

MISSISSIPPI SUPREME COURT DECISIONS – OCTOBER 5, 2023***SUPREME COURT - CIVIL CASES*****MISS. BAR V. HESSLER****CIVIL - BAR MATTERS**

DISCIPLINARY MATTERS - RECIPROCITY DOCTRINE - EXTRAORDINARY CIRCUMSTANCES - Applying the reciprocity doctrine, the sanction imposed in this state generally mirrors the sanction imposed in the sister state, absent extraordinary circumstances which compel, justify, or support variance from the foreign jurisdiction's sanction

DISCIPLINARY MATTERS - RULES OF DISCIPLINE - SUSPENSION PENDING ADJUDICATION - Upon being disciplined in another jurisdiction, an attorney admitted to practice in the state shall forthwith, but no later than fifteen days upon the imposition of such discipline, provide complaint counsel a certified copy of the discipline; failure to provide the certified copy forthwith shall, upon petition by complaint counsel, result in the immediate suspension of the attorney pending final resolution by the Supreme Court

APPELLATE PROCEDURE - EXPEDITED ADJUDICATION - JUDICIAL DISCRETION - In the interest of expediting decision, or for other good cause shown, the Supreme Court or the Court of Appeals may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction

FACTS

In 2022, Eric John Hessler, an attorney licensed in Louisiana and Mississippi, was arrested and charged with operating a vehicle while intoxicated. Hessler subsequently pled guilty to the amended charge of reckless operation of a vehicle. On June 22, 2022, the Louisiana Supreme Court suspended Hessler from the practice of law for one year and one day, with the suspension being deferred in its entirety. The Louisiana Supreme Court further ordered Hessler to participate in a two-year diagnostic monitoring agreement with the Judges and Lawyers Assistance Program and placed Hessler on probation for the duration of the monitoring period. The Bar filed a Miss. R. Discipline 13 Formal Complaint with the Supreme Court, petitioning for reciprocal discipline predicated on Hessler's failure to present the Complaint Counsel a certified copy of the Louisiana order within fifteen days as required by Miss. R. Discipline 13(a). Hessler answered the complaint admitting that he was disciplined in Louisiana and recognized that reciprocal discipline was proper under state precedent. Concurrent to his answer, Hessler also filed a motion to suspend the rules and not impose immediate suspension or expedite adjudication. In the affidavit accompanying the motion, Hessler asserted that he believed the Bar would be made aware of the Louisiana proceedings and impose reciprocal punishment but was unaware of his duty to disclose. Hessler further argued that because his case was essentially identical to the precedential case, the Supreme Court could impose the retroactive deferred suspension without having to suspend pending adjudication.

ISSUES

Whether (1) the reciprocal discipline imposed by the State should mirror that of the punishment imposed by Louisiana and (2) Hessler should be suspended pending adjudication.

HOLDING

(1) Because no extraordinary circumstances warranted a departure from the discipline imposed by Louisiana, because Hessler fully cooperated with the Louisiana disciplinary proceedings, and because the incident was isolated and unrelated to the practice of law, retroactive reciprocal punishment was warranted. (2) Because Hessler promptly communicated and was fully transparent with the Supreme Court upon discovery of his rule violation, because Hessler was not

suspended from the practice of law in the original jurisdiction imposing discipline because the offense for which Hessler was disciplined was unrelated to the management of client affairs, financial impropriety, or dishonesty, and because the Bar did not object to Hessler's motion to suspend the rules and not impose immediate suspension, the Supreme Court determined that immediate suspension of Hessler pending adjudication was not necessary. Therefore, the Supreme Court suspended Hessler from practicing law for one year and one day, deferred in its entirety, and retroactive to June 22, 2022.

Suspended From Practice of Law for One Year & One Day - 2023-BD-00057-SCT (Oct. 5, 2023)

En Banc Opinion by Presiding Justice Kitchens

Adam Bradley Kilgore & Melissa Selman Scott for Complainant - Graham Patrick Carner for Respondent

Briefed by [Andrew "Blake" Huffman](#)

Edited by [Kara Edwards](#) & [Ashley House](#)

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PRIORITYONE BANK V. FOLKES

CIVIL - CONTRACT

CONTRACTS - ARBITRATION - MOTION TO COMPEL ARBITRATION - A motion to compel arbitration is valid when (1) there is a valid arbitration agreement and (2) the dispute is within the scope of the arbitration agreement

CONTRACTS - RIGHT TO COMPEL ARBITRATION - ARBITRATION WAIVER - A party may waive the right to compel arbitration by (1) actively participating in litigation or (2) taking actions inconsistent with the right to compel arbitration which substantially invoke the judicial process to the detriment or prejudice of the other party; filing answers, counterclaims, motions, requests, and discovery obviates the right to arbitration

FACTS

In 2019, PriorityOne Bank ("PriorityOne") provided a loan to Laura Folkes through a line of credit secured by a deed of trust on a commercial property. In February 2020, Folkes filed for bankruptcy. After Folkes defaulted on her payment obligations under the bankruptcy agreement, PriorityOne foreclosed on the property. Folkes's bankruptcy trustee paid the only payment that was made on the loan, \$9,394, to PriorityOne before the foreclosure, which was credited to the loan. Following the foreclosure, PriorityOne sold the property to Steven Adams. In February 2021, Folkes filed a complaint in chancery court alleging that the foreclosure was made in bad faith because PriorityOne had accepted a "substantial payment" toward the debt before foreclosure. PriorityOne answered the complaint, participated in discovery, and filed a motion for summary judgment. The chancery court never ruled on PriorityOne's motion for summary judgment. In July 2021, Folkes also filed a complaint in circuit court against PriorityOne. The circuit court ordered arbitration. In the chancery court proceedings, Folkes received permission to amend her complaint to include two paragraphs alleging PriorityOne shared confidential financial information and colluded with a third party to purchase the foreclosed property. Folkes's prayer for relief to set aside the foreclosure on equitable grounds remained unchanged and was not expanded. PriorityOne then moved to compel arbitration and to dismiss on multiple grounds, including impermissible claim splitting and failure to join the current owner of the property at issue. The chancery court denied PriorityOne's motion to compel arbitration. PriorityOne petitioned the Supreme Court for interlocutory appeal, which the court denied. PriorityOne appealed.

ISSUE

Whether the chancery court erred by denying PriorityOne's motion to compel arbitration.

HOLDING

Because PriorityOne substantially participated in litigation by answering Folkes's complaint, answering discovery, and litigating a motion for summary judgment, PriorityOne waived any right to arbitrate Folkes's chancery court claim that the foreclosure was made in bad faith and should be set aside, and the chancery court properly denied PriorityOne's

motion to compel arbitration. Therefore, the Supreme Court affirmed the judgment of the Covington County Chancery Court.

DISSENT

Justice Griffis argued that the chancery court erred by denying PriorityOne’s motion to compel arbitration because PriorityOne’s participation in litigation occurred before Folkes’s amended complaint was filed. He argued the majority should have considered whether the arbitration clause applied because the claims included in the amended complaint triggered the arbitration clause.

Affirmed - 2022-CA-00429-SCT (Oct. 5, 2023)

En Banc Opinion by Presiding Justice Kitchens - Dissent by Justice Griffis
Hon. David Shoemake (Covington County Chancery Court)
Derek Andrew Henderson for Appellant - Orvis A. Shiyou Jr. for Appellee
Briefed by [Maggie Crain](#)
Edited by [Nivory Gordon](#) & [Ashley House](#)

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SUPREME COURT - ORDERS

JARVIS V. STATE

EN BANC ORDER

ORDER

Thaddeus L Jarvis, Jr. was convicted of armed robbery, kidnapping, burglary of a dwelling, and conspiracy to commit armed robbery. Jarvis pro-se filed a second claim for post-conviction relief. The Court found that Jarvis’s application was time-barred and successive, without exception, pursuant to Miss. Code Ann. § 99-39-5(2)-27(9). The Court also found the filing frivolous. Thus, the Court denied Jarvis’s Application for Leave to Proceed in the Trial Court and warned that future filings deemed frivolous may result in monetary sanctions and restrictions on future applications for post-conviction collateral relief.

OBJECTION IN PART

Presiding Justice Kitchens objected in part to the Court’s order, arguing that Jarvis’s application made reasonable arguments and disagreed with the Court’s determination that Jarvis’s application was frivolous. He also disagreed with the Court’s warning that future filings may result in monetary sanctions or restrictions on filing applications for post-conviction collateral relief. He believed that the Court should simply deny or dismiss motions instead of punishing the defendant for filing a motion. He argued that novel arguments that might remove a criminal defendant from confinement should not be discouraged by the threat of monetary sanctions and restrictions on filings. He stated that the Court must not discourage convicted defendants from exercising their right to appeal.

