Benchbook for

Mississippi Circuit Court Judges

2021

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FOREWORD

The *Benchbook for Mississippi Circuit Court Judges* is drafted in such a way as to easily facilitate the addition of new material, changes in the law, and make corrections as needed.

To search for a word, phrase, or particular chapter within the *Benchbook* document, please press down the "Ctrl/Control" button and then press the "F" button, and a "Find" box will open. Simply type the word, phrase, or particular chapter's name, such as "burden of proof" or "Chapter 16," in the blank and press "Enter." Click "Next" to move through the document.

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CHAPTER 1

THE CIRCUIT COURT

Establishment of the Circuit Courts

Mississippi Constitution, Article VI, § 144:

> The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution.

Mississippi Constitution, Article VI, § 156:

> The circuit court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law.

Circuit Court Subject Matter Jurisdiction

General Subject Matter Jurisdiction

Civil

Mississippi Constitution, Article VI, § 156:

> The circuit court shall have original jurisdiction in all matters civil . . . in this state not vested by this Constitution in some other court. . . .

§ 9-7-81 Jurisdiction in general:

> The circuit court shall have original jurisdiction in all actions when the principal of the amount in controversy exceeds two hundred dollars, and of all other actions and causes, matters and things arising under the constitution and laws of this state which are not exclusively cognizable in some other court. . . .
>
> > Subject matter jurisdiction deals with the power and authority of a court to consider a case. As such, subject matter jurisdiction may not be waived and may be asserted at any stage of the proceeding or even collaterally. ***Esco v. Scott*, 735 So. 2d 1002, 1006 (Miss. 1992).**

Criminal

Mississippi Constitution, Article VI, § 156:

> The circuit court shall have original jurisdiction in all matters . . . criminal in this state not vested by this Constitution in some other court. . . .

§ 9-7-81 Jurisdiction in general:

> The circuit court . . . shall have power to hear and determine all prosecutions in the name of the state for treason, felonies, crimes, and misdemeanors, except such as may be exclusively cognizable before some other court; and said court shall have all the powers belonging to a court of oyer and terminer and general jail delivery, and may do and perform all other acts properly pertaining to a circuit court of law.
>
> > [O]nce a case has been appealed from the circuit court to this Court, the circuit court loses jurisdiction to amend or modify its sentence. If the case is affirmed, the lower court is issued a mandate to perform purely ministerial acts in carrying out the original sentence. There is no authority in the circuit court, or indeed this Court, following the issuance of a mandate affirming the case, to modify a judgment and sentence theretofore imposed. In the absence of some statute authorizing such modification, and presently there is none, once a case has been terminated and the term of court ends, a circuit court is powerless to alter or vacate its judgment. ***Harrigill v. State*, 403 So. 2d 867, 868-69 (Miss. 1981) (citations omitted).**

Special Statutes Conferring Jurisdiction to the Circuit Court

§ 11-27-3 Creation of court:

> A special court of eminent domain is hereby created, to consist of a judge, jury, and such other officers and personnel as hereinafter set out, and it shall have and exercise the jurisdiction and powers hereinafter enumerated. The original powers and jurisdiction shall be and is hereby fixed in the county court in each county that has elected to come under the provisions of Section 9-9-1 Mississippi Code of 1972, or that may hereafter come under the provisions of said Section 9-9-1, and in every other county of this state, the original powers and jurisdiction shall be and is hereby fixed in the circuit court of such county, which said powers and jurisdiction may be exercised in full either in termtime or vacation, or both.

Mississippi Constitution, Article VI, § 161:

> And the chancery court shall have jurisdiction, concurrent with the circuit court, of suits on bonds of fiduciaries and public officers for failure to account for money or property received, or wasted or lost by neglect or failure to collect, and of suits involving inquiry into matters of mutual accounts; but if the plaintiff brings his suit in the circuit court, that court may, on application of the defendant, transfer the cause to the chancery court, if it appear that the accounts to be investigated are mutual and complicated.

Appellate Jurisdiction

Mississippi Constitution, Article VI, § 156:

> The circuit court shall have . . . such appellate jurisdiction as shall be prescribed by law.

Civil Appeals

§ 11-51-85 From justice court judgment:

> Either party may appeal to the circuit court of the county from the judgment of any justice court judge. . . .

§ 11-51-81 To county court [and to circuit court]:

> All appeals from courts of justices of the peace, special and general, and from all municipal courts shall be to the county court under the same rules and regulations as are provided on appeals to the circuit court, but appeals from orders of the board of supervisors, municipal boards, and other tribunals other than courts of justice of the peace and municipal courts, shall be direct to the circuit court as heretofore. And from the final judgment of the county court in a case appealed to it under this section, a further appeal may be taken to the circuit court on the same terms and in the same manner as other appeals from the county court to the circuit court are taken: Provided that where the judgment or record of the justice of the peace, municipal or police court is not properly certified, or is not certified at all, that question must be raised in the county court in the absence of which the defect shall be deemed as waived and by such waiver cured and may not thereafter be raised for the first time in the circuit court on the appeal thereto; and provided further that there shall be no appeal from the circuit court to the Supreme Court of any case civil or criminal which originated in a justice of the peace, municipal or police court and was

thence appealed to the county court and thence to the circuit court unless in the determination of the case a constitutional question be necessarily involved and then only upon the allowance of the appeal by the circuit judge or by a judge of the Supreme Court.

> We find that the effect of this statute is that it prevents this Court from hearing appeals from cases originating in the justice or municipal courts of the twenty counties having county courts; thus, the statute usurps this Court's constitutional power to establish procedural rules. Accordingly, today we announce that the "three-court rule" in Section 11–51–81 is unconstitutional and void. . . . Having found a portion of Section 11–51–81 to be unconstitutional, we need to make perfectly clear that our finding on this issue in no way affects the constitutionality of the remainder of Section 11–51–81. . . . Thus, it is without question from express legislative language that this statute is severable, and the remainder of the statute is effective. ***Jones v. City of Ridgeland*, 48 So. 3d 530, 535-39 (Miss. 2010).**

§ 11-51-79 From county court:

Appeals from the law side of the county court shall be made to the circuit court. . . .

Uniform Civil Rule of Circuit and County Court 5.04, Notice of Appeal:

The party desiring to appeal a decision from a lower court must file a written notice of appeal with the circuit court clerk. A copy of that notice must be provided to all parties or their attorneys of record and the lower court or lower authority whose order or judgment is being appealed. A certificate of service must accompany the written notice of appeal. The court clerk may not accept a notice of appeal without a certificate of service, unless so directed by the court in writing. In all appeals, whether on the record or by trial de novo, the notice of appeal and payment of costs must be simultaneously filed and paid with the circuit court clerk within thirty (30) days of the entry of the order or judgment being appealed. The timely filing of this written notice and payment of costs will perfect the appeal. The appellant may proceed in forma pauperis upon written approval of the court acting as the appellate court. The written notice of appeal must specify the party or parties taking the appeal; must designate the judgment or order from which the appeal is taken; must state if it is on the record or an appeal de novo; and must be addressed to the appropriate court.

Criminal Appeals

§ 99-35-1 Right to appeal:

In all cases of conviction of a criminal offense against the laws of the state by the judgment of a justice court, or by a municipal court, for the violation of an ordinance thereof, an appeal may be taken within forty (40) days from the date of such judgment of conviction to the county court of the county, in counties in which a county court is in existence, or the circuit court of the county, in counties in which a county court is not in existence, which shall stay the judgment appealed from. Any person appealing a judgment of a justice court or a municipal court under this section shall post bond for court costs relating to such appeal. The amount of such bond shall be determined by the justice court judge or municipal judge, payable to the state in an amount of not less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1,000.00). On appearance of the appellant in the circuit court the case shall be tried anew and disposed of as other cases pending therein.

> This Court has held where there is conflict between a statute and a procedural rule created by the Supreme Court, the rule controls and the statute is void and of no effect. ***Murray v. State*, 870 So. 2d 1182, 1184 (Miss. 2004) (citations omitted).**

Mississippi Rule of Criminal Procedure 29.1, Notice of Appeal; Contents; Defects; Dismissal:

> (a) Notice of Appeal. Any person adjudged guilty of a criminal offense by a justice or municipal court may appeal to county court or, if there is no county court, to circuit court, by filing simultaneously a written notice of appeal, and both a cost bond and an appearance bond (or cash deposit), as provided in Rules 29.3(a) and 29.4(a), with the clerk of the circuit court having jurisdiction within thirty (30) days of such judgment. . . .

Administrative Appeals

Various statutes authorize a party to appeal to the circuit court from a decision rendered by an administrative agency or board.

Uniform Civil Rule of Circuit and County Court 5.03, Scope of Appeals from Administrative Agencies:

On appeals from administrative agencies the court will only entertain an appeal to determine if the order or judgment of the lower authority:

1. Was supported by substantial evidence; or
2. Was arbitrary or capricious; or
3. Was beyond the power of the lower authority to make; or
4. Violated some statutory or constitutional right of the complaining party.

Transfer of Jurisdiction

To Circuit Court

Mississippi Constitution, Article VI, § 162:

All causes that may be brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court.

§ 9-7-83 Jurisdiction of cases transferred or remanded to it:

The circuit court shall have jurisdiction of all cases transferred to it by the chancery court or remanded to it by the supreme court.

From Circuit Court

Civil Cases

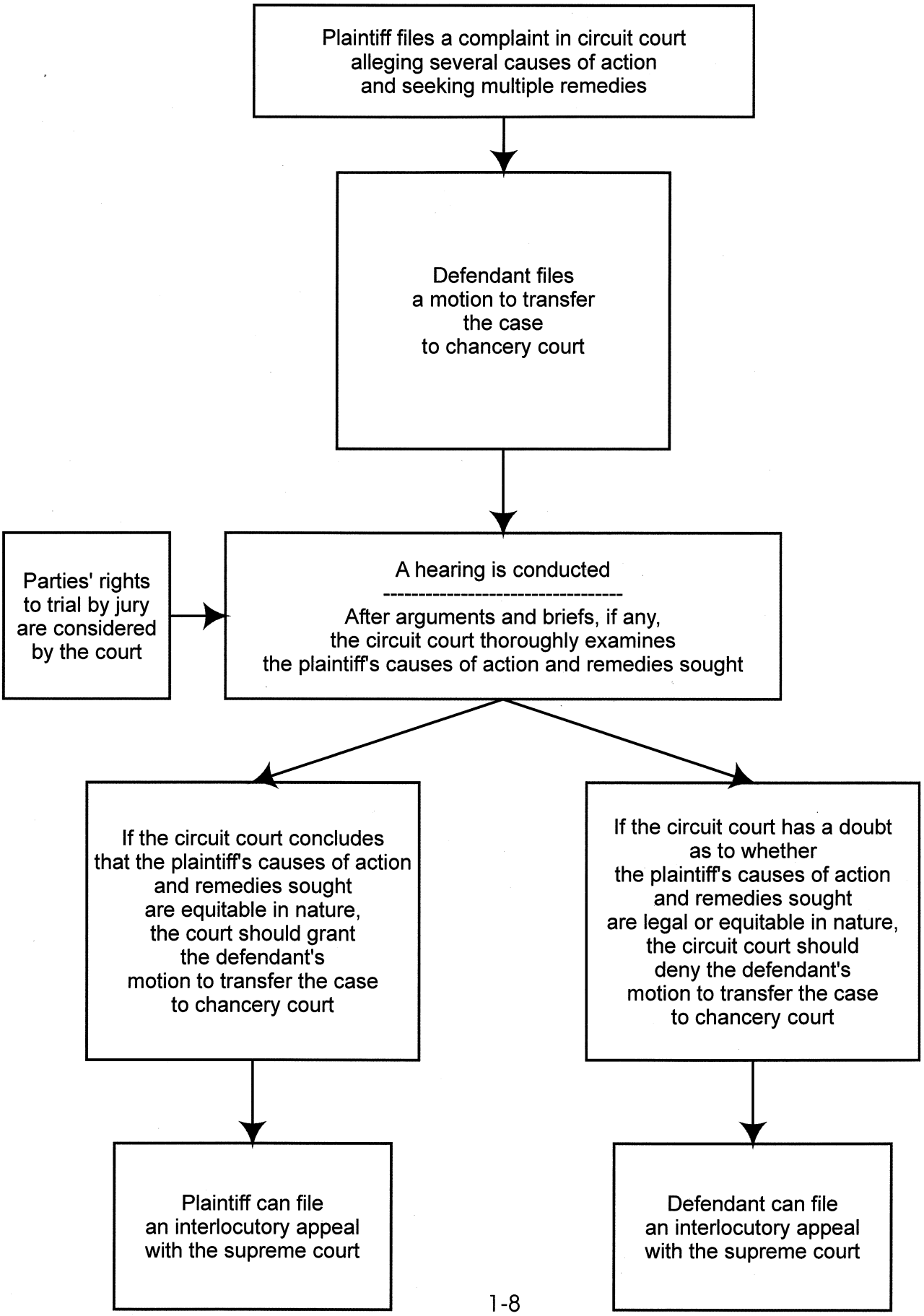
Mississippi Constitution, Article VI, § 157:

All causes that may be brought in the circuit court whereof the chancery court has exclusive jurisdiction shall be transferred to the chancery court.

Under the Mississippi Constitution of 1890, circuit courts are courts of general jurisdiction, while chancery courts have limited jurisdiction over "all matters in equity" and other designated matters. The constitution contains complementary provisions for the transfer of cases commenced in the wrong forum. The jurisdiction of the chancery court is a question of subject matter jurisdiction that may be raised by either party at any time. However, this Court is prohibited by the Mississippi Constitution from reversing on this issue after a final judgment.

A party aggrieved by the trial court's grant or denial of a motion to transfer may seek relief by pursuing an interlocutory appeal, as DPI has done here. “To determine whether a court has subject matter jurisdiction, we look to the face of the complaint, examining the nature of the controversy and the relief sought.” The reviewing court must look to the substance, not the form, of a claim to determine whether that claim is legal or equitable. We have consistently held that if it appears from the face of a well-pleaded complaint that an independent basis for equity jurisdiction exists, our chancery courts may hear and adjudge law claims. In that circumstance, the legal claims lie within the pendent jurisdiction of the chancery court. As long as the chancery court's equity jurisdiction has attached, the chancery court has discretion to award legal and punitive damages. Conversely, “if the complaint seeks legal relief, even in combination with equitable relief, the circuit court can have proper subject matter jurisdiction.” In fact, if there is some doubt as to whether a case is within the jurisdiction of the chancery court, the case is better tried in circuit court because “it is more appropriate for a circuit court to hear equity claims than it is for a chancery court to hear actions at law since circuit courts have general jurisdiction but chancery courts enjoy only limited jurisdiction.” This Court also has cited the constitutional right to a jury trial as a reason for resolving doubtful cases in favor of circuit court jurisdiction. Nonetheless, a party cannot, by invoking the right to a jury trial, secure a transfer to circuit court of a case properly within the chancery court's jurisdiction. ***Derr Plantation, Inc. v. Swarek*, 14 So. 3d 711, 715-16 (Miss. 2009) (citations omitted).**

Motion to Transfer from Circuit Court to Chancery Court



Mississippi Constitution, Article VI, § 161:

> And the chancery court shall have jurisdiction, concurrent with the circuit court, of suits on bonds of fiduciaries and public officers for failure to account for money or property received, or wasted or lost by neglect or failure to collect, and of suits involving inquiry into matters of mutual accounts; but if the plaintiff brings his suit in the circuit court, that court may, on application of the defendant, transfer the cause to the chancery court, if it appear that the accounts to be investigated are mutual and complicated.

§ 9-9-27 Cases transferred; prosecution by affidavit:

> In any civil case instituted in the circuit court, wherein all parties file a motion to transfer said case to the county court for trial, or wherein all parties file an instrument of writing consenting to such a transfer, the circuit court may, in its discretion, transfer the case to the county court for trial. . . .

Criminal Cases

§ 9-9-27 Cases transferred; prosecution by affidavit:

> In misdemeanor cases and in felony cases not capital, wherein indictments have been returned by the grand jury, the circuit court may transfer with full jurisdiction all or any of the same, in its discretion, to the county court for trial. . . and prosecutions by affidavit are hereby authorized in misdemeanor cases under the same procedure as if indictments had been returned in the circuit court and same had been transferred to the county court. . . .

Youth Court Cases

§ 43-21-159 Transfer of cases:

> (1) When a person appears before a court other than the youth court, and it is determined that the person is a child under jurisdiction of the youth court, such court shall, unless the jurisdiction of the offense has been transferred to such court as provided in this chapter, or unless the child has previously been the subject of a transfer from the youth

court to the circuit court for trial as an adult and was convicted, immediately dismiss the proceeding without prejudice and forward all documents pertaining to the cause to the youth court; and all entries in permanent records shall be expunged. The youth court shall have the power to order and supervise the expunction or the destruction of such records in accordance with Section 43-21-265. Upon petition therefor, the youth court shall expunge the record of any case within its jurisdiction in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped, there was no disposition of such case, or the person was found not delinquent. In cases where the child is charged with a hunting or fishing violation or a traffic violation, whether it be any state or federal law, a violation of the Mississippi Implied Consent Law, or municipal ordinance or county resolution, or where the child is charged with a violation of Section 67-3-70, the appropriate criminal court shall proceed to dispose of the same in the same manner as for other adult offenders and it shall not be necessary to transfer the case to the youth court of the county. However, unless the cause has been transferred, or unless the child has previously been the subject of a transfer from the youth court to the circuit court for trial as an adult and was convicted, the youth court shall have power on its own motion to remove jurisdiction from any criminal court of any offense including a hunting or fishing violation, a traffic violation, a violation of the Mississippi Implied Consent Law, or a violation of Section 67-3-70, committed by a child in a matter under the jurisdiction of the youth court and proceed therewith in accordance with the provisions of this chapter.

(2) After conviction and sentence of any child by any other court having original jurisdiction on a misdemeanor charge, and within the time allowed for an appeal of such conviction and sentence, the youth court of the county shall have the full power to stay the execution of the sentence and to release the child on good behavior or on other order as the youth court may see fit to make unless the child has previously been the subject of a transfer from the youth court to the circuit court for trial as an adult and was convicted. When a child is convicted of a misdemeanor and

is committed to, incarcerated in or imprisoned in a jail or other place of detention by a criminal court having proper jurisdiction of such charge, such court shall notify the youth court judge or the judge's designee of the conviction and sentence prior to the commencement of such incarceration. The youth court shall have the power to order and supervise the destruction of any records involving children maintained by the criminal court in accordance with Section 43-21-265. However, the youth court shall have the power to set aside a judgment of any other court rendered in any matter over which the youth court has exclusive original jurisdiction, to expunge or destroy the records thereof in accordance with Section 43-21-265, and to order a refund of fines and costs.

(3) Nothing in subsection (1) or (2) shall apply to a youth who has a pending charge or a conviction for any crime over which circuit court has original jurisdiction.

(4) In any case wherein the defendant is a child as defined in this chapter and of which the circuit court has original jurisdiction, the circuit judge, upon a finding that it would be in the best interest of such child and in the interest of justice, may at any stage of the proceedings prior to the attachment of jeopardy transfer such proceedings to the youth court for further proceedings unless the child has previously been the subject of a transfer from the youth court to the circuit court for trial as an adult and was convicted or has previously been convicted of a crime which was in original circuit court jurisdiction, and the youth court shall, upon acquiring jurisdiction, proceed as provided in this chapter for the adjudication and disposition of delinquent child proceeding proceedings. If the case is not transferred to the youth court and the youth is convicted of a crime by any circuit court, the trial judge shall sentence the youth as though such youth was an adult. The circuit court shall not have the authority to commit such child to the custody of the Department of Youth Services for placement in a state-supported training school.

(5) In no event shall a court sentence an offender over the age of eighteen (18) to the custody of the Division of Youth Services for placement in a state-supported training school.

(6) When a child's driver's license is suspended by the youth court for any reason, the clerk of the youth court shall report the suspension, without a court order under Section 43-21-261, to the Commissioner of Public Safety in the same manner as such suspensions are reported in cases involving adults.

(7) No offense involving the use or possession of a firearm by a child who has reached his fifteenth birthday and which, if committed by an adult would be a felony, shall be transferred to the youth court.

Effect of Wrongful Transfer of Jurisdiction

Mississippi Constitution, Article VI, § 147:

No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction; but if the Supreme Court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the Supreme Court may remand it to that court which, in its opinion, can best determine the controversy.

The institution of a suit in an improper court is not sufficient grounds to deny recovery. The court, in such a case, should transfer the cause. Moreover, the opposite party should ask for such transfer**.** ***Griffin v. Maryland Cas. Co.,*** **57 So. 2d 486, 489 (Miss. 1952) (citation omitted)**; ***see*** **§ 11-3-9 Want of jurisdiction.**

Circuit Court Powers & Authority[1]

Rule Authority

Mississippi Rule of Civil Procedure 11, Signing of Pleadings and Motions, states in part:

> **(b) Sanctions.** If a pleading or motion is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false, and the action may proceed as though the pleading or motion had not been served. For wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees.

Mississippi Rule of Civil Procedure 26, General Provisions Governing Discovery, states in part:

> The court may impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement. . . .

Mississippi Rule of Civil Procedure 37, Failure to Make or Cooperate in Discovery: Sanctions, states in part:

> **(b) Failure to Comply With Order.**
>
> **(2) Sanctions by Court in Which Action Is Pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify in behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this rule, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) an order striking out pleadings or parts thereof, or staying

[1]This section is only a partial listing of the rules and statutes which authorize and empower the circuit courts to act.

further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or in addition, thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Mississippi Rule of Civil Procedure 45, Subpoena, states in part:

> **(f) Sanctions.** On motion of a party or of the person upon whom a subpoena for the production of books, papers, documents, electronically stored information, or tangible things is served and upon a showing that the subpoena power is being exercised in bad faith . . . the court in which the action is pending shall order that the subpoena be quashed and may enter such further orders as justice may require to curb abuses of the powers granted under this rule. To this end, the court may impose an appropriate sanction.

Uniform Civil Rule of Circuit and County Court 2.02, Scope of Authority of Court, states:

> The court is empowered to hear and determine all motions, appeals or other applications to the court, which the court may hear and determine without a jury, in term or vacation, and may hear or determine the same in any county in the judicial district of the court, or in a county to which venue has been transferred.

Uniform Civil Rule of Circuit and County Court 1.03, Sanctions, states:

> Any person embraced within these rules who violates the provisions hereof may be subjected to sanctions, contempt proceedings or other disciplinary actions imposed or initiated by the court.

Mississippi Rule of Criminal Procedure 17.9, Failure to Disclose; Sanctions, states in part:

> **(c) Sanctions.** Willful violation by an attorney of an applicable discovery rule, or an order issued pursuant thereto, may subject the attorney to appropriate sanctions by the court.

Mississippi Rule of Criminal Procedure 33, Subpoenas, states in part:

> **(d) Sanctions.** Violation of this Rule may provide a basis for sanctions.

Statutory Authority

In General

§ 9-1-17 Punishment of contempt:

The Supreme, circuit, chancery and county courts and the Court of Appeals shall have power to fine and imprison any person guilty of contempt of the court while sitting, but the fine shall not exceed One Hundred Dollars ($100.00) for each offense, nor shall the imprisonment continue longer than thirty (30) days. If any witness refuse to be sworn or to give evidence, or if any officer or person refuse to obey or perform any rules, order, or judgment of the court, such court shall have power to fine and imprison such officer or person until he shall give evidence, or until the rule, order, or judgment shall be complied with. . . .

§ 9-1-23 District domicile required [to be conservators of the peace]:

The judges of the Supreme, circuit and county courts and chancellors and judges of the Court of Appeals shall be conservators of the peace for the state, each with full power to do all acts which conservators of the peace may lawfully do; and the circuit judges and chancellors shall reside within their respective districts and the county judges shall reside in their respective counties.

§ 9-1-27 Appointment of officers pro tempore:

Whenever a vacancy shall exist in the office of clerk of any court, sheriff, or coroner and the vacancy shall not have been filled on or before the commencement of the term of any court which the clerk, sheriff, or coroner is required to attend, or if the clerk, sheriff, or coroner shall be absent, deceased, become unable, or refuse to discharge his duties, or be on trial therein, the court, or the judge or judges thereof, shall have power to appoint a suitable person to discharge the duties of clerk, sheriff, or coroner pro tempore. . . .

§ 11-53-23 Dismissal for want of jurisdiction:

When a case shall be dismissed by any court for want of jurisdiction, judgment shall be rendered by such court for costs against the party who invoked the jurisdiction, as in other cases.

§ 11-55-5 Costs awarded for meritless action:

Except as otherwise provided in this chapter, in any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its

judgment and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct including, but not limited to, abuse of discovery procedures available under the Mississippi Rules of Civil Procedure.

§ 13-5-26 Drawing and assigning jurors:

(2) A judge or any court or any other state or county official having authority to conduct a trial or hearing with a jury within the county may direct the circuit clerk to draw and assign to that court or official the number of jurors he deems necessary for one or more jury panels or as required by law for a grand jury. . . .

§ 93-1-17 Persons authorized to solemnize marriage:

[A]ny judge of the Supreme Court, Court of Appeals, circuit court, chancery court or county court may solemnize the rites of matrimony between any persons anywhere within this state who shall produce a license granted as herein directed.

Court Processes

§ 9-1-19 Authority of judges of supreme, circuit courts and chancellors and judges of Court of Appeals to grant remedial writs:

The judges of the Supreme and circuit courts and chancellors and judges of the Court of Appeals, in term time and in vacation, may severally order the issuance of writs of habeas corpus, mandamus, certiorari, supersedeas and attachments, and grant injunctions and all other remedial writs, in all cases where the same may properly be granted according to right and justice, returnable to any court, whether the suit or proceedings be pending in the district of the judge granting the same or not. . . .

§ 9-7-91 Judgments and executions:

The circuit court may render judgments according to the principles and usages of law, in all cases cognizable before it, and award executions, directed to the sheriff or other proper officer of any county. The court, upon legal conviction of a person of a crime or misdemeanor, shall proceed to judgment and award execution thereon as the law directs.

§ 11-1-17 Rendition of final decree; appeal:

All chancellors or judges of the chancery and circuit courts of the state of Mississippi shall render their final decree on any and all matters taken under advisement by such chancellors or judges not later than six (6) months after the date when same are taken under advisement or not later than six (6) months after the date on which the chancellors or courts or judges set as a date for the final brief or memoranda of authority is required to be filed on or as to the cause taken under advisement, whichever is the latest date after the date on which the cause or case is taken under advisement.

In the event a final decree has not been entered within the six months period hereinbefore referred to, then any party to said law suit shall have the right to appeal on the record as otherwise provided the same as if a final decree has been rendered adversely. Said appeal shall be to the supreme court of the state of Mississippi and shall be treated as a preferred case over other cases except election contests.

In Forma Pauperis

§ 11-53-17 Indigent action without security:

A citizen may commence any civil action, or answer a rule for security for costs in any court without being required to prepay fees or give security for costs, before or after commencing suit, by taking and subscribing the following affidavit:

> I, _____, do solemnly swear that I am a citizen of the State of Mississippi, and because of my poverty I am not able to pay the costs or give security for the same in the civil action (describing it) which I am about to commence (or which I have begun, as the case may be) and that, to the best of my belief, I am entitled to the redress which I seek by such suit.

However, "[t]he right to proceed in forma pauperis in civil cases does not extend beyond the initial trial of the matter." While section 11-53-17 allows "persons who are truly indigent [to] proceed in civil actions as paupers[,] . . . this statute authorizes in forma pauperis proceeding[s] in civil cases at the trial level only." ***Walker v. Bailey*, 270 So. 3d 195, 201 (Miss. Ct. App. 2018) (citations omitted).**

One of the great problems of civil government is securing justice to the poor. Under the Constitution all persons are entitled to maintain an action in the courts for an injury done to him in his lands, goods, person, or reputation, and the courts shall be open and justice shall be administered without sale, denial, or delay. It is the policy of the law that every person, however humble or poor, may resort to the courts for the vindication of his rights and the redress of his wrongs. Justice must be granted to every person, whether such person is able to pay the costs or not; if he is too poor to pay the costs, under the law he may make oath to that effect, and the suit will then be entertained and rights will be accorded to him just as though he were paying the expense. If a person is able to deposit the costs, or give security therefor, it may be required, but, if he is unable to do so, he cannot be denied justice. ***Meeks v. Meeks*, 156 Miss. 638, 126 So. 189, 190 (1930).**

***See* Mississippi Rule of Civil Procedure 3(c), Commencement of action:**

> **Proceeding In Forma Pauperis.** A party may proceed in forma pauperis in accordance with sections 11-53-17 and 11-53-19 of the Mississippi Code Annotated. The court may, however, on the motion of any party, on the motion of the clerk of the court, or on its own initiative, examine the affiant as to the facts and circumstances of his pauperism.
>
> > Rule 3(c) allows indigents to sue without depositing security for costs; however, the indigent affiant may be examined as to affiant's financial condition and the court may, if the allegation of indigency is false, dismiss the action. ***Advisory Committee Notes.***

§ 11-53-19 Untrue allegation of poverty, dismissal:

The court may dismiss an action commenced or continued on affidavit of poverty, if satisfied that the allegation of poverty was untrue.

> It is contended on behalf of appellee that the action of the court in dismissing the case was authorized by section 948, Code 1906, which provides: "The court may dismiss an action commenced or continued on affidavit of poverty, if satisfied that the allegation of poverty was untrue." The judgment of the court in dismissing a cause under this statute must be based on testimony capable of being embodied in a bill of exceptions and made a part of the record in the case. Such a judgment is reviewable by this court on appeal. The question must be heard and determined on testimony adduced before the court in the regular way. This was not done. Therefore the court was in error in dismissing the case. ***Feazell v. Soltzfus*, 98 Miss. 886, 54 So. 444, 444-45 (1911).**

§ 11-53-21 Judgment against indigent:

In cases commenced or continued on an affidavit of poverty, the officers of the court shall perform all the duties required in the prosecution of the suit, and the witnesses shall attend until released; but in the case of failure to prosecute his suit to effect, judgment shall be given against the plaintiff for costs, and execution may be issued as in other cases.

§ 99-3-28 Warrants against teachers, jail officers or counselors at adolescent offender programs; probable cause hearing:

(1)(a) Except as provided in subsection (2) of this section, before an arrest warrant shall be issued against any teacher who is a licensed public school employee as defined in Section 37-9-1, a certified jail officer as defined in Section 45-4-9, a counselor at an adolescent opportunity program created under Section 43-27-201 et seq., or a sworn law enforcement officer within this state as defined in Section 45-6-3 for a criminal act, whether misdemeanor or felony, which is alleged to have occurred while the teacher, jail officer, counselor at an adolescent opportunity program or law enforcement officer was in the performance of official duties, a probable cause hearing shall be held before a circuit court judge. The purpose of the hearing shall be to determine if adequate probable cause exists for the issuance of a warrant. All parties testifying in these proceedings shall do so under oath. The accused shall have the right to enter an appearance at the hearing, represented by legal counsel at his own expense, to hear the accusations and evidence against him; he may present evidence or testify in his own behalf. . . .

(2) Nothing in this section shall prohibit the issuance of an arrest warrant by a circuit court judge upon presentation of probable cause, without the holding of a probable cause hearing, if adequate evidence is presented to satisfy the court that there is a significant risk that the accused will flee the court's jurisdiction or that the accused poses a threat to the safety or wellbeing of the public.

§ 99-13-5 Grand jury finding of insanity or intellectual disability:

When any person is held in prison or on bail, charged with an offense, and the grand jury does not find a true bill for reason of insanity of the accused or for reason that the accused has an intellectual disability, which they judge to be such that he or she was not responsible for his acts or omissions at the time when the act or omission charged was committed or made, the grand jury shall certify the fact to the circuit court and shall state whether or not the insane person or person with an intellectual disability is a danger to the security of persons and property and the peace and safety of the community, and if the grand jury reports that insanity or intellectual disability and that danger, the court shall immediately give notice of the case to the chancellor or to the clerk of the chancery court, whose duty it shall be to proceed with the insane person and his estate or the person with an intellectual disability according to the law provided in the case of persons with mental illness or persons with an intellectual disability.

§ 99-13-7 Acquittal for insanity; presumption of continued illness and dangerousness; restoration of sanity hearing; standard of proof; counsel; application of subsection:

(1) When any person is indicted for an offense and acquitted on the ground of insanity, the jury rendering the verdict shall state in the verdict that ground and whether the accused has since been restored to his sanity and whether he is dangerous to the community. If the jury certifies that the person is still insane and dangerous, the judge shall order him to be conveyed to and confined in one of the state psychiatric hospitals or institutions.

(2) There shall be a presumption of continuing mental illness and dangerousness of the person acquitted on the ground of insanity. The presumption may be challenged by the person confined to the state psychiatric hospital or institution and overcome by clear and convincing evidence that the person has been restored to sanity and is no longer dangerous to the community. The court ordering confinement of the person to a state psychiatric hospital or institution shall conduct the hearing to determine whether the person has been restored to sanity and is no longer dangerous to the community. The person shall have the right to counsel at the hearing and if the person is indigent, counsel shall be appointed. The provisions of this subsection shall not apply to a person found by the jury to have been restored to sanity and no longer a threat to the community.

§ 99-13-9 Acquittal for intellectual disability:

When any person is indicted for an offense and acquitted on the ground of having an intellectual disability, the jury rendering the verdict shall state in the verdict that ground and whether the accused constitutes a danger to life or property and to the peace and safety of the community. If the jury certifies that the person with an intellectual disability is dangerous to the peace and safety of the community or to himself, the court shall immediately give notice of the case to the chancellor or the clerk of the chancery court, whose duty it shall be to proceed with the person according to the law provided in the case of persons with an intellectual disability, the person with an intellectual disability himself being remanded to custody to await the action of the chancery court.

§ 99-13-11 Mental examinations of accused:

In any criminal action in which the mental competency of a person charged with a felony is in question, the circuit or county court or judge in vacation on motion duly made by the defendant or the district attorney, or on the motion of the court or judge, may order the person to submit to a mental examination by a competent psychiatrist or psychologist selected by the court to determine his ability to make a defense; any cost or expense in connection with such mental examination shall be paid by the county in which the criminal action is pending.

***See* § 41-21-63, Commitment; jurisdiction of chancery court and circuit court:**

(2)(b) If a circuit court with jurisdiction over unresolved felony charges enters an order concluding that the person is incompetent to stand trial and is not restorable to competency in the foreseeable future, the matter should be referred to the chancery court to be subject to civil commitment procedures under Sections 41-21-61 through 41-21-107. The order of the circuit court shall be in lieu of the affidavit for commitment provided for in Section 41-21-65. The chancery court shall have jurisdiction and shall proceed with civil commitment procedures under Sections 41-21-61 through 41-21-107.

§ 99-15-1 Conservators of peace:

The judges of the circuit courts are conservators of the peace throughout the state, and each judge of the county court and every justice court judge is such within his county.

§ 99-15-3 Taking of bonds and recognizances:

Any conservator of the peace has power to take all manner of bonds and recognizances from persons charged on affidavit with crimes and offenses, for their appearance in the circuit court to answer thereto, as well as for crimes and offenses committed in their presence. If any person fail to give bond or enter into recognizance, with the sureties prescribed, when required to do so by a conservator of the peace, he shall be committed to the county jail, there to remain until he comply or be otherwise discharged by due course of law. Every bond or recognizance so taken shall be returned to the circuit court before its next term. If any person so bound fail to appear in the circuit court, his bond or recognizance shall be adjudged forfeited, and otherwise proceeded with as provided by law.

§ 99-15-5 Arrest and commitment:

Any conservator of the peace may, upon a finding of probable cause, by warrant issued under his hand, cause any person charged on affidavit with having committed, or with being suspected of, any offense against the law, to be arrested and brought before him, or before some other conservator of the peace in the proper county. On examination, the conservator of the peace shall commit the offender to jail if the offense be not bailable, and if it be bailable and the offender fail to find bail.

§ 99-15-9 Subpoenas:

A conservator of the peace, in all examinations had before him for offenses, may issue a subpoena to any county, and compel obedience thereto.

§ 99-15-11 Search warrants:

Any conservator of the peace, on the affidavit of a credible person, may issue a search warrant and cause stolen or embezzled goods to be seized; but the affidavit and warrant must specify the goods to be seized and the person or place to be searched.

§ 99-15-15 Appointment of counsel:

When any person shall be charged with a felony, misdemeanor punishable by confinement for ninety (90) days or more, or commission of an act of delinquency, the court or the judge in vacation, being satisfied that such person is an indigent person and is unable to employ counsel, may, in the discretion of the court, appoint counsel to defend him. Such appointed counsel shall have free access to the accused who shall have process to compel the attendance of witnesses in his favor. The accused shall have such representation available at every critical stage of the proceeding against him where a substantial right may be affected.

§ 99-15-17 Compensation of counsel; amount:

The compensation for counsel for indigents appointed as provided in Section 99-15-15, shall be approved and allowed by the appropriate judge and in any one (1) case may not exceed one thousand dollars ($1,000.00) for representation in circuit court whether on appeal or originating in said court. Provided, however, if said case is not appealed to or does not originate in a court of record, the maximum compensation shall not exceed two hundred dollars ($200.00) for any one (1) case, the amount of such compensation to be approved by a judge of the circuit court in the county where the case arises. Provided, however, in a capital case two (2) attorneys may be appointed, and the compensation may not exceed two thousand dollars ($2,000.00) per case. If the case is appealed to the state supreme court by counsel appointed by the judge, the allowable fee for services on appeal shall not exceed one thousand dollars ($1,000.00) per case. In addition, the judge shall allow reimbursement of actual expenses. The attorney or attorneys so appointed shall itemize the time spent in defending said indigents together with an itemized statement of expenses of such defense, and shall present same to the appropriate judge. The fees and expenses as allowed by the appropriate judge shall be paid by the county treasurer out of the general fund of the county in which the prosecution was commenced.

> Although Section 99-15-17 limits the compensation which an attorney may receive for the representation of an indigent, it also allows for "reimbursement of actual expenses." [We] are able to save this statute from unconstitutionality by interpreting this language to include reimbursement for all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case, i.e., the lawyer will receive a pro rata share of actual overhead. . . . [The] $1,000.00 given to an attorney for representation of an indigent is an "honorarium" or pure profit. ***Wilson v. State*, 574 So. 2d 1338, 1340-41 (Miss. 1990).**

§ 99-15-23 Plea entered for defendant standing mute:

If the defendant, on arraignment, refuses or neglects to plead, or stands mute, the court must cause the plea of "not guilty" to be entered, and the trial to proceed.

§ 99-15-24 Motions and guilty pleas:

In criminal cases in circuit courts, unless otherwise provided by law, guilty pleas may be taken and motions may be heard in any county in the circuit court district that contains the county in which venue lies. Nothing in this section shall be construed as affecting venue for the purpose of bringing indictments or the conducting of jury trials.

§ 99-15-25 Entry of guilty plea in vacation:

(1) Any person who is charged in any circuit or county court with the commission of a criminal offense by a proper affidavit, indictment or information in cases of misdemeanors or by indictment by the grand jury in cases of felonies, and who is represented by counsel, may, by his own election, appear before the judge of the court at such time as the said judge may fix in vacation of the court and be arraigned and enter a plea of guilty to the offense with which he is charged. Upon the entering of such plea of guilty, the judge shall have the power and authority to impose any lawful and proper sentence upon the defendant in vacation just as though the plea was entered and the sentence imposed during a regular term of the court.

(2) All judgments and orders imposing sentences in vacation upon such pleas of guilty shall be entered upon the minutes of the proper court in vacation just as though same were had and entered during term time.

§ 99-15-26 Release after successful completion of conditions:

(1)(a) In all criminal cases, felony and misdemeanor, other than crimes against the person, a crime of violence as defined in Section 97–3–2, a violation of Section

97-11-31 or crimes in which a person unlawfully takes, obtains or misappropriates funds received by or entrusted to the person by virtue of his or her public office or employment, the circuit or county court shall be empowered, upon the entry of a plea of guilty by a criminal defendant made on or after July 1, 2014, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

(b) In all misdemeanor criminal cases, other than crimes against the person, the justice or municipal court shall be empowered, upon the entry of a plea of guilty by a criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

(c) Notwithstanding paragraph (a) of this subsection (1), in all criminal cases charging a misdemeanor of domestic violence as defined in Section 99-3-7(5), a circuit, county, justice or municipal court shall be empowered, upon the entry of a plea of guilty by the criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

(d) No person having previously qualified under the provisions of this section shall be eligible to qualify for release in accordance with this section for a repeat offense. A person shall not be eligible to qualify for release in accordance with this section if charged with the offense of trafficking of a controlled substance as provided in Section 41-29-139(f) or if charged with an offense under the Mississippi Implied Consent Law. Violations under the Mississippi Implied Consent Law can only be nonadjudicated under the provisions of Section 63-11-30.

(2)(a) Conditions which the circuit, county, justice or municipal court may impose under subsection (1) of this section shall consist of:

(i) Reasonable restitution to the victim of the crime.
(ii) Performance of not more than nine hundred sixty (960) hours of public service work approved by the court.
(iii) Payment of a fine not to exceed the statutory limit.
(iv) Successful completion of drug, alcohol, psychological or psychiatric treatment, successful completion of a program designed to bring about the cessation of domestic abuse, or any combination thereof, if the court deems treatment necessary.
(v) The circuit or county court, in its discretion, may require the defendant to remain in the program subject to good behavior for a period of time not to exceed five (5) years. The justice or municipal court, in its discretion,

may require the defendant to remain in the program subject to good behavior for a period of time not to exceed two (2) years.

(b) Conditions which the circuit or county court may impose under subsection (1) of this section also include successful completion of an effective evidence-based program or a properly controlled pilot study designed to contribute to the evidence-based research literature on programs targeted at reducing recidivism. Such program or pilot study may be community based or institutionally based and should address risk factors identified in a formal assessment of the offender's risks and needs.

(3) When the court has imposed upon the defendant the conditions set out in this section, the court shall release the bail bond, if any.

(4) Upon successful completion of the court-imposed conditions permitted by subsection (2) of this section, the court shall direct that the cause be dismissed and the case be closed.

(5) Upon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped or there was no disposition of such case.

§ 99-15-27 Copy of indictment and list of special venire in capital cases:

Any person indicted for a capital crime shall, if demanded by him by motion in writing before the completion of drawing of any special venire which is summoned to appear on the day of his trial, have a copy of the indictment and list of the special venire delivered to him or his counsel at least one (1) entire day before said trial.

§ 99-15-29 Continuances:

On all applications for a continuance the party shall set forth in his affidavit the facts which he expects to prove by his absent witness or documents that the court may judge of the materiality of such facts, the name and residence of the absent witness, that he has used due diligence to procure the absent documents, or presence of the absent witness, as the case may be, stating in what such diligence consists, and that the continuance is not sought for delay only, but that justice may be done. The court may grant or deny a continuance, in its discretion, and may of its own motion cross-examine the party making the affidavit. . . .

§ 99-15-31 Continuances in capital cases:

Application for continuance in capital cases shall not be entertained after the

drawing of any special venire which is summoned to appear on the day the case is set for trial, except for causes arising afterward, unless a good excuse be shown for not having made the application before.

§ 99-15-35 Change of venue:

On satisfactory showing, in writing, sworn to by the prisoner, made to the court, or to the judge thereof in vacation, supported by the affidavits of two or more credible persons, that, by reason of prejudgment of the case, or grudge or ill will to the defendant in the public mind, he cannot have a fair and impartial trial in the county where the offense is charged to have been committed, the circuit court, or the judge thereof in vacation, may change the venue in any criminal case to a convenient county, upon such terms, as to the costs in the case, as may be proper.

§ 99-15-37 Transfer of records to removal court:

Upon the order being made changing the venue in a criminal case, the clerk shall make out a transcript of the caption of the record, also of the proceedings impaneling the grand jury, of the indictment, with the entries or indorsements thereon, and all entries relative thereto in the records of his office, of the bonds and recognizances of the defendant, of the names of all the witnesses, and of all orders, judgments, or other papers or proceedings belonging to or had in said cause and attach his certificate thereto, under his hand, with the seal of the court annexed, and forward it, sealed up, by a special messenger, or deliver it himself, together with all the original subpoenas in the case, to the clerk of the circuit court to which the trial is ordered to be removed.

§ 99-15-39 Trial on indictment:

The defendant, on a change of venue, shall be tried on the copy of the indictment so certified; and the record, proceedings, and papers therein copied and certified, shall, in all respects become, be received, read, and taken as the original record, papers and proceedings in the said cause, and shall have the same force and effect. Defects in the transcript shall not avail the accused if he do not object to them specifically before trial.

§ 99-15-43 Venue in capital cases:

In capital cases the application for change of venue must be made before the drawing of any special venire which is summoned to appear on the day the case is set for trial, or it will be too late, except where the ground on which such application is based occurred after the drawing of such venire.

§ 99-15-45 Costs of change of venue:

The county from which the venue is changed shall pay the costs and expenses incident to such change and trial in another county as if such change of venue had not been made.

§ 99-15-47 Joint indictments; felony severance:

Any of several persons jointly indicted for a felony may be tried separately on making application therefor, in capital cases, before the drawing of any special venire which is summoned to appear on the day the case is set for trial and in other cases, before arraignment.

§ 99-15-57 Relief under previous law; expunging of record:

(1) Any person who pled guilty within six (6) months prior to the effective date of Section 99-15-26, and who would have otherwise been eligible for the relief allowed in such section, may apply to the court in which such person was sentenced for an order to expunge from all official public records all recordation relating to his arrest, indictment, trial, finding of guilty and sentence. If the court determines, after hearing, that such person has satisfactorily served his sentence or period of probation and parole, pled guilty within six (6) months prior to the effective date of Section 99-15-26 and would have otherwise been eligible for the relief allowed in such section, it may enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or trial in response to any inquiry made of him for any purpose.

(2) Upon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped, there was no disposition of such case, or the person was found not guilty at trial.

§ 99-15-59 Expunging of misdemeanor charges:

Any person who is arrested, issued a citation, or held for any misdemeanor and not formally charged or prosecuted with an offense within twelve (12) months of arrest, or upon dismissal of the charge, may apply to the court with jurisdiction over the matter for the charges to be expunged.

§ 99-15-105 Establishment of program:

(1) Each district attorney, with the consent of a circuit court judge of his district, shall have the prosecutorial discretion as defined herein and may as a matter of such prosecutorial discretion establish a pretrial intervention program in the circuit court districts. . . .

§ 99-19-20 Fines; payment; indigent defendants; inability to work or unavailability of work:

(1) Except as otherwise provided under Section 99-19-20.1,1 when any court sentences a defendant to pay a fine, the court may order (a) that the fine be paid immediately, or (b) that the fine be paid in installments to the clerk of the court or to the judge, if there be no clerk, or (c) that payment of the fine be a condition of probation, or (d) that the defendant be required to work on public property for public benefit under the direction of the sheriff for a specific number of hours, or (e) any combination of the above.

(2) Except as otherwise provided under Section 99-19-20.1, the defendant may be imprisoned until the fine is paid if the defendant is financially able to pay a fine and the court so finds, subject to the limitations provided under this section. The defendant shall not be imprisoned if the defendant is financially unable to pay a fine and so states to the court in writing, under oath, after sentence is pronounced, and the court so finds, except if the defendant is financially unable to pay a fine and such defendant failed or refused to comply with a prior sentence as specified in subsection (1) of this section, the defendant may be imprisoned. This subsection shall be limited as follows:

> (a) In no event shall such period of imprisonment exceed one (1) day for each One Hundred Dollars ($100.00) of the fine.
>
> (b) If a sentence of imprisonment, as well as a fine, were imposed, the aggregate of such term for nonpayment of a fine and the original sentence of imprisonment shall not exceed the maximum authorized term of imprisonment.
>
> (c) It shall be in the discretion of the judge to determine the rate of the credit to be earned for work performed under subsection (1)(d), but the rate shall be no lower than the rate of the highest current federal minimum wage.

(3) Periods of confinement imposed for nonpayment of two (2) or more fines shall run consecutively unless specified by the court to run concurrently.

§ 99-19-20.1 Incarceration for failure to pay fine, restitution, or court costs; ability to pay; maximum term of imprisonment; minors:

(1) Incarceration shall not automatically follow the nonpayment of a fine, restitution or court costs. Incarceration may be employed only after the court has conducted a hearing and examined the reasons for nonpayment and finds, on the record, that the defendant was not indigent or could have made payment but refused to do so. When determining whether a person is indigent, the court shall use the current Federal Poverty Guidelines and there shall be a presumption of indigence when a defendant's income is at or below one hundred twenty-five percent (125%) of the Federal Poverty Guidelines, subject to a review of his or her assets. A defendant at or below one hundred twenty-five percent (125%) of the Federal Poverty Guidelines without substantial liquid assets available to pay fines, fees, and costs shall be deemed indigent. In determining whether a defendant has substantial liquid assets, the judge shall not consider up to Ten Thousand Dollars ($10,000.00) in tangible personal property, including motor vehicles, household goods, or any other assets exempted from seizure under execution or attachment as provided under Section 85-3-1. If the defendant is above one hundred twenty-five percent (125%) of the Federal Poverty Guidelines, the judge shall make an individualized assessment of his or her ability to pay based on the totality of the circumstances including, but not limited to, the defendant's disposable income, financial obligations and liquid assets. If the judge determines that a defendant who claims indigence is not indigent and the defendant could have made payment but refused to do so, the case file shall include a written explanation of the basis for the determination of the judge. In justice and municipal court, such finding shall be included in the court's order.

(2) If it appears to the satisfaction of the court that nonpayment is not willful, the court shall enter an order that allows the defendant additional time for payment, reduces the amount of each installment, revokes the fine, in whole or in part, or allows the defendant to perform community service at the state minimum wage per hour rate. If the court finds nonpayment is willful after consideration of the defendant's situation, means, and conduct with regard to the nonpayment, the court shall determine the period of incarceration, if any, subject to the limitations set by law and subsection (3) of this section.

(3) If at the time the fine, restitution or court cost is ordered, a sentence of incarceration is also imposed, the aggregate total of the period of incarceration imposed pursuant to this section and the term of the sentence originally imposed may not exceed the maximum term of imprisonment authorized for the offense.

(4) A minor who is to serve as a confidential informant must be notified that the minor has the right to contact one (1) or both parents.

§ 99-19-25 Suspension of sentence:

The circuit courts and the county courts, in misdemeanor cases, are hereby authorized to suspend a sentence and to suspend the execution of a sentence, or any part thereof, on such terms as may be imposed by the judge of the court. Provided, the suspension of imposition or execution of a sentence hereunder may not be revoked after a period of five (5) years. . . .

§ 99-19-29 Vacation of suspension or conditional pardon:

Whenever any court granting a suspended sentence, or the governor granting a pardon, based on conditions which the offender has violated or failed to observe, shall be convinced by proper showing, of such violation of sentence or pardon, then the governor or the judge of the court granting such suspension of sentence shall be authorized to annul and vacate such suspended sentence or conditional pardon in vacation or court time. The convicted offender shall thereafter be subject to arrest and court sentence service, as if no suspended sentence or conditional pardon had been granted, and shall be required to serve the full term of the original sentence that has not been served. The offender shall be subject, after such action by the court or the governor, to arrest and return to proper authorities as in the case with ordinary escaped prisoner.

§ 99-19-71 Expunging of misdemeanor conviction:

(1) Any person who has been convicted of a misdemeanor that is not a traffic violation, and who is a first offender, may petition the justice, county, circuit or municipal court in which the conviction was had for an order to expunge any such conviction from all public records.

(2)(a) Any person who has been convicted of one (1) of the following felonies may petition the court in which the conviction was had for an order to expunge one (1) conviction from all public records five (5) years after the successful completion of all terms and conditions of the sentence for the conviction: a bad check offense under Section 97-19-55; possession of a controlled substance or paraphernalia under Section 41-29-139(c) or (d); false pretense under Section 97-19-39; larceny under Section 97-17-41; larceny of consigned motor fuels under Section 4 of this act; malicious mischief under Section 97-17-67; or shoplifting under Section 97-23-93. A person is eligible for only one (1) felony expunction under this paragraph.

(b) Any person who was under the age of twenty-one (21) years when he committed a felony may petition the court in which the conviction was had for an order to expunge one (1) conviction from all public records five (5) years after the

successful completion of all terms and conditions of the sentence for the conviction; however, eligibility for expunction shall not apply to a felony classified as a crime of violence under Section 97-3-2 and any felony that, in the determination of the circuit court, is related to the distribution of a controlled substance and in the court's discretion it should not be expunged. A person is eligible for only one (1) felony expunction under this paragraph.

(c) The petitioner shall give ten (10) days' written notice to the district attorney before any hearing on the petition. In all cases, the court wherein the petition is filed may grant the petition if the court determines, on the record or in writing, that the applicant is rehabilitated from the offense which is the subject of the petition. In those cases where the court denies the petition, the findings of the court in this respect shall be identified specifically and not generally.

(3) Upon entering an order of expunction under this section, a nonpublic record thereof shall be retained by the Mississippi Criminal Information Center solely for the purpose of determining whether, in subsequent proceedings, the person is a first offender. The order of expunction shall not preclude a district attorney's office from retaining a nonpublic record thereof for law enforcement purposes only. The existence of an order of expunction shall not preclude an employer from asking a prospective employee if the employee has had an order of expunction entered on his behalf. The effect of the expunction order shall be to restore the person, in the contemplation of the law, to the status he occupied before any arrest or indictment for which convicted. No person as to whom an expunction order has been entered shall be held thereafter under any provision of law to be guilty of perjury or to have otherwise given a false statement by reason of his failure to recite or acknowledge such arrest, indictment or conviction in response to any inquiry made of him for any purpose other than the purpose of determining, in any subsequent proceedings under this section, whether the person is a first offender. A person as to whom an order has been entered, upon request, shall be required to advise the court, in camera, of the previous conviction and expunction in any legal proceeding wherein the person has been called as a prospective juror. The court shall thereafter and before the selection of the jury advise the attorneys representing the parties of the previous conviction and expunction.

(4) Upon petition therefor, a justice, county, circuit or municipal court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped or there was no disposition of such case.

(5) No public official is eligible for expunction under this section for any conviction related to his official duties.

Court Administration

Uniform Circuit and County Court Rule 1.02, Court Decorum, states:

> The court shall be opened formally and conducted with dignity and decorum at all times. The judge shall wear a judicial robe at all times when presiding in open court. The wearing of a robe is discretionary where court facilities make it infeasible. Each officer of the court shall be responsible for the promotion of respect for the court.

§ 9-1-29 Court to control clerk's office:

> Each court shall have control over all proceedings in the clerk's office, and such control shall be exercised in a manner consistent with the Mississippi Rules of Civil Procedure.

§ 9-13-1 Circuit and chancery court appointment:

> Each circuit judge . . . shall appoint a competent person as shorthand reporter in his district by an entry upon the minutes of the court of an order to that effect, dated and signed by him. The said shorthand reporter shall be known as the official court reporter of said district.

§ 9-13-17 Appointment of additional court reporters:

> The circuit judge . . . may, by an order spread upon the minutes and made a part of the records of the court, appoint an additional court reporter for a term or part of a term whose duties, qualifications and compensation shall be the same as is now provided by law for official court reporters. The additional court reporter shall be subject to the control of the judge, as is now provided by law for official court reporters, and the judge shall have the additional power to terminate the appointment of such additional court reporter, whenever in his opinion the necessity for such an additional court reporter ceases to exist, by placing upon the minutes of the court an order to that effect. . . .

§ 9-17-1 Creation of office; appointment; compensation:

> (1) The judges and chancellors of judicial districts, including chancery, circuit and county courts, may, in their discretion, jointly or independently, establish the office of court administrator in any county by an order entered on the minutes of each participating court in the county. The establishment of the office of court administrator shall be accomplished by vote of a majority of the participating judges and chancellors in the county, and such court administrator shall be

appointed by vote of a majority of the judges or chancellors and may be removed by a majority vote of the judges or chancellors. In case of a tie vote, the senior judge or senior chancellor shall cast two (2) votes. . . .

§ 9-1-9 Adjournment upon absence of judge:

If the circuit judge . . . fail to attend at any term of the court, it shall stand adjourned from day to day until the third day, when, if the judge shall not appear and open court, it shall stand adjourned without day; but, by virtue of a written order by the judge, it may be adjourned by the clerk or sheriff to any day of the term, as the order may direct, and parties, witnesses and jurors must attend accordingly.

§ 9-1-33 Minutes of court:

The minutes of the proceedings of the Supreme, circuit, chancery and county courts and the Court of Appeals shall be entered by the clerk of each, respectively, in the minute book of the court, against the next sitting of the court, if practicable, when the same shall be read in open court; and when corrected shall be signed--the minutes of the Supreme Court by the Chief Justice or presiding judge, of the Court of Appeals by the Chief Judge or presiding judge, of the circuit court by the circuit judge, of the chancery court by the chancellor, and of the county court by the county judge; and on the last day of the term, or within ten (10) days thereafter, the minutes shall be drawn up, read and signed. Whenever by inadvertence said minutes and proceedings may remain unsigned or the judge of said court dies before signing the minutes, the succeeding judge or judges of said court may, in their discretion, examine into said unsigned minutes and ascertain as to the correctness thereof, and after same shall have been read in open court, and if the court is of the opinion that same are true and correct, then the said minutes may be signed and adopted by said judge or judges.

Office Administration

§ 9-1-36 Office allowance for circuit judges, chancellors and certain staff; procedure to employ certain staff members; title to tangible property; reports; adoption or rules and regulations:

(1) Each circuit judge and chancellor shall receive an office operating allowance for the expenses of operating the office of the judge, including retaining a law clerk, legal research, stenographic help, stationery, stamps, furniture, office equipment, telephone, office rent and other items and expenditures necessary and incident to maintaining the office of judge. The allowance shall be paid only to the extent of actual expenses incurred by the judge as itemized and certified by the judge to the Supreme Court in the amounts set forth in this subsection; however, the judge may expend sums in excess thereof from the compensation otherwise provided for his office. No part of this expense or allowance shall be used to pay an official court reporter for services rendered to said court.

(a) Until July 1, 2008, the office operating allowance under this subsection shall be not less than Four Thousand Dollars ($4,000.00) nor more than Nine Thousand Dollars ($9,000.00) per annum.

(b) From and after July 1, 2008, the office operating allowance under this subsection shall be Nine Thousand Dollars ($9,000.00) per annum.

(2) In addition to the amounts provided for in subsection (1), there is hereby created a separate office allowance fund for the purpose of providing support staff to judges. This fund shall be managed by the Administrative Office of Courts.

(3) Each judge who desires to employ support staff after July 1, 1994, shall make application to the Administrative Office of Courts by submitting to the Administrative Office of Courts a proposed personnel plan setting forth what support staff is deemed necessary. . . .

***See* § 1-1-11 Distribution of sets purchased by state; electronic statutes access; CD-ROMS.**

***See* § 1-1-58 Advance sheets of general laws.**

***See* § 9-1-37 Stationery allowance.**

Inherent Authority

We agree with the learned trial judge that all courts possess the inherent authority to control the proceedings before them including the conduct of the participants. ***Aeroglide Corp. v. Whitehead*, 433 So. 2d 952, 953 (Miss. 1983).**

To Order Sanctions

Additionally or alternatively, discovery violations may subject an attorney in a criminal trial to monetary sanctions . . . under the trial court's inherent authority to control proceedings before it. This Court stated as follows:

> In *Ladner v. Ladner*, we held that even where there is no specific statutory authority for imposing sanctions, courts have inherent power to protect the integrity of their processes, and may impose sanctions in order to do so.

[In *Bean v. Broussard*,] [w]e found, first of all, that the circuit court had inherent authority to impose monetary sanctions against an attorney, even though the pre-amendment version of Rule 11(b) spoke only to imposition of sanctions against a party. ***January v. Barnes*, 621 So. 2d 915, 921 (Miss. 1992) (citations omitted).**

To Implement Rules

Unquestionably, a circuit court possesses inherent rule making power to enable it to effectively implement the Mississippi Rules of Civil Procedure. ***Koerner v. Crittenden*, 635 So. 2d 833, 835 (Miss. 1994).**

Uniform Civil Rule of Circuit and County Court Practice 1.14, Local Practice, states in part:

> There will be no local rules of court unless such rules are approved by the Supreme Court of Mississippi.

