

MISSISSIPPI SUPREME COURT DECISIONS – FEBRUARY 17, 2022***SUPREME COURT - ORDERS*****FULCHER V. STATE****ORDER****ORDER**

Jonathan Fulcher filed an Application for Leave to Proceed in the Trial Court With 2nd Petition for Post-Conviction Collateral Relief. The Court noted that the mandate in Fulcher's direct appeal was issued in 2002, and as such, his petition was barred as untimely unless excepted. Further, the Court noted that because Fulcher's previous petition for post-conviction relief was rejected, his present petition was successive. Lastly, the Court held that Fulcher's claims were barred by res judicata. The Supreme Court held that Fulcher presented no arguable basis for his claims and that the claims raised in his successive petition were frivolous. Further, the Court issued a warning that future filings deemed frivolous could result in monetary sanctions or in restrictions on filing applications, or pleadings in that nature, for post-conviction collateral relief in forma pauperis. Therefore, the Supreme Court denied Fulcher's Application for Leave to Proceed in the Trial Court With 2nd Petition for Post-Conviction Collateral Relief.

OBJECTION

Presiding Justice King agreed that Fulcher's application for post-conviction relief should be denied. However, he disagreed with the Court's finding that the application was frivolous and the Court's warning that future filings being deemed frivolous may result in monetary sanctions or restrictions on filing applications for post-conviction collateral relief in forma pauperis. He argued that monetary sanctions placed on indigent defendants only serve to punish or preclude the defendants from their lawful rights to appeal and further violate a defendant's constitutional rights. Further, he argued that novel arguments which might remove a criminal defendant from confinement should not be discouraged by the threat of monetary sanctions and restrictions on filing. Rather, he argued that the Supreme Court should only dismiss or deny motions that lack merit.

Denied - 2021-M-01195 (Feb. 8, 2022)

Order by Justice Maxwell - Objection by Presiding Judge King

Briefed by [Mariel Soehner](#)

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LINSON V. STATE**EN BANC ORDER****ORDER**

Gregory Linson filed an Application for Leave to Proceed in the Trial Court. Linson was convicted of selling cocaine and sentenced as both a subsequent offender and a habitual offender to sixty years in prison. He previously filed six post-conviction applications for leave to seek post-conviction relief in the trial court. In his seventh post-conviction application, Linson claimed: (1) his sentence was illegal; (2) the statute he was convicted and sentenced under was unconstitutional; (3) material facts not previously presented require that his conviction and sentence be vacated; (4) the

chain of custody for the cocaine was insufficient; and (5) the State violated his due-process rights by failing to disclose the evidence-log book used at trial. The Court noted that an illegal-sentence claim is a recognized exception to the time, waiver, and successive-writ bars, so long as the claim has some arguable basis. However, the Supreme Court found that Linson neither explained his illegal-sentence claim nor cited any authority sufficient to merit relief from the bars. The Court also noted that Linson's claim challenging the constitutionality of a statute that was the basis for conviction and sentencing has not been recognized as an exception to the bars. Finally, the Court found that Linson's claims concerning the cocaine presented as evidence at trial were capable of determination at trial or on direct appeal and were therefore waived due to lack of cause and actual prejudice sufficient to merit relief. Because Linson had been warned of possible sanctions for frivolous filings twice before, the Court found that Linson's current filing was frivolous and that sanctions were proper. Therefore, the Supreme Court denied Linson's Application for Leave to Proceed in the Trial Court and restricted Linson from filing further applications for post-conviction collateral relief related to this conviction and sentence in forma pauperis.

OBJECTION

Presiding Justice King agreed that Linson's Application for Leave to Proceed in the Trial Court lacked merit and should be dismissed. However, he disagreed with the Court's order restricting Linson from filing further petitions for post-conviction collateral relief in forma pauperis. He argued that monetary sanctions placed on indigent defendants only serve to punish or preclude the defendants from their lawful rights to appeal and further violate a defendant's constitutional rights. Further, he argued that an individual who, even incorrectly, believes that he has been deprived of his freedom should not be expected to sit silently by and wait to be forgotten. Therefore, he argued that, rather than violating Linson's fundamental rights by restricting his access to the courts, the Supreme Court should find that his petition for post-conviction relief lacked merit.

Denied - 2018-M-01063 (Feb. 10, 2022)

En Banc Order by Justice Ishee - Objection by Presiding Justice King
Briefed by [Macy Walters](#)

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WILLIAMS V. STATE

ORDER

ORDER

Isaiah Williams filed an Application for Leave to Proceed in the Trial Court. The Court noted that the mandate in Williams's appeal was issued in 2008, and thus the petition was barred as untimely unless excepted. Next, the Court found that Williams's previous petitions for post-conviction relief had been rejected, and this petition was successive. Further, the Court pointed out that the claims raised in the present petition have been previously addressed and are barred by res judicata. The Court held that Williams presented no arguable basis for his claims and denied the petition. The Court found Williams's claims to be frivolous and warned him that any future frivolous claims could result in a monetary sanction or a restriction on his ability to file claims.

OBJECTION IN PART

Presiding Justice King agreed that Williams's application should be denied but disagreed that William's claim was frivolous and the Court's warning of future sanctions. He argued that Williams's application made reasonable arguments and therefore should not be deemed frivolous under the Court's previous definition. Additionally, he disagreed with the Court's warning that future filings may lead to restriction or sanctions and argued that monetary sanctions or restrictions on a criminal defendant only punish or preclude them from their lawful right to appeal and violate their constitutional rights. He argued, in the future, rather than punish the defendant, the Court should deny or dismiss claims that lack merit.

Ordered - 2021-M-01267 (Feb. 14, 2022)

Order by Justice Maxwell - Objection in Part by Presiding Justice King
Briefed by [Anna Tucker](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – FEBRUARY 15, 2022
COURT OF APPEALS - CIVIL CASES

ANDERSON V. S & S PROPS.

