cross examination of Anna, and if he did, the trial court's decision was too extreme. He further explained that the trial court failed to exhaust other remedies to sanction Pavlinic for his conduct in the courtroom, such as censuring, reporting to the bar, fining, or instituting contempt proceedings, before preventing him from participating further in the case. Therefore, the trial court erred by removing Pavlinic from meaningfully participating in the case.

Affirmed - 2019-CT-00302-SCT (Feb. 10, 2022)
En Banc Opinion by Justice Chamberlin - Dissent by Presiding Justice King
Hon. James T. Kitchens, Jr. (Lowndes County Circuit Court)
George T. Holmes (Pub. Def. Office) for Appellant - Barbara W. Byrd, Abbie Eason Koonce (Att'y Gen. Office) for Appellee
Briefed by Marlee Russell

Click here to view the full opinion

MISSISSIPPI COURT OF APPEALS DECISIONS – FEBRUARY 8, 2022

COURT OF APPEALS - CIVIL CASES

BLUE CROSS & BLUE SHIELD OF MISS. V. BROWN & BROWN OF MISS. LLC

CIVIL - CONTRACT

CIVIL PROCEDURE - WRIT OF GARNISHMENT - BURDEN - Pursuant to Miss. Code Ann. § 11-35-45, if the plaintiff believe that the answer of the garnishee is untrue or that it is not a full discovery as to the debt due by the garnishee or as to the property in his possession belonging to the defendant, he shall, at the term when the answer is filed, unless the court grant further time, contest the same, in writing, specifying in what particular he believes the answer to be incorrect

CONTRACTS - ASSIGNMENT - VALIDITY - According to *Saxon Group Inc.*, the general rule in Mississippi is that the right to receive money due or to become due under an existing contract may be assigned

CIVIL PROCEDURE - GARNISHMENT CONTEST - COSTS & ATTORNEY'S FEES - Pursuant to Miss. Code Ann. § 11-35-45, if a garnishee's answer is found correct, it shall have judgment for the costs against the plaintiff; however, absent a contractual provision or statutory authority providing for attorney's fees, such may not be recoverable unless punitive damages are also proper

FACTS

In January 2015, Sherri Baker and Blue Cross and Blue Shield of Mississippi ("BCBS") entered into a "Certified Agent Agreement" that allowed Baker to sell BCBS products in exchange for a commission. In July 2015, Baker assigned any compensation from the agreement to her company, Coast Benefit Professionals LLC ("Coast Benefit"). In early 2018, Brown and Brown of Mississippi LLC ("Brown") obtained two judgments against Baker and later filed suit against Baker in circuit court to enforce the judgments. In July 2019, Brown filed suggestions for writs of garnishment against BCBS, Coast Benefit, and The Peoples Bank, which were issued for each company the same day. BCBS answered the garnishment, denying indebtedness to Baker and asserting the validity of Coast Benefit's assignment. Brown submitted requests for production of documents and requests for admissions to BCBS in November 2019, which were answered in December 2019. Brown also submitted requests to Baker in March 2020; there was no indication in the record whether Baker responded. In August 2020, Brown filed a motion to compel payment from BCBS based on the garnishment. BCBS responded to the motion in October 2020, arguing that the motion should be denied because Brown failed to timely contest BCBS's answer to garnishment and that BCBS owed no money to Baker. The motion to compel was heard in October 2020 and was granted by the circuit court. The circuit court found that BCBS was to pay Baker and not Coast Benefit because she earned the commissions herself, ordered BCBS to tender payments to Brown for any commissions earned by Baker from July 11, 2019 until the Judgment was satisfied, and ordered that there was no reason to delay entry of final judgment of Brown's claims against BCBS. The judgment was entered on December 2, 2020. BCBS appealed.