Denied - 2021-M-01196-SCT (Sept. 27, 2023)

En Banc Order by Justice Ishee - Objection in Part by Presiding Justice Kitchens
Briefed by [Zylan Coleman](#)
Edited by [Kayla Tran](#) & [Mason Scioneaux](#)

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SUPREME COURT - POST-CONVICTION RELIEF

GALLOWAY V. STATE

CRIMINAL - DEATH PENALTY - POST CONVICTION

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

POST-CONVICTION RELIEF - PROCEDURAL BAR - EXCEPTIONS - The denial of a post-conviction relief motion is a final judgment and bars subsequent requests for post-conviction relief unless (1) there are issues with the defendant's supervening insanity prior to the execution of a death sentence; (2) there has been an intervening decision of the United States Supreme Court or of the Mississippi Supreme Court, which would require a different outcome or sentence; (3) there is newly discovered evidence, which was not previously discoverable, that would have been practically conclusive if it were available at trial; or (4) the defendant claims that his sentence has expired, or his probation, parole, or conditional release has been unlawfully revoked

CRIMINAL PROCEDURE - JURY SELECTION - RACIAL DISCRIMINATION - If a peremptory challenge appears to be merely based on race, a *Batson* challenge will require a race-neutral reason for the peremptory challenge, provided that the objecting party demonstrates a prima facie showing that the exercise of the peremptory challenge was based only on race

CRIMINAL PROCEDURE - JURY SELECTION - VOIR DIRE - Mississippi law guarantees the right of either party in a case to probe the prejudices of prospective jurors and investigate their thoughts on matters directly related to the issues to be tried

CRIMINAL PROCEDURE - JURY SELECTION - VOIR DIRE - Voir dire is presumed sufficient to ensure a fair and impartial jury; to overcome this presumption, a party must present evidence indicating that the jury was not fair and impartial and show that prejudice resulted from the circuit court's handling of the voir dire

EVIDENCE - ADMISSABILITY - EXPERT TESTIMONY - Admissibility of expert testimony is viewed in light of Miss. R. Evid. 702; such testimony is admissible if it is found to be relevant and reliable

EVIDENCE - ADMISSABILITY - EXPERT TESTIMONY - Miss. R. Evid. 702 provides that when determining admissibility of expert testimony, courts must consider whether the expert opinion is based on scientific knowledge (reliability) and whether the expert opinion will assist the trier of fact to understand or determine a fact in issue (relevance); additionally, the *Daubert* factors, as follows, should be considered: (1) whether the theory can be, and has been, tested; (2) whether the theory has been published or subjected to peer review; (3) any known rate of error; and (4) the general acceptance that the theory has garnered in the relevant expert community

EVIDENCE - ADMISSABILITY - EXPERT TESTIMONY - Miss. R. Evid. 702 states if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case

EVIDENCE - ADMISSABILITY - EXPERT TESTIMONY - To examine the reliability of an expert's opinions and methods, courts must examine factors including: whether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community

CRIMINAL PROCEDURE - APPEALS - WAIVER - The failure to contend an issue on direct appeal bars the accused from raising that issue on a later appeal

EVIDENCE - DISCOVERY VIOLATIONS - BRADY TEST - Under *King v. State*, to show that a *Brady* violation has taken place, the defendant must prove: (a) that the State possessed evidence favorable to the defendant (including

impeachment evidence); (b) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (c) that the prosecution suppressed the favorable evidence; and (d) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different

POST-CONVICTION RELIEF - RES JUDICATA - REPHRASING ISSUES - Rephrasing issues on appeal for post-conviction purposes will not defeat the procedural bar of res judicata if that issue was already addressed on appeal; the petitioner carries the burden of demonstrating that his claim is not procedurally barred

POST-CONVICTION RELIEF - VALIDITY OF A JURY VERDICT - JUROR'S AFFIDAVIT - Under Miss. R. Evid. 606(b)(1), during an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment; the court may not receive a juror's affidavit or evidence of a juror's statement on these matters

POST-CONVICTION RELIEF - VALIDITY OF A JURY VERDICT - JUROR SELF-INCRIMINATION - Under Miss. R. Evid. 606(b), jurors generally may not impeach their own verdict by testifying about motives or influences affecting deliberations

CRIMINAL PROCEDURE - VOIR DIRE - JUROR DISHONESTY - To decide a claim of juror dishonesty in voir dire, the court must determine (1) whether the question incorrectly answered was relevant; (2) whether the question incorrectly answered was unambiguous; and (3) whether the juror had knowledge of the information sought in the question; if the trial court's determination of these inquiries is in the affirmative, the court should then determine if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to respond, which can be shown by a cause affecting the juror's competency or impartiality at trial

CRIMINAL PROCEDURE - PREJUDICE - RESTRAINTS IN THE JURY'S PRESENCE - A defendant has a right to be free from all manner of restraints when in the presence of the jury, unless in exceptional cases where there is evident danger of his escape or in order to protect others from an attack by the defendant; however, a trial judge has considerable discretion regarding the decision to restrain a defendant based on reasonable grounds for apprehension; a defendant whose rights have been violated may only have his conviction overturned if there is a showing that he suffered prejudice

CONSTITUTIONAL LAW - CRUEL AND UNUSUAL PUNISHMENT - AVAILABLE ALTERNATIVES - The United States Supreme Court requires that in all Eighth Amendment method-of-execution claims alleging cruel pain, the defendant must identify an "available alternative" method of execution

POST-CONVICTION RELIEF - REVERSIBLE ERROR - CUMULATIVE ERROR - The cumulative-error doctrine holds that individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial

FACTS

On December 5, 2008, Alan Graham overheard his niece, Shakeyia Anderson, on the phone and got the impression that she was going to meet with "Bo." At 10:00 PM, Anderson went out with a man in a white Ford Taurus. On the evening of December 6, her unclothed body was found in a secluded, wooded area with tire marks on it. The investigation began the next morning with medical examiner Dr. Paul McGarry assisting the investigation. Police identified Leslie Galloway as a possible suspect and arrested him while he was in a white Ford Taurus. The police found Anderson's DNA on the car and in Galloway's house. In addition, while searching the car, the police found that one side of the undercarriage of the car was wiped cleaner than the rest, that the tire tracks of Galloway's car matched the marks on Anderson's body. Dr. McGarry, who conducted the autopsy and would later be fired by the Orleans Parish (Louisiana) Coroner, concluded that Anderson must have been raped anally. A jury sentenced Galloway to death for capital murder based on sexual assault with four aggravating factors. During the trial, Galloway wore an electronic restraint device. After the trial, a paralegal and Kathryn Gates, one of the jurors, signed separate affidavits claiming that Tina Swanier, another juror, felt coerced into voting for the death penalty despite not wanting to. Gates's affidavit also showed that she violated a sequestration order by watching the news on the case and lied about not having been on a criminal jury before during voir dire. On direct appeal, the Mississippi Supreme Court affirmed his conviction and death sentence. The United States Supreme Court denied writ of certiorari. In October 2014, Galloway filed a Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief ("Capital PCR"). In October 2015, the Court granted a stay of the Capital PCR proceeding to allow Galloway to pursue a separate PCR matter regarding his 2007 carjacking, which was an aggravating factor used in his capital murder trial. In September 2018, the trial court in

the carjacking proceedings denied Galloway's PCR relief, and the Mississippi Supreme Court affirmed the results. As a result, the stay on Galloway's Capital PCR for the capital murder case was lifted, and Galloway filed an amended Capital PCR. Galloway petitioned for post-conviction relief.

ISSUES

Whether (1) Galloway's counsel were ineffective in failing to conduct an adequate investigation and present available mitigating evidence during the penalty phase of trial; (2) trial counsel provided ineffective assistance for failing to raise a *Batson* challenge; (3) Galloway's counsel provided ineffective assistance by failing to conduct constitutionally adequate voir dire; (4) trial counsel was ineffective for failing to investigate and challenge the expert testimony of Dr. McGarry; (5) trial counsel was ineffective for limiting the review of Galloway's forensic expert, Dr. LeRoy Riddick, and failing to consult with and prepare him; (6) trial counsel was ineffective for failing to lodge a Miss. R. Evid. 702 pretrial challenge to Dr. McGarry's testimony; (7) trial counsel was ineffective for failing to object to Dr. McGarry's testimony as beyond the scope of the disclosed nature of his testimony; (8) the State corrupted the truth-seeking function of the trial by suppressing material impeachment evidence regarding Dr. McGarry violated Galloway's constitutional and state law rights; (9) the State corrupted the truth-seeking function of the trial by presenting false and misleading evidence violating Galloway's Constitution and state law rights; (10) Galloway's death verdict was unconstitutionally coerced from a hold-out juror; (11) a juror's exposure to the media's portrayal of the victim violated Galloway's constitutional rights; (12) a juror's dishonest answer in voir dire created prejudicial error and required reversal; (13) forcing Galloway to wear an electronic restraint at trial violated his constitutional rights; (14) executing Galloway would violate the Eighth and Fourteenth Amendments to the United States Constitution; and (15) there was cumulative error.

HOLDING

(1) Because Galloway's counsel's mitigation investigation or presentation of evidence was not objectively deficient or unreasonable, because Galloway's counsel made the strategic decision not to tell Galloway's full "life story" to humanize Galloway by avoiding evidence that may uncover harmful information, such as his prior felony drug conviction, pending burglary and sexual assault charges, and that Galloway's brother was serving a life sentence, and because the evidence about Galloway's carjacking conviction was also damaging as it could have portrayed Galloway as a violent vigilante, Galloway failed to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy, and Galloway's defense was not prejudiced. (2) Because there was no challenge to the State's peremptory strikes of two black female jurors, because there was no record or opportunity given for the State to provide a race neutral reason for striking the jurors, because Galloway's counsel claimed they would have made a *Batson* challenge if one were appropriate, and because the mere fact that an all-white jury was empaneled was not evidence of prejudice, there was no evidence that Galloway's counsel was deficient by failing to raise a *Batson* challenge during voir dire. (3) Because Galloway raised a voir dire challenge on direct appeal and was procedurally barred on collateral appeal, because the challenge rested on an affidavit from an out-of-state attorney but there was no affidavit from Juror 23 herself regarding her belief that death was the "only sentence it could be," because there was no evidence that the jury selection was so ill chosen as to permeate the entire trial with obvious unfairness, because eleven prospective jurors indicated they could not consider imposing the death penalty, and because counsel participated thoroughly throughout jury examinations, there was no merit to Galloway's voir dire challenge. (4) Because Galloway previously appealed his counsel's investigation of Dr. McGarry and was now procedurally barred, because Dr. McGarry had a strong reputation and had performed tens of thousands of autopsies, and because Galloway's counsel's stated strategy was a quick examination of Dr. McGarry rather than to attack his credibility, Galloway's counsel's performance was not deficient. (5) Because Dr. Riddick provided a written opinion that there was "no definitive physical evidence of anal penetration" prior to trial and because Galloway's counsel was able to use Dr. Riddick's testimony to make a reasonably compelling argument against Dr. McGarry's argument that the tear could "only have been produced by a penis through nonconsensual sex" when Dr. Riddick testified that the tear in the victim's anus could have been caused by being run over, and that there was no semen or DNA found in her anus, defense counsel's decision not to spend further time and effort interviewing Dr. Riddick prior to trial and to limit Dr. Riddick's testimony to the topic of sexual battery was not deficient. (6) Because Galloway previously appealed his counsel's pretrial motions regarding Dr. McGarry and was now procedurally barred and because the Supreme Court could not find that Dr. McGarry's opinions went beyond his scope of expertise or improperly invaded the province of the jury, defense counsel was not ineffective for failing to lodge a Miss. R. Evid. 702 pretrial motion for a *Daubert* hearing on Dr. McGarry's testimony. (7) Because the issue could have