CIVIL - REAL PROPERTY

REAL PROPERTY - STANDING - TAX SALES - Prior to 2019, pursuant to Miss. Code Ann. § 27-45-27, a purchaser of property from a tax sale had standing to challenge the validity of that tax sale based upon notice

REAL PROPERTY - STANDING - TAX SALES - Pursuant to Miss. Code Ann. § 27-45-27(2), no purchaser of land that is sold at a tax sale shall have any right of action to challenge the validity of that tax sale

CIVIL PROCEDURE - STATUTORY AMENDMENTS - APPLICATIONS - A statutory amendment adopted prior to the issuance of a court's order must be applied to that order unless it impairs the obligation of a contract or abrogates a vested right

CIVIL PROCEDURE - VESTED RIGHTS - REQUIREMENTS - In order to be vested, a right must be a contract right, a property right, or a right arising from a transaction in the nature of a contract which is perfected to the degree that it is not dependent on the continued existence of the statute

FACTS

In 2015, S & S Properties Inc. ("S&S") purchased several pieces of real property at a tax sale held by the Tunica County Tax Collector's Office. In 2019, S&S filed a complaint in chancery court against Norma Anderson, the Tunica County Tax Collector, and Rechelle Siggers, the County Chancery Clerk (collectively "the County"), to set aside and void the tax sales purchased through the 2015 tax sale and to order the County to refund S&S for the purchases of the parcels. S&S asserted that the County failed to serve proper notice of the tax sales to the assessed property owners, and the parties subsequently agreed by stipulation that a sheriff's notice was not issued or served for the tax sales as required by Miss. Code Ann. § 27-43-3. After discovery, the parties signed an agreed order to grant S&S leave to amend its complaint and to join the assessed property owners. The County moved to dismiss the complaint, and S&S filed an amended motion for summary judgment. Following a hearing, the chancellor granted S&S's motion for summary judgment and denied the County's motion to dismiss. The chancellor also found that S&S had standing to challenge the validity of the tax sales. In so doing, the tax sales were set aside as void because the County did not provide proper notice to the assessed property owners, and the County was ordered to refund S&S for the purchase of the properties. However, between the filing of S&S's complaint and the court's final order, Miss. Code Ann. § 27-45-27 was amended to include § 27-45-27(2). The County appealed.

ISSUE

Whether the chancellor erred in granting S&S's amended motion for summary judgment because the amended Miss. Code Ann. § 27-45-27(2) applied to S&S's 2015 tax-sale purchases, and S&S, therefore, lacked standing to challenge the tax sales.

HOLDING

Because retroactively applying the amended statute would have impaired S&S's vested contract rights, Miss. Code Ann. § 27-45-27(2) failed to apply, and S&S, therefore, had standing to challenge the tax sales. Therefore, the Court of Appeals affirmed the judgment of the Tunica County Chancery Court.

Affirmed - 2021-CA-00033-COA (Feb. 15, 2022)

Opinion by Judge Smith

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DIVERSICARE OF MERIDIAN V. SHELTON

CIVIL - CONTRACT

CONTRACTS - CAPACITY - HEALTH-CARE SURROGATES - Under Miss. Code Ann. § 41-41-211, a surrogate may make a health-care decision for a patient who is an adult or emancipated minor if the patient has been determined by the primary physician to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available

CONTRACTS - CAPACITY - HEALTH-CARE SURROGATES - Miss. Code Ann. § 41-41-211 does not apply in such cases where an individual is mentally competent at all times

CONTRACTS - AGENCY - ESTABLISHING AUTHORITY - In order to establish agency authority, a claimant must present sufficient evidence of words, acts, or conduct of the principal to conclude that the agent that the authority to perform a specific act

FACTS

On August 13, 2019, Sarah Elizabeth Hamrick was admitted to Diversicare of Meridian (“Diversicare”) for rehabilitative care following a fall, and her daughter Linda Diane Shelton accompanied her for the admission process. Hamrick felt ill and told the Diversicare representative that Shelton “could sign the documents” for her. Shelton signed the documents as “Diane Shelton” in Hamrick’s presence and gave no indication that she was Hamrick’s legal representative. Shelton did not have authority to make healthcare decisions through a written healthcare proxy or through power of attorney, conservatorship, or guardianship, and no primary physician had declared Hamrick mentally incompetent. Shelton signed a “Resident Admission/Change Form,” which listed her as the “Primary Contact & Financially Responsible Party.” Shelton also signed an “Admission Agreement” which stated, “by my signature, I represent that I am a person duly authorized by Resident by law to execute this Admission Agreement and that I accept its terms.” The form also required documents that showed status verification of the legal representative, but Shelton had no such documents. Shelton did sign an arbitration agreement between Diversicare and Hamrick that allowed for revocation by written notice within thirty days but later claimed she had no authority to do so. On August 15, 2019, Hamrick died in the Diversicare facility. On March 2, 2020, Shelton was appointed the administratrix of Hamrick’s estate. In June 2020, Shelton filed a wrongful death suit against Diversicare, claiming that Diversicare breached the standard of care owed to Hamrick. Diversicare filed a motion to dismiss the proceeding and to compel arbitration in July 2020, arguing that Hamrick gave Shelton express authority to sign the admission paperwork, which included the arbitration agreement. Shelton argued that under the Uniform Health-Care Decisions Act, Miss. Code Ann. § 41-41-201 to 220, she had no legal authority to sign the documents. In September 2020, the circuit court heard argument on the motion to dismiss and compel arbitration and ruled to dismiss the motion, finding that Shelton did not have legal capacity or authority to agree to and sign the admissions agreement for Hamrick. Diversicare then filed a motion to alter or amend the circuit court’s judgment, arguing that there was no Mississippi precedent that required formal legal documents to show a conferral of actual agency authority and that Shelton was sufficiently granted actual authority to enter the arbitration agreement through oral communication. In November 2020, the circuit court denied Diversicare’s motion. Diversicare appealed.

ISSUES

Whether (1) the circuit court erred in applying Miss. Code Ann. § 41-41-211 and (2) Shelton had authority to sign the arbitration agreement under the principles of contract and agency law.

HOLDING

(1) Because there was no dispute that Hamrick was mentally competent, the circuit court erred in its application of Miss. Code Ann. § 41-41-211 by holding that a written instrument was required. (2) Because Diversicare failed to provide sufficient proof that Hamrick gave Shelton the authority to sign more than the documents required for Hamrick's admission into rehabilitative care, Shelton did not have authority to sign the arbitration agreement. Therefore, the Court of Appeals affirmed and remanded the judgment of the Lauderdale County Circuit Court.