Exceeding Inherent Authority

To Order Sanctions

> However, in the case sub judice, the circuit court exceeded its inherent authority to control its docket. Specifically, a lower court cannot unilaterally implement and enforce a settlement deadline which affords less time for parties to negotiate and settle a case before risking the assessment of costs than that allowed by Uniform Circuit Court Rule 2.13. ***Watts v. Pennington*, 598 So. 2d 1308, 1312 (Miss. 1992).**
>
> [W]e hold that the inherent authority of the trial court did not extend to awarding of damages as in a tort action for litigation expenses [when a mistrial is declared because of improper conduct by the party]. ***Aeroglide Corp. v. Whitehead*, 433 So. 2d 952, 953 (Miss. 1983).**

To Modify Sentences

> The language utilized by this Court in *Harrigill* is clear that there is no inherent authority to alter or vacate a judgment, but rather legislation is required:
>
> > In light of our precedent, there is no indication that circuit court judges have inherent authority to modify sentences after the end of the term of court during which the sentence [was] given.
>
> ***Dickerson v. State*, 731 So. 2d 1082, 1085 (Miss. 1998) (citations omitted) *overruled by Presley v. State*, 792 So. 2d 950 (Miss. 2001).**
>
> With respect to the term of court issue, we find Miss. Code Ann. Section 11-1-16 (1991) clearly gives a circuit court authority to consider a pending motion after a term has ended. *Dickerson v. State* is therefore overruled to the extent it is inconsistent with this statute. ***Presley v. State*, 792 So. 2d 950, 953 (Miss. 2001).**

Circuit Court Districts

Mississippi Constitution, Article VI, § 152:

> The Legislature shall divide the state into an appropriate number of circuit court districts. . . .

§ 9-7-3 Circuit court districts and terms of court; number of judges; powers and duties of judges:

> (1) The state is divided into an appropriate number of circuit court districts severally numbered and composed of the counties as set forth in the [§§ 9-7-5 to -57]. . . .
>
> ***See* Miss. Code Ann. §§ 9-7-5 to -57** (listing the circuit court districts).

§ 9-7-1 Judges in General:

> A circuit judge . . . may hold court in any other district with the consent of the judge thereof, when in their opinion the public interest may require. . . .

Circuit Court Terms of Court

Official Terms of Court

Mississippi Constitution, Article VI, § 158:

> A circuit court shall be held in each county at least twice in each year, and the judges of said courts may interchange circuits with each other in such a manner as may be provided by law.
>
> ***See* § 9-7-1** (The circuit judge may hold court in any other district with the consent of the judge thereof, when in their opinion the public interest may require).

§ 9-7-87 Jurisdiction of special terms:

> At a special term the circuit court may impanel grand and petit juries, and shall have jurisdiction to hear and determine all civil and criminal business, in the same manner as at a regular term. . . . The judge may direct whether jurors shall be summoned and how they shall be drawn.

§ 11-1-16 Proceedings in vacation; jurisdiction and authority of judge:

(1) Notwithstanding the provisions of any other law to the contrary, the judge of any circuit, chancery, county, youth or family court or any other court of record shall, in vacation, and in the same manner as at a regular term, have jurisdiction to hear and determine and make and enter judgments, orders and decrees in all cases, civil or criminal, which are pending in the court and which were triable at the preceding term. Parties and witnesses duly summoned, subpoenaed or bound by recognizance at the preceding term shall be bound to attend without the necessity of additional process. Petit juries may be impaneled in such cases in the same manner as in term time. All judgments, orders and decrees which the judge may render or make in such cases tried shall be signed by him and thereupon be entered and recorded on the minute book of the court in which the case or matter is pending, and shall have the same force and effect as if made, entered and recorded in term time. Appeals may be had and taken therefrom when so entered and recorded, as in other cases, in like manner as is provided by law when cases are tried in term time.

(2) The provisions of this section shall be supplemental and in addition to all other jurisdiction and authority which the judge of any court may lawfully exercise in vacation or at a special term.

> With respect to the term of court issue, we find Miss. Code Ann. Section 11-1-16 (1991) clearly gives a circuit court authority to consider a pending motion after a term has ended. ***Presley v. State*, 792 So. 2d 950, 953 (Miss. 2001).**
>
> It is thus clear that there has been a vast expansion by statutory enactment of the times within which circuit judges are lawfully empowered to conduct court affairs. ***Griffin v. State*, 565 So. 2d 545, 548 (Miss. 1990).**

§ 99-15-25 Entry of guilty plea in vacation:

(1) Any person who is charged in any circuit or county court with the commission of a criminal offense by a proper affidavit, indictment or information in cases of misdemeanors or by indictment by the grand jury in cases of felonies, and who is represented by counsel, may, by his own election, appear before the judge of the court at such time as the said judge may fix in vacation of the court and be arraigned and enter a plea of guilty to the offense with which he is charged. Upon the entering of such plea of guilty, the judge shall have the power and authority to impose any lawful and proper sentence upon the defendant in vacation just as though the plea was entered and the sentence imposed during a regular term of the court.

(2) All judgments and orders imposing sentences in vacation upon such pleas of guilty shall be entered upon the minutes of the proper court in vacation just as though same were had and entered during term time.

§ 9-7-3 Circuit court districts and terms of court; number of judges; powers and duties of judges:

(1) . . . A court to be styled "The Circuit Court of the County of . . ." shall be held in each county, and within each judicial district of a county having two (2) judicial districts, at least twice a year. Court shall be held in circuit court districts consisting of a single county on the same dates state agencies and political subdivisions are open for business excluding legal holidays. The dates upon which terms shall commence and the number of days for which the terms shall continue in circuit court districts consisting of more than one (1) county shall be set by order of the circuit court judge in accordance with the provisions of subsection (2) of this section. A matter in court may extend past a term if the interest of justice so requires.

(2) An order establishing the commencement and continuation of terms of court for each of the counties within a circuit court district consisting of more than one (1) county shall be entered annually and not later than October 1 of the year immediately preceding the calendar year for which the terms of court are to become effective. Notice of the dates upon which the terms of court shall commence and the number of days for which the terms shall continue in each of the counties within a circuit court district shall be posted in the office of the circuit clerk of each county within the district and mailed to the office of the Secretary of State for publication and distribution to all Mississippi Bar members. If an order is not timely entered, the terms of court for each of the counties within any circuit court district shall remain unchanged for the next calendar year. A certified copy of any order entered under the provisions of this subsection shall, immediately upon the entry thereof, be delivered to the clerk of the board of supervisors in each of the counties within the circuit court district.

Circuit Court Judges

Qualifications

Mississippi Constitution, Article VI, § 154:

> No person shall be eligible to the office of judge of the circuit court or of the chancery court who shall not have been a practicing lawyer for five years and who shall not have attained the age of twenty-six years, and who shall not have been five years a citizen of this State.

Requirements for Office

§ 9-7-1 Judges in general:

> A circuit judge shall be a resident of the district in which he or she serves but shall not be required to be a resident of a subdistrict if the district is divided into subdistricts.

§ 9-1-23 District domicile required:

> [T]he circuit judges . . . shall reside within their respective districts. . . .

§ 9-1-25 Law practice prohibited:

> It shall not be lawful for any judge of the circuit court to exercise the profession or employment of an attorney or counselor at law, or to be engaged in the practice of law; and any person offending against this prohibition shall be guilty of a high misdemeanor and be removed from office; but this shall not prohibit a circuit judge from practicing in any of the courts for a period of six (6) months from the time such judges assume office so far as to enable them to bring to a conclusion cases actually pending when they were appointed or elected in which such judge was then employed. . . .

How Elected

Mississippi Constitution, Article VI, § 153:

> The judges of the circuit courts . . . shall be elected by the people in a manner and at a time to be provided by the legislature and the judges shall hold their office for a term of four years.

§ 9-7-1 Judges; election; holding of terms of court; term of office; residence:

A circuit judge shall be elected for and from each circuit court district. . . and their terms of office shall continue for four (4) years.

Number of Circuit Court Judges

§ 9-7-3 Circuit court districts and terms of court; number of judges; powers and duties of judges:

(3) The number of judges in each circuit court district shall be determined by the Legislature based upon the following criteria:

(a) the population of the district;

(b) the number of cases filed in the district;

(c) the case load of each judge in the district;

(d) the geographic area of the district;

(e) an analysis of the needs of the district by the court personnel of the district; and

(f) any other appropriate criteria.

Judicial Oath

Mississippi Constitution, Article VI, § 155:

The judges of the several courts of this state shall, before they proceed to execute the duties of their respective offices, take the following oath or affirmation, to-wit:

I, _____, solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ according to the best of my ability and understanding, agreeably to the Constitution of the United States and the Constitution and laws of the state of Mississippi. So help me God.

§ 25-1-11 Filing of oath of office:

[B]ut the oath of office of the circuit judges, chancellors, and district attorneys may be filed in the office of the clerk of the court where such officer shall first attend to discharge the duties of his office. The oath of office of all officers whose duties are confined within the limits of the county in which they are elected shall be filed in the office of the clerk of the chancery court of the county.

Senior Circuit Court Judge

§ 9-7-3 Circuit court districts and terms of court; number of judges; powers and duties of judges:

(5) In a district having more than one (1) office of circuit judge, there shall be no distinction whatsoever in the powers, duties and emoluments of those offices except that the judge who has been for the longest time continuously a judge of that court or, should no judge have served longer in office than the others, the judge who has been for the longest time a member of The Mississippi Bar, shall be the senior judge. The senior judge shall have the right to assign causes and dockets and to set terms in districts consisting of more than one (1) county. A circuit court judge shall have the right to assign criminal matters to county court as provided in Section 9-9-21.

Continuing Judicial Education

Mandatory Continuing Judicial Education Rule 2, Scope and Exemptions, states in pertinent part:

> These rules shall apply to . . . Judges of the Circuit, Chancery, County . . . Courts.

Mandatory Continuing Judicial Education Rule 3, CJE Requirement, states:

> The use of the term "judges" herein shall be deemed to include Senior Judges, Family Court Judges, Circuit Judges, Chancellors, County Court Judges, Youth Court Judges, including Youth Court Referees, Court of Appeals Judges, and Supreme Court Justices. Each judge and justice in the State of Mississippi shall attend, or complete an approved substitute for attendance, a minimum of twelve (12) actual hours of approved Continuing Judicial Education (CJE) during each successive twelve (12) month period (the "CJE year") from and after August 1 of each year, of which one hour shall be in the area of legal ethics, professional responsibility, [or] professionalism, (the "ethics/professionalism hour"), except for Youth Court Referees and new judges as hereinafter provided, and provided the funding for said educational programs is available through the Mississippi Judicial College or state travel allowance. . . .

Mandatory Continuing Judicial Education Rule 4, Credits, states in pertinent part:

> (b) A maximum of twelve (12) hours in excess of the minimum annual requirement may be carried forward for credit in the succeeding year, except those acquired from a Judge Advocate General program. However, no hours completed in the area of legal ethics, professional responsibility, professionalism shall be carried forward. . . .

Mandatory Continuing Judicial Education Rule 5, Annual Report, states:

> On or before August 31 of each year, each judge and justice subject to CJE in the state, shall make a written report to the Mississippi Judicial College, in such form as the college shall prescribe, concerning his or her compliance with these rules accredited judicial education during the preceding CJE year.

Mandatory Continuing Judicial Education Rule 6, Noncompliance and Sanctions, states in pertinent part:

> (a) As soon as practicable after October 1 of each year, the Mississippi Judicial College shall compile the following:

(1) A list of those judges, or justices who have complied with these rules for the prior preceding CJE year ending July 31, as required by Rules 3 and 5, Mississippi Rules for Mandatory Continuing Judicial Education.
(2) A list of judges or justices who have not complied with these rules for the prior preceding CJE year ending July 31 indicating that they have not complied with the requirement of Rules 3 and 5, Mississippi Rules for Mandatory Continuing Judicial Education.
(3) Any request for waiver of these rules from any judge/justice.

(b) The above lists shall then be forwarded to the Committee On Mandatory Continuing Judicial Education who shall then notify, by certified mail, each judge/justice who has not complied with Rules 3 and 5, Mississippi Rules for Mandatory Continuing Judicial Education within sixty (60) days, why the judge/justice should not be reported to the Supreme Court for sanction. Said judge/justice shall furnish the Committee with an affidavit:

(1) Indicating that the judge/justice has complied with the requirement prior to expiration of the sixty (60) days, or
(2) Setting forth a valid excuse for failure to comply with the requirements because of hardship or other good cause.

(c) At the expiration of sixty (60) days from the date of the Notice to Show Cause, the Committee shall notify the Supreme Court of Mississippi of each judge/justice who fails to file an affidavit satisfactory to the Committee On Mandatory Continuing Judicial Education as described in (b)(1) and (b)(2) above and may recommend appropriate sanctions to the Mississippi Supreme Court. The sanctions are to be determined by said Supreme Court. Said sanctions may include a private reprimand, public reprimand, and/or the publication of the name of said judge in the Mississippi Lawyer as not having satisfactorily completed mandatory judicial education, or other appropriate sanction.

(d) At any time after notice of noncompliance to the Supreme Court, a judge/justice may file with the Committee an affidavit indicating compliance with Rules 3 and 5, Rules for Mandatory Continuing Judicial Education; and if satisfactory to the Committee On Mandatory Continuing Judicial Education, it shall forthwith notify the Supreme Court and may recommend sanctions to be imposed by the Supreme Court.

Removal from Office

Mississippi Constitution, Article VI, § 177A:

> On recommendation of the commission on judicial performance, the Supreme Court may remove from office, suspend, fine or publicly censure or reprimand any justice or judge of this state for:
>
> > (a) actual conviction of a felony in a court other than a court of the State of Mississippi;
> > (b) willful misconduct in office;
> > (c) willful and persistent failure to perform his duties;
> > (d) habitual intemperance in the use of alcohol or other drugs; or
> > (e) conduct prejudicial to the administration of justice which brings the judicial office into disrepute; and may retire involuntarily any justice or judge for physical or mental disability seriously interfering with the performance of his duties, which disability is or is likely to become of a permanent character. . . .

Mississippi Constitution, Article VI, § 175:

> All public officers, for wilful neglect of duty or misdemeanor in office, shall be liable to presentment or indictment by a grand jury; and, upon conviction, shall be removed from office, and otherwise punished as may be prescribed by law.

§ 25-5-1 Criminal convictions; mental competency:

> If any public officer . . . shall be convicted or enter a plea of guilty or nolo contendere in any court of this state or any other state or in any federal court of any felony other than manslaughter or any violation of the United States Internal Revenue Code, of corruption in office or peculation therein, or of gambling or dealing in futures with money coming to his hands by virtue of his office, any court of this state, in addition to such other punishment as may be prescribed, shall adjudge the defendant removed from office; and the office of the defendant shall thereby become vacant. If any such officer be found by inquest to be of unsound mind during the term for which he was elected or appointed, or shall be removed from office by the judgment of a court of competent jurisdiction or otherwise lawfully, his office shall thereby be vacated; and in any such case the vacancy shall be filled as provided by law.
>
> When any such officer is found guilty of a crime which is a felony under the laws of this state or which is punishable by imprisonment for one (1) year or more, other than manslaughter or any violation of the United States Internal Revenue

Code, in a federal court or a court of competent jurisdiction of any other state, the Attorney General of the State of Mississippi shall promptly enter a motion for removal from office in the circuit court of Hinds County in the case of a state officer, and in the circuit court of the county of residence in the case of a district, county or municipal officer. The court, or the judge in vacation, shall, upon notice and a proper hearing, issue an order removing such person from office and the vacancy shall be filled as provided by law.

Vacancy from Office

§ 9-1-105 Absence or disability:

(1) Whenever any judicial officer is unwilling or unable to hear a case or unable to hold or attend any of the courts at the time and place required by law by reason of the physical disability or sickness of such judicial officer, by reason of the absence of such judicial officer from the state, by reason of the disqualification of such judicial officer pursuant to the provision of Section 165, Mississippi Constitution of 1890, or any provision of the Code of Judicial Conduct, or for any other reason, the Chief Justice of the Mississippi Supreme Court, with the advice and consent of a majority of the justices of the Mississippi Supreme Court, may appoint a person as a special judge to hear the case or attend and hold a court.

(2) Upon the request of the Chief Judge of the Court of Appeals, the senior judge of a chancery or circuit court district, the senior judge of a county court, or upon his own motion, the Chief Justice of the Mississippi Supreme Court, with the advice and consent of a majority of the justices of the Mississippi Supreme Court, shall have the authority to appoint a special judge to serve on a temporary basis in a circuit, chancery or county court in the event of an emergency or overcrowded docket. It shall be the duty of any special judge so appointed to assist the court to which he is assigned in the disposition of causes so pending in such court for whatever period of time is designated by the Chief Justice. The Chief Justice, in his discretion, may appoint the special judge to hear particular cases, a particular type of case, or a particular portion of the court's docket. . . .

CIRCUIT COURT JURISDICTION

CIVIL

Original jurisdiction in all civil matters
not vested by the constitution in another court
Miss. Const. art. VI, § 156

Appellate jurisdiction as prescribed by law
Miss. Const. art. VI, § 156 & § 9-7-81

Actions with the amount in controversy over $200.00
§ 9-7-81

Actions not exclusively cognizable in another court
§ 9-7-81

Eminent domain cases where there is no county court
§ 11-27-3

CRIMINAL

Original jurisdiction in all criminal matters
not vested by the constitution in another court
Miss. Const. art. VI, § 156

Prosecutions in the name of the state for
"treason, felonies, crimes, and misdemeanors,"
except those cognizable before another court
§ 9-7-81

CHANCERY COURT JURISDICTION

- All matters in equity
- Divorce & alimony
- Matters testamentary & of administration
- Minor's business
- Cases of idiocy, lunacy, & persons of unsound mind
- All cases of which the chancery court had jurisdiction when the Mississippi Constitution was enacted

Miss. Const. art. VI, § 159

- Suits to try title & to cancel deeds & other clouds upon real estate
- Suits to decree & to displace possession of real estate
- Suits to decree rents & compensation for improvements & taxes

Miss. Const. art. VI, § 160

Youth court jurisdiction by statute

§§ 43-21-107 & -151

COUNTY COURT JURISDICTION

CIVIL

Concurrent with the justice court in all civil matters
§ 9-9-21

Concurrent with the circuit & chancery courts
over all matters of law & equity
with an amount in controversy up to $200,000.00
§ 9-9-21

Exclusive jurisdiction over eminent domain,
partition of personal property,
& actions for unlawful entry & detainer
§ 9-9-21

Civil cases transferred from the circuit court
§ 9-9-27

CRIMINAL

Concurrent with the justice court in all criminal matters
§ 9-9-21

Criminal cases transferred from circuit court
§ 9-9-21

Non-capital felonies transferred from circuit court
§ 9-9-27

YOUTH COURT

Youth court jurisdiction by statute
§ 43-21-107 & -151

JUSTICE COURT JURISDICTION

CIVIL

Actions with the amount in controversy up to $500.00
"or such higher amount as may be prescribed by law"
Miss. Const. art. VI, § 171

Actions with the amount in controversy up to $3,500.00
§ 9-11-9

Payment of court costs is jurisdictional
§ 9-11-10

CRIMINAL

Concurrent with the circuit court over all crimes
where the punishment prescribed is not more than
a fine & imprisonment in the county jail
Miss. Const. art. VI, § 171 & § 99-33-1

Criminal case remanded by a circuit court grand jury
§§ 99-33-1 & 99-33-13

Preliminary hearings & initial appearances
for criminal offenses committed within the county
MRCrP 5 & 6

MUNICIPAL COURT JURISDICTION

CIVIL

Actions filed pursuant to and as provided in
Title 93, Chapter 21, Mississippi Code of 1972,
the Protection from Domestic Abuse Act
§ 21-23-7

CRIMINAL

Actions for violations of the municipal ordinances
& state misdemeanor laws made offenses against the municipality
§ 21-23-7

Preliminary hearings & initial appearances
for criminal offenses committed within the municipality
§ 21-23-7

Criminal case remanded by a circuit court grand jury
§ 21-23-7

APPENDIX A

TO

CHAPTER 1

CONSTITUTIONAL AND STATUTORY OATHS

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APPENDIX OF CONSTITUTIONAL & STATUTORY OATHS

GRAND JURY OATHS

§ 13-5-45 Appointment of foreman:

The court shall appoint one of the grand jurors to be foreman of the grand jury, to whom the following oath shall be administered in open court, in the presence of the rest of the grand jurors, to wit:

> You, as foreman of this grand inquest, shall diligently inquire into, and true presentment make, of all such matters and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service. The counsel of the state, your fellows, and your own you will keep secret. You shall not present any person through malice, hatred or ill will, nor shall you leave any person unpresented through fear, favor or affection, or for any reward, hope or promise thereof, but in all your presentments, you shall present the truth, the whole truth, and nothing but the truth, to the best of your skill and understanding. So help you God.

And the following oath shall be administered to the other jurors, to wit:

> The same oath that your foreman has now taken before you on his part, you, and each of you, shall well and truly observe, and keep on your respective parts. So help you God.

PETIT JURY OATHS

§ 13-5-71 Petit juror oath:

Petit jurors shall be sworn in the following form:

> You, and each of you, do solemnly swear (or affirm) that you will well and truly try all issues and execute all writs of inquiry that may be submitted to you, or left to your decision by the court, during the present term, and true verdicts give according to the evidence. So help you God.

§ 11-27-17 Jury oath [Eminent domain cases]:

When the jury shall be so impaneled, the jurors shall be sworn as follows:

I do solemnly swear or affirm that as a member of this jury I will discharge my duty honestly and faithfully, to the best of my ability, and that I will a true verdict render according to the evidence, without fear, favor, or affection, and that I will be governed by the instructions of the court. So help me God.

§ 13-5-73 Capital case juror oath:

The jurors in a capital case shall be sworn to:

> [W]ell and truly try the issue between the state and the prisoner, and a true verdict give according to the evidence and the law.

BAILIFF'S OATH

§ 13-5-73 Capital case juror oath:

Bailiffs may be specially sworn by the court, or under its direction, to attend on such jury and perform such duties as the court may prescribe for them.

COURT REPORTER'S OATH

§ 9-13-3 Oath of office:

Before entering into his office, the court reporter shall take, in open court, an oath that he will faithfully discharge the duties thereof; and the oath so taken shall be entered in the minutes of the court.

INTERPRETER'S OATH

§ 13-1-313 Oath of true interpretation:

Before participating in any proceedings subsequent to an appointment under the provisions of sections 13-1-301 et seq., an interpreter shall make an oath or affirmation that he will make a true interpretation in an understandable manner to the person for whom he is appointed and that he will repeat the statements of such persons in the English language to the best of his skill and judgment. The appointing authority shall provide recess periods as necessary for the interpreter when the interpreter so indicates.

JUDGE'S OATH

Section 155 Judicial oath of office:

The judges of the several courts of this state shall, before they proceed to execute the duties of their respective offices, take the following oath or affirmation, to-wit:

> I, _____, solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ according to the best of my ability and understanding, agreeably to the Constitution of the United States and the Constitution and laws of the state of Mississippi. So help me God.

LEGISLATOR'S OATH

Section 40 Oath of office:

Members of the legislature, before entering upon the discharge of their duties, shall take the following oath:

> I, _____, do solemnly swear (or affirm) that I will faithfully support the Constitution of the United States and of the state of Mississippi; that I am not disqualified from holding office by the Constitution of this state; that I will faithfully discharge my duties as a legislator; that I will, as soon as practicable hereafter, carefully read (or have read to me) the Constitution of this state, and will endeavor to note, and as a legislator to execute, all the requirements thereof imposed on the legislature; and I will not vote for any measure or person because of a promise of any other member of this legislature to vote for any measure or person, or as a means of influencing him or them so to do. So help me God.

OTHER ELECTED OFFICIAL'S OATH

Section 268 Oath of office:

All officers elected or appointed to any office in this state, except judges and members of the legislature, shall, before entering upon the discharge of the duties thereof, take and subscribe the following oath:

I, _____, do solemnly swear (or affirm) that I will faithfully support the Constitution of the United States and the Constitution of the State of Mississippi, and obey the laws thereof; that I am not disqualified from holding the office of _____; that I will faithfully discharge the duties of the office upon which I am about to enter. So help me God.

CHAPTER 2

JUDICIAL ETHICS

CHARTS

CHAPTER 2

JUDICIAL ETHICS

Code of Judicial Conduct

On April 4, 2002, the Mississippi Supreme Court adopted the current Code of Judicial Conduct.

Application of the Code of Judicial Conduct

A. Parties Affected.

Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master or referee, is a judge within the meaning of this Code. All judges shall comply with this Code except as provided below.

B. Part-time Judge.

A part time judge shall not be subject to the restrictions and limitations of Sections 4C, 4D(2), 4F, and 4G, except as regards practice in the court in which the part-time judge serves [prohibition on practice of law], and 4H(1).

C. Special Judge.

A special judge shall not, except while serving as a judge, be subject to the restrictions and limitations of Sections 4A. A special judge shall not, at any time be subject to the restrictions and limitations of Sections, 4B, 4D, 4E, 4F, 4G, and 4H. A special judge, except while serving as a special judge or while a candidate for judicial office, shall not be subject to the restrictions of Canon 5.

D. Magistrates, court commissioners, special masters and referees.

Magistrates, court commissioners, special masters and referees shall not at any time be subject to the restrictions and limitations of Sections 4A, 4B, 4C(1), 4C(2) 4D, 4E, 4F, 4G, and 4H. Magistrates, court commissioners, special masters and referees, except while a candidate for judicial office, shall not be subject to the restrictions of Canon 5.

E. Time for Compliance.

A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 4D(1), 4D(2) and 4E and shall comply with those Sections as soon as reasonably possible and shall do so in any event within the period of one year.

F. Effective Date.

The separate provisions of this Code shall govern acts, events and conduct of those subject to those provisions from and after the effective date of the adoption of each such provision. Acts, events and conduct which occur prior to the adoption of each provision shall be governed by the provisions of the Code effective at the time of such acts, events and conduct.

Canon 1 A Judge Shall Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code should be construed and applied to further that objective.

> The Commission found that [the] Judge had violated Canon 1 . . . by failing to observe high standards of conduct when he committed the minor child to detention after recusing himself from the case and then entering an order appointing [another judge] to hear the case without authority. ***Mississippi Comm'n on Judicial Performance v. Osborne*, 16 So. 3d 16, 21 (Miss. 2009).**

> Canon 1 charges a judge to observe high standards of conduct and to uphold the integrity, as well as the independency, of the judiciary. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1069 (Miss. 1999) (interpreting previous version of canon).**

Canon 2 **A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All Activities**

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

> In its brief, the Commission explains that [the] Judge's involvement in her relatives' cases violated Canon 2A [and] 2B. . . . ***Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).**
>
> Judge's actions relating to refunding the expungement fee violated Canons 2A, 3B(2), and 3B(8). ***Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).**
>
> Canon 2 states that a judge should avoid both impropriety and the appearance of impropriety in all activities. It charges a judge to respect, as well as comply with, the law in all she does, thereby promoting public confidence in the integrity and impartiality of the judiciary. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1070 (Miss. 1999) (interpreting previous version of canon).**

B. Judges shall not allow their family, social, or other relationships to influence the judges' judicial conduct or judgment. Judges shall not lend the prestige of their offices to advance the private interests of the judges or others; nor shall judges convey or permit others to convey the impression that they are in a special position to influence the judges. Judges shall not testify voluntarily as character witnesses.

> ***Note:*** See the commentary concerning a judge testifying as a character witness.
>
> In its brief, the Commission explains that [the] Judge's involvement in her relatives' cases violated Canon 2A [and] 2B. . . . ***Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).**

C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, gender, religion or national origin.

Canon 3 A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

It is fundamental that judges should be sufficiently detached and unencumbered from any proclivity towards predisposition of any matter that may come before them. This is the pervading theme throughout the Code of Judicial Conduct and the theme of impartiality is an integral factor which permeates statutory and common law. ***Mississippi Comm'n on Jud. Perf. v. Jenkins*, 725 So. 2d 162, 168 (Miss. 1998) (interpreting previous version of canon).**

A. Judicial Duties in General.

The judicial duties of judges take precedence over all their other activities. The judges' judicial duties include all the duties of their office prescribed by law. In the performance of these duties, the following standards apply:

> In his official capacity, [the judge] executed an arrest warrant and other documents related to the criminal charges against [defendant], including an order setting bond. Thereafter, [the judge] served as counsel for [the defendant] on these same charges in the circuit court. By doing so, [the judge] violated Canons 1, 2A, 2B, 3A, 3B(1), 3B(2), and 4D(1) of the Code of Judicial Conduct of Mississippi Judges. We find that [the judge's] conduct constituted willful misconduct and conduct prejudicial to the administration of justice which brings the judicial office into disrepute. ***Mississippi Comm'n on Judicial Performance v. Pittman*, 993 So. 2d 816, 818 (Miss. 2008).**

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide all assigned matters within the judge's jurisdiction except those in which disqualification is required.

> In its brief, the Commission explains that [the] Judge's involvement in her relatives' cases violated Canon 3B(1). . . . ***Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).**

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

In its brief, the Commission explains that [the] Judge's . . . failure to adjudicate the domestic abuse cases properly by dismissing the matters without a hearing or order violated Canons 3B(2), 3B(7), and 3B(8) and Section 93-21-1. ***Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).**

Judge's actions relating to refunding the expungement fee violated Canons 2A, 3B(2), and 3B(8). ***Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).**

A judge is to be faithful to the law and to ignore outside influences. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1070 (Miss. 1999) (interpreting previous version of canon).**

(3) A judge shall require order and decorum in proceedings before the judge.

A judge is to maintain order in her courtroom. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1071 (Miss. 1999) (interpreting previous version of canon).**

(4) Judges shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacities, and shall require similar conduct of lawyers, and of their staffs, court officials, and others subject to their direction and control.

The Commission found that [the] Judge had violated Canons 2A and 3B(4) by incarcerating [an attorney] for expressing his First Amendment rights. The Commission stated that [the] Judge was "discourteous and intolerant" toward [the attorney] and that his actions created an impression that individuals with certain viewpoints are specially positioned to influence him. We agree that [the] Judge violated Canons 1, 2A, 3B(2), 3B(4), and 3B(8) of the Mississippi Code of Judicial Conduct. ***Mississippi Comm'n on Judicial Performance v. Littlejohn*, 62 So. 3d 968, 971 (Miss. 2011).**

A judge is to act courteously to anyone in her courtroom and to expect the same behavior from others subject to her control. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1071 (Miss. 1999) (interpreting previous version of canon).**

Elected members of the judiciary have a duty to conduct

> themselves with respect for those they serve, including the court staff and the litigants that come before them. ***Mississippi Comm'n on Jud. Perf. v. Spencer*, 725 So. 2d 171, 178 (Miss. 1998) (interpreting previous version of canon).**

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. A judge shall refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and shall require the same standard of conduct of others subject to the judge's direction and control.

> In its brief, the Commission explains that [the] Judge's involvement in her relatives' cases violated Canon 3B(5). . . . ***Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).**

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to all who are legally interested in a proceeding, or their lawyers, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

> (a) where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized: provided:
>
> > (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
> > (ii) the judge makes provision promptly to notify all other

parties of the substance of the ex parte communication and allows an opportunity to respond.

> Judge's ex parte communications with a litigant were clearly prohibited by Canon 3B(7), and such conduct has been found by this Court to constitute misconduct. ***Mississippi Comm'n on Judicial Performance v. Bradford*, 18 So. 3d 251, 254 (Miss. 2009).**
>
> A judge must allow anyone with a legal interest in a matter to be heard in her court. The canon further bars the judge from engaging in ex parte communications concerning a matter pending before her court. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1071 (Miss. 1999) (interpreting previous version of canon).**
>
> This Court realizes that it is difficult not to have ex parte communications because judges do not know the nature of their calls when they answer the phone. However, this problem can be alleviated by using clerks to screen calls, inquiring whether they pertain to a matter presently pending before the court. If so, the call could be directed to the county attorney, thereby avoiding any ex parte communications. For a judge to merely listen to another person involved in pending litigation is a violation Canon 3A(4). ***Mississippi Comm'n on Jud. Perf. v. Chinn*, 611 So. 2d 849, 852 (Miss. 1992) (interpreting previous version of canon).**

(b) Judges may obtain the advice of a disinterested expert on the law applicable to a proceeding before them if the judges give notice to the parties of the person consulted and the substance of the advice, and afford the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle

matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

> In its brief, the Commission explains that [the] Judge's . . . failure to adjudicate the domestic abuse cases properly by dismissing the matters without a hearing or order violated Canons 3B(2), 3B(7), and 3B(8) and Section 93-21-1. ***Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).**
>
> Judge's actions relating to refunding the expungement fee violated Canons 2A, 3B(2), and 3B(8). ***Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).**

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

(12) Except as may be authorized by rule or order of the Supreme Court, a judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;
(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;
(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.

Finally, Judge's actions in seeking the removal of the complainant from her job violated Canons 2B and 3C(1). ***Mississippi Comm'n on Judicial Performance v. Curry*, 249 So. 3d 369, 374 (Miss. 2018).**

Finally, Canon 3C(1) provides "[a] judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business." [The] Judge did not "maintain professional competence in judicial administration." ***Mississippi Comm'n on Judicial Performance v. Sheffield*, 235 So. 3d 30, 34 (Miss. 2017).**

A judge is to diligently discharge all administrative duties, as well

as to maintain professional competence in administering judicial matters. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1071 (Miss. 1999) (interpreting previous version of canon).**

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

(5) A judge shall not appoint a major donor to the judge's election campaign to a position if the judge knows or learns by means of a timely motion that the major donor has contributed to the judge's election campaign unless

(a) the position is substantially uncompensated;
(b) the person has been selected in rotation from a list of qualified and available persons compiled without regard to their having made political contributions; or
(c) the judge or another presiding or administrative judge affirmatively finds that no other person is willing, competent and able to accept the position.

D. Disciplinary Responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional

Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

E. Disqualification.

(1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

> Canon 3E(1)(a), furthermore, requires that judges disqualify themselves when their impartiality might be questioned or when they have personal prejudice concerning a party. . . . There is no doubt that [the] Judge had personal knowledge of the evidentiary facts, and she exhibited bias and prejudice by executing the arrest warrant. ***Mississippi Comm'n on Judicial Performance v. Bustin*, 71 So. 3d 598, 601-02 (Miss. 2011).**

(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

> Canon 3E(1)(b) states that judges should disqualify themselves whenever the judge "served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter. . . ." [The] Judge served as the ex-wife's lawyer in a divorce and child-custody

proceeding against [the defendant] at the same time that the ex-wife submitted the affidavit that charged [the defendant] with child kidnapping. [The] Judge, therefore, should have disqualified herself from the criminal matter. ***Mississippi Comm'n on Judicial Performance v. Bustin*, 71 So. 3d 598, 602 (Miss. 2011).**

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or member of the judge's family residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) is acting as a lawyer in the proceeding;
(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

Canon 3E(1)(d) provides, in pertinent part, that judges should disqualify themselves whenever they are acting as a lawyer in the proceeding. . . . As already noted, [the] Judge served as the ex-wife's lawyer in the divorce and child-custody proceeding . . . And, as the ex-wife's attorney, [the] Judge had an interest that could have been substantially affected by the outcome of the criminal proceeding against [the defendant]. ***Mississippi Comm'n on Judicial Performance v. Bustin*, 71 So. 3d 598, 602 (Miss. 2011).**

(2) Recusal of Judges from Lawsuits Involving Major Donors. A party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge. Such motions will be filed, considered and subject to appellate review as provided for other motions for recusal.

Note: A "major donor" is a donor who or which has, in the judge's most recent election campaign, made a contribution to the judge's campaign of (a) more than $2,000 if the judge is a justice of the Supreme Court or judge of the Court of Appeals, or (b) more than $1,000 if the judge is a judge of a court other than the Supreme Court or the Court of Appeals.

F. Remittal of Disqualification.

A judge who may be disqualified by the terms of Section 3E may disclose on the record the basis of the judge's possible disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Canon 4 A Judge Shall So Conduct the Judge's Extra-judicial Activities as to Minimize the Risk of Conflict with Judicial Obligations

A. Extra-judicial Activities in General.

A judge shall conduct all of the judge's extra-judicial activities so that they do not:
(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
(2) demean the judicial office; or
(3) interfere with the proper performance of judicial duties.

> These Canons apply to a judge's personal, as well as professional, conduct. His extrajudicial conduct toward an individual whom he most likely knew was mentally disabled demeaned the judicial office and cast reasonable doubt on [the judge's] capacity to act impartially, also violating Canon 4(A). ***Mississippi Comm'n on Judicial Performance v. Weisenberger*, 201 So. 3d 444, 449 (Miss. 2016).**

> To be sure, we affirm our reverence for the judicial oath of office and the Canons which govern judicial conduct. This certainly includes Canon 4A(1), which requires judges to "conduct all extra-judicial activities so that they do not cast doubt on the judge's capacity to act impartially as a judge." ***Mississippi Comm'n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1009 (Miss. 2004).**

B. Avocational Activities.

A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

> For the reasons stated herein, we find the judge may not be sanctioned for his statements which are protected by the First Amendment to the United States Constitution. We reject the Commission's findings and recommendation, and we finally dismiss the Commission's complaint and this case with prejudice**.** ***Mississippi Comm'n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1016 (Miss. 2004).**

C. Governmental, Civic or Charitable Activities.

(1) A judge shall not make an appearance before, or otherwise consult with, an executive or legislative body or official or a public hearing except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

> In making this suggestion [that another judge who had not attended public meetings at which the instant case had been discussed should hear the case on remand,] we do not mean to imply the judges of this state, especially trial judges, should seclude themselves from the public. Trial judges have the duty of complete impartiality in the trial of any case, and responsibility to maintain complete independence and integrity in hearing and deciding any case. This does not mean they cannot be in attendance at a meeting of public officials, or give an audience to any one or more groups of citizens. Of course, if a judge learns beforehand that the purpose of some meeting would compromise the independence of his judicial conduct, he should not attend. Likewise, we do not doubt practically every judge has had occasion to remind people who seek their audience that they cannot discuss any pending case. If this government is to remain democratic, judges must have the independence to decide each case on its merits to the very best of their minds, hearts and conscience. The striving for this goal by any judge is not impeded, however, by courteously listening to citizens not seeking to influence his judicial decisions. A good judge is capable of quickly correcting any improper suggestion or erroneous impression of the judicial function. ***Clark v. State*, 409 So. 2d 1325, 1330 (Miss. 1982) (interpreting previous version of canon).**

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not

conducted for profit, subject to the following limitations and the other requirements of this Code.

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization:

(i) will be engaged in proceedings that would ordinarily come before the judge, or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

D. Financial Activities.

(1) Judges should refrain from financial and business dealings that tend to reflect adversely on their impartiality, interfere with the proper

performance of their judicial duties, exploit their judicial positions, or involve them in frequent transactions with lawyers or persons likely to come before the court on which the judges serve.

> In his official capacity, [the judge] executed an arrest warrant and other documents related to the criminal charges against [defendant], including an order setting bond. Thereafter, [the judge] served as counsel for [the defendant] on these same charges in the circuit court. By doing so, [the judge] violated Canons 1, 2A, 2B, 3A, 3B(1), 3B(2), and 4D(1) of the Code of Judicial Conduct of Mississippi Judges. We find that [the judge's] conduct constituted willful misconduct and conduct prejudicial to the administration of justice which brings the judicial office into disrepute. ***Mississippi Comm'n on Judicial Performance v. Pittman*, 993 So. 2d 816, 818 (Miss. 2008).**

(2) Judges should manage their investments and other financial interests to minimize the number of cases in which they are disqualified. As soon as a judge can do so without serious financial detriment, the judge should divest himself or herself of investments and other financial interests that might require frequent disqualification.

(3) Neither judges nor members of their families residing in their households should accept a gift, bequest, favor, or loan from anyone reflecting the expectation of judicial favor.

(4) Non-public information acquired by a judge in the judge's judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to the judge's judicial duties.

E. Fiduciary Activities.

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

F. Service as Arbitrator or Mediator.

A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

G. Practice of Law.

(1) A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

(2) A judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not practice law in a representative capacity. Notwithstanding this prohibition, staff, court officials and others subject to the judge's direction may act pro se, and those otherwise licensed to practice law may, without compensation, give legal advice to and draft or review documents for members of their families.

H. Compensation, Reimbursement and Reporting.

(1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

(2) Public Reports. A judge shall comply with those provisions of law requiring the reporting of economic interest to the Mississippi Ethics Commission.

I. Disclosure.

Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in Sections 3E and 3F, or as otherwise required by law.

Canon 5 A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

A. All Judges and Candidates

(1) Except as authorized in Sections 5B(2), 5C(1) and 5C(2), a judge or a candidate for election to judicial office shall not:

(a) act as a leader or hold an office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other political functions.

(2) A judge shall resign from judicial office upon becoming a candidate either in a party primary or in a general election for a non-judicial office, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(3) A candidate for a judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control, from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;

(c) except to the extent permitted by Section 5C(2), shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or
(iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(3)(d).

B. Candidates Seeking Appointment to Judicial or Other Governmental Office.

(1) Candidates for appointment to judicial office or judges seeking other governmental office shall not solicit or accept funds, personally or through a committee or otherwise, to support their candidacies.

(2) A candidate for appointment to judicial office or a judge seeking other governmental office shall not engage in any political activity to secure the appointment except that:

(a) such persons may:

(i) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;

(ii) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals to the extent requested or required by those specified in Section 5B(2)(a); and

(iii) provide to those specified in Sections 5B(2)(a)(i) and 5B(2)(a)(ii) information as to the candidate's qualifications for the office;

(b) a non-judge candidate for appointment to judicial office may, in addition, unless otherwise prohibited by law:

(i) retain an office in a political organization,

(ii) attend political gatherings, and

(iii) continue to pay ordinary assessments and ordinary contributions to a political organization or candidate and purchase tickets for political party dinners or other political functions.

C. Judges and Candidates Subject to Public Election.

(1) Judges holding an office filled by public election between competing candidates, or candidates for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings in their own behalf while candidates for election or re-election, identify themselves as members of political parties, and contribute to political parties or organizations.

> Additionally, although [the] Judge admittedly attended political gathering, ordinarily a violation under 5A(1)(c), the record evinces only that he was there as a judicial candidate running for reelection. Section 5C(1) expressly permits incumbent judges to attend and speak to political gatherings on their own behalf while candidates for election or reelection. ***Mississippi Comm'n on Judicial Performance v. Osborne*, 11 So. 3d 107, 112 (Miss. 2009).**

(2) A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for the candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees shall not solicit or accept contributions and public support for the candidate's campaign earlier than 60 days before the qualifying deadline or later than 120 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

(3) Candidates shall instruct their campaign committees at the start of the

campaign not to accept campaign contributions for any election that exceed those limitations placed on contributions by individuals, political action committees and corporations by law.

(4) A candidate and the candidate's committee shall timely comply with all provisions of law requiring the disclosure and reporting of contributions, loans and extensions of credit.

D. Incumbent Judges.

A judge shall not engage in any political activity except as authorized under any other Section of this Code, on behalf of measures to improve the law, the legal system or the administration of justice, or as expressly authorized by law.

E. Applicability.

Canon 5 generally applies to all incumbent judges and judicial candidates. Successful candidates, whether or not incumbents, are subject to judicial discipline for their campaign conduct; unsuccessful candidates who are lawyers are subject to lawyer discipline for their campaign conduct. Lawyers who are candidates for judicial office are subject to Rule 8.2(b) of the Mississippi Rules of Professional Conduct. However, the provisions of Canon 5F below shall not apply to elections for the offices of justice court judge and municipal judge.

F. Special Committee--Proceedings and Authority.

In every year in which an election is held for Supreme Court, Court of Appeals, chancery court, circuit court or county court judge in this state and at such other times as the Supreme Court may deem appropriate, a Special Committee on Judicial Election Campaign Intervention ("Special Committee") shall be created whose responsibility shall be to issue advisory opinions and to deal expeditiously with allegations of ethical misconduct in campaigns for judicial office. The committee shall consist of five (5) members. The Chief Justice of the Supreme Court, the Governor, the Lieutenant Governor, the Speaker of the House of Representatives of the Mississippi Legislature and the chair of the Commission on Judicial Performance (Commission) shall each appoint one member. Those appointed by the Chief Justice, the Governor and the chair of the Commission shall be attorneys licensed to practice in the state. No person shall be appointed to serve as a member of a Special Committee for the year in which such person is a candidate for judicial office. Should the Chief Justice expect to be a candidate for judicial office during the year for which a Special Committee is to be appointed the Chief Justice shall declare such expectation, and in such event, the appointment which otherwise would have been made by the Chief Justice shall be

made by the next senior justice of the Supreme Court not seeking judicial office in such year. Likewise, should the Governor, Lieutenant Governor, Speaker of the House of Representatives or chair of the Commission expect to seek judicial office during such year, that official shall declare such expectation, and the appointment which otherwise would have been made by such appointing authority shall be made, respectively: by the Lieutenant Governor if the Governor expects to seek such an office; by the President Pro Tem of the Senate if the Lieutenant Governor expects to seek such an office; by the Speaker Pro Tem of the House of Representatives if the Speaker expects to seek such an office; and by the vice-chair of the Commission if the chair expects to seek such an office. Any action taken by the Special Committee shall require a majority vote. Each Special Committee shall be appointed no later March 1 in the year of their service, and it shall continue in existence for ninety (90) days following such judicial elections or for so long thereafter as is necessary to consider matters submitted to it within such time. The Commission shall provide administrative support to the Special Committee. Should any appointing authority fail to make an appointment, three members shall constitute a sufficient number to conduct the business of the Special Committee. The objective of the Special Committee shall be to alleviate unethical and unfair campaign practices in judicial elections, and to that end, the Special Committee shall have the following authority:

(1) Within ten (10) days of the effective date of this rule or within the ten (10) days after formally announcing and/or officially qualifying for election or re-election to any judicial office in this state, whichever is later, all candidates, including incumbent judges, shall forward written notice of such candidacy, together with an appropriate mailing address and telephone number, to the Commission. Upon receipt of such notice, the Special Committee shall, through the Commission, cause to be distributed to all such candidates by certified mail-return receipt requested copies of the following: Canon 5 of the Code of Judicial Conduct; summaries of any previous opinions issued by the Special Committee, Special Committees organized for prior elections, or the Supreme Court of Mississippi, which relate in any way to campaign conduct and practices; and a form acknowledgment, which each candidate shall promptly return to the Commission and therein certify that the candidate has read and understands the materials forwarded and agrees to be bound by such standards during the course of the campaign. A failure to comply with this section shall constitute a per se violation of this Section authorizing the Committee to immediately publicize such failure to all candidates in such race and to all appropriate media outlets. In the event of a question relating to conduct during a judicial campaign, judicial candidates, their campaign organizations, and all independent persons, committees and organizations are encouraged to seek an opinion from the Special Committee before such conduct occurs.

(2) Opinions as to the propriety of any act or conduct by a judicial candidate, a candidate's campaign organization or an independent person, committee or organization conducting activities which impact on the election and as to the construction or application of Canon 5 may be provided by the Special Committee upon request from any judicial candidate, campaign organization or an independent person, committee or organization. If the Special Committee finds the question of limited significance, it may provide an informal opinion to the questioner. If, however, it finds the questions of sufficient general interest and importance, it may render a formal opinion, in which event it shall cause the opinion to be published in complete or synopsis form. Furthermore, the Special Committee may issue formal opinions on its own motion under such circumstances, as it finds appropriate. The Special Committee may decline to issue an opinion when a majority of the Special Committee members determine that it would be inadvisable to respond to the request and to have so confirmed in writing their reasoning to the person who requested the opinion. All formal opinions of the Special Committee shall be filed with the Supreme Court and shall be a matter of public record except for the names of the persons involved, which shall be excised. Both formal and informal opinions shall be advisory only; however, the Commission on Judicial Performance, the Supreme Court and all other regulatory and enforcement authorities shall consider reliance by a judicial candidate upon the Special Committee opinion in any disciplinary or enforcement proceeding.

(3) Upon receipt of information facially indicating a violation by a judicial candidate of any provision of Canon 5 during the course of a campaign for judicial office, or indicating actions by an independent person, committee or organization which are contrary to the limitations placed upon candidates by Canon 5, the Commission staff shall immediately forward a copy of the same by e-mail or facsimile, if available, and U.S. mail to the Special Committee members and said Committee shall:

> (a) seek, from the informing party and/or the subject of the information, such further information on the allegations as it deems necessary;
>
> (b) conduct such additional investigation as the Committee may deem necessary;
>
> (c) determine whether the allegations warrant speedy intervention and, if so, immediately issue a confidential cease-and-desist request to the candidate and/or organization or independent committee or organization believed to be engaging in unethical and/or unfair campaign practices. If the Committee determines that the unethical and/or unfair campaign practice is of a serious and damaging nature, the Committee may, in its

discretion, disregard the issuance of a cease-and-desist request and immediately take action authorized by the provisions of paragraph (3)(d)(i) and (ii), hereafter described. If the allegations of the complaint do not warrant intervention, the Committee shall dismiss the same and so notify the complaining party.

(d) If a cease-and-desist request is disregarded or if the unethical or unfair campaign practices otherwise continue, the Committee is further authorized:

(i) to immediately release to all appropriate media outlets, as well as the reporting party and the person and/or organization against whom the information is submitted, a public statement setting out the violations believed to exist, or, in the case of independent persons, committees or organizations, the actions by an independent person, committee or organization which are contrary to the limitations placed upon candidates by Canon 5. In the event that the violations or actions have continued after the imposition of the cease and desist request, the media release shall also include a statement that the candidate and/or organization or independent person, committee or organization has failed to honor the cease-and-desist request, and
(ii) to refer the matter to the Commission on Judicial Performance or to any other appropriate regulatory or enforcement authority for such action as may be appropriate under the applicable rules.

(4) All proceedings under this Rule shall be informal and non-adversarial, and the Special Committee shall act on all requests within ten (10) days of receipt, either in person, by facsimile, by U.S. mail, or by telephone. In any event, the Special Committee shall act as soon as possible taking into consideration the exigencies of the circumstances and, as to requests received during the last ten (10) days of the campaign, shall act within thirty-six (36) hours.

(5) Except as herein specifically authorized, the proceedings of the Special Committee shall remain confidential, and in no event shall the Special Committee have the authority to institute disciplinary action against any candidate for judicial office, which power is specifically reserved to the Commission on Judicial Performance under applicable rules.

(6) The Committee shall after conclusion of the election distribute to the Commission on Judicial Performance copies of all information and all proceedings relating thereto.

(7) This Canon 5F shall apply to all candidates for judicial offices of the Supreme Court, Court of Appeals, chancery courts, circuit courts and county courts, be they incumbent judges or not, and to the families and campaign/solicitation committees of all such candidates. Persons who seek to have their name placed on the ballot as candidates for such judicial offices and the judicial candidates' election committee chairpersons, or the chairperson's designee, shall no later than 20 days after the qualifying date for candidates in the year in which they seek to run complete a two-hour course on campaign practices, finance, and ethics sponsored and approved by the Committee. Within ten days of completing the course, candidates shall certify to Committee that they have completed the course and understand fully the requirements of Mississippi law and the Code of Judicial Conduct concerning campaign practices for judicial office. Candidates without opposition are exempt from attending the course.

Mississippi Commission on Judicial Performance

Purpose

Mississippi Commission on Judicial Performance Rule 1B states:

> The Commission was created in 1979 by the Mississippi Legislature and the voters of the State of Mississippi by constitutional amendment. The Commission shall enforce the standards of judicial conduct, inquire into judicial disability and conduct, protect the public from judicial misconduct and disabled judges, and protect the judiciary from unfounded allegations. All proceedings before the Commission shall be of a civil nature, not criminal, as the purpose of the Commission is to be rehabilitative and educational as well as disciplinary.

> > The Commission's duties, function, and purpose are set forth by constitutional provision, general statutory law, and the Rules of the Commission. The purpose of the Commission is rehabilitative, educational, and disciplinary, and the proceedings are civil in nature. ***Mississippi Comm'n on Jud. Perf. v. Byers*, 757 So. 2d 961, 965 (Miss. 2000) (quoting 1998 Mississippi Commission on Judicial Performance Annual Report).**

Jurisdiction

Mississippi Commission on Judicial Performance Rule 2 states:

> The Commission shall consider conduct of a judge or the physical or mental condition of a judge. In the absence of fraud, corrupt motive, or bad faith, the Commission shall not consider allegations against a judge for making findings of fact, reaching a legal conclusion, or applying the law as he understands it. . . . Notwithstanding that a judge has resigned his office, the Commission shall retain jurisdiction over that judge if prior to his resignation the Commission has initiated an inquiry into the conduct of the judge.

> > A review of the complaint process reveals that the Commission has jurisdiction over every judge of any court in existence in the State of Mississippi. ***Mississippi Comm'n on Jud. Perf. v. Byers*, 757 So. 2d 961, 965 (Miss. 2000) (quoting 1998 Mississippi Commission on Judicial Performance Annual Report).**

Members of the Commission

Mississippi Constitution, Article VI, § 177A, Commission on Judicial Performance, states:

> There shall be a commission on judicial performance of the State of Mississippi, to be composed of seven (7) members;
>
> -three (3) of whom shall be judges of courts of record in the state which are trial courts of original jurisdiction, other than justice courts;
> -one (1) member shall be a justice court judge;
> -two (2) lay persons who reside in the state and who have never held judicial office or been members of the bar of Mississippi; and
> -one (1) practicing attorney who has practiced law in the state for at least ten (10) years.
>
> All judicial members are to be appointed by the judiciary of the State of Mississippi as provided by law. Restrictions on the members of the commission may be imposed by statute. Members of the commission on judicial performance not subject to impeachment shall be subject to removal from the commission by two-thirds (2/3) vote of the supreme court sitting en banc.

§ 9-19-1 Membership of commission:

> The Commission on Judicial Performance shall consist of the following members:
>
> (a) One (1) circuit court judge to be appointed by the Chief Justice of the Supreme Court of Mississippi upon the recommendation of the Governor;
> (b) One (1) chancellor to be appointed by the Chief Justice of the Supreme Court of Mississippi upon the recommendation of the Lieutenant Governor;
> (c) One (1) county court judge to be appointed by the Chief Justice of the Supreme Court of Mississippi upon the recommendation of the Speaker of the House;
> (d) One (1) justice court judge to be appointed by the Chief Justice of the Supreme Court of Mississippi;
> (e) One (1) practicing attorney to be appointed by the Chief Justice upon the recommendation of the Governing Board of The Mississippi Bar; and
> (f) Two (2) lay persons who shall not be residents of the same Supreme Court District to be appointed by the Chief Justice of the Supreme Court of Mississippi.
>
> An alternate for each member shall be selected at the time and in the manner prescribed for initial appointments in each representative class to replace those members who might be disqualified or absent.

Prohibited Conduct by Judges

Mississippi Constitution, Article VI, § 177A, Commission on Judicial Performance, states:

> On recommendation of the commission on judicial performance, the supreme court may remove from office, suspend, fine or publicly censure or reprimand any justice or judge of this state for:
>
> > (a) actual conviction of a felony in a court other than a court of the State of Mississippi;
> > (b) willful misconduct in office;
> > (c) willful and persistent failure to perform his duties;
> > (d) habitual intemperance in the use of alcohol or other drugs; or
> > (e) conduct prejudicial to the administration of justice which brings the judicial office into disrepute. . . .
> >
> > > The language of § 177A and the interpretations of that language by this Court are sufficient to put men [and women] of common intelligence on notice of what type of conduct is prohibited. ***Mississippi Comm'n on Jud. Perf. v. Russell*, 691 So. 2d 929, 942 (Miss. 1997).**
> > >
> > > We find and hold today that, where the Commission finds judicial misconduct within one of the five categories under § 177A, failure to report such findings to this Court, and disposal of the violation by agreement, settlement, or memorandum of understanding between the respondent and the Commission, are beyond the Commission's constitutional authority. ***Mississippi Comm'n on Jud. Perf. v. Martin*, 995 So. 2d 727, 730 (Miss. 2008).**

Commission on Judicial Performance Rule 6A states:

> A. Grounds for Discipline and Retirement. The grounds for discipline and retirement, as prescribed by the Constitution, are:
>
> > (1) Actual conviction of a felony in a court other than a court of the State of Mississippi;
> > (2) Willful misconduct in office;
> > (3) Willful and persistent failure to perform his duties;
> > (4) Habitual intemperance in the use of alcohol or other drugs;
> > (5) Conduct prejudicial to the administration of justice which brings the judicial office into disrepute;

(6) Physical or mental disability seriously interfering with the performance of his duties, which disability is or is likely to become of a permanent character;
(7) Any willful violation of law constituting a serious misdemeanor or felony;
(8) Any violation of the code of judicial conduct and
(9) Any violation of the rules of professional conduct as adopted by the Supreme Court.

> ***See*** **Mississippi Constitution, Article VI, § 175** (removal for conviction of misdemeanor in office and neglect of duty); **§ 25-5-1** (removal for criminal convictions and mental competency).

Willful Misconduct

This Court has held that willful misconduct in office is:

> the improper or wrong use of power of his office by a judge acting intentionally or with gross unconcern for his conduct and generally in bad faith. It involves more than an error of judgment or a mere lack of diligence. Necessarily, the term would encompass conduct involving moral turpitude, dishonesty, or corruption, and also any knowing misuse of the office, whatever the motive. However, these elements are not necessary to a finding of bad faith. A specific intent to use the powers of judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith.

Willful misconduct in office of necessity is conduct prejudicial to the administration of justice which brings the judicial office into disrepute. However, a judge may also, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to the administration of justice so as to bring the judicial office into disrepute. ***Mississippi Comm'n on Judicial Performance v. Harris*****, 131 So. 3d 1137, 1142 (Miss. 2013).**

Willful misconduct in office is the improper or wrongful use of power of his office by a judge acting intentionally, or with gross unconcern for his conduct and generally in bad faith. It involves more than an error of judgment or a mere lack of diligence**.** ***Mississippi Comm'n on Jud. Perf. v. Boykin*****, 763 So. 2d 872, 874-75 (Miss. 2000) (citations omitted).**

Necessarily, the term [willful misconduct] would encompass conduct involving moral turpitude, dishonesty, or corruption, and also any knowing misuse of the office, whatever the motive. However, these elements are

not necessary to a finding of bad faith. ***Mississippi Comm'n on Jud. Perf. v. Chinn*, 611 So. 2d 849, 851 (Miss. 1992) (citation omitted).**

A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith. ***Mississippi Comm'n on Jud. Perf. v. Boykin*, 763 So. 2d 872, 874-75 (Miss. 2000) (citations omitted).**

This Court has defined bad faith as "a specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercises of his authority constitutes bad faith." ***Mississippi Comm'n on Jud. Perf. v. Russell*, 691 So. 2d 929, 936 (Miss. 1997).**

Conduct Prejudicial to the Administration of Justice

Willful misconduct in office of necessity is conduct prejudicial to the administration of justice that brings the judicial office into disrepute. ***Mississippi Comm'n on Jud. Perf. v. Boykin*, 763 So. 2d 872, 874-75 (Miss. 2000) (citations omitted).**

Conduct which falls short of reaffirming one's fitness for the high responsibilities of judicial office constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute. It includes conduct which would justify a reasonable man in believing that a result achieved by a judge was achieved because of his position and prestige, and conduct which would appear to an objective observer to be not only un-judicial but prejudicial to public esteem for the judicial office. It depends not so much on the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers. The judicial office refers not to the judge as an individual, but, rather, to the judiciary. Conduct prejudicial to the administration of justice that brings the judicial office into disrepute is less grave than willful misconduct in office. ***Mississippi Comm'n on Jud. Perf. v. Russell*, 691 So. 2d 929, 942 (Miss. 1997) (citations omitted).**

[A] judge may also, through negligence or ignorance not amounting to bad faith, behave in a manner so as to bring the judicial office into disrepute. The result is the same regardless of whether bad faith or negligence and ignorance are involved and [it] warrants sanctions. ***Mississippi Comm'n on Jud. Perf. v. Atkinson*, 645 So. 2d 1331, 1335 (Miss. 1994) (citations omitted).**

> There is no simple, black-letter definition of conduct prejudicial to the administration of justice which brings the judicial office into disrepute. [Quoting the Maryland Supreme Court, the court wrote:] "Precisely what "conduct prejudicial to the proper administration of justice" is or may be, in any or all circumstances, we shall not undertake to say. Indeed, a comprehensive, universally applicable definition may never evolve but it is unlikely we shall ever have much trouble recognizing and identifying such conduct whenever the constituent facts are presented." ***In re Baker*, 535 So. 2d 47, 50 (Miss. 1988).**
>
> A sitting judge is charged with knowing and carrying out the law of the state in which she sits. This disregard of state law, whether done intentionally or mistakenly, most certainly brings the integrity and independence of the office into question. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1071 (Miss. 1999).**

Procedures & Rules of the Mississippi Commission on Judicial Performance

§ 9-19-23 Rules:

> The commission on judicial performance shall make rules implementing this chapter, including rules of practice and procedure concerning receiving, processing and handling of complaints or inquiries and for hearings of the commission, a committee of the commission, its master or its factfinder, and the supreme court, to be approved by the supreme court.