been raised on direct appeal and was not, the issue was waived; notwithstanding the waiver, because Galloway contended that the prosecution did not disclose that it would present McGarry's testimony that Anderson suffered sexual battery and because the prosecution did send Galloway's counsel a letter stating that McGarry would testify to Anderson suffering sexual battery, no discovery violation occurred and the issue failed. (8) Because the evidence used to show this contention was published after Galloway's trial, the State could not have suppressed the information at issue; even if the evidence existed at the time of trial, because the second part of the *Brady* test requires that the defendant prove that he did not possess the evidence nor could obtain it himself with any reasonable diligence and because the evidence would have been equally discoverable by the prosecution and the defense, Galloway's argument fails the *Brady* test and thus the issue was without merit. (9) Because Galloway attacked McGarry's testimony by alleging prosecutorial misconduct and because the Court's prior determination that his testimony fell within the scope of his expertise barred later claims that the testimony was false, this contention was barred by *res judicata*; notwithstanding the bar, because Galloway supported his contention with affidavits from other experts disagreeing with McGarry and because the Fifth Circuit previously held that other experts disagreeing with the first expert was insufficient alone to call the first expert's testimony into question, the issue was without merit. (10) Because all of the affidavits Galloway used to support this contention were hearsay except for that of Gates and because Miss. R. Evid. 606(b)(1) prohibited jurors from testifying about any statements made or incidents that occurred during the jury's deliberation, the issue failed. (11) Because all of the affidavits Galloway used to support this contention were hearsay, the issue failed; in addition, because Gates was testifying about her own misconduct and because jurors may not impeach their own verdicts under Miss. R. Evid. 606(b), this issue failed. (12) Because Galloway did not assert that he would have moved to strike Gates, because a juror may only be removed from the jury if the cause would affect his competency or impartiality at trial, because prior jury experience did not result in issues of competency or impartiality, because even if Galloway asserted that he would have struck Gates, he accepted other jurors who previously served on juries, this issue failed. (13) Because Galloway's counsel knew at the time of trial that Galloway was wearing an electric restraint, the issue was waived; in addition, because a judge has considerable discretion when deciding to restrain a defendant in the presence of a jury, because a defendant whose rights were violated may only have his conviction overturned if he can show that he suffered prejudice, and because Galloway did not show that wearing the restraint prejudiced him, the issue failed. (14) Because the Supreme Court previously held that Mississippi's death penalty scheme did not violate the federal and state constitutions for being discriminatory, because the death penalty scheme was not inhumane or arbitrary against black men, because the evolving standards of decency principle was a policy argument for the legislature to consider, because courts have only held that the principle prohibits executing certain categories of people rather than prohibiting the death penalty itself, because the evolving standards of decency principle did not prohibit the death penalty, because all Eighth Amendment method-of-execution claims alleging cruel pain require that the accused identify an available alternative, because the Mississippi Code identifies three legal alternatives, and because Galloway did not propose any of those alternatives, his method-of-execution claim under the federal and state constitutions failed. (15) Because individual errors that were not reversible on their own may combine to make up reversible error and because the Court did not find that the aggregate of the errors here mandated reversal, Galloway's cumulative errors argument failed. Therefore, the Supreme Court affirmed the judgment of the Harrison County Circuit Court.

Post-Conviction Relief Denied - 2013-DR-01796-SCT (Oct. 5, 2023)

Opinion by Justice Beam

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

Mary Jo Woods, Krissy Casey Nobile (Office of Cap. Post-Conviction Couns.), Henderson Hill, & Claudia Van Wyk for Petitioner
- Parker Alan Proctor Jr. (Att'y Gen. Office) for Respondent

Briefed by [Stephanie Iken](#) & [Taylor Coe](#)

Edited by [Kennedy Gerard](#), [Emilee Crocker](#), & [Mason Scioneaux](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – OCTOBER 3, 2023
COURT OF APPEALS - CIVIL CASES

GOODE V. WALMART, INC.

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - OFFENSES AFFECTING BUSINESSES - QUALIFIED IMMUNITY - Under Miss. Code Ann. § 97-23-95, a merchant may claim qualified immunity by showing (1) proof of a good faith basis and probable cause based upon reasonable grounds to detain and question the customer and (2) proof that the detention and questioning of the customer was done in a reasonable manner

CIVIL PROCEDURE - PROBABLE CAUSE - ESTABLISHING PROBABLE CAUSE - Probable cause is established where the originator of the prosecution possesses the reasonable belief that there is a good chance of establishing his case to the satisfaction of the court or the jury

CIVIL PROCEDURE - SUMMARY JUDGMENT - CONTRADICTING RECORD - When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment

TORTS - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS - ELEMENTS - To survive summary judgment on an intentional infliction of emotional distress claim, the movant must show the existence of a genuine issue of material fact that: (1) the defendant acted willfully or wantonly towards the plaintiff by committing certain described actions; (2) the defendant's acts are ones which evoke outrage or revulsion in civilized society; (3) the acts were directed at, or intended to cause harm to, the plaintiff; (4) the plaintiff suffered severe emotional distress as a direct result of the defendant's acts; and (5) such resulting emotional distress was foreseeable from the intentional acts of the defendant

TORTS - NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS - REQUIREMENTS - The tort of negligent infliction of emotional distress requires a plaintiff to plead and prove some demonstrable harm, whether it be physical or mental, and that harm must have been reasonably foreseeable to the defendant

TORTS - MALICIOUS PROSECUTION - ABUSE OF PROCESS - The elements of an abuse of process claim are: (1) the party made an illegal use of process, (2) the party has an ulterior motive, and (3) damage resulted from the perverted use of process

FACTS

In October 2019, Willie Sims, a Wal-Mart asset protection associate, stopped Dacarvos Goode for shoplifting at Wal-Mart. Sims stated in his deposition that he had watched Goode switch the tags by placing a \$1 price tag on a \$9.96 hoodie and bought four hoodies at the discounted price. With Goode present, Sims rescanned the hoodies at a nearby customer service desk and confirmed that Goode had scanned the hoodies incorrectly. Sims told Goode the police were on their way, but Goode left before they arrived. Wal-Mart filed criminal shoplifting charges against Goode in November 2019 after learning Goode's name. When Sims went to file the charges on behalf of Wal-Mart, he learned that Goode had filed assault charges against Sims within a week of the incident. The municipal court dismissed Goode's assault complaint against Sims for lack of probable cause. After a hearing on the merits of the shoplifting charge, Goode was found guilty of shoplifting. Goode appealed for a trial de novo in county court. Sims was not called to testify and the State announced that the charges would be nolle prosequed. While Goode's shoplifting appeal was pending, Goode filed suit against Wal-Mart and Sims (collectively "Walmart") in circuit court for assault, intentional or negligent infliction of emotional distress, abuse of process, and negligence. In Goode's deposition, he admitted that he was not detained, but alleged that Sims put his forearm on Goode's neck when Goode was leaving Wal-Mart. In his deposition, Sims stated that he first observed Goode in the menswear department and watched him thereafter. Another asset protection associate also confirmed Sim's version of events. The surveillance videos capturing the encounter were entered into evidence, as well as Goode's receipt of the incorrect-priced hoodies, a photograph of the store signage showing the hoodies's accurate price, and a photograph of the \$1 price tag on the \$9.96 hoodie. The surveillance video

showed Sims stopping Goode at the customer host podium and taking Goode to the customer service desk to rescan the hoodies. The surveillance video also showed that there was no unreasonable behavior from Sims or Goode and that nobody was paying attention to them. Sims was not in a uniform, so there was nothing special about the less-than-five-minute encounter. The surveillance video mirrored Goode's version of events, except it did not show Sims putting his forearm on Goode's neck or any physical contact. Goode went to the emergency room six days after the incident. Goode also submitted his medical records into evidence that stated he was assaulted at Wal-Mart. The circuit court granted Wal-Mart's motion for summary judgment on Goode's four claims. Goode appealed.

ISSUES

Whether the circuit court erred by granting Wal-Mart's motion for summary judgment finding no genuine dispute (1) that Wal-Mart acted in good faith with probable cause in stopping Goode and questioning him in a reasonable manner; (2) on Goode's assault claim; (3) on Goode's claims of intentional and negligent infliction of emotional distress; (4) on Goode's abuse-of-process claim; and (5) on Goode's claim that Wal-Mart was negligent.