Affirmed & Remanded - 2020-CA-01362-COA (Feb. 15, 2022)

Opinion by Judge McDonald

Hon. Charles W. Wright Jr. (Lauderdale County Circuit Court)

Margaret Sams Gratz for Appellants - William C. Hammack for Appellee

Briefed by [William Doherty](#)

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LAMBES V. LAMBES

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CUSTODY - ALBRIGHT FACTORS - While the *Albright* factors are important, a chancellor has ultimate discretion to weigh evidence in the way he sees fit; the polestar consideration in custody cases is the best interest and welfare of the child

CIVIL PROCEDURE - FINDINGS OF FACT - APPELLATE REVIEW - Where a chancellor has made no specific findings of fact, it is assumed that the chancellor resolved the fact issues in favor of the appellee

FAMILY LAW - CUSTODY - APPELLATE REVIEW - Where the specific basis of a decision is not stated in the chancellor's opinion, the decision will not be disturbed if substantial evidence can be found in the record supporting the decision

FAMILY LAW - CUSTODY - HISTORY OF FAMILY VIOLENCE - Miss. Code Ann. § 93-5-24 creates a rebuttable presumption that it is not in the best interest of the child to be placed in the sole custody, joint legal custody, or joint physical custody of a parent who has a history of perpetrating family violence; however, the presumption may be rebutted by a demonstration that the other parent's mental illness affects the best interest of the children, proof of successful completion of a parenting class by the perpetrator, and a determination that the perpetrator has committed no further acts of domestic violence

FAMILY LAW - CUSTODY - GUARDIAN-AD-LITEM - A chancellor's custody order will be upheld even if it is partly based on a less-than-perfect guardian-ad-litem investigation

FACTS

Eric and Angela Lambes were married in 2011 and had two children during the marriage. The couple separated in August 2014, with Angela alleging that Eric assaulted her. The Jackson County Justice Court issued an ex parte emergency domestic abuse protection order against Eric. Angela's attorney advised her not to press charges, and the chancery court dismissed her petition for a protective order without prejudice. By that time, Eric had filed a complaint for divorce on the ground of habitual cruel and inhuman treatment or, alternatively, irreconcilable differences. In her answer, Angela sought divorce on the same grounds and counterclaimed that Eric had exhibited violent behavior. Angela sought primary physical care, custody, and control of the minor children. After two years of continuances, the chancery court appointed a guardian ad litem ("GAL") and entered a temporary order awarding joint legal custody of the children to both parents and sole physical custody to Angela, with Eric being allowed visitation as agreed upon by the parties. The GAL filed an initial report in January 2017, which included reports of Eric's violent behavior, allegations that the children grew more aggressive after seeing their father, interviews with the children's counselor, and reports of a notebook prepared by Angela's mother, Debra Skinner, that compiled pictures of the children and her own recounting of incidents of abuse. The GAL report concluded that three of the *Albright* factors favored Angela and suggested she retain physical custody with Eric to receive reasonable visitation. At the hearing in February 2017, Angela accused Eric of abusing the children but could not provide specific instances or otherwise substantiate the claims. Eric expressed concern for Angela's mental health, evidenced by a letter from Eric's attorney to Angela's former attorney that detailed

an incident wherein Angela visited Eric's place of employment and was asked to leave by management. Eric testified to additional incidents that gave him "significant concern" for Angela's mental health. Eric's father, Robert Lambes, testified that the couple had lived with him for a period of time, during which Angela called his wife names, threw a set of keys at his head, and attacked his wife with a shirt. Angela testified that she was not diagnosed with a mental illness and asserted that the children were taken to the doctor constantly, intimating that the boys had contracted impetigo while in their father's care. She also asserted that Eric had smoked marijuana and that there had been several incidents of domestic violence between the couple. She ultimately requested sole physical custody with Eric to receive visitation every other weekend. Debra testified that Eric had punched holes in the walls of her house when they lived with her and that he was abusive. The GAL testified that the other witnesses' testimonies had altered her position as relayed in her initial report, but she reserved making any recommendation until Angela and Debra received psychological evaluations. The chancery court amended the temporary order and ordered temporary physical custody to both parents on an alternating one-week schedule, co-parenting classes, and psychological testing.

In March 2018, Angela filed a withdrawal of her consent to divorce on the ground of irreconcilable differences and a withdrawal of her consent to adjudicate the issues of child custody, visitation, and support. At the hearing, both Eric and Angela requested a modification of custody, asserting that the alternating one-week schedule was not working. The chancery court did not modify custody but rather ordered Eric and Angela to meet with Dr. Darlys Alford to work on their co-parenting issues and to meet with the child's pediatrician to follow-up on health concerns Angela noted. Angela subsequently filed a motion seeking to remove or replace the GAL, claiming that the GAL had only met with her once for thirty minutes in August 2016, had never interviewed the children, had not conducted a home visit since August 2016, did not meet with Angela regarding her motion for custody, and had shared a notebook Debra gave her with Eric's attorney. The GAL filed a revised report in November 2018, which included Dr. Alford's analysis of both parents wherein she reported that Angela seemed to suffer from PTSD and possible personality disorder and that Eric admitted to past anger issues. Dr. Alford suggested that Eric have primary custody, noting that the children seemed relaxed in his company. The GAL's report also noted that the pediatrician had no immediate health concerns for the children, contrary to the allegations in Angela's motion for modification of custody. In light of Angela's motion to replace her, the GAL withheld any recommendation pending the court's decision on Angela's motion to avoid concerns of bias. Angela moved to strike both the November 2018 report and the initial GAL report because it was contrary to the GAL's testimony at the subsequent hearing.