ISSUES

Whether the circuit court erred in (1) finding BCBS liable for a garnishment when Brown did not file a written contest to BCBS's garnishment answer until one year after the expiration of the court term when BCBS's garnishment answer was filed; (2) finding BCBS liable for a garnishment when Baker had assigned her payment rights four years before BCBS was served with the writ of garnishment; and (3) not awarding BCBS its costs and attorney's fees incurred in defending Brown's contest to BCBS's garnishment answer.

HOLDING

(1) Because Brown did not contest BCBS's answer until substantially after the term of court, Brown's motion to compel should have been denied as untimely, and the circuit court erred in finding BCBS liable for a garnishment. (2) Because Baker lawfully assigned her interest in commissions under the Certified Agent Agreement to Coast Benefit years before BCBS was served with the writ of garnishment, BCBS truthfully answered that it was not indebted to Baker, and the circuit court erred in finding otherwise. (3) Because the judgment was found in favor of BCBS, it was entitled to its costs under the statute but not attorney fees. Therefore, the Court of Appeals reversed, rendered, and remanded the judgment of the Harrison County Circuit Court.

Reversed, Rendered, & Remanded - 2020-CA-01414-COA (Feb. 8, 2022)
Opinion by Judge Emfinger
Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court, Second Judicial Dist.)
James Altus McCullough II & William Dement Drinkwater for Appellant - Mariano Javier Barvié for Appellee
Briefed by Allyson Avant

Click here to view the full opinion

NOWELL V. STEWART

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CHILD SUPPORT - *ADAMS* FACTORS - When determining whether a modification of child support is warranted, a judge may consider several factors: (1) increased needs caused by advanced age and maturity of the children; (2) increase in expenses; (3) inflation; (4) the relative financial condition and earning capacity of the parties; (5) the health and special needs of the child, both physical and psychological; (6) the health and special needs of the parents, both physical and psychological; (7) the necessary living expenses of the father; (8) the estimated amount of income taxes the respective parties must pay on their incomes; (9) the free use of a residence, furnishings, and automobile; and (10) such other facts and circumstances that bear on the support subject shown by the evidence

FAMILY LAW - CHILD SUPPORT - MODIFICATION - At trial, the parent seeking child support modification bears the burden of showing a material change of circumstances of one or more of the interested parties not reasonably foreseeable at the time of the divorce, which may be done by showing that a significant increase in the cost of goods or services or by a specific showing of needs not previously existing; a general pronouncement of increased expenses does not rise to the level of a material change in circumstances warranting modification

FAMILY LAW - RECORDS - CONFIDENTIALITY & SEALING - Before sealing a record, a trial court must first balance the parties' competing interests, which are the public's right of access versus confidentiality