Confidentiality of the Proceedings

Mississippi Constitution, Article VI, § 177A, Commission on Judicial Performance, states:

> All proceedings before the commission shall be confidential, except upon unanimous vote of the commission. After a recommendation of removal or public reprimand of any judge is filed with the clerk of the supreme court, the charges and recommendations of the commission shall be made public. . . .

Mississippi Commission on Judicial Performance Rule 4 states:

> **A. All Proceedings.** All proceedings before the Commission shall be confidential, except upon unanimous vote, as prescribed in § 177A. Confidentiality shall attach upon the initiation of an inquiry and shall include all records, files, and reports of the Commission. All proceedings before the Supreme Court and any final decisions made by the Supreme Court shall be made public as in other cases at law. However, an appeal from a private admonishment by the

Commission shall be confidential unless on appeal the Supreme Court imposes sanctions harsher than the private admonishment.

B. Disclosure. By unanimous vote, the Commission may waive confidentiality and disclose such information deemed appropriate by the Commission. Such action may be taken upon the Commission's own motion or upon written request of the judge. . . .

> ***See* § 9-19-19 Confidentiality of proceedings before commission** (All commission members, staff, witnesses or any other person privy to any hearing before the commission shall take an oath of secrecy concerning all proceedings before the commission, violation of which shall be punishable as contempt.).

Initial Inquiry

Mississippi Commission on Judicial Performance Rule 5 states:

A. Initiation of Inquiry. Upon receipt of proper information regarding a judge's conduct or physical or mental condition, the Commission shall initiate a confidential inquiry to determine whether the matter is within the Commission's jurisdiction. On its own motion, the Commission may make inquiry concerning a judge's conduct or physical or mental condition, and may file a formal complaint based upon the results of such inquiry on its own motion.

B. Preliminary Inquiry. Upon receipt of such information, the executive director shall make a prompt, discreet, and confidential preliminary inquiry and evaluation under guidelines approved by the Commission. The executive director shall then make a report to the Commission. After such report, the Commission shall dismiss complaints which are not within the Commission's jurisdiction, relate only to claimed errors of law or fact, or are unfounded. The Complainant shall be informed in writing of the Commission's action.

C. Notice to Judge. The Commission shall not notify a judge of any initial complaint dismissed after preliminary inquiry, unless otherwise determined by the Commission. When the initial complaint is not dismissed, within ninety (90) days of its receipt the judge shall be notified of the investigation and nature of the charge. Failure to make timely notification shall not be grounds for dismissal of any investigation or proceeding. Such notice shall be in writing and may be transmitted by a member of the Commission, the executive director, any adult person designated by the Commission, or by certified or registered mail addressed to the judge at his last known residence of record. When a judge has been notified of an investigation and the Commission has dismissed the matter, the judge shall

be so notified and the file shall be closed.

D. Sworn Complaint or Statement in Lieu of Complaint. If the initial complaint is not dismissed, the complainant shall be asked to file a detailed, signed, sworn complaint against the judge. The sworn complaint shall state the names and addresses of the complainant and the judge, the facts constituting the alleged misconduct, and, so far as is known, whether the same or a similar complaint by the complainant against the judge has ever been made to the Commission. A sworn complaint may be waived by a two-thirds (2/3) vote of the Commission; a sworn complaint shall not be required in an inquiry initiated by the Commission on its own motion.

E. Informal Conference. The Commission may request the judge to attend an informal conference concerning the matters relating to his judicial performance.

F. Right to Counsel. At all stages of the Commission's proceedings, the judge shall be entitled to counsel.

G. Subpoena. The subpoena power granted the Commission by law shall apply at any stage of the investigation or any proceedings. The judge shall be entitled to subpoenae for any formal hearing. All subpoenae shall be on the form prescribed by the Commission, and the Commission shall have the power to enforce process.

H. Earwigging Prohibited. No person shall discuss or attempt to discuss with or in the presence or hearing of a member anything concerning an inquiry or proceeding then pending with or likely to be considered by the Commission, except in accordance with these rules. Any person knowingly violating this or any other rule of the Commission may be guilty of contempt.

***Compare* § 9-19-21 Powers and duties of commission:**

> (1) The commission shall be entitled to compel by subpoena the attendance and testimony of witnesses, including the judge as witness, and to provide for the inspection of documents, books, accounts and other records.
> (2) If the commission, after investigation of a complaint, determines that there is sufficient evidence to warrant a hearing to determine whether or not there has been a violation under § 177A, the commission may employ counsel to prepare and present the complaint to the commission, a committee of the commission, its master or its factfinder, and to represent the commission before the supreme court.
> (3) The commission shall make transcripts of all hearings that are

conducted under subsection (2) of this section. Such transcripts shall serve as a record in proceedings before the supreme court.
(4) On request of the speaker of the house of representatives, the president of the senate or the governor, the commission shall make available information for use in consideration of impeachment or recall election, respectively.
(5) No records pertaining to complaints determined by the commission to be outside its jurisdiction shall be retained over twelve (12) months after such determination by the commission.

Possible Dispositions by the Mississippi Commission on Judicial Performance

Mississippi Commission on Judicial Performance Rule 6B states:

> **B. Disposition.** The Commission shall dispose of the case in one (1) of the following ways:
>
> (1) If it finds that there has been no misconduct, the case shall be dismissed.
> (2) If it fails to find grounds for discipline under Section 177A of the Mississippi Constitution, but nevertheless finds that there has been conduct for which a private admonishment constitutes an adequate response, it shall issue the admonishment. The complainant shall be notified that the matter has been resolved. The Commission shall notify the Chief Justice of the Supreme Court of its action.
> (3) The Commission may enter into a memorandum of understanding with the judge concerning his future conduct or submission to professional treatment or counseling.
> (4) If it is determined that probable cause exists to require a formal hearing, it shall so notify the judge by service of a notice and a formal complaint.
>
> > Although the Commission generally does not impose disciplinary sanctions, but rather makes findings and recommendations for submission to the Supreme Court, it may, under Rule 6, dismiss cases or impose the lesser sanction of a private admonishment, without action by the Supreme Court. In the case of private admonishment, the Commission will notify the Chief Justice of the Supreme Court of its action. **Miss. Comm'n Jud. Perf. R. 8 cmt.**

Formal Complaint

Mississippi Commission on Judicial Performance Rule 6C states:

> **C. Formal Complaint.** The formal complaint shall be entitled "BEFORE THE MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE, INQUIRY CONCERNING A JUDGE, NO. _____." The formal complaint shall identify any complainant and shall specify in ordinary and concise language the charges against the judge. The notice shall advise the judge of his right to file a written, sworn answer to the charges against him within thirty (30) days after service of the notice upon him. The notice and formal complaint shall be served upon the judge by personal service by a member of the Commission, the executive director, or by any adult person designated by the Commission, or by certified or registered mail addressed to the judge at his last known residence of record.

Judge's Answer

Mississippi Commission on Judicial Performance Rule 6D states:

> **D. Answer.** Within thirty (30) days after service of the notice and the formal complaint, the judge may file with the Commission a sworn answer or motions. The formal complaint and answer shall constitute the pleadings. Thereafter, no further motions or pleadings may be filed unless the Commission shall first grant leave.

Temporary Suspension of a Judge

Mississippi Constitution, Article VI, § 177A, Commission on Judicial Performance, states:

> The commission may, with two-thirds (2/3) of the members concurring, recommend to the Supreme Court the temporary suspension of any judge against whom formal charges are pending.

Mississippi Commission on Judicial Performance Rule 7 states:

> Upon the filing of a formal complaint, the Commission may, in its discretion, issue its order directed to the judge to show good cause before the Commission why the Commission should not recommend to the Supreme Court that he be suspended from office while the inquiry is pending. The order to show cause shall be returnable before the Commission at a designated place and at a time certain, at which place and time the Commission shall consider the question of suspension. Either after issuing its order to show cause or without such order to show cause, the Commission may recommend to the Supreme Court that the judge be

suspended from performing the duties of his office, pending final determination of the inquiry. If the Commission recommends suspension, such recommendation and a transcript of all proceedings of the Commission shall be immediately forwarded to the Clerk of the Supreme Court. An interim suspension shall not preclude further action by the Commission.

§ 9-19-13 Disqualification of judge during proceedings:

Except as otherwise provided in Section 25-3-36(7), on recommendation of the commission on judicial performance, the Supreme Court may disqualify a judge from exercising any judicial function, without loss of salary, during pendency of proceedings before the commission or in the supreme court. If so disqualified, a special judge shall be appointed to perform his duties, as provided by law.

Formal Hearing

Mississippi Commission on Judicial Performance Rule 8 states:

A. Scheduling of Hearing. The Commission shall schedule a formal hearing concerning the charges. The hearing shall be held no sooner than five (5) days after filing of an answer or after the deadline for filing of the answer if no answer is filed. Notice of the hearing shall be sent to the judge at his last known residence of record or to his attorney. At the date set for the formal hearing, the hearing shall proceed whether or not the judge has filed an answer, and whether or not he appears in person or through counsel. The failure of the judge to answer or appear may be taken as evidence of the facts alleged in the formal complaint.

B. Discovery and Procedure. In all formal proceedings the Mississippi Rules of Civil Procedure shall be applicable except as otherwise provided in these rules. The sole parties to formal proceedings shall be the Commission and the judge.

C. Factfinder. The formal hearing shall be conducted before the entire Commission or before a committee of the Commission, a master or a factfinder designated by the Commission.

D. Conduct of Hearing. Facts requiring action of the Commission shall be established by clear and convincing evidence. The Mississippi Rules of Evidence shall apply to any formal hearing. All witnesses shall take an oath or affirmation to tell the truth. All Commission members, staff, witnesses, counsel, or any other person privy to any hearing before the Commission shall take an oath of secrecy concerning all proceedings before the Commission, violation of which shall be punishable as contempt. The Commission shall employ a member of the Mississippi State Bar to prepare and present the formal complaint to the

Commission and otherwise act as counsel and to represent the Commission before the Supreme Court or direct the Executive Director to so represent the Commission as counsel. The Commission shall designate one (1) of its judicial or attorney members to preside over each formal hearing. He shall dispose of all preliminary matters and shall rule on procedural and evidentiary matters during the course of the hearing. The judge shall have the right to present evidence and to produce and cross- examine witnesses. The judge shall be limited to two (2) character witnesses who may testify at the formal hearing; he may submit the affidavits of any other character witnesses he deems appropriate. The hearing shall be recorded by a reporter employed by the Commission. . . .

. . . .

I. Witness Fees. All witnesses shall receive fees and expenses in the statutorily allowable amount. Expenses of witnesses shall be borne by the party calling them. When the physical or mental disability of the judge is in issue, the Commission may reimburse the judge for the reasonable fees of any physician rendering a report or testifying at a Commission hearing. If the judge is exonerated of the charges against him and the Commission determines that the imposition of costs and expert witness fees would work a financial hardship or injustice upon him, the Commission may order that part or all of those costs and fees be reimbursed.

Findings of Fact and Recommendations

Mississippi Commission on Judicial Performance Rule 8 states:

> **E. Determination.** If the full Commission has held the formal hearing, it shall promptly prepare its findings of fact and any recommendations. When a committee, master, or factfinder has held the formal hearing, its findings of fact and recommendations shall be filed with the Commission within thirty (30) days after the hearing's conclusion; provided, however, the Commission may grant additional time for the preparation of such findings and recommendations. The executive director shall promptly deliver to the judge or his legal representative and to the Commission counsel a copy of the transcript of the proceedings and a copy of the findings and recommendations. Within ten (10) days from receipt of such copies, the judge and Commission counsel may submit written objections to the findings and recommendations. The Commission shall review the findings and recommendations, the written objections, and the transcript; and it may accept, modify, or reject, in whole or in part, the findings and recommendations and may make additional findings of fact and recommendations.
>
> > The findings of the Commission must be based upon clear and convincing evidence**.** ***Mississippi Comm'n on Jud. Perf. v. Brown*****, 761 So. 2d 182, 184 (Miss. 2000) (citation omitted).**
>
> **F. Commission Recommendation.** The Commission recommendations to the Supreme Court for discipline may include removal from office, suspension, fine, public censure or reprimand, or retirement. In addition, the Commission may privately admonish a judge as provided by law. The Commission findings and recommendation and the numerical vote shall be recorded; all other Commission action shall remain confidential.
>
> **G. Dissent.** If any member dissents from a recommendation as to discipline or retirement, the dissenting recommendation shall also be transmitted to the Supreme Court. Only the dissent, with the number of dissenters shall be transmitted; the names of the individual dissenters shall remain confidential.
>
> **H. No Discipline Recommended.** If two-thirds (2/3) of the members of the Commission fail to recommend discipline or retirement, the case shall be dismissed.

Private Admonishment

Mississippi Commission on Judicial Performance Rule 6B(2) states:

> (2) If it fails to find grounds for discipline under Section 177A of the Mississippi Constitution, but nevertheless finds that there has been conduct for which a private admonishment constitutes an adequate response, it shall issue the admonishment. The complainant shall be notified that the matter has been resolved. The Commission shall notify the Chief Justice of the Supreme Court of its action.

§ 9-19-11 Right to privately admonish:

> The commission on judicial performance may privately admonish a justice or judge found to have been engaged in improper action or a dereliction of duty affecting the administration of justice; subject to review in the supreme court; provided, however, that all appeals from private admonishments shall remain confidential.

Appeal of Private Admonishment

Mississippi Commission on Judicial Performance Rule 10F states:

> **F. Private Admonishments.** If a judge desires to appeal a private admonishment, he shall file a notice of appeal with the Commission within thirty (30) days from the issuance of such admonishment. The Commission shall promptly file with the Clerk of the Supreme Court the record and its admonishment. The judge shall be the appellant and the Commission the appellee. An appeal from a private admonishment issued by the Commission shall follow the same procedures as other Commission matters except that such appeal shall remain confidential, as provided by law.

Supreme Court Review

Mississippi Commission on Judicial Performance Rule 10 states:

> **A. Filing and Service.** The Commission shall promptly file the record, its findings and recommendations, and any dissents with the Clerk of the Supreme Court and shall immediately serve copies thereof upon the judge.
>
> **B. Procedure.** The Mississippi Rules of Appellate Procedure shall be applicable for all Commission proceedings before the Supreme Court, except as otherwise provided in these rules.
>
> **C. Preference Cases.** The Supreme Court shall treat all Commission matters as preference cases, to be determined with reasonable expedition.
>
> **D. Briefs.** When the Commission has recommended the interim suspension of a judge, the Commission, as petitioner, and the judge, as respondent, shall file simultaneous briefs with the Supreme Court within seven (7) days after the filing of the Commission's recommendations with the Clerk of the Supreme Court. No reply briefs shall be filed. In other cases the Commission, as petitioner, and the judge, as respondent, shall file simultaneous briefs with the Supreme Court within thirty (30) days after the filing of the Commission's recommendations with the Clerk of the Supreme Court. No reply briefs shall be filed.
>
> **E. Decision.** Based upon a review of the entire record, the Supreme Court shall prepare and publish a written opinion and judgment directing such disciplinary action, if any, as it finds just and proper. The Supreme Court may accept, reject, or modify, in whole or in part, the findings and recommendation of the Commission. In the event that more than one (1) recommendation for discipline of the judge is filed, the Supreme Court may render a single decision or impose a single sanction with respect to all recommendations.

Rule 10(e) states that the Supreme Court shall review the entire record then prepare a written opinion and judgment directing any disciplinary action it deems proper. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1071 (Miss. 1999).**

Standard of Review of Commission's Findings

In reviewing judicial misconduct cases, this Court conducts an "independent inquiry of the record," and in doing so, "accord[s] careful consideration [of] the findings of fact and recommendations of the Commission, or its committee, which has had an opportunity to observe the demeanor of the witnesses. " ***Mississippi Comm'n on Jud. Perf. v. Littlejohn***, **62 So. 3d 968, 970 (Miss. 2011) (citations omitted).**

Sanctioning Authority

This Court must render an independent judgment, as we are vested with the "sole power to impose sanctions in judicial misconduct cases." ***Mississippi Comm'n on Jud. Perf. v. Patton***, **57 So. 3d 626, 629 (Miss. 2011) (citations omitted).**

Factors Used to Determine the Appropriate Sanctions for Misconduct

The imposition of sanctions is a matter left solely to the discretion of this Court**.** ***Mississippi Comm'n on Jud. Perf. v. Bishop*****, 761 So. 2d 195, 198 (Miss. 2000) (citations omitted).**

We have stated that the sanction should recognize the misconduct, deter and discourage similar behavior, preserve the dignity and reputation of the judiciary and protect the public. ***Mississippi Comm'n on Jud. Perf. v. Sanders*****, 749 So. 2d 1062, 1072 (Miss. 1999) (citation omitted).**

In an effort to clarify the standard by which we determine the appropriate sanction in a judicial misconduct case, this Court modifies *Gibson* and its progeny to the extent that Mississippi law considers "moral turpitude" as a factor in determining the appropriateness of sanctions. Instead, this Court will examine the extent to which the conduct was willful, and the extent to which the conduct exploited the judge's position to satisfy his or her personal desires or was intended to deprive the public of assets or funds rightfully belonging to it. In examining the extent to which the conduct was willful, we will examine "whether the judge acted in bad faith, good faith, intentionally, knowingly, or negligently." "[M]isconduct that is the result of deliberation is generally more serious than that of a spontaneous nature." For example, spontaneous conduct, such as provoked conduct, may fall on one end of the spectrum, and may indicate a lesser sanction. Planned, premeditated conduct may fall on the opposite end of the spectrum, indicating the appropriateness of a harsher sanction. Conduct that is knowing and/or deliberate, but not the result of premeditation, may fall between spontaneous and premeditated conduct. Certainly, the analysis of the extent of willfulness will allow for consideration of acts of dishonesty. Furthermore, the inappropriateness

of the action may also be considered under the aggravating circumstances factor. When analyzing the extent to which the conduct exploited the judge's position to satisfy personal desires, we will examine factors such as whether the judge received money, received favors, or otherwise acted in a manner indicative of any improper personal motivation. ***Mississippi Comm'n on Jud. Perf. v. Skinner*, 119 So. 3d 294, 306-07 (Miss. 2013) (citations omitted).**

To determine which sanction will be the most appropriate in judicial misconduct proceedings, the court will look to the following factors:

(1) The length and character of the judge's public service;
(2) Whether there is any prior case law on point;
(3) The magnitude of the offense and the harm suffered;
(4) Whether the misconduct is an isolated incident or evidences a pattern of conduct;
(5) Whether moral turpitude was involved; and
(6) The presence or absence of mitigating or aggravating circumstances.

***Mississippi Comm'n on Jud. Perf. v. Gibson,* 883 So. 2d 1155, 1157-58 (Miss. 2004) *overruled in part on other grounds by Mississippi Comm'n on Jud. Perf. v. Boone*, 60 So. 3d 172, 177 (Miss. 2011).**

When dealing with judicial misconduct, this Court has recognized that the sanction should fit the offense. ***Mississippi Comm'n on Jud. Perf. v. Chinn*, 611 So. 2d 849, 856 (Miss. 1992) (citations omitted).**

In determining whether a reprimand should be public, this Court considers [the above listed] mitigating factors which weigh in favor of confidential, private action. ***Mississippi Comm'n on Jud. Perf. v. Atkinson*, 645 So. 2d 1331, 1336 (Miss. 1994) (citations omitted).**

Sanctions Available

Mississippi Constitution, Article VI, § 177A, Commission on Judicial Performance, states:

On recommendation of the commission on judicial performance, the Supreme Court may remove from office, suspend, fine or publicly censure or reprimand any justice or judge of this state. . . .

Removal

The Mississippi Commission on Judicial Performance recommends to this Court that former Madison County Justice Court Judge . . . be removed from office after finding by clear and convincing evidence that [the judge] physically and verbally assaulted a mentally disabled individual. . . . Because of the egregious nature of [the judge's] actions, this Court agrees with the Commission's recommendation and removes [the judge] from office. ***Mississippi Comm'n on Judicial Performance v. Weisenberger*, 201 So. 3d 444, 446 (Miss. 2016).**

Based upon the seriousness of his admitted criminal acts and judicial misconduct, [the judge] shall be removed from office. ***Mississippi Comm'n on Judicial Performance v. DeLaughter*, 29 So. 3d 750, 755 (Miss. 2010).**

We have considered that removal from office [is an] appropriate sanction for the most egregious cases of judicial misconduct. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1073 (Miss. 1999).**

In determining whether removal is an appropriate sanction, this Court looks to Mississippi cases in which that sanction has been imposed to determine whether the conduct in the present case is equally egregious. This Court will remove a judge from office when the misconduct involved warrants such action. ***Mississippi Comm'n on Jud. Perf. v. Guest*, 717 So. 2d 325, 330 (Miss. 1998) (citation omitted).**

[R]emoval of judges has usually involved repeated or systematic abuses of their judicial office. As a general rule, this Court will not remove a judge from office for a first offense, absent a showing of personal gain. ***Mississippi Comm'n on Jud. Perf. v. Guest*, 717 So. 2d 325, 331 (Miss. 1998) (citation omitted).**

[Removal may be ordered where the judge] has engaged in a long-standing course of misconduct. . . **. *Mississippi Comm'n on Jud. Perf. v. Guest*, 717 So. 2d 325, 331 (Miss. 1998) (citation omitted).**

[T]he court [has] declined to remove a judge from office for a first offense where there was no evidence that the respondent had acted with malice or other improper motive and where he had not benefitted from the conduct in question. ***Mississippi Comm'n on Jud. Perf. v. Guest*, 717 So. 2d 325, 331 (Miss. 1998) (citation omitted).**

This Court has removed judges from public office for failure to report public monies coming into their hands**. *Mississippi Comm'n on Jud. Perf. v. Coleman*, 553 So. 2d 513, 516 (Miss. 1989).**

Suspension

> We have considered suspension from office without pay [is an] appropriate sanction for the most egregious cases of judicial misconduct. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1073 (Miss. 1999).**

Public Reprimand

> In determining whether a reprimand should be public, this Court will consider mitigating factors which weigh in favor of confidential, private action. Those factors are:
>
> (1) the length and character of the judge's public service;
> (2) any positive contributions made by the judge to the courts and the community;
> (3) the lack of prior judicial precedent on the incident in issue;
> (4) the commitment to fairness and innovative procedural form on the part of the judge;
> (5) the magnitude of the offense;
> (6) the number of persons affected;
> (7) whether "moral turpitude" was involved.
>
> ***Mississippi Comm'n on Judicial Performance v. Carr*, 786 So. 2d 1055, 1059 (Miss. 2001).**

> The fact that [a judge] acted in knowing or careless indifference to these laws weighs heavily in favor of a public reprimand. ***Mississippi Comm'n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1072 (Miss. 1999).**

Private Reprimand

> This Court declined to issue a public reprimand, finding a private reprimand was the appropriate sanction under the facts as presented and "the isolated nature of the offense" in light of the mitigating factors. ***Mississippi Comm'n on Jud. Perf. v. Atkinson*, 645 So. 2d 1331, 1336 (Miss. 1994) (citations omitted).**

> The court stated that a private reprimand was appropriate "because [the offender's] conduct was not premeditated or planned, but a spontaneous, albeit incorrect, judgment call intended to . . . uncover the truth." ***Attorney L.S. v. Mississippi Bar*, 649 So. 2d 810, 815 (Miss. 1994) (citation omitted) (a bar disciplinary proceeding).**

> The court gave a private reprimand because [the offender's] candor and humility in admitting misconduct were mitigating factors. ***Attorney L.S. v. Mississippi Bar*, 649 So. 2d 810, 815 (Miss. 1994) (citation omitted) (a bar disciplinary proceeding).**

Retirement of a Judge

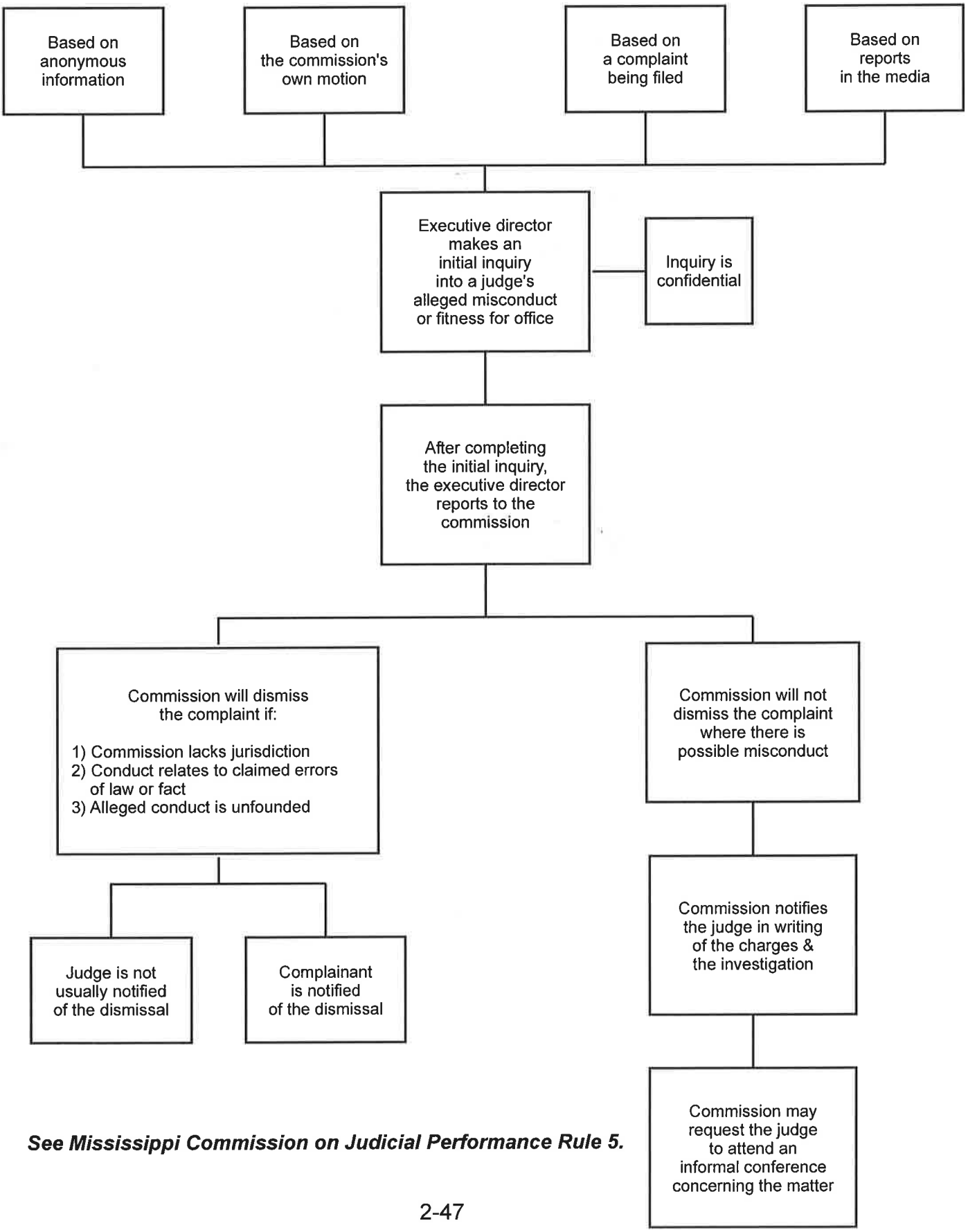
Mississippi Constitution, Article VI, § 177A, Commission on Judicial Performance, states:

> On recommendation of the commission on judicial performance, the Supreme Court may . . . retire involuntarily any justice or judge for physical or mental disability seriously interfering with the performance of his duties, which disability is or is likely to become of a permanent character.

§ 9-19-15 Disability or retirement of judge:

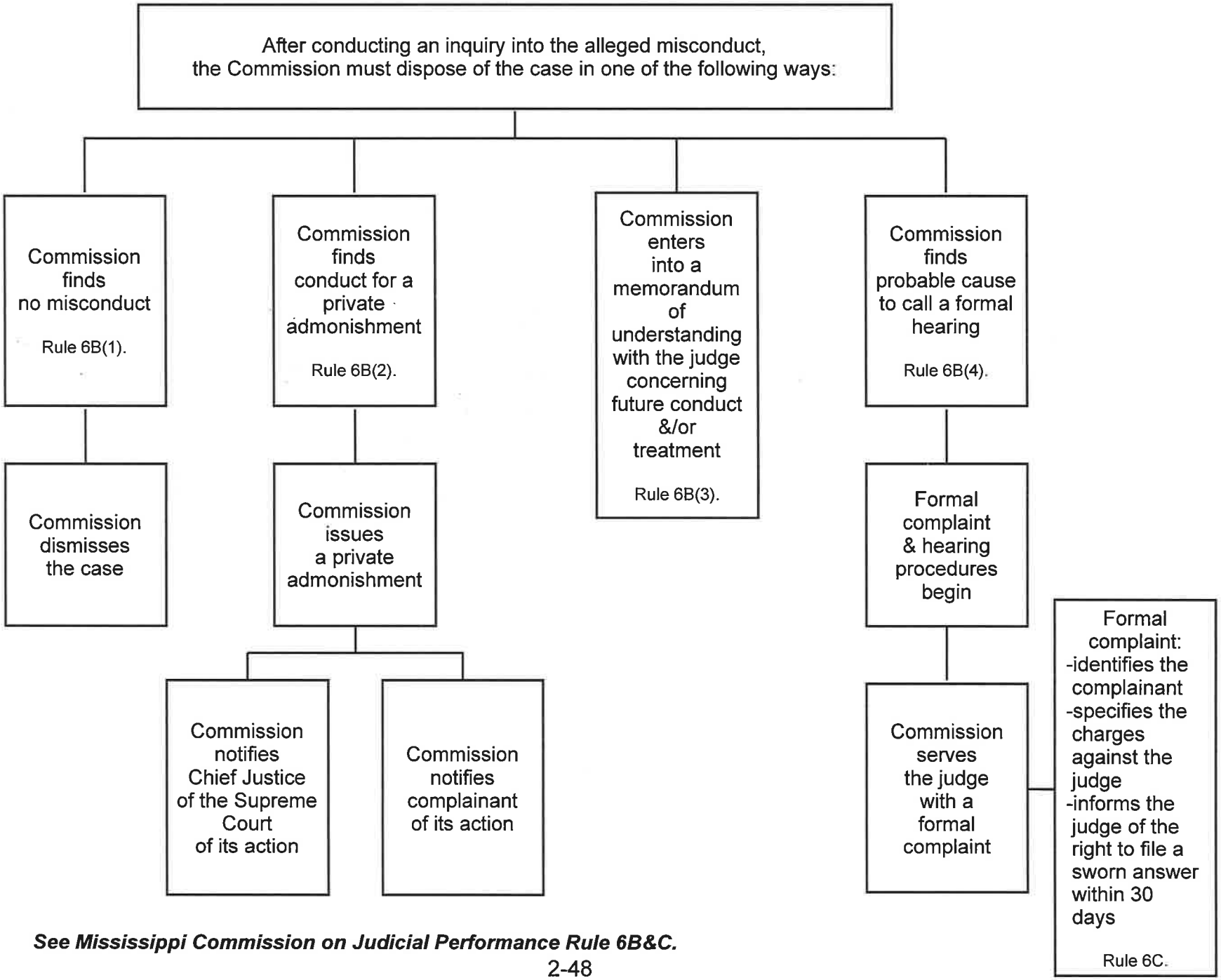
> A justice or judge retired by the Supreme Court or the seven-member tribunal shall be considered to have retired voluntarily. The Supreme Court's finding of disability shall satisfy any certification of disability required by applicable retirement and disability law.

Initial Inquiry by the Mississippi Commission on Judicial Performance



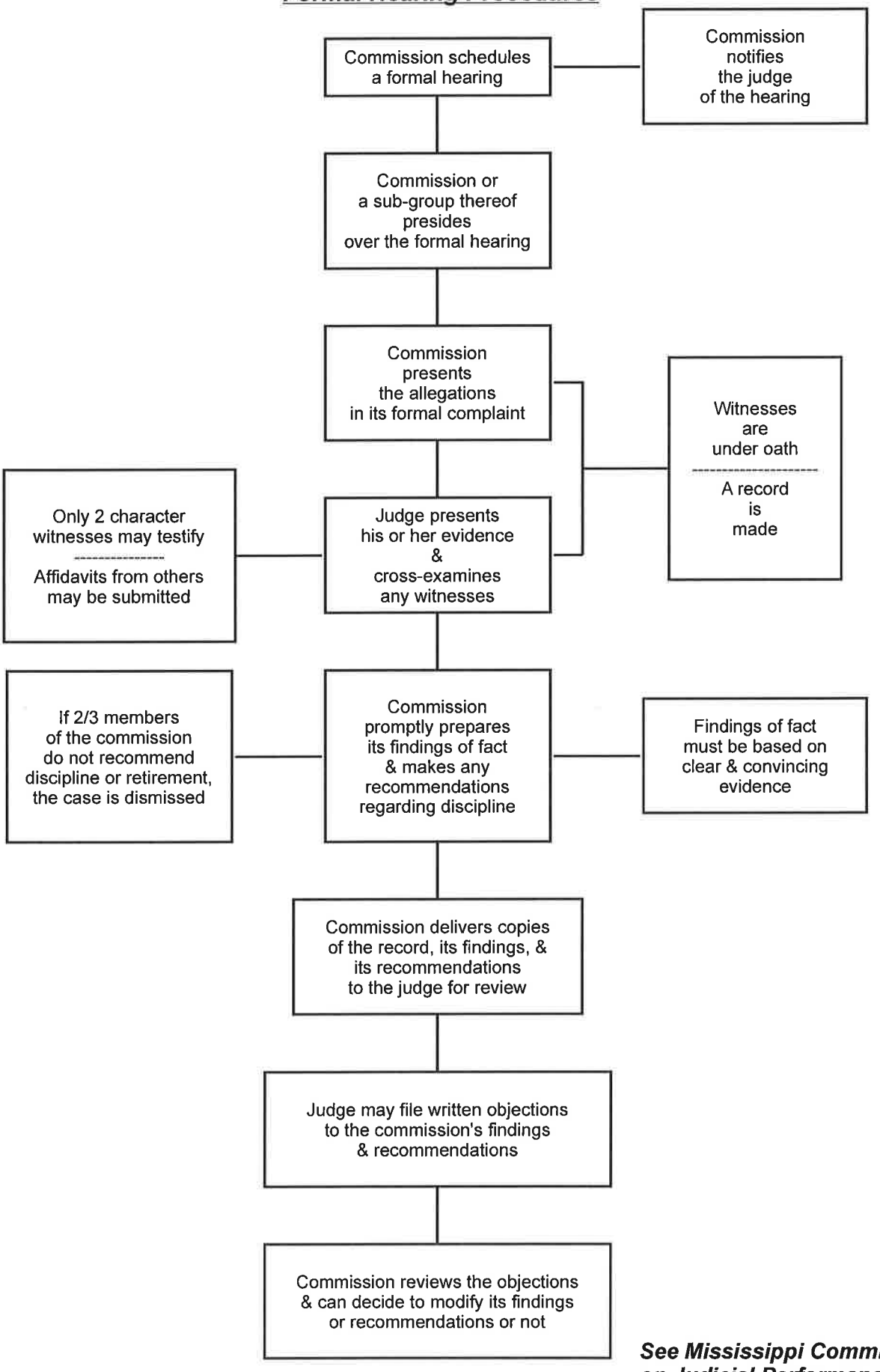
See Mississippi Commission on Judicial Performance Rule 5.

Possible Dispositions by the Mississippi Commission on Judicial Performance



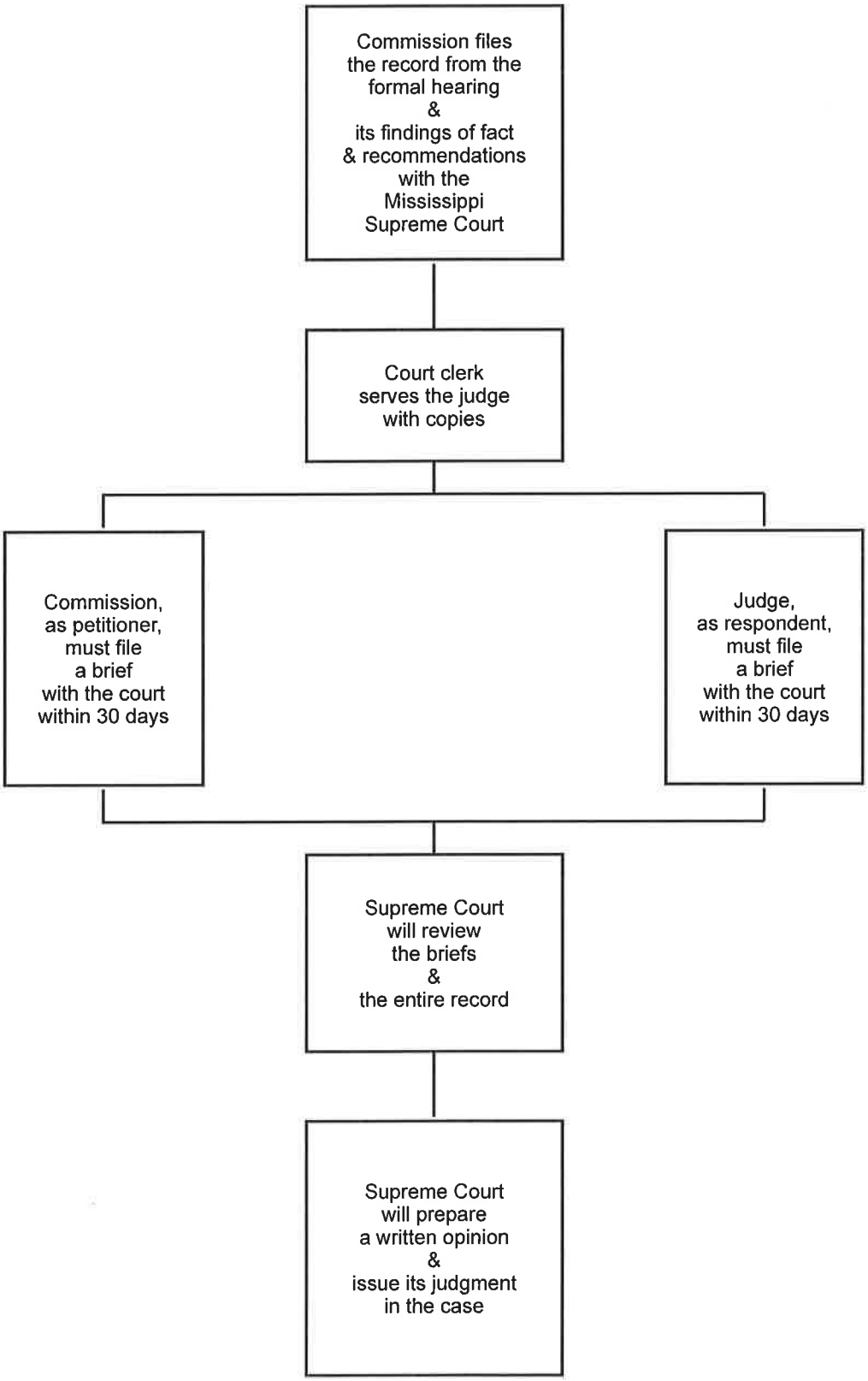
See Mississippi Commission on Judicial Performance Rule 6B&C.

Formal Hearing Procedures



See Mississippi Commission on Judicial Performance Rule 8.

Supreme Court Review of Commission's Findings & Recommendations



See Mississippi Commission on Judicial Performance Rule 10.

Procedural Safeguards for Judges in Judicial Performance Proceedings

- Notice of charges

- Opportunity to be heard

- Right to counsel

- Right to subpoena power for formal hearing

- Right to present evidence

- Right to cross-examine witnesses

- Opportunity to file objections to commission's findings

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Judicial Sanctions Ordered by the Mississippi Supreme Court			
Sanction	**Court Judge**	**Conduct Warranting Sanctions**	**Citation**
Removal, fine, & court costs	Justice	Judge physically and verbally assaulted a mentally disabled individual.	*MCJP v. Weisenberger*, 201 So. 3d 444 (Miss. 2016).
Removal, fine, & court costs	Justice	Judge lent prestige of office to assist a friend; deprived drug-court participant of right to counsel of her choosing; kept drug-court participants in program longer than statutorily permitted; improperly enrolled participants from other jurisdictions in drug court; and deprived drug-court participants of their due process rights.	*MCJP v. Thompson*, 169 So. 3d 857 (Miss. 2015).
Removal, fine, & court costs	Youth	Judge deliberately and unlawfully incarcerated eleven citizens without affording them due process.	*MCJP v. Darby*, 143 So. 3d 564 (Miss. 2014).
Removal & court costs	Chancery	Judge pled guilty to the felony of obstruction of justice in federal court. (Judge had resigned from office at the time of the opinion).	*MCJP v. Walker*, 172 So. 3d 1165 (Miss. 2015).
Removal & court costs	Circuit	Judge pled guilty to felonies in federal court. (Judge had resigned from office at the time of the opinion).	*MCJP v. DeLaughter*, 29 So. 3d 750 (Miss. 2010).
Removal & court costs	County	Judge recused himself from a case and then continued to issue orders in the case; once a judge recuses himself/herself from a case, the judge can not take further action in the case; there was prior judicial misconduct on the part of the judge. (Judge had resigned from office at the time of the opinion).	*MCJP v. Osborne*, 16 So. 3d 16 (Miss. 2009).

Removal	Justice	Judge used his position to have charges against the judge's son dismissed.	*MCJP v. Brown*, 918 So. 2d 1247 (Miss. 2005).
Removal	Justice	Judge engaged in numerous ex parte communications with litigants and allegedly made sexual advances toward several females.	*MCJP v. Lewis*, 913 So. 2d 266 (Miss. 2005).
Removal	Justice	Judge accepted payments of fines payable to justice court; improperly dismissed charges; misused contempt powers (24 counts of judicial misconduct).	*MCJP v. Willard*, 788 So. 2d 736 (Miss. 2001).
Removal	Chancery	Judge became involved in legal proceedings to which he would ultimately be acting as the judge.	*MCJP v. Jenkins*, 725 So. 2d 162 (Miss. 1998).
Removal	Justice	Judge had 25 counts of personal and professional misconduct including ex parte communications, exhibiting a hostile demeanor towards people, failure to properly perform his duties, and claims of sexual harassment.	*MCJP v. Spencer*, 725 So. 2d 171 (Miss. 1998).
Removal	Justice	Judge entered order without authority; improperly handled DUI case; accepted money without authority; executed judgment without authority; engaged in ticket fixing; engaged in ex parte communications, & obstructed the judicial process.	*MCJP v. Dodds*, 680 So. 2d 180 (Miss. 1996).
Removal	Justice	Judge became socially involved with person who appeared in her court as a defendant; knew the defendant was a fugitive from another state & participated in fugitive's criminal case after extradition.	*MCJP v. Milling*, 651 So. 2d 531 (Miss. 1995).

Removal	Justice	Judge engaged in ticket fixing; failed to sentence criminals in accordance with statute; dismissed misdemeanor cases not in accordance with statute; & interfered with rotation of cases assigned to other judges in an attempt to influence other judges.	*MCJP v. Chinn*, 611 So. 2d 849 (Miss. 1992).
Removal	Justice	Judge allowed clerks & other officials to dismiss traffic tickets without an adjudication; failed to timely sign dockets; & dismissed traffic tickets in exchange for information on other criminal activity.	*MCJP v. Hopkins*, 590 So. 2d 857 (Miss. 1991).
Removal	Justice	Judge adjudicated approximately 28 DUI convictions & 552 routine traffic convictions without reporting them to Commissioner of Public Safety.	*In re Quick*, 553 So. 2d 522 (Miss. 1989).
Removal	Justice	Judge used criminal process to collect fees & fines; failed to properly account for the fines; converted the fines to his own use.	*MCJP v. Coleman*, 553 So. 2d 513 (Miss. 1989).
Removal	Justice	Judge engaged in ticket fixing; summarily adjudicated criminal defendants as not guilty on basis of ex parte communications or other un-docketed reasons; submitted improperly changed court abstracts to Department of Public Safety; used official influence to seek favorable consideration by judges of other courts for tickets issued to individual defendants; & used justice court personnel & supplies to carry out this course of conduct.	*In re Hearn*, 542 So. 2d 901 (Miss. 1989).
Removal	County	Judge failed to keep records & make reports; imposed excessive fines; & utilized prisoners for personal & county work.	*In re Collins*, 524 So. 2d 553 (Miss. 1988).

Removal	Justice	Judge converted money which came into his hands by virtue of office to his own use & falsified court records to cover his misconduct.	*In re Stewart*, 490 So. 2d 882 (Miss. 1986).
Removal	Justice	Judge received & collected criminal fines, penalties, costs & assessments on behalf of county & failed to report & pay sums over to county.	*In re Garner*, 466 So. 2d 884 (Miss. 1985) *overruled in part on other grounds by MCJP v. Boone*, 60 So. 3d 172 (Miss. 2011).
Removal	Justice	Judge converted money from civil litigants for his own use.	*In re Brown*, 458 So. 2d 681 (Miss. 1984).
Removal	Justice	Judge committed perjury; failed to remedy deficiency in regard to issuance of garnishments; & failed to refund garnishment costs which had been deposited but as to which no garnishment had been issued.	*In re Anderson*, 451 So. 2d 232 (Miss. 1984).
Removal	Justice	Judge charged traffic violators a greater sum as a fine than that officially reported.	*In re Anderson*, 412 So. 2d 743 (Miss. 1982).
Suspension without pay, public reprimand, fine & court costs	Justice	Judge committed judicial misconduct by sentencing a defendant to the work center after the defendant had appealed his conviction to a higher court and had then paid his court fine.	*MCJP v. Sheffield*, 235 So. 3d 30 (Miss. 2017).

Suspension without pay, public reprimand, fine & court costs	Justice	Judge improperly stated to the defendant that the judge may have to use his gun on the defendant due to the defendant's habit of placing his hands in his pockets. Judge also made disparaging comments about the defendant's mother's parenting skills.	*MCJP v. Vess*, 227 So. 3d 952 (Miss. 2017).
Suspension without pay, public reprimand, fine & court costs	Chancery	Judge improperly signed ex parte orders and contributed to the mismanagement of a ward's estate.	*MCJP v. Shoemake*, 191 So. 3d 1211 (Miss. 2016).
Suspension without pay, public reprimand, fine & court costs	Chancery	Judge abused contempt powers and illegally incarcerated litigant who had appealed and paid a supersedeas bond to stay payment of court's judgment.	*MCJP v. Littlejohn*, 172 So. 3d 1157 (Miss. 2015).
Suspension without pay, public reprimand, fine & court costs	County	Judge had presided over several cases involving six minor siblings where the judge had issued a no-contact order between the father and the children; subsequently, the judge recused himself from all proceedings involving the parties; although the judge had recused himself from the proceedings and based on ex parte communications, he issued bench warrants for the arrests of the parents for contempt of court for violation of the no-contact order and ordered them held without bond.	*MCJP v. Skinner*, 119 So. 3d 294 (Miss. 2013).

Suspension without pay, public reprimand, fine & court costs	Justice	Judge communicated with the sheriff's office during a criminal investigation at a time when there was no case pending before him; signed an order where there was no case pending before him and engaged in ex parte communications concerning the matter; non-adjudicated a minor in violation of Mississippi Code Annotated § 63–11–30(3), at the request of the minor and her father; engaged in ex parte communications with the minor and her father; failed to give notice to prosecuting authorities; and interfered in a case that was assigned to another justice court judge; reduced a defendant's bond which had been set by another justice court judge; dismissed eleven (11) cases of no proof of insurance in a four (4) month period after the respective defendants supplied proof of insurance that was obtained after the fact; improperly involved himself in a domestic civil matter; engaged in improper ex parte communications with a litigant involved in the domestic dispute; and improperly attempted to aid the litigant by asking an officer to assist the litigant.	*MCJP v. Thompson*, 80 So. 3d 86 (Miss. 2012).
Suspension without pay, public reprimand, fine & court costs	Justice	Judge executed a felony arrest warrant based on an affidavit submitted by the judge's own client.	*MCJP v. Bustin*, 71 So. 3d 598 (Miss. 2011).
Suspension without pay, public reprimand, fine & court costs	Justice	Judge engaged in "ticket-fixing" and had ex parte communications.	*MCJP v. McKenzie*, 63 So. 3d 1219 (Miss. 2011).

Suspension without pay, public reprimand, fine & court costs	County	Judge engaged in ex parte communications; misused his contempt power; failed to properly notice hearings; granted relief not requested; and issued a search warrant without legal authority.	*MCJP v. Patton*, 57 So. 3d 626 (Miss. 2011).
Suspension without pay, public reprimand, fine & court costs	Justice	Judge touched a deputy clerk in an inappropriate manner and had in the past made inappropriate remarks.	*MCJP v. Brown*, 37 So. 3d 14 (Miss. 2010).
Suspension without pay, public reprimand, fine & court costs	Justice & Municipal	Judge, with deputies, went to the home of the complainant to inquire about missing sections of a fence that had been removed from a cemetery; judge subsequently ordered the complainant to return the fences or face prosecution; despite the fact that no charges were ever pending concerning the pieces of fence, the judge informed the complainant that a warrant had been issued for her arrest.	*MCJP v. Carr*, 990 So. 2d 763 (Miss. 2008) *overruled in part on other grounds by MCJP v. Boone*, 60 So. 3d 172 (Miss. 2011).
Suspension without pay, public reprimand, & fine	Justice	Judge initiated improper ex parte communications to investigate a pending civil matter; failed to comply with the statutory limitations of money judgments in justice court; and retaliated against a complainant who filed a complaint with the Commission on Judicial Performance.	*MCJP v. Bozeman*, 302 So. 3d 1217 (Miss. 2020).
Suspension without pay, public reprimand, & fine	Justice	Judge committed judicial misconduct by contacting two law enforcement investigators; engaging in sua sponte actions on behalf of a defendant; and speaking with a defendant's mother.	*MCJP v. Sutton*, 275 So. 3d 1062 (Miss. 2019).
Suspension without pay, public reprimand & court costs	Justice	Judge failed to properly adjudicate criminal matters assigned to him; engaged in ticket-fixing; and dismissed criminal charges against multiple defendants in exchange for simultaneous payments to a "drug fund" established and maintained by the police chief.	*MCJP v. Smith*, 109 So. 3d 95 (Miss. 2013).

Suspension without pay, public reprimand & court costs	Justice	Judge improperly attempted to contact a judge in another jurisdiction concerning a pending criminal matter involving a friend's family member.	*MCJP v. Dearman*, 73 So. 3d 1140 (Miss. 2011).
Suspension without pay, public reprimand & court costs	Justice	Judge interfered with the prosecution of a case against a defendant who was charged with a crime against the judge's relative; interfered with the defendant's attempt to post bond; disrupted a Board of Supervisors' meeting to complain about the sheriff's actions relating to the defendant's bond, which caused a disturbance and an interruption of the Board of Supervisors' business; interfered with the defendant's attempts to hire legal counsel by discouraging attorneys from representing the defendant, thereby attempting to deny the defendant his constitutional right to counsel and to a fair criminal proceeding; and stated on the record in a proceeding in circuit court "my advice to them [a victim of a crime] would be do not use the court, handle it themselves." Judge was also accused of willful misconduct for "passing to the file" DUI charges based on written motions filed by the county prosecutor; these actions were allegedly in violation of Mississippi Code § 63-11-39 and § 99-15-26. However, the Mississippi Supreme Court found no sanctionable conduct and dismissed that count against the judge with prejudice.	*MCJP v. McGee*, 71 So. 3d 578 (Miss. 2011).

Suspension without pay, public reprimand & court costs	Justice	Judge refused to sign a search warrant referencing an acquaintance's computer; ordered that the acquaintance's handcuffs and shackles be removed during her initial appearance; on a second charge against the acquaintance, the judge engaged in ex parte communications with the acquaintance's husband; attempted to have the acquaintance released from jail; and became emotionally upset when the acquaintance was brought before the judge.	*MCJP v. Cowart*, 71 So. 3d 590 (Miss. 2011).
Suspension without pay, public reprimand & court costs	Justice	Judge sua sponte reduced bonds and charges without proper motion; conditioned the reduction on church attendance; exceeded her authority by altering bonds after a defendant had been released on bond or had waived preliminary hearing, or after a preliminary hearing had been conducted; permitted others to create the impression that they were in a special position to influence her as a judge; initiated and invited ex parte communications; and presided at her nephew's initial appearance.	*MCJP v. Dearman*, 66 So. 3d 112 (Miss. 2011).
Suspension without pay, public reprimand & court costs	Justice	Judge had ex parte communications with a defendant and a police officer and improperly reduced a court fine.	*MCJP v. Boone*, 60 So. 3d 172 (Miss. 2011).
Suspension without pay, public reprimand & court costs	Justice	Judge waited to rule on certain criminal cases pending the outcome of an unrelated case in chancery court; obtained ex parte information by attending the chancery court proceeding; engaged in ex parte communications; held a defendant without bond for a non-capital offense; improperly reduced a defendant's bond; refused to reduce a defendant's bond based on ex parte information concerning threats made against the judge; and allowed testimony about the alleged threats during the defendant's hearing.	*MCJP v. Anderson*, 32 So. 3d 1180 (Miss. 2010).

Suspension without pay, public reprimand & court costs	Justice	Judge had a conflict of interest in a case and did not properly recuse himself from the proceedings; judge, who had been on the bench approximately 29 years, "had a fundamental lack of understanding of legal principles in connection with the recusal process."	*MCJP v. Hartzog*, 32 So. 3d 1188 (Miss. 2010).
Suspension without pay, public reprimand & court costs	Justice	Judge engaged in ex parte communications with a party and ruled in that party's favor; continued cases without a motion being made to do so by either party; dismissed a DUI case without allowing the prosecutor to call a witness; attempted to get cases assigned to another judge dismissed, among other instances of judicial misconduct.	*MCJP v. Bradford*, 18 So. 3d 251 (Miss. 2009).
Suspension without pay, public reprimand & court costs	Justice	Judge engaged in ex parte communications with a party concerning a pending matter; offered legal advice to the party; & used his influence as a judge to advance the private interests of others.	*MCJP v. Fowlkes*, 967 So. 2d 12 (Miss. 2007).
Suspension without pay, public reprimand & court costs	Justice	Judge did not allow a defendant in a trespass proceeding to present any evidence on his behalf; sua sponte issued a warrant for the re-arrest of a defendant who had posted bond set by the judge; sua sponte revoked a defendant's probation without following proper procedures; after finding a defendant not guilty of DUI 1st, ordered the defendant not to drive for 2 years; improperly issued arrest warrants; improperly set aside court orders issued by another judge; and improperly amended a charge against a defendant.	*MCJP v. Roberts*, 952 So. 2d 934 (Miss. 2007).
Suspension without pay, public reprimand & court costs	Justice	Judge interfered with a criminal prosecution by having the sheriff contact the arresting officer to have him not attend court on the trial date so that a DUI charge could be dismissed for failure to prosecute; such action was deemed the "epitome of judicial misconduct exhibiting moral turpitude."	*MCJP v. Sanford*, 941 So. 2d 209 (Miss. 2006).

Suspension without pay, public reprimand & court costs	Justice	Judge repeatedly engaged in ex parte communications and set aside judgments.	*MCJP v. Britton*, 936 So. 2d 898 (Miss. 2006).
Suspension without pay, public reprimand & court costs	Justice	Judge engaged in ex parte communications, remanded charges, and presided over a case where there was a conflict of interest.	*MCJP v. Cowart*, 936 So. 2d 343 (Miss. 2005).
Suspension without pay, public reprimand & court costs	Justice	Judge failed to render timely decisions; failure to give notice to parties of court orders.	*MCJP v. McPhail*, 874 So. 2d 441 (Miss. 2004).
Suspension, public reprimand & court costs	Municipal	Judge "passed" numerous traffic tickets to the files without requiring the defendants to appear in court.	*MCJP v. Gordon*, 955 So. 2d 300 (Miss. 2007).
Suspension, fine & public reprimand	Justice	Judge became involved in dispute between friend/distant relative & third party; wrote insufficient funds check; & failed to file reports of campaign contributions or expenditures as required by law.	*MCJP v. Franklin*, 704 So. 2d 89 (Miss. 1997).
Suspension, fine & public reprimand	Justice	Judge ordered or allowed an alteration of court dockets, & he improperly purchased replevined property.	*In re Mullen*, 530 So. 2d 175 (Miss. 1988).

Suspension without pay & court costs	County	While speaking to a political organization, the judge made a number of inflammatory, racial remarks which were not deemed to be protected political speech; judges are however permitted to speak at political gatherings on their own behalf while candidates for re-election.	*MCJP v. Osborne*, 11 So. 3d 107 (Miss. 2009).
Suspension without pay & court costs	County	Judge intervened on behalf of a family member in a vehicle repossession & used his judicial office in a manner to impede a quick & peaceful resolution to the matter.	*MCJP v. Osborne*, 977 So. 2d 314 (Miss. 2008).
Suspension & fine	Justice	Judge had jailer park his vehicle across from house of minor who had made allegations against judge in order to intimidate minor & her family, & judge interjected himself in a meeting between student & principal & used his position as judge to intimidate the student.	*MCJP v. Bishop*, 761 So. 2d 195 (Miss. 2000).
Suspension & fine	Justice	Judge assaulted a litigant in the courtroom & used profane language at the defendant during the altercation.	*MCJP v. Guest*, 717 So. 2d 325 (Miss. 1998).
Suspension & fine	Justice	Judge dismissed charges pursuant to ex parte communications with defendant and defendant's aunt; prior discipline of judge involved political activity & attempting to have another justice court judge dismiss a person's traffic violation.	*MCJP v. Peyton*, 645 So. 2d 954 (Miss. 1994) *overruled in part on other grounds by MCJP v. Boone*, 60 So. 3d 172 (Miss. 2011).

Suspension & court costs	Justice	Judge conducted ex parte bond hearings; assigned his daughter as public defender; improperly set aside judgment.	*MCJP v. Peyton*, 812 So. 2d 204 (Miss. 2002).
Suspension	Youth	Judge granted ex parte order changing child custody.	*MCJP v. Perdue*, 853 So. 2d 85 (Miss. 2003).
Suspension (Interim)	Circuit	Judge engaged in ex parte communications; suspension pending resolution of formal complaints.	*MCJP v. Delaughter*, 35 So. 3d 1208 (Miss. 2008).
Suspension (Interim)	Justice	Judge had 2 pending felony indictments; suspension was pending resolution of the indictments.	*MCJP v. Hartzog*, 822 So. 2d 941 (Miss. 2002).
Suspension	Municipal	Judge pled guilty to felony in federal district court, & was convicted of alcohol-related misdemeanors; judge was suspended from office as municipal judge pro tempore as long as he served as mayor, which was analogous to removal.	*MCJP v. Thomas*, 549 So. 2d 962 (Miss. 1989).
Public censure	Supreme	Judge conducted himself in a manner prejudicial to the administration of justice which brought the judicial office into disrepute.	*MCJP v. McRae*, 700 So. 2d 1331 (Miss. Const. Tribunal 1997).
Public censure	Justice	Judge remained active in a political party following his election to bench.	*MCJP v. Peyton*, 555 So. 2d 1036 (Miss. 1990).

Public reprimand, fine & court costs	Justice	Judge failed to give notice to a litigant that she would face an eviction and an increase in the amount of the judgment against her; granted unrequested relief; acted with ignorance or disregard of the law; entered an unsupported judgment which caused direct harm to the a litigant; and gave legal advice to a litigant.	*MCJP v. Roberts*, 227 So. 3d 938 (Miss. 2017).
Public reprimand, fine & court costs	Chancery	Judge abused his contempt powers, failed to recuse himself from contempt proceedings, and prevented those he charged with contempt from presenting any defense.	*MCJP v. Harris*, 131 So. 3d 1137 (Miss. 2013).
Public reprimand, fine & court costs	Circuit	Judge failed to disclose a conflict to the parties in a civil lawsuit and failed to rule on counsel's motion to recuse made after the conflict was discovered.	*MCJP v. Bowen*, 123 So. 3d 381 (Miss. 2013).
Public reprimand, fine & court costs	Municipal	Judge attempted to use his judicial office to advance the private interests of his tenant, and by extension, his own private financial interests as landlord. Judge was also impatient and discourteous and abused his contempt power when arguing with a probation officer.	*MCJP v. Fowlkes*, 121 So. 3d 904 (Miss. 2013).
Public reprimand, fine & court costs	Circuit	Judge was confrontational and discourteous to two (2) attorneys, a bail bondsman, and a litigant appearing before him in court and wrongfully imposed contempt of court sanctions against the two (2) attorneys and the bail bondsman.	*MCJP v. Smith*, 78 So. 3d 889 (Miss. 2011).
Public reprimand, fine & court costs	Youth	Judge wrongfully imposed criminal contempt of court sanctions against a party without affording her due process rights.	*MCJP v. Darby*, 75 So. 3d 1037 (Miss. 2011).