At the motions hearing in November 2018, Angela moved for a continuance. Eric's counsel noted that Angela's attorney had sent the children's pediatrician a letter and, because he took issue with specific language used by Angela and her attorney and because he did not want to be entangled with the litigation, the doctor decided not to treat the children any longer. The GAL testified that the children should remain more permanently in the father's home with visitation to the mother. The motion for continuance was granted, and temporary physical custody was awarded to Eric with Angela to receive visitation. Another hearing was held in May 2019, whereupon both parties asserted that they wanted a divorce. The chancellor asked if either party would agree that the divorce be granted to the other on the ground of habitual cruel and inhuman treatment, noting the protracted litigation up to this point. Eric's counsel agreed to admit the allegation and grant Angela a divorce on those grounds. The court granted Angela's counterclaim and awarded her a divorce while retaining jurisdiction over the separate issues of child support and custody.

The GAL then submitted a third, updated report in June 2019, which included all her previous findings and new information from a meeting with Angela. The GAL interviewed the pediatrician, who noted that the boys had no pressing medical concerns. In an interview, one of the children told the GAL that his mother "did not fuss at Dad because Dad would hurt her." However, he also said he had never seen his father harm his mother, and he did not believe he would do so. The child said that Angela and her mother frequently talked badly about Eric, with Debra even telling the boy that when he grew up his "Dad [would] try to kill him." The boy said his father spanked them but only when they got in trouble and that he never yelled. In the report, the GAL noted Miss. Code Ann. § 93-5-24(9)(a)(i) and the presumption against custody for a violent parent, but she recommended that the presumption was properly rebutted by Dr. Alford's conclusion that Angela had a personality disorder, the father's completion of parenting class, ongoing counseling, compliance with all orders of the court and the lack of any violence during the pendency of the litigation. At trial in June 2019, a psychological evaluation by a separate professional counselor was entered into evidence. The evaluation concluded that Angela had no identifiable mental issues but that she most likely suffered from Post-

Traumatic Stress Syndrome.” In the evaluation, Eric was characterized as a “capable and dependable parent” and that he “ha[d] no significant issues with anger” and “no potential for abuse or likelihood of development of the potential for child abuse.” On the other hand, Dr. Alford testified at trial that she had seen the boys with their mother and father on separate occasions. With Eric, the boys “seemed in good spirits and relaxed.” With Angela, the eldest was less participatory, and the youngest child was more active and “seemed to be sort of pressuring [Angela] to do what he wanted to do.” Dr. Alford concluded that Angela’s behavior “seem[ed] to be typical of someone who has a personality disorder,” and recommended Eric be awarded sole physical custody. Eric resumed his testimony regarding Angela’s mental health, noting that her father was schizophrenic. He admitted to habitual cruel and inhuman treatment, but not domestic violence.

When the trial resumed in October 2019, Eric testified that the stress of the litigation was adversely affecting the children’s health and that he could not successfully co-parent with Angela due to communication problems. The children’s counselor testified that both children had said they wanted to spend equal time with their parents. The counselor informed the GAL that the inconsistency between the households contributed to the boys’ problems but equivocated her recommendation by saying the mother’s “emotional support” was “very important,” but the “more kind of structured and a self-sufficient upbringing that a father typical[ly] brings is very important as well.” Ultimately, the counselor did not feel that it was appropriate to give a recommendation for custody. Angela’s attorney questioned Eric regarding the emergency domestic abuse order that was entered in August 2014. Even though the petition for the order was withdrawn, the chancellor allowed the attorney some latitude to explore the issue because domestic abuse is a factor to consider when awarding custody. Eric reiterated his concerns about Angela’s mental health, citing an incident when Angela stood in their yard and struck herself in the head with a board. Debra testified that she had never personally witnessed Eric physically abuse Angela, but she had seen bruises on Angela’s neck. She acknowledged that Angela’s father, uncle, and brother were all diagnosed with schizophrenia. In December 2019, the chancery court issued its bench ruling after discussing the *Albright* factors and considering the totality of the evidence. The court found that the best interest of the minor children would be served by awarding sole physical custody to Eric. The court awarded joint legal custody to both parents, and Angela was ordered to pay monthly child support payments. Angela appealed.

ISSUES

Whether (1) the chancery court’s award of child custody was supported by substantial evidence; (2) Eric’s confession to divorce on the ground of habitual cruel and inhuman treatment statutorily precluded him from being awarded custody; and (3) the GAL made material misrepresentations in her report.

HOLDING

(1) Because the appellate court is required to assume that the chancellor resolved all fact issues in favor of the appellee where the chancellor made no specific finding, and because there was credible evidence to support the chancery court’s ruling despite the fact that none of the *Albright* factors weighed in favor of Eric, the chancery court’s award of custody was supported by substantial evidence. (2) Because a counselor concluded that Angela had a personality disorder, because Eric completed a co-parenting class and received ongoing counseling, and because there was no credible evidence presented of any family violence after 2015, the statutory presumption against custody for a parent with a history of perpetrating family violence was rebutted by a preponderance of the evidence. (3) Because the GAL spent more than three years interviewing the parties, because the GAL thoroughly addressed Angela’s various allegations of abuse and none of those allegations were substantiated by testimony or other evidence, and because the chancellor made his own decision based upon findings of fact independent from the GAL’s reports, the GAL’s report was adequate and did not contain material misrepresentations. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Chancery Court.

CONCURRENCE IN PART & DISSENT IN PART

Judge McCarty argued that the majority opinion improperly disregarded the results of the *Albright* test in granting custody to Eric. While he acknowledged that the court does not consider the *Albright* factors a mathematical formula, he reiterated that it is a test of which the results should be considered. He noted that when every *Albright* factor is found neutral or in favor of one parent, then “the only possible ruling is to find that the prevailing parent is the one who should receive custody.” He would reverse the decision of the chancellor as manifestly in error for applying an erroneous legal standard because the results of the *Albright* test were not followed. In all other respects, he agreed with the majority.