HOLDING

(1) Because there was sufficient evidence that Wal-Mart had probable cause to approach and question Goode since several Wal-Mart associates observed Goode switching the tags on several items, because Goode acknowledged that he was not detained, and because the surveillance video showed that the few customers present likely did not notice any interaction between Goode and Sims who appeared to be ordinary shoppers, questioning was done in a reasonable manner, and the circuit court did not err by granting Wal-Mart's motion for summary judgment finding there was no issue of genuine dispute and Wal-Mart was immune from liability under qualified immunity. (2) Because the surveillance video showed no physical contact or aggression between Goode and Sims, because Goode's testimony that Sims put his arm on Goode's neck was blatantly contradicted by the surveillance video, and because Goode's medical records from the emergency room that provided Goode's version of events were hearsay and self-serving statements, the circuit court did not err by granting Wal-Mart's motion for summary judgment on Goode's assault claim. (3) Because there was no evidence that Wal-Mart's shoplifting charges against Goode led to a wrongful conviction, because Wal-Mart had probable cause to approach and question Goode, and because there was no evidence to support Goode's claims that Wal-Mart's conduct was so outrageous, extreme, or negligent, the circuit court did not err by granting Wal-Mart's motion for summary judgment finding no genuine dispute on Goode's claims of intentional and negligent infliction of emotional distress. (4) Because Goode failed to identify an illegal use of the legal process by pursuing the shoplifting charge, because there was no evidence that Wal-Mart filed shoplifting charges to retaliate against Goode for filing assault charges, and because Wal-Mart had probable cause to instigate criminal proceedings against Goode, the circuit court did not err by granting Wal-Mart's motion for summary judgment finding no genuine dispute on Goode's abuse-of-process claim. (5) Because Goode failed to present sufficient evidence to create a genuine issue of material fact that Sims's actions during the incident were unreasonable, and because Goode failed to show that his alleged injuries were proximately caused by Wal-Mart, the circuit court did not err by granting Wal-Mart's motion for summary judgment finding no genuine dispute on Goode's claim that Wal-Mart was negligent. Therefore, the Court of Appeals affirmed the judgment of the Lamar County Circuit Court.

Affirmed - 2022-CP-00633-COA (Oct. 3, 2023)

Opinion by Presiding Judge Carlton

Hon. Claiborne McDonald (Lamar County Circuit Court)

Pro se for Appellant - Wilbur Pemble Delashmet & Mignon Mestayer Delashmet for Appellees

Briefed by [Emily Kaplan](#)

Edited by [Kayla Tran](#) & [Ashley House](#)

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HARRISON V. HARRISON

CIVIL - DOMESTIC RELATIONS

DOMESTIC RELATIONS - DIVORCE - UNCONDONED ADULTRY - In Mississippi, one seeking a divorce on the grounds of adulterous activity must show by clear and convincing evidence both an adulterous inclination of the offending party and a reasonable opportunity to satisfy that inclination, which adultery may be shown by evidence or admissions, and either is sufficient to support a decree of divorce

DOMESTIC RELATIONS - PROPERTY SETTLEMENT AGREEMENT - IRRECONCILABLE-DIFFERENCES DIVORCE - A property settlement agreement should specify, with particularity, within its four corners, whether it is to be limited to an irreconcilable differences divorce or whether it is intended to be binding in a divorce granted on any other grounds

DIVORCE - PROPERTY SETTLEMENT AGREEMENT - UNCONSCIONABILITY - In property and financial matters between divorcing spouses, absent fraud or overreaching, the parties should be allowed broad latitude, and agreements should not be disturbed simply because an agreement is not necessarily in one's best interest

DIVORCE - PROPERTY SETTLEMENT AGREEMENT - AMENDMENTS - Chancery courts have the power to modify various provisions of a property settlement agreement incorporated into a judgment of divorce where fraud exists or a mutual mistake of fact has occurred in the drafting of the instrument

FACTS

In 1985, Kim and Glenn Harrison married, after which they had three children. In May 2020, they separated, and all of their children were adults at this time. Kim filed a complaint for divorce on grounds of adultery and habitual cruel and inhumane treatment, or in the alternative, irreconcilable differences. A property settlement agreement ("PSA") and a waiver of process were drafted by Kim's attorney, and Glenn signed these documents, which were then filed in court by Kim's attorney. A day after filing, Glenn obtained counsel and filed a motion to set aside the PSA and waiver. Glenn asserted that when Kim presented him with the PSA, Kim concealed and misrepresented material facts concerning the parties' marriage, property, and debts, and Glenn asserted that he signed the documents under Kim's undue influence, misrepresentation, fraud, concealment, duress, and undue methods. Glenn then filed an answer and counterclaim for divorce on the grounds of uncondoned adultery, habitual cruel and inhumane treatment, or alternatively, irreconcilable differences. The chancellor held a hearing and denied Glenn's motion to set aside the PSA and waiver, and filed an order to enforce the PSA as written. The chancellor explained that after testimony and evidence, she did not find that Kim concealed or misrepresented material facts. The chancellor also did not find that Glenn signed the PSA and waiver as a result of any undue influence by Kim. A separate hearing was held on Kim's divorce complaint. The chancellor entered a final judgment granting Kim a divorce on the ground of uncondoned adultery, and the PSA was incorporated as part of the final judgment. Glenn appealed.

ISSUES

Whether (1) the chancery court erred in granting Kim a divorce on the grounds of uncondoned adultery; (2) the chancery court erred by failing to set aside the property settlement agreement; (3) the property settlement agreement was inequitable as a result of overreaching, duress, fraud, misrepresentation, and undue influence; and (4) the property settlement lacked the essential elements of a valid contract.

HOLDING

(1) Because the property settlement agreement in its entirety did not reflect that the parties actually intended to obtain an irreconcilable-differences divorce, the chancery court did not err by granting Kim a divorce on the grounds on uncondoned adultery. (2) Because the record was clear that the parties had never consented to an irreconcilable-differences divorce, there was no merit to Glenn's argument that the parties consented to such a divorce, and the chancery court did not err in imposing the property settlement agreement upon Glenn and Kim. (3) Because Glenn failed to demonstrate that the property settlement agreement was unconscionable or that he signed it based on overreaching, duress, fraud, or intentional misrepresentation, and because the court held that in property and financial matters between divorcing spouses, absent fraud or overreaching, the parties should be allowed broad latitude, the property settlement agreement was not inequitable. (4) Because Glenn and Kim entered into a court-approved contract

regarding the disposition of their marital property and because there was no evidence of fraud, mutual mistake of fact, or overreaching in this case, the property settlement agreement did not lack the essential elements of a valid contract. Therefore, the Court of Appeals affirmed the judgment of the Jones County Chancery Court.

Affirmed - 2022-CA-00274-COA (Oct. 3, 2023)

Opinion by Presiding Judge Carlton

Hon. Billie J. Graham (Jones County Chancery Court, Second Judicial Dist.)

Terry L. Caves & Risher Grantham Caves for Appellant - Renee M. Porter for Appellee

Briefed by [Mattie Hooker](#)

Edited by [Emilee Crocker](#) & [Mason Scioneaux](#)

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HUTSON V. HUTSON

CIVIL - CUSTODY

FAMILY LAW - CUSTODY - GRANDPARENT VISITATION- Pursuant to Miss. Code Ann. § 93-16-3(2), a natural grandparent is entitled to grandparent visitation when the grandparent has shown (1) that a viable relationship with his or her grandchild has been established, (2) that visitation with the grandchild has been unreasonably denied by the grandchild’s parent, and (3) the visitation is in the best interest of the grandchild

FAMILY LAW - CUSTODY - BEST INTEREST OF CHILD - When a grandparent has not evidenced that he is entitled to an award of grandparent visitation pursuant to Miss. Code Ann. § 93-16-3(2), the chancellor need not consider whether awarding grandparent visitation is in the best interest of the child

EVIDENCE - WITNESS - WEIGHT OF TESTIMONY - Pursuant to Miss. R. Evid. 614(b), the court may examine a witness regardless of who calls the witness; parental testimony is generally weighted more heavily in custody and visitation hearings since the law presumes that parents will love their children the most

CIVIL PROCEDURE - JUDGMENT - MOTION FOR NEW TRIAL - In order to succeed on a Miss. R. Civ. P. 59(e) motion, the movant must show: (1) an intervening change in controlling law, (2) availability of new evidence not previously available, or (3) need to correct a clear error of law or to prevent manifest injustice

FACTS

Jacob and Theresa Hutson (“the Hutsons”) married in 2016 and had three children, the eldest of which was Jacob’s natural daughter, Jane. Jacob’s dad, Michael Hutson, petitioned the Rankin County Chancery Court for court-ordered grandparent visitation with Jane after Jacob and Theresa refused to allow any contact between Michael and Jane, claiming that Michael’s behavior had become erratic and resembled that of a senile man. Furthermore, the Hutsons claimed that Michael did not consider the other two children to be his grandchildren and showed Jane preferential treatment, leading to behavioral issues and turmoil within the family. After conducting a hearing on the issue, the chancellor dismissed Michael’s petition on the basis that Jacob and Theresa had just cause to deny him visitation. Michael moved for a new trial and to amend the judgment, claiming that the chancellor’s ruling was not supported by the evidence. In response, the Hutsons filed a motion for attorney’s fees. The chancellor conducted a second hearing and ruled in favor of the Hutsons, denying Michael’s motion and awarding the Hutsons attorney’s fees. Michael appealed.