FACTS

Cynthia Stewart and Michael Nowell married in 1999. In 2002, they had a daughter, H.G.N., whom a doctor diagnosed with autism spectrum disorder around 2010. Cynthia and Michael divorced in 2013, with the judgment incorporating their Marital Dissolution Agreement ("MDA"). In accordance with the MDA, the judgment granted Stewart physical custody of H.G.N., Michael standard visitation, and shared joint legal custody. Michael consented to pay Cynthia in child support, $590 a month for the first three years and $1,000 per month beginning in January 2016 and ending when H.G.N. turned twenty-one. Regarding medical bills, the MDA stipulated that Cynthia bore responsibility for H.G.N.'s monthly healthcare premiums. It also required Michael and Cynthia to each pay one-half of H.G.N.'s healthcare and deductibles not covered by her insurance. Cynthia filed a complaint in 2016 for child-support modification and contempt, alleging that a material change in circumstances occurred since the parties' judgment of divorce and MDA that justified an increase in Michael's child-support obligation. Specifically, she claimed that "H.G.N. is now older, larger, involved in more activities and pastimes, and the overall general costs of raising said children has increased." Also, she requested a modification of Michael's visitation schedule. Michael filed a counter-complaint for modification and contempt and sought sole physical custody in response. In 2018, a trial commenced, and the chancellor suspended the trial sua sponte based on alleged attempts to influence the court's decisions, such as an email threatening witnesses. The chancellor subsequently sealed the case, imposed a gag order, and suspended the trial for an investigation to be conducted. In 2020, the parties filed a joint stipulation that limited the issues for the rest of the trial. Thereafter, the trial resumed with the chancellor clarifying that the amount of H.G.N.'s reasonable monthly expenses remained the only issue before the court. The chancellor made a preliminary opinion based solely on the parties' Miss. Unif. Chancery Ct. R. 8.05 financial statements. He determined that $2,000 a month for H.G.N.'s monthly expenses from now until she turns twenty-one was sufficient, disagreeing with Cynthia's Rule 8.05 financial statement. Additionally, the chancellor ruled that Cynthia's request for Michael to pay back child support in the amount of $2,000 for the past three years for a lump sum of $30,000 was reasonable. The chancellor found that Cynthia's demand for Michael to pay $5,600 in back medical expenses was reasonable. After the chancellor's preliminary opinion, Michael testified that by the end of their marriage, he provided Cynthia items for housing and transportation, valued at $450,000, to compensate the future needs of H.G.N. and claimed that the MDA included a plan to increase child support. He asserted that H.G.N.'s special needs have not changed since the divorce, except for her private school tuition that he claimed to pay $900 per month for but provided no evidence of such funding and differed from his Rule 8.05 statement. Cynthia testified extensively about the ways in which H.G.N.'s diagnosis has impacted her needs and thus her expenses; her Rule 8.05 statement reflected these expenses. Upon the trial's end, the chancellor found that, based on the evidence, a substantial and material change in circumstances had occurred and that an increase in child support was reasonable. Accordingly, in addition to the

amounts determined in his preliminary opinion, the chancellor ordered Michael to pay one-half of any medical insurance premiums for H.G.N., one-half of any non-covered medical expenses, and the cost of her senior-year tuition after any grants and scholarships have been applied. In September 2020, Cynthia filed a motion to remove the seal. Michael opposed the motion, filing a motion to dismiss for lack of jurisdiction. Cynthia failed to set a hearing on her motion, and in November 2020 moved to unseal the case. Michael filed a motion in opposition. The Supreme Court passed the motion to unseal for consideration with the appeal. Michael appealed.

ISSUES

Whether (1) the medical expenses relating to H.G.N.'s special needs were foreseeable at the time of the divorce and the chancellor erred in relying on her special needs as a basis to increase support; (2) the chancellor erred by failing to address the *Adams* factors when determining whether a material change in circumstances had occurred that warrants a modification of child support; (3) Cynthia failed to meet her burden of proving any material and unforeseen change in circumstances since the judgment of divorce and original child-support order; and (4) Michael's motion in opposition of unsealing the case should be granted.

HOLDING

(1) Because, although it is foreseeable that expenses increase with the natural growth of the child, it is impossible to foresee the actual amount of the increase, and because the Supreme Court has held that a factor to consider in modification is the health and special needs of the child, both physical and psychological, the chancellor did not err in relying on H.G.N.'s special needs as a basis to increase support. (2) Because the Supreme Court has continuously stated that the *Adams* factors may be considered, rather than that they must be, and because the record indicated the chancellor considered some, if not all, of the factors, the chancellor did not err by failing to explicitly address the factors. (3) Because Cynthia specifically stated the basis and amounts of the increased expenses and showed that such expenses were unforeseeable at the time of the divorce by providing extensive testimony about H.G.N.'s diagnosis impacting her needs and expenses, a Rule 8.05 financial statement that reflected the expenses, receipts of purchases, education and medical records, and physician testimony about H.G.N.'s needs and abilities, Cynthia met her burden of proving material and unforeseen circumstances. (4) Because the public's right of access was outweighed by the substantial harm that public disclosure of H.G.N's confidential medical records and testimony relating to H.G.N. would cause her, and because the ultimate reasons for sealing the case stemming from the outside influences were moot, the case file remained sealed and confidential, however, the gag order was lifted. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Chancery Court.