Affirmed - 2020-CA-00095-COA (Feb. 15, 2022)

Opinion by Chief Judge Barnes - Concurrence in Part & Dissent in Part by Judge McCarty
Hon. Mark Anthony Maples (Jackson County Chancery Court)
Juliet Lawson Jowett for Appellant - G. Charles Bordis IV for Appellee
Briefed by [Morgan Jones](#)

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ROBINSON V. SMITH

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - DEFAULT JUDGMENT - RESPONSE - Before a default or a default judgment may be entered, it must be shown that the party allegedly in default failed to file a responsive pleading otherwise failed to defend in some manner

CIVIL PROCEDURE - COUNTERCLAIM - RESPONSE - A response to a stand-alone counterclaim that is not asserted in the answer is not required

CIVIL PROCEDURE - DEFAULT JUDGMENT - VOID - A default judgment entered against a party who is not “in default” is “void ab initio” and must be set aside

FACTS

In August 2019, Lionel Robinson and his passenger, Ferante Sims, were involved in a two-car accident with another driver, Patrick Smith. Robinson and Sims sued Smith, alleging Smith’s negligence caused the accident. Smith filed an answer denying liability. Smith also filed a separate document entitled “Counter-Claim” in which he alleged that Robinson’s negligence caused the accident. Robinson and Sims did not respond to the stand-alone counterclaim, and the trial court subsequently entered a default judgment against Robinson and Sims on the counterclaim as to negligence and liability. After the default judgment was entered, Smith filed a motion for summary judgment and dismissal of Robinson and Sims’s complaint. Smith argued that the default judgment on the counterclaim established that Robinson’s negligence caused the wreck as the “law of the case.” Robinson and Sims then filed a motion to set aside the default judgment and responded to Smith’s motion for summary judgment, but the trial court denied Robinson and Sims’s motion to set aside the default judgment and held that Smith was entitled to summary judgment. The trial court also certified as final its order granting summary judgment and dismissing Robinson and Sims’s claims against Smith. Robinson and Sims later filed a motion to reconsider the grant of summary judgment, claiming that Smith failed to properly serve the counterclaim, but it was denied. Robinson and Sims then filed a motion to dismiss Smith’s counterclaim, but it was also denied. Robinson and Sims appealed.

ISSUES

Whether the trial court erred by (1) denying the plaintiffs’ motion to set aside the default judgment; (2) granting Smith’s motion for summary judgment; and (3) denying the plaintiffs’ motion to reconsider the order granting summary judgment.

HOLDING

(1) Because Robinson and Sims were not in default, the trial court had no discretion to decline to set aside the default judgment, so the trial court erred in refusing to set aside the default judgment. (2) Because Smith’s stand-alone counterclaim was procedurally improper, and because Robinson and Sims had no obligation to file a responsive pleading, Robinson and Sims were not in default, and therefore the trial court erred in entering a default judgment against Robinson and Sims. (3) Because the trial court erred by entering a default judgment against Robinson and Sims, it necessarily follows that the trial court erred by relying on that default judgment in granting summary judgment against Robinson and Sims. Therefore, the Court of Appeals reversed and remanded the judgment of the Grenada County Circuit Court.

Reversed & Remanded - 2020-CA-01249-COA (Feb. 15, 2022)

Opinion by Presiding Judge Wilson
Hon. Joseph H. Loper Jr. (Grenada County Circuit Court)
Carlos Eugene Moore for Appellants - Robert F. Stacy Jr. & Joshua A. Turner for Appellee
Briefed by [Regan Monk](#)

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RUTLAND V. BURROUGHS

CIVIL - TORTS-OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

CIVIL PROCEDURE - MOTION TO RECONSIDER - FILING - If a motion for reconsideration is filed within ten days of the judgment, its treatment is governed by Miss. R. Civ. P. 59(e), which allows review of denial only for an abuse of discretion

CIVIL PROCEDURE - MOTION TO RECONSIDER - STANDARD OF REVIEW - Miss. R. Civ. P. 59(e) requires a successful movant to show: (i) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii) need to correct a clear error of law or to prevent manifest injustice

CIVIL PROCEDURE - MOTION TO RECONSIDER - FAILURE TO PRESENT EVIDENCE - Failure to present evidence that is available at the time that a motion for summary judgment is being considered is a valid ground for denial of a motion to reconsider

FACTS

In a previous suit against the defendants, the trial court granted Alisa Rutland's motion for a directed verdict, and all charges against her were dismissed. One year later, Rutland filed a malicious prosecution lawsuit against the defendants. Two years later, Rutland's attorney withdrew from representing her due to a difference of opinion on how to proceed with her claim of malicious prosecution. The trial court granted Rutland sixty days to either retain new counsel or proceed pro se. During the sixty-day period, the defendants moved for summary judgment, arguing that they had merely provided information to the district attorney and law enforcement, who then decided to prosecute Rutland. Rutland neither obtained new counsel nor responded to the defendant's motion within the sixty days, and the trial court granted the defendants' motion for summary judgment. Seven days later, after Rutland had eventually retained new counsel, she filed a motion for reconsideration, claiming that the defendant's motion for summary judgment was improper because it was filed during a stay in the case and that the trial court's grant of summary judgment was an unnecessarily harsh sanction for failure to prosecute. The trial court denied her motion to reconsider. Rutland appealed.

ISSUES

Whether the (1) order granting Rutland sixty days to retain new counsel or proceed pro se constituted a stay of the proceedings, thus making the defendants' motion for summary judgment procedurally improper and (2) trial court erred in denying Rutland's motion to reconsider.

HOLDING

(1) Because nothing in the text of the order denoted a stay of the proceedings, the order did not constitute a stay, therefore, the defendants' motion for summary judgment was procedurally proper, and the court did not abuse its discretion by denying Rutland's request for a continuance or additional time to hire counsel. (2) Because the case was never stayed, and because Rutland failed to designate any of her exhibits that she filed in opposition to summary judgment as part of the record on appeal, it cannot be reviewed on appeal; because the grant of a motion for summary judgment was not a sanction against Rutland, the trial court did not abuse its discretion by denying Rutland's motion for reconsideration. Therefore, the Court of Appeals affirmed the judgment of the Jones County Circuit Court.