Public reprimand, fine & court costs	Justice	Judge engaged in ex parte communications; allowed the defendant's mother to enter a plea on behalf of her daughter; did not treat parties with courtesy; wrote a note on behalf of a party to her employer.	*MCJP v. Vess*, 10 So. 3d 486 (Miss. 2009).
Public reprimand, fine & court costs	Justice	Judge had unlawfully denied bond and entered court orders which exceeded the authority of the court. (Judge no longer in office at the time of the opinion).	*MCJP v. Boland*, 998 So. 2d 380 (Miss. 2008) *overruled by MCJP v. Osborne*, 11 So. 3d 107 (Miss. 2009).
Public reprimand, fine & court costs	Justice	Judge wrote checks in excess of $330,000 from a closed account.	*MCJP v. Hartzog*, 904 So. 2d 981 (Miss. 2004) *overruled in part on other grounds by MCJP v. Boone*, 60 So. 3d 172 (Miss. 2011).
Public reprimand, fine & court costs	Justice	Judge improperly suspended fines in 13 cases and improperly suspended state assessments in 4 cases.	*MCJP v. Sheffield*, 883 So. 2d 546 (Miss. 2004).

Public reprimand, fine & court costs	Municipal	Judge improperly set aside judgments entered by previous judge, without any notice or hearing.	*MCJP v. Gibson*, 883 So. 2d 1155 (Miss. 2004) *overruled in part on other grounds by MCJP v. Boone*, 60 So. 3d 172 (Miss. 2011).
Public reprimand, fine & court costs	Justice	Judge improperly dismissed cases and dismissed speeding tickets.	*MCJP v. Williams*, 880 So. 2d 343 (Miss. 2004).
Public reprimand, fine & court costs	Municipal	Judge improperly used his judicial office for benefit in private practice; showed improper demeanor towards litigants and court personnel.	*MCJP v. Gunter*, 797 So. 2d 988 (Miss. 2001).
Public reprimand, fine & court costs	Justice	Judge engaged in ex parte communications; dismissed tickets based on ex parte communications; failed to conduct hearings on court matters.	*MCJP v. Warren*, 791 So. 2d 194 (Miss. 2001).
Public reprimand, fine & court costs	Circuit	Judge improperly released prisoners & engaged in ex parte communications.	*MCJP v. Russell*, 724 So. 2d 873 & 691 So. 2d 929 (Miss. 1997).
Public reprimand & fine	Justice	Judge rescinded an arrest warrant, which had been signed by another judge, in a criminal proceeding in which the judge was a party, thereby prejudicing the administration of justice and bringing the judicial office into disrepute.	*MCJP v. Burton*, 268 So. 3d 565 (Miss. 2019).

Public reprimand & fine	Justice	Judge conducted hearings in more than 25 civil cases, held the cases in abeyance, and then failed to rule on the cases, and the judge granted judgment to a party without conducting a hearing on the merits.	*MCJP v. McGee*, 266 So. 3d 1003 (Miss. 2019).
Public reprimand & fine	Justice	Judge engaged in ticket fixing & in ex parte communications with defendants.	*MCJP v. Boykin*, 763 So. 2d 872 (Miss. 2000).
Public reprimand & fine	Justice	Judge reduced charges of DUI to disorderly conduct or DUI first offenses.	*MCJP v. Jones*, 735 So. 2d 385 (Miss. 1999).
Public reprimand & fine	Circuit	Judge suspended sentence of former client & placed another inmate on probation after his conviction & sentence had been affirmed.	*MCJP v. Sanders*, 708 So. 2d 866 (Miss. 1998).
Public reprimand & fine	Municipal	Judge pointed a loaded weapon at individuals who were believed to be trespassing on neighboring land; fired shots at tires of individuals' vehicle; & placed handcuffs on & temporarily detained individuals.	*MCJP v. Whitten*, 687 So. 2d 744 (Miss. 1997).
Public reprimand & fine	Justice	Judge reduced 3 citations for DUI in violation of statute precluding such reductions; assessed fines in excess of statutory maximum in 6 criminal cases, failed to require affidavits in 4 criminal cases; issued orders without authority; & allowed cameras in courtroom.	*MCJP v. Emmanuel*, 688 So. 2d 222 (Miss. 1997).
Public reprimand & fine	Municipal	Judge violated judicial canon requiring judge to resign his office when he became a candidate in general election for non-judicial office.	*MCJP v. Haltom*, 681 So. 2d 1332 (Miss. 1996).

Public reprimand & fine	Justice	Judge dismissed numerous speeding & traffic tickets & engaged in ex parte communications.	*MCJP v. Bowen*, 662 So. 2d 551 (Miss. 1995).
Public reprimand & fine	Justice	Judge altered final judgment on his own volition because of ex parte communications.	*MCJP v. Underwood*, 644 So. 2d 458 (Miss. 1994).
Public reprimand & fine	Justice	Judge violated judicial canon requiring judge to resign his office when he became a candidate in general election for non-judicial office.	*MCJP v. Ishee*, 627 So. 2d 283 (Miss. 1993).
Public reprimand & fine	Justice	Judge engaged in ticket fixing & in ex parte communications concerning charges.	*MCJP v. Gunn*, 614 So. 2d 387 (Miss. 1993) *overruled in part on other grounds by MCJP v. Boone*, 60 So. 3d 172 (Miss. 2011).
Public reprimand & fine	Justice	Judge dismissed traffic offenses at request of persons with no prosecutorial responsibility; allowed clerical personnel to adjudicate criminal cases; & allowed traffic tickets to be adjudicated by highway patrol officers &/or court clerk or deputy clerk.	*In re Seal*, 585 So. 2d 741 (Miss. 1991).
Public reprimand & fine	Justice	Judge improperly dismissed nonmoving violations; assessed excessive fees, charges, & costs; & failed to properly docket cases.	*MCJP v. Cowart*, 566 So. 2d 1251 (Miss. 1990).

Public reprimand & fine	Justice	Judge interfered with administration of police officers; improperly questioned rape victim; failed to pay traffic fine; failed to properly register automobile; & publicly supported bond issue.	*In re Chambliss*, 516 So. 2d 506 (Miss. 1987).
Public reprimand & fine	Justice	Judge had found defendants not guilty without a trial after being contacted by other officials; had unlawfully entered a JNOV; had interfered with the assignment of cases; had unlawfully handled bad check cases; and had improperly assessed constable fees.	*In re Hearn*, 515 So. 2d 1225 (Miss. 1987).
Public reprimand & fine	Justice	Judge used criminal process or threat of criminal process to collect "bad checks"; failed to properly docket & process "bad check" cases on criminal or civil docket; failed to collect civil court costs in advance; failed to keep required records; & collected court costs from county for cases which were never docketed.	*In re Odom*, 444 So. 2d 835 (Miss. 1984).
Public reprimand & fine	Justice	Judge failed to properly docket & use lawful procedure to collect on “bad check” claims.	*In re Lambert*, 421 So. 2d 1023 (Miss. 1982).
Public reprimand & fine	Justice	Judge failed to use lawful procedure to collect on “bad check” claims.	*In re Branan*, 419 So. 2d 145 (Miss. 1982).
Public reprimand & court costs	Municipal	Judge made improper statements on social media and in a newspaper interview; improperly ordered participants into a drug court program; and exhibited discourteous conduct in the courtroom.	*MCJP v. Clinkscales*, 192 So. 3d 997 (Miss. 2016).

Public reprimand & court costs	Justice	Judge had ex parte communication with a defendant about his pending criminal case; failed to disclose such ex parte communication to the prosecutor; dismissed the charges against the defendant without a hearing and without any motion to dismiss by the prosecutor; and falsified court records.	*MCJP v. Carver*, 107 So. 3d 964 (Miss. 2013).
Public reprimand & court costs	Chancery	Judge misused contempt powers by holding an attorney in criminal contempt of court for failing to say the Pledge of Allegiance in open court.	*MCJP v. Littlejohn*, 62 So. 3d 968 (Miss. 2011).
Public reprimand & court costs	County	Judge repeatedly failed to issue orders in court proceedings.	*MCJP v. Agin*, 17 So. 3d 578 (Miss. 2009).
Public reprimand & court costs	Municipal	Judge had presided over a legal proceeding concerning a defendant, i.e, had signed the warrant for his arrest, and then represented the defendant against the same criminal charges.	*MCJP v. Pittman*, 993 So. 2d 816 (Miss. 2008).
Public reprimand & court costs	Justice	Judge made a number of inappropriate and offensive remarks while attending a seminar in her capacity as a judge; her offensive remarks were not protected by the First Amendment. (Judge no longer in office at the time of the opinion).	*MCJP v. Boland*, 975 So. 2d 882 (Miss. 2008).
Public reprimand & court costs	County	Judge had failed repeatedly to issue rulings in cases pending before him.	*MCJP v. Agin*, 987 So. 2d 418 (Miss. 2008).

Public reprimand & court costs	Justice	Judge conducted ex parte communications with a party and ordered a stay of his own order; in another case, the judge failed to dispose of a pending case.	*MCJP v. Sutton*, 985 So. 2d 322 (Miss. 2008) *overruled in part on other grounds by MCJP v. Boone*, 60 So. 3d 172 (Miss. 2011).
Public reprimand & court costs	Justice	Judge became involved in a court matter by attempting to talk to a fellow justice court judge about the court matter & subsequently told a justice court deputy clerk not to issue an arrest warrant, which had been signed by the other justice court judge.	*MCJP v. Thompson*, 972 So. 2d 582 (Miss. 2008) *overruled in part on other grounds by MCJP v. Boone*, 60 So. 3d 172 (Miss. 2011).
Public reprimand & court costs	Municipal	Judge received a DUI – 1st Offense to which he pled guilty; judge payed the fine and complied with all sentencing conditions; judge also self-reported his charge to the MCJP.	*MCJP v. Westfaul*, 962 So. 2d 555 (Miss. 2007).

Public reprimand & court costs	Justice	Judge reinstated his grandson's license and intervened on his behalf in a sentencing matter.	*MCJP v. Cole*, 932 So. 2d 9 (Miss. 2006) *overruled in part on other grounds by MCJP v. Boone*, 60 So. 3d 172 (Miss. 2011).
Public reprimand & court costs	Chancery	Judge failed to pay vendors for items purchased even after he was reimbursed for the purchases by the State.	*MCJP v. Teel*, 863 So. 2d 973 (Miss. 2004).
Public reprimand & court costs	Justice	Judge conducted ex parte communications about dismissal of charges.	*MCJP v. Blakeney*, 848 So. 2d 824 (Miss. 2003).
Public reprimand & court costs	Justice	Judge found a defendant guilty of the crime charged without giving her the opportunity to defend herself.	*MCJP v. Wells*, 794 So. 2d 1030 (Miss. 2001).
Public reprimand & court costs	Justice	Judge allowed media to videotape court proceedings.	*MCJP v. Carr*, 786 So. 2d 1055 (Miss. 2001).
Public reprimand & court costs	Justice	Judge dismissed charges & then reinstated them; exceeded jurisdiction of the court.	*MCJP v. Neal*, 774 So. 2d 414 (Miss. 2000).

Public reprimand & court costs	Municipal	Not stated.	*MCJP v. White*, 660 So. 2d 226 (Miss. 1995).
Public reprimand & reinstatement	County	Judge improperly filed 6 new complaints on behalf of clients after appointment to the bench.	*MCJP v. Osborne*, 876 So. 2d 324 (Miss. 2004).
Public reprimand	Justice	Judge was improperly involved in her relatives' cases; failed to adjudicate domestic abuse cases properly by dismissing the matters without a hearing or order; refunded an expungement fee; and sought removal of the complainant from her job.	*MCJP v. Curry*, 249 So. 3d 369 (Miss. 2018).
Public reprimand	Chancery	Judge improperly issued subpoenas and admitted that he had failed to comply with the law.	*MCJP v. Buffington*, 55 So. 3d 167 (Miss. 2011).
Public reprimand	Justice	Judge refused to return handgun to a defendant who was not charged.	*MCJP v. Lewis*, 830 So. 2d 1138 (Miss. 2002).
Public reprimand	Justice	Judge made ex parte communications about pending cases; remanded cases to the file which were assigned to another judge.	*MCJP v. Lewis*, 801 So. 2d 704 (Miss. 2001).
Public reprimand	Justice	Judge made ex parte contacts with another judge who was assigned to his son's DUI case; contacted arresting officer; & contacted that officer's supervisor.	*MCJP v. Brown*, 761 So. 2d 182 (Miss. 2000).

Public reprimand	Circuit	Judge abused court's contempt powers, among other misconduct.	*MCJP v. Byers*, 757 So. 2d 961 (Miss. 2000).
Public reprimand	Circuit	Judge abused court's contempt powers against circuit clerk, & unlawfully expunged felony convictions of 2 criminal defendants.	*MCJP v. Sanders*, 749 So. 2d 1062 (Miss. 1999).
Public reprimand	Court of Appeals	Judge committed offense of DUI.	*MCJP v. Thomas*, 722 So. 2d 629 (Miss. 1998).
Public reprimand	Justice	Judge attempted to limit a litigant's rights to execute upon a judgment & then vacated the judgment without notice or hearing.	*MCJP v. Fisher*, 706 So. 2d 1107 (Miss. 1998).
Public reprimand	Justice	Judge had ex parte communications with defendant, defendant's mother, arresting officer, & prosecuting attorney; judge interfered with a defendant's bonding process.	*MCJP v. Vess*, 692 So. 2d 80 (Miss. 1997).
Public reprimand	Municipal	Judge incarcerated a defendant without notice or hearing; sentenced another defendant to more jail time than allowed by law; & found same defendant guilty of perjury based upon judge's own affidavit & warrant.	*MCJP v. Fletcher*, 686 So. 2d 1075 (Miss. 1997).
Public reprimand	Not stated	Not stated.	*MCJP v. Jenkins*, 677 So. 2d 171 (Miss. 1996).
Public reprimand	Justice	Judge notarized deed with a false acknowledgment & entered orders in cases not pending before judge's court.	*MCJP v. Hartzog*, 646 So. 2d 1319 (Miss. 1994).

Public reprimand	Municipal	Judge set accused's bail while serving as municipal judge & thereafter sought to reduce bail while acting as practicing attorney representing accused.	*MCJP v. Atkinson*, 645 So. 2d 1331 (Miss. 1994).
Public reprimand	Justice	Not stated.	*MCJP v. Vess*, 637 So. 2d 882 (Miss. 1994).
Public reprimand	Justice	Judge failed to pay hospital account & issued arrest warrant in dispute between a car dealer and customer which was not properly before the court.	*MCJP v. Cantrell*, 624 So. 2d 94 (Miss. 1993).
Public reprimand	Justice	Not stated.	*MCJP v. Riley*, 572 So. 2d 875 (Miss. 1990).
Public reprimand	Justice	Judge held an unsuccessful litigant in contempt of court.	*MCJP v. Walker*, 565 So. 2d 1117 (Miss. 1990).
Public reprimand	Justice	Judge had defendant in an eviction proceeding unlawfully jailed and in another proceeding, entered an order granting relief from a temporary restraining order which had been granted by another justice court judge.	*In re Bailey*, 541 So. 2d 1036 (Miss. 1989).
Public reprimand	Justice	Judge disrupted court proceedings; made accusations of impropriety against another judge & wildlife officers; & acted on behalf of a criminal defendant.	*In re Cooksey*, 515 So. 2d 957 (Miss. 1987).
Private reprimand	Justice	Judge improperly sentenced a defendant (sentence was the result of a plea bargain).	*MCJP v. T.T.*, 922 So. 2d 781 (Miss. 2006).

Private reprimand	Justice	Judge allowed a photograph to be taken during a court proceeding and had failed to wear a robe during a court proceeding.	*MCJP v. Blakeney*, 905 So. 2d 521 (Miss. 2004).
Private reprimand	Chancery	Judge had excessive delays in rendering opinions and orders in 6 cases before the court.	*MCJP v. U.U.*, 875 So. 2d 1083 (Miss. 2004).
Private reprimand	Justice	Judge's participation in drafting petition against law enforcement officer was willful misconduct.	*MCJP v. S.S.*, 834 So. 2d 31 (Miss. 2003).
Private reprimand	Municipal	Judge ordered probationers to marry as a condition of probation, & set bond for his own client.	*MCJP v. A Municipal Court Judge*, 755 So. 2d 1062 (Miss. 2000).
Private reprimand	Justice	Judge commented to clerk that clerk "checked out" all the men that came into the office & that clerk also "checked out" the judge.	*MCJP v. R.R.*, 732 So. 2d 224 (Miss. 1999).
Private reprimand	Justice	Judge collected fines in lieu of court clerk & dismissed cases upon representations by offender without hearing the State's side.	*MCJP v. A Justice Court Judge*, 580 So. 2d 1259 (Miss. 1991).
Private reprimand	Justice	Judge requested assistance for a person charged with a traffic violation in another court, but this was an isolated instance occurring shortly after election to his first term.	*MCJP v. Peyton*, 555 So. 2d 1036 (Miss. 1990).

Private reprimand	Chancery	Judge called a litigant involved in an action pending before the judge & solicited his political support, but other mitigating circumstances existed.	*In re Baker*, 535 So. 2d 47 (Miss. 1988).
Private admonishment	Justice	Judge was prohibited from serving as a justice court judge and a part-time police officer as this was a violation of the separation of powers, and he failed to issue garnishment writs even though he had collected the filing fees.	*In re Anderson*, 447 So. 2d 1275 (Miss. 1984).
No sanction & dismissal of proceedings	Justice	Judge was accused of willful misconduct for "passing to the file" sixteen (16) DUI charges based on written motions filed by the county prosecutor; these actions were allegedly in violation of Mississippi Code § 63-11-39. After reviewing the language in § 63-11-39, the Mississippi Supreme Court found that passing the DUI charges to the file was not in fact a reduction in the charges. Therefore, the Court held that the proposed sanctions were not warranted, and it dismissed the complaint against the judge with prejudice.	*MCJP v. Little*, 72 So. 3d 501 (Miss. 2011).
No sanction & dismissal of proceedings	Justice	Judge improperly denied bond to a criminal defendant but her actions did not show a wilful desire to disregard the state constitution.	*MCJP v. Martin*, 921 So. 2d 1258 (Miss. 2005).
No sanction & dismissal of proceedings	Justice	Judge may exercise his or her protected free speech rights, under certain circumstances, without violating the Code of Judicial Conduct.	*MCJP v. Wilkerson*, 876 So. 2d 1006 (Miss. 2004).

Dismissal of interim suspension because suspension was moot as judge had resigned from office	Justice	An order for interim suspension had been granted by the Supreme Court; the judge and the commission entered into a memorandum of understanding and sought the interim suspension to be vacated; the Supreme Court denied the motion; the judge resigned from office; on rehearing, the Supreme Court held that a memorandum of understanding is not an allowed disposition if misconduct has been found.	*MCJP v. Martin*, 995 So. 2d 727 (Miss. 2008).
Dismissal of interim suspension because judge complied with judicial education requirements	Justice	Judge, who had failed to attend annual training by the Mississippi Judicial College, was suspended pending his compliance with the mandatory judicial education training requirements.	*In re Cadle*, 466 So. 2d 79 (Miss. 1985).
Commission recommendation affirmed by the Mississippi Supreme Court	Municipal	Mississippi Supreme Court affirmed the recommendation of the Commission on Judicial Performance that municipal court judges should be suspended from serving as judges as long as they are either mayor or mayor pro tempore of their respective municipalities, as this creates an unavoidable conflict of interest in holding the dual offices of mayor and municipal judge.	*In re Grant*, 631 So. 2d 758 (Miss. 1994), *overruled by Myers v. City of McComb*, 943 So. 2d 1 (Miss. 2006).
Agreed Statement of Facts and Recommendations approved by Supreme Court	Circuit	Judge, who had resigned from office, joined with the Commission in an Agreed Statement of Facts and Recommendations filed with the Supreme Court; if judge violated agreement, he would be subject to removal.	*In re Maples*, 611 So. 2d 211 (Miss. 1992).

CHAPTER 3

DISQUALIFICATION & RECUSAL

CHARTS

CHAPTER 3

DISQUALIFICATION & RECUSAL

> Disqualification is something that incapacitates, disables, or makes one ineligible; esp., a bias or conflict of interest that prevents a judge . . . from impartially hearing a case. . . . ***Black's Law Dictionary*** **(10th ed. 2014).**
>
> Recusal is the removal of oneself as judge . . . in a particular matter, esp. because of a conflict of interest. ***Black's Law Dictionary*** **(10th ed. 2014).**

Basis for Disqualification/Recusal

Mississippi Constitution, Article VI, § 165, Disqualification of Judges, provides:

> No judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties. . . .
>
> > It has been held that the interest which disqualifies a judge under the constitution must be a pecuniary or property interest, or one affecting his individual rights. ***McLendon v. State*****, 191 So. 821, 822 (Miss. 1939).**
> >
> > When a judge is not disqualified under § 165 of the Mississippi Constitution, or [Miss. Code Ann.] § 9-1-11, the propriety of his or her sitting is a question to be decided by the judge and is subject to review only in case of manifest abuse of discretion. ***Williams v. State*****, 971 So. 2d 581, 593 (Miss. 2007) (citation omitted).**

§ 9-1-11 Interest or relationship:

> The judge of a court shall not preside on the trial of any cause where the parties, or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, or wherein he may have been of counsel, except by the consent of the judge and of the parties.
>
> > A judge may also be disqualified under § 9-1-11 which, in addition to requiring disqualification for relation of the judge by affinity or consanguinity, requires disqualification where the judge may have been counsel. ***Upton v. McKenzie*****, 761 So. 2d 167, 172 n.1 (Miss. 2000).**

Canon 3 A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

E. Disqualification.

(1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

> Canon 3E(1)(a), furthermore, requires that judges disqualify themselves when their impartiality might be questioned or when they have personal prejudice concerning a party. . . . There is no doubt that [the] Judge had personal knowledge of the evidentiary facts, and she exhibited bias and prejudice by executing the arrest warrant. ***Mississippi Comm'n on Judicial Performance v. Bustin*, 71 So. 3d 598, 601-02 (Miss. 2011).**

(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

> Canon 3E(1)(b) states that judges should disqualify themselves whenever the judge "served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter. . . ." [The] Judge served as the ex-wife's lawyer in a divorce and child-custody proceeding against [the defendant] at the same time that the ex-wife submitted the affidavit that charged [the defendant] with child kidnapping. [The] Judge, therefore, should have disqualified herself from the criminal matter. ***Mississippi Comm'n on Judicial Performance v. Bustin*, 71 So. 3d 598, 602 (Miss. 2011).**
>
> A judge is disqualified from ruling on a motion for post-conviction relief when the judge participated in the prosecution of the underlying conviction. . . . and his recusal was required. ***Holmes v. State*, 966 So. 2d 858, 862 (Miss. Ct. App. 2007).**

(c) the judge knows that the judge, individually or as a fiduciary, or the

judge's spouse or member of the judge's family residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) is acting as a lawyer in the proceeding;
(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

Canon 3E(1)(d) provides, in pertinent part, that judges should disqualify themselves whenever they are acting as a lawyer in the proceeding. . . . As already noted, [the] Judge served as the ex-wife's lawyer in the divorce and child-custody proceeding . . . And, as the ex-wife's attorney, [the] Judge had an interest that could have been substantially affected by the outcome of the criminal proceeding against [the defendant]. ***Mississippi Comm'n on Judicial Performance v. Bustin*, 71 So. 3d 598, 602 (Miss. 2011).**

(2) Recusal of Judges from Lawsuits Involving Major Donors.
A party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge. Such motions will be filed, considered and subject to appellate review as provided for other motions for recusal.

The Canon enjoys the status of law such that we enforce it rigorously, notwithstanding the lack of a litigant's specific demand. ***Green v. State*, 631 So. 2d 167, 177 (Miss. 1994).**

Quick Reference for Disqualification

Is the Judge Constitutionally Disqualified from Presiding over this Proceeding?

Is the judge related by blood (consanguinity) or marriage (affinity) to either of the parties?

Does the judge have a pecuniary, property, or individual interest in the proceedings?

Yes → The judge is disqualified unless both parties & the judge consent otherwise

No ↓

Is the Judge Statutorily Disqualified from Presiding over this Proceeding?

After passing the constitutional inquiry into disqualification, has the judge served as counsel in the proceeding?

Yes → The judge is disqualified unless both parties & the judge consent otherwise

No ↓

Is the Judge Disqualified From Presiding over this Proceeding Under Canon 3?

Is the judge, judge's spouse, or a person related within the 3rd degree of kinship to them a party to the proceeding?

Is the judge, judge's spouse, or a person related within the 3rd degree of kinship to them a lawyer in the proceeding?

Does the judge, judge's spouse, or a person related within the 3rd degree of kinship to them have an interest in the proceeding which may be substantially affected by the outcome?

Does the judge or a member of her or his immediate family have a financial or other interest in the proceeding which may be substantially affected by the outcome?

Has the judge previously been a material witness in the proceeding?

Will the judge likely be a material witness in the proceeding?

Does the judge have knowledge of disputed facts of the proceeding?

Has a lawyer with whom the judge was previously associated served as counsel in the proceeding at the time that the judge was associated with the lawyer?

Has a lawyer with whom the judge was previously associated been a material witness in the proceeding?

Does the judge have a bias or prejudice against a party?

Is this a proceeding wherein the judge's impartiality might reasonably be questioned?

Is a party or counsel for a party, a major donor to the election campaign of the judge?

Yes → The judge should disqualify herself/himself

No ↓

The judge is not disqualified from presiding over this proceeding

*Unless judge discloses on the record the basis for the disqualification & both parties consent in writing to the judge not disqualifying herself/himself

Motion for Recusal

Mississippi Rule of Civil Procedure 16A Motions for Recusal of Judges:

> Motions seeking the recusal of judges shall be timely filed with the trial judge and shall be governed by procedures set forth in the Uniform Rules of Circuit and County Court Practice and the Uniform Rules of Chancery Court Practice.
>
> > Judge of a court who has cause to recuse himself must pass on question of his disqualification, and it is incumbent on challenging party to bring to attention of court, under rules of evidence, facts on which such disqualification rests. ***Hitt v. State*, 149 Miss. 718, 115 So. 879, 879 (1928).**

Chancery Court Judges

Uniform Chancery Court Rule 1.11, Motions for Recusal of Judges, states:

Any party may move for the recusal of a judge of the chancery court if it appears that the judge's impartially might be questioned by a reasonable person knowing all the circumstances, or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law. A motion seeking recusal shall be filed with an affidavit of the party or the party's attorney setting forth the factual basis underlying the asserted grounds for recusal and declaring that the motion is filed in good faith and that the affiant truly believes the facts underlying the grounds stated to be true. Such motion shall, in the first instance, be filed with the judge who is the subject of the motion within 30 days following notification to the parties of the name of the judge assigned to the case; or, if it is based upon facts which could not reasonably have been known to the filing party within such time, it shall be filed within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted. The subject judge shall consider and rule on the motion within 30 days of the filing of the motion, with hearing if necessary. If a hearing is held, it shall be on the record in open court. The denial of a motion to recuse is subject to review by the Supreme Court on motion of the party filing the motion as provided in M.R.A.P. 48B.

Circuit and County Court Judges

Uniform Civil Rule of Circuit and County Court 1.15, Motions For Recusal of Judges, states:

Any party may move for the recusal of a judge of the circuit or county court if it appears that the judge's impartiality might be questioned by a reasonable person knowing all the circumstances, or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law. A motion seeking recusal shall

be filed with an affidavit of the party or the party's attorney setting forth the factual basis underlying the asserted grounds for recusal and declaring that the motion is filed in good faith and that the affiant truly believes the facts underlying the grounds stated to be true. Such motion shall, in the first instance, be filed with the judge who is the subject of the motion within 30 days following notification to the parties of the name of the judge assigned to the case; or, if it is based upon facts which could not reasonably have been known to the filing party within such time, it shall be filed within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted. The subject judge shall consider and rule on the motion within 30 days of the filing of the motion, with hearing if necessary. If a hearing is held, it shall be on the record in open court. The denial of a motion to recuse is subject to review by the Supreme Court on motion of the party filing the motion as provided in M.R.A.P. 48B.

Appellate Review

Mississippi Rule of Appellate Procedure 48B, Proceedings on Motion for Disqualification of Trial Judge, states:

If a judge of the circuit, chancery or county court shall deny a motion seeking the trial judge's recusal, or if within 30 days following the filing of the motion for recusal the judge has not ruled, the filing party may within 14 days following the judge's ruling, or 14 days following the expiration of the 30 days allowed for ruling, seek review of the judge's action by the Supreme Court. A true copy of any order entered by the subject judge on the question of recusal and transcript of any hearing thereon shall be submitted with the petition in the Supreme Court. The Supreme Court will not order recusal unless the decision of the trial judge is found to be an abuse of discretion. Otherwise, procedure in the Supreme Court shall be in accordance with M.R.A.P. 21. Appointment of another judge to hear the case shall be made as otherwise provided by law.

> The law in Mississippi pertaining to the recusal of a judge has been amply addressed. Under Canon 3E(1) of the Code of Judicial Conduct, judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances. But the decision whether to recuse is committed to the discretion of the trial judge, and we will reverse only if that discretion is abused. Furthermore, we presume that the trial judge is qualified, impartial, and unbiased, and the party arguing that recusal was required must rebut that presumption. ***In re B.A.H.*****, 225 So. 3d 1220, 1233 (Miss. Ct. App. 2016).**
>
> The decision to disqualify, however, remains in the discretion of the trial

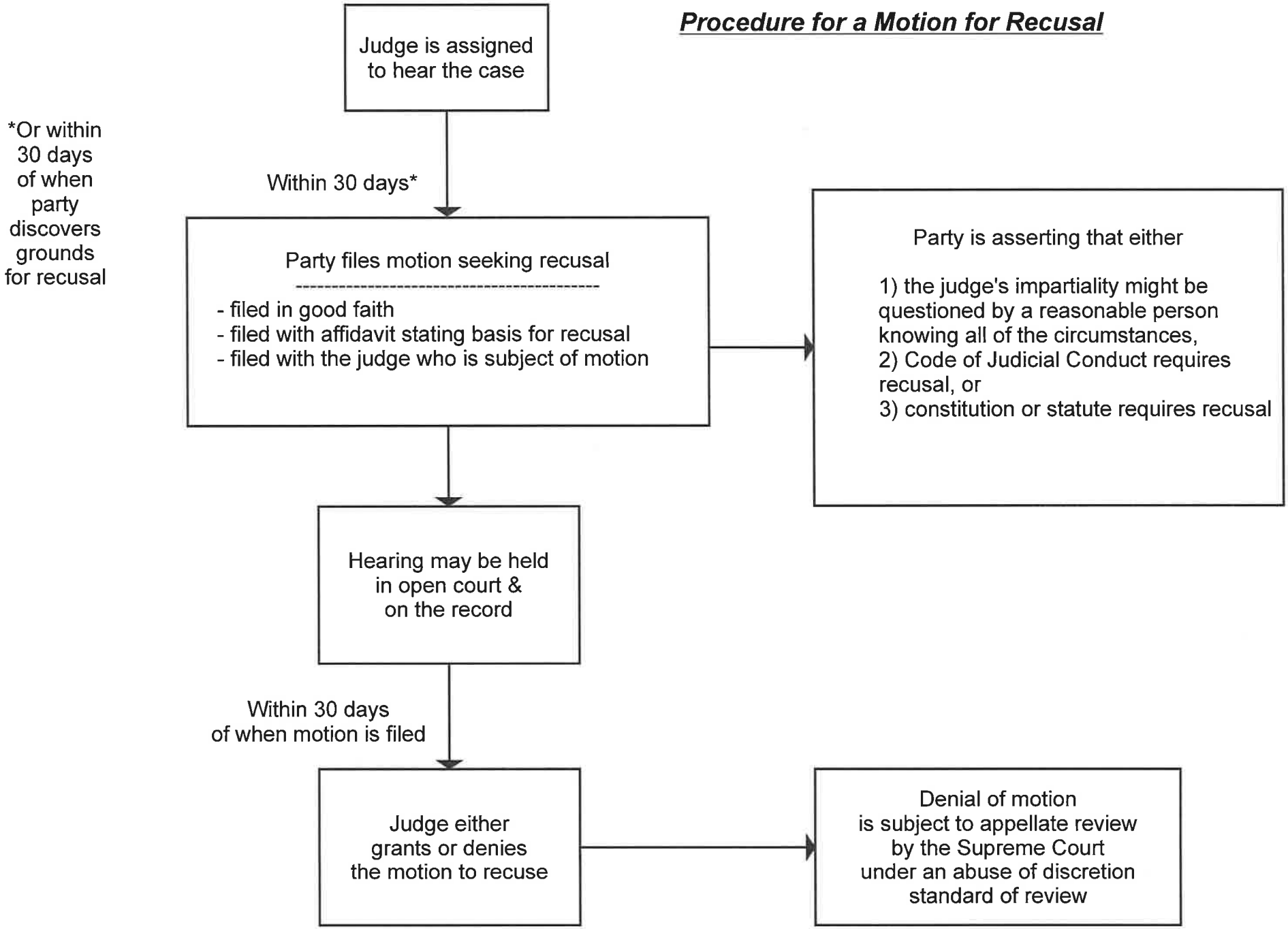
judge, and this Court will not order recusal unless the decision of the trial judge is found to be an abuse of discretion. ***King v. State*, 897 So. 2d 981, 988 (Miss. Ct. App. 2004) (citation omitted).**

Furthermore, impartiality is not apparent simply because a trial judge has presided over a previous criminal proceeding against the defendant. ***King v. State*, 897 So. 2d 981, 988 (Miss. Ct. App. 2004).**

Issue Must be Presented to the Trial Judge for Appellate Review

The [defendant] asks this Court to recuse the circuit judge because of bias evidenced by statements made in her order to compel discovery and in a response made to this Court. The [defendant] alleges that the circuit judge's language and phrases give the appearance that she considers that the [defendant] is liable for [the defendant's employee's] actions. We find that this issue is premature and not ripe for review because the circuit court has neither considered nor ruled upon such a motion. ***Mississippi United Methodist Conference v. Brown*, 911 So. 2d 478, 482 (Miss. 2005).**

Procedure for a Motion for Recusal



See U.C.R.C.C.C. 1.15, U.C.C.R. 1.11, & M.R.A.P. 48B.

When a Judge Should Recuse Herself/himself

Presumption

It is presumed that a judge who has been sworn to administer impartial justice is unbiased and qualified to hear the case**.** ***Burnham v. Stevens*****, 734 So. 2d 256, 262 (Miss. Ct. App. 1999).**

Rebutting the Presumption

For a party to overcome the presumption, the party must produce evidence of a reasonable doubt about the validity of the presumption. Reasonable doubt may be found when there is a question of whether a reasonable person, knowing all of the circumstances, would harbor doubts about the judge's impartiality. Said another way, "[t]he presumption is overcome only by showing beyond a reasonable doubt that the judge was biased or unqualified." ***Kinney v. S. Mississippi Planning & Dev. Dist., Inc.*****, 202 So. 3d 187, 194 (Miss. 2016) (citations omitted).**

Test

[I]n viewing all circumstances, recusal is required only where the judge's conduct would lead a reasonable person, knowing all the circumstances, to conclude that the "prejudice is of such a degree that it adversely affects the client." ***In re Blake*****, 912 So. 2d 907, 917 (Miss. 2005).**

The proper standard is that recusal is required when the evidence produces a reasonable doubt as to the judge's impartiality. ***Dodson v. Singing River Hosp. Sys.*****, 839 So. 2d 530, 533 (Miss. 2003).**

It is an objective test to determine when a judge should recuse himself. A judge is required to disqualify himself or herself "if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality." ***Frierson v. State*****, 606 So. 2d 604, 606 (Miss. 1992).**

We make the point that this test is an objective one. . . . The issue is not any wrongdoing on the part of the trial judge, but how this situation appears to the general public and the litigants whose cause comes before this judge. Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interest of the parties involved in the litigation. . . . ***Jenkins v. Forrest County Gen. Hosp.*****, 542 So. 2d 1180, 1181-82 (Miss. 1988) (citations omitted).**

Standard of Review for Disqualification or Recusal

The standard of review in a recusal case is as follows:

> This Court applies an objective standard in deciding whether a judge should have disqualified himself. A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality. The decision to recuse or not to recuse is one left to the sound discretion of the trial judge, so long as he applies the correct legal standards and is consistent in the application. On appeal, a trial judge is presumed to be qualified and unbiased and this presumption may only be overcome by evidence which produces a reasonable doubt about the validity of the presumption. In determining whether a judge should have recused himself, the reviewing court must consider the trial as a whole and examine every ruling to determine if those rulings were prejudicial to the complaining party.

***Peters v. State*, 920 So. 2d 1050, 1058 (Miss. Ct. App. 2006).**

In considering recusal motions, this Court will not look exclusively at the incidences complained of, but must take into account all of circumstances. We agree with a court from a sister state that, in viewing all circumstances, recusal is required only where the judge's conduct would lead a reasonable person, knowing all the circumstances, to conclude that the "prejudice is of such a degree that it adversely affects the client.**" *In re Blake*, 912 So. 2d 907, 917 (Miss. 2005) (citations omitted).**

Standard of Review in Proceedings on a Motion for Disqualification of Trial Judge

[T]he Supreme Court will not order recusal unless the decision of the trial judge is found to be an abuse of discretion. **Miss. R. App. Pro. 48B.**

Special Issues Concerning Recusal

Consent to a Judge Presiding Who Is Disqualified

Canon 3F Remittal of Disqualification provides:

> A judge who may be disqualified by the terms of Section 3E may disclose on the record the basis of his disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be incorporated in the record of the proceeding.

However, conflicts that would normally require disqualification can be waived "by the consent of the judge and of the parties. ***Wright v. State*, 228 So. 3d 915, 920 (Miss. Ct. App. 2017), *cert. denied*, 223 So. 3d 788 (Miss. 2017).**

In his order denying Holmes's motion to recuse, Judge relied upon Holmes's waiver of the conflict of interest regarding Judge's presiding over his guilty plea hearing. The supreme court has held that, under the statutory provision for waiver of disqualification, a criminal defendant may effectively waive the conflict presented by the acceptance of his guilty plea by a judge who was the district attorney who brought the charges against him. The issue of whether Holmes's waiver effectively barred his subsequent challenge to Judge's acceptance of his guilty plea is not presently before this Court, as that is a matter for adjudication by the substitute judge appointed to rule on Holmes's PCR. But, assuming Holmes effectively waived Judge's disqualification to preside over his guilty plea hearing, the waiver did not extend to Holmes's motion for post-conviction relief. . . . When Holmes filed his PCR with the court, an entirely new legal proceeding was commenced. In that new proceeding, Holmes did not seek to waive Judge's disqualification but instead moved to recuse Judge. As we have held, Judge was disqualified from ruling on Holmes's motion for post-conviction relief and his recusal was required. We reverse and remand this case for the appointment of a substitute judge before whom further proceedings may be had. ***Holmes v. State*, 966 So. 2d 858, 861-62 (Miss. Ct. App. 2007) (citation omitted).**

The defendant argues that his conviction should be reversed because one of his attorneys is the trial judge's brother-in-law. He contends that the trial

judge violated Canon 3 C(1)(d). Alternatively, the defendant contends that the trial judge could have heard the case had he followed the procedure outlined in Canon 3 D. Prior to trial, the defendant informed the judge that he wished to retain the services of the judge's brother-in-law in selecting a jury. The trial judge, pursuant to the Canons of Judicial Conduct, informed the parties that counsel was his brother-in- law. Thereafter, the defendant and his trial attorneys indicated that they did not have any problem with the trial judge presiding in spite of the fact that the defendant was represented in part by the trial judge's brother-in-law. Accordingly, neither the defendant nor his attorneys raised an objection to the trial judge serving and all agreed to sign an order allowing the judge's continued service. . . . In the case sub judice, we find that the parties clearly agreed to the trial judge's continued service. . . . We hold that the trial judge's failure to recuse himself sua sponte was not an abuse of discretion.
***Dowbak v. State*, 666 So. 2d 1377, 1388-89 (Miss. 1996).**

Contempt Proceedings

Lastly, Canon 3E(1)(a) requires a judge to recuse himself in proceedings in which his impartiality might reasonably be questioned because the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. Similarly, Canon 3(B)(1) requires a judge to hear and decide all cases, except those in which disqualification is required. This Court has held that it is "necessary" for a person charged with constructive contempt "to be tried by another judge" because "the trial judge has substantial personal involvement in the prosecution." Judge was personally involved in the litigation that formed the basis for the contempt citations. Judge was the citing judge, so he was required to recuse himself from the show-cause hearing. ***Mississippi Comm'n on Judicial Performance v. Harris*, 131 So. 3d 1137, 1143-44 (Miss. 2013).**

This Court has provided that:

> [I]n cases of indirect or constructive criminal contempt, where the trial judge has substantial personal involvement in the prosecution, the accused condemner must be tried by another judge. [E]xamples of substantial personal involvement in the prosecution warranting recusal include cases where the trial judge acts as a one-man grand jury; where the trial judge is instrumental in the initiation of the constructive-contempt proceedings; and where the trial judge acts as prosecutor and judge.

This Court repeatedly has found that a judge who initiates constructive contempt proceedings has substantial personal involvement and must recuse himself. It is undisputed that the chancellor initiated the contempt proceedings when he issued show-cause orders requiring that Appellants appear and demonstrate why they should not be held in contempt. As the proceedings were for constructive criminal contempt, we conclude that the chancellor was required to recuse himself from conducting them. His failure to do so violated Appellants' due-process rights and warrants reversal of the contempt judgments. ***Corr v. State*, 97 So. 3d 1211, 1215 (Miss. 2012) (citations omitted).**

As noted, a person charged with constructive criminal contempt is afforded certain procedural safeguards. The citing judge must recuse himself from conducting the contempt proceedings involving the charges. [I]t is necessary for that individual to be tried by another judge in cases of constructive contempt where the trial judge has substantial personal involvement in the prosecution. In *Williamson*, this Court reversed and remanded finding that it was improper for the citing judge to preside where he was a material witness. Based on *Williamson*, Cooper Tire is entitled to have proceedings before a different judge. ***Cooper Tire & Rubber Co. v. McGill*, 890 So. 2d 859, 869 (Miss. 2004) (citations omitted).**

> [The trial judge] made his decision [to find the defendant in contempt] based on acts that took place outside of his presence. It is necessary for the individual to be tried by another judge in cases of constructive criminal contempt where the trial judge has substantial personal involvement in the prosecution [of the contempt proceeding]. . . . Because [the trial judge] was instrumental in the initiation of the constructive contempt proceedings, this Court holds that he should not have heard the contempt proceedings. He should have turned over those proceedings to another judge. ***Terry v. State*, 718 So. 2d 1097, 1104-05 (Miss. 1998).**

Mississippi Rule of Criminal Procedure 32.3 Indirect Criminal Contempt; Commencement; Prosecution, states:

> **(a) Nature of the Proceedings.** All criminal contempts not adjudicated pursuant to Rule 32.2 shall be prosecuted by means of a written motion or on the court's own initiative.
>
> **(b) Disqualification of the Judge.** Indirect criminal contempt charges shall be heard by a judge other than the trial judge.
>
> > Section (b) requires that a new judge hold a hearing to determine the guilt of the contemnor, as well as to impose punishment, whenever the nature of the contemptuous conduct involves indirect criminal contempt. *See Mississippi Comm'n on Jud. Performance v. Harris*, 131 So. 3d 1137, 1142 n.6 (Miss. 2013); *Corr v. State*, 97 So. 3d 1211, 1216 (Miss. 2012). *But see Purvis v. Purvis*, 657 So. 2d 794, 798 (Miss. 1994) (citing *Mayberry v. Pennsylvania*, 400 U.S. 455, 463-64, 91 S. Ct. 499, 504, 27 L. Ed. 2d 532 (1971)) ("[d]irect contempt may be handled by the sitting judge instantly, although it is wise for a judge faced with personal attacks who waits till the end of the proceedings to have another judge take his place"). **M.R.Cr.P. 32.3 cmt.**

Mississippi Rule of Criminal Procedure 32.5. Further Proceedings, states:

> **(b) When Judge Disqualified.** A judge who enters an order pursuant to Rule 32.2(d), institutes an indirect contempt proceeding on the court's own initiative pursuant to Rule 32.3 or Rule 32.4, or reasonably expects to be called as a witness at any hearing on the matter, is disqualified from sitting at the hearing.

No Prospective Recusal

> For reasons we need not discuss here, it has not been this Court's practice to grant prospective recusal, and we decline to do so now. We shall review any request for recusal [of a trial judge] in future cases on a case-by-case basis. ***In re Blake*, 912 So. 2d 907, 918 (Miss. 2005).**

Presiding Over the Previous Trial is Not a Basis For Disqualification on Remand

> It is not unusual for a judge to sit on successive trials following mistrials or to hear on remand a case where he previously has heard and ruled on the evidence. ***Garrison v. State*, 726 So. 2d 1144, 1151 (Miss. 1998).**
>
> If a trial judge is disqualified merely because he has previously presided at the trial of a case involving the same evidence and transaction, then it would be necessary for him to stand aside and turn the duties of his office over to a special judge in every case in which there has been a mistrial, in every case where on appeal a new trial has been ordered, in every case where he himself has granted a new trial, and in every case growing out of the same transaction or based upon the same facts. We decline to adopt such a rule. ***Adams v. State*, 72 So. 2d 211, 241 (Miss. 1954).**

Participation in Prosecuting a Case Disqualifies the Judge from any Matter Involving that Case

> Where one actively engages in any way in the prosecution and conviction of one accused of a crime, he is disqualified from sitting as a judge in any matter which involves that conviction. ***Banana v. State*, 638 So. 2d 1329, 1330 (Miss. 1994).**

Waiver of Issue that Judge Should Recuse Herself/Himself

> [The defendant] failed to object or file a motion asking for the judge to recuse himself. This argument was not raised until his appeal, which procedurally bars [the defendant] from arguing the issue in this case. Over the years, this Court has been quick to point out that it will not allow a party to take his chances with a judge about whom he knows of grounds for recusal and then, after he loses, file his motion. Where the party knew of the grounds for the motion or with the exercise of reasonable diligence may have discovered those grounds, and where that party does not move timely prior to trial, the point will be deemed waived. This Court has consistently held that failing to object to a trial judge's appearance in a case can result in a waiver. ***Tubwell v. Grant*, 760 So. 2d 687, 689 (Miss. 2000).**

An Exception to the General Rule

> The right to recusal may be waived. Once a party knows of, "or with the exercise of reasonable diligence may have discovered" possible grounds, that party should then move for recusal. Generally, failure to do so will be considered implied consent to have the judge go forward in the case. There is, however, an exception to this rule. When recusal is based on the fact that the judge at one time served a prosecutorial role in the same case, an appellate court can hear the matter sua sponte. It can be heard even if expressly waived in the lower court. This is because the duty to avoid the appearance of impropriety overrides any waiver. Therefore, we hold that [the defendant's] objection will be heard in this appeal. ***Ryals v. State*, 914 So. 2d 285, 286 (Miss. Ct. App. 2005).**

Cases Where Recusal Was Required or Where the Judge Should Have Recused Herself/Himself		
Citation	**Court Judge**	**Circumstances Requiring Recusal**
Terrell v. State, 166 So. 3d 549 (Miss. Ct. App. 2015).	Circuit	Judge's substantial involvement in initiating contempt proceedings and comments made during the proceedings create doubts about his impartiality.
Mississippi Comm'n on Judicial Performance v. Harris, 131 So. 3d 1137 (Miss. 2013).	Chancery	Judge must comply with *Cooper Tire v. McGill*, which held that a person charged with constructive criminal contempt is entitled to procedural safeguards, including recusal of the citing judge.
In re McDonald, 98 So. 3d 1040 (Miss. 2012).	Chancery	Since the judge initiated the constructive criminal contempt proceedings, he was required to recuse and have the hearings conducted by another judge.
Corr v. State, 97 So. 3d 1211 (Miss. 2012).	Chancery	The chancellor initiated the contempt proceedings when he issued show-cause orders requiring that Appellants appear and demonstrate why they should not be held in contempt. As the proceedings were for constructive criminal contempt, the chancellor was required to recuse himself from conducting them. His failure to do so violated the Appellants' due-process rights and warranted reversal of the contempt judgments.
Miller v. State, 94 So. 3d 1120 (Miss. 2012).	Circuit	Where the judge had been the youth-court prosecutor in a proceeding in which the child victim was removed from her mother's care, where the proceeding involved the same victim, same offenses, and the same perpetrator as in the instant case, and where the court in the proceeding had determined that the defendant was responsible for the victim's care and had abused her, the judge should have recused himself from presiding over the criminal trial based on the same offenses.

Graves v. State, 66 So. 3d 148 (Miss. 2011).	Circuit	Where the judge has found an attorney to be in criminal contempt for matters that occurred in part outside the judge's presence, that same judge should have recused himself from presiding over the later criminal contempt hearing.
Mississippi Commission on Judicial Performance v. Hartzog, 32 So. 3d 1188 (Miss. 2010).	Justice	Judge had a conflict of interest with both parties to a court proceeding for eviction and should have timely and properly recused himself.
In re Spencer, 985 So. 2d 330 (Miss. 2008).	Chancery	Judge who instigated the contempt of court charge and had a "substantial personal involvement" in the proceeding should have recused herself from presiding over the contempt of court charge.
Holmes v. State, 966 So. 2d 858 (Miss. Ct. App. 2007).	Circuit	Although defendant expressly waived any conflict of interest in the trial judge, a former assistant district attorney, accepting the defendant's plea and imposing sentence, the trial judge should have recused himself from ruling on the same defendant's subsequent PCR petition.
Mississippi United Methodist Conference v. Brown, 929 So. 2d 907 (Miss. 2006).	Circuit	After reviewing the wording of the trial judge's discovery order, the trial judge's response to a party's motion for recusal, and her order denying recusal, the supreme court concluded that a reasonable person, knowing all the circumstances, would conclude that the trial judge could not sit as an impartial administrator of justice because the trial judge had written that the party had been untruthful to the court and indicated that the judge had concluded that the defendant was at fault.
Payton v. State, 937 So. 2d 462 (Miss. Ct. App. 2006).	Circuit	Judge who had previously recused himself from the defendant's case because of circumstances with the defendant's attorney should not have re-sentenced the defendant on remand; a special judge appointed by the Supreme Court should have re-sentenced the defendant.

Brent v. State, 929 So. 2d 952 (Miss. 2005).	Circuit	The trial judge had previously served as a county court judge and had signed the search warrant which led to the arrest of the defendant; at trial, the defendant argued that the search warrant was invalid, leading the trial judge in his capacity as trial court judge to determine whether his prior granting of the search warrant was proper; despite the trial judge's statements that he held no bias against the defendant, the supreme court concluded that not only might a reasonable person harbor doubts about the impartiality of the judge in this situation, any reasonable person should have such doubts.
Ryals v. State, 914 So. 2d 285 (Miss. Ct. App. 2005).	Circuit	The trial judge had served in a prosecutorial role in the underlying criminal case.
In re Blake, 912 So. 2d 907 (Miss. 2005).	Circuit	On-the-record proceedings indicated hostility by the trial judge towards an attorney who had 7 cases pending before the same trial judge, leading the supreme court to find that a reasonable person aware of all the circumstances would question whether the attorney's clients could get a fair hearing in the judge's court.
Cooper Tire & Rubber Co. v. McGill, 890 So. 2d 859 (Miss. 2004).	Circuit	The citing trial judge must recuse himself from conducting the contempt proceedings involving the charges. It is necessary for that individual to be tried by another judge in cases of constructive contempt where the trial judge has substantial personal involvement in the prosecution. It was improper for the citing judge to preside where he was a material witness.
Dodson v. Singing River Hospital Sys., 839 So. 2d 530 (Miss. 2003).	Circuit	Judge had a long-standing relationship with one party's counsel, and had in fact recused himself from another case where the same counsel was involved.

In re Williamson, 838 So. 2d 226 (Miss. 2002).	Circuit	Judge had found attorneys to be in constructive criminal contempt, but because the judge was a necessary fact witness to the contempt proceedings, he should have recused himself.
Steiner v. Steiner, 788 So. 2d 771 (Miss. 2001).	Chancery	Judges had long-standing practice of recusal from divorce proceedings in which an attorney who regularly practiced before them was a party to the divorce.
McDonald v. State, 784 So. 2d 261 (Miss. Ct. App. 2001).	Circuit	Judge who was a district attorney when the defendant was indicted should have recused himself to avoid even the appearance of a conflict despite the fact that the defendant orally waived his right to request a recusal.
Jackson v. State, 778 So. 2d 786 (Miss. Ct. App. 2001).	Circuit	Even though failure to recuse was ruled not to be manifest error, the better course of action would have been recusal where the judge was the district attorney when the defendant was indicted on previous charges but not the instant case.
McGee v. State, 820 So. 2d 700 (Miss. Ct. App. 2000).	Circuit	Judge knew information pertaining to the case.
Beyer v. Easterling, 738 So. 2d 221 (Miss. 1999).	Circuit	Judge should recuse himself to avoid appearance of impropriety where counsel for one party had practiced before the judge for many years.
Terry v. State, 718 So. 2d 1097 (Miss. 1998).	Circuit	Judge who initiated constructive contempt proceedings should have recused herself from presiding over the proceeding.
Mississippi Comm'n on Judicial Performance v. Sanders, 708 So. 2d 866 (Miss. 1998).	Circuit	Judge who previously represented the defendant was disqualified from presiding over any matters pertaining to that defendant.
Aetna Cas. & Sur. Co. v. Berry, 669 So. 2d 56 (Miss. 1996), *overruled on other grounds by Owens v. Mississippi Farm Bureau Cas. Ins. Co.*, 910 So. 2d 1065 (Miss. 2005).	Chancery	Judge should have recused himself where party's counsel represented the judge in his divorce proceeding & was very involved in the judge's re-election campaign.

Banana v. State, 638 So. 2d 1329 (Miss. 1994).	Circuit	Judge who was district attorney when defendant was indicted was disqualified from presiding over the post-conviction motion.
Davis v. Neshoba County Gen. Hosp., 611 So. 2d 904 (Miss. 1992).	Circuit	Judge who had previously served as counsel for a party should have recused himself.
Frierson v. State, 606 So. 2d 604 (Miss. 1992).	Circuit	Judge who was district attorney when defendant was indicted was disqualified from presiding over the trial.
Collins v. Dixie Transp., Inc., 543 So. 2d 160 (Miss. 1989).	Circuit	Judge participated as a witness in the proceeding.
Jenkins v. Forrest County Gen. Hosp., 542 So. 2d 1180 (Miss. 1988).	Circuit	Judge's brother was senior partner in law firm representing a party & members of community affected by the outcome had supported judge's election.
Clark v. State, 409 So. 2d 1325 (Miss. 1982).	Circuit	Judge was exposed to discussions about pending cases.
Boydstun v. State, 244 So. 2d 732 (Miss. 1971).	Circuit	Judge should have recused himself where there was ill will between judge & defendant, who had unsuccessfully attempted to defeat the judge in an election.
Black v. State, 187 So. 2d 815 (Miss. 1966).	Circuit	Judge was disqualified where prosecuting witness was a close relative of the judge.
Yazoo & M.V.R. Co. v. Kirk, 58 So. 710 (Miss. 1912).	Circuit	Judge was disqualified to sit in a case where the plaintiff's attorneys were the judge's son and brother-in-law.

Cases Where Recusal Was Not Required		
Citation	**Court Judge**	**Circumstances Not Requiring Recusal**
Taylor v. Petrie, 41 So. 3d 724 (Miss. Ct. App. 2010).	Circuit	Where the defendant's claims regarding recusal were based on the fact that the judge had denied several of defendant's motions in the course of the proceedings and the defendant had not offered any other evidence of possible bias, the judge was not required to recuse himself from the proceedings.
Gray v. State, 37 So. 3d 104 (Miss. Ct. App. 2010).	Circuit	Judge who was district attorney in 1988 when defendant was convicted of a prior felony, without more involvement, was not required to recuse himself from PCR proceedings.
Scott v. State, 8 So. 3d 855 (Miss. 2008).	Circuit	Judge was not required to recuse herself after learning about a criminal defendant's confession from the defendant's attorney where the information was learned in her role as "gatekeeper."
Bateman v. Gray, 963 So. 2d 1284 (Miss. Ct. App. 2007).	Circuit	Judge was not required to recuse himself where the only allegation of bias was that he had eaten meals at a lodge owned by a party's relative.
Christie v. State, 915 So. 2d 1073 (Miss. Ct. App. 2005).	Circuit	Judge who informed the defendant at sentencing that plea bargaining did not occur in his district was not required to recuse himself from sentencing the defendant.
Hill v. State, 919 So. 2d 142 (Miss. Ct. App. 2005).	Circuit	Judge was not required to recuse himself where he knew the victim's daughter, but did not have a close, personal friendship with her.
Copeland v. Copeland, 904 So. 2d 1066 (Miss. 2004).	Chancery	Where attorney for one party had merely introduced the judge and other political candidates at a community campaign rally, the judge was not required to recuse himself.

Alderson v. Alderson, 810 So. 2d 627 (Miss. Ct. App. 2002).	Chancery	Judge was not required to recuse himself even though he knew the father of a husband involved in a divorce proceeding before him.
King v. State, 821 So. 2d 864 (Miss. Ct. App. 2002).	Circuit	While in private practice the judge had represented a civil client who had been sued by the defendant in the instant criminal proceeding.
Bishop v. State, 812 So. 2d 934 (Miss. 2002).	Circuit	Judge who only ruled on pre-trial motions was not required to recuse himself even though judge had represented the defendant as a public defendant. Recusal would have been proper as well.
Vinson v. Benson, 805 So. 2d 571 (Miss. Ct. App. 2001).	Chancery	Judge was not required to recuse himself just because the judge had issued a restraining order against a party to the proceeding in a previous case.
Vance v. State, 799 So. 2d 100 (Miss. Ct. App. 2001).	Circuit	Judge was not required to recuse himself even though he previously presided over the plea hearing which was the subject of the defendant's current post-conviction motion.
Taylor v. State, 789 So. 2d 787 (Miss. 2001).	Circuit	Judge was not required to recuse herself even though a potential witness in the case was a court employee. The supreme court did find this circumstance "somewhat troubling."
Farmer v. State, 770 So. 2d 953 (Miss. 2000).	Circuit	Judge who heard guilty plea which was later overturned was qualified to sit for subsequent trial absent some showing of actual prejudice or bias.

Foster v. Foster, 788 So. 2d 779 (Miss. Ct. App. 2000).	Chancery	Guardian ad litem communicated to the judge in the form of her reports that were required to be filed with the court; her communications were proper & the judge had no reason to recuse himself.
Summers ex rel. Dawson v. St. Andrew's Episcopal Sch., 759 So. 2d 1203 (Miss. 2000).	Circuit	Judge, when practicing law, had examined the party's expert as a witness in a trial occurring some 8-10 years prior to the instant proceeding.
Walker v. State, 759 So. 2d 422 (Miss. Ct. App. 1999).	Circuit	No proof that the judge was biased against the defendant.
Steed v. State, 752 So. 2d 1056 (Miss. Ct. App. 1999).	Circuit	Judge presided over a prior civil action in which defendant was a party; this did not demonstrate bias or prejudice which required recusal.
Norton v. Norton, 742 So. 2d 126 (Miss. 1999).	Chancery	Sanctions levied against party's attorney were not clear evidence of bias requiring recusal.
Wallace v. State, 741 So. 2d 938 (Miss. Ct. App. 1999).	Circuit	Judge, who signed search warrant leading to arrest, was not required to recuse himself. *But see Brent v. State*, 929 So. 2d 952 (Miss. Ct. App. 2005).
Jones v. State, 740 So. 2d 904 (Miss. 1999).	Circuit	Defendant failed to rebut presumption that judge was impartial although judge instructed defense counsel to "shut up," outside the presence of the jury.