ISSUES

Whether the chancery court erred in (1) finding that the Hutsons did not unreasonably deny Michael visitation; (2) failing to conduct a proper analysis of the *Martin* factors and by failing to make specific findings of fact or by failing to properly consider and find that grandparent visitation was in the best interest of the child; (3) improperly weighing the evidence; (4) improperly taking control of witness testimony or improperly interfering with the hearing; (5) failing to grant Michael’s motions under Miss. R. Civ. P. 53 and 59(e); (6) awarding the Hutsons attorney’s fees.

HOLDING

(1) Because parents were presumed to know what was in the best interest of their child and the evidence supported the Hutsons' claim that Michael unfairly favored Jane over the other children to the detriment of the family, the Hutsons did not unreasonably deny Michael visitation. (2) Because Michael had failed to either satisfy his initial burden of showing that the Hutsons had unreasonably denied him visitation with Jade or present evidence that he was entitled to an award of grandparent visitation, the chancery court was not required to consider the *Martin* factors or whether the visitation would be in the best interest of the child. (3) Because the law presumed that natural parents will love their children most and no testimony or other evidence indicated that the Hutsons were unfit, the chancery court was justified in giving more credence to the parents' testimony. (4) Because Miss. R. Evid. 614(b) authorized the chancery court to examine any witness regardless of which party called the witness and Mississippi precedent allowed chancellors to question witnesses when the testimony was unclear, the chancery court did not err in questioning the adverse witnesses since Michael's counsel had confused them. (5) Because Michael failed to meet the requirements of a movant on the Miss. R. Civ. P. 59(e) motion and because Miss. R. Civ. P. 52(b) granted the chancery court discretion in determining whether the court should amend or make additional findings, the court did not err in denying both of the motions by Michael. (6) Because the motion for an award of attorney's fees could happen "at any time" under Miss. Code Ann. § 93-16-3(4) and because the decision to award fees fell under the discretion of the chancery court, Michael's contest was without merit. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Chancery Court.

Affirmed - 2022-CA-00569-COA (Oct. 3, 2023)

Opinion by Judge Westbrook

Hon. John C. McLaurin Jr. (Rankin County Chancery Court)

John Holaday for Appellant - Mary Judith Barnett for Appellees

Briefed by [Brandon D. Peterson](#)

Edited by [Nivory Gordon](#) & [Mason Scioneaux](#)

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JOHNSON V. DRAKE

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - PLEADINGS - AMENDMENTS - Miss. R. Civ. P. 15(a) states that a party may amend a pleading as a matter of course at any time before a responsive pleading is served

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - TIMELINESS - All actions for which no other period of limitations is prescribed shall be commenced within three years next after the cause of such action accrued, and not after

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - TOLLING - Miss. R. Civ. P. Rule 4(h) states that a plaintiff must serve the summons and complaint on a defendant within 120 days after the complaint is filed to continue the tolling of the statute of limitations and avoid dismissal

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - TOLLING EXPIRATION - If a plaintiff fails to serve process on a defendant within 120 days after filing the complaint, the statute of limitations automatically begins to run again when the period expires

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - GOOD CAUSE EXTENSION - A party must show good cause for delay in service of process to obtain an extension to effectuate service of process

FACTS

In 2017, Sheila Johnson slipped and fell in Polk's Pharmacy on a recently mopped floor. In 2020, Johnson filed a suit against Gene Polk's, Inc. ("Polk's") and John Does 1-10. In 2021, Johnson filed an amended complaint which added Jani-King Franchising, Inc. ("Jani-King") and Michael Drake d/b/a Jani-King (Drake) and alleged that employees of Jani-King mopped the floor Johnson slipped and fell on. In 2022, Polk's entered a special appearance to the trial court and filed a motion to dismiss with prejudice or, alternatively, for summary judgment because Polk's had not been served process. Polk's argued for dismissal on the grounds that the original complaint had not been timely served to it and the amended complaint could not relate back to the original complaint because of its untimeliness. Johnson filed a motion

for additional time to serve Polk's. Johnson's counsel admitted that the summons was never sent but noted issues regarding legal staff and the pandemic. Jani-King was voluntarily dismissed from the case, and Drake motioned to dismiss and strike the amended complaint or, alternatively, for summary judgment, asserting that the amended complaint was filed without leave of the court and did not relate back to the original complaint. At the motion hearing, Polk's asserted it still had not been served the original or amended complaint. Johnson admitted service of process had not been executed but argued good cause existed for an extension. The Simpson County Circuit Court dismissed Johnson's case because the claims in both complaints were barred by the statute of limitations and the amended complaint did not relate back to the original complaint. Johnson appealed.

ISSUE

Whether the circuit court erred when granting defendants' motions to dismiss by holding that the original complaint could not be amended.

HOLDING

Because none of the defendants filed a responsive pleading to Johnson's original complaint, Johnson was theoretically free to amend her complaint, but because Johnson did not serve the summons and complaint on the defendants within 120 days after filing the complaint with the court and because Johnson did not show good cause for her failure to serve the summons and complaint on the defendants, the amended complaint did not relate back to the original complaint, and the circuit court did not err in granting the defendants' motions to dismiss. Therefore, the Court of Appeals affirmed the judgment of the Simpson County Circuit Court.

Affirmed - 2022-CA-00818-COA (Oct. 3, 2023)

Opinion by Judge Greenlee

Hon. Stanley Alex Sorey (Simpson County Circuit Court)

Martin R. Jelliffe & Brennan Ducote for Appellant - Glen Austin Stewart for Appellee

Briefed by [Jay Palen](#)

Edited by [Kennedy Gerard](#) & [Mason Scioneaux](#)

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LITTON V. LITTON

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - AGREED ORDERS - FORCE & EFFECT - An agreed order has the same force and effect as judgments rendered after litigation

FAMILY LAW - AGREED ORDERS - BINDING & CONCLUSIVE - Agreed orders are binding and conclusive, operating as res judicata and estoppel to the same extent as judgments after contest

FACTS

William Powell Litton III ("Powell") and Wendi Dow Litton ("Wendi") were married in 2007. During their marriage, Powell and Wendi had two minor children. Powell and Wendi filed for divorce in 2014, and the chancery court granted an irreconcilable-differences divorce and joint custody of the children. Under the divorce order, Powell and Wendi would alternate weeks with the children for summer visitation. The divorce order also required Powell and Wendi to equally divide the cost of the children's extracurricular activities, including summer camps. Following conflicts related to summer visitation and extracurricular activities, Powell and Wendi signed and submitted an agreed order to the chancery court in February 2020. Under the agreed order, Powell had the tie-breaker vote in deciding the children's extracurricular activities when Wendi disagreed that it was in the children's best interest to participate. The agreed order explicitly excluded church as an extracurricular activity and provided a new summer visitation schedule for summer 2020 and summer 2021. In March 2022, Powell filed a petition requesting the chancery court to uphold his tie-breaking authority regarding the children's attendance at a summer camp and to hold Wendi in contempt of the agreed order. The proposed summer camp would have equally impacted Powell's and Wendi's time with the children. The chancery

court found that summer camps qualified as extracurricular activities and fell under Powell’s tie-breaking authority per the agreed order. Further, the chancery court noted that Wendi would be able to make up her summer parenting days affected by the summer camps. Additionally, the chancery court directed Powell and Wendi to return to the summer visitation schedule outlined in the divorce order. Wendi appealed.

ISSUES

Whether the chancery court erred by (1) classifying summer camps as extracurricular activities and (2) directing Powell and Wendi to resume the divorce order’s weekly alternating summer schedule for the summer of 2022.

HOLDING

(1) Because the divorce order explicitly included summer camps within the meaning of extracurricular activities, because the agreed order did not specifically exclude summer camps as extracurricular activities as it did for other activities, and because the agreed order had the same legal weight as the divorce order, the chancery court did not err by classifying summer camps as extracurricular activities. (2) Because Wendi had not lost any parenting days resulting from summer camps, and because the agreed order specifically stated the divorce order’s summer visitation schedule would remain in effect except for the summers of 2020 and 2021, the chancery court did not err by directing Powell and Wendi to resume the divorce order’s weekly alternating summer schedule for the summer of 2022. Therefore, the Court of Appeals affirmed the judgment of the Coahoma County Chancery Court.

Affirmed - 2022-CA-00712-COA (Oct. 3, 2023)

Opinion by Judge Smith

Hon. Watosa Marshall Sanders (Coahoma County Chancery Court)

T. Swayze Alford & Kayla Fowler Ware for Appellant - Mitchell D. Moskovitz, Charles Jones Swayze III, & Charles J. Swayze Jr. for Appellee

Briefed by [Katie Shaw](#)

Edited by [Kayla Tran](#) & [Ashley House](#)

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McGOVERN V. McGOVERN

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CHILD SUPPORT - RECONSIDERATION - A court will look to the guidelines provided in Miss. Code Ann. § 43-19-101 to determine whether an award for child support is reasonable

CIVIL PROCEDURE - APPEALS - FINAL JUDGMENT - A judgment must be complete within itself, leaving open no matter or description or designation out of which contention may arise as to its meaning

FAMILY LAW - CUSTODY - ALBRIGHT FACTORS - In matters concerning custody, a court will use the *Albright* factors to determine the best interest and welfare of the children

FAMILY LAW - DIVORCE - MARITAL PROPERTY - A party must prove that an asset is not within the marital estate to avoid equitable division of the assets

CIVIL PROCEDURE - CONTEMPT - SERVICE OF PROCESS - Service for contempt motions can be waived if it can be shown that a party consented to address the issue

FAMILY LAW - DIVORCE - ATTORNEY’S FEES - A court cannot determine an award for attorney’s fees solely based on a party’s misconduct or dilatory actions if it is unclear as to how the actions correlate to the legal expenses