Affirmed - 2020-CA-01100-COA (Feb. 15, 2022)

Opinion by Presiding Judge Wilson
Hon. Richard W. McKenzie (Jones County Circuit Court, Second Judicial Dist.)
Gregory Malta & Jared Frank Evans for Appellant - John Stephen Graham, Benjamin Blue Morgan, William Matthew Vines, & Reeve G. Jacobus Jr. for Appellees

SHANNON V. SHANNON

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DIVORCE - CRUEL & INHUMAN TREATMENT - The conduct of the offending spouse must be so unkind as to be cruel, that is, so unreasonably harsh and severe as to be inhumane, so lacking in human qualities, so unfeeling or brutal as to endanger, or put one in reasonable apprehension of danger to life, limb, or health; such conduct must be habitual, that is, done so often, or continued so long, that its recurrence may be reasonably expected whenever occasion or opportunity presents itself

CIVIL PROCEDURE - REMEDIES - INJUNCTION - A permanent injunction is a remedy potentially available only after a plaintiff can make a showing that some independent legal right is being infringed and must be supported by some underlying cause of action

FAMILY LAW - DIVORCE - DIVISION OF MARITAL ASSETS - Chancellors are to evaluate the division of marital assets by the *Ferguson* guidelines and should support their decisions with findings of fact and conclusions of law for purposes of appellate review; chancellors need not make findings as to each and every factor set forth in *Ferguson* but may consider only those factors they find applicable to the property in question

CIVIL PROCEDURE - MOTION PRACTICE - CONTINUANCE - The decision to grant or deny a motion for a continuance is within the sound discretion of the trial court and will not be reversed unless the decision results in manifest injustice

FACTS

In September 2018, Laron and Nancy Shannon married. Thirteen months later, Nancy moved out of the marital home, and, in December 2019, Laron filed for divorce, a temporary restraining order (“TRO”), preliminary and permanent injunctions, and other relief. Laron alleged habitual and inhuman treatment and asserted that his age (seventy-seven years old) and Alzheimer’s-type dementia made it easy for him to be unduly influenced and emotionally abused by Nancy. Without notice to Nancy, the chancellor granted Laron’s request for a TRO that remained in effect until the date of the final divorce trial. Nancy filed a counter-complaint for divorce, similarly alleging habitual cruel and inhuman treatment against Laron. On the day of the trial, Nancy made an ore tenus motion to continue or, alternatively, that she be allowed to testify remotely by telephone, arguing that she was unable to be present due to financial constraints, COVID-19 concerns, fear of being arrested because of the TRO, and a tropical storm. Laron objected, arguing that the trial had been set for months, that Nancy’s financial statement indicated that she had sufficient funds to be present for trial, and that Nancy should have arranged to testify remotely prior to the day of the trial. The chancery court denied both motions and proceeded with the trial without Nancy present. The court granted Laron a full and complete divorce from Nancy on the ground of habitual cruel and inhuman treatment. The court granted Laron a truck and the marital residence and entered a permanent restraining order against Nancy. The court granted Nancy an SUV, an iMac, \$32,124.50 previously removed from the parties’ joint account, and a lump sum alimony of \$26,000. Additionally, the court entered a separate judgment divesting Nancy of her right, title, and interest in and to the marital residence. Nancy appealed.

ISSUES

Whether the chancery court erred in (1) granting Laron a divorce on the ground of habitual cruel and inhuman treatment; (2) granting Laron a permanent restraining order against Nancy; (3) entering a separate judgment divesting title; (4) failing to apply the *Ferguson* factors and erroneously dividing the property; and (5) denying Nancy’s ore tenus motion for continuance or, in the alternative, allow her to participate remotely.

HOLDING

(1) Because the chancery court analyzed Nancy’s behavior as it affected Laron, a seventy-seven-year-old man with Alzheimer’s-type dementia, because of the testimony presented by Laron’s witnesses, and because Nancy presented no

credible witnesses to refute such evidence, the chancery court did not err in granting Laron a divorce on the ground of habitual cruel and inhuman treatment. (2) Because Laron’s claim for injunctive relief was a part of his underlying cause of action for divorce on the ground of habitual cruel and inhuman treatment, he had an independent legal right to be free from abuse at the hands of Nancy; thus, the chancery court did not err in granting a permanent restraining order. (3) Because the chancery court’s decision to grant Laron’s divorce was not in error, Nancy’s argument regarding the separate judgment divesting title was without merit. (4) Because the court is not obligated to make a finding as to each and every *Ferguson* factor, and because the chancery court explained its considerations prior to the division award based on the testimony presented at trial, the chancery court did not err in its application of the *Ferguson* factors and division of assets. (5) Because Nancy provided no proof to substantiate her request for a continuance or to participate in the trial remotely, and because she waited until the day of trial to make her requests without filing a proper motion, the chancery court did not err in denying her motion for a continuance, or, in the alternative, request to participate remotely. Therefore, the Court of Appeals affirmed the judgment of the Tippah County Chancery Court.

CONCURRENCE IN PART & DISSENT IN PART

Presiding Judge Wilson agreed with the grant of a divorce and the financial aspects of the final judgment, but he argued that the chancellor erred by entering a permanent restraining order against Nancy. He suggested that there was no showing that it was needed to prevent any abuse, a violation of any of Laron’s legal rights, or an ongoing threat of irreparable harm. Lastly, he emphasized that permanent restraining orders should not be granted lightly or as a matter of course in every divorce where one spouse’s conduct is considered habitual cruel and inhuman treatment. Therefore, the trial court erred by granting Laron a permanent restraining order against Nancy.

Affirmed - 2020-CA-00847-COA (Feb. 15, 2022)

En Banc Opinion by Judge Emfinger - Concurrence in Part & Dissent in Part by Presiding Judge Wilson
Hon. Lawrence Lee Little (Tippah County Chancery Court)
John S. Grant IV & John S. Grant III for Appellant - John A. Ferrell for Appellee
Briefed by [J. Evan Thomas](#)

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TILLMAN V. KLLM TRANSP.