Beyer v. Easterling, 738 So. 2d 221 (Miss. 1999).	Circuit	Fact that a lawyer has practiced before a judge for a long period of time does not necessarily require recusal.
McBride v. Meridian Pub. Improvement Corp., 730 So. 2d 548 (Miss. 1999).	Chancery	Judge was not required to recuse herself from proceedings to attack validity of agreement entered into by city, even though judge had previously worked for firm representing city and had been associated with another firm representing city & where the judge's work had not involved projects at issue.
Proby v. State, 726 So. 2d 264 (Miss. 1998).	Circuit	Judge was not required to recuse himself after defendant discovered that judge had worked for district attorney's office when defendant was convicted of earlier drug charge that prosecutor intended to use for sentence enhancement where judge was unbiased and impartial during trial, & prior conviction was not used for enhancement purposes.
Walls v. Spell, 722 So. 2d 566 (Miss. 1998).	Chancery	Judge was not disqualified because the judge's son was the county attorney in which the defendant faced criminal charges for the same transaction.
Evans v. State, 725 So. 2d 613 (Miss. 1997).	Circuit	Fact that defendant filed a civil rights lawsuit against the judge does not require recusal absent evidence of judge's bias.
McFarland v. State, 707 So. 2d 166 (Miss. 1997).	Circuit	Judge was not required to recuse himself in election fraud case just because he was an elected official of county in question.

Hunter v. State, 684 So. 2d 625 (Miss. 1996).	Circuit	Although judge's former law firm had represented victim in divorce action & judge's nephew represented victim's estate & victim's daughter, & victim's daughter was witness against defendant at trial, judge did nothing in presiding over trial which indicated prejudice to defendant.
Evans v. State, 725 So. 2d 613 (Miss. 1997).	Circuit	A judge does not have to recuse himself or herself where a prisoner has merely filed a civil lawsuit, in *forma pauperis*, and the judge is a defendant in that lawsuit. Circumstances may require recusal if the evidence demonstrates that the trial judge is biased.

Situations Which May Require Recusal		
Waters v. Gnemi, 907 So. 2d 307 (Miss. 2005).	Circuit	A circuit court judge may preside over a general election contest; however, "*sua sponte* recusals are not uncommon in general election contest."

CHAPTER 4

COURT DECORUM
&
MAINTAINING CONTROL OVER THE COURT'S PROCEEDINGS

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Court Decorum

It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. ***Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 1061, 25 L. Ed. 2d 353 (1970).**

A judge shall require order and decorum in proceedings before the judge. **Miss. Code of Jud. Conduct Canon 3B(3).**

Uniform Chancery Court Rule 1.01:

All proceedings in the Chancery Court, whether in term time or in vacation, shall be conducted with due formality and in an orderly and dignified manner. No drinks, food, gum or smoking shall be permitted. The counsel, parties, and witnesses, must be respectful to the court and to each other. Bickering or wrangling between counsel or between counsel and witness will not be tolerated. Applause or demonstration or approval or disapproval, and the use of profane or indecent language are prohibited. Counsel, in examining witnesses, in reading from brief or opinion and in all presentations, to the Court, shall stand unless specifically excused from doing so by the Court. Counsel shall in formal hearings address the Court in the historic manner of "Your Honor" and/or "May it please the Court." The dignity and the respect of the Court shall be preserved at all times. In the interest of security, all persons entering the courtroom may be searched for weapons.

Uniform Civil Rule of Circuit and County Court Practice 1.02:

The court shall be opened formally and conducted with dignity and decorum at all times. The judge shall wear a judicial robe at all times when presiding in open court. The wearing of a robe is discretionary where court facilities make it infeasible. Each officer of the court shall be responsible for the promotion of respect for the court.

Mississippi Rule of Civil Procedure 77(b):

All trials upon the merits shall be conducted in open court, except as otherwise provided by statute.

Punctuality

Uniform Chancery Court Rule 1.05:

> When any civil action has been set for, or adjourned to, a particular day or hour, all officers, parties, witnesses and solicitors whose presence is necessary for the trial shall be present promptly at the time set. Any negligent or willful failure to obey this rule shall be punished by contempt.

Uniform Civil Rule of Circuit and County Court Practice 3.01:

> Every person whose presence is required for the conduct of the business of the court shall be prompt in attendance. Any attorney or party who subpoenas an expert witness to testify shall inform the court of the presence of such witness at the time of such witness' initial appearance.
>
> > We are well aware that most of this state's lawyers practice in many courts and that conflicting trial settings are a not infrequent occurrence. Where a lawyer receives a second setting on a date when he already has a prior court commitment, it is incumbent upon that lawyer to notify the second court immediately of the first setting and secure a rescheduling of the second matter. We have made it clear that, in the unlikely event the judge presiding over the court making the second setting does not respect the prior setting, we will afford relief. ***Alviers v. City of Bay St. Louis*, 576 So. 2d 1256, 1258 (Miss. 1991).**

Judge's Demeanor

Mississippi Code of Judicial Conduct Canon 3B(4)-(5):

> Judges shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacities, and shall require similar conduct of lawyers, and of their staffs, court officials, and others subject to their direction and control.
>
> A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. A judge shall refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and shall require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial. ***Cmt.***

Elected members of the Judiciary have a duty to conduct themselves with respect for those they serve, including the court staff and the litigants that come before them. ***Mississippi Comm'n on Jud. Perf. v. Spencer*, 725 So. 2d 171, 178 (Miss. 1998).**

Furthermore, all officers of the court should comport themselves in a manner that instills public trust and confidence in the decisions rendered. ***Cavett v. State*, 717 So. 2d 722, 725 (Miss. 1998).**

In commenting upon the influence a trial judge has on the jury during trial, this Court has previously said: It is a matter of common knowledge that jurors, as well as officers in attendance upon court, are very susceptible to the influence of the judge. The sheriff and his deputies, as a rule, are anxious to do his bidding; and jurors watch closely his conduct, and give attention to his language, that they may, if possible, ascertain his leaning to one side or the other, which, if known, often largely influences their verdict. He cannot be too careful and guarded in language and conduct in the presence of the jury, to avoid prejudice to either party. ***Young v. State*, 679 So. 2d 198, 204 (Miss. 1996).**

Finally, we must address a remark of the judge threatening defense counsel with the jailhouse while the jury was present. We are inclined to be sympathetic with the judge, and understand why an exhibition of temper may have occurred. The trial judge on several occasions had admonished defense counsel about continuing ineffectual and repetitive cross examination of the State's witnesses which he had again called for the defense, stating to him in no uncertain terms that he was providing the State with evidence that was inadmissible and detrimental to his client. Nevertheless, defense counsel persisted and finally, stated colloquially, the judge "lost his cool" and advised defense counsel that he was going to spend some time as a guest of the county government. Under the circumstances, we understand the reason for the judge's conduct; however, we cannot approve it because of its possible effect on the jury. ***Waldrop v. State*, 506 So. 2d 273, 276 (Miss. 1987).**

Inherent Authority & Power to Control Court Proceedings

A court's power to maintain control over the proceedings before it is not grounded in its punitive jurisdiction, but in the necessary and inherent power to regulate its proceedings. ***Knott v. State*, 731 So. 2d 573, 576 (Miss. 1999) (citation omitted).**

We agree with the learned trial judge that all courts possess the inherent authority to control the proceedings before them including the conduct of the participants. ***Aeroglide Corp. v. Whitehead*, 433 So. 2d 952, 953 (Miss. 1983).**

In *Ladner v. Ladner*, 436 So.2d 1366, 1370 (Miss.1983), we held that even where there is no specific statutory authority for imposing sanctions, courts have an inherent power to protect the integrity of their processes, and may impose sanctions in order to do so. ***Selleck v. S.F. Cockrell Trucking, Inc.*, 517 So. 2d 558, 560 (Miss. 1987).**

Not only may willful and intentional conduct be sanctioned, but courts have the inherent power to impose sanctions "to protect the integrity of their processes." When counsel's carelessness causes his opponent to expend time and money needlessly, it is not an abuse of discretion for the court to require offending counsel to pay for his mistake, especially where, as here, out-of-town travel was involved. Therefore, the sanctions imposed below are affirmed. ***Vicksburg Refining, Inc. v. Energy Resources, Ltd.*, 512 So. 2d 901, 902 (Miss. 1987) (citations omitted).**

The decision to impose sanctions for discovery abuse is vested in the trial court's discretion. The provisions for imposing sanctions are designed to give the court great latitude. The power to dismiss is inherent in any court of law or equity, being a means necessary to orderly expedition of justice and the court's control of its own docket. Nevertheless, the trial court should dismiss a cause of action for failure to comply with discovery only under the most extreme circumstances. ***Pierce v. Heritage Prop., Inc.*, 688 So. 2d 1385, 1388 (Miss. 1997) (citations omitted).**

Control over Those Appearing in Court

Uniform Civil Rule of Circuit and County Court Practice 1.03:

Any person embraced within these rules who violates the provisions hereof may be subjected to sanctions, contempt proceedings or other disciplinary actions imposed or initiated by the court.

Attorneys

> In this case, lesser sanctions [other than dismissal] for counsel's misconduct are available and may be appropriate. ***Glover v. Jackson State Univ.*, 755 So. 2d 395, 404 (Miss. 2000).**
>
> In *Danzig v. Danzig*, 79 Wash. App. 612, 904 P.2d 312 (Wash. Ct. App. 1995), a trial court sanctioned an attorney for his unethical conduct arising out of a matter that was not before that court. On appeal it was held that the trial court has the power to police the conduct of an attorney in an action before it, as well as, the duty to initiate disciplinary action against an attorney whose unprofessional conduct comes to its attention. However, the trial court does not have subject matter jurisdiction to discipline an attorney for misconduct in matters which are not before the court. ***Knott v. State*, 731 So. 2d 573, 576 (Miss. 1999).**

Uniform Civil Rule of Circuit and County Court Practice 3.02:

> Attorneys should manifest an attitude of professional respect toward the judge, the opposing attorney, witnesses, defendants, jurors, and others in the courtroom. In the courtroom, attorneys should not engage in behavior or tactics purposely calculated to irritate or annoy the opposing attorney and shall address the court, not the opposing attorney, on all matters relating to the case.
>
> All objections to testimony must be made to the judge and not to the opposing attorney. The objection must be specific and not general. The attorneys will not be permitted to argue between themselves. Attorneys must stand when addressing the court, examining witnesses, and addressing the jury, except when excused for good cause by the court. Attorneys may direct remarks to the jury panel only during voir dire, opening and closing statements.

Bailiffs

Uniform Chancery Court Rule 1.03:

> The sheriff must see that the courtroom, library, Judge's chamber, witness rooms and rest rooms are kept clean and in comfortable condition.

Uniform Civil Rule of Circuit and County Court Practice 3.08:

> The bailiff will escort the impaneled jury each time they enter or leave the courtroom during the trial and after the verdict. All attorneys, litigants, and spectators will be seated when the jury enters or leaves the courtroom.

The bailiff was admonished for escorting a juror into the offices of the district attorney. ***Gayle v. State*, 743 So. 2d 392, 397-98 (Miss. Ct. App. 1999).**

Jurors

Uniform Civil Rule of Circuit and County Court Practice 3.06:

Jurors are not permitted to mix and mingle with the attorneys, parties, witnesses and spectators in the courtroom, corridors, or restrooms in the courthouse. The court must instruct jurors that they are to avoid all contacts with the attorneys, parties, witnesses or spectators.

Uniform Civil Rule of Circuit and County Court Practice 3.11:

Within the discretion of the court, a recess of jury deliberations may be held. The jury may be reconvened at the time and place set by the court. In cases in which the jury is not sequestered the judge shall instruct the jury as to the following:

1. That the jurors are not to converse with anyone, including family members or another juror, about the case or on any subject connected with the trial. However, a juror may inform another about the juror's schedule.
2. That the jurors are not to form or express an opinion on the case or any subject connected with the trial.
3. That the jurors are not to view any place connected with the case or subject connected with the trial.
4. That the jurors are not to read, listen to, or watch any news account or other matter relating to the case or other subject connected with the trial.
5. That the jurors shall report to the court any communications or attempts to communicate with them on the case or subject connected with the trial.
6. On such other matters as the court deems appropriate.

The defense moved for a mistrial on the basis of the prosecutor's actions. They stated that such actions were commendable but for that very reason the jury might be influenced to the detriment of the defendant. The court questioned the jury, asking if anyone "saw or heard anything that would affect their decision." All jurors indicated that they had not and the trial proceeded. The concern here is that the actions of the prosecutor in treating the ill juror somehow ingratiated her with jurors. Initially, this was a decision for the trial judge to make. Had a mistrial been granted, that would be understandable. However, we do not find the failure to do so to be clearly erroneous. ***Gayle v. State*, 743 So. 2d 392, 397-98 (Miss. Ct. App. 1999).**

Witnesses

> And trial courts have long had the inherent authority to control their courtrooms, which includes the authority to control the mode and order by which witnesses are interrogated. ***People v. Rose*, 289 Mich. App. 499, 509, 808 N.W.2d 301, 310 (2010).**

Parties in Civil Proceedings

> On the third day of the trial, S.F. Cockrell, owner of the [defendant company], went into the jury room and conversed with jurors for ten or 15 minutes. . . . Then Cockrell told Hall, a juror who was by profession a concrete finisher, that he (Cockrell) needed some work done on his driveway and that he would like Hall to do the work. When this conversation was brought to the attention of the trial court, the judge offered to grant plaintiff Selleck a mistrial. After consulting with his client regarding the trial court's offer, plaintiff's counsel stated the following: It's just economically impossible to pay all these expenses again. . . . Seldom has this Court encountered such a blatant attempt to influence a juror. We find it difficult to believe that Cockrell did not know the impropriety of offering employment to a juror during the trial. We would be remiss in our duty to administer justice if we allowed such misconduct to go unsanctioned. In *Great American Surplus Lines, Inc. v. Dawson*, 468 So. 2d 87 (Miss. 1985), we reversed because material witnesses had talked and laughed with jurors during the trial. There we stated that "whatever tends to threaten public confidence in the fairness of jury trials, tends to threaten one of our sacred legal institutions." Cockrell argues that Selleck waived this issue when, through counsel, he affirmatively stated that he did not want the circuit court to declare a mistrial. We note, however, that Selleck's counsel stated that his client could not afford a third trial unless he could "recover some of [his] expenses" for the second trial, which he estimated to be $2,500.00. What occurred in the case at bar was an attempt to influence a juror by offering him employment. The only relief which the trial court offered Selleck was a mistrial with a $2,500.00 price tag attached. Thus, Cockrell's intentional, inexcusable conduct put Selleck between a rock and a hard place: he could let his case go to a tainted jury, or he could lose the $2,500.00 expended so far and still have no verdict. The trial court should not, nor should we, stand by and allow a wrong-doer like Cockrell to force such a choice. ***Selleck v. S.F. Cockrell Trucking, Inc.*, 517 So. 2d 558, 559-60 (Miss. 1987).**

Mississippi Rule of Civil Procedure 54(e):

> **(e) Costs.** Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, and this provision is applicable in all cases in which the State of Mississippi is a party plaintiff in civil actions as in cases of individual suitors. . . .

Parties in Criminal Proceedings

State &/or Prosecuting Attorney

The sanctions of excluding the evidence or granting a continuance or a mistrial are not the only sanctions within the trial court's discretion to impose. Nor, is the trial court limited in the imposition of sanctions to only one form of sanction. Additionally, discovery violations may subject an attorney in a criminal trial to monetary sanctions either under the provisions of URCCC 1.03 ("[a]ny person . . . who violates the provisions hereof may be subjected to sanctions, contempt proceedings or other disciplinary actions imposed or initiated by the court"), URCCC 9.04 (willful violations may result in sanctions), or under the trial court's inherent authority to control proceedings before it. ***State v. Blenden*, 748 So. 2d 77, 88 (Miss. 1999).**

District attorneys must not directly, or by innuendo and insinuation, comment on a defendant's not testifying. Any person competent to be a prosecuting attorney knows that elementary principle of law. If a prosecuting attorney, who is presumed to know better, persists in making erroneous and prejudicial remarks in his argument before the jury, then the trial court should deal harshly with him to the extent of sanctions, reprimands and contempt. This Court will not look for some reason to excuse such action of a prosecuting attorney, even though a new trial would be expensive to the people of the county. Such expense, fault and blame should be placed at the door of the person who is responsible for it***. Wilson v. State*, 433 So. 2d 1142, 1146 (Miss. 1983).**

The natural and probable consequence of granting wide latitude to closing argument should not be to cause wide-ranging improper arguments. Trial courts should control the arguments and consider contempt for those who disregard the proper boundaries. Appellate review may on occasion require reversal of convictions, which is not necessary here. ***Robinson v. State*, 733 So. 2d 333, 336 (Miss. Ct. App. 1998).**

Defendant

The defendant's right to be present at his own trial, however, is not absolute. *Illinois v. Allen* explicitly held that:

> A defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

***Bostic v. State*, 531 So. 2d 1210, 1213 (Miss. 1988) (citations omitted).**

When the dignity and decorum of the court is undermined by a criminal defendant's actions, there are four (4) constitutionally permissible approaches to controlling that disruptive defendant:

(1) Cite or threaten to cite a contumacious defendant for criminal contempt (This sanction, however, would not likely impress a defendant seeking to prevent any trial or facing a severe sentence such as death or life imprisonment.);

(2) Imprison the unruly defendant for civil contempt and discontinue the trial until such time as the defendant promises to behave himself;

(3) Remove the defendant from the courtroom and continue his trial in his absence until and unless he promises to conduct himself in a manner befitting an American courtroom;

(4) Bind and gag a defendant, thereby keeping him present in the courtroom although this will affect the jury's attitude toward the defendant, and it is an affront to the very dignity and decorum of judicial proceedings.

***Bostic v. State*, 531 So. 2d 1210, 1213 (Miss. 1988) (citations omitted).**

The warning informs the defendant of the consequences of his actions. If a defendant then persists in his disruptive conduct, he has made a knowing and intelligent waiver of his right to be present at trial. ***Bostic v. State*, 531 So. 2d 1210, 1213 (Miss. 1988).**

Control Over Court Proceedings

Pre-Trial Proceedings

Pleadings

Mississippi Rule of Civil Procedure 11(b):

(b) Sanctions. If a pleading or motion is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false, and the action may proceed as though the pleading or motion had not been served. For wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees.

Discovery - Civil Proceedings

Mississippi Rule of Civil Procedure 26(c):

> The court may impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement. Upon a showing of good cause, any order entered pursuant to this subdivision may be altered or amended.
>
> > But, the question still remains as to what actions the chancellor should have taken, if any, upon learning that a discovery violation had occurred. If a party fails to obey a court order permitting discovery, the court may, in its discretion, refuse to allow the disobedient party to support her claims with the undisclosed evidence. We also believe that sanctions may be imposed for the failure to supplement even without a prior court order. Although there is no statutory authority for imposing sanctions without an order, courts have "an inherent power to protect the integrity of their processes" where statutory law provides no adequate remedy. Ordinarily, the discovering party would have no way of knowing that a response should have been supplemented until he finds out at trial. Thus, if this were the proper case, the trial judge would have been permitted to impose a sanction. In our prior decisions, we have held that sanctions should be imposed where the disobedient party willfully neglected or declined to permit discovery, or where undue advantage and surprise results. We have also recognized, however, that the "lower court should be cautious in refusing to permit testimony." In other words, penal sanctions are not to be imposed per se for every discovery violation, and a determination of whether to impose such a sanction is ordinarily vested in the sound discretion of the trial judge. ***Ladner v. Ladner*, 436 So. 2d 1366, 1370-71 (Miss. 1983).**
> >
> > Not only may willful and intentional conduct be sanctioned, but courts have the inherent power to impose sanctions to protect the integrity of their processes. When counsel's carelessness causes his opponent to expend time and money needlessly, it is not an abuse of discretion for the court to require offending counsel to pay for his mistake, especially where, as here, out-of-town travel was involved. ***Vicksburg Refining, Inc. v. Energy Resources, Ltd.*, 512 So. 2d 901, 902 (Miss. 1987).**

Mississippi Rule of Civil Procedure 37:

> **(a) Motion for Order Compelling Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order may be made to the court in which the action is pending.
(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rules 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(d).
(3) Evasive or Incomplete Answer. For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.
(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is denied, the court shall, after opportunity for hearing, require the moving party of the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expense unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) Sanctions by Court. If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court.
(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify in behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this rule, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
(C) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or in addition, thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable under Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially

justified or that other circumstances make an award of expenses unjust. The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order under Rule 26(d).

(e) Additional Sanctions. In addition to the application of those sanctions, specified in Rule 26(d) and other provisions of this rule, the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorneys' fees, if any party or counsel (i) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(c), or (ii) otherwise abuses the discovery process in seeking, making or resisting discovery.

> The decision to impose sanctions for discovery abuse is vested in the trial court's discretion. The provisions for imposing sanctions are designed to give the court great latitude. The power to dismiss is inherent in any court of law or equity, being a means necessary to orderly expedition of justice and the court's control of its own docket. Nevertheless, the trial court should dismiss a cause of action for failure to comply with discovery only under the most extreme circumstances. Such dismissals by the trial court are reviewed under an abuse of discretion standard. When this Court reviews a decision that is within the trial court's discretion, it first asks if the court below applied the correct legal standard. If the trial court applied the right standard, then this Court considers whether the decision was one of several reasonable ones which could have been made. This Court will affirm a trial court's decision unless there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors. ***Pierce v. Heritage Prop., Inc.*, 688 So. 2d 1385, 1388 (Miss. 1997).**
>
> In *Pierce*, this Court adopted the position of the United States Court of Appeals for the Fifth Circuit in *Batson v. Neal Spelce Assocs., Inc.*, 765 F.2d 511 (5th Cir.1985), for evaluating the appropriateness of dismissal as a sanction:
>
> > First, dismissal is authorized only when the failure to comply with the court's order results from wilfulness or bad faith, and not from the inability to comply. Dismissal is proper only in situations where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions. Another consideration is whether the other party's preparation for trial was substantially prejudiced. Finally, dismissal may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client, or when a party's simple negligence is grounded in confusion or

sincere misunderstanding of the court's orders.

***Scoggins v. Ellzey Beverages, Inc.*, 743 So. 2d 990, 996 (Miss. 1999) (citations omitted).**

Mississippi Rule of Civil Procedure 41(b):

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.

Mississippi Rule of Civil Procedure 41(b) authorizes a court to dismiss an action for failure of the plaintiff to prosecute. This power is granted not only by Rule 41(b), but is part of a trial court's inherent authority and is necessary for the orderly expedition of justice and the court's control of its own docket. ***Regan v. S. Cent. Reg'l Med. Ctr.*, 234 So. 3d 1242, 1245 (Miss. 2017).**

In *Wallace v. Jones*, 572 So. 2d 371, 374 (Miss. 1990), this Court explained that involuntary dismissals should be granted in only three cases: dismissal at the close of the plaintiff's evidence for failure to show a right to relief; dismissal for want of prosecution, and dismissal for failure to comply with the rules of the court or any order of the court. The Court went on to say:

> dismissal for failure to comply with an order of the district court is appropriate only where there is a clear record of delay or contumacious conduct and lesser sanctions would not serve the best interests of justice. This is so because dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and any dismissals with prejudice are reserved for the most egregious cases.

***Glover v. Jackson State Univ.*, 755 So. 2d 395, 404 (Miss. 2000) (citations omitted).**

Uniform Chancery Court Rule 1.10:

A. All discovery must be completed within ninety days from service of an answer by the applicable defendant. Additional discovery time may be allowed with leave of court upon written motion setting forth good cause for the extension. Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial.

B. When responding to discovery requests, interrogatories, requests for

production, and requests for admission, the responding party shall, as part of the responses, set forth immediately preceding the response the question or request to which such response is given. Responses shall not be deemed to have been served without compliance to this subdivision.

C. No motion to compel shall be heard unless the moving party shall incorporate in the motion a certificate that movant has conferred in good faith with the opposing attorney in an effort to resolve the dispute and has been unable to do so. Motions to compel shall quote verbatim each contested request, the specific objection to the request, the grounds for the objection and the reasons supporting the motion.

Discovery - Criminal Proceedings

Mississippi Rule of Criminal Procedure 17.9:

(a) Failure to Make Disclosure--Pre-Trial. If, at any time prior to trial, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

(b) Failure to Make Disclosure--Trial. If, during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these Rules and the defense objects to the introduction for that reason, the court shall:

(1) Grant the defense a reasonable opportunity to interview the newly discovered witness and/or examine the newly produced documents, photographs or other evidence.

(2) If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, In the interest of justice and absent unusual circumstances, exclude the evidence, grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence, or grant a mistrial.

(3) The court shall not be required to grant either a continuance or mistrial for such a discovery violation if the prosecution withdraws its efforts to introduce such evidence.

The court shall follow the same procedure for violation of discovery by the defense.

(c) Sanctions. Willful violation by an attorney of an applicable discovery rule, or an order issued pursuant thereto, may subject the attorney to appropriate sanctions

by the court.

> When the State enters the court as a litigant, it places itself on the same basis as any other litigant; subjecting itself to the inherent authority of the court to control actions before it, just as any other litigant. The Court may invoke this inherent authority through the adjudication of cases, the promulgation of rules, or the development of internal management practices. Here the State committed various discovery violations which resulted in the declaration of a mistrial. As a result, the trial court exercised its inherent authority to control matters proceeding before it to impose monetary sanctions on the State. . . . For the above and foregoing reasons the trial court's judgments are affirmed. ***State v. Blenden*, 748 So. 2d 77, 88-89 (Miss. 1999).**

Mississippi Rule of Criminal Procedure 17.4:

> **(a) Alibi Defense.**
> (1) In General. Upon the written demand of the prosecuting attorney stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten (10) days, or at such other time as the court may direct, upon the prosecuting attorney, a written notice of the intention to offer a defense of alibi, which notice shall state the specific place(s) at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi. Within ten (10) days thereafter, but in no event less than ten (10) days before the trial, unless the court otherwise directs, the prosecuting attorney shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the State intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses. If, prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information previously furnished, the party shall promptly notify the other party or the other party's attorney of the name and address of such additional witness.
> (2) Effect of Failure to Comply. Upon the failure of either party to comply with subsection (a)(1), the court may use such sanctions as it deems proper, including:
> (A) Granting a continuance;
> (B) Limiting further discovery of the party failing to comply;
> (C) Finding the attorney failing to comply in contempt; or
> (D) Excluding the testimony of the undisclosed witness.
> (3) Additional Provisions. Subsections (a)(1) and (a)(2) do not limit the defendant's right to testify in the defendant's own behalf.

(b) Insanity Defense.
(1) In General. If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, the defendant shall, within the time provided for filing pretrial motions or at such later time as the court may direct, serve upon the prosecuting attorney and the clerk of the court a written notice of the intention to offer a defense of insanity. Within ten (10) days thereafter, but in no event less than ten (10) days before the trial, unless the court otherwise directs, the defendant shall serve upon the prosecuting attorney the names and addresses of the witnesses upon whom the defendant intends to rely to establish the defense of insanity. If a defendant intends to introduce expert testimony relating to a mental illness, defect, or other condition bearing upon the issue of whether the defendant had the mental state required for the offense charged, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the prosecuting attorney and the clerk of the court notice of such intention, with the names and addresses of such expert witnesses upon whom the defendant intends to rely. The prosecuting attorney shall serve notice on the defendant promptly, but in no event less than ten (10) days prior to trial, stating the names and addresses of any witnesses upon whom the State intends to rely relating to the issue of the defendant's mental condition at the time of the alleged offense or the defendant's mental state required for the offense charged. If, prior to or during trial, either party learns of an additional witness whose identity should have been included in the notice under this rule, the party shall promptly notify the other party or the other party's attorney of the name and address of such additional witness.
(2) Effect of Failure to Comply. If there is a failure to comply with the requirements of subsection (b)(1), the court may use such sanctions as it deems eluding:

(A) Granting a continuance and/or assessing costs against the appropriate attorney or party;
(B) Limiting further discovery of the party failing to comply;
(C) Finding the attorney failing to comply in contempt; or
(D) Excluding the testimony of appropriate witnesses.

(c) Exceptions. For good cause shown, the court may grant an exception to the requirements of sections (a) and (b).

Trial Proceedings

The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. ***Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).**

Witnesses

Mississippi Rule of Civil Procedure 45(g):

> **(g) Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

Sequestration Rule

Mississippi Rule of Evidence 615:

> At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:
>
> > (a) a party who is a natural person;
> > (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; or
> > (c) a person whose presence a party shows to be essential to presenting the party's claim or defense.
> >
> > > **Advisory Committee Note:** This rule does not discuss sanctions for violation of the sequestration order. Under existing Mississippi law the court has the discretion to exclude the offending witness from testifying. *See Johnson v. State*, 346 So. 2d 927 (Miss. 1977). The trial judge should not permit a witness who has violated the rule to testify unless he has first determined that the adversary would not be prejudiced by the violation of the rule. Other available remedies might be to strike the testimony of a witness who violated the rule, cite the witness for contempt, or allow a "full-bore" cross-examination. *See Douglas v. State*, 525 So. 2d 1312 (Miss. 1988).
> >
> > During the course of the trial, the witness Charles Coleman, who had apparently been subpoenaed by the State and who had been in the courtroom during the testimony of previous witnesses, was offered as a witness in the case-in-chief for the State. Gerrard objected, saying first that the witness had not been disclosed to the defense, and, second, that sequestration had been violated. The State announced that it would withdraw Coleman as a witness. Thereafter, Coleman sat in the courtroom for the remainder of the trial. After the defense had rested, the State announced that it would call Coleman as a rebuttal witness. This too brought an objection by the defense. . . . When the defense objected to

> Coleman's testimony as being in violation of the Rule, the parties went into chambers. . . . The prosecutor felt that Coleman deserved an opportunity to respond to Gerrard's statements. The defense objected, stating that the prosecutor knew Gerrard would so testify because he had said it before. The trial judge then asked defense counsel to state specifically from where these statements appeared. Defense counsel did not answer. The trial judge then stated that he would allow the prosecution to ask only two questions, the content of which was established in chambers, and further stated that the defense would have wide open cross-examination. The defense at no time proffered how asking these two questions prejudiced their case. Since the trial court followed our rule and Comments thereto, there was no abuse of discretion. The trial court allowed the prosecution to ask only two questions, of which the content was limited. The defense declined cross-examination. This matter was properly within the discretion of the trial judge, and he conducted the proceedings in accordance with the standards set forth by this Court. . . . ***Gerrard v. State*, 619 So. 2d 212, 217-18 (Miss. 1993).**

Post-Trial Proceedings

Mississippi Rule of Civil Procedure 54(e):

> **(e) Costs.** Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, and this provision is applicable in all cases in which the State of Mississippi is a party plaintiff in civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs, execution may be ordered to issue against such security. Costs may be taxed by the clerk on one day's notice. On motions served within five days of the receipt of notice of such taxation, the action of the clerk may be reviewed by the court.

Mississippi Rule of Civil Procedure 70(d):

> **(d) Contempt.** The court may also in proper cases adjudge the party in contempt.

Electronic & Photographic Coverage of Court Proceedings

In 2003, the Mississippi Supreme Court adopted the Rules for Electronic and Photographic Coverage of Judicial Proceedings. The court stated that the rules were adopted in order to "promote the fair and effective administration of justice." ***In re Mississippi Rules for Electronic and Photographic Coverage of Judicial Proceedings*, No. 89-R-99031, (Miss. 2003).**

[O]n April 17, 2003, this Court adopted the Mississippi Rules for Electronic and Photographic Coverage of Judicial Proceedings (MREPC), bringing Mississippi in accord with those states which have elected to allow coverage of court proceedings by use of still cameras, television, and other electronic technology. Prior to passage of the MREPC, cameras were generally excluded from Mississippi courtrooms under the Mississippi Code of Judicial Conduct. At present, the MREPC allow for electronic media coverage of public judicial proceedings in appellate and trial courts of record in this state subject to certain conditions. ***Stephens v. State*, 911 So. 2d 424, 431 (Miss. 2005).**

Decorum

Rule 6 for Electronic and Photographic Coverage of Judicial Proceedings:

The decorum and dignity of the court, the courtroom, and the judicial proceedings must be maintained at all times. Court customs shall be followed including appropriate attire. Movement in the courtroom during the proceedings shall be limited and may be completely prohibited except during breaks or recesses. Disruption of proceedings will not be permitted.

Notice

Rule 5 for Electronic and Photographic Coverage of Judicial Proceedings:

Media representatives who propose to engage in electronic coverage of a judicial proceeding shall notify the clerk and the court administrator of the court of such intention at least forty-eight (48) hours prior to the commencement of the proceeding. The presiding justice or judge may shorten or waive the time for advance notice.

In the hearing on media coverage, there was discussion of the difference between MREPC 5, requiring that media representatives notify the clerk and court administrator of their intention to use electronic coverage forty-eight hours prior to trial, and MREPC 7 which requires parties to file objections to such coverage up to fifteen days prior to trial. In this

discussion, there was apparent confusion as to the purpose of the two rules. . . . MREPC 5 requires notice of the media's intention to record or broadcast forty-eight hours before the proceedings begin, so that administrative coordination may be had prior to the proceedings. The "media notice" is not for leave or permission to record or broadcast because that right is presumed unless there are objections or [an] order to the contrary. ***In re WLBT, Inc.*, 905 So. 2d 1196, 1198 n.1 (Miss. 2005).**

Authority of the Trial Court

Rule 3 for Electronic and Photographic Coverage of Judicial Proceedings:

Electronic media coverage of public judicial proceedings shall be allowed in the appellate and trial courts of record in this state subject to the conditions below. The presiding justice or judge has the discretion to limit or terminate electronic coverage at any time during the proceedings if the court deems such necessary and in the interest of justice to protect the rights of the parties or witnesses, or the dignity of the court, or to assure orderly conduct of the proceedings.

(a) Authority of presiding justice or judge. All electronic coverage is subject at all time to the authority of the presiding justice or judge to

(i) control the conduct of the proceedings,
(ii) ensure decorum and prevent distraction, and
(iii) ensure fair administration of justice in the pending case.
The rights of the parties to a fair adjudication are recognized as paramount. It is the responsibility of the media to so arrange and operate equipment in order to comply with these rules.

(b) Persons other than media representatives. These rules do not allow the use of electronic devices by attorneys and persons other than media representatives except as may be allowed by the court.

(c) Coverage of certain matters prohibited. Electronic coverage of the following matters is expressly prohibited unless the presiding justice or judge shall allow the coverage by order: divorce; child custody; support; guardianship; conservatorship; commitment; waiver of parental consent to abortion; adoption; delinquency and neglect of minors; determination of paternity; termination of parental rights; domestic abuse; motions to suppress evidence; proceedings involving trade secrets; and in camera proceedings.

(d) Coverage of certain persons prohibited. Electronic coverage of the following categories of witnesses is expressly prohibited: police

informants, minors, undercover agents, relocated witnesses, victims and families of victims of sex crimes, and victims of domestic abuse.

> Also, the rules allow the presiding justice or judge with the discretion to limit or terminate electronic coverage at any time during the proceedings if the court deems such necessary and in the interest of justice to protect the rights of the parties or witnesses, or the dignity of the court, or to assure orderly conduct of the proceedings. ***Stephens v. State*, 911 So. 2d 424, 431 (Miss. 2005).**

Objections

Rule 7 for Electronic and Photographic Coverage of Judicial Proceedings:

> Any party may object to electronic coverage by written motion, which may be supported by affidavits. Such motions shall be filed no later than fifteen (15) days prior to commencement of the judicial proceedings, unless good cause exists to shorten the time for filing.
>
> > In the hearing on media coverage, there was discussion of the difference between MREPC 5, requiring that media representatives notify the clerk and court administrator of their intention to use electronic coverage forty-eight hours prior to trial, and MREPC 7 which requires parties to file objections to such coverage up to fifteen days prior to trial. In this discussion, there was apparent confusion as to the purpose of the two rules. MREPC 7 requires parties to formally object to all use of camera and television coverage. Should parties believe media coverage would be prejudicial or otherwise objectionable, their objection is to be filed sufficiently in advance of the proceedings to allow a response and hearing. . . . ***In re WLBT, Inc.*, 905 So. 2d 1196, 1198 n.1 (Miss. 2005).**
>
> > [W]here no objection is made at the trial level regarding the admission or exclusion of the media as permitted by these rules, such error, if any, is waived on appeal. ***Stephens v. State*, 911 So. 2d 424, 431-32 (Miss. 2005).**

Restrictions on Coverage

Rule 4 for Electronic and Photographic Coverage of Judicial Proceedings:

> (a) The location of equipment and personnel necessary for electronic media coverage of judicial proceedings shall be at a place either inside or outside the courtroom so as to be minimally intrusive to the proceedings. Only equipment

which does not produce distracting sound or light shall be employed to cover judicial proceedings. No flash or strobe lighting shall be used. All running wires shall be securely taped to the floor. No other artificial lighting device of any kind shall be employed in connection with electronic coverage unless otherwise authorized by the court. Matters covered by this sub-part are subject to the discretion of the presiding judge and may be relaxed so long as the coverage does not result in distraction of the proceedings.

(b) No members or potential members of the jury may be recorded or shown at any time prior to their dismissal, nor shall the jury selection process be subject to electronic coverage. The presiding judge shall inform all potential jurors at the beginning of the jury selection process of the restrictions of this particular provision.

(c) No audio recording is permitted of off-the-record conferences in the courtroom between the court and counsel, or between counsel and co-counsel, or between counsel and clients or witnesses.

(d) Judicial proceedings held in chambers and proceedings generally closed to the public shall not be subject to electronic coverage.

(e) Electronic media equipment shall not be taken into the courtroom, relocated, or removed from the designated media area except prior to convening of the judicial proceedings, during recesses, and after adjournment for the day. This prohibition shall not apply to small, handheld electronic devices.

(f) Unless otherwise allowed by the presiding judge, no more than one television camera or video recorder, one audio system for radio broadcasting, and one still photographer shall be allowed in any judicial proceeding. If pooling arrangements are employed, such data or information is to be available equally to all pool participants, and the pool representative shall charge no fees or expenses to the other pool participants. The pool representative is not to be given any economic or coverage advantage over the other pool participants. Any pooling arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding justice or judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding justice or judge shall exclude all contesting media personnel from a proceeding. . . .

> Rule 4 of the Mississippi Rules for Electronic and Photographic Coverage of Judicial Proceedings places limitations on the use of the technology to prevent disruption [and to] protect jurors. . . . It is within these limits that

the presiding judge's discretion and courtroom management must be exercised. Here, the judge stated that taking pictures of the jury was "clearly inappropriate. . . . " ***Smith v. State*, 158 So. 3d 1182, 1185 (Miss. Ct. App. 2015) (citation omitted).**

Sanctions Available

Rule 9 for Electronic and Photographic Coverage of Judicial Proceedings:

A violation of these rules may be sanctioned by measures deemed appropriate by the court.

Ways to Control the Courtroom

- court decorum
- court formality
- punctuality of the court
- the judge's personal demeanor
- the judge's tone of voice
- enforcement of the court rules
- pre-trial conferences
- inform the parties of the court's expectations
- consistency in controlling the courtroom
- take recesses to control the situations which may arise
- private conferences at the side bar or in chambers
- effective use of the bailiff
- make a record of what goes on in your court room

Court Rules & Statutes Authorizing Control Over Court Proceedings			
Court Rule or Statute	**Rule Number**	**Title**	**Particular Provision**
Mississippi Rule of Civil Procedure	1	Scope of Rules	Rules apply to all civil proceedings
	4(c)(3)(C)	Summons	Payment of costs for personal service
	4(h)	Summons	Time limit for service
	6(b)	Time	Court can grant extension of time
	11	Signing of Pleadings & Motions	Sanctions available for violations of the rule
	12(f)	Defenses & Objections	Motion to strike
	15(a)	Amended & Supplemental Pleadings	Leave of court may be required
	16	Pre-Trial Procedure	Pre-trial conference conducted by the court
	26	General Provision Governing Discovery	Sanctions available for violations of the rule
	37	Failure to Make or Cooperate in Discovery	Sanctions available for violations of the rule
	41(b)	Dismissal of Actions	Involuntary dismissal by the court
	45(g)	Subpoena	Failure to obey subpoena can result in contempt of court
	47(a)	Jurors	Court may conduct voir dire

Court Rules & Statutes Authorizing Control Over Court Proceedings			
	50	Motions for a Directed Verdict & for Judgment Notwithstanding the Verdict	Court's discretion to grant
	51(a)	Instructions to Jury	Procedural instructions from the court
	54	Judgment; Costs	Court may award costs
	56(g)	Summary Judgment	Sanctions for motions made in bad faith
	59(d)	New Trials; Amendments of Judgments	Court may *sua sponte* grant a new trial
	60	Relief from Judgment or Order	
	70(d)	Judgment for Specific Acts; Vesting Title	Contempt for failure to obey
	77(b)	Courts & Clerks	Court business is conducted in open court
	78	Motion Practice	Court establishes its own procedures for conducting court business
	81	Applicability of Rules	Special provisions for contempt
	83	Local Court Rules	
Mississippi Rule of Evidence	101	Scope	Apply in circuit court proceedings
	104(a)	Preliminary Questions	Court determines preliminary questions concerning admissibility, etc.
	105	Limited Admissibility	Court instructs the jury on limited admissibility of evidence
	403	Exclusion of Relevant Evidence	Court's discretion to exclude

Court Rules & Statutes Authorizing Control Over Court Proceedings			
	611	Mode & Order of Interrogation & Presentation	Court maintains control of interrogation
	615	Exclusion of Witnesses	Court's discretion for sanctions for failure to comply
	706	Court Appointed Experts	Court's discretion to appoint
	1008	Functions of Court & Jury	Court determines whether a condition for admissibility has been met
	1101	Applicability of Rules	
Uniform Chancery Court Rule	1.01	Proceedings must Be Orderly and Dignified	Court decorum
	1.02	Officers must Be Present in Court	Clerk and sheriff present for court
	1.03	Sheriff Must Keep Courtroom Clean & Comfortable	Sheriff's duties
	1.04	Clerk Must Have Papers & Dockets in Courtroom	
	1.05	Officers, Witnesses & Solicitors Must be Prompt	Contempt of court for failure to abide by rule
	1.06	Assignment of Cases	Sanctions imposed if rule is violated
	1.10	Discovery Deadlines & Practice	
	1.11	Motion for Recusal of Judges	
	1.12	Electronic Media Coverage	
	2.08	Delay in Answering	Party may be taxed for delay costs

Court Rules & Statutes Authorizing Control Over Court Proceedings			
	2.09	Amendments During Trial Term	Party seeking material amendment may be taxed for delay costs
	3.02	Cloud of Witness - What Done	Court may tax the costs for unnecessary witnesses
	3.10	Earwigging the Chancellor Prohibited	
	4.03	No Interruption While Rendering Opinions	
	6.01	Attorney Must Be Retained	Court may consent to removal
	6.02	Fiduciaries & Attorney Must be Diligent	Contempt for failure to abide by the rule
	6.12	Petitions for Allowance of Attorney's Fees	Fixed by the court
	6.17	Failure to File Accountings	Contempt for failure to file accountings
	8.05	Financial Statement Required	Contempt for failure to abide by the rule
Uniform Civil Rules of Circuit & County Court Practice	1.02	Court Decorum	
	1.03	Sanctions	Sanctions available for violating the court rules
	1.04	Cameras [in the court room]	Only in accord with Code of Judicial Conduct; *See MREPC*
	1.10	Earwigging Prohibited	
	2.02	Scope of Authority of Court	

Court Rules & Statutes Authorizing Control Over Court Proceedings			
	3.01	Prompt Attendance	
	3.02	Conduct of Attorneys	Court enforces the provisions of this rule
	3.04	Communication with Jury	
	3.06	Conduct of Jurors	
	3.07	Jury Instructions	Court may offer jury instructions
	3.08	Duty of Bailiff	
	3.09	Unnecessary Witnesses	Court may tax the costs for unnecessary witnesses
	3.11	Jury Recess	Court instructs jurors
	3.13	Assessment of Costs Upon Settlement of Case	Court may order costs to be paid
	5.02	Duty to Make Record	Duty to make a record of the court's proceedings
Mississippi Rules of Criminal Procedure	Appendix	Sample Charge to the Grand Jury	Court gives the charge to the grand jury
	17.4	Alibi Defense	Sanctions available for violations of the rule
	17.4	Insanity Defense	Sanctions available for violations of the rule

Court Rules & Statutes Authorizing Control Over Court Proceedings			
	17.9	Failure to Disclose; Sanctions	Court procedure to remedy non-disclosed discovery; sanctions available for violations of the rule
	18.8	Jury Sequestration	Court's discretion in certain circumstances
	32.2	Direct Contempt	Sanction for contempt
	32.5	Further Proceedings	Sanction for contempt
Mississippi Rules for Electronic and Photographic Coverage of Judicial Proceedings	3	Electronic Media Coverage Allowed	Authority of the trial court and prohibitions against coverage
	4	Restrictions	Restrictions on MREPC coverage
	6	Decorum	Courtroom decorum must be maintained
	9	Enforcement and Sanctions	Sanctions available for violations of the MREPC
Mississippi Code Annotated	§ 13-5-61	Non-disclosure of jury-room secrets	Penalty for violating is contempt
	§ 11-43-39	Subpoena of witnesses	Fines & contempt available to enforce subpoenas
	§ 11-55-5	Costs awarded for meritless action	Power to award costs as sanction

Scenarios & How to Maintain Control of the Court's Proceedings		
Description of the Facts	**Ways to Control the Situation**	**Citation**
The attorney made derogatory comments to the judge about the court proceedings.	The court found the attorney in direct criminal contempt of court. The attorney was sentenced to 5 days incarceration.	*In re Smith*, 926 So. 2d 878 (Miss. 2006).
The attorney failed to attend a court proceedings and had informed the clerk that she may or may not be in attendance, indicating that she knew she was scheduled to be in court.	The court found the attorney in direct criminal contempt of court.	*In re Hampton*, 919 So. 2d 949 (Miss. 2006).
The defendant's attorney made comments about the judge's conduct during the trial and derogatory comments about the judge.	The court found the attorney in criminal contempt and fined him $100.00.	*Lumumba v. State*, 868 So. 2d 1018 (Miss. Ct. App. 2003).
The plaintiff's attorney makes numerous derogatory remarks on the record about the judge, albeit not in the presence of the jury.	The court can declare a mistrial & the judge possibly should recuse himself from further proceedings. The attorney could also be sanctioned for his remarks. However, dismissal should not be ordered because the party is not at fault for her attorney's actions.	*Glover v. Jackson State Univ.*, 755 So. 2d 395 (Miss. 2000).

The attorney for a civil defendant makes an improper remark during cross-examination of a witness, which the court determines justifies a mistrial.	If the court finds that the attorney's remark is not contemptuous or intentional, the court should not award litigation expenses to the opposing party. If the court finds that the attorney's remark is contemptuous or intentional, the court may be able to award litigation expenses to the opposing party.	*Aeroglide Corp. v. Whitehead*, 433 So. 2d 952 (Miss. 1983).
Defense counsel for a criminal defendant repeatedly fails to follow proper court procedures & provides ineffective assistance to his client.	The court should not make remarks about the attorney's conduct or suggest that the attorney will be jailed for his actions in front of the jury. The court may want to appoint different counsel for the defendant.	*Waldrop v. State*, 506 So. 2d 273 (Miss. 1987).
An attorney does not attend court at the scheduled time & the court waits for his arrival & then dismisses the jurors.	The court could find the attorney in contempt of court. Also sanctions are available for violating a court rule.	*Alviers v. City of Bay St. Louis*, 576 So. 2d 1256 (Miss. 1991).
An attorney schedules a hearing on a motion but fails to check with the court to determine if the judge was available for the hearing; the parties appear but the judge is not available.	The court can order sanctions against the party for the expenses incurred by the opposing counsel in attending the hearing.	*Vicksburg Refining v. Energy Resources*, 512 So. 2d 901 (Miss. 1991).
An attorney, who is not appearing before the court in a specific proceeding, does legal work for a criminal defendant who has been declared a pauper.	The court does not have jurisdiction over the attorney and can not sanction him for his conduct.	*Knott v. State*, 731 So. 2d 573 (Miss. 1999).

The State fails to disclose discovery which has been properly asked for by the defense; in addition the state crime lab misrepresented its findings & procedures.	The court may order a mistrial & order sanctions against the State for the defense's reasonable expenses.	*State v. Blenden*, 748 So. 2d 77 (Miss. 1999).
A criminal defendant begins to insult the judge repeatedly in open court.	The court could find the defendant in direct criminal contempt of court. The court should not physically or verbally assault the defendant.	*MCJP v. Guest*, 717 So. 2d 325 (Miss. 1998).
A criminal defendant takes the stand & begins to make various remarks which are inappropriate in front of the jury & begins to behave in a very disruptive manner.	After informing the defendant that if he does not act properly he will be removed from the court room until he can behave, the defendant can be removed from the court & the proceedings continue in his absence.	*Bostic v. State*, 531 So. 2d 1210 (Miss. 1988).
A criminal defendant will not be quiet during voir dire and at one point starts walking towards the door.	After informing the defendant that if he does not act properly he will be removed from the court room until he can behave, the defendant can be removed from the court & the proceedings continue in his absence. Binding & gagging may also be used.	*Walters v. State*, 391 So. 2d 645 (Miss. 1980).
An out-of-state plaintiff in a suit to establish "heirship" is not diligent in prosecuting his case & also fails to comply with some of the court's orders.	The court should not dismiss the plaintiff's cause of action since lesser sanctions are available.	*Estate of Hunter v. Hunter*, 736 So. 2d 440 (Miss. 1999).

The plaintiff in a negligence action answers an interrogatory in a manner which may be untruthful.	If the answer is subject to more than one interpretation & is not obviously untruthful, the court should not dismiss the cause of action.	*Wood v. Biloxi Pub. Sch. Dist.*, 757 So. 2d 190 (Miss. 2000).
The plaintiff in a negligence action fails to answer fully and truthfully questions during discovery & offers no credible reason for failing to do so.	If the plaintiff wilfully gives false answers and knowingly does not answer discovery questions truthfully, then dismissal with prejudice is warranted. Costs and reasonable attorney's fees could also be ordered.	*Scoggins v. Ellzey Beverages, Inc.*, 743 So. 2d 990 (Miss. 1999).
The plaintiff in a civil action testified falsely under oath and in discovery that no one else was with her at the time of the accident.	Because the plaintiff wilfully gave false testimony and knowingly withheld information, dismissal with prejudice is warranted. Costs and reasonable attorney's fees could also be ordered.	*Pierce v. Heritage Prop., Inc.*, 688 So. 2d 1385 (Miss. 1997).
The defendant in a civil proceeding goes into the jury room and speaks with the jurors and even offers one juror a job.	The court should declare a mistrial & award the other party attorney's fees and expenses. The court could also find the defendant in criminal contempt of court.	*Selleck v. S.F. Cockrell Trucking, Inc.*, 517 So. 2d 558 (Miss. 1987).

The defendant in a civil action refuses to answer questions asked at his deposition by the plaintiff and invokes his 5th Amendment privilege against self-incrimination.	The court must proceed on a question by question basis to determine if the answer to the question might reveal criminal activity for which the defendant could lawfully be prosecuted. If so, the defendant can lawfully refuse to answer. If not, the defendant can be subject to contempt for failure to answer.	*In re Knapp*, 536 So. 2d 1330 (Miss. 1988).
A witness in a criminal proceeding invokes his 5th Amendment privilege against self-incrimination while on the witness stand.	If he is subject to criminal prosecution, he has a right to refuse to answer any question which might indicate criminal activity.	*Butler v. State*, 702 So. 2d 125 (Miss. 1997).
In a divorce proceeding, the alleged girlfriend of the husband invokes her 5th Amendment privilege against self-incrimination & refuses to answer questions under oath.	If she is subject to criminal prosecution, such as for adultery, she has a right to refuse to answer any question which might indicate criminal activity.	*See In re Knapp*, 536 So. 2d 1330 (Miss. 1988).
After the sequestration rule has been invoked by either party, a witness remains in the court room during the trial.	The court can refuse to let the witness testify, limit his testimony, find the witness in contempt of court, or allow a "full-bore" cross-examination.	*Gerrard v. State*, 619 So. 2d 212 (Miss. 1993).
A reporter is in the court room during a court proceeding & the court orders the reporter not to publish the information which has been discussed in open court.	This would be a prior restraint & presumptively invalid.	*Jeffries v. State*, 724 So. 2d 897 (Miss. 1998).

A friend of a civil litigant or a criminal defendant places an ad in a newspaper giving her knowledge of the case, including information about polygraph examinations, & her opinion of the case.	The court does not have jurisdiction over a member of the public who is not appearing before the court. URCCC 9.01 does not apply to people who are not appearing in court proceedings before the court.	*See Terry v. State*, 718 So. 2d 1097 (Miss. 1998).

CHAPTER 5

CONTEMPT OF COURT

CHARTS

CHAPTER 5

CONTEMPT OF COURT

Contempt Power

Statutory Authority

§ 9-1-17 Punishment of contempt:

The Supreme, circuit, chancery and county courts and the Court of Appeals shall have power to fine and imprison any person guilty of contempt of the court while sitting, but the fine shall not exceed One Hundred Dollars ($100.00) for each offense, nor shall the imprisonment continue longer than thirty (30) days. If any witness refuse to be sworn or to give evidence, or if any officer or person refuse to obey or perform any rules, order, or judgment of the court, such court shall have power to fine and imprison such officer or person until he shall give evidence, or until the rule, order, or judgment shall be complied with.

At the discretion of the court, any person found in contempt for failure to pay child support and imprisoned therefor may be referred for placement in a state, county or municipal restitution, house arrest or restorative justice center or program, provided such person meets the qualifications prescribed in Section 99-37-19.

Section 1656, Mississippi Code 1942 Annotated (1956), limits the punishment that may be imposed for direct contempt of court to a fine of $100 and imprisonment to thirty days. This section does not apply to constructive contempt. ***Wood v. State*, 227 So. 2d 288, 290 (Miss. 1969) (citation omitted).**

Civil Court Rules

Mississippi Rule of Civil Procedure 70(d) Judgment for Specific Acts; Vesting Title:

(d) Contempt. The court may also in proper cases adjudge the party in contempt.

Rule 70 applies only after judgment is entered. **Miss. R. Civ. P. 70 Cmt.**

Uniform Chancery Court Rule 1.05:

When any civil action has been set for, or adjourned to, a particular day or hour, all officers, parties, witnesses and solicitors whose presence is necessary for the

trial shall be present promptly at the time set. Any negligent or willful failure to obey this rule shall be punished by contempt.

Uniform Civil Rule of Circuit and County Court 1.03:

Any person embraced within these rules who violates the provisions hereof may be subjected to sanctions, contempt proceedings or other disciplinary actions imposed or initiated by the court.

Criminal Court Rules

Mississippi Rule of Criminal Procedure 32.1 Applicability; Indirect and Direct Contempt Defined; Criminal and Civil Contempt Defined:

(a) Applicability. Rule 32 applies to both civil and criminal contempt arising in a criminal action.

(b) Indirect Contempt. "Indirect contempt," also known as "constructive contempt," means any contempt other than a direct contempt.

(c) Direct Contempt. "Direct contempt" means contempt committed:

(1) in the presence of the judge presiding in court; or
(2) so near to the judge as to interrupt the court's proceedings.

(d) Criminal Contempt. "Criminal contempt" means either:

(1) misconduct of a person that obstructs the administration of justice and that is committed either in the presence of the judge presiding in court or so near thereto as to interrupt its proceedings;
(2) willful disobedience or resistance of any person to a court's lawful writ, subpoena, process, order, rule, or command, where the primary purpose of the finding of contempt is to punish the contemnor; or
(3) any other willfully contumacious conduct which obstructs the administration of justice, or which lessens the dignity and authority of the court.

(e) Civil Contempt. "Civil contempt" means willful, continuing failure or refusal of any person to comply with a court's lawful writ, subpoena, process, order, rule or command that by its nature is still capable of being complied therewith.

Mississippi Rule of Criminal Procedure 32.2 Direct Contempt:

(a) Summary Imposition of Sanctions. The court against which a direct civil or criminal contempt has been committed may summarily impose sanctions on the person who committed it if:

(1) the presiding judge has personally perceived the conduct constituting the contempt and has personal knowledge of the identity of the person committing it;
(2) the contempt has interrupted the order of the court or interfered with the dignified conduct of the court's business; and
(3) the punishment imposed does not exceed thirty (30) days incarceration or a fine of One-Hundred Dollars ($100.00).

The court shall afford the alleged contemnor an opportunity, consistent with the circumstances then existing, to present exculpatory or mitigating evidence. If the court summarily finds and announces on the record that direct contempt has been committed, the court may defer imposition or execution of sanctions until the conclusion of the proceeding during which the contempt was committed.

(b) Order of Contempt. Either before sanctions are imposed, or promptly thereafter, the court shall issue a written order stating, or shall state on the record, that a direct contempt has been committed and specifying:

(1) whether the contempt is civil or criminal;
(2) the evidentiary facts known to the court from the judge's own personal knowledge concerning the conduct constituting the contempt and, regarding any relevant evidentiary facts not so known, the basis of the court's findings;
(3) the sanction imposed for the contempt;
(4) in the case of civil contempt, how the contempt may be purged; and
(5) in the case of criminal contempt, if the sanction is incarceration, a determinate term.

(c) Review and Record.

(1) Review. The contemnor may seek review by appeal or by writ of habeas corpus, if appropriate.
(2) Record. The appellate record in cases of direct contempt in which sanctions have been summarily imposed shall consist of:

(1) the order of contempt; and, if the proceeding during which the contempt occurred was recorded, a transcript of that part of the proceeding; and
(2) any evidence admitted in the proceeding.

(d) No Summary Imposition of Sanctions. In any proceeding involving a direct contempt for which the court determines not to impose sanctions summarily, the judge shall issue a written order specifying the evidentiary facts within the personal knowledge of the judge respecting the conduct constituting the contempt and the identity of the contemnor. Thereafter, the proceeding shall be conducted pursuant to Rule 32.3 or Rule 32.4, whichever is applicable, and Rule 32.5 in the same manner as an indirect contempt.

Mississippi Rule of Criminal Procedure 32.3. Indirect Criminal Contempt; Commencement; Prosecution:

(a) Nature of the Proceedings. All criminal contempts not adjudicated pursuant to Rule 32.2 shall be prosecuted by means of a written motion or on the court's own initiative.

(b) Disqualification of the Judge. Indirect criminal contempt charges shall be heard by a judge other than the trial judge.

Mississippi Rule of Criminal Procedure 32.4. Indirect Civil Contempt:

(a) Commencement. A civil contempt proceeding may be commenced by the filing of a motion for contempt with the clerk of the court whose order or judgment is claimed to have been violated. No filing fee shall be required in connection with the filing of the motion for civil contempt. The proceeding shall be considered part of the action out of which the contempt arose.

(b) Contents of the Motion. The motion for civil contempt shall contain:

(1) a statement of the order or judgment involved, or a copy thereof, if available, and the name of the issuing judge where appropriate;
(2) the case caption and the docket number of the case;
(3) a short, concise statement of the facts on which the asserted contempt is based; and
(4) a request for the issuance of a summons as specified below.

The motion for civil contempt shall be verified or supported by affidavits.

(c) Summons. The summons shall issue only on a judge's order and shall direct the parties to appear before the court at a date and time certain for the purpose(s) specifically stated therein of:

(1) scheduling a trial;
(2) considering whether and when the filing of an answer is necessary;

(3) considering whether discovery is necessary;
(4) holding a hearing on the merits of the motion; or
(5) considering such other matters or performing such other acts as the court may deem appropriate.

A hearing on the merits of the motion shall be held not less than seven (7) days after service of the summons.

(d) Service of the Summons and Motion. The following shall be served upon the alleged contemnor:

(1) a copy of the summons;
(2) a copy of the motion for civil contempt;
(3) a copy of the accompanying affidavits; and
(4) if incarceration to compel compliance is sought, notice to the alleged contemnor in the following form:

TO THE PERSON ALLEGED TO BE IN CONTEMPT OF COURT:

1. It is alleged that you have disobeyed a court order, are in contempt of court, and should go to jail until you obey the court's order.

2. You have the right to have a lawyer. If you already have a lawyer, you should consult the lawyer at once. If you do not now have a lawyer, please note:

(a) A lawyer can be helpful to you by:
(1) explaining the allegations against you;
(2) helping you determine and present any defense to those allegations;
(3) explaining to you the possible outcomes; and
(4) helping you at the hearing.
(b) Even if you do not plan to contest that you are in contempt of court, a lawyer can be helpful.
(c) If you want a lawyer but do not have the money to hire one, you may ask the court to appoint one for you.

3. IF YOU DO NOT APPEAR FOR A SCHEDULED COURT HEARING BEFORE THE JUDGE, YOU WILL BE SUBJECT TO ARREST.

Mississippi Rule of Criminal Procedure 32.5. Further Proceedings:

(a) Consolidation of Criminal and Civil Contempts. If a person has been charged with more than one (1) contempt pursuant to Rule 32.3, Rule 32.4, or both, the court may consolidate the proceedings for hearing and disposition.