FACTS

Anthony and Tera McGovern, parents of three children, separated and filed competing divorce petitions in March 2021. They entered into a joint consent to a divorce based on irreconcilable differences regarding child custody and visitation, child support, payment of the children’s school tuition, medical care, equitable distribution of property, and later, alimony, attorney’s fees, and contempt. Prior to its final judgment, the trial court issued a temporary order stating that “[the parties] shall each have temporary use and possession of the vehicle they routinely use.” Anthony filed a “Motion

to Cite Plaintiff for Contempt” in October 2020, alleging that Tera broke the terms of this order by taking possession of and selling a 2006 Pontiac GTO. Tera filed a response to the motion for contempt, but the trial court did not address this issue in its initial divorce decree. In February 2022, the trial court entered its final judgment on the remaining issues. During the trial, evidence regarding Anthony’s heavy alcohol usage was admitted. The trial court applied the *Albright* factors and granted Tera physical custody of the children while granting both Tera and Anthony joint legal custody. Additionally, the trial court ordered that Anthony have visitation rights every weekend he was home from work. The trial court ordered Anthony to pay Tera \$2,500 in child support in addition to “any and all expenses related to the children’s attendance at Parklane Academy, including tuition, book fees, after-school care, activity and sport fees.” The trial court also ordered him to pay for the children’s college education and provide their health insurance if Medicaid no longer covered them. Regarding the equitable distribution of property, the trial court determined that the marital home was a part of the marital estate through the family-use doctrine and found that the improvements made in the home were made to accommodate a growing family. While determining the value of the marital assets, the trial court factored in the value of Anthony’s 2008 Chevrolet truck. Regarding the attorney’s fees, the trial court ordered Anthony to pay \$16,000 of Tera’s attorney’s fees due to his dishonesty with the court. The trial court denied Tera alimony. Anthony filed a motion to alter the judgment in March 2022, where the trial court determined that because Anthony failed to properly serve Tera with the motion for contempt per Miss. R. Civ. P. 81, his motion was denied. Anthony appealed.

ISSUES

Whether the trial court erred by (1) awarding Tera child support in excess of the child support guidelines; (2) punitively modifying Anthony’s custody and visitation award; (3) determining the 2008 Chevrolet truck was marital property; (4) granting Tera fifty percent of the equity in the marital home; (5) failing to address the Pontiac GTO and the contempt of Tera; and (6) awarding attorney’s fees to Tera that were not authenticated.

HOLDING

(1) Because the trial court’s judgment potentially awarded Tera child support far greater than what was accounted for pursuant to the child support guidelines outlined in Miss. Code Ann. § 43-19-101 and because the trial court’s order was not clear and “complete” within itself, the trial court erred and the issue of child support was reversed and remanded for reconsideration. (2) Because there was no evidence in the record that the trial court acted punitively in its child custody and visitation award and because the record supported the trial court’s *Albright* analysis, the trial court did not err by modifying Anthony’s custody and visitation award. (3) Because the 2008 Chevrolet truck was accumulated during the course of the marriage and because Anthony could not prove that the truck should be considered outside the marital estate, the trial court did not err by including the truck in the marital estate. (4) Because the record reflected that most of the financial payments on the home occurred during the marriage and because any home improvements were made to accommodate a growing family, the trial court did not err in finding that the marital home was a marital asset under the family-use doctrine. (5) Because Tera consented to the trial court addressing the issue of contempt stemming from the temporary order and because she responded to Anthony’s motion for contempt, the trial court erred by denying Anthony’s motion on the basis that Tera was never served with the motion pursuant to Miss. R. Civ. P. 81, and the issue was remanded. (6) Because the award of attorney’s fees to Tera was wholly based on Anthony’s actions and because the record was unclear as to how the fees could be attributed to his actions, the trial court erred in determining that Tera was entitled to \$16,000 in attorney’s fees, and the issue was reversed and remanded for reconsideration. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Pike County Chancery Court.

Affirmed in Part; Reversed & Remanded in Part - 2022-CA-00478-COA (Oct. 3, 2023)

Opinion by Judge Greenlee

Hon. Wayne Smith (Pike County Chancery Court)

S. Christopher Farris for Appellant - Casen Wayne Choate for Appellee

Briefed by [Lydia Cates](#)

Edited by [Doug Reynolds](#) & [Mason Scioneaux](#)

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PHILLIPS V. MISS. DEP'T OF CORR.

CIVIL - STATE BOARDS & AGENCIES

CIVIL PROCEDURE - CONSTITUTIONAL CHALLENGES - SPECIFIC PLEADINGS - The constitutionality of a statute will not be considered unless the point is specifically pleaded; a constitutional issue raised for the first time on appeal is procedurally barred

STATE BOARD & AGENCIES - AMENDED STATUTES - PAROLE ELIGIBILITY - In 2021, Miss. Code Ann. § 47-7-3(1)(h)(i) was amended to allow individuals convicted of armed robbery committed after June 30, 1995, to be eligible for parole after serving sixty percent or twenty-five years, whichever is less, of his sentence

CIVIL PROCEDURE - CONSTITUTIONAL CHALLENGE - NOTICE REQUIREMENTS - Under Miss. R. Civ. P. 24(d), where an action seeks to restrain or enjoin enforcement, operation, or execution of any state statute by challenging the constitutionality, the party asserting the unconstitutionality shall notify the Attorney General within such time as to afford him an opportunity to intervene and argue the question of constitutionality

FACTS

In November 1994, Marshall Phillips committed armed robbery. In February 1995, Phillips was sentenced to serve thirty years for armed robbery and twenty years for aggravated assault, with the terms set to run concurrently. In July 2021, Phillips filed a request to be granted parole eligibility through the Mississippi Department of Correction's Administrative Remedies Program ("MDOC"). In his request, Phillips argued that a new law made all armed robbery convictions eligible for parole. In September 2021, the MDOC denied Phillips's request for parole eligibility because his sentencing order provided that Phillips would not be eligible for parole or probation for his sentence. Phillips responded to the MDOC's denial and argued that he was sentenced under the law that was in effect at the time of his conviction, but the Legislature amended the law to allow parole eligibility after serving sixty percent of a sentence. As such, Phillips argued that not having parole eligibility would violate his Fourteenth Amendment right. The MDOC responded that the new statute Phillips referenced, Miss. Code Ann. § 47-7-3(1)(h)(i) ("amended statute"), did not make armed robbery committed from October 1994 to June 1995 eligible for parole, which was when Phillips had committed it. Phillips then filed a petition for judicial review of the MDOC's decision in circuit court arguing that he was eligible for parole after serving sixty percent of his sentence regardless of his conviction date. The MDOC filed a response to the petition that again provided that, under the statute at the time, Phillips was not eligible for parole for the armed robbery he committed in November 1994 and sentenced for in February 1995. The circuit court denied Phillips's motion for judicial review, finding that Phillips was not eligible for parole on the armed robbery conviction when he was sentenced. Additionally, the circuit court found that Phillips remained ineligible for parole under the amended statute because his armed robbery conviction occurred before July 1995. Phillips appealed.

ISSUES

Whether the (1) circuit court erred by affirming the MDOC's interpretation and application of the amended statute and (2) amended statute violated Phillips's Equal Protection rights.

HOLDING

(1) Because the amended statute did not apply to Phillips's armed robbery conviction that occurred before June 1995, the circuit court did not err by affirming the MDOC's interpretation and application of the amended statute. (2) Because Phillips did not specifically plead that the amended statute was unconstitutional, and because Phillips did not properly serve the Attorney General with notice of his constitutional argument, the issue was procedurally barred. Therefore, the Court of Appeals affirmed the judgment of the Sunflower County Circuit Court.

DISSENT

Presiding Judge Wilson argued that it was unclear whether the time limitation provided at the beginning of the amended statute applied only to armed robberies committed after June 1995. Further, he argued the amended statute was ambiguous since it did not provide a clear provision for armed robberies committed between October 1994 and June 1995. He suggested that the nine-month window of armed robberies arbitrarily singled out a narrow group of offenders for unequal treatment. Furthermore, he argued that, if Phillips asserted a direct challenge to the constitutionality of the

amended statute, the State responded to Phillips’s constitutional argument on the merits and did not argue that Phillips waived the issue. Therefore, he would reverse and render to grant Phillips parole eligibility.

DISSENT

Judge McDonald agreed with Presiding Judge Wilson’s dissent but added that Phillips was not required to serve process since he filed a petition for review of an ARP decision in circuit court. Therefore, she would grant Phillips parole eligibility based on the amended statute.