CIVIL - WORKERS' COMPENSATION

WORKERS' COMPENSATION - CLAIM DISMISSAL - REVIEW OF DISMISSAL - Dismissal of a claim by the Workers' Compensation Commission is not final until twenty days after the entry of the order of dismissal; during that twenty-day period, the claimant may request a review of dismissal

WORKERS' COMPENSATION - CLAIM DISMISSAL - STATUTE OF LIMITATION - Once the order of dismissal becomes final, Miss. Code Ann. § 71-3-53 provides that the Workers' Compensation Commission has continuing jurisdiction; the statute of limitation is triggered by either the filing of a Form B-31 or the rejection of the claim

WORKERS' COMPENSATION - CLAIM DISMISSAL - REJECTION OF A CLAIM - A dismissal of a workers' compensation claim for failure to file a required pre-hearing statement should be treated as a rejection of a claim and should begin the limitations period

FACTS

After suffering a back injury during his employment with KLLM Transport (“KLLM”), Howard Tillman filed a petition with the Mississippi Workers' Compensation Commission (“Commission”). Tillman failed to file his pre-hearing statement by its due date. The administrative judge (“AJ”) then issued an order giving Tillman twenty days to complete the statement or show cause why he should not be sanctioned for unreasonable delay. After Tillman failed to perform either action, the AJ entered an order for the sanction. After a month without action from Tillman, the AJ entered an order dismissing Tillman’s claim. The order explained that the dismissal triggered the one-year statute of limitation. Tillman never filed a motion to review or reinstate the claim. The Commission sent a request to KLLM to file a Form

B-31 (notice of final payment), and Tillman also filed a motion to compel KLLM to file the form. KLLM responded that a Form B-31 was not needed because Tillman failed to file a pre-hearing statement, and the claim was now barred by the one-year statute of limitation. The AJ subsequently found that the Commission no longer had jurisdiction because the claim was time-barred under Miss. Code Ann. § 71-3-53. Tillman appealed.

ISSUE

Whether the Commission’s dismissal of Tillman’s claim was contrary to law because of the failure of the employer to file a Form B-31.

HOLDING

Because the Commission found Tillman’s claim time-barred specifically due to the rejection of the claim and not the filing of the Form B-31, the employer’s failure to file a Form B-31 had no bearing on the dismissal. Therefore, the Court of Appeals affirmed the decision of the Mississippi Workers’ Compensation Commission.

Affirmed - 2021-WC-00057-COA (Feb. 15, 2022)

Opinion by Chief Judge Barnes

Mississippi Workers’ Compensation Commission

Lindsay E. Varnadoe for Appellant - Pamela S. Ratliff for Appellees

Briefed by [Carter Babaz](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

WILLIAMS V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - POST-RELEASE SUPERVISION - EVIDENTIARY STANDARD - When the basis for revocation of post-release supervision is alleged criminal activity, the State must show proof of an actual conviction or that a crime has been committed and that it is more likely than not that the probationer committed the offense

POST-CONVICTION RELIEF - POST-RELEASE SUPERVISION - REVOCATION - Mere arrest cannot be the basis for revocation of probation

POST-CONVICTION RELIEF - POST-RELEASE SUPERVISION - DOUBLE JEOPARDY - A petition to revoke post-release supervision is not a criminal case nor a trial on the merits of the case; thus, double jeopardy does not apply

POST-CONVICTION RELIEF - SENTENCING - LENGTH LIMIT - The number of years in incarceration plus the number of years of post-release supervision cannot exceed the maximum number of years authorized by law for the commission of a felony

FACTS

Alfred Williams was convicted of fondling and given a fifteen-year sentence with seven years to serve in custody and eight years of post-release supervision. About eight years later, a field officer signed an affidavit asserting that Williams violated two conditions of his post-release supervision, the conditions to not commit any offenses against the law and the condition to pay all fines and costs of court. The affidavit stated Williams was arrested for Possession of a Controlled Substance with Intent to Distribute and owed the trial court \$2,458. At a hearing, the trial judge asked Williams if he could give a statement. In response, Williams apologized, asked for mercy from the court, and said, “[t]hat won’t ever happen again, possession with intent.” No other witnesses testified, nor was any other evidence presented at the hearing. The trial court issued an order revoking Williams’s post-release supervision, citing the two reasons stated in the affidavit. Sometime thereafter, the district attorney chose to nolle prosequi Williams’s drug-possession charge. In light of the

district attorney's decision, Williams filed a motion for the court to reconsider and reinstate his post-release supervision. The court initially denied the motion but later vacated the order. The court held that Williams's motion should have been considered a post-conviction relief motion and ordered the State to respond. In arguing the motion should be denied, the State asserted Williams confessed to selling marijuana and that a probation officer had signed an affidavit saying Williams failed to make payments towards his fines. The court denied post-conviction relief, finding that, although the district attorney decided to nolle prosequi the charge, Williams confessed to the crime during the revocation hearing. Thus, there were reasonable grounds to find Williams violated his post-release supervision. Williams appealed.

ISSUES

Whether (1) the trial court erred in revoking Williams's post-release supervision; (2) the trial court failed to revoke his post-release supervision in thirty days; (3) Williams's double jeopardy rights were violated when his post-release supervision was revoked; and (4) the trial court imposed an illegal sentence since Williams was originally sentenced to eight years of post-release supervision.

HOLDING

(1) Because Williams was merely arrested for possession and not convicted, and because there was no evidence presented at the hearing of Williams's failure to pay fines, his possession of drugs, or that the trial court followed proper criminal procedure, the trial court erred in revoking Williams's post-release suspension. (2) Because the issue of the thirty-days requirement to revoke post-release supervision was first raised on appeal, the issue was procedurally barred. (3) Because Williams raised the issue of his double jeopardy rights for the first time on appeal, the issue was procedurally barred; however, notwithstanding the procedural bar, the claim was without merit because a petition for post-conviction relief is a civil, not criminal, case, and double jeopardy does not apply. (4) Because the issue of an illegal sentence was first raised on appeal, the issue was procedurally barred; however, notwithstanding the procedural bar, because the statute does not limit the number of years of post-release supervision and the total number of years of incarceration plus post-release supervision did not exceed the maximum sentence for fondling, the issue was meritless. Therefore, the Court of Appeals reversed and remanded the judgment of the Lamar County Circuit Court.

DISSENT

Judge Emfinger argued that Williams was not entitled to relief based on the fact that the charge was dropped and that common law does not require a conviction in order to revoke post-release supervision. He also noted that the trial court found that it was more likely than not that Williams illegally acted based upon his admission during the revocation hearing. Lastly, he emphasized the fact that Williams had not made any other challenges to his revocation, and therefore the matters raised on appeal were not properly before the Court because they were not raised before the trial court. Thus, the trial court's denial of Williams's motion for post-conviction relief should be affirmed.