Affirmed - 2020-CA-00728-COA (Feb. 8, 2022)
Opinion by Presiding Judge Carlton
Hon. John C. McLaurin Jr. (Rankin County Chancery Court)
John S. Grant IV for Appellant - Heather Marie Aby, Kathleen Elizabeth Carrington, & Donna Brown Jacobs for Appellee
Briefed by Katie Lee Crockett

Click here to view the full opinion

UNITED SERVS. AUTO. ASS'N V. MOFFATT

CIVIL - INSURANCE

INSURANCE - UNINSURED-MOTORIST COVERAGE - STATUTE OF LIMITATIONS - A cause of action against an insurer for uninsured or underinsured-motorist benefits is subject to a three-year statute of limitations
INSURANCE - UNINSURED-MOTORIST COVERAGE - STATUTE OF LIMITATIONS - The statute of limitations for an uninsured-motorist claim begins to run when it can be reasonably known that the damages suffered exceed the limits of insurance available to the alleged tortfeasor
INSURANCE - DUTY OF THE INSURED - REASONABLE CARE - In determining whether an insured has acted reasonably regarding coverage of his insurance contract, the insured has the duty to exercise reasonable care, due

diligence as a reasonable and prudent man to acquire information about the accident, so that he may be readily informed about claims out of which damage may arise

FACTS

Taylor Moffatt was injured in a two-car accident on February 4, 2012. At the time of the accident, Moffatt had uninsured/underinsured motorist ("UM") insurance coverage through a policy issued by United Service Automobile Association ("USAA"). Nellie Barber, the driver of the second vehicle, was insured through a policy issued by GEICO. After being transported from the accident scene to the hospital, Moffatt was diagnosed with fractures to her third and fourth metacarpals on her dominant hand. Five days later, Moffatt had the first of two surgeries that she attributed to the accident. On July, 1, 2013, Moffat underwent a second outpatient surgery and, on July 15, 2013, she received her last medical treatment associated with the accident. Moffatt's attorney put GEICO on notice of representation in December 2013, and settlement negotiations began in February 2014. The record reflected that at no time did Moffatt's lawyer specifically ask GEICO what the policy limits were under Barber's policy during settlement negotiations. In December 2014, GEICO sent a letter to Moffatt's attorney asking him to advise if he had discussed a settlement offer of $25,000 with Moffatt, which GEICO initially made in June 2014. The record contained no correspondence from Moffatt's lawyer in response to the letter, but on January 16, 2015, Moffatt filed a complaint against Barber in the County Court of Jackson County seeking actual and compensatory damages as a result of Barber's alleged negligence. Barber answered the complaint in a timely manner. Moffatt served Barber with combined discovery requests in April 2015, and on September 10, 2015, Barber responded to the combined discovery requests. The responses included a copy of the policy-declaration page for Barber's insurance policy in effect on the date of the accident, which showed that Barber had $50,000.00 in coverage for the car accident. On October 19, 2016, Moffatt filed a motion to amend her complaint to add USAA as a defendant and add a claim against USAA for UM coverage. The next day, the county court entered an agreed order allowing Moffatt to amend her complaint, which she filed on October 26, 2016. In response, USAA filed a motion for summary judgment asserting that Moffatt's UM claim was barred by the three-year statute of limitations because Moffatt was aware, or should have been aware, that her damages exceeded Barber's policy limits "far more than three years prior to the date she filed her [a]mended [c]omplaint." Moffatt opposed USAA's motion asserting that she was unaware of Barber's policy limits until September 10, 2015, the date that Barber served her discovery responses. Subsequently, USAA filed a reply supporting its motion, and the county court conducted a hearing. The county court found that Moffatt should have reasonably known she had a UM claim against USAA by July 15, 2013, the date she received the last medical treatment associated with the accident, and therefore Moffatt should have filed the claim by July 15, 2016. As a result of this finding, the county court granted summary judgment in USAA's favor, finding that Moffatt's claims against USAA were barred by the statute of limitations. Moffatt appealed to the Jackson County Circuit Court, asserting that a genuine issue of material fact existed regarding when she knew or should have known of her UM claim against USAA three years before she filed her amended complaint against it on October 26, 2016. The circuit court reversed the county court's summary judgment in USAA's favor, finding there was a genuine issue of material fact as to when Moffatt knew or should have known her damages exceeded Barber's available insurance coverage. USAA appealed.