(b) When Judge Disqualified. A judge who enters an order pursuant to Rule 32.2(d), institutes an indirect contempt proceeding on the court's own initiative pursuant to Rule 32.3 or Rule 32.4, or reasonably expects to be called as a witness at any hearing on the matter, is disqualified from sitting at the hearing.

(c) Failure to Appear at Hearing.

(1) Generally. If, after proper notice, the alleged contemnor fails to appear personally at the time and place set by the court, the court may enter an order directing the alleged contemnor be taken into custody and brought before the court or judge designated in the order.

(2) Civil Contempt. If, after proper notice, the alleged contemnor in a civil contempt proceeding fails to appear in person or by counsel at the time and place set by the court, the court may proceed in the alleged contemnor's absence.

(d) Disposition. When a court makes a finding of contempt, the court shall issue a written order that specifies the sanction imposed for the contempt. In the case of a civil contempt, the order shall specify how the contempt may be purged. In the case of a criminal contempt, if the sanction is incarceration, the order shall specify a determinate term.

Mississippi Rule of Criminal Procedure 32.6. Bail:

A contemnor incarcerated for contempt is entitled to the same consideration with respect to bail pending appeal as a defendant convicted in a criminal proceeding, as provided by law.

Case Law

[T]his Court has determined that this statute is not applicable since the ability to punish for criminal contempt is derived from the inherent powers of the court. ***Purvis v. Purvis*, 657 So. 2d 794, 798 (Miss. 1995).**

Types of Contempt of Court - Civil & Criminal

Contempts are neither wholly civil nor altogether criminal. And it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both. It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. Imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order. On the other hand, if the defendant does that which has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience. ***Hinds County Bd. of Supervisors v. Common Cause*, 551 So. 2d 107, 120-21 (Miss. 1989).**

However, [the appellant] confuses "civil" and "criminal" contempt. The terms "criminal contempt" and "civil contempt" refer to the nature of the proceedings and the nature of the sentence meted out. A case tried under all the rules for criminal proceedings, in which the defendant is given all of the criminal due process, and sentenced to a certain term in jail, is clearly a criminal contempt case, even though the act of contempt is the violation of an injunction in a civil case. [I]f the case is tried under ordinary civil procedure, and the court orders the defendant to jail until he complies with the decree, the contempt proceeding is a civil one. ***Pierpont v. Bond*, 744 So. 2d 843, 845 (Miss. Ct. App. 1999).**

A determining factor in classifying a contempt action as civil or criminal is the purpose for which the power is exercised. Stated differently, what is the primary purpose of the suit? ***Common Cause v. Smith*, 548 So. 2d 412, 415 (Miss. 1989).**

The critical feature that determines whether the remedy is civil or criminal in nature is not when or whether the contemnor is physically required to set foot in jail but whether the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order. ***Common Cause v. Smith*, 548 So. 2d 412, 417 (Miss. 1989) (citation omitted).**

A COMPARISON & CONTRAST OF CIVIL & CRIMINAL CONTEMPT								
Type of Contempt	**Primary Purpose**	**Purpose of Penalty**	**Penalties**	**Length of Incarceration**	**Burden of Proof**	**Burden of Persuasion**	**Right to Appeal**	**Standard of Review**
Civil	If the primary purpose of the contempt proceeding is to enforce the rights of private litigants, or if the penalty is to enforce compliance with a court order, then the contempt is civil	Coercive Contemnor holds the keys to his own cell Compliance cures contempt	Fine (paid to the moving party) Incarceration Payment of past due amounts Compliance with court order Attorney fees	Indefinite length of time Incarceration terminates when the contemnor purges himself of the contempt &/or complies with the court order	Preponderance of the evidence	The moving party must prove that the contemnor has violated a valid court order Contemnor can avoid incarceration by proving inability to pay or comply with the court order; show non-willful behavior	§ 11-51-12	Factual findings are subject to manifest error review
Criminal	A criminal contempt proceeding is maintained to vindicate the authority of the court or to punish for offensive conduct 2 types of criminal contempt: *Direct* *Constructive*	Punishment Contemnor cannot relieve himself of the contempt by agreeing to comply with a court order Compliance does not cure contempt	Fine (paid to the court) Incarceration	Fixed term; definite amount of time Contemnor cannot shorten his sentence by promising not to repeat the offensive conduct *Direct* - Not longer than 30 days in jail; No right to jury trial *Constructive* - No maximum sentence; Right to jury trial may attach	Beyond a reasonable doubt	*Direct* - Occurs in the presence of the court & may be dealt with immediately; court's own knowledge *Constructive* - Occurs outside the presence of the court & requires due process, i.e., specific charges, notice & a hearing; State must prove that the contemnor acted in such a manner that was calculated to impede, embarrass, obstruct, defeat or corrupt the administration of justice	§ 11-51-11	*Ab initio* review of the record

CIVIL CONTEMPT

Characteristics of Civil Contempt

Purpose of Civil Contempt

Civil contempt is coercive in nature. ***Banks v. Banks*, 648 So. 2d 1116, 1123 (Miss. 1995).**

If the purpose of the proceedings is to coerce action or non-action by a party, the order of contempt is characterized as civil. ***Newell v. Hinton*, 556 So. 2d 1037, 1044 (Miss. 1990) (citations omitted).**

If the primary purpose of [the contempt proceeding] is to enforce the rights of private litigants . . . then the contempt is civil. ***Common Cause v. Smith*, 548 So. 2d 412, 415 (Miss. 1989).**

[I]f the case is tried under ordinary civil procedure, and the court orders the defendant to jail until he complies with the decree, the contempt proceeding is clearly a civil one. ***Pierpont v. Bond*, 744 So. 2d 843, 845 (Miss. Ct. App. 1999) (citations omitted).**

Purpose of Penalty

A decree finding a person in civil contempt resembles an injunction and seeks to force a party to act or cease to act in a particular manner. ***Lahmann v. Hallmon*, 722 So. 2d 614, 620 (Miss. 1998) (citation omitted).**

Such orders [for civil contempt], although imposing a jail sentence, classically provide for termination of the contemnor's sentence upon purging himself of the contempt. The sentence is usually indefinite and not for a fixed term. Consequently, it is said that the contemnor "carries the key to his cell in his own pocket." ***Newell v. Hinton*, 556 So. 2d 1037, 1044 (Miss. 1990) (citations omitted).**

A civil contempt penalty is coercive. . . . ***Hinds County Bd. of Supervisors v. Common Cause*, 551 So. 2d 107, 120 (Miss. 1989).**

[I]f the penalty is to enforce compliance with a court order, then the contempt is civil. ***Common Cause v. Smith*, 548 So. 2d 412, 415 (Miss. 1989).**

In civil contempt cases, the contemnor can discharge the contempt by paying the costs and expenses and doing what he had previously refused to do. In other

words, he carries the keys of his prison in his own pocket. ***Common Cause v. Smith*, 548 So. 2d 412, 415 (Miss. 1989).**

In civil contempt cases, the punishment is conditional in nature because the defendant can end the sentence and discharge himself at any moment by doing what he has previously refused to do. ***Common Cause v. Smith*, 548 So. 2d 412, 415 (Miss. 1989).**

Civil Contempt Proceedings

Burden of Proof

§ 11-51-12(4) Appeal from judgment of civil contempt:

(4) The burden of proof in civil contempt shall be proof by a preponderance of the evidence.

The burden of proof in a case of civil contempt is by a preponderance of the evidence. ***Goodson v. Goodson*, 816 So. 2d 420, 423 (Miss. Ct. App. 2002).**

Burden of Persuasion

Civil contempt is commenced by private parties but the State also can be a plaintiff in a civil contempt action to vindicate a civil right as opposed to enforcing a criminal law. ***Knowles v. State*, 708 So. 2d 549, 557-58 (Miss. 1998 (citation omitted).**

This type contempt proceeding is ordinarily instituted by one of the parties to the litigation who seeks to coerce another party to perform or cease performing an act. The order of contempt is entered by the court for the private benefit of the offended party. ***Newell v. Hinton*, 556 So. 2d 1037, 1044 (Miss. 1990) (citations omitted).**

[W]e would [also] reverse the contempt findings of the trial court based upon its lack of jurisdiction over various named defendants, for failure to properly issue service of process. . . . Service of process is required before a named person becomes a party to a motion [for contempt]. . . . ***Mississippi Ass'n of Educ. v. Trustees of Jackson Mun. Separate Sch. Dist.*, 510 So. 2d 123, 127 (Miss. 1987).**

Prima Facie Case

The movant's showing on the contempt feature of the proceedings below consisted of the following:

> (a) Establishment that there was outstanding the decree imposing upon [the contemnor] the obligation to pay all reasonable and necessary medical and dental expenses;
> (b) Exhibits tendered and admitted into evidence showing medical, dental and drug expenses incurred and/or paid; and
> (c) Evidence to the effect that [the contemnor] had not paid the above sum. Our law is settled that such a showing makes out a prima facie case of contempt.

***Clements v. Young*, 481 So. 2d 263, 270 (Miss. 1985) (citations omitted).**

A citation for civil contempt is proper when the contemnor has willfully and deliberately ignored the order or the court. ***Jones v. Lee*, 754 So. 2d 564, 568 (Miss. Ct. App. 2000).**

A citation for contempt is determined upon the facts of each case and is a matter for the trier of fact. ***Ewing v. Ewing*, 749 So. 2d 223, 226 (Miss. Ct. App. 1999).**

Affirmative Defenses

Conduct Was Not Willful

The chancellor ruled that Doyle was in contempt, but found that the contempt was not wilful because he acted on advice of his attorney. ***Gray v. Pearson*, 797 So. 2d 387, 395 (Miss. Ct. App. 2001).**

There are several available defenses to a civil contempt charge. One is that the violation was not willful or deliberate such that the behavior in question may not be labeled as contumacious. Included in this defense may be an honest inability to perform according to the dictates of the order or decree. ***Ewing v. Ewing*, 749 So. 2d 223, 226 (Miss. Ct. App. 1999) (citations omitted).**

Impossibility of performance of a court directive due to circumstances beyond the control of the alleged contemnor is a perfect defense to a contempt citation. ***Ewing v. Ewing*, 749 So. 2d 223, 225 (Miss. Ct. App. 1999).**

Inability to Pay

Once a prima facie case for civil contempt is established, the contemnor may avoid being incarcerated by proving the affirmative defense of inability to pay. ***Knowles v. State*, 708 So. 2d 549, 558 (Miss. 1998) (citation omitted).**

This Court has many times stated that even where there has been established a prima facie case of contempt, the defendant may avoid judgment of contempt [incarceration] by establishing that he is without present ability to discharge his obligation. If the contemnor raises this as a defense, he has the burden of proving his inability to pay, and such showing must be with particularity and not in general terms. ***Gebetsberger v. East*, 627 So. 2d 823, 826 (Miss. 1993) (citations omitted).**

Vague or Non-specific Order

Another available defense is an inability to obey an order which is vague or not sufficiently specific. ***Humphrey v. Martin*, 755 So. 2d 551, 554 (Miss. Ct. App. 2000) (citations omitted).**

Clean Hands Doctrine

Another available defense is the traditional notion of "clean hands." ***Banks v. Banks*, 648 So. 2d 1116, 1123 (Miss. 1994) (citation omitted).**

Penalties Available for Civil Contempt

[D]etermination of punishment for contempt falls within the discretion of the [trial judge], and this Court will not reverse absent manifest error or application of an erroneous legal standard. ***Varner v. Varner*, 666 So. 2d 493, 495 (Miss. 1995).**

The imposition of punishment for contempt of the court is within the discretion of the [trial judge]. ***Gebetsberger v. East*, 627 So. 2d 823, 826 (Miss. 1993).**

Fine

One may be fined for civil contempt. . . . ***Purvis v. Purvis*, 657 So. 2d 794, 796-97 (Miss. 1995).**

Incarceration

One may be jailed for civil contempt; however, the contemnor must be relieved of the penalty when he performs the required act. ***Purvis v. Purvis*, 657 So. 2d 794, 796-97 (Miss. 1995).**

Length of Incarceration

The sentence is usually indefinite and not for a fixed term. ***Newell v. Hinton*, 556 So. 2d 1037, 1044 (Miss. 1990) (citations omitted).**

Attorney's Fees

It is a civil contempt action. Courts do have the authority to award reasonable attorney fees in these actions. ***Rogers v. Rogers*, 662 So. 2d 1111, 1116 (Miss. 1995) (citation omitted).**

Appeal of Civil Contempt

§ 11-51-12 Appeal from judgment of civil contempt:

(1) A person ordered by any tribunal, except the Supreme Court, to be punished for a civil contempt, may appeal to the court to which other cases are appealable from said tribunal. If jail confinement is ordered to compel the payment of any monetary sum, the contemnor shall be allowed to appeal upon the execution of an appearance bond, payable to the appellee, with sufficient sureties, in the penalty of one hundred twenty-five percent (125%) of such sum as he has been adjudicated in contempt for failure to pay, unless the court shall determine that a lesser bond should be required. The bond shall be conditioned to abide the results of the appeal.
(2) Where the punishment for civil contempt is other than jail confinement, the contemnor shall be allowed to appeal upon the posting of a bond, payable to the appellee, with sufficient sureties, to be approved by the tribunal appealed from, in an amount to be fixed by such tribunal, conditioned to abide the results of the appeal.
(3) All appeals allowed in accordance with the provisions of this section shall operate as a supersedeas. . . .

§ 11-51-3 Appeals to Supreme Court:

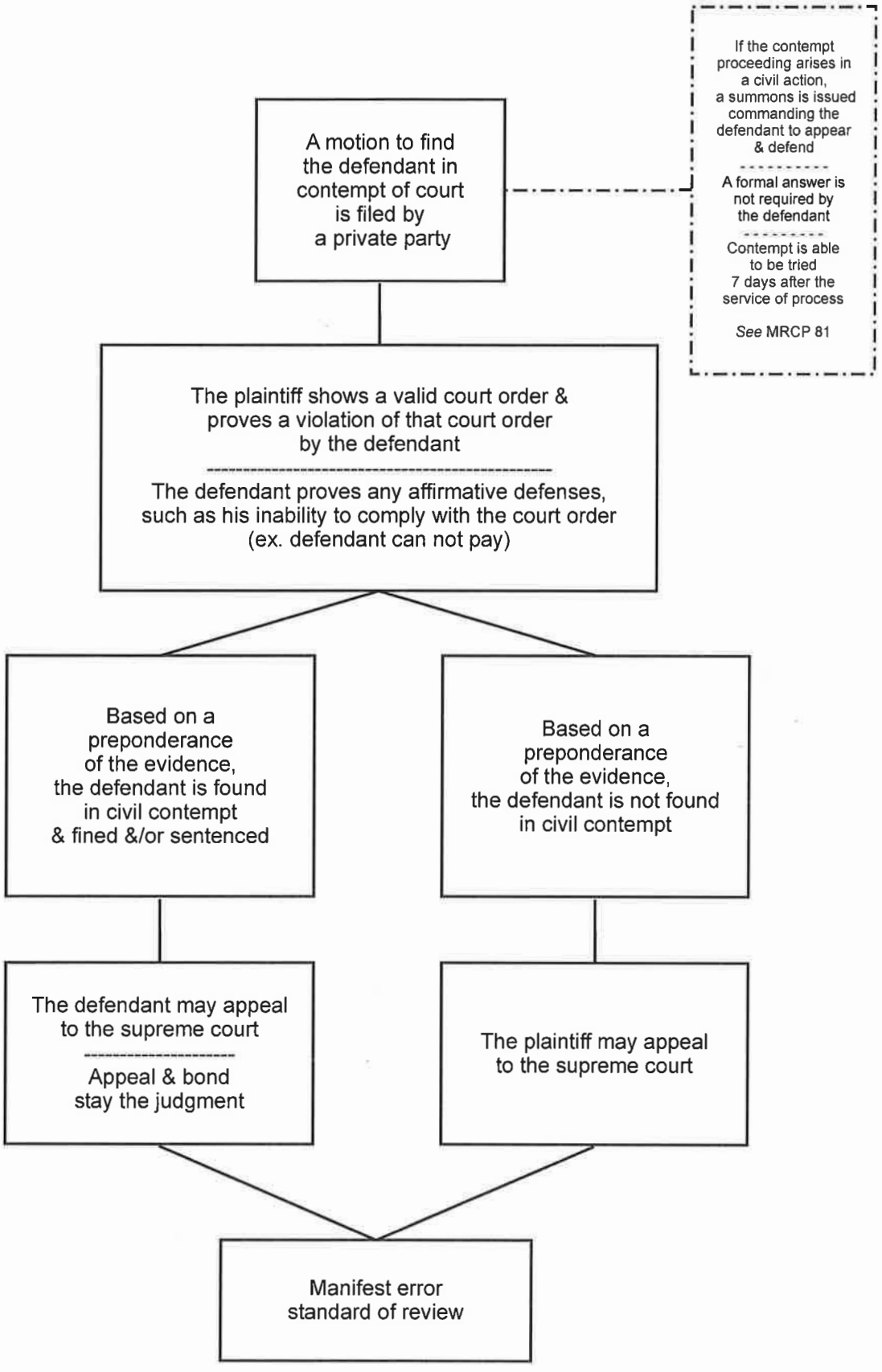
An appeal may be taken to the Supreme Court from any final judgment of a circuit or chancery court in a civil case, not being a judgment by default, by any of the parties or legal representatives of such parties; and in no case shall such appeal be held to vacate the judgment or decree.

> A plaintiff in a civil contempt case may appeal by [the] authority of § 11-51-3, which authorizes appeals from final judgments. ***Common Cause v. Smith*, 548 So. 2d 412, 414-15 (Miss. 1989).**

Standard of Review

> [D]etermination of punishment for contempt falls within the discretion of the chancellor, and this Court will not reverse on appeal absent manifest error or application of an erroneous legal standard. ***Varner v. Varner*, 666 So. 2d 493, 495 (Miss. 1995).**

CIVIL CONTEMPT OF COURT



CRIMINAL CONTEMPT

Characteristics of Criminal Contempt

Purpose of Criminal Contempt

Conduct directed against the court's dignity and authority is criminal contempt. It involves an act which tends to bring the court into disrepute or disrespect. Conduct amounting to criminal contempt must be directed against the court or against a judge acting judicially rather than individually. ***Purvis v. Purvis*, 657 So. 2d 794, 797 (Miss. 1995).**

Criminal contempt actions are prosecuted to vindicate the authority of the court. ***Common Cause v. Smith*, 548 So. 2d 412, 415-16 (Miss. 1989).**

A case tried under all the rules for criminal proceedings, in which the defendant is given all of the criminal due process, and sentenced to a certain term in jail, is clearly a criminal contempt case, even though the act of contempt is the violation of an injunction in a civil case. ***Pierpont v. Bond*, 744 So. 2d 843, 845 (Miss. Ct. App. 1999) (citations omitted).**

Purpose of Penalty

[A] criminal contempt penalty is punishment. ***Hinds County Bd. of Supervisors v. Common Cause*, 551 So. 2d 107, 120 (Miss. 1989).**

The penalty [in criminal contempt actions] is designed to punish the defendant for disobedience to the court's order; the punishment is for past offenses and does not terminate upon compliance with a court order. ***Common Cause v. Smith*, 548 So. 2d 412, 415-16 (Miss. 1989).**

In criminal contempt cases, the nature of the punishment is unconditional because the relief cannot undo or remedy what has been done or afford any compensation and the defendant cannot shorten the term by promising not to repeat the offense. ***Common Cause v. Smith*, 548 So. 2d 412, 415-16 (Miss. 1989).**

Because [the movant] sought, in this case, to sanction [the contemnor] for her past wilful disobedience of the [judge's] order rather than to coerce her future obedience, we conclude that this was a proceeding in the nature of criminal contempt. ***Allred v. Allred*, 735 So. 2d 1064, 1067 (Miss. Ct. App. 1999).**

Types of Criminal Contempt - Direct & Indirect/Constructive

Mississippi Rule of Criminal Procedure 32.1 Applicability; Indirect and Direct Contempt Defined; Criminal and Civil Contempt Defined:

> **(b) Indirect Contempt.** "Indirect contempt," also known as "constructive contempt," means any contempt other than a direct contempt.
>
> **(c) Direct Contempt.** "Direct contempt" means contempt committed:
>
> > (1) in the presence of the judge presiding in court; or
> > (2) so near to the judge as to interrupt the court's proceedings.
>
> **(d) Criminal Contempt.** "Criminal contempt" means either:
>
> > (1) misconduct of a person that obstructs the administration of justice and that is committed either in the presence of the judge presiding in court or so near thereto as to interrupt its proceedings;
> > (2) willful disobedience or resistance of any person to a court's lawful writ, subpoena, process, order, rule, or command, where the primary purpose of the finding of contempt is to punish the contemnor; or
> > (3) any other willfully contumacious conduct which obstructs the administration of justice, or which lessens the dignity and authority of the court. . . .

Direct Criminal Contempt

> Where the act which constitutes the contempt is committed in the immediate presence of the court, this contempt is defined as direct. A direct contempt consists of words spoken or acts done in the presence of the courts which tend to embarrass or prevent [the] orderly administration of justice. ***Varvaris v. State*, 512 So. 2d 886, 887-88 (Miss. 1987) (citation omitted).**
>
> In defining what is meant by "the presence of the court," as that term is used with reference to contempts, it is said that "the court" consists not of the judge, the courtroom, the jury, or the jury room individually, but of all of these combined. The court is present wherever any of its constituent parts is engaged in the prosecution of the business of the court according to law. ***Ex Parte Wisdom*, 79 So. 2d 523, 524 (Miss. 1955).**

Indirect/Constructive Criminal Contempt

> Constructive contempt is defined as any act calculated to impede, embarrass, obstruct, defeat, or corrupt administration of courts of justice when the act is done beyond the presence of the court. ***Brame v. State*, 755 So. 2d 1090, 1093 (Miss. 2000).**
>
> Constructive contempt is an act calculated to impede or embarrass, obstruct, defeat, or corrupt administration of courts of justice when the act is done beyond the presence of the court. ***Lawson v. State*, 573 So. 2d 684, 686 (Miss. 1990) (citations omitted).**

Deciding Between the Two Types

> We agree with the argument that the contempt [of a prospective juror giving false information to the trial judge], if any, was what the law regards as a "constructive" contempt rather than a "direct" one. The alleged contempt, while within the presence of the court, could not be known to the court in its judicial knowledge or observation, and hence there could not be summary punishment. ***Hinton v. State*, 222 So. 2d 690, 691 (Miss. 1969) (citation omitted).**
>
> The important fact that we have to consider here is, that the court could not proceed upon its own knowledge of the facts, punish the offender without further proof, and without trial of any form. There had to be a hearing, and the court had to rely upon the testimony of witnesses. . . . [A]lthough the contempt may have been committed technically 'in the presence of the court,' but not within the sight or hearing of the judge, we think that notice should be given to the accused, and a reasonable opportunity afforded to him to prepare his defense. ***Ex Parte Wisdom*, 79 So. 2d 523, 524 (Miss. 1955).**
>
> Whenever there is any doubt whether the alleged contemnor has been guilty of direct or constructive contempt, the doubt should be resolved in favor of the latter, rather than the former. . . . The alleged contemnor will thereby be brought into court, and tried on notice and specification of the grounds of the contempt. ***Wood v. State*, 227 So. 2d 288, 290 (Miss. 1969) (citation omitted).**

Criminal Contempt Proceedings

Burden of Proof

§ 11-51-11(4) Appeal from a judgment of criminal contempt:

> (4) The burden of proof in criminal contempt shall be proof beyond a reasonable doubt. . . .
>
> > In a proceeding for criminal contempt [of court], evidence of guilt must be established beyond a reasonable doubt. ***Terry v. State*, 718 So. 2d 1097, 1103 (Miss. 1998); *Varvaris v. State*, 512 So. 2d 886, 888 (Miss. 1987).**

Burden of Persuasion

Direct Criminal Contempt

Who Carries the Burden

> A [direct] criminal contempt is one which takes place in the very presence of the judge making all the elements of the offense personal knowledge. ***Varvaris v. State*, 512 So. 2d 886, 887-88 (Miss. 1987) (citation omitted).**

Due Process Requirements

> A contempt which is direct, in the immediate presence of the court, may be summarily punished without affidavit, pleading or formal charges. ***Thomas v. State*, 734 So. 2d 339, 341 (Miss. Ct. App. 1999) (citations omitted).**
>
> [T]here is no process that is due prior to the imposition of the penalty [in a direct criminal contempt proceeding]. ***Bennett v. State*, 738 So. 2d 300, 306 (Miss. Ct. App. 1999) *overruled on other grounds by White v. State*, 785 So. 2d 1059 (Miss. 2001).**

Rules of Evidence

Mississippi Rule of Evidence 1101, Applicability of Rules, states in pertinent part:

> Except for the rules pertaining to privileges, these [evidence] rules do not apply in the following situations: . . . . Contempt proceedings in which the court may act summarily.

Prima Facie Case

The Mississippi Supreme Court has found that a charge of [direct criminal] contempt of court consists of words spoken or acts done in the presence of the court which tend to embarrass or prevent the orderly administration of justice. A direct criminal contempt "may consist of an open insult, in the presence of the court, to the person of the presiding justice, or a resistance to or defiance of power of the court." Disorderly conduct in the court room, or the use of violence, or threatening, or insulting language to the court, witnesses, or counsel is contempt. ***Thomas v. State*, 734 So. 2d 339, 341 (Miss. Ct. App. 1999) (citations omitted).**

Where the acts of criminal contempt take place in the presence of the court, no evidence or proof other than the court's own knowledge is required. ***Varvaris v. State*, 512 So. 2d 886, 887-88 (Miss. 1987) (citation omitted).**

Affirmative Defenses

Contempt can only be willful. ***Brame v. State*, 755 So. 2d 1090, 1094 (Miss. 2000) (citations omitted).**

Judge's Recusal

Direct contempt may be handled by the sitting judge instantly, although it is wise for a judge faced with personal attacks who waits until the end of the proceedings to have another judge take his place. ***Purvis v. Purvis*, 657 So. 2d 794, 798 (Miss. 1995).**

[I]n cases of direct contempt, wherein a personal attack has been made on the court, necessitating instantaneous action, [the contempt] may be dealt with by the judge offended. ***Varvaris v. State*, 512 So. 2d 886, 888 (Miss. 1987) (citation omitted).**

The punishment for a criminal contempt rests exclusively with the court against [which] the contempt was directed. ***Culpepper v. State*, 516 So. 2d 485, 488 (Miss. 1987).**

Indirect/Constructive Criminal Contempt

Who Carries the Burden

> The State must prove [that the contempt occurred]. ***Brame v. State*, 755 So. 2d 1090, 1093 (Miss. 2000) (citations omitted).**
>
> As in all criminal matters, the accused enjoys the presumption of innocence. The burden of [proof] to establish that contempt has been committed is on the party that is asserting that it has. ***Terry v. State*, 718 So. 2d 1097, 1103 (Miss. 1998).**

Due Process Requirements

> [The trial judge should have used] the correct procedural safeguards required for a charge of constructive [criminal] contempt, which are "a specific charge, notice, and a hearing." ***Mississippi Comm'n on Jud. Perf. v. Byers*, 757 So. 2d 961, 970 (Miss. 2000) (citation omitted).**
>
> [The judge] should have informed [the defendant] of her right to seek the advice of an attorney before proceeding with the contempt proceeding. . . . The trial courts should exercise due diligence to ensure that all parties are informed of this right [to counsel] before a [criminal] proceeding continues. ***Terry v. State*, 718 So. 2d 1097, 1107 (Miss. 1998).**
>
> Constructive contempt requires a specification of charges, notice, and a hearing. ***Purvis v. Purvis*, 657 So. 2d 794, 798 (Miss. 1995).**
>
> [W]e would [also] reverse the contempt findings of the trial court based upon its lack of jurisdiction over various named defendants, for failure to properly issue service of process. . . . Service of process is required before a named person becomes a party to a motion. . . . ***Mississippi Ass'n of Educ. v. Trustees of Jackson Mun. Separate Sch. Dist.*, 510 So. 2d 123, 127 (Miss. 1987).**

Prima Facie Case

> The State must prove that [the alleged contemnor] acted in such a manner that was calculated to impede, embarrass, obstruct, defeat or corrupt the administration of justice, when the act is done beyond the presence of the court. ***Brame v. State*, 755 So. 2d 1090, 1093 (Miss. 2000) (citations omitted).**

Affirmative Defenses

Conduct Was Not Willful

> Contempt can only be willful. A contempt citation is proper only when the contemnor has wilfully and deliberately ignored the order of the court. It is a defense to a contempt proceeding that the person was not guilty of willful or deliberate violations of a prior judgment or decree. The circuit court found [the defendant's] conduct to constitute gross negligence. However, gross negligence does not rise to the level of willful conduct which is required to support a finding of criminal contempt. ***Brame v. State*, 755 So. 2d 1090, 1094 (Miss. 2000) (citations omitted).**

Vague or Non-specific Order

> It is one of the fundamental precepts of contempt proceedings that, in order to determine that an alleged contemnor's disobedience is wilful, the directive claimed to have been violated must have been clear in defining the action that is either mandated or proscribed. A person is entitled to be informed with a high degree of clarity as to exactly what her obligations are under a court order before she can be found in contempt for wilfully disobeying that order. ***Allred v. Allred*, 735 So. 2d 1064, 1067 (Miss. Ct. App. 1999).**

Judge's Recusal

Mississippi Rule of Criminal Procedure 32.5. Further Proceedings:

> **(b) When Judge Disqualified.** A judge who enters an order pursuant to Rule 32.2(d), institutes an indirect contempt proceeding on the court's own initiative pursuant to Rule 32.3 or Rule 32.4, or reasonably expects to be called as a witness at any hearing on the matter, is disqualified from sitting at the hearing.
>
> > [I]n cases of indirect or constructive criminal contempt, where the trial judge has substantial personal involvement in the prosecution, the accused condemner must be tried by another judge. [E]xamples of substantial personal involvement in the prosecution warranting recusal include cases where the trial judge acts as a one-man grand jury; where the trial judge is instrumental in the initiation of the constructive-contempt proceedings; and where the trial judge acts as prosecutor and judge. This Court repeatedly has found that a judge who initiates constructive contempt proceedings has substantial personal involvement and must recuse himself. It is undisputed that the chancellor initiated the contempt proceedings when he issued show-cause orders requiring that Appellants appear and

demonstrate why they should not be held in contempt. As the proceedings were for constructive criminal contempt, we conclude that the chancellor was required to recuse himself from conducting them. His failure to do so violated Appellants' due-process rights and warrants reversal of the contempt judgments. ***Corr v. State*, 97 So. 3d 1211, 1215 (Miss. 2012) (citations omitted).**

As noted, a person charged with constructive criminal contempt is afforded certain procedural safeguards. The citing judge must recuse himself from conducting the contempt proceedings involving the charges. [I]t is necessary for that individual to be tried by another judge in cases of constructive contempt where the trial judge has substantial personal involvement in the prosecution. In *Williamson*, this Court reversed and remanded finding that it was improper for the citing judge to preside where he was a material witness. Based on *Williamson*, Cooper Tire is entitled to have proceedings before a different judge. ***Cooper Tire & Rubber Co. v. McGill*, 890 So. 2d 859, 869 (Miss. 2004) (citations omitted).**

[The trial judge] made his decision [to find the defendant in contempt] based on acts that took place outside of his presence. It is necessary for the individual to be tried by another judge in cases of constructive criminal contempt where the trial judge has substantial personal involvement in the prosecution [of the contempt proceeding]. . . . Because [the trial judge] was instrumental in the initiation of the constructive contempt proceedings, this Court holds that he should not have heard the contempt proceedings. He should have turned over those proceedings to another judge. ***Terry v. State*, 718 So. 2d 1097, 1104-05 (Miss. 1998).**

Where a course of action is aggravated by personal attacks, another judge should be asked to sit at the contempt hearing. ***Purvis v. Purvis*, 657 So. 2d 794, 798 (Miss. 1995).**

Penalties Available for Criminal Contempt

Fine

> A person may be fined for . . . criminal contempt. ***Bennett v. State*, 738 So. 2d 300, 306 (Miss. Ct. App. 1999) *overruled on other grounds by White v. State*, 785 So. 2d 1059 (Miss. 2001).**
>
> Where the relief provided is by fine, it is punitive when it is paid to the court as opposed to the complainant. . . . ***Common Cause v. Smith*, 548 So. 2d 412, 415-16 (Miss. 1989).**

Direct Criminal Contempt

§ 9-1-17 Punishment of contempt:

> The Supreme, circuit, chancery and county courts and the Court of Appeals shall have power to fine and imprison any person guilty of contempt of the court while sitting, but the fine shall not exceed One Hundred Dollars ($100.00) for each offense. . . .

Indirect/Constructive Criminal Contempt

§ 11-51-11(4) Appeal from judgment of criminal contempt:

> (4) The burden of proof in criminal contempt shall be proof beyond a reasonable doubt. A contemnor shall not be entitled to a jury trial unless the contemnor requests a jury trial and unless the fine exceeds Five Hundred Dollars ($500.00). . . .
>
> > Sentence of contempt of court and pay a fine of $250.00 and serve ten days in the lee county jail, ten days suspended upon payment of fine and court costs [was] affirmed. ***Lawson v. State*, 573 So. 2d 684, 687 (Miss. 1990).**
> >
> > This case is an appeal . . . wherein the defendant/appellant, Sheriff Edwin Coleman, was convicted of constructive or indirect criminal contempt of court for failure to incarcerate a felon. . . . Coleman was sentenced to serve a term of thirty (30) days in the Pontotoc County Jail and pay a $500 fine, plus all court costs. . . . His conviction and sentence are hereby affirmed. ***Coleman v. State*, 482 So. 2d 221, 223 (Miss. 1986).**

Incarceration

> A person may be imprisoned for . . . criminal contempt. ***Bennett v. State*, 738 So. 2d 300, 306 (Miss. Ct. App. 1999) *overruled on other grounds by White v.***

***State*, 785 So. 2d 1059 (Miss. 2001).**

[F]urthermore, the relief is punitive where the sentence of imprisonment is for a definite period; the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. ***Common Cause v. Smith*, 548 So. 2d 412, 415-16 (Miss. 1989).**

Direct Criminal Contempt

Length of Incarceration

§ 9-1-17 Punishment of contempt:

The Supreme, circuit, chancery and county courts and the Court of Appeals shall have power to fine and imprison any person guilty of contempt of the court while sitting, but . . . nor shall the imprisonment continue longer than thirty (30) days.

No Right to a Jury Trial

We conclude that where the confinement is not more than six (6) months . . . that the offense is a petty one, and the accused is not entitled to a jury trial under the Sixth Amendment of the Constitution of the United States. ***Hinton v. State*, 222 So. 2d 690, 692 (Miss. 1969).**

Indirect/Constructive Criminal Contempt

Length of Incarceration

In Mississippi, there is no maximum penalty for the crime of [constructive] criminal contempt. ***Walls v. Spell*, 722 So. 2d 566, 572 (Miss. 1998).**

Section 1656 limits the punishment that may be imposed for direct contempt of court. . . . This section does not apply to constructive contempt. ***Wood v. State*, 227 So. 2d 288, 290 (Miss. 1969) (citation omitted).**

Right to a Jury Trial May Attach

§ 11-51-11(4) Appeal from judgment of criminal contempt:

(4) A contemnor shall not be entitled to a jury trial unless the contemnor requests a jury trial and unless . . . the imprisonment exceeds six (6) months.

Where the legislature has failed to set a maximum penalty [for

constructive criminal contempt] under the statute, this Court will view the punishment imposed on multiple charges in the aggregate. As [the defendant] was sentenced to a total of 18 months in jail for contempt, we hold that the [trial judge] committed reversible error in failing to grant [the defendant's] motion for a jury trial. ***Walls v. Spell*, 722 So. 2d 566, 573-74 (Miss. 1998).**

When determining whether a contemnor has the right to a jury trial, the court must look to the maximum sentence possible under the statute, or to the penalty actually imposed if no punishment is provided by statute. . . . The actual penalty imposed . . . must be the focus. The maximum penalty allowed by [the Court] without a jury trial has been six (6) months imprisonment and $500.00. [A sentence that falls beneath that] threshold limit triggering the right to a jury trial, [does not require a jury trial at the contempt proceedings]. ***Purvis v. Purvis*, 657 So. 2d 794, 798 (Miss. 1995).**

Appeal of Criminal Contempt

A person convicted of criminal contempt [in circuit court] may appeal to [the Mississippi Supreme Court]. ***Common Cause v. Smith*, 548 So. 2d 412, 414 (Miss. 1989).**

§ 11-51-11 Appeal from judgment of criminal contempt:

(1) A person ordered by any tribunal . . . to be punished for a contempt, may appeal to the court to which other cases are appealable from said tribunal. Where the punishment is either a fine only, or jail confinement only, the appeal shall be allowed upon the posting of a bond, payable to the state, with sufficient sureties, not exceeding $1,000.00, conditioned to abide the results of the appeal. Where the punishment is both a fine and jail confinement, the appeal shall be allowed upon the posting of a bond, not exceeding $2,000.00, conditioned to appear in the court to which the appeal is prosecuted and to abide the results of such appeal.

(2) The amount of the bonds provided for in subsection (1) of this section shall be fixed by the tribunal appealed from, shall be approved by the sheriff or other officer in whose custody the appellant may be and shall not be construed as a limitation on the amount of any fine which may be imposed.

(3) All appeals allowed in accordance with the provisions of this section shall operate as a supersedeas. . . .

Plaintiff in a Criminal Contempt Case May Not Appeal

> There is no statute authorizing an appeal by the petitioner [who brought the criminal contempt proceedings at the trial court level] when the a trial court has dismissed a petition for criminal contempt. . . . Consequently, [the Mississippi Supreme Court] has no subject matter jurisdiction to entertain an appeal from the lower court's dismissal of the criminal contempt charges against the defendants. ***Common Cause v. Smith*, 548 So. 2d 412, 415, 418 (Miss. 1989).**

Appeal of Contempt is a Separate Action

> The trial court's order [finding the defendant's attorney in direct criminal contempt] was styled as if it were an order in the [the defendant's] prosecution. However, criminal contempt is a separate action in which a bond must be posted before an appeal is authorized. ***Bennett v. State*, 738 So. 2d 300, 306 (Miss. Ct. App. 1999) *overruled on other grounds by White v. State*, 785 So. 2d 1059 (Miss. 2001).**

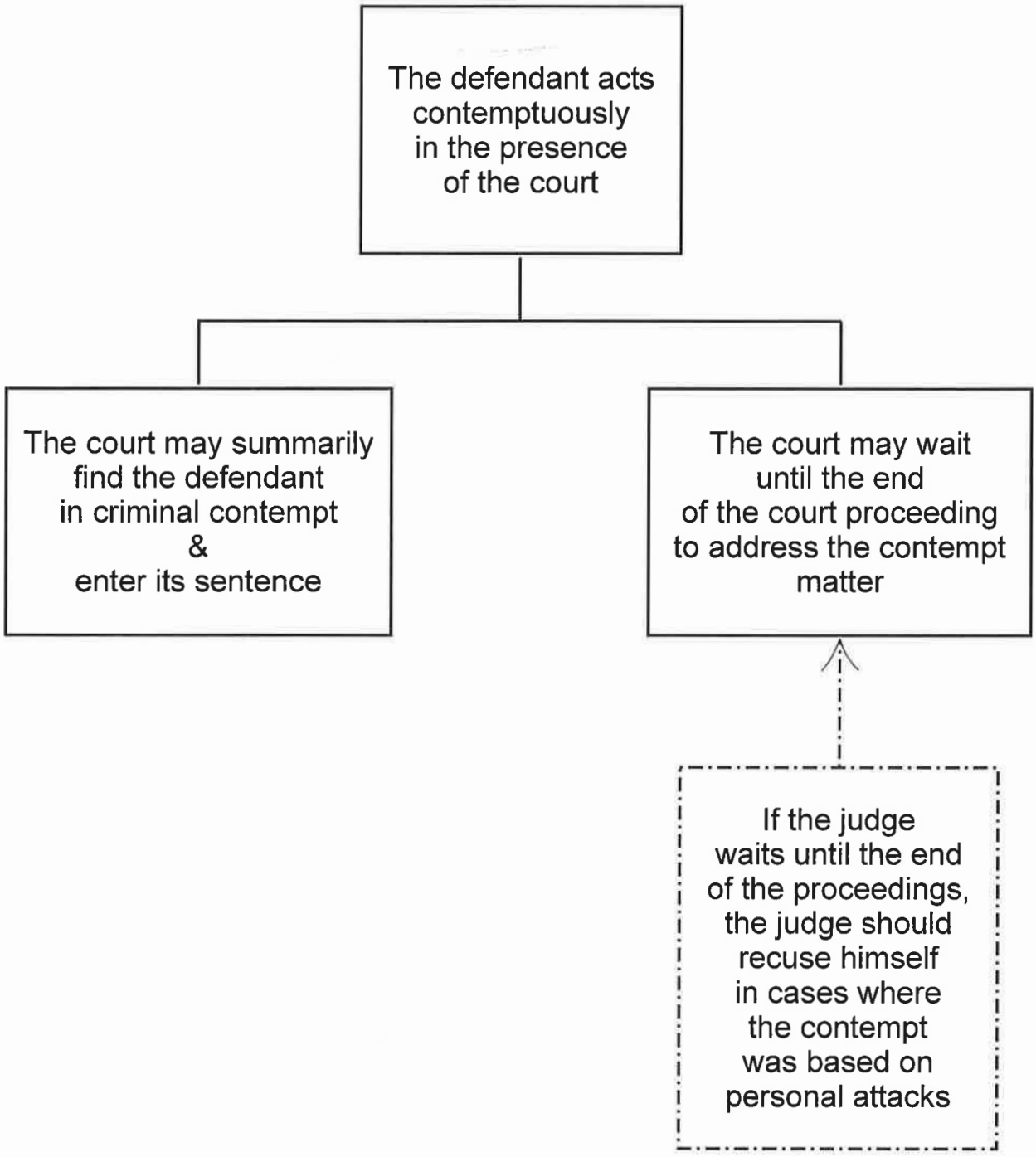
Standard of Review

> [W]here an appeal addresses a finding of criminal contempt which is punitive in nature, this Court is not bound by the manifest error rule when reviewing an appeal of a conviction of criminal contempt. There must be an *ab initio* review and determination of whether on the record the contemnor is guilty of contempt beyond a reasonable doubt. ***Shields v. State*, 702 So. 2d 380, 384 (Miss. 1997) (citation omitted).**

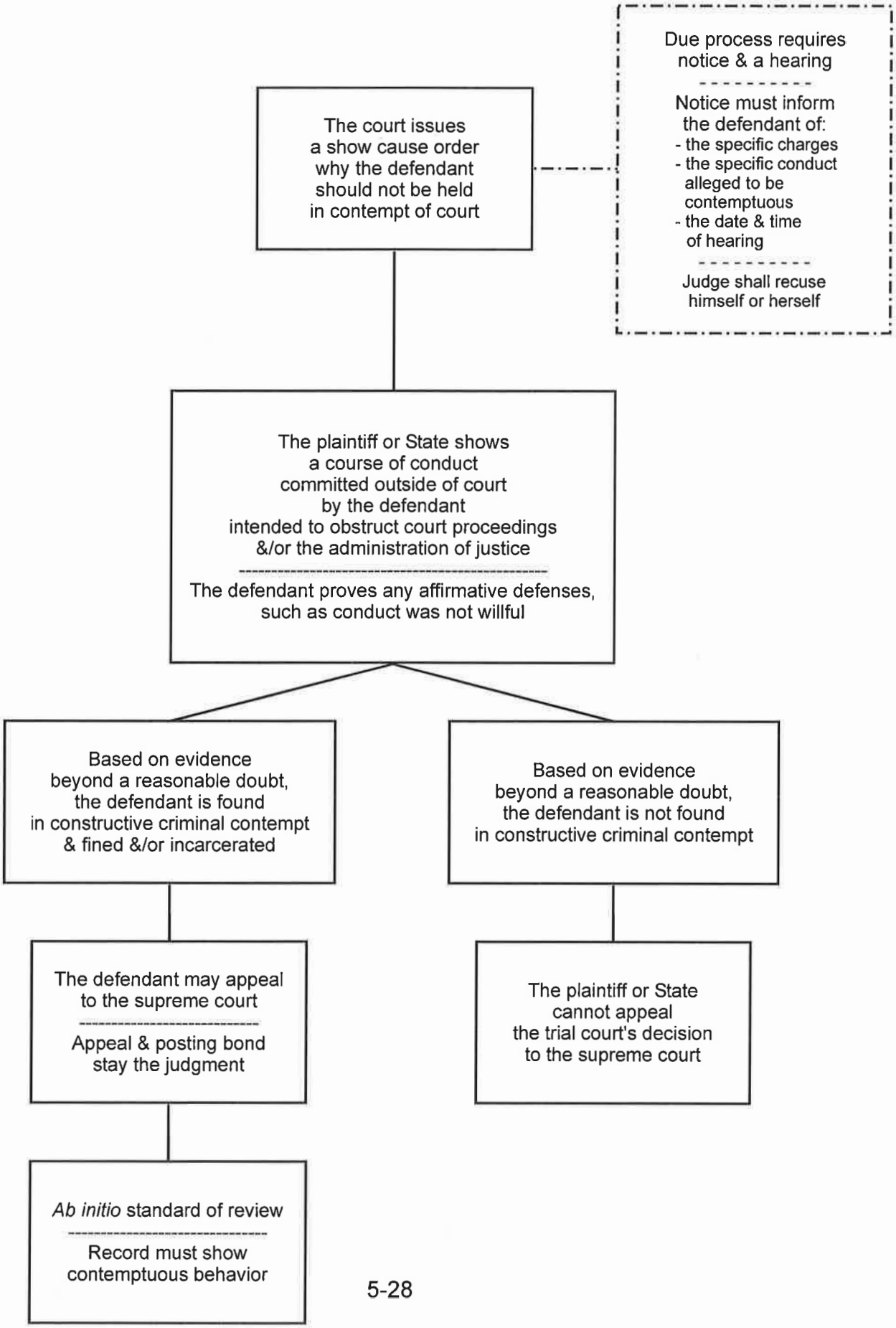
Ab Initio Review Explained

> [In an appeal from a contempt ruling,] we proceed *ab initio*. It is our responsibility to determine whether on this record [defendant] is guilty of [criminal] contempt. We are not bound by the rule ordinarily applicable - that we have no authority to reverse except the [court] be manifestly in error. ***Cook v. State*, 483 So. 2d 371, 374 (Miss. 1986) (citations omitted).**
>
> Although a reviewing court must consider the evidence in the light most favorable to the verdict, this does not mean that *ab initio* review is a lower standard than *de novo* review. . . . When conducting [an] *ab initio* review . . . the court looks at the entire record as a matter of first impression, giving no weight to the circuit court's findings. This is the same as *de novo* review." ***Management Computer Servs. Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67, 81 (Wisc. 1996) (citations omitted).**

DIRECT CRIMINAL CONTEMPT OF COURT



CONSTRUCTIVE CRIMINAL CONTEMPT OF COURT



Contempt of Court for Failure to Pay Fines

§ 99-19-20 Fines; payment; indigent defendants; inability to work or unavailability of work:

(1) Except as otherwise provided under Section 99-19-20.1 of this act, when any court sentences a defendant to pay a fine, the court may order

(a) that the fine be paid immediately, or

(b) that the fine be paid in installments to the clerk of the court or to the judge, if there be no clerk, or

(c) that payment of the fine be a condition of probation, or

(d) that the defendant be required to work on public property for public benefit under the direction of the sheriff for a specific number of hours, or

(e) any combination of the above.

(2) Except as otherwise provided under Section 99-19-20.1 of this act, the defendant may be imprisoned until the fine is paid if the defendant is financially able to pay a fine and the court so finds, subject to the limitations provided under this section. The defendant shall not be imprisoned if the defendant is financially unable to pay a fine and so states to the court in writing, under oath, after sentence is pronounced, and the court so finds, except if the defendant is financially unable to pay a fine and such defendant failed or refused to comply with a prior sentence as specified in subsection (1) of this section, the defendant may be imprisoned. This subsection shall be limited as follows:

(a) In no event shall such period of imprisonment exceed one (1) day for each One Hundred Dollars ($100.00) of the fine.

(b) If a sentence of imprisonment, as well as a fine, were imposed, the aggregate of such term for nonpayment of a fine and the original sentence of imprisonment shall not exceed the maximum authorized term of imprisonment.

(c) It shall be in the discretion of the judge to determine the rate of the credit to be earned for work performed under subsection (1)(d), but the rate shall be no lower than the rate of the highest current federal minimum wage.

(3) Periods of confinement imposed for nonpayment of two (2) or more fines shall run consecutively unless specified by the court to run concurrently.

> We now hold that when a circuit court makes release from prison contingent upon payment of a fine, it is mandatory that the circuit court follow the statutory requirement of Miss. Code Ann. § 99-19-20(2). The court must make an inquiry as to whether the convicted defendant is in fact able to pay the fine, and make a finding on this question. ***Jones v. State*****,**

564 So. 2d 848, 851 (Miss. 1990) (discussing prior version of statute).

To begin with, it is established beyond per adventure that an indigent may not be incarcerated because he is financially unable to comply with an otherwise lawfully imposed sentence of a fine. So long as Cassibry is "financially unable to pay a fine" and the trial court so finds, he may not be imprisoned, period. ***Cassibry v. State*, 453 So. 2d 1298, 1299 (Miss. 1984) (citations omitted) (discussing prior version of statute).**

Section 99-19-20(1)(d) authorizes the trial judge to require that Cassibry perform public service. Considering the present state of things, the trial judge may well want to employ this alternative and allow Cassibry to begin to work off his fine. Section 99-19-20(2)(c) provides that he would receive credit against his fine for any such public service work at the rate of the highest current federal minimum wage. Another alternative available to the trial judge at this time is the establishment of a realistic installment plan for the payment of the fine. Accepting the fact that Cassibry is financially unable to pay the $45,000.00 at this time, the trial judge would be well within the scope of the discretionary authority vested in him by statute if he required that Cassibry pay what he reasonably could at reasonable, periodic intervals. ***Cassibry v. State*, 453 So. 2d 1298, 1299-300 (Miss. 1984) (citations omitted) (discussing prior version of statute).**

§ 99-19-20.1 Incarceration for failure to pay fine, restitution, or court costs; ability to pay; maximum term of imprisonment; minors:

(1) Incarceration shall not automatically follow the nonpayment of a fine, restitution or court costs. Incarceration may be employed only after the court has conducted a hearing and examined the reasons for nonpayment and finds, on the record, that the defendant was not indigent or could have made payment but refused to do so. When determining whether a person is indigent, the court shall use the current Federal Poverty Guidelines and there shall be a presumption of indigence when a defendant's income is at or below one hundred twenty-five percent (125%) of the Federal Poverty Guidelines, subject to a review of his or her assets. A defendant at or below one hundred twenty-five percent (125%) of the Federal Poverty Guidelines without substantial liquid assets available to pay fines, fees, and costs shall be deemed indigent. In determining whether a defendant has substantial liquid assets, the judge shall not consider up to Ten Thousand Dollars ($10,000.00) in tangible personal property, including motor vehicles, household goods, or any other assets exempted from seizure under execution or attachment as provided under Section 85-3-1. If the defendant is above one hundred twenty-five percent (125%) of the Federal Poverty Guidelines, the judge shall

make an individualized assessment of his or her ability to pay based on the totality of the circumstances including, but not limited to, the defendant's disposable income, financial obligations and liquid assets. If the judge determines that a defendant who claims indigence is not indigent and the defendant could have made payment but refused to do so, the case file shall include a written explanation of the basis for the determination of the judge. In justice and municipal court, such finding shall be included in the court's order.

(2) If it appears to the satisfaction of the court that nonpayment is not willful, the court shall enter an order that allows the defendant additional time for payment, reduces the amount of each installment, revokes the fine, in whole or in part, or allows the defendant to perform community service at the state minimum wage per hour rate. If the court finds nonpayment is willful after consideration of the defendant's situation, means, and conduct with regard to the nonpayment, the court shall determine the period of incarceration, if any, subject to the limitations set by law and subsection (3) of this section.

(3) If at the time the fine, restitution or court cost is ordered, a sentence of incarceration is also imposed, the aggregate total of the period of incarceration imposed pursuant to this section and the term of the sentence originally imposed may not exceed the maximum term of imprisonment authorized for the offense. . . .

§ 99-37-7 Contempt for default:

(1) Subject to the provisions of Section 99-19-20.1 of this act, when a defendant sentenced to pay a fine or to make restitution defaults in the payment thereof or of any installment, the court, on motion of the district attorney, or upon its own motion, may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance.

(2) Subject to the provisions of Section 99-19-20.1 of this act, unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment, the court may find that his default constitutes contempt and may order him committed until the fine or the restitution, or a specified part thereof, is paid.

(3) A judicial officer shall not be held criminally or civilly liable for failure of any defendant to pay any fine or to make restitution if the officer exercises his judicial authority in accordance with subsections (1) and (2) of this section to require the payment of such fine or restitution.

(4) When a fine or an order of restitution is imposed on a corporation or unincorporated association, it is the duty of the person authorized to make disbursement from the assets of the corporation or association to pay the fine or make the restitution from those assets, and his failure to do so may be held to be contempt unless he makes the showing required in subsection (2) of this section.

CONTEMPT OF COURT SCENARIOS			
Type of Contempt	**Facts**	**Special Points to Consider / Rationale**	**Citation**
Criminal Contempt - Direct	Attorney made inflamatory remarks to the jury and to the judge repeatedly, resulting in a mistrial.	Both the transcripts and the audio recording of the record fully supported the trial court's findings. The record demonstrated beyond a reasonable doubt that the attorney was guilty of direct criminal contempt, and that his contemptuous conduct resulted in a mistrial in the underlying criminal matter.	*Minka v. State*, 234 So. 3d 353 (Miss. 2017).
Criminal Contempt - Direct	Attorney stood up to dispute the court's ruling and interrupted court proceedings.	Attorney was found in direct criminal contempt after he disrespected the court, specifically by standing up to dispute a judge's bond ruling after the bond hearing had been concluded and despite being directed by the judge to sit down and make any further argument by written motion.	*Routh v. State*, 227 So. 3d 959 (Miss. 2017).
Criminal Contempt - Direct	Attorney failed to abide by an order of the Court and was willfully disruptive of court proceedings.	Because the record established beyond a reasonable doubt that the attorney was guilty of direct criminal contempt for displaying willful, contemptuous conduct in the courtroom that interfered with the orderly administration of justice, the supreme court affirmed the trial court's order.	*Spore v. State*, 214 So. 3d 223 (Miss. 2017).

Criminal Contempt - Direct	Attorney made derogatory comments about the court and the proceedings.	The attorney "used insulting language and was displaying both a resistance to, and a defiance of, the appropriate power and authority of the court. She chose to use words in the presence of the court which can easily be said to have a tendency to embarrass or prevent the orderly administration of justice."	*In re Smith*, 926 So. 2d 878 (Miss. 2006).
Criminal Contempt - Direct	Attorney failed to attend a hearing.	The conversation between the attorney and the circuit clerk clearly indicates the attorney was aware of her obligation to attend the hearing and demonstrates her intention to absent herself from the hearing.	*In re Hampton*, 919 So. 2d 949 (Miss. 2006).
Criminal Contempt - Direct	In court on post-trial motions, an attorney and the trial judge became involved in a verbal exchange where the attorney called bailiffs the court's "henchmen" and made the comment that he would pay for justice if that was what it took in the judge's courtroom.	Attorney's conduct was done in the presence of the court and intended to embarrass the judge and to prevent the orderly administration of justice.	*Lumumba v. State*, 868 So. 2d 1018 (Miss Ct. App. 2003).
Criminal Contempt - Direct	At his initial appearance, the defendant in a criminal proceeding called the justice court judge a disrespectful name and yelled obscenities in the court room.	The defendant was found in contempt of court and sentenced under the authority of § 9-11-15 which applies to justice court.	*Thomas v. State*, 734 So. 2d 339 (Miss. Ct. App. 1999).

Criminal Contempt - Direct	During a pre-trial hearing, a criminal defendant made derogatory comments about the judge and the judicial proceedings.	Defendant's conduct was inexcusable and it offended the dignity and authority of the court.	*Shields v. State*, 702 So. 2d 380 (Miss. 1997).
Criminal Contempt - Direct	At trial, the sequestration rule (M.R.E. 615) had been invoked but a witness for the State stayed in the court room throughout the testimony of other witnesses.	Court could find that the witness willfully violated the rule. The comment to Rule 615 allows the court to "cite the witness for contempt," among other remedies, when a witness violates the sequestration rule.	*See Gerrard v. State*, 619 So. 2d 212 (Miss. 1993).
Criminal Contempt - Direct	Litigants in a civil proceeding engaged in a physical altercation that spilled over into the court room.	The actions done in the presence of the court embarrassed or prevented the orderly administration of justice.	*Lamar v. State*, 607 So. 2d 129 (Miss. 1992).
Criminal Contempt - Direct	A witness who was the father of a criminal defendant was found in contempt because he threatened to kill the assistant district attorney.	The statements made in the presence of the court embarrassed or prevented the orderly administration of justice.	*Varvaris v. State*, 512 So. 2d 886 (Miss. 1987).
Criminal Contempt - Indirect/Constructive	Process servers failed to serve process personally and signed and notarized the proof-of-service affidavits without the notary being physically present to witness the signatures.	The conduct at issue did not occur in the court's presence.	*Corr v. State*, 97 So. 3d 1211 (Miss. 2012).

Criminal Contempt - Indirect/Constructive	Party failed to comply with discovery order.	The fine imposed upon the party was to punish the party's failure to obey the discovery order and to vindicate the authority of the trial court.	*Cooper Tire & Rubber Co. v. McGill*, 890 So. 2d 859 (Miss. 2004).
Criminal Contempt - Indirect/Constructive	The defendant violated an injunction prohibiting him from spraying pesticides.	The defendant acted knowingly.	*Walls v. Spell*, 722 So. 2d 566 (Miss. 1998).
Criminal Contempt - Indirect/Constructive	A criminal defendant's attorney makes a statement to a television station to the effect that his client passed a polygraph test and therefore should not be prosecuted.	If the court finds that the attorney willfully violated URCCC 9.01, a contempt charge would be upheld.	*See Terry v. State*, 718 So. 2d 1097 (Miss. 1998).
Criminal Contempt - Indirect/Constructive	An attorney was substantially late to court proceedings with no justifiable excuse for his tardiness, and the jury had to be excused.	The attorney can be found in contempt of court and fined up to the amount allowed for contempt. Another remedy would be to order sanctions for violating URCCC 3.01 in the amount of the jury costs.	*See Alviers v. City of Bay St. Louis*, 576 So. 2d 1256 (Miss. 1991).
Criminal Contempt - Indirect/Constructive	After the jury had returned its verdict in a civil case, an attorney contacted two jurors to question them about the verdict despite a court order prohibiting such contact.	The attorney willfully disregarded the court's order and did not request permission from the court to contact the jurors.	*Lawson v. State*, 573 So. 2d 684 (Miss. 1990).

Criminal Contempt - Indirect/Constructive	At settlement negotiations, an attorney misrepresented to the court that his client was willing to settle the case when in fact the client did not know of the settlement offer.	The Mississippi Bar also sanctioned the attorney.	*Culpepper v. State*, 516 So. 2d 485 (Miss. 1987).
Criminal Contempt - Indirect/Constructive	A sheriff on numerous occasions released prisoners from the county jail who were imprisoned there under court order.	The sheriff violated his statutory duties.	*Coleman v. State*, 482 So. 2d 219 (Miss. 1986).
Criminal Contempt - Indirect/Constructive	A prospective juror did not answer the jury questions honestly, in particular failing to inform the court that the defendant's attorney also represented the prospective juror's wife in their divorce proceedings.	This was constructive because even though the contemptuous act occurred within the presence of the court, the court could not know of the contempt based on observation and its own judicial knowledge.	*Hinton v. State*, 222 So. 2d 690 (Miss. 1969).
Civil Contempt	Party to a consent decree final judgment continuously violated the terms of the agreement.	The record reflects that the party found in contempt routinely and deliberately operated the racetrack in violation of the conditions for timely conclusion of races and extinguishing of lights and thus the chancellor acted within her discretion in holding him in contempt.	*Riley v. Wiggins*, 908 So. 2d 893 (Miss. Ct. App. 2005).
Civil Contempt	Although he is able to pay, a judgment debtor has not paid the damages owed to the judgment creditor.	A judgment creditor would be able to collect the judgment by execution, garnishment or any other available lawful means so long as it does not include imprisonment.	*See In re Nichols*, 749 So. 2d 68 (Miss. 1999).