Reversed & Remanded - 2020-CP-00950-COA (Feb. 15, 2022)

En Banc Opinion by Judge Greenlee - Dissent by Judge Emfinger
Hon. Anthony Alan Mozingo (Lamar County Circuit Court)
Pro se for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee
Briefed by [Samuel Taylor Rayburn](#)

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COURT OF APPEALS - CRIMINAL CASES

FORD V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - EVIDENCE - PROCEDURAL BARS - When the *Weathersby* rule is not mentioned during a directed verdict motion or in a post-trial motion for judgment notwithstanding the verdict, the issue is procedurally barred

CRIMINAL PROCEDURE - EVIDENCE - INCONSISTENCIES - The *Weathersby* rule does not apply when the defendant gives materially different and inconsistent statements than the State's evidence provided through credible witnesses and physical facts

CRIMINAL LAW - EVIDENCE - CONFESSION - A defendant's testimony that he did not make a confession or that police fabricated his testimony does not constitute grounds to exclude the confession if it is contradicted by evidence that the statement was, in fact, made

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - Under *Strickland*, a claimant of ineffective assistance of counsel bears the burden of proof to show that: (1) counsel's performance was deficient and (2) the deficiency prejudiced his defense

CRIMINAL LAW - COUNSEL - ARGUMENTS - Prosecutors are entitled to argue inferences based upon evidence presented at trial

FACTS

On the morning of July 21, 2018, two police officers responded to a 911 call to a residence in Leake County regarding a "deceased person." Several witnesses told officers that Johnny Ford was the individual who shot Miesha Bolin. Subsequently, the officers took Ford to the police station, where he waived his *Miranda* by signing a waiver form. Ford then told investigators that he had killed Bolin in self-defense and was later indicted by a grand jury for first-degree murder. Officer Toby Gill was the first witness to testify and stated that he and Officer Jerry Horne were the first officers to arrive at the scene. Once they arrived, both officers found a body lying on the floor in a pool of dried blood which had been shot twice, once in the abdomen and once in the head. Investigator Billy McMillian was the second witness called to the stand. The investigator testified to the evidence collected while at the crime scene. Ford's counsel informed the court that Ford wished to cross-examine the investigator during the investigator's testimony. The trial judge responded by saying that it was well within the defendant's rights. The court then recessed, and the matter was never addressed again. The third witness was Katina Townsend, who testified that Ford was the murderer after a struggle between Ford and Bolin. Townsend testified that Bolin had a gun and had been threatening to kill someone all night. She further stated that once Bolin put her gun down, Ford lunged for the gun, and the fight commenced between the two people, resulting in Bolin's death. Chris Jones was the next witness whose testimony largely followed Townsend's testimony. However, Jones added that everyone was largely afraid of what Bolin could have done that night. The last witness called to the stand was Investigator Justin Sims, who conducted Ford's interview while at the station. Ford's attorney asked that the verbal confession be suppressed and not admitted into evidence, but the trial court determined that the statement was admissible. Lastly, the Chief Medical Examiner for Mississippi and an expert witness for firearms examination and comparison testified on the State's behalf. Ford's counsel did not call any witnesses on his behalf. The jury convicted Ford of first-degree murder. Ford appealed.

ISSUES

Whether (1) Ford was entitled to a directed verdict of not guilty under the *Weathersby* rule; (2) the trial court erred in denying Ford's request to represent himself; (3) the trial court erred in allowing Investigator Sims to testify about his summarized version of Ford's statement to law enforcement; (4) the trial court erred in holding that Ford's counsel was constitutionally effective; (5) the State committed prosecutorial misconduct in closing arguments; and (6) Ford's conviction should be reversed as a result of cumulative error.

HOLDING

(1) Because Ford did not raise the *Weathersby* rule during his trial or in a post-trial motion, and because the State offered evidence substantially contradicting Ford's statements to law enforcement, *Weathersby* did not apply to this case, and Ford was not entitled to a directed verdict of acquittal. (2) Because Ford acquiesced to his attorney's continuing representation by remaining silent and not objecting to his attorney's continued representation or asking if he could ask any additional questions not asked by his attorney, the issue was without merit. (3) Because there was credible proof that Ford made a statement to law enforcement, and because it was within the province of the jury to weigh the credibility of the investigator's re-telling of Ford's oral statement, the trial court did not err by allowing Investigator Sims to read his summary of Ford's verbal confession to the jury. (4) Because Ford's counsel was not constitutionally

ineffective for failing to request a “stand your ground” jury instruction, because there was no reasonable probability that the trial judge would have granted a motion for a new trial, because Ford could not show that his counsel’s failure to move for a directed verdict prejudiced his defense, and because Ford failed the first prong of *Strickland*, the trial court did not err in finding that Ford’s counsel was effective. (5) Because the inference made by the prosecutor in the closing argument was not outside the realm of facts supported by the evidence presented at trial, the argument was without merit. (6) Because Ford’s other arguments were without merit, there can be no cumulative error. Therefore, the Court of Appeals affirmed the judgment of the Leake County Circuit Court.

CONCURRENCE IN PART & IN RESULT

Judge Westbrook agreed with the majority on Parts I, II, III, V, and VI. However, she only agreed in result on Part IV. She emphasized that (1) a defendant may be entitled to both a stand-your-ground instruction and a self-defense instruction so long as the evidence warrants them and (2) the Court should make clear the legal distinction between analyzing a trial court’s refusal of a jury instruction from counsel’s failure to request a jury instruction because of the differences in the standards of review.

Affirmed - 2020-KA-00278-COA (Feb. 15, 2022)

Opinion by Judge Lawrence - Concurrence in Part & in Result by Judge Westbrook
Hon. Mark Sheldon Duncan (Leake County Circuit Court)

James Howard Murphy for Appellant - Allison Kay Hartman & Ladonna C. Holland (Att’y Gen. Office) for Appellee
Briefed by [Chandler Coleman](#)

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