ISSUE

Whether a genuine issue of material fact existed as to whether Moffatt reasonably could have known the damages she suffered exceeded the limits of Barber's insurance on or before October 26, 2013.

HOLDING

Because USAA asserted that Moffatt's UM claim accrued on July 1, 2013, the date of Moffatt's second surgery, and because Moffatt asserted that her claim did not accrue until September 10, 2015, when she learned in discovery that Barber's liability policy limits were $50,000, a genuine issue of a material fact existed as to whether Moffatt could have reasonably learned that the extent of her injuries exceeded the extent of Barber's liability policy before October 26, 2013, and the circuit court did not err in reversing the county court's order of summary judgment in USAA's favor. Therefore, the Court of Appeals affirmed and remanded the judgment of the Jackson County Circuit Court.

Affirmed & Remanded - 2020-CA-01391-COA (Feb. 8, 2022)
Opinion by Presiding Judge Carlton
Hon. Kathy King Jackson (Jackson County Circuit Court)

Edward C. Taylor & Nathan Ryne Hand for Appellant - Courtney Parker Wilson for Appellee
Briefed by Dallas Martin

Click here to view the full opinion

COURT OF APPEALS - POST-CONVICTION RELIEF

MANGUM V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PROCEDURAL BAR - TIMING - Pursuant to Miss. Code Ann. § 99-39-5(2), a motion for post-conviction relief must be filed within three years following the entry of judgment of conviction; failure to file within the three-year period procedurally bars appeal of the dismissal of the motion
POST-CONVICTION RELIEF - STANDING - SUCCESSIVE MOTIONS - Pursuant to Miss. Code Ann. § 99-39-23(6), an order that dismisses a petitioner's motion or denies relief is a final judgment; therefore, second or successive motions are barred
POST-CONVICTION RELIEF - PROCEDURAL BAR - EXCEPTIONS - Pursuant to Miss. Code Ann. § 99-39-23(6), evidence, which was not previously discoverable, that would have been practically conclusive if it were available at trial is excepted from the procedural bars
POST-CONVICTION RELIEF - PROCEDURAL BAR - EXCEPTIONS - In extraordinary circumstances, a claim of ineffective counsel may be excepted from the procedural bars applicable to motions for post-conviction relief

FACTS

In 1981, Gerald Mangum pled guilty to murder, rape, and burglary of an occupied dwelling. Mangum was sentenced to life imprisonment for his murder conviction. In 1982, Mangum filed a motion to withdraw his guilty plea for murder, which was denied. In 1988, Mangum filed a motion to vacate the judgment, which was treated as a post-conviction relief ("PCR") motion and dismissed. Mangum appealed to the Supreme Court, which affirmed the denial. In 1990, Mangum filed a petition for habeas corpus relief in federal court. In 1993 the magistrate judge recommended that Mangum's petition be denied. Mangum objected to recommendation of denial and submitted a petition to amend. The district court adopted the magistrate judge's recommendation and denied Mangum's petition to amend. Mangum then appealed to the Fifth Circuit Court of Appeals, which affirmed the denial. Mangum filed his second PCR motion in 1998 and his third PCR motion in 2004; both were dismissed. Also in 2004, Mangum filed his fourth PCR motion, which was denied. In 2007, Mangum filed his fifth PCR motion, which was denied in 2009. Mangum appealed, and the Court of Appeals affirmed. In 2017, Mangum was paroled and released from prison. Later in 2017, Mangum filed his sixth PCR motion in the Supreme Court, which was dismissed without prejudice so that Mangum could re-file in the circuit court. Mangum then filed his sixth PCR motion in the circuit court. In 2020, Mangum filed an amended PCR motion, which was considered his seventh PCR motion. Later in 2020, the circuit court dismissed Mangum's sixth and seventh PCR motions, finding that Mangum's PCR motions were barred as successive writs and that Mangum failed to meet his burden of proving that his claims were excepted from the procedural bar. Mangum appealed.