Affirmed - 2022-SA-00392-COA (Oct. 3, 2023)

En Banc Opinion by Judge Emfinger - Dissent by Presiding Judge Wilson - Dissent by Judge McDonald

Hon. Margaret Carey-McCray (Sunflower County Circuit Court)

Pro se for Appellant - Tabatha Amanda-Faye Baum & William R. Collins (Att’y Gen. Office) for Appellees

Briefed by [Reynolds Ward](#)

Edited by [Doug Reynolds](#) & [Ashley House](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

ALBERT V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - PLEAS - REQUIREMENTS TO ACCEPT PLEAS - Miss. R. Crim. P. 15.3(c) states that trial courts must determine that a plea is voluntarily and intelligently made before it accepts the guilty plea; a plea is not voluntary if induced by fear, violence, deception, or improper inducements

CRIMINAL PROCEDURE - PLEAS - VOLUNTARINESS OF PLEAS - For a plea to be voluntary, a defendant must know the possible sentences he might receive by pleading guilty and understand the maximum and minimum penalties provided by law; a plea is voluntary when the defendant hears from the trial court what the effects and consequences of his guilty plea will be, despite the advice given to the defendant by his attorney

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - To prove ineffective assistance of counsel, the defendant bears the burden of demonstrating that (1) his lawyer’s performance was deficient and (2) he suffered prejudice as a result of his lawyer’s deficient performance; the defendant must show that, were it not for counsel’s errors, he would not have pled guilty and would have insisted on going to trial

EVIDENCE - UNRELATED INCIDENTS - IMPROPER EVIDENCE - Evidence offered regarding unrelated incidents is improper and irrelevant under Miss. R. Evid. 412

FACTS

Jaime Albert was indicted by a grand jury on three counts of sexual battery and one count of fondling. In April 2021, Albert accepted a plea bargain from the State. The circuit court sentenced Albert to twenty years in custody for each sexual battery conviction, to run concurrently, with six years to serve in the custody of the Mississippi Department of Corrections (“MDOC”) and fourteen years suspended, conditioned upon five years of supervised probation. The circuit court imposed a fifteen-year sentence, six years to serve in the custody of MDOC, with nine years suspended, conditioned upon five years of supervised probation, a \$1,000 fine, and other customary costs for the one count of fondling. All four of these sentences were to run concurrently. In September 2021, Albert filed a motion for post-conviction collateral relief (“PCR”) requesting the circuit court to vacate all four guilty pleas because they were not voluntary or intelligently made. Further, Albert argued that he was improperly advised of the maximum and minimum sentences for the sexual battery convictions, and never received the correct information that the sentences carried a maximum of thirty years without a statutory minimum. Regarding the fondling conviction, Albert argued that he was given the incorrect minimum and maximum punishments and was not advised that the circuit court had the discretion to impose a sentence of imprisonment, a fine, or both. Albert also raised a claim of ineffective assistance of counsel

arguing that his counsel incorrectly advised him of the minimum and maximum sentences that pressured him into pleading guilty. Albert argued that he would not have pled guilty if he had been advised correctly. Additionally, Albert argued that the State committed a *Brady* violation since it failed to disclose a report that contained statutory rape allegations against someone else toward the same victim. Therefore, Albert argued that his convictions and sentences should be set aside due to the newly discovered evidence. In March 2022, the circuit court granted in part and denied in part Albert's PCR motion. The circuit court held that evidence supported Albert's claim regarding the three convictions for sexual battery; however, the failure to inform Albert of the possibility of a fine for fondling was deemed a harmless error. For the claim of ineffective assistance of counsel, the circuit court held it was unable to find evidence that Albert's counsel's error was the but for cause of Albert pleading guilty. Albert appealed.

ISSUES

Whether (1) Albert's plea was involuntary on the grounds that he did not understand the correct penalties for a fondling charge; (2) Albert received ineffective assistance of counsel which caused him to enter a guilty plea; and (3) undisclosed evidence of investigative reports and charges against another person contained exculpatory information.

HOLDING

(1) Because the circuit court clarified the specific sentence for fondling, because the circuit court asked Albert whether he understood the sentence for fondling, and because Albert responded that he understood the sentence, Albert's plea was voluntary. (2) Because Albert was made aware that his counsel advised him of the incorrect sentencing guidelines for fondling, because the circuit court provided Albert with the correct sentencing guidelines before Albert pled guilty, because there was no evidence presented to suggest that Albert was threatened or coerced by his counsel into pleading guilty, and because Albert failed to prove that he would not have pled guilty but for his counsel initially providing the incorrect sentencing guidelines, Albert's counsel was effective. (3) Because Albert failed to provide sufficient evidence that an alleged indictment in an unrelated case of another victimization of the same victim contained exculpatory information for Albert, Albert's claim was without merit. Therefore, the Court of Appeals affirmed the judgment of the Washington County Circuit Court.

DISSENT

Judge Wilson argued that Albert's plea bargain was an indivisible package. Therefore, since Albert's pleas to the three counts of sexual battery were involuntary, his plea to fondling was involuntary, too. Additionally, he argued that by failing to vacate the fondling conviction, the majority imposed a new plea bargain upon Albert that was not offered by the State nor agreed to by Albert. He also stated that the new bargain left Albert in a worse position than the original plea deal. Therefore, Albert's fondling conviction should be vacated.

Affirmed - 2022-CA-00374-COA (Oct. 3, 2023)

En Banc Opinion by Judge Smith - Dissent by Presiding Judge Wilson

Hon. W. Ashley Hines (Washington County Circuit Court)

Nick Crawford & Vicki L. Gilliam for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [Selena Houston](#)

Edited by [Kara Edwards](#) & [Ashley House](#)

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JOHNSON V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - SENTENCE MODIFICATION - JURISDICTION - Once a circuit judge pronounces a sentence in a felony case, a sentencing order is entered of record, and the term of court expires, the circuit judge is without jurisdiction to change or modify that sentence at a later time, unless a statutory exception applies

CRIMINAL PROCEDURE - SENTENCING - GROSS DISPROPORTIONALITY - The only exception for a party seeking relief who cannot show that his sentence exceeds the statutory penalty is proof of gross disproportionality;

factors to consider when determining whether a sentence is grossly disproportionate include: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions

PROFESSIONAL RESPONSIBILITY - CONFLICT OF INTEREST - SUA SPONTE RECUSAL - A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality; it is presumed that a trial judge is qualified and unbiased, and the presumption may only be overcome by evidence that produces a reasonable doubt about the validity of the presumption

FACTS

John Ryan Johnson was arrested in May 2018 for the burglary of Courtney Houser's residence. Johnson was arrested again in December 2018 for stalking Houser. Johnson pled guilty to burglary of a dwelling in an open plea. During Johnson's sentencing hearing in June 2019, Houser's husband testified to the fear and anxiety that Houser and her children felt after the burglary. In addition to Houser, thirteen members of the community wrote to the circuit court to describe other crimes related to Johnson's unstable behavior. After noting that the general public felt terrorized by Johnson's behavior, the circuit court sentenced Johnson to twenty-five years with fifteen years to serve, ten years suspended, and five years post-release supervision. Johnson was represented by his father, Attorney W. Richard Johnson ("W. Richard"). W. Richard filed a post-conviction relief ("PCR") motion in June 2022, claiming that Johnson's sentence was grossly disproportionate as a result of personal and political "influences" caused by the circuit court judge's relationship with his father. An affidavit from W. Richard was included with the PCR motion listing a number of alleged influences over the circuit court judge. When questioned about the affidavit during the PCR hearing held in September 2022, W. Richard stated that he did not ask for the circuit court judge to recuse from the case. The circuit court declined to amend Johnson's sentencing order nearly three years after the conclusion of its term because Johnson cited no legal authority to do so. Johnson then called witness Lane Campbell to the stand. Campbell, an attorney in Warren County, presented a scatter plot graph showing the sentences of terms of years of 215 individuals charged with similar offenses. According to the graph, six defendants received a longer sentence than Johnson's fifteen years, six people were sentenced to serve ten years, and the remainder were sentenced to serve less than ten years. W. Richard then testified at the PCR hearing that the timing of Johnson's arrest was related to his political participation in the community, evidenced by a newspaper article where Johnson's arrest was placed directly over a political advertisement for W. Richard. W. Richard then stated that he did not believe his son was arrested as a political retaliation. The circuit court provided that, after a term of court expired, it did not have the authority to reconsider a lawful sentence handed down at any time. Further, the circuit court stated the sentence imposed on Johnson was not the most severe, and there was no evidence that the sentence was out of line with sentences handed down by other circuit courts. The circuit court denied Johnson's PCR motion. Johnson appealed.

ISSUES

Whether the circuit court erred when denying Johnson's PCR motion by (1) determining that the circuit court lacked jurisdiction to alter Johnson's sentence after the term of court ended; (2) determining that Johnson's sentence for residential burglary was not grossly disproportionate; and (3) not recusing himself sua sponte from Johnson's case due to alleged prejudice from social and political influences.

HOLDING

(1) Because Johnson put forth no statutory authority under which the circuit court could have shortened his sentence or made him eligible for parole as Johnson requested, the circuit court lacked jurisdiction to modify Johnson's sentence or make him eligible for parole after its term ended. (2) Because Johnson's sentence fell within the middle of the statutory sentencing range, because residential burglary was a violent crime, because the circuit court utilized evidence from Johnson's presentence investigation report to determine what sentence to impose citing the community's concern with Johnson, and because the graph presented by Johnson showed that Johnson's sentence was similar to other individuals who committed residential burglary, Johnson's sentence for residential burglary was not grossly disproportionate. (3) Because Johnson presented no evidence to overcome the presumption that the circuit court judge was qualified and unbiased, and because Johnson explicitly told the circuit court that he did not wish for the judge to recuse himself, the circuit court judge did not abuse his discretion by failing to sua sponte recuse himself. Therefore, the Court of Appeals affirmed the judgment of the Warren County Circuit Court.