Civil Contempt	A witness refuses to answer any and all questions during a deposition.	The court must proceed on a question by question basis to determine if holding the witness in contempt is proper.	*In re Knapp*, 536 So. 2d 1330 (Miss. 1988).
Not Contempt (Constructive criminal contempt case)	A defense attorney was held in contempt for failure to prepare for court when he stated that he was not ready to proceed to trial because he had not received video recordings requested from the State.	There was no evidence that the defense attorney had willfully and deliberately ignored the court's order.	*Graves v. State*, 66 So. 3d 148 (Miss. 2011).
Not Contempt (Direct contempt case)	An attorney refused to recite the Pledge of Allegiance in open court.	There was no evidence that the attorney said or did anything to disrupt court proceedings or embarrass the court; the trial judge violated the attorney's First Amendment rights.	*Mississippi Comm'n on Jud. Perf. v. Littlejohn*, 62 So. 3d 968 (Miss. 2011).
Not Contempt (Constructive criminal contempt case)	An attorney held and looked at an evidence bag and the sheriff accused the attorney of trying to "smudge" off the identification numbers.	No contempt was found because there was no evidence that the attorney acted willfully, but only negligently. Negligent acts can not support a finding of contempt.	*Brame v. State*, 755 So. 2d 1090 (Miss. 2000).
Not Contempt (Civil contempt case)	A judgment debtor has not paid the judgment creditor the amount he owes in damages and the debtor shows that he is unable to pay the damages.	Inability to pay is a defense to contempt. Article 3, § 30 of the Mississippi Constitution prohibits imprisonment for a debt owed.	*In re Nichols*, 749 So. 2d 68 (Miss. 1999).

Not Contempt (Constructive criminal contempt case)	A reporter who had observed a criminal proceeding in open court wrote about a juvenile's prior court record despite the court ordering the reporter not to publish those facts.	Prior restraint on speech is presumptively invalid and court could not rebut that presumption.	*Jeffries v. State*, 724 So. 2d 897 (Miss. 1998).
Not Contempt (Constructive criminal contempt case)	A criminal defendant's attorney knew that a third-party was placing an advertisement in the local newspaper in which the advertisement stated that his client had passed a polygraph test.	The attorney could not be found in contempt because there was no evidence that the attorney "released or authorized for release" the advertisement. URCCC 9.01 prohibits such actions.	*Terry v. State*, 718 So. 2d 1097 (Miss. 1998).
Not Contempt (Constructive criminal contempt case)	A friend of a criminal defendant placed an advertisement in the local newspaper which stated that her friend had passed a polygraph test.	This person could not be found in contempt; she was a non-party, not subject to URCCC 9.01.	*Terry v. State*, 718 So. 2d 1097 (Miss. 1998).
Not Contempt (Constructive criminal contempt case)	An attorney was substantially late to court proceedings, but his tardiness was due to a justifiable excuse, such as a car accident.	The court must evaluate the excuse, but a finding of contempt of court for being late would have to be based on evidence beyond a reasonable doubt.	*See Alviers v. City of Bay St. Louis*, 576 So. 2d 1256 (Miss. 1991).
Not Contempt (Civil contempt case)	A witness refuses to answer certain questions during a deposition which tend to relate to possible criminal activity.	The court must determine if the witness could be subject to criminal prosecution based on his answers and if so, the witness can not be held in contempt.	*In re Knapp*, 536 So. 2d 1330 (Miss. 1988).

Not Contempt (Civil contempt case)	The wife of a party to a partition of land proceeding interfered with a land surveyor who was surveying the property subject to the partition.	The wife was not a party to the proceedings and could not be held in contempt. See MRCP 65(d)(2) which explains that a person in "active concert or participation" to a party will be bound by an injunction or restraining order if that person receives actual notice of the order by personal service or otherwise.	*In re Will of Lynn v. Lynn*, 878 So. 2d 1052 (Miss. Ct. App. 2004).

CHAPTER 6

IN PERSONAM JURISDICTION

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IN PERSONAM JURISDICTION

In Personam Jurisdiction

A court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal rights, rather than merely over property interests. ***Black's Law Dictionary*** **(10th ed. 2014).**

In Personam Jurisdiction of the Plaintiff

[A] plaintiff ordinarily consents to a court's jurisdiction by filing suit. . . . ***United States v. Swiss Amer. Bank, Ltd.*****, 191 F.3d 30, 35 (1st Cir. 1999).**

[A] plaintiff who brings suit against defendants in a forum in which the court could not otherwise exercise personal jurisdiction submits itself to the jurisdiction of the court with respect to all the issues embraced in the suit, including those pertaining to the counterclaim of the defendants. ***Global Shipping & Trading, Ltd. v. Verkhnesaldincky Metallurgic Co.*****, 892 P.2d 143, 146-47 (Wyo. 1995) (citation omitted).**

In Personam Jurisdiction of the Resident Defendant

[W]e find the unmistakable principle, long existing and deeply embedded, that (. . . resident . . .) persons who, by their conduct in, or effects upon, this state, acquire otherwise enforceable duties toward this state's citizens, upon whom the law confers correlative and corresponding rights, may be haled into our courts and, consistent with due process, required to answer for their defaults. ***Jones v. Chandler*****, 592 So. 2d 966, 971 (Miss. 1991).**

Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of [the] court was prerequisite to its rendition of a judgment personally binding him. ***International Shoe Co. v. Washington*****, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945).**

Simply put, a state court cannot exercise binding jurisdiction over persons residing outside its boundaries unless there is some reasonable basis for doing so. A state court does not have jurisdiction over, and therefore cannot bind to a judgment, an individual with whom the state has no "contacts, ties or relations." ***Feldman v. Bates Mfg. Co.*****, 362 A.2d 1177, 1180 (N.J. 1976).**

In Personam Jurisdiction of the Non-Resident Defendant

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." The U.S. Supreme Court has outlined the factors to be considered in determining whether the assertion of personal jurisdiction will comport with fair play and substantial justice:

> We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

***Estate of Jones v. Phillips ex rel. Phillips*, 992 So. 2d 1131, 1141-42 (Miss. 2008) (citations omitted).**

[W]e find the unmistakable principle, long existing and deeply embedded, that (. . . non-resident . . .) persons who, by their conduct in, or effects upon, this state, acquire otherwise enforceable duties toward this state's citizens, upon whom the law confers correlative and corresponding rights, may be haled into our courts and, consistent with due process, required to answer for their defaults. ***Jones v. Chandler*, 592 So. 2d 966, 971 (Miss. 1991).**

It is well-settled that personal jurisdiction may be asserted over an individual who is served with process while present within the forum state. If a non-resident defendant cannot be served with process while in the forum state, jurisdiction may be obtained through the use of our "long-arm statute," provided that the defendant has sufficient "minimum contacts" with [this state] so that the exercise of personal jurisdiction over him will not offend the constitutional guarantee of due process. The doctrine of "minimum contacts" evolved to extend the personal jurisdiction of state courts over non-resident defendants; it was never intended to limit the jurisdiction of state courts over persons found within the borders of the forum state. ***Cariaga v. Eighth Judicial Dist. Court*, 762 P.2d 886, 887 (Nev. 1988).**

Statutory Provision for Jurisdiction - Long-Arm Jurisdiction

§ 13-3-57 Service on nonresidents; generally:

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state. Service of summons and process upon the defendant shall be had or made as is provided by the Mississippi Rules of Civil Procedure.

Any such cause of action against any such nonresident, in the event of death or inability to act for itself or himself, shall survive against the executor, administrator, receiver, trustee, or any other selected or appointed representative of such nonresident. Service of process or summons may be had or made upon such nonresident executor, administrator, receiver, trustee or any other selected or appointed representative of such nonresident as is provided by the Mississippi Rules of Civil Procedure, and when such process or summons is served, made or had against the nonresident executor, administrator, receiver, trustee or other selected or appointed representative of such nonresident it shall be deemed sufficient service of such summons or process to give any court in this state in which such action may be filed, in accordance with the provisions of the statutes of the State of Mississippi or the Mississippi Rules of Civil Procedure, jurisdiction over the cause of action and over such nonresident executor, administrator, receiver, trustee or other selected or appointed representative of such nonresident insofar as such cause of action is involved.

The provisions of this section shall likewise apply to any person who is a nonresident at the time any action or proceeding is commenced against him even though said person was a resident at the time any action or proceeding accrued against him.

> This statute is an affirmative declaration of conditions upon which non-residents may be held amenable to suit in this state. ***Southern Pac. Transp. Co. v. Fox*, 609 So. 2d 357, 359 (Miss. 1992).**
>
> The long-arm statute requires the satisfaction of at least one of its self-contained conditions before it may be utilized. ***Sorrells v. R&R Custom Coach Works, Inc.*, 636 So. 2d 668, 671 (Miss. 1994).**

Mississippi Rule of Civil Procedure 4, Summons:

(c) Service:
(1) By Process Server. A summons and complaint shall, except as provided in subparagraphs (2) and (4) of this subdivision, be served by any person who is not a party and is not less than 18 years of age. When a summons and complaint are served by process server, an amount not exceeding that statutorily allowed to the sheriff for service of process may be taxed as recoverable costs in the action.
(2) By Sheriff. A summons and complaint shall, at the written request of a party seeking service or such party's attorney, be served by the sheriff of the county in which the defendant resides or is found, in any manner prescribed by subdivision (d) of this rule. The sheriff shall mark on all summons the date of the receipt by him, and within thirty days of the date of such receipt of the summons the sheriff shall return the same to the clerk of the court from which it was issued.
(3) By Mail.
(A) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (4) of subdivision (d) of this rule by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 1-B and a return envelope, postage prepaid, addressed to the sender.
(B) If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint may be made in any other manner permitted by this rule.
(C) Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing the notice and acknowledgment of receipt of summons.
(D) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.
(4) By Publication.
(A) If the defendant in any proceeding in a chancery court, or in any proceeding in any other court where process by publication is authorized by statute, be shown by sworn complaint or sworn petition, or by a filed affidavit, to be a nonresident of this state or not to be found therein on diligent inquiry and the post office address of such defendant be stated in the complaint, petition, or affidavit, or if it be stated in such sworn complaint or petition that the post office address of the defendant is not known to the plaintiff or petitioner after diligent inquiry, or if the affidavit be made by another for the plaintiff or petitioner, that such post office address is unknown to the affiant after diligent inquiry and he believes it is unknown to the plaintiff or petitioner after diligent inquiry by the plaintiff or petitioner, the clerk, upon filing the complaint or petition, account or other commencement of a proceeding, shall promptly prepare and publish a summons to the defendant to

appear and defend the suit. The summons shall be substantially in the form set forth in Form 1-C. . . .

(h) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

> A voluntary entry of appearance by a defendant no longer serves as a waiver of that defendant's right to subsequently contest the court's in personam jurisdiction arising from an alleged defect in the manner in which the defendant was served with process. Thus, earlier disputes over whether an appearance was a general appearance or a special appearance for the limited purpose of contesting the court's jurisdiction (or, in Mississippi at least, whether there was even such a thing as a limited appearance) have become moot. ***Schustz v. Buccaneer, Inc.*, 850 So. 2d 209, 213 (Miss. Ct. App. 2003).**
>
> Therefore, a moving party has a choice of making a M.R.C.P. 4(h) objection to process by filing a M.R.C.P. 12(b)(4)or(5) motion prior to filing a responsive pleading; by asserting other general affirmative defenses; or by filing them simultaneously therewith. The M.R.C.P. 4(h) defense is waived only after the filing of an answer or affirmative defenses if the defense is not asserted prior to or simultaneously within the answer. The rule also provides that the issue may be raised in an amended answer filed with leave of court under M.R.C.P. 15. . . . In the instant case, the issue was raised in Rains' initial pleading and then renewed in the subsequently filed answer and affirmative defenses. The issue was properly and timely pled. ***Rains v. Gardner*, 731 So. 2d 1192, 1197 (Miss. 1999).**

Long-Arm Jurisdiction - Three (3) Prongs

Jurisdictional issues are reviewed pursuant to a de novo standard of review. Jurisdiction is decided based on the existing facts at the time the action is commenced. Determining whether personal jurisdiction can be exercised over a nonresident defendant involves a two-part analysis. First, we must analyze and decide if the Mississippi long-arm statute is applicable to [defendant]. Second, we must determine if applying the long-arm statute to [defendant] comports with the Due Process Clause of the Fourteenth Amendment and the U.S. Constitution. Mississippi Code Section 13–3–57 sets forth the following occurrences which subject a nonresident to personal jurisdiction within the state of Mississippi:

> Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this State.

[Plaintiff] alleges that [defendant] committed a tort in the state, entered into a contract in the state, and conducted business within the state. Because we find that [defendant] was "doing business" within the state in accordance with the long-arm statute, we will not address whether [defendant] committed a tort or entered into a contract in the state. Before the long-arm statute was amended in 1991, the "doing business" element of the statute could not be applicable to a nonresident defendant without a connection between the cause of action and the business, work, or service taking place within the state. After the statute was amended, the "nexus" requirement between the cause of action and the business being conducted within the state was eliminated. Currently, ". . . the long-arm statute, by its plain terms, applies to any person or corporation performing any character of work in this state." ***Joshua Properties, LLC v. D1 Sports Holdings, LLC*, 130 So. 3d 1089, 1092-93 (Miss. 2014) (citations omitted).**

The threshold condition for application of the long-arm statute is the requirement that the nonresident corporation, over which personal jurisdiction is sought, is not a corporation qualified to do business in this state. Once that condition is satisfied, the statute may be properly utilized in three situations:

> (1) where the nonresident made a contract with a resident of this state to be performed in whole or in part in this state;
> (2) where the nonresident committed a tort in whole or in part in this state against a resident or nonresident of this state; or
> (3) where the nonresident did business or performed any character of work

or service in this state.

If the nonresident's conduct can be characterized as fitting any one of the aforementioned three categories, then such resident will be deemed subject to jurisdiction of the courts of Mississippi, provided that compliance with the protections of the Due Process Clause can be maintained. ***Sorrells v. R&R Custom Coach Works, Inc.*, 636 So. 2d 668, 671 (Miss. 1994) (citations omitted).**

To assert personal jurisdiction over [the non-resident defendant] corporation, it must be amenable to suit under Mississippi's long arm statute. This statute allows exercise of personal jurisdiction over a nonresident corporation if it made a contract with a Mississippi resident to be performed in whole or in part in this state, committed a tort in whole or in part in this state against a resident or nonresident, or conducted any business or performed any character of work or service in Mississippi. ***Kekko v. K&B Louisiana Corp.*, 716 So. 2d 682, 682 (Miss. Ct. App. 1998) (citations omitted).**

Contract

Mississippi's long-arm statute allows exercise of personal jurisdiction over a nonresident corporation if, among other situations, the nonresident made a contract with a Mississippi resident to be performed in whole or in part in this state. If such a contract was entered, then the non-resident will be subject to jurisdiction of Mississippi courts, provided that the exercise of jurisdiction is consistent with due process. ***American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545, 549 (Miss. Ct. App. 2000) (citations omitted).**

The parties' agreement that an oral contract existed for goods to be manufactured in Mississippi for sale to the defendant is sufficient to support a finding that there was a contract to be performed in part in Mississippi. [The defendant] is therefore amenable to suit under the long-arm statute. ***American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545, 549 (Miss. Ct. App. 2000) (citations omitted).**

Interpreting Mississippi law . . . as allowing personal jurisdiction when only a single contract exists, another court correctly stated that:

> [T]his court specifically adopted the "single tort" provision as a proper basis for acquiring jurisdiction over a nonresident defendant. We recognized the present trend of the state supreme court to broaden the scope of in personam jurisdiction in tort cases, and are persuaded that the same result is required in the "single contract" case by a plain reading of the amended statute.

***Sorrells v. R&R Custom Coach Works, Inc.*, 636 So. 2d 668, 671 (Miss. 1994).**

Although a single contract between [the defendant] and the [plaintiffs] would be sufficient to impose personal jurisdiction upon [the defendant] under the "contracts" prong of the long-arm statute, no contract other than the express or implied manufacturer's warranties existed between the [plaintiffs] and [the defendant]. But, since warranties are a form of contract, the existence of a warranty might satisfy this category, if the contract was to be performed in whole or in part in Mississippi. ***Sorrells v. R&R Custom Coach Works, Inc.*, 636 So. 2d 668, 671 (Miss. 1994) (citations omitted).**

Tort

The Mississippi long arm statute subjects a nonresident corporation to jurisdiction of this state's courts if it committed a tort, in whole or in part, within this state. . . . Consequently, any jurisdiction over [the non-resident defendant] based on the tort prong of our long arm must be supported by a tort committed by [the defendant], in whole or in part, in Mississippi. . . . ***Gross v. Chevrolet Country, Inc.*, 655 So. 2d 873, 879 (Miss. 1995).**

For purposes of the tort prong of Mississippi's long arm statute, "a tortious act outside the state which causes injury within the state confers jurisdiction on the courts of that state." ***Gross v. Chevrolet Country, Inc.*, 655 So. 2d 873, 879 (Miss. 1995) (citations omitted).**

Torts arise from breaches of duties causing injuries, and it is common experience that breach and causation and impact do not all always happen at once. . . . We find instructive our experience in personal jurisdiction problems in products liability suits against non-residents. The context invariably is that the defendant has manufactured the said-to-have-been-defective product in another state and placed it in the stream of commerce via which it ultimately arrives in Mississippi. Before plaintiff may hale the non-resident into this state's courts, he must show the tort has been committed "in whole or in part in this state." On the premise that the injury occurs in this state and the tort is not complete until the injury occurs, we have consistently sustained personal jurisdiction in such cases. In doing so, we have reasoned "the tort is committed, at least in part, in this state." ***Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1157 n.4 (Miss. 1992).**

The tort is not complete until the injury occurs, and if the injury occurs in this State, then, under the amended statute, the tort is committed, at least in part, in this State, and in personam jurisdiction of the nonresident tort feasor is conferred upon the Mississippi court. ***Smith v. Temco*, 252 So. 2d 212, 216 (Miss. 1971).**

Doing Business

Prior to the amendment of the long-arm statute in 1991, the test for determining whether a nonresident corporation is doing business in Mississippi was:

> (1) the nonresident corporation must purposefully do some act or consummate a transaction in Mississippi,
> (2) the cause of action must arise from or be connected with the act or transaction in Mississippi [the nexus test], and
> (3) the assumption of jurisdiction by Mississippi must not offend traditional notions of fair play and substantial justice.

Effective July 1, 1991, the legislature amended the statute and repealed the nexus test. The amended statute applies prospectively to actions commenced after its effective date. Because this suit was filed in 1994, we apply the amended statute and look to whether [the non-resident defendant] Corporation:

> (1) did some act or consummated a transaction in Mississippi and
> (2) whether the assumption of jurisdiction by this state would offend traditional notions of fair play and substantial justice.

***Kekko v. K&B Louisiana Corp.*, 716 So. 2d 682, 682-83 (Miss. Ct. App. 1998) (citations omitted).**

[Whether the assumption of jurisdiction by this state would offend traditional notions of fair play and substantial justice] must be considered in light of the amount and type of activity in Mississippi, convenience of the parties, whether the parties receive benefits and protections of Mississippi's laws, and the equities of the situation. ***Gross v. Chevrolet Country, Inc.*, 655 So. 2d 873, 877-78 (Miss. 1995) (citations omitted).**

Determinations of whether a defendant is "doing business" within the state proceeds on an ad hoc basis. The record reflects that:

> (1) [The defendant] was a native Mississippian, although he was a citizen of Tennessee at all times relevant hereto.
> (2) [The defendant] had incorporated Consolidated Enterprises, Inc. as a Mississippi corporation. . . .
> (3) [The defendant] had entered into a partnership which conducted business in Mississippi and owned land near Sardis, Mississippi.
> (4) He was a principal stockholder of Consolidated Agri Leasing, a Tennessee corporation which is qualified to do business in Mississippi and which in fact does conduct business here.

[The defendant] was doing business in Mississippi in the sense that he did various acts here for the purpose of realizing a pecuniary benefit or otherwise accomplishing an object. Though his domestic and business residences were in Memphis, [the defendant's] presence within Mississippi was of such a continuing and substantial a nature that we regard him doing business here within the

meaning and contemplation of § 13-3-57**.** ***McDaniel v. Ritter*****, 556 So. 2d 303, 308-09 (Miss. 1989) (citations omitted).**

Due Process Objections to Long-Arm In Personam Jurisdiction

[T]he Due Process Clause of the Fourteenth Amendment serves as a limitation on the power of a state's long-arm statute in the exercise of in personam jurisdiction over a non-resident defendant. One court has succinctly phrased the dual considerations as follows:

> There are two components of the state standard. First, the state's long-arm statute, as interpreted by the state courts, must apply. Second, its application in the particular case must comport with the due process requirements of the fourteenth amendment. Thus, the state standard, in referring to the power of state courts, incorporates elements of both state and federal law.

Sorrells v. R&R Custom Coach Works, Inc.**, 636 So. 2d 668, 671 (Miss. 1994) (citations omitted).**

By our decision today, we reiterate certain limitations placed upon our long-arm statute by the Due Process Clause. ***Sorrells v. R&R Custom Coach Works, Inc.*****, 636 So. 2d 668, 669 (Miss. 1994).**

Even though a provision of the long-arm statute is satisfied, we must also determine whether the exercise of jurisdiction here is consistent with constitutional due process. The United States Supreme Court has established the fundamental guidance that we are to follow. A defendant must have "minimum contacts" with the forum state so that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." The defendant's conduct relating to the forum state must have been sufficient to create a reasonable expectation that he could be brought into that state's courts. Though the two standards have some overlap, we consider them separately. ***American Cable Corp. v. Trilogy Communications, Inc.*****, 754 So. 2d 545, 549-50 (Miss. Ct. App. 2000) (citations omitted).**

Assuming, [the defendant] was "doing business" in this state, traditional notions of fair play and substantial justice would be offended by requiring [the defendant] to defend a suit in Mississippi due to the lack of purposeful, continuous, and systematic contacts with the state and [the defendant's] failure to invoke the benefits and protections of Mississippi laws. ***Gross v. Chevrolet Country, Inc.*****, 655 So. 2d 873, 879-80 (Miss. 1995) (citations omitted).**

Minimum Contacts

[The defendant] has no contacts with Mississippi which would cause reasonable anticipation that it would be "haled into court" here. Not only are there no substantial, continuous, and deliberate contacts with Mississippi, there is no purposeful availment of the Mississippi market and no invocation of the benefits or protections of Mississippi laws. In sum, [the defendant] does not have the requisite minium contacts with Mississippi such that it would be reasonable to require [the defendant] to defend suit here. ***Gross v. Chevrolet Country, Inc.*, 655 So. 2d 873, 879 (Miss. 1995) (citations omitted).**

According to the Supreme Court, the due process requirement of "minimum contacts" may be satisfied through conduct or contacts with the forum state which give rise to an exercise of either general jurisdiction or specific jurisdiction, as related by the following language:

> [T]he constitutional touchstone remains whether the defendant purposefully established "minimum contacts" in the forum State. Although it has been argued that foreseeability of causing injury in another State should be sufficient to establish contacts there when policy consideration so require, the Court has consistently held that this kind of foreseeability is not a "sufficient benchmark" for exercising personal jurisdiction. Instead, "the foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. Thus where the defendant "deliberately" has engaged in significant activities within a State, or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by the "benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

***Sorrells v. R&R Custom Coach Works, Inc.*, 636 So. 2d 668, 673 (Miss. 1994) (citations omitted).**

The concept of "minimum contacts" can be further divided into contacts that create specific personal jurisdiction and those that lead to general personal jurisdiction. Jurisdiction is labeled "specific" when the nonresident defendant's contacts with the forum state are directly related to the cause of action. "General jurisdiction" will exist even without this direct relationship to the cause of action, if the defendant's contacts with the forum state are continuous and systematic. ***American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545, 550 (Miss. Ct. App. 2000) (citations omitted).**

General In Personam Jurisdiction

General jurisdiction over a foreign corporation may be properly exercised when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum state, but sufficient contacts exist between the forum state and the foreign corporation**.** ***Sorrells v. R&R Custom Coach Works, Inc.*****, 636 So. 2d 668, 673 (Miss. 1994) (citations omitted).**

When a claim involves an exercise of general jurisdiction, a defendant's contacts with the forum state must be so "systematic and continuous" as to reasonably support an exercise of jurisdiction. ***Sorrells v. R&R Custom Coach Works, Inc.*****, 636 So. 2d 668, 673 (Miss. 1994) (citations omitted).**

[In the instant case, the defendant's] contacts with Mississippi were neither systematic nor continuous. They therefore are insufficient to support an exercise of general jurisdiction. ***American Cable Corp. v. Trilogy Communications, Inc.*****, 754 So. 2d 545, 550 (Miss. Ct. App. 2000) (citations omitted).**

Specific In Personam Jurisdiction

If jurisdiction exists it is founded on the contacts arising out of [the defendant's] contract with [the plaintiff]. ***American Cable Corp. v. Trilogy Communications, Inc.*****, 754 So. 2d 545, 550 (Miss. Ct. App. 2000) (citations omitted).**

An assertion of in personam jurisdiction may be appropriate where "the controversy is related to or arises out of a defendant's contacts with the forum." Thus, the controversy in the case sub judice must have been related to or arisen out of [the defendant's] contacts with Mississippi before an exercise of specific jurisdiction could be deemed proper. ***Sorrells v. R&R Custom Coach Works, Inc.*****, 636 So. 2d 668, 673-74 (Miss. 1994) (citations omitted).**

Among the factors considered by courts in determining whether specific jurisdiction exists is whether the defendant or the plaintiff initiated the contacts with the forum state. . . . Though the distinction of "who started it" may appear minor, in fact this shows that the nonresident buyer reached out beyond its [state's] home and itself initiated negotiations with a foreign corporation in Mississippi. ***American Cable Corp. v. Trilogy Communications, Inc.*****, 754 So. 2d 545, 550 (Miss. Ct. App. 2000) (citations omitted).**

While a single contact can be a sufficient basis upon which to predicate specific jurisdiction, that single contact must be "purposeful," and directed at the forum. Again, since [the non-resident defendant] initiated contact with a corporation in Mississippi, this action showed purpose. ***American Cable Corp. v. Trilogy***

***Communications, Inc.*, 754 So. 2d 545, 550 (Miss. Ct. App. 2000) (citations omitted).**

Although no representative of [the defendant] ever traveled to Mississippi, specific jurisdiction may arise without the nonresident defendant's ever stepping foot upon the forum state's soil. What we review is whether the defendant purposefully conducted activities in the forum state. Did the defendant consciously seek the benefits offered by the forum state's resident company and incidentally receive the burden of that state's laws? It is the purposefulness of the decision that is important and not the physical presence of the defendant in the state. . . . What we find to be an accurate and quite relevant statement of the guiding principle is this "when a nonresident defendant takes purposeful and affirmative action, the effect of which is to cause business activity, foreseeable by the defendant in the forum state, such action by the defendant is considered a minimum contact for jurisdictional purposes." ***American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545, 551-52 (Miss. Ct. App. 2000) (citations omitted).**

Stream of Commerce

We also write to emphasize the requirement that a nonresident defendant do more than merely place its product in the "stream of commerce" before its actions will be deemed "purposefully directed" at Mississippi for purposes of Due Process analysis. ***Sorrells v. R&R Custom Coach Works, Inc.*, 636 So. 2d 668, 669 (Miss. 1994).**

Explaining the Due Process Clause limitations upon a forum state's jurisdictional power in the exercise of specific jurisdiction, and the relevant inquiry concerning placement of a product into the "stream of commerce", the Supreme Court has stated:

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, and the litigation results from alleged injuries that "arise out of or relate to" those activities. Thus "[t]he forum State does not exceed its power under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" and those products subsequently injure forum consumers.

Therefore, the dispositive inquiry becomes whether a defendant's mere awareness that its product might reach a forum state in the stream of commerce is sufficient to constitute "minimum contacts" and support an exercise of jurisdiction over it.

The Supreme Court of the United States has answered that question in the negative. There, the Supreme Court stated that:

> The "substantial connection," between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State. . . . But, a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

The placement of its product into the stream of commerce by [the defendant] does not constitute an act purposefully directed toward Mississippi. Although we do not elucidate what activities would be construed as actions directed towards a forum state, the record is completely devoid of any activity by [the defendant] indicative of an intent or purpose by [the defendant] to serve the Mississippi market. Consequently, [the defendant] did not purposefully direct any action toward Mississippi, and an exercise of specific jurisdiction could not be supported. ***Sorrells v. R&R Custom Coach Works, Inc.*, 636 So. 2d 668, 674-75 (Miss. 1994) (citations omitted).**

Traditional Notions of Fair Play & Substantial Justice

If a nonresident defendant has sufficient minimum contacts with the forum, the "fairness" factor of the jurisdictional inquiry must be examined. The Supreme Court has stated that the "fairness" of requiring a nonresident to defend a suit in a distant forum is a function of several factors, including the burden upon the nonresident defendant, the interests of the forum state, the plaintiff's interest in securing relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies. ***American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545, 552 (Miss. Ct. App. 2000) (citations omitted).**

Although the Mississippi forum is less convenient for [the non-resident defendant] than a Florida one, traditional notions of fair play and substantial justice are not infringed. ***American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545, 552 (Miss. Ct. App. 2000).**

Challenging a Court's Exercise of In Personam Jurisdiction

Mississippi Rule of Civil Procedure 12(b), Defenses & Objections, states in part:

> Every defense . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . Lack of jurisdiction over the person. . . No defense or objection is waived by being joined with one or more other defenses or objection in a responsive pleading or motion. . . .
>
> > Therefore, a moving party has a choice of making a M.R.C.P. 4(h) objection to process by filing a M.R.C.P. 12(b)(4)or(5) motion prior to filing a responsive pleading; by asserting other general affirmative defenses; or by filing them simultaneously therewith. The M.R.C.P. 4(h) defense is waived only after the filing of an answer or affirmative defenses if the defense is not asserted prior to or simultaneously within the answer. The rule also provides that the issue may be raised in an amended answer filed with leave of court under M.R.C.P. 15. . . . In the instant case, the issue was raised in Rains' initial pleading and then renewed in the subsequently filed answer and affirmative defenses. The issue was properly and timely pled. ***Rains v. Gardner*, 731 So. 2d 1192, 1197 (Miss. 1999).**

Waiver of Challenge to In Personam Jurisdiction if Not Timely Asserted

Mississippi Rule of Civil Procedure 12(h)(1), Defenses & Objections, states in part:

> A defense of lack of jurisdiction over the person . . . is waived:
> (A) if omitted from a motion in the circumstances described in subdivision (g) [Consolidation of Defense in Motion], or (B)if it is neither made by a motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.
>
> > Rule 12(h)(1) states that certain specified defenses which are available to a party when the party makes a pre-answer motion, but which are omitted from the pre-answer motion, are waived. The specified defenses include: (1) lack of personal jurisdiction; (2) improper venue; (3) insufficiency of process; and (4) insufficiency of service of process. In addition, Rule 12(h)(1) further provides that if a party answers rather than filing a pre-answer motion, the party must raise any of these specified defenses in the answer or an amended answer made as a matter of course pursuant to Rule 15(a) to avoid waiver of such defenses. ***Advisory Committee Notes.***

> A voluntary entry of appearance by a defendant no longer serves as a waiver of that defendant's right to subsequently contest the court's in personam jurisdiction arising from an alleged defect in the manner in which the defendant was served with process. . . . Despite this change that has grown out of the adoption of rules of procedure that mirror the Federal Rules of Civil Procedure, the right to contest the court's jurisdiction based on some perceived problem with service may yet be lost after making an appearance in the case if the issues related to jurisdiction are not raised at the first opportunity. Thus, a defendant appearing and filing an answer or otherwise proceeding to defend the case on the merits in some way - such as participating in hearings or discovery - may not subsequently attempt to assert jurisdictional questions based on claims of defects in service of process. The written entry of appearance itself is not considered a responsive pleading for these purposes. Therefore, that document standing alone does not effect a waiver of the right to contest in personam jurisdiction based on a challenge to the process. However, case law makes it clear that the challenge must be asserted by motion or otherwise at the first opportunity after the appearance or it is deemed waived. ***Schustz v. Buccaneer, Inc.*, 850 So. 2d 209, 213 (Miss. Ct. App. 2003) (citations omitted).**

Appeal of Trial Court's Ruling on In Personam Jurisdiction - De Novo

> An appellate court reviews jurisdictional issues de novo by examining the facts set out in the pleadings and exhibits to determine the propriety of the proceedings. Here we first consider [the defendant's] contention that the court lacked personal jurisdiction over it. A court that lacks personal jurisdiction over a defendant cannot enter a valid judgment against that defendant. If a judgment or order is void, it should be set aside. The grant or denial of a Rule 60(b) motion is generally within the discretion of the trial court. However, if the judgment is found to be void the only proper decision is to set the judgment aside. ***American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545, 549 (Miss. Ct. App. 2000) (citations omitted).**

***See* Mississippi Rule of Appellate Procedure 5.**

CHAPTER 7

VENUE

CHARTS

CHAPTER 7

VENUE

Venue is the proper or a possible place for a lawsuit to proceed, usually because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant. The territory, such as a country or other political subdivision, over which a trial court has jurisdiction. ***Black's Law Dictionary* (10th ed. 2014).**

Venue must be carefully distinguished from jurisdiction. Jurisdiction deals with the power of a court to hear and dispose of a given case; in the federal system, it involves questions of a constitutional dimension concerning the basic division of judicial power among the states and between state and federal courts. Venue is of a distinctly lower level of importance; it is simply a statutory device designed to facilitate and balance the objectives of optimum convenience for parties and witnesses and efficient allocation of judicial resources. ***Black's Law Dictionary* (10th ed. 2014).**

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VENUE IN CIVIL CASES

Venue Rule

Mississippi Rule of Civil Procedure 82, Jurisdiction and Venue, states in part:

> Except as provided by this rule, venue of all actions shall be as provided by statute. . . .

Venue Statutes

> In the final analysis, venue is about convenience. The legislative prescription implies a legislative finding [that] counties meeting certain criteria will generally be more convenient to the parties. ***Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1157 (Miss. 1992).**

Defendant is a Mississippi Resident

§ 11-11-3 Proper county; transfers; considerations; limitations waiver:

(1)(a)(i) Civil actions of which the circuit court has original jurisdiction shall be commenced

-in the county where the defendant resides, or
-in the county where a substantial alleged act or omission occurred or
-where a substantial event that caused the injury occurred.

> Of right, the plaintiff selects among the permissible venues, and his choice must be sustained unless in the end there is no credible evidence supporting the factual basis for the claim of venue. ***Hedgepeth v. Johnson*, 975 So. 2d 235, 238 (Miss. 2008) (citation omitted).**

(1)(a)(ii) Civil actions alleging a defective product may also be commenced
-in the county where the plaintiff obtained the product.

Defendant is a Mississippi Corporation

§ 11-11-3 Proper county; transfers; considerations; limitations waiver:

(1)(a)(i) Civil actions of which the circuit court has original jurisdiction shall be commenced

-in the county where the defendant resides, or
-in the county of its principal place of business, or
-in the county where a substantial alleged act or omission occurred or
-where a substantial event that caused the injury occurred.

> Clearly, Section 11-11-3(1)(a)(i) lays out four venue options from which plaintiffs can choose when filing a lawsuit. The first two are based on the status of the defendant; that is, if the defendant is a resident defendant, the suit may be filed in his county of residence; or, if the defendant is a corporation, the suit may be filed in the county of its principal place of business. The latter two venue options focus on the alleged acts or omissions of the defendants; that is, the suit may be filed where a substantial alleged act or omission occurred; or, finally, suit may be filed where a substantial event that caused the injury occurred. According to the clear language of the statute, "[c]ivil actions of which the circuit court has original jurisdiction shall be commenced in" one of these four places. ***Hedgepeth v. Johnson*, 975 So. 2d 235, 238-39 (Miss. 2008).**

(1)(a)(ii) Civil actions alleging a defective product may also be commenced
-in the county where the plaintiff obtained the product.

Explanation of Substantial

> Our legislature has provided no definition of the word "substantial" as it appears in our venue statute; we have also declined to clearly articulate one over a multitude of cases concerning this statute. "[I]n the absence of a statutory definition of a phrase, it must be given its common and ordinary meaning." . . . We have examined the notion of substantiality in our precedent concerning the substantial evidence rule, stating that "[s]ubstantial evidence means something more than a 'mere scintilla' or suspicion." A substantial act or event is one that bears more than a mere incidental relationship to the plaintiff's cause of action. . . . Substantiality is also often interpreted as a constraint designed to ensure that our judicial system proceeds along basic equitable principles. In the case sub judice, the defendant was not being haled into a remote district. Jones County and Covington County are adjoining counties. Taylor Construction was not haled into Covington County by Superior to establish venue but rather voluntarily entered into Covington County to load and later return 688 of the 732 mats it rented, which are central to the dispute. A substantial act then is one that bears a real relevance to the plaintiff's claim. The plaintiff's burden to demonstrate credible evidence for a choice of venue is a burden to demonstrate credible evidence of acts by the defendant in the chosen venue that have a real, not incidental,

relevance to the plaintiff's claim. The complaint, the exhibits to the complaint, the answer, and affidavits demonstrate credible evidence of multiple substantial acts and occurrences in Covington County. ***Taylor Constr. Co., Inc. v. Superior Mat Co., Inc.*, 298 So. 3d 956, 958-59 (Miss. 2020) (citations omitted).**

Defendant is a Municipality

§11-45-25 Suits by and against municipalities:

Suits against any municipality shall be instituted in the county in which such municipality is situated, where such actions are brought in the circuit courts, and where such municipality is wholly situated in one (1) county. In a case where a county has two (2) judicial districts, such suits shall be brought in the judicial district in which the municipality or its principal office is located. In cases where a municipality is located in two (2) counties, such suits shall be brought in the county in which the principal office of the municipality is located. . . .

Proper venue for a lawsuit against the City of Brandon, therefore, would be in Rankin County. ***Estate of Jones v. Quinn*, 716 So. 2d 624, 627 (Miss. 1998)**.

Defendant is a County

§ 11-45-17 Suits by and against county:

Any county may sue and be sued by its name, and suits against the county shall be instituted in any court having jurisdiction of the amount sitting at the county site; but suit shall not be brought by the county without the authority of the board of supervisors, except as otherwise provided by law.

A complaint against Simpson County, therefore, would be properly filed in Simpson County. ***Estate of Jones v. Quinn*, 716 So. 2d 624, 627 (Miss. 1998).**

Defendant is a State/Political Subdivision

§ 11-46-13(2) Jurisdiction; venue; appeals:

The venue for any suit filed under the provisions of this chapter [Immunity of State and Political Subdivisions From Liability and Suit for Torts and Torts of Employees] against the state or its employees shall be in the county in which the act, omission or event on which the liability phase of the action is based, occurred or took place. The venue for all other suits filed under the provisions of this chapter shall be in the county or judicial district thereof in which the principal offices of the governing body of the political subdivision are located. The venue specified in this subsection shall control in all actions filed against governmental entities, notwithstanding that other defendants which are not governmental entities may be joined in the suit, and notwithstanding the provisions of any other venue statute that otherwise would apply.

Section 11-46-13(2) provides that proper venue for a tort suit against any government entity, including a county or municipality, is "in the county or judicial district thereof in which the principal offices of the governing body of the political subdivision are located." ***Estate of Jones v. Quinn*, 716 So. 2d 624, 627 (Miss. 1998).**

The second sentence in § 11-46-13(2) regarding venue for suits against other political subdivisions does not apply here, because it controls only in "all *other* suits filed under the provisions of this chapter," meaning all suits other than those filed against state employees. ***Estate of Jones v. Quinn*, 716 So. 2d 624, 628 (Miss. 1998).**

Section 11-46-13(2) specifically states that no other venue statutes that otherwise would apply will be controlling in a lawsuit against the state or its employees. ***Estate of Jones v. Quinn*, 716 So. 2d 624, 628 (Miss. 1998).**

Multiple Plaintiffs

§ 11-11-3 Proper county; transfers; considerations; limitations waiver:

(2) In any civil action where more than one (1) plaintiff is joined, each plaintiff shall independently establish proper venue; it is not sufficient that venue is proper for any other plaintiff joined in the civil action.

When Venue is Determined

> [I]t is of no consequence that [certain defendants] were eventually dismissed from the suit, because proper venue is determined at the time the lawsuit is originally filed, and subsequent dismissal of the defendant upon whom venue is based does not destroy proper venue. ***Estate of Jones v. Quinn*, 716 So. 2d 624, 628 (Miss. 1998) (citation omitted).**

Joinder of Defendants & the Effect on Venue

Mississippi Rule of Civil Procedure 82, Jurisdiction and Venue, states in part:

> Where several claims or parties have been properly joined, the suit may be brought in any county in which any one of the claims could properly have been brought. Whenever an action has been commenced in a proper county, additional claims and parties may be joined, pursuant to Mississippi Rules of Civil Procedure 13, 14, 22, and 24, as ancillary thereto, without regard to whether that county would be a proper venue for an independent action on such claims or against such parties. . . .
>
> > Considering the Mississippi statutes and decisions as an entirety, the pertinent rule may be summarized in this way: Where an action is properly brought in a county in which one of the defendants resides, it may be retained notwithstanding there is a dismissal of the resident defendant, provided the following exists--the action was begun in good faith in the bona fide belief that plaintiff had a cause of action against the resident defendant; the joinder of the local defendant was not fraudulent or frivolous, with the intention of depriving the non-resident defendant of his right to be sued in his own county; and there was a reasonable claim of liability asserted against the resident defendant. ***New Biloxi Hospital, Inc. v. Frazier*, 146 So. 2d 882, 884-85 (Miss. 1962) (citations omitted).**

Fraudulent Joinder of Defendants for Venue Selection

This Court has held that the proper question is not whether the plaintiff's attorney intended to fraudulently establish venue, but whether the facts support inclusion of the defendant upon whom venue is based. ***Estate of Jones v. Quinn*, 716 So. 2d 624, 628 (Miss. 1998).**

In *New Biloxi Hospital, Inc. v. Frazier*, a standard was set for requiring the plaintiff to follow in order to prohibit abuse of the rule [of joinder for venue purposes]:

> (1) the action must be initiated in good faith in the bona fide belief that the plaintiff has a cause of action against the defendant upon whom venue is based;
> (2) the claim against the defendant upon whom venue is based must be neither fraudulent nor frivolous nor made with the intention of depriving the other defendants of their right to be sued in their own counties; and
> (3) there must be reasonable claim of liability asserted against the defendant upon whom venue is based.

***Blackledge v. Scott*, 530 So. 2d 1363, 1365 (Miss. 1988) (citation omitted).**

[W]hen this suit was brought, the Circuit Court of Jackson County had jurisdiction both of the subject matter and also venue jurisdiction. The action was filed in good faith against both [defendants]. The declaration contained substantial charges of negligence by [the resident defendant] as well as by [the other non-resident defendant]. . . . Under these circumstances, the question is whether the action may be maintained in Jackson County against the non-resident defendant, despite a dismissal against the resident defendant. We think it can. . . . Plaintiffs brought the action in good faith in the bona fide belief that they had a cause of action against [the resident defendant], there was no fraud, or frivolous joinder of the resident defendant, and plaintiffs asserted a reasonable claim of liability against him. Under these circumstances, a later settlement with the resident defendant did not deprive that court of venue and jurisdiction of the action. ***New Biloxi Hosp., Inc. v. Frazier*, 146 So. 2d 882, 884 (Miss. 1962).**

Motion for a Transfer of Venue to the Court With Proper Venue

The terminology in the next sections of this chapter intentionally draws a distinction between the phrases "transfer of venue" and "change of venue." "Transfer of venue" is used to discuss situations where a cause of action has been filed on one county, but venue is proper by statute in another county. The defendant will make a motion to transfer venue arguing "improper venue." The phrase "change of venue" is used when venue is proper in the county in which the cause of action was filed, but because of some extenuating circumstances, venue needs to be changed.

§ 11-11-3 Proper county; transfers; considerations; limitations waiver:

(4)(a) If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties and witnesses a claim or action would be more properly heard in a forum outside this state or in a different county of proper venue within this state, the court shall decline to adjudicate the matter under the doctrine of forum non conveniens. As to a claim or action that would be more properly heard in a forum outside this state, the court shall dismiss the claim or action. As to a claim or action that would be more properly heard in a different county of proper venue within this state, the venue shall be transferred to the appropriate county. In determining whether to grant a motion to dismiss an action or to transfer venue under the doctrine of forum non conveniens, the court shall give consideration to the following factors:

(i) Relative ease of access to sources of proof;
(ii) Availability and cost of compulsory process for attendance of unwilling witnesses;
(iii) Possibility of viewing of the premises, if viewing would be appropriate to the action;
(iv) Unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his remedy;
(v) Administrative difficulties for the forum courts;
(vi) Existence of local interests in deciding the case at home; and
(vii) The traditional deference given to a plaintiff's choice of forum.

(b) A court may not dismiss a claim under this subsection until the defendant files with the court or with the clerk of the court a written stipulation that, with respect to a new action on the claim commenced by the plaintiff, all the defendants waive the right to assert a statute of limitations defense in all other states of the United States in which the claim was not barred by limitations at the time the claim was filed in this state as necessary to effect a tolling of the limitations periods in those states beginning on the date the claim was filed in this state and ending on the date the claim is dismissed.

Mississippi Rule of Civil Procedure 82(d), Jurisdiction and Venue, states in pertinent part:

> When an action is filed laying venue in the wrong county, the action shall not be dismissed, but the court, on timely motion, shall transfer the action to the court in which it might properly have been filed and the case shall proceed as though originally filed therein. The expenses of the transfer shall be borne by the plaintiff. The plaintiff shall have the right to select the court to which the action shall be transferred in the event the action might properly have been filed in more than one court.

In *Hedgepeth v. Johnson*, the Court explained:

> Clearly, Section 11-11-3(1)(a)(i) lays out four venue options jurisdiction shall be commenced in one of these four from which plaintiffs can choose when filing a lawsuit. The first two are based on the status of the defendant; that is, if the defendant is a resident defendant, the suit may be filed in his county of residence; or, if the defendant is a corporation, the suit may be filed in the county of its principal place of business. The latter two venue options focus on the alleged acts or omissions of the defendants; that is, the suit may be filed where a substantial alleged act or omission occurred; or, finally, suit may be filed where a substantial event that caused the injury occurred. According to the clear language of the statute, "[c]ivil actions of which the circuit court has original jurisdiction shall be commenced in" one of these four places.

Because Scott County is neither the "county where [either of] the defendant[s] reside[ ]" nor "the county [where either of the defendants have their] principal place of business," the Court need only consider whether Scott County is the "county where a substantial alleged act or omission occurred or where a substantial event that caused the injury occurred." . . . Carson's complaint alleged that venue is proper in Scott County because "substantial acts complained of herein as well as substantial events that caused the injury occurred in Scott County, Mississippi." The complaint also contains allegations that the appellees conspired against him to unlawfully issue and serve writs of garnishment even though they were aware of the existence of a supersedeas appeal bond. A review of the record reveals that, in fact, Linley and Hurdle served two writs of garnishment in Scott County, Mississippi, for the purpose of taking Carson's funds. Importantly, Linley and Hurdle's service of the writs, their purpose, and the garnishing of Carson's funds are undisputed facts. Contesting Carson's venue choice, Linley and Hurdle argued that no alleged act or omission occurred in Scott County. Hurdle explained "that the conspiracy alleged in the subject Complaint, as well as the requests for the Writs of Garnishment, are the substantial alleged acts or omissions . . .

that led to the claimed injury." We agree with the trial court that Carson alleged a conspiracy by the appellees to wrongfully seize his money. However, the trial court erred when it concluded that "everything that the [appellees] did or didn't do in furtherance of wrongfully seizing [Carson's] money happened in Oktibbeha County." Carson's well-pleaded complaint, the uncontested facts, and evidence presented reveal that he alleged that a substantial act occurred in Scott County, Mississippi; specifically, service of the writs of garnishment. Linley and Hurdle agree that they served the writs in Scott County with the intent to garnish Carson's funds. However, they argue no injury occurred in Scott County, explaining, "there really wasn't any money taken out of Scott County. It was a paper transaction, but no money." In other words, Linley and Hurdle argue that service of the writs is not a substantial injury-causing event. Assuming service of the writs is not a substantial injury-causing event, an act "can nevertheless establish venue if it is both substantial and alleged by the plaintiff." The service of the writs of garnishment in Scott County, Mississippi, is a substantial alleged overt act or omission in furtherance of the alleged unlawful conspiracy to seize Carson's funds. Moreover, the overt act of serving the writs in Scott County effectuated the alleged unlawful purpose of seizing Carson's funds. . . . "It is the plaintiff's prerogative to decide where, among permissible venues, to sue the defendant." Carson had his choice of permissible venues, and he chose Scott County, Mississippi. Because Carson produced credible evidence supporting his choice of forum, we reverse the Scott County Circuit Court and remand the case for further proceedings in the Scott County Circuit Court. ***Carson v. Linley*, 292 So. 3d 212, 216-18 (Miss. 2020) (citations omitted).**

Superior filed suit against Taylor Construction in the Covington County Circuit Court, alleging breach of contract, open account, quantum meruit, and bad-faith breach of contract. Taylor Construction filed its answer along with a motion to transfer venue under Rule 82(d). After hearing arguments, the circuit court denied Taylor Construction's motion. . . . The Covington County Circuit Court found that credible evidence existed to support Superior's venue selection of Covington County. Relying on Mississippi Code Section 11-11-3(1)(a)(i), "in the county where a substantial alleged act or omission occurred," the circuit court found that substantial acts occurred in Covington County. Examining the allegations in the complaint, exhibits to the complaint, the defendant's answer, and the affidavits presented by the parties, the record demonstrates that the circuit court did not abuse its discretion. . . . It was agreed that Taylor Construction would pick up and return the lion's share of mats in Covington County. The pickup and return of mats was a substantial act or omission because the mats' rental and return occurred in Covington

> County. . . . Credible evidence exists in the record to support the circuit court's determination that the plaintiff's choice of venue was appropriate; accordingly, the circuit court did not abuse its discretion. We affirm the judgment of the circuit court. ***Taylor Constr. Co., Inc. v. Superior Mat Co., Inc.*, 298 So. 3d 956, 957-61 (Miss. 2020) (citations omitted).**

Procedure

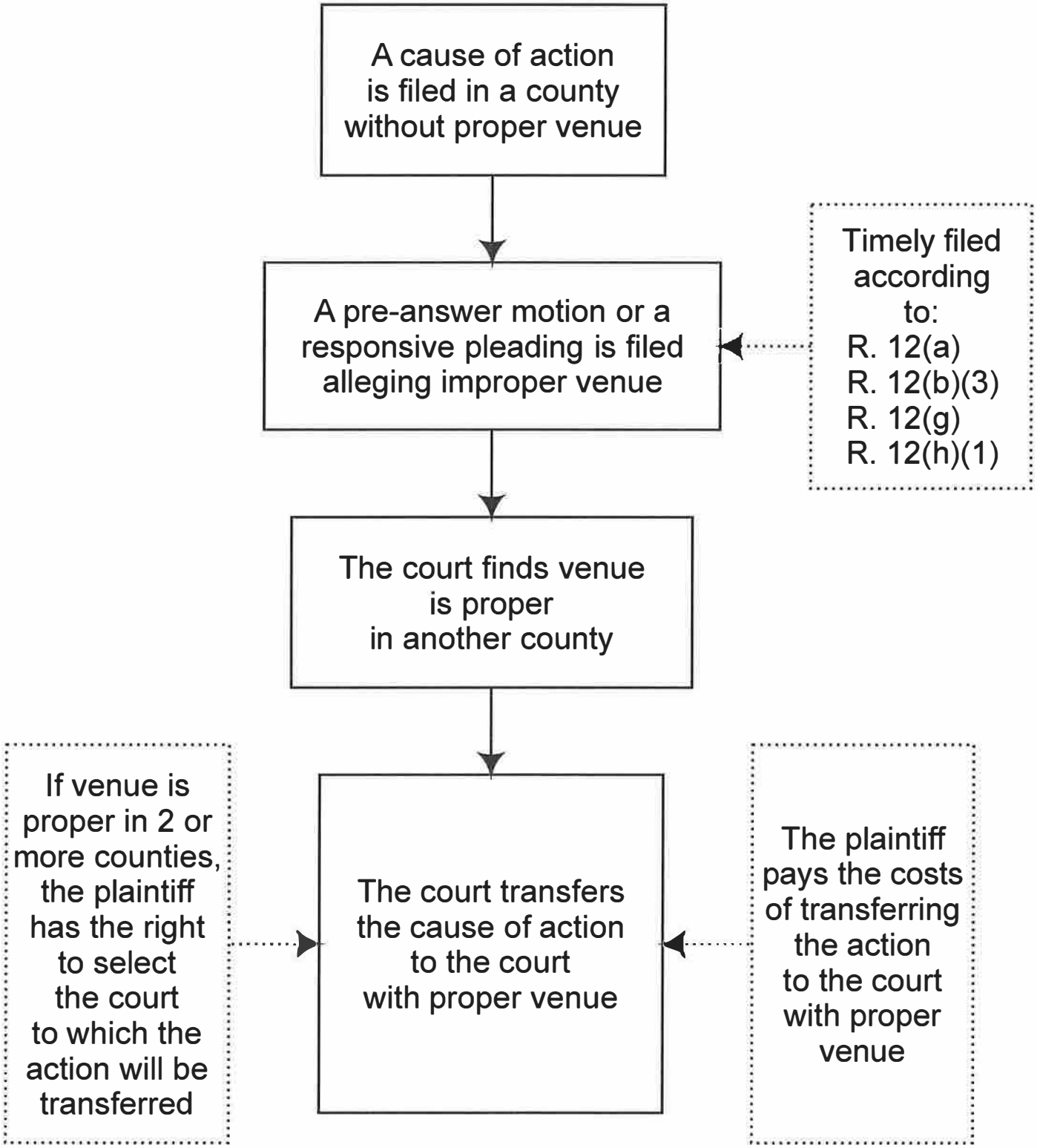
Mississippi Rule of Civil Procedure 12, Defenses and Objections, states in pertinent part:

> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . .
>
> (3) Improper venue, ...
>
> (d) Preliminary Hearings. The defenses specifically enumerated (1) through (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings (subdivision (c) of this rule), shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

> [T]he court at trial must give the plaintiff the benefit of the reasonable doubt [that venue is proper where filed]. . . . If in the end venue is improper, the court must honor timely objection and transfer to correct venue, and, if it does not do so, we must reverse. ***Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1155 (Miss. 1992).**

> [I]f venue is improper, the court on timely motion shall transfer the action to the court in which it might properly have been filed. . . . Never to be overlooked when such issues are raised in the trial courts is our policy that a defendant sued alone in personam shall be sued in the county of his residence. The defendant having timely objected to venue and moved to transfer, the trial court was bound to transfer this cause to the [county of the] defendant's . . . residence. ***Dunn v. Dunn*, 577 So. 2d 378, 379-80 (Miss. 1991).**

MOTION TO TRANSFER VENUE TO PROPER COURT



References:
Mississippi Rules of Civil Procedure 12(b)(3) & 82(d).

Waiver of Challenge to Venue if Not Timely Asserted

Mississippi Rule of Civil Procedure 12, Defenses and Objections, states in pertinent part:

> A defense of lack of . . . improper venue . . . is waived:
>
> > (A) if omitted from a motion in the circumstances described in subdivision (g) [Consolidation of Defenses in Motion], or
> > (B) if it is neither made by a motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course. . . .
> >
> > > Rule 12(h)(1) states that certain specified defenses which are available to a party when the party makes a pre-answer motion, but which are omitted from the pre-answer motion, are waived. . . . Rule 12(h)(1) further provides that if a party answers rather than filing a pre-answer motion, the party must raise any of these specified defenses in the answer or an amended answer made as a matter of course pursuant to Rule 15(a) to avoid waiver of such defenses. ***Advisory Committee Notes.***

What is important is that venue needs to be settled early on. This policy premise undergirds our rule that a defendant waives any objection to venue unless he asserts it early on. ***Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1155 (Miss. 1992) (citation omitted).**

In a well-reasoned opinion, the [court] explained why [the defendant] had waived his right to change venue:

> Rule 82(b) says that "Except as provided by this rule, venue of all actions shall be as provided by statute." Sub-section (d) provides that in the case of improper venue, upon timely motion made by defendant, the action shall be transferred to a proper court. . . . So [was] there was a timely motion made? . . . We go from there to Rule 12. Rule 12(a) provides that a defendant must answer within 30 days after the summons and complaint was served upon him. Rule 12(b) provides that every defense to a claim for relief in any plea shall be asserted in the responsive pleading when it is required, except as to certain defenses . . . [which] may at the option of the pleader be made by motion. One of those seven defenses is improper venue. Now, Rule 12(h)(1) provides that a defense of improper venue is waived if it's neither made by motion or in a responsive pleading. In other words, it can be waived if it's not made by a motion or other responsive pleading. . . . It's the opinion of this Court that the defendant waived the right of raising the defense of improper venue when he failed to include that defense with his Motion to Quash. . . . ***Lowrey v. Will of Smith*, 543 So. 2d 1155, 1158-59 (Miss. 1989).**

Motion for a Change of Venue

§ 11-11-51 Sufficient cause to change venue, generally:

When either party to any civil action in the circuit court shall desire to change the venue, he shall present to the court, or the judge of the district, a petition setting forth under oath that he has good reason to believe, and does believe that,

- from the undue influence of the adverse party [or],
- prejudice existing in the public mind, or
- for some other sufficient cause to be stated in the petition,

he cannot obtain a fair and impartial trial in the county where the action is pending, and that the application is made as soon as convenient after being advised of such undue influence, prejudice, or other cause, and not to delay the trial or to vex or harass the adverse party.

On reasonable notice in writing to the adverse party of the time and place of making the application, if made in vacation, the court, if in term time, or the judge in vacation, shall hear the parties and examine the evidence which either may adduce, and may award a change of venue to some convenient county where an impartial trial may be had, and, if practicable, in which the circuit court may next be held. If made in vacation, the order shall be indorsed on the petition and directed to the clerk, who shall file the same with the papers in the suit.

Timeliness of Motion

The defendants filed their motion for change of venue nearly two years after the action was commenced in the Circuit Court of George County. However, the motion was filed a full three months before the trial began. . . . The trial in this case was not delayed as a result of the change of venue, and a plain reading of § 11-11-51 clearly shows that the requirement of a timely filing is intended to prevent a party from filing a change of venue motion simply as a delay tactic. Since part of the basis of the change of venue motion was the amount of pre-trial publicity, it would have been premature to file such a motion so long before the trial that the effects of the publicity would have been too remote for a determination of resulting prejudice in the community. Based upon all of these facts, it cannot be said that the change of venue motion filed three months before the trial, and not resulting in any trial delay, was untimely. ***Beech v. Leaf River Forest Prod., Inc.*, 691 So. 2d 446, 449 (Miss. 1997).**

[T]his Court [has] affirmed a change of venue under Section 11-11-51 where the change was reasonable in light of extensive pretrial publicity and citizen bias against the defendants. ***Salts v. Gulf Nat. Life Ins. Co.*, 743 So. 2d 371, 374 (Miss. 1999) (citation omitted).**

[M]ere inconvenience is insufficient grounds for a change of venue from an obviously proper forum. ***Salts v. Gulf Nat. Life Ins. Co.*, 743 So. 2d 371, 375 (Miss. 1999).**

[The defendants] have not, however, shown bias under the statute [11-11-51] and have failed to prove [the plaintiff's] choice of venue would have denied them a fair and impartial trial, which the statute requires. While defending in [one] county may have been more burdensome on them than defending in [another] county, the statute clearly provides mere inconvenience is insufficient grounds for a change venue from an obviously proper forum. ***Pisharodi v. Golden Triangle Regional Med. Ctr.*, 735 So. 2d 353, 355 (Miss. 1999).**

§ 11-11-57 Limit of one removal:

A civil suit shall not be removed more than once, or in any other manner than as prescribed, and in no case where it shall appear that there has been unnecessary delay or negligence in making the application.

§ 11-11-53 Transfer of papers:

(1) When an order for a change of venue shall be made, the clerk shall make out a descriptive list of all the papers in the cause and a certified copy of all orders and judgments made therein, with their dates, and a bill of the costs that have accrued. The said clerk shall carefully and safely put all the papers, with a copy of the descriptive list, and a copy of the orders and judgments, and the bill of costs, into a package, to be well covered and sealed up, and directed to the clerk of the court in which the suit is ordered removed. The clerk shall, if not otherwise directed by the judge, take the receipt of the party obtaining the change of venue for the papers contained on said list, and deliver the package to said party, to be carried to the clerk of the court to whom it may be directed, or it may be sent by mail, postage paid, or by express, the clerk taking proper receipt therefor. . . .