ISSUE

Whether the circuit court abused its discretion by dismissing Mangum's sixth and seventh PCR motions.

HOLDING

Because Mangum's sixth and seventh PCR motions were not filed within the three-year statute of limitations, because Mangum had previously filed PCR motions that were denied or dismissed, because the affidavits from Mangum's sisters and mother did not meet the exception of newly discovered evidence, and because Mangum failed to show extraordinary circumstances that would except his claim of ineffective assistance of counsel from the procedural bar, the circuit court did not abuse its discretion by dismissing Mangum's sixth and seventh PCR motions. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2020-CP-01205-COA (Feb. 8, 2022)
Opinion by Presiding Judge Carlton
Hon. Betty W. Sanders (Hinds County Circuit Court, First Judicial Dist.)
Pro se for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee
Briefed by Abbey Bufkin

Click here to view the full opinion

COURT OF APPEALS - CRIMINAL CASES

LADNER V. STATE

CRIMINAL - FELONY

EVIDENCE - ADMISSIBILITY - HARMLESS ERROR - If an erroneous admissibility ruling does not prejudice the accused, then the error is considered harmless and the reviewing court it not required to reverse the lower court
EVIDENCE - PRIOR BAD ACTS - EXCEPTIONS - Pursuant to Miss. R. Evid. 404(b), prior bad acts may be admissible if the prior bad act and the crime in question are closely related, in order to avoid confusing the jury, or to give a complete story at trial; evidence of a prior bad act may be admissible in order to explain law enforcement's actions during an arrest

FACTS

In February 2018, Harrison County Sheriff's Deputy Caleb Gregoire pulled over Jamie Ladner for an expired tag. Gregoire's body camera recorded the stop, and the recording was admitted into evidence. Ladner informed Gregoire of a previous manufacturing marijuana charge and that his license was expired. Ladner consented to a search of his vehicle and said that there were no weapons or contraband in the vehicle. When searching the vehicle, the deputy found a glass meth pipe and a gun. Ladner acknowledged that he lied about his knowledge of the gun and meth pipe. The deputy took the gun and issued a citation for possession of drug paraphernalia. After the Harrison County Sheriff's Office confirmed Ladner's prior conviction and obtained an arrest warrant, Ladner was arrested for possession of a firearm by a felon. The indictment was later amended to reflect Ladner's status as a non-violent habitual offender. The day before trial, the State motioned to prohibit the testimony of Debbie Holbrook. Holbrook was expected to testify that Becky Gregory, Ladner's aunt, owned the vehicle, asked Ladner to get it repaired, and owned the gun. The trial court ruled the testimony regarding the conversation inadmissible hearsay but allowed the testimony regarding ownership the vehicle. Ladner filed two motions in limine requesting the court to prohibit or limit any mentioning of his prior convictions under Miss. R. Evid. 609, prior bad acts pursuant to Miss. R. Evid. 404(b), including the body-camera footage from the traffic stop, as well as any uncharged criminal actions. The trial court allowed evidence of Ladner's manufacturing marijuana conviction and the body-camera footage relevant to the meth pipe, finding that redacting such footage would confuse the jury as to why the office began searching the vehicle. Ladner was found guilty and sentenced to serve six years in the custody of the Mississippi Department of Corrections. The trial court denied Ladner's motion for a new trial or judgment notwithstanding the verdict. Ladner appealed.