Affirmed - 2022-CA-00997-COA (Oct. 3, 2023)

Opinion by Judge Westbrook

Hon. M. James Chaney Jr. (Warren County Circuit Court)

W. Richard Johnson for Appellant - Scott Stuart (Att’y Gen. Office) for Appellee

Briefed by [Sarah Schlager](#)

Edited by [Kara Edwards](#) & [Ashley House](#)

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COURT OF APPEALS - CRIMINAL CASES

DEJOHNETTE V. STATE

CRIMINAL - FELONY

CONSTITUTIONAL LAW - RIGHT TO SPEEDY TRIAL - BALANCING TEST - The speedy trial balancing test given by the Supreme Court in *Barker* requires consideration of the following factors in totality: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) whether the defendant was prejudiced by the delay

CONSTITUTIONAL LAW - RIGHT TO SPEEDY TRIAL - PREJUDICE - Prejudice to the defendant should be assessed in light of the following interests: (1) to prevent oppressive pretrial incarceration, (2) to minimize the anxiety and concern of the accused due to an unresolved charge, and (3) to limit the possibility that the defense will be impaired, with the third interest being the most important

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - REFUSING JURY INSTRUCTIONS - A defendant is entitled to have jury instructions that present his theory of the case; the court may refuse the instruction if it (1) incorrectly states the law, (2) if adequately covered elsewhere in the instructions, or (3) is without foundation in the evidence

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - LESSER-INCLUDED OFFENSE - To be entitled to a lesser-included offense instruction, the defendant must point to evidence in the record from which a jury could reasonably find him not guilty of the crime with which he was charged and at the same time find him guilty of the lesser-included offense

CRIMINAL LAW - MANSLAUGHTER - HEAT OF PASSION - Heat of passion is a state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter; passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time; the term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment, or terror

FACTS

Brandon DeJohnette was the estranged boyfriend of Mirrander McClain. In November 2018, DeJohnette was drinking with Mirrander’s mother, Clara McClain, when Clara informed DeJohnette that another guy was interested in Mirrander. At that time, Mirrander called Clara from work, and DeJohnette took the phone from Clara. DeJohnette got into a verbal altercation with Mirrander over the phone before ending the conversation and heading to Mirrander’s home. On her way home from work, Mirrander stopped by her sister’s home, Latosha McClain. Latosha lived no more than a hundred feet from Mirrander. When Mirrander arrived home, DeJohnette met her and continued the earlier confrontation. DeJohnette shot Mirrander five times before fleeing the scene. Latosha, alerted by her daughter to the gunshots, went to Mirrander’s house and found her alive in a pool of blood. Latosha asked if DeJohnette shot her. Mirrander answered yes. After the bumper of DeJohnette’s vehicle was found near the scene along with DeJohnette’s ID card, the Wilkinson County Sheriff’s Office issued a warrant for DeJohnette’s arrest. DeJohnette was apprehended at his sister’s home in Louisiana. DeJohnette waived his *Miranda* rights and gave a statement. DeJohnette claimed that, despite never carrying a gun, he happened to possess one on the day of the shooting. Furthermore, DeJohnette told

officers that Mirrander had a way of pushing his buttons and had previously pulled a gun on him. DeJohnette was charged with murder and resisting arrest two days after the shooting. Fourteen months later, in January 2020, DeJohnette filed a motion to dismiss for lack of a speedy trial. The State provided the delay was caused by the delay in receiving the autopsy report from the Mississippi Crime Laboratory, although it presented no evidence or documentation to confirm. In February 2020, the circuit court denied DeJohnette's motion and found that fifteen months was not that long, the delay was not entirely the State's fault, and the delay did not prejudice DeJohnette. DeJohnette was arraigned in June 2020. The circuit court granted DeJohnette's repeated motions to continue the trial. After a finding by Dr. Criss Lott that DeJohnette was mentally competent to stand trial, the trial finally began in February 2022. During the jury instruction conference, the circuit court refused DeJohnette's heat-of-passion jury instruction due to a lack of evidentiary support. After the jury found DeJohnette guilty of first-degree murder, the circuit court sentenced him to life imprisonment. DeJohnette appealed.

ISSUES

Whether (1) DeJohnette's right to a speedy trial was violated and (2) the circuit court erred by denying DeJohnette's heat-of-passion jury instruction.

HOLDING

(1) Because, although the assertion of the right to a speedy trial and the length and reasons for the delay weighed in favor of DeJohnette, DeJohnette failed to provide evidence that the fifteen-month delay impaired his defense or caused actual prejudice, DeJohnette's right to a speedy trial was not violated. (2) Because DeJohnette's use of a deadly weapon to kill Mirrander implicated malice, because no evidence in the record contradicted a finding of malice, because DeJohnette's unusual carrying of a firearm indicated an intent to use the weapon, and because whether Mirrander provoked DeJohnette by previously pulling a gun on him before the night of the shooting would not have satisfied the immediacy requirement between provocation and killing, the circuit court did not err by denying DeJohnette's heat-of-passion jury instruction. Therefore, the Court of Appeals affirmed the judgment of the Wilkinson County Circuit Court.

Affirmed - 2022-KA-00249-COA (Oct. 3, 2023)

Opinion by Judge Westbrook

Hon. Lillie Blackmon Sanders (Wilkinson County Circuit Court)

Justin T. Cook (Pub. Def. Office) for Appellant - Lauren G. Cantrell (Att'y Gen. Office) for Appellee

Briefed by [William Davis](#)

Edited by [Kayla Tran](#) & [Ashley House](#)

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EVANS V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - INDICTMENT - CONSTRUCTIVE AMENDMENT - A constructive amendment of the indictment takes place when the proof and instructions expand the grounds upon which the defendant may be found guilty of the charged offense, allowing for a conviction without proof of the elements alleged by the grand jury in its indictment

CRIMINAL PROCEDURE - CONSTRUCTIVE AMENDMENT - PLAIN ERROR - If a variance between the indictment and instructions does not prejudice the defendant's defense or deny the defendant's right to a fair trial, then it is not plain error

CRIMINAL LAW - STATUTORY RAPE - PROOF OF SEXUAL PENETRATION - Pursuant to Miss. Code Ann. § 97-3-65(5), for a separate crime of attempted statutory rape, actual penetration is not required if it is proved that certain genital-area injuries occurred in an attempt to have sexual intercourse with a child under the age of sixteen

FACTS

On January 5, 2007, Matthew Evans asked Amy, a fourteen-year-old child, to help him move boxes into a trailer in Monroe County, and Amy agreed. Upon entering the trailer, Amy walked into a bedroom to make space for boxes. Evans followed Amy into the bedroom and held her down on the bed. Evans removed Amy's clothing and digitally penetrated her vagina. Amy repeatedly told Evans to stop. Next, Evans penetrated Amy's vagina with his penis for five to ten minutes. After Amy pushed Evans off of her, she got dressed and went to the bathroom where Amy determined that her vagina was bleeding. Amy then left the trailer. A few days later, Amy's parents reported the rape to law enforcement. Shortly thereafter, investigators interviewed Evans who confessed to having sexual intercourse with Amy. On January 10, Kathy Kolar, a pediatric nurse practitioner, forensically examined Amy and determined that she had sustained blunt force trauma which caused vaginal lacerations and bleeding. Subsequently, Evans was indicted on one count of statutory rape by having sexual intercourse with a fourteen-year-old child in violation of Miss. Code Ann. § 97-3-65. In October 2008, a jury trial was held. At trial, Evans testified that he did not have or attempt to have sexual intercourse with Amy. Kolar, the State's expert witness, testified that there were blood spots under Amy's vaginal tissues and a one-quarter inch long tear in the tissue between Amy's hymen and vaginal opening. At the State's request, the trial court gave a jury instruction which tracked the language of Evans's indictment and the elements of statutory rape found in Miss. Code Ann. § 97-3-65(1). At the State's request and without an objection from the defense, the trial court also gave a separate jury instruction which stated that "in all cases where a victim is under the age of sixteen (16) years, it shall not be necessary to prove penetration where it is shown the genitals, anus or perineum of the child have been lacerated or torn in the attempt to have sexual intercourse with the child." This jury instruction exactly tracked the language of Miss. Code Ann. § 97-3-65(5). On October 30, 2008, the jury convicted Evans on the count of statutory rape. In September 2020, Evans filed a motion for post-conviction collateral relief, requesting permission to file an out-of-time appeal. On April 5, 2022, the trial court granted Evans's motion, enabling him to directly appeal his 2008 conviction. Evans appealed.

ISSUES

Whether the trial court committed plain error in giving the State's jury instruction on "attempted statutory rape" because the jury instruction: (1) constructively amended Evans's indictment; (2) was unsupported by the evidence; and (3) confusing.

HOLDING

(1) Because Evans was indicted for one count of statutory rape under Miss. Code Ann. § 97-3-65, because the trial court gave a separate jury instruction which tracked the language of Evans's indictment and the elements of statutory rape found in Miss. Code Ann. § 97-3-65(1), and because Miss. Code Ann. § 97-3-65(5) did not establish either a separate crime of "attempted statutory rape" or a broader ground for conviction of statutory rape, the jury instruction did not constructively amend Evan's indictment. (2) Because the jury instruction exactly tracked the language of Miss. Code Ann. § 97-3-65(5), because Kolar, the State's expert witness, testified that there were blood spots under Amy's vaginal tissues and a one-quarter inch long tear in the tissue between Amy's hymen and vaginal opening, and because Amy was under sixteen years old, the jury instruction merely provided that sexual penetration need not be proven to attain a conviction and was supported by the evidence. (3) Because Evans testified at trial that he neither attempted to engage nor actually engaged in sexual intercourse with Amy, because the jury instruction which tracked Miss. Code Ann. § 97-3-65(5) concerned an injury to the victim's genital-area resulting from attempted sexual intercourse, and because Evans would not have been convicted had the jury believed Evans's testimony at trial, the jury instruction was not confusing. Thus, the trial court did not commit plain error in giving the State's jury instruction. Therefore, the Court of Appeals affirmed the judgment of the Monroe County Circuit Court.

Affirmed - 2022-KA-00364-COA (Oct. 3, 2023)

Opinion by Chief Judge Barnes

Hon. Thomas J. Gardner III (Monroe County Circuit Court)

Justin Taylor Cook (Pub. Def. Office) for Appellant - Lauren Gabrielle Cantrell (Att'y Gen. Office) for Appellee

Briefed by [Joseph Muldrew](#)

Edited by [Nivory Gordon](#) & [Mason Scioneaux](#)

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