ISSUES

Whether the trial court erred by (1) excluding the testimony of Debbie Holbrook and (2) allowing the body-camera footage to be admitted into evidence.

HOLDING

(1) Because Holbrook's statement was not offered to prove the truth of the matter asserted and only offered to show why Ladner was in possession of the truck, and because the evidence of Ladner's guilt was overwhelming, the trial court erred in prohibiting Holbrook's testimony, and such error harmless. (2) Because the footage was admitted to explain the deputy's actions, and because the jury was entitled to hear all the circumstances surrounding the stop and subsequent

search, the evidence was admissible. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

SPECIAL CONCURRENCE

Judge Emfinger agreed that the trial court did not err by admitting the body-camera footage into evidence. He argued that Holbrook's statement should have been allowed at trial because the statement was offered into evidence to explain why Ladner had the vehicle rather than prove the truth of the matter asserted.

DISSENT

Judge McCarty argued that exclusion of Holbrook's testimony deprived Ladner of a fair trial as her corroboration was one of the only pieces of evidence to support his theory of defense. He cited precedent which found that a criminal defendant is entitled to present his defense to the finder of fact, and it is fundamentally unfair to deny the jury the opportunity to consider the defendant's defense when there is testimony to support the theory. Because of this, he would have reversed and remanded for a new trial.

Affirmed - 2020-KA-00299-COA (Feb. 8, 2022)
Opinion by Judge Westbrooks - Special Concurrence by Judge Emfinger - Dissent by Judge McCarty
Hon. Roger T. Clark (Harrison County Circuit Court, First Judicial Dist.)
George T. Holmes (Pub. Def. Office) for Appellant - Lauren Gabrielle Cantrell (Att'y Gen. Office) for Appellee
Briefed by Christian Eaves

Click here to view the full opinion

LOWE V. STATE

CRIMINAL - FELONY

CONSTITUTIONAL LAW - CONFRONTATION CLAUSE - TESTIMONIAL STATEMENTS - The Confrontation Clause bars admission of testimonial statements made by a witness not appearing at trial unless that witness was unavailable and the defendant was given a prior opportunity to cross-examine the witness; the Supreme Court has held that a statement is testimonial when it is given to the police or individuals working with the police for the purpose of prosecuting the accused
CONSTITUTIONAL LAW - CONFRONTATION CLAUSE - ADMISSIBILITY – Police officers cannot, through their trial testimony, refer to the substance of statements given to them by nontestifying witnesses in the course of their investigation, when those statements inculpate the defendant
CRIMINAL PROCEDURE - APPEALS - HARMLESS ERROR - Pursuant to *Pitchford*, an error will be deemed harmless where the same result would have been reached in the end
CRIMINAL PROCEDURE - LIMITING INSTRUCTION - DENIAL - The erroneous denial of a limiting instruction is harmless error unless it deprives the defendant of a fair trial

FACTS

On January 23, 2018, Officer Gregory Holliman of the Hattiesburg Police Department contacted a known confidential informant (hereinafter "CI") and coordinated a controlled buy of crack cocaine from the appellant, Clarence Lowe Jr. Holliman provided the CI with the money for the controlled buy and a cell phone fitted with recording equipment, then patted her down for contraband. The CI dialed the number given to her by Holliman, activating the audio recording, then entered the apartment that was identified as Lowe's. The CI purchased the crack cocaine and returned to Holliman who patted her down again, secured the drugs, and sent them to be tested at the Mississippi Crime Laboratory. On May 21, 2018, a second controlled buy from Lowe was completed by Holliman and the same CI. As a result of these two sales, Lowe was indicted on January 23, 2018, for conspiracy to sell a controlled substance (Count I) and sale of a controlled substance within 1,500 feet of a church (Count II); and again, on May 21, 2018, for conspiracy to sell a controlled substance (Count III) and sale of a controlled substance within 1,500 feet of a church (Count IV). Counts I and III were separated from Counts II and IV and dropped. On September 18, 2019, Lowe went to trial on Counts II

and IV. The CI was not available to testify at trial. Citing the CI's absence, Lowe filed a motion in limine to keep out the audio and visual recording taken by the CI, the CI's written statement, the recordings made by law enforcement through a cellphone in the CI's pocket, and all hearsay testimony of the CI. Lowe argued that the evidence was testimonial, subject to cross-examination, and, in turn, a violation of the Confrontation Clause because the CI was not available for cross-examination. The State responded that Holliman worked with the CI in the past and could use the evidence to identify Lowe, who he knew from another drug deal. The trial court found that the CI's written statement was testimonial and for that reason was inadmissible; however, the court allowed the video and audio recordings to be admitted. Holliman testified that he had an extensive history working with the CI. He said that she originally contacted him to inform him that she could buy crack cocaine from Lowe, and that from his prior knowledge he knew the complex was close to a church. Holliman then testified to the events of both buys, noting that he followed protocol. The audio and video recordings were played. They confirmed Holliman's testimony, and the audio played the conversation during the buy for the jury in which Lowe told the CI to weigh the drugs and stated his intention to buy more of the substance from his supplier. The case agent for the January 2018 controlled buy testified to his presence, confirmed that the CI entered Lowe's apartment, and testified that he measured from the apartment complex to the church, which resulted in less that 1,500 feet. Lowe did not appear for the second day of the trial. The trial judge continued the trial in his absence, finding that Lowe knowingly waived his right to be present at the trial. Lowe was convicted on Count II, sale of a controlled substance within 1,500 feet of a church, and the jury sentenced him to serve twenty-four years. Lowe appealed.

ISSUES

Whether the court erred in allowing the State to play audio and video recordings made by an unavailable witness, and in turn (1) violated Lowe's right to confront the witness under the Confrontation Clause (2) violated Lowe's right to confront the witness under Miss. R. Evid. 403(b) and 404; and (3) erred by failing to provide a limiting instruction to the jury for consideration of the testimony.

HOLDING

(1) Because Holliman's testimony that the CI had bought drugs from Lowe in the past exceeded the need and permissible scope of explaining Holliman's actions while simultaneously implicating Lowe, the testimony was admitted in error. However, because the testimony did not change the result of the trial, and because the State provided overwhelming evidence that Lowe sold the crack cocaine to the CI, Lowe suffered no prejudice from the testimony and, therefore, the error was harmless. (2) Because Lowe did not object to the testimony on this specific basis at trial, he waived this argument on appeal. (3) Because the absence of the limiting instruction did not deprive Lowe of a fair trial, the error was harmless, and this argument was without merit. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2019-KA-01621-COA (Feb. 8, 2022)
Opinion by Chief Judge Barnes
Hon. Jon Mark Weathers (Forrest County Circuit Court)
Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Lauren Gabrielle Cantrell (Att'y Gen. Office) for Appellee
Briefed by Kelsey Davis

Click here to view the full opinion

MISSISSIPPI CASES EDITOR
GREYSON YOUNG

ASSOCIATE CASES EDITORS
GABRIELLE BEECH
CAROLINE HEAVEY
JOSHUA HOLMES
CECELIA HURT
BETSY MONTAGUE
BLAKE TIMS

Thank you for supporting the Mississippi Law Journal.

Questions or comments: Greyson Young, newsletter@mississippilawjournal.org

All BriefServ subscribers traditionally receive access to our website with archived case briefs since January 2016. Our BriefServ Archive is available to subscribers at https://mississippilawjournal.org/briefserv/. If you have questions about accessing or using the BriefServ website, please contact us at support@mississippilawjournal.org