§ 11-11-55 Duties of receiving court:

The clerk to whom the papers may be transmitted shall open the package and compare the papers with the descriptive list, and shall give the person delivering the same, if demanded, a receipt therefor. He shall then enter the cause on his docket as if it had been commenced in the court of which he is clerk, and issue subpoena for witnesses as in other cases.

Interlocutory Appeal on Issue of a Change or Transfer of Venue

This interlocutory appeal concerns our venue scheme in Mississippi as set forth in section 11-11-3 of the Mississippi Code. We may properly consider issues pertaining to venue via an interlocutory appeal. ***Forrest County Gen. Hosp. v. Conway*, 700 So. 2d 324, 326 (Miss. 1997) (citation omitted).**

[T]he petitioners filed a motion for a [transfer] of venue on the basis that the acts complained of did not occur or accrue in [the county where suit was filed.] [T]he lower court entered an order denying the petitioners' motion. [T]he petitioners requested that the lower court certify the issue for interlocutory appeal and stay any further proceedings pending appeal. [T]he lower court denied both requests and [this petitioner] filed a petition for interlocutory appeal and stay with this Court. . . . This Court finds that the petition for interlocutory appeal and stay of lower court proceedings should be granted. The Court further finds that the interlocutory appeal should be expedited for consideration on the merits. ***McMillan v. Puckett*, 641 So. 2d 757, 758-59 (Miss. 1994).**

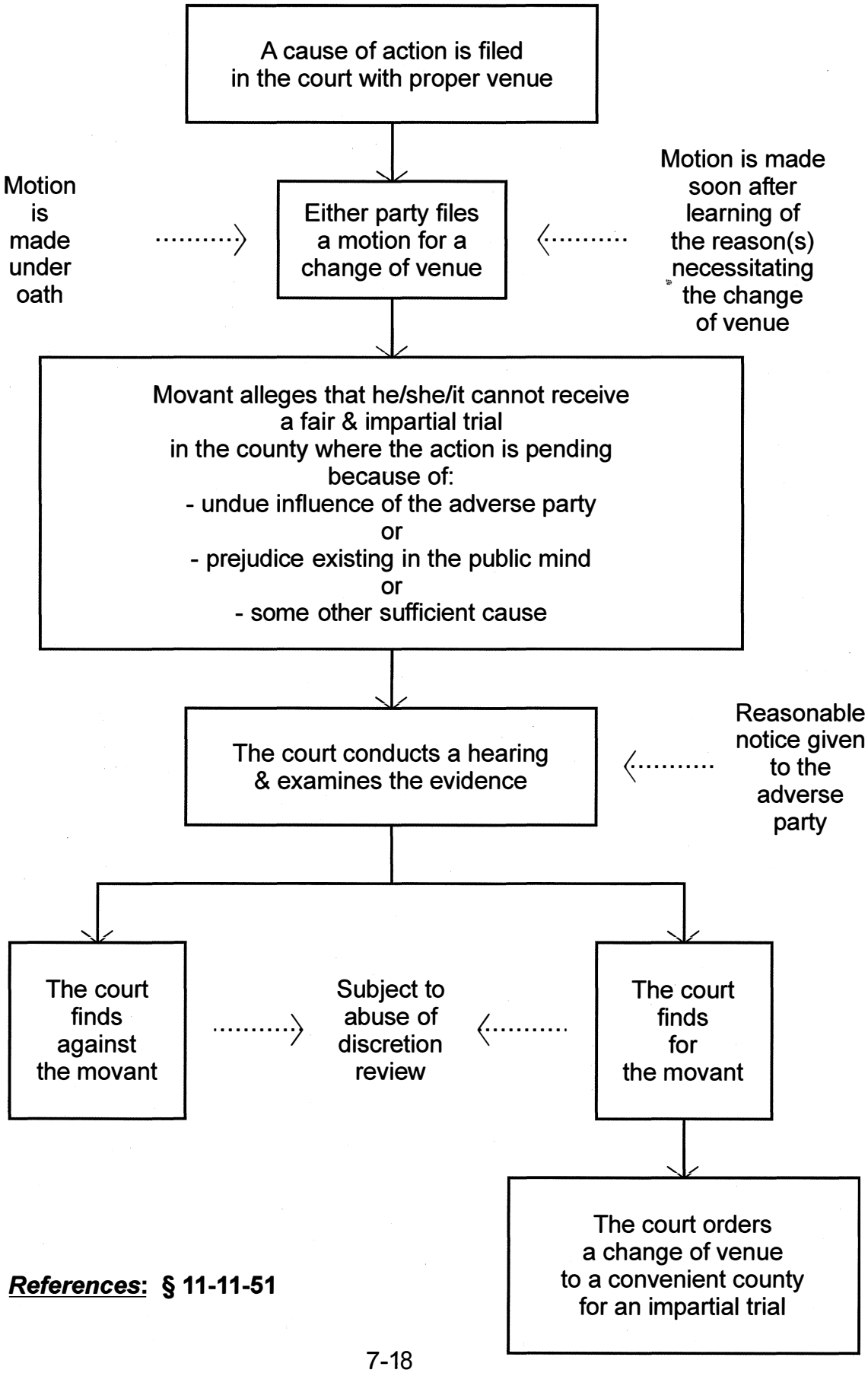
***See* Mississippi Rule Appellate Procedure 5.**

Standard of Review For a Change or Transfer of Venue

The decision to deny or grant a motion for a change of venue lies within the discretion of the trial court. We will not overturn that decision unless the trial court abuses its discretion. It is the plaintiff's prerogative to decide where, among permissible venues, to sue the defendant. Therefore, absent weighty reasons, a plaintiff's choice of forum should not be disturbed. That being said, one of the basic tenets in our jurisprudence is "no matter how guilty one may be, no matter how atrocious his crime, nor how certain his doom, when brought to trial anywhere he shall, nevertheless, have the same fair and impartial trial accorded to the most innocent defendant." Although "the decisions on change of venue deal primarily and predominantly with criminal cases, a person is also entitled to a fair and impartial trial in a civil case." ***Bayer Corp. v. Reed*, 932 So. 2d 786, 788-89 (Miss. 2006) (citations omitted).**

An application for a change of venue is addressed to the [sound] discretion of the trial judge, and his ruling thereon will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion or that the discretion has not been justly and properly exercised under the circumstances of the case. ***Beech v. Leaf River Forest Prod., Inc.*, 691 So. 2d 446, 448 (Miss. 1997).**

Motion for a Change of Venue in a Civil Action



References: **§ 11-11-51**

Forum Non Conveniens & Venue

§ 11-11-3 Proper county; transfers; considerations; limitations waiver:

(4)(a) If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties and witnesses a claim or action would be more properly heard in a forum outside this state or in a different county of proper venue within this state, the court shall decline to adjudicate the matter under the doctrine of forum non conveniens. . . .

Subsection four addresses the doctrine of forum non conveniens. ***Mississippi Baptist Health Sys., Inc. v. Harkins*, 245 So. 3d 370, 375 (Miss. 2018).**

Section 11-11-3, Mississippi's general venue statute, was amended in 2004, effectively codifying the common-law doctrine of forum non conveniens, which this Court first recognized in 1943 in *Strickland v. Humble Oil & Refining Co.*, 194 Miss. 194, 11 So. 2d 820 (1943) and later that year, in *Barnett v. National Surety Corp.*, 195 Miss. 528, 15 So. 2d 775 (1943). The common-law doctrine simply allows a court to dismiss a case - even where jurisdiction is authorized - upon determination that the plaintiff's chosen forum is a "seriously inconvenient forum" and a more suitable forum is available elsewhere. ***Alston v. Pope*, 112 So. 3d 422, 426 (Miss. 2013).**

Mississippi Rule of Civil Procedure 82(e), Forum Non-conveniens, states:

With respect to actions filed in an appropriate venue where venue is not otherwise designated or limited by statute, the court may, for the convenience of the parties and witnesses or in the interest of justice, transfer any action or any claim in any civil action to any court in which the action might have been properly filed and the case shall proceed as though originally filed therein.

This Court has held that the courts of this state should not try cases that would be seriously inconvenient to one or more of the parties, provided that a more appropriate forum can be found. This Court has also laid out a multi-factor test which should be considered in any application for forum non conveniens dismissal. The reviewing court must balance various public and private interests in order to determine if litigation in the chosen forum would seriously inconvenience a party. The factors are:

(1) relative ease and access to sources of proof;

(2) availability of compulsory process for obtaining attendance of unwilling witnesses;

(3) possibility of a view of the premises (if appropriate);
(4) expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his remedy;
(5) administrative burden on Mississippi courts in entertaining the suit;
(6) whether there are local interests in deciding the case at home; and
(7) the plaintiff's forum should rarely be disturbed.

***3M Co. v. Johnson*, 926 So. 2d 860, 863-64 (Miss. 2006).**

To the extent that any of our previous decisions indicated that the doctrine of intrastate forum non conveniens would apply in this state, they are hereby overruled. Giving respect to the plaintiff's choice of forum, we hold the doctrine of forum non conveniens to be inapplicable when the trial court is faced with a choice of venue between two Mississippi counties.

***Clark v. Luvel Dairy Prod., Inc.*, 731 So. 2d 1098, 1107 (Miss. 1998).**

VENUE IN CRIMINAL CASES

Right to Proper Venue

Mississippi Constitution, Article III, § 26 provides in pertinent part:

> In all criminal prosecutions the accused shall have a right to a . . . public trial by an impartial jury of the county where the offense was committed.
>
> > Proof of venue is indispensable to a criminal trial, and it may be proved by direct or circumstantial evidence. ***Smith v. State*, 646 So. 2d 538, 541 (Miss. 1994) (citations omitted).**

Venue Statutes

§ 99-11-1 General criminal jurisdiction:

> The several courts of justice organized under the constitution and laws of this state, shall possess the sole and exclusive jurisdiction of trying and punishing all persons in the manner prescribed by law, for crimes and offenses committed in this state, except such as are exclusively cognizable by the courts deriving their jurisdiction from the constitution and laws of the United States.

§ 99-11-3 Venue:

> (1) The local jurisdiction of all offenses, unless otherwise provided by law, shall be in the county where committed. But, if on the trial the evidence makes it doubtful in which of several counties, including that in which the indictment or affidavit alleges the offense was committed, such doubt shall not avail to procure the acquittal of the defendant. . . .

In Counties with Two (2) Judicial Districts

§ 99-11-37 Harrison or Hinds County; jurisdiction:

> (1) In Harrison County, a county having two (2) judicial districts, all crimes and misdemeanors shall be cognizable only in the proper court of the district in which the offense may be committed, and such court shall have jurisdiction of the same. (2) In Hinds County, a county having two (2) judicial districts, all crimes and misdemeanors committed in Hinds County shall be cognizable in the court of either judicial district of the county, and such court shall have jurisdiction of the same. Any and all proceedings may be conducted in either judicial district.

Crimes Involving More than One Venue

§ 99-11-17 Crimes commenced in Mississippi:

Where an offense is commenced in this state and consummated out of it, either directly or by the accused or by any means or agency procured by or proceeding from him, he may be indicted and tried in the county in which such offense was commenced or from which such means or agency proceeded.

§ 99-11-15 Crimes commenced outside Mississippi:

Where an offense is commenced out of this state and consummated in it, or where an offense is consummated in this state by any means or agency proceeding from a person out of this state, the person so commencing such offense or putting in operation such means or agency, although out of the state at the time such offense was actually consummated, shall be liable to indictment and punishment therefor in the county in which the offense was consummated.

§ 99-11-19 Crimes committed in multiple counties:

When an offense is committed partly in one county and partly in another, or where the acts, effects, means, or agency occur in whole or in part in different counties, the jurisdiction shall be in either county in which said offense was commenced, prosecuted, or consummated, where prosecution shall be first begun.

§ 99-11-21 Cause or occurrence of death:

Where the mortal stroke or other cause of death occurs or is given or administered in one county, and the death occurs in another county, the offender may be indicted and tried in either county; and so, also, if the mortal stroke or cause of death occur or be given or administered in another state or country and the death happen in this state, the offender may be indicted and tried in the county in which the death happened.

§ 99-11-23 Movement of stolen property:

Where property is stolen in another state or country and brought into this state, or is stolen in one county in this state and carried into another, the offender may be indicted and tried in any county into or through which the property may have passed, or where the same may be found.

Particular Crimes

§ 99-11-11 Embezzlement:

When an embezzlement is committed it may be prosecuted in the county in which the money or property, or some part thereof, was received or converted by the accused, or in the county in which he was under obligation to pay over the funds or to deliver up the property.

§ 99-11-13 Kidnapping:

Every person who shall be accused of kidnapping may be indicted and tried either in the county where the offense may have been committed, or in any county into or through which any person so kidnapped or confined shall have been taken while under such confinement.

§ 99-11-9 Jurisdiction of paternity proceedings:

The circuit court of the county in which an illegitimate child is born shall have jurisdiction of any action brought under § 97-29-11. . . .

Motion for a Change of Venue

The usual procedure employed when the accused believes he cannot get an impartial jury in a particular county is a motion for a change of venue. ***Hoops v. State*, 681 So. 2d 521, 526 (Miss. 1996).**

Fundamentally, the trial judge and this Court as well must keep ever in mind that a motion for change of venue raises not only a procedural point; rather, the office of the motion is to afford the accused that most fundamental of all rights he possesses under our law: his right to a fair trial before an impartial jury, secured to him by sections 14 and 26 of the Mississippi Constitution**.** ***Fisher v. State*, 481 So. 2d 203, 215 (Miss. 1985) (citations omitted).**

Procedure

§ 99-15-35 Change of venue:

On satisfactory showing, in writing, sworn to by the prisoner, made to the court, or to the judge thereof in vacation, supported by the affidavits of two or more credible persons, that, by reason of prejudgment of the case, or grudge or ill will to the defendant in the public mind, he cannot have a fair and impartial trial in the county where the offense is charged to have been committed, the circuit court, or

the judge thereof in vacation, may change the venue in any criminal case to a convenient county, upon such terms, as to the costs in the case, as may be proper.

> Lastly, Copple argues that the circuit court erred in failing to grant his motion for a change of venue due to excessive media coverage and the fact that there were two murder victims. The decision to grant or deny a motion for change of venue is within the discretion of the trial judge. Pursuant to Mississippi Code Annotated section 99-15-35, a motion for a change of venue must be in writing and supported by affidavits of two or more credible persons showing that the defendant cannot receive a fair and impartial trial in that county. When a proper change-of-venue motion is filed with the circuit court, a presumption arises that an impartial jury is unattainable, and the burden is on the State to rebut that presumption. In the present case, Copple did not properly support his change of venue motion with facts or affidavits; therefore, the presumption did not arise, and the State did not have the burden of proving that a fair trial could be obtained in Lowndes County. The record contains Copple's change of venue motion, but contains no other affidavits in support of the motion. As Copple did not satisfy section 99-15-35, this issue is without merit. Further, after reviewing the record, we do not find evidence that the circuit court erred in determining that the jurors were fair and impartial. During voir dire, the circuit court specifically addressed any pretrial publicity about the case. It asked the jury pool whether any of them had read, seen, or heard anything about the case. . . . The circuit court then asked all twenty-three jurors whether they had formed an opinion about how the case should be decided based on the publicity. Approximately five indicated that they had formed an opinion. Finally, the circuit court asked those five jurors whether they could set their opinion aside based on evidence presented at trial. Three said they could not change their opinion. Based on the record, it appears that those three jurors were excused for cause. The circuit court again addressed the twenty jurors remaining of the original twenty-three jurors, and again asked whether they could base their verdict on the evidence presented at trial and not the publicity. They responded that they could. Thus, of the sixty-nine potential jurors, only three indicated that they had heard publicity of the trial and that they had already formed an unchangeable opinion. Because Copple did not file a proper motion for change of venue, and there is no indication in the record that Copple did not receive a fair trial by an impartial jury, this issue is without merit. ***Copple v. State*, 117 So. 3d 651, 657-58 (Miss. Ct. App. 2013).**
>
> An application for change of venue must conform strictly to the statute. ***Baldwin v. State*, 732 So. 2d 236, 241 (Miss. 1999) (citations omitted).**

§ 99-15-43 Venue in capital cases:

In capital cases the application for change of venue must be made before the drawing of any special venire which is summoned to appear on the day the case is set for trial, or it will be too late, except where the ground on which such application is based occurred after the drawing of such venire.

Mississippi Rule of Criminal Procedure 11.1(a), Change of Venue, states in part:

The trial judge, for good cause, may grant the defendant a change of venue.

Mississippi Rule of Criminal Procedure 11.2, Transfer to Another County, states in part:

If a change of venue is granted pursuant to Rule 11.1, the judge shall direct that a certified copy of the order granting the change of venue be transmitted to the circuit clerk of the county to which the venue has been changed. The circuit clerk of the county to which the venue has been changed must file the certified order and designate a docket number for said case for future reference. Unless otherwise directed by the judge, all pleadings, motions, orders of the court, and other matters thereafter filed shall bear both the original number of the county of original venue and the assigned number of the county of changed venue, and shall be filed with the circuit clerk of the county of original venue.

The judge may hear or determine all pretrial and post-trial matters in the county to which venue has been changed or in any county of the judge's district. In all cases in which venue has been changed, it shall be within the judge's discretion, after the jury has been selected, to conduct the trial in the county of original venue or in the county to which venue has been transferred.

All costs of a trial transferred from one county to another county, including the cost of transporting the jury from one county to another where the same is ordered, shall be borne by the county of original venue. The clerk of the county of original venue shall handle any appeal.

§ 99-15-45 Costs of change of venue:

The county from which the venue is changed shall pay the costs and expenses incident to such change and trial in another county as if such change of venue had not been made.

Defendant Raises an Irrebuttable Presumption if Certain Elements Are Present

However, the presumption that an impartial jury can not be obtained may at times be irrebuttable. Elements which should serve to indicate an irrebuttable presumption are:

(1) Capital cases based on considerations of a heightened standard of review;
(2) Crowds threatening violence toward the accused;
(3) An inordinate amount of media coverage, particularly in cases of
    (a) serious crimes against influential families;
    (b) serious crimes against public officials;
    (c) serial crimes;
    (d) crimes committed by a black defendant upon a white victim;
    (e) where there is an inexperienced trial counsel.

***Evans v. State*, 725 So. 2d 613, 647 (Miss. 1997) (citations omitted).**

While the presumption may be rebutted during voir dire, "in some circumstances pretrial publicity can be so damaging and the presumption so great, that no voir dire can rebut it." We have set forth certain elements which, when present would serve as an indicator to the trial court as to when the presumption is irrebuttable. ***White v. State*, 495 So. 2d 1346, 1349 (Miss. 1986) (citations omitted).**

Defendant Raises a Rebuttable Presumption

A presumption of inability to conduct a fair trial in a venue arises with an application for change of venue, supported by two affidavits affirming the defendant's inability to receive a fair trial. ***Holland v. State*, 705 So. 2d 307, 336 (Miss. 1997).**

[The defendant] attached five form affidavits to his motion for change of venue. These affidavits indicated that the affiant(s) thought that [the defendant] could not get a fair trial in [the county where the offense took place] because of ill will toward the defendant. Accordingly, [the defendant] successfully raised a rebuttable presumption under our statutory law to demonstrate that an impartial jury could not be impaneled. . . . ***Morgan v. State*, 681 So. 2d 82, 91 (Miss. 1996).**

When these and similar circumstances exist, particularly in combination, it is incumbent that trial be had in as dispassionate an environment as possible. Judicial efficiency and economy would be better served by a change of venue prior to trial, than by trial, reversal and retrial. Justice would be better served by a fair trial initially. ***Johnson v. State*, 476 So. 2d 1195, 1215 (Miss. 1985).**

A motion for a change of venue is not automatically granted in a capital case. There must be a satisfactory showing that a defendant cannot receive a fair and impartial trial in the county where the offense is charged. ***Gray v. State*, 728 So. 2d 36, 65 (Miss. 1998).**

State's Rebuttal of the Defendant's Presumption

[T]he prosecution was charged with rebutting the presumption that [the defendant] could not obtain an impartial jury panel in [the county where the offense is charged]. ***Morgan v. State*, 681 So. 2d 82, 91 (Miss. 1996).**

The venire chosen in [the] [c]ounty [with venue] was thoroughly examined and questioned about whether they had been exposed to any form of publicity. The venire was questioned about their amount of exposure to any of the various forms of publicity. In addition, if any member was exposed, they were also questioned about whether such publicity would influence or affect their impartiality. The linchpin is whether the venire members stated that they could be fair and impartial jurors if chosen. The record reflects that each of the impaneled jury members affirmatively stated that they could serve as fair and impartial jurors. ***Simon v. State*, 688 So. 2d 791, 804 (Miss. 1997) (citations omitted).**

At [the change of venue] hearing, the State called seven witnesses with extensive ties to Leake County, who all testified that they were unaware of any general feelings of ill will in the community against [the defendant]. The witnesses were also unable to recall any extensive pre-trial publicity associated with the case. . . . After a careful review of the record, we are unconvinced that the defendant was denied a fair trial. ***Mason v. State*, 736 So. 2d 1053, 1055-56 (Miss. Ct . App. 1999).**

It is true that the great majority of those called for jury service nevertheless insisted that they could give [the defendant] a fair trial and would set aside what they had learned through the news media and heard otherwise about the case. All twelve of those seated so proclaimed. No doubt these jurors were responding in good faith and no doubt the trial judge accepted their responses in good faith. The saturation pre-trial publicity described above, however, suggests that there was and remains substantial doubt that [the defendant] could then or ever get a fair trial in Lauderdale County. ***Fisher v. State*, 481 So. 2d 203, 221-22 (Miss. 1985).**

Trial Court's Discretion

We have repeatedly held that the matter of whether venue should be changed in a criminal proceeding is committed to the sound discretion of the trial judge. . . .

We have repeated these notions so often in recent years that we have tended to overlook that the venue decision is committed to the trial judge's sound discretion, not his unfettered discretion. ***Fisher v. State*, 481 So. 2d 203, 215 (Miss. 1985).**

A motion for change of venue ordinarily should be granted where, under the totality of the circumstances it appears reasonably likely that, in the absence of such relief, the accused's right to a fair trail may be lost. ***Cabello v. State*, 490 So. 2d 852, 854 (Miss. 1986) (citations omitted).**

The sound exercise of the discretion vested in the trial judge when faced with a motion for change of venue must be informed by the evidence presented at the venue hearing coupled with the trial judge's reasoned application of his sense of the community and, particularly in a case such as this, an awareness of the incontrovertible impact of saturation media publicity upon the attitudes of a community. ***Fisher v. State*, 481 So. 2d 203, 215 (Miss. 1985).**

[We] are of the opinion that the trial court should have granted the motion for a change of venue at this point [after the defendant had presented the witnesses on his behalf]. [The defendant] made a prima facie showing of community prejudice by complying with the [statute's] formalities, i.e., submitting an affidavit signed by two witnesses with knowledge. The presumption was then raised to an irrebuttable level by the testimony of the fifteen defense witnesses [who included members of the news media] who stated specific reasons why [the defendant] could not receive a fair trial in Lauderdale County. ***Johnson v. State*, 476 So. 2d 1195, 1213 (Miss. 1985).**

Other Factors to Consider

1. The number of witnesses presented by the defendant at the hearing & who they are, i.e., members of the media - ***Johnson v. State*, 476 So. 2d 1195, 1211-12 (Miss. 1985).**
2. The number of articles in the newspaper and the number of reports played on television and radio about the case - ***Fisher v. State*, 481 So. 2d 203, 219 (Miss. 1985).**
3. The type of coverage the media is giving to the public, i.e., is the media telling information that would be inadmissible at trial, information about evidence uncovered in the case, or is someone involved in the case talking to the media - ***Fisher v. State*, 481 So. 2d 203, 217-20 (Miss. 1985).**
4. Who the State calls as witnesses to rebut the defendant's presumption - ***Fisher v. State*, 481 So. 2d 203, 222 (Miss. 1985).**
5. The number of potential jurors who raised their hands when asked if they knew or had heard about the case - ***White v. State*, 495 So. 2d 1346, 1348 (Miss. 1986); *Fisher v. State*, 481 So. 2d 203, 220 (Miss. 1985).**
6. The jurors statements that they can be fair and impartial - ***Hickson v.***

***State*, 707 So. 2d 536, 543 (Miss. 1997); *Fisher v. State*, 481 So. 2d 203, 221-22 (Miss. 1985).**

Standard of Review for a Change of Venue

This Court reviews the trial court's finding under an abuse of discretion standard. ***Holland v. State*, 705 So. 2d 307, 336 (Miss. 1997) (citation omitted).**

When the defendant alleges that he cannot obtain an impartial jury without a change of venue, the lower court's decision to deny such as motion is within the trial judge's sound discretion. Where this discretion has not been abused the decision of the lower court will not be overturned. ***Morgan v. State*, 681 So. 2d 82, 91 (Miss. 1996) (citations omitted).**

If a Change of Venue is Granted

§ 99-15-37 Transfer of records to removal court:

Upon the order being made changing the venue in a criminal case, the clerk shall make out a transcript of the caption of the record, also of the proceedings impaneling the grand jury, of the indictment, with the entries or indorsements thereon, and all entries relative thereto in the records of his office, of the bonds and recognizances of the defendant, of the names of all the witnesses, and of all orders, judgments, or other papers or proceedings belonging to or had in said cause and attach his certificate thereto, under his hand, with the seal of the court annexed, and forward it, sealed up, by a special messenger, or deliver it himself, together with all the original subpoenas in the case, to the clerk of the circuit court to which the trial is ordered to be removed.

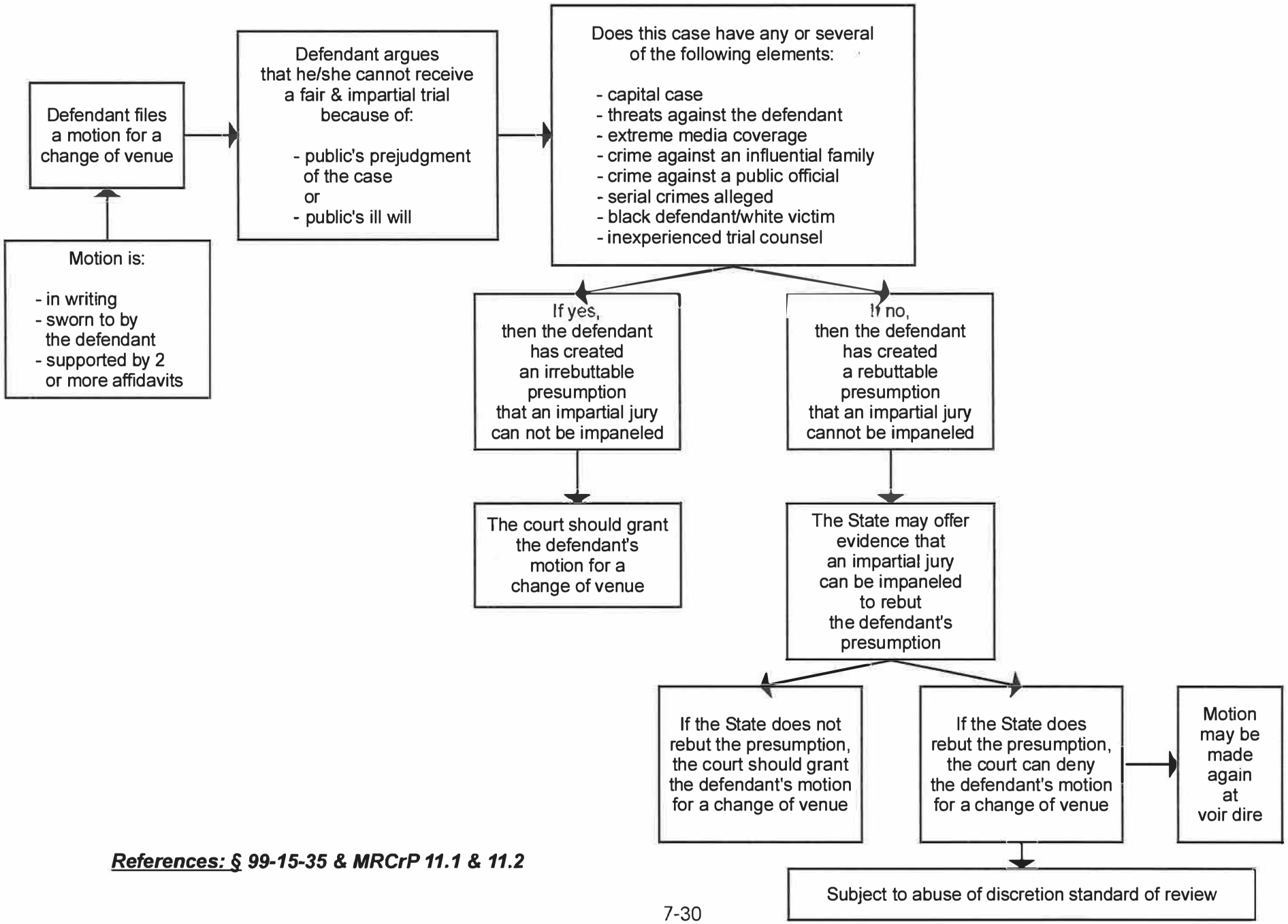
§ 99-15-39 Trial on indictment:

The defendant, on a change of venue, shall be tried on the copy of the indictment so certified; and the record, proceedings, and papers therein copied and certified, shall, in all respects become, be received, read, and taken as the original record, papers and proceedings in the said cause, and shall have the same force and effect. Defects in the transcript shall not avail the accused if he do not object to them specifically before trial.

§ 99-15-45 Costs of change of venue:

The county from which the venue is changed shall pay the costs and expenses incident to such change and trial in another county as if such change of venue had not been made.

Motion for a Change of Venue in a Criminal Proceeding



References: § 99-15-35 & MRCrP 11.1 & 11.2

CHAPTER 8

EVIDENCE

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EVIDENCE

Authentication

Mississippi Rule of Evidence 901, Authenticating or Identifying Evidence:

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

> Under Mississippi Rule of Evidence 901, the authentication requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Authentication is a condition precedent to admissibility. Moreover, [a] party must make a prima facie showing of authenticity, and then the evidence goes to the jury, which ultimately will determine the evidence's authenticity. ***Saunders v. State*, 241 So. 3d 645, 648 (Miss. Ct. App. 2018).**

(b) Examples. The following are examples only--not a complete list--of evidence that satisfies the requirement:

> (1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.
>
> (2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
>
> (3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.
>
> > Rule 901 of the Mississippi Rules of Evidence governs the authentication of documents in Mississippi trial courts. [The defendant] sought to have the exemplars and the statements in question authenticated by an expert witness under Rule 901(b)(3), which provides that a document may be authenticated by comparison by the trier of fact or by expert witness with specimens which have been authenticated. While this is an acceptable form of authentication, it is certainly not the only form. A handwritten document may be authenticated by someone who is familiar with the handwriting of the purported writer of the document. This rule of evidence is well-established in Mississippi case law. “A witness

> who in the course of official business or in any other way has acquired by experience a knowledge of a person's handwriting, may state his opinion as to whether a particular writing was made by such person." ***Flora v. State*, 925 So. 2d 797, 805-06 (Miss. 2006) (citation omitted).**

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) Opinion About a Voice. An opinion identifying a person's voice--whether heard firsthand or through mechanical or electronic transmission or recording--based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

> (A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or
>
> (B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Evidence About Public Records. Evidence that:

> (A) a document was recorded or filed in a public office as authorized by law; or
>
> (B) a purported public record or statement is from the office where items of this kind are kept.

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

> (A) is in a condition that creates no suspicion about its authenticity;
>
> (B) was in a place where, if authentic, it would likely be; and
>
> (C) is at least 20 years old when offered.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by the Mississippi Constitution or Court Rule. Any method of authentication or identification allowed by the Mississippi Constitution or a rule prescribed by the Mississippi Supreme Court.

Whether the evidence presented satisfies Miss. R. Evid. 401 and 901 is a matter left to the discretion of the trial judge. His decision will be upheld unless it can be shown that he abused his discretion. ***Stromas v. State*, 618 So. 2d 116, 119 (Miss. 1993).**

Self-Authentication

Mississippi Rule of Evidence 902, Evidence That Is Self-Authenticating:

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal--or its equivalent--that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so.

The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester--or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record--or a copy of a document that was recorded or filed in a public office as authorized by law--if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Mississippi Supreme Court pursuant to statutory authority.

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) Presumptions Under a Federal or State Statute. A signature, document, or other matter that a Mississippi or federal statute declares to be presumptively or prima facie genuine or authentic.

(11) Certified Records of a Regularly Conducted Activity. A record that meets the requirements of Rule 803(6), if a certificate of the custodian or another qualified witness complies with subparagraph (A).

(A) Certificate. The certificate must show:

(i) the custodian's or witness's first hand knowledge of the making, maintenance, and storage of the record; and
(ii) that the record complies with Article X and Rules 803(6)(A)-(C) and 901(a).

A certificate relating to a foreign record must also be accompanied by the final certification required by paragraph (3).

The foundational requirements for admitting evidence under the business records exception are:
1) the statement is in written or recorded form;
2) the record concerns acts, events, conditions, opinions or diagnoses;
3) the record was made at or near the time of the matter recorded;
4) the source of the information had personal knowledge of the matter;
5) the record was kept in the course of regular business activity; and
6) it was the regular practice of the business activity to make the record. ***Dillon v. Greenbriar Digging Service, Ltd.*, 919 So. 2d 172, 175 (Miss. Ct. App. 2005) (citation omitted).**

(B) Notice. Before the trial or hearing at which the record will be offered, the proponent must give an adverse party notice of the intent to offer the record--and must provide a copy of the record and certificate--so that the party has a fair opportunity to state any

objection. Otherwise, the record is not self-authenticating under this paragraph (11).

(C) Making Objections. An adverse party waives any objection that is not:

(i) stated specifically in writing; and
(ii) served within 15 days after receiving the notice required by subparagraph (B), or at a later time that the parties agree on or that the court allows.

(D) Hearing and Ruling on Objections. The proponent must schedule a hearing on any objection, and the court should determine admissibility of the record before the trial or hearing at which it may be offered. If the court cannot do so, the record is not self-authenticating under this paragraph (11).

(E) Sanctions. In a civil case after the trial or hearing, the proponent may move that the objecting party and attorney pay the expenses of presenting the evidence necessary to have the record admitted. The court must so order, if it determines that the objection raised no genuine question and lacked arguable good cause.

(F) Definitions. In this paragraph "certificate" means:

(i) for a domestic record, a written declaration under oath or attestation given under penalty of perjury; and
(ii) for a foreign record, a written declaration signed in a foreign country that, if falsely made, would subject the maker to criminal penalty under that country's laws.

(12) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification and notice requirements of Rule 902(11).

(13) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification and notice requirements of Rule 902(11).

Relevancy

Mississippi Rule of Evidence 401, Test for Relevant Evidence:

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the case.

Rule 401 makes no distinction between relevancy and materiality. The Mississippi Rules of Evidence 401 defines relevant evidence as evidence which makes the determination of the action more probable or less probable than without the evidence. If the evidence has any probative value, the rule favors admission. ***Suber v. Suber*, 936 So. 2d 945, 950 (Miss. Ct. App. 2006).**

Probative Value v. Prejudicial Effect

Mississippi Rule of Evidence 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

***Advisory Committee Note*:** Relevant evidence may be inadmissible when its probative value is outweighed by its tendency to mislead, to confuse, or to prejudice the jury. If the introduction of the evidence would waste more time than its probative value was worth, then a trial judge may rightly exclude such otherwise relevant evidence. By providing for the exclusion of evidence whose probativeness is outweighed by prejudice, Mississippi is following existing federal and state practice. Such a rule also keeps collateral issues from being injected into the case. This rule also gives the trial judge the discretion to exclude evidence which is merely cumulative.

Rule 403 is the ultimate filter through which all otherwise admissible evidence must pass. ***Jenkins v. State*, 75 So. 3d 49, 55 (Miss. Ct. App. 2011).**

While a trial court must certainly balance probative value and prejudice when evaluating evidence under Rule 403, a trial court's failure to articulate the balancing on the record does not require reversal. ***Brink v. State*, 888 So. 2d 437, 451 (Miss. Ct. App. 2004) (citations omitted).**

The trial court is afforded great discretion in determining whether or not to admit evidence under Rule 403. The Mississippi Supreme Court has long held that evidentiary rulings are within the trial judge's broad discretion and will only be reversed if the reviewing court perceives an abuse of that discretion. ***Gribble v. State*, 760 So. 2d 790, 792 (Miss. Ct. App. 2000).**

Photographs

> It is well settled in this state that the admission of photographs is a matter left to the sound discretion of the trial judge and that his decision favoring admissibility will not be disturbed absent a clear abuse of that judicial discretion. The discretion of the trial judge in this matter is almost unlimited, regardless of the gruesomeness, repetitiveness, and the extenuation of probative value. So long as a photograph has probative value and serves a meaningful evidentiary purpose, it may still be admissible despite being gruesome, grisly or inflammatory. The trial judge's discretion, however, while almost unlimited, is not completely unfettered. It has been noted by the Mississippi Supreme Court that photographs have been held to be so gruesome and inflammatory as to be prejudicial in only one circumstance, [a] close-up photograph of a partly decomposed, maggot-infested skull. Photographs are considered to have evidentiary value in the following instances: (1) aid in describing the circumstances of the killing; (2) describe the location of the body and the cause of death; (3) supplement or clarify witness testimony. ***Jones v. State*, 938 So. 2d 312, 316-17 (Miss. Ct. App. 2006) (citations omitted).**

Character Evidence

Mississippi Rule of Evidence 404, Character Evidence; Crimes or Other Acts:

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

> Although relevant, character evidence, also referred to as prior bad acts, may not be used for the purpose of proving that [a person] acted in conformity therewith on a particular occasion. But this rule has several exceptions, one of which is evidence of a pertinent trait of character of the victim of the crime offered by an accused. Another exception is where the evidence is not offered for character purposes, but rather for some other purpose. In this case, both exceptions apply. Rule 404(a)(2) which allows a defendant to admit evidence of a pertinent trait of character of the victim of the crime applies on its face. The character trait at issue violence is certainly pertinent to Richardson's claim of self-defense. And Rule 404(b) which allows character evidence to be introduced for other purposes applies because Richardson clearly and forcefully attempted to use the prior criminal history, not to show propensity, but to show his state of mind, that is, that at the time of the shooting, he feared Quilon, and that his fear was reasonable. Murder requires deliberate design. A killing in self-defense requires an objectively reasonable belief that lethal force was necessary to prevent death or serious bodily harm. Richardson's claim of self-defense not only allows, but requires evidence of the defendant's state of mind at the time of the killing. So, evidence showing Richardson's knowledge of Quilon's prior violent criminal history was quite clearly relevant under Rule 401's standard and admissible under the standards of Rule 404(a)(2) and Rule 404(b). ***Richardson v. State*, 147 So. 3d 838, 841-42 (Miss. 2014).**

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

> (A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
>
> (B) a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; and
>
> (C) the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

If evidence is admissible under Rule 404(b), it still must pass through Rule 403, which is the ultimate filter through which all otherwise admissible evidence must pass. ***Horton v. State*, 253 So. 3d 334, 341 (Miss. Ct. App.), *cert. denied*, 252 So. 3d 595 (Miss. 2018).**

While evidence of other crimes or bad acts is not usually admissible, an exception exists where [the evidence] is necessary to show identity, knowledge, intent, [or] motive[;] or to prove scienter. Another exception exists where the evidence is necessary to tell the complete story so as not to confuse the jury. ***Barber v. State*, 143 So. 3d 586, 591 (Miss. Ct. App. 2013).**

The trial judge instructed the jury that it could consider Cole's prior bad acts to show among other things the absence of mistake or accident. Where a defendant does not put mistake or accident at issue or where a reasonable juror could not conclude from the evidence that the defendant's conduct was an accident or mistake, prior-bad-acts evidence may not be admitted for that purpose. . . . We therefore cannot say that the trial judge abused his discretion in finding that the evidence of Cole's prior bad acts was admissible for the purpose of showing absence of accident or mistake. ***Cole v. State*, 126 So. 3d 880, 885 (Miss. 2013).**

Limiting Instructions

Mississippi Rule of Evidence 105, Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes:

> If the court admits evidence that is admissible against a party or for a purpose--but not against another party or for another purpose--the court, unless expressly waived or rebutted, shall restrict the evidence to its proper scope, contemporaneously instruct the jury accordingly, and give a written instruction if requested.

> > The burden should properly be upon the trial counsel to request a limiting instruction. This was our rule before *Smith v. State*, in accord with Rule 105 of the Mississippi Rules of Evidence. The rule provides in pertinent part that "[w]hen evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." We struggled in *Smith* to require judges to issue the sua sponte ruling, since that would contradict "a rule so clear" as M.R.E. 105. Today we abandon *Smith*'s requirement that a judge issue a sua sponte limiting instruction and return to the clear language of Rule 105. The rule clearly places the burden of requesting a Rule 404(b) limiting instruction upon counsel. ***Brown v. State*, 890 So. 2d 901, 913 (Miss. 2004) (citation omitted).**

Witnesses

Husband & Wife

Mississippi Rule of Evidence 601, Competency to Testify:

(a) In General. Every person is competent to be a witness, except as provided in subdivisions (b) and (c).

(b) Competency of Spouse. If one spouse is a party, the other spouse may not testify as a witness in the case unless both consent, except:

(1) when called as a witness by the spouse who is a party;

(2) in a controversy between them; or

(3) in a criminal case for:

(A) a criminal act against a child;

(B) contributing to the neglect or delinquency of a child;

(C) desertion or nonsupport of a child under 16; and

(D) abandonment of a child.

***Compare* § 13-1-5 Competency of spouses:**

Husbands and wives may be introduced by each other as witnesses in all cases, civil or criminal, and shall be competent witnesses in their own behalf, as against each other, in all controversies between them. Either spouse is a competent witness and may be compelled to testify against the other in any criminal prosecution of either husband or wife for a criminal act against any child, for contributing to the neglect or delinquency of a child, or desertion or nonsupport of children under the age of sixteen (16) years, or abandonment of children. But in all other instances where either of them is a party litigant the other shall not be competent as a witness and shall not be required to answer interrogatories or to make discovery of any matters involved in any such other instances without the consent of both.

Section 13-1-54 was superceded by Mississippi Rule of Evidence 601(a), but both contain similar language. ***Sandlin v. State*, 156 So. 3d 813, 818 (Miss. 2013).**

The record shows that, at the time of the homicide, appellant and his wife were divorced. . . . Since the parties were divorced at the time of the homicide, the wife was competent to testify as to the acts of the husband. ***Hudson v. McAdory*, 268 So. 2d 916, 923 (Miss. 1972).**

Husband-Wife Privilege

Mississippi Rule of Evidence 504, Spousal Privilege:

(a) Definition. A communication is "confidential" if a person makes it privately to the person's spouse and does not intend its disclosure to any other person.

(b) General Rule of Privilege. A person has a privilege to prevent the person's current or former spouse from testifying in a civil or criminal case about any confidential communication between them.

(c) Who may Claim the Privilege. Either spouse may claim the privilege. A spouse has authority to claim the privilege on the other spouse's behalf.

(d) Exceptions. The privilege does not apply:

(1) in a civil case between the spouses; or

(2) in a criminal case when one spouse is charged with a crime against:

(A) the person of a minor child; or

(B) the person or property of:

(i) the other spouse;

(ii) a resident of either spouse's household; or

(iii) a third person when committed during a crime against any person described in paragraphs (d)(1) and (2).

> After this transaction, and after the courts had severed the bonds of matrimony between him and his wife, will the courts permit him to tell about this transaction between himself and his wife, over the objections of his divorced wife? If to relate this story it can be said that the witness will be disclosing the confidences of husband and wife, we think the answer will be in the negative. On the other hand, if the witness is merely relating an ordinary business transaction, which the wife could have made with any other person, and which cannot be reasonably termed confidential, the answer must be the reverse. ***Hesdorffer v. Hiller*, 71 So. 166, 166-67 (Miss. 1916).**

Recorded Telephone Conversations

§ 41-29-503 Admission of evidence:

> The contents of an intercepted wire, oral or other communication and evidence derived from an intercepted wire, oral or other communication may not be received in evidence in any trial, hearing or other proceeding in or before any court, . . . if the disclosure of that information would be in violation of this article. *See* 18 U.S.C. § 2515 (1968).

§ 41-29-535 Application:

> This article shall not apply to a person who is a subscriber to a telephone operated by a communication common carrier and who intercepts a communication on a telephone to which he subscribes. This article shall not apply to persons who are members of the household of the subscriber who intercept communications on a telephone in the home of the subscriber. *See* 18 U.S.C. § 2511 (1968).

> The situation in the present case does appear to be factually distinguishable from those in *Stewart* and *Simpson*. In both of those cases, one spouse taped another spouse in the marital home. In this case Steve and Carol are not spouses, and have no marital home. The Fifth Circuit Court and this Court found no violation of the federal wiretapping statute, because they found that those situations fell within the business-use exception. The same logic that was applied in *Stewart* and *Simpson* should be applied to the case before

> us today. If there is no prohibition against a spouse recording the conversations of another spouse within the marital home, then it follows that there should be no prohibition against a custodial parent recording the conversations of her children in the custodial home. Steve argues that the *Simpson* decision should not be extended beyond its particular facts, but we do not consider this decision an extension. The logic behind these cases is as follows. It is permissible to record what one could just as easily hear by picking up an extension phone. ***Wright v. Stanley*, 700 So. 2d 274, 279 (Miss. 1997) (citations omitted).**

Appraiser

Mississippi Rule of Evidence 601, Competency to Testify:

> (c) Competency of Appraiser. When the court--as required by law--appoints a person to make an appraisal for the immediate possession of property in an eminent domain case:
>
> > (1) the appraiser may not testify as a witness in the trial of the case; and
> >
> > (2) the appraiser's report is not admissible in evidence during the trial.

Children

Mississippi Rule of Evidence 803, Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness:

> (25) Tender Years Exception. A statement by a child of tender years describing any act of sexual contact with or by another is admissible if:
>
> > (A) the court--after a hearing outside the jury's presence--determines that the statement's time, content, and circumstances provide substantial indicia of reliability; and
> >
> > (B) the child either:
> >
> > > (i) testifies; or
> > >
> > > (ii) is unavailable as a witness, and other evidence corroborates the act.

Under Mississippi Rule of Evidence 803(25), the "tender-years exception" to the hearsay rule, a witness may testify about statements made by a child of tender years describing any act of sexual contact with or by another. Before admitting this testimony, the trial judge must conduct a hearing outside the jury's presence and make two findings - - (1) the child was of tender years when she made the statement, and (2) the statement has substantial indicia of reliability. ***Nelson v. State*, 222 So. 3d 318, 323 (Miss. Ct. App. 2017).**

Tender Years

For the tender-years exception to apply, the child must be of tender years. In determining whether a child is of tender years, the circuit court should consider the age of the child at the time the statement was made, not the age of the child at the time of the trial. ***Little v. State*, 72 So. 3d 557, 560 (Miss. Ct. App. 2011).**

Today we hold that there is a rebuttable presumption that a child under the age of twelve is of tender years. Where an alleged sexual abuse victim is twelve or older, there is no such presumption and the trial court must make a case-by-case determination as to whether the victim is of tender years. This determination should be made on the record and based on a factual finding as to the victim's mental and emotional age. If the court finds that the declarant is of tender years, then it must still rule on the Rule 803(25)(a) and (b) factors before admitting the testimony. ***Veasley v. State*, 735 So. 2d 432, 436-37 (Miss. 1999).**

***See* § 99-43-101 Child witness standards of protection.**

Testimony Must Relate to Acts Performed With or On the Child

There was no sexual contact "performed with or on the child" as defined in M.R.E. 803(25) [for the testimony to be admissible]. ***Smith v. Jones*, 654 So. 2d 480, 491 (Miss. 1995).**

Indicia of Reliability

Some factors that the court should examine to determine if there is sufficient indicia of reliability are

(1) whether there is an apparent motive on declarant's part to lie;
(2) the general character of the declarant;
(3) whether more than one person heard the statements;
(4) whether the statements were made spontaneously;
(5) the timing of the declarations;
(6) the relationship between the declarant and the witness;
(7) the possibility of the declarant's faulty recollection is remote;
(8) certainty that the statements were made;
(9) the credibility of the person testifying about the statements;
(10) the age or maturity of the declarant;
(11) whether suggestive techniques were used in eliciting the statement; and
(12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated.

***Advisory Committee Note*:** Corroborating evidence may not be used as an indicia of reliability. A finding that there is a substantial indicia of reliability should be made on the record.

Again, this Court has previously held that no mechanical test is available to find substantial indicia of reliability. Although not an exhaustive list, some factors to consider are spontaneity and consistent repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate. Other factors to consider are whether there is an apparent motive on the part of the declarant to lie and the timing of the declarations. ***Hennington v. State*, 702 So. 2d 403, 418 (Miss. 1999).**

The reliability of the statement must be judged independently of any corroborating evidence; otherwise the confrontation clause may be violated. To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. ***Hennington v. State*, 702 So. 2d 403, 416 (Miss. 1999).**

Unavailability

Mississippi Rule of Evidence 804, Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness:

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant: . . .

(2) refuses to testify about the subject matter despite a court order to do so; . . .

> The trial judge's determination on the availability of a witness will not be disturbed on appeal unless this Court finds the trial judge abused his discretion. Clearly the record before this Court indicates the judge did all he could to persuade the child to testify. His repeated attempts were met with a flat refusal by the child. He simply did not want to go into court and testify about what had happened to him. We hold that the trial judge correctly found the child unavailable as a witness under Miss. R. Evid. 804(a)(2). ***Hennington v. State*, 702 So. 2d 403, 411 (Miss. 1999).**

(6) is a child for whom testifying in the physical presence of the accused is substantially likely to impair the child's emotional or psychological health substantially.

> The abuse of discretion standard is applied when considering a lower court's decision that a witness is unavailable, and the trial judge's determination will not be disturbed on appeal unless the appellate court finds that the trial judge abused his discretion. This Court finds that the trial court was entitled to rely on the uncontested testimony of the expert and did not abuse its discretion in finding that the children were unavailable within the meaning of M.R.E. 804(a)(6). ***Britt v. State*, 844 So. 2d 1180, 1184 (Miss. 2003).**

> The trial court must find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant, and the emotional distress that would be suffered by the child witness must be more than mere nervousness or a reluctance to testify. ***J.L.W.W. v. Clarke County Dep't of Human Services*, 759 So. 2d 1183, 1186 (Miss. 1999) (citations omitted).**

Expert Witnesses

Mississippi Rule of Evidence 702, Testimony by Expert Witnesses:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

For expert testimony to be admissible, it must be both relevant and reliable. The party offering the testimony must show that the expert based his opinion not on opinions or speculation, but rather on scientific methods and procedures. The Court made it clear the role that the trial judge plays in assessing whether to allow expert testimony: The trial judge enjoys a role as a gatekeeper in assessing the value of the testimony. To be relevant and reliable, the testimony must be scientifically valid and capable of being applied to the facts at issue. As the trial court operates as the gatekeeper as to the admissibility of expert testimony, we examine the trial court's decision under an abuse of discretion standard of review. ***Moss v. Batesville Casket Co.*, 935 So. 2d 393, 404 (Miss. 2006) (citations omitted).**

Qualifications

For a witness to be qualified as an expert, the witness must be qualified by virtue of his or her knowledge, skill, experience or education. ***Mississippi Transp. Comm'n v. McLemore*, 863 So. 2d 31, 35 (Miss. 2003) (citations omitted).**

Testimony

For expert testimony to be admissible, the witness' scientific, technical or other specialized knowledge must assist the trier of fact in understanding

or deciding a fact in issue. ***Mississippi Transp. Comm'n v. McLemore*, 863 So. 2d 31, 35 (Miss. 2003) (citations omitted).**

The trial court must determine that the expert testimony is relevant – that is, the requirement that the testimony must assist the trier of fact means the evidence must be relevant. ***Mississippi Transp. Comm'n v. McLemore*, 863 So. 2d 31, 38 (Miss. 2003) (citations omitted).**

The trial court must [also] determine whether the proffered testimony is reliable. ***Mississippi Transp. Comm'n v. McLemore*, 863 So. 2d 31, 38 (Miss. 2003) (citations omitted).**

The trial court 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). ***Edmonds v. State*, 955 So. 2d 787, 791 (Miss. 2007) (citations omitted).**

The trial court [should] also consider factors mentioned in *Daubert v. Merrell Dow Pharms., Inc.*:

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.

***Edmonds v. State*, 955 So. 2d 787, 791 (Miss. 2007) (citations omitted).**

Limitations on Expert Witness Testimony

Trial judges should remember their solemn gate-keeping responsibilities consistent with *Daubert*, our amended Rule 702, and *McLemore* and its progeny, whether it be assuring that an expert is confined to offering opinions within his/her areas of expertise or assuring that an expert's testimony is based upon sufficient facts and data, is the product of reliable principles and methods, and is based on the principles and methods having been applied reliably to the facts of the case. ***Bullock v. Lott*, 964 So. 2d 1119, 1129 (Miss. 2007) (citations omitted).**

The trial judges should take care that [a witness'] testimony as an expert is confined to the area of his expertise under Miss. R. Evid. 702. ***Stubbs v. State*, 845 So. 2d 656, 670 (Miss. 2003)**

Role of the Trial Judge

The trial judge acts as a gatekeeper, ensuring that expert testimony is both relevant and reliable. ***Bullock v. Lott*, 964 So. 2d 1119, 1128 (Miss. 2007) (citations omitted).**

The admission of expert testimony is within the sound discretion of the trial judge. ***Mississippi Transp. Comm'n v. McLemore*, 863 So. 2d 31, 34 (Miss. 2003) (citations omitted).**

The trial court's decision to allow expert testimony will be affirmed unless we can safely say that the trial court abused its judicial discretion in allowing or disallowing evidence so as to prejudice a party in a civil case, or the accused in a criminal case. ***Bullock v. Lott*, 964 So. 2d 1119, 1128 (Miss. 2007) (citations omitted).**

Other Expert Witness Testimony Rules

Mississippi Rule of Evidence 703, Bases of an Expert's Opinion Testimony:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible.

Mississippi Rule of Evidence 706, Court-Appointed Expert Witnesses:

> (a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.
>
> (b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:
>
> > (1) must advise the parties of any findings the expert makes;
> >
> > (2) may be deposed by any party;
> >
> > (3) may be called to testify by the court or any party; and
> >
> > (4) may be cross-examined by any party, including the party that called the expert.
>
> (c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:
>
> > (1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and
> >
> > (2) in any other civil case, by the parties in the proportion and at the time that the court directs--and the compensation is then charged like other costs.
>
> (d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

(f) Certain Eminent Domain Cases. Subdivisions (a)-(d) do not apply to an appraiser whom a court appoints--as required by law--for an immediate possession claim in an eminent domain case.

Exclusion of Witnesses

Mississippi Rule of Evidence 615, Excluding Witnesses:

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; or

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense.

> Applying these principles to this case, the trial court erred in allowing the Sheriff to testify. The Rule had clearly been invoked by both parties at the beginning of the trial. At that point, all witnesses-- case-in-chief witnesses and rebuttal witnesses--should have been sequestered. . . . ***Douglas v. State*, 525 So. 2d 1312, 1316 (Miss. 1988)**

Violations of the Rule

This Court has held that the possible remedies for violations of the sequestration rule include:

prohibiting the witness from testifying,
striking his testimony,
citing him for contempt, or
allowing a "full-bore" cross-examination.

***State v. Blenden*, 748 So. 2d 77, 85 (Miss. 1999)**

Hearsay

Definitions

Mississippi Rule of Evidence 801, Definitions That Apply to This Article; Exclusions from Hearsay:

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Hearsay Rule

Mississippi Rule of Evidence 802, The Rule Against Hearsay:

Hearsay is not admissible except as provided by law. The words "as provided by law" include other rules prescribed by the Mississippi Supreme Court."

Hearsay Exceptions - Availability of Declarant is Immaterial

Mississippi Rule of Evidence 803, Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

A present sense impression is a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. In *Clark v. State*, 693 So. 2d 927, 932 (Miss. 1997), the Mississippi Supreme Court held that the transcript of the victim's 911 call to the emergency operator fell within the present sense impression to the hearsay rule, because the events leading up to the call were sufficiently contemporaneous

to fit within the exception. ***Cabrere v. State*, 920 So. 2d 1062, 1065 (Miss. Ct. App. 2006)**

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition. The Mississippi Supreme Court [has] held that the transcript of the 911 call also fell within the excited utterance exception to the hearsay rule since it relates to the events that were unfolding as it was made, it was made while the victim was in an excited state, and it was made contemporaneously with the event. The circuit court was within its discretion in admitting the transcript of the 911 call into evidence. ***Cabrere v. State*, 920 So. 2d 1062, 1065 (Miss. Ct. App. 2006)**

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

The Court of Appeals addressed this same hearsay issue in *Edwards v. State*, 856 So. 2d 587 (Miss. Ct. App. 2003). The facts in *Edwards* are very similar to the case sub judice. Prior to his death, Nathaniel Edwards, Sr. (the victim) went to the home of his neighbor, a deputy police officer. The victim stated "I want you to come get my son out of the house because he is going to hit me in the head and take my money." The next day the victim was found dead with a lacerated head. The trial court admitted the evidence under M.R.E. 803(3) and allowed the officer to testify to the statement. In *Edwards*, the Court of Appeals correctly held that the trial court erred by admitting the hearsay statement pursuant to M.R.E. 803(3). However, the Court of Appeals found that the admission of the hearsay statement was harmless error because the properly admitted evidence was sufficient to support a jury verdict. We find that the statements in the case sub judice and *Edwards* are similar. The statements concerned two victims' desire to evict a defendant from their home prior to their deaths. Like *Edwards*, we find the trial court's admission of the testimony pursuant to M.R.E.

803(3) was error. However, the admission of the hearsay statement was harmless error because the properly admitted evidence was sufficient to support a jury verdict. ***McIntosh v. State*, 917 So. 2d 78, 82-83 (Miss. 2005)**

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made to any person at any time for--and is reasonably pertinent to--medical diagnosis or treatment;

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause; and

(C) is supported by circumstances that substantially indicate its trustworthiness.

In this paragraph, "medical" includes emotional, mental, and physical health.

Rule 803(4) provides that statements made for purposes of medical diagnosis or treatment are not excluded by the hearsay rule if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances substantially indicating their trustworthiness. A two-part test must be met before Rule 803(4) testimony may be admitted. First, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment, and second, the content of the statement must be such as is reasonably relied on by a physician in treatment. ***Osborne v. State*, 942 So. 2d 193, 197-98 (Miss. Ct. App. 2006)**

(5) Recorded Recollection. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11); and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

The radio log was a record of regularly conducted business activity. It was therefore admissible under the business records exception to the hearsay rule. Such records are admissible upon the showing of the following foundational requirements: (1) the statement is in written or recorded form; (2) the record concerns acts, events, conditions, opinions or diagnoses; (3) the record was made at or near the time of the matter recorded; (4) the source of the information had personal knowledge of the matter; (5) the record was kept in the course of regular business activity; and (6) it was the regular practice of the business activity to make the record. ***Cabrere v. State*, 920 So. 2d 1062, 1064 (Miss. Ct. App. 2006)**

Counsel established all the foundational requirements necessary to admit the inspection report under the business records exception to the hearsay rule. The inspection report was one that was kept daily on the same form prepared by the inspector that was working that day. Ploattski was competent to testify about the inspection report because he worked for Lexie as an inspector and regularly kept similar records on the same form. The supreme court [has] held that a person who is familiar with the contents, terms, and

meaning of a form is competent to give testimony regarding the foundational requirements of the business record exception. ***Dillon v. Greenbriar Digging Service, Ltd.*, 919 So. 2d 172, 176 (Miss. Ct. App. 2005)**

(7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law enforcement personnel; or

(iii) in a civil case or against the prosecution in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

The Department's field inspectors prepare a weekly "kill report" for each inspected plant. This report is used for statistical information to track the number and weight of animals being slaughtered in the state. The reports are prepared on-site, e-mailed to the Department's main office in Jackson where they are printed, and then are sent to the USDA, Department of Agriculture Statistics. The documents, although available in e-mail form only and therefore unsigned, are admissible as government records

prepared in the regular course of business pursuant to Mississippi Rules of Evidence 803(8). The records were authenticated at the Commission hearing by their custodian, and were admitted into evidence. ***Slay v. Spell*, 882 So. 2d 254, 259 (Miss. Ct. App. 2004)**

(9) Public Records of Vital Statistics. A record of a vital statistic, if reported to a public office in accordance with a legal duty.

(10) Absence of a Public Record. Testimony -- or a certification under Rule 902 -- that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that
(i) the record or statement does not exist; or
(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice -- unless the court sets a different time for the notice or the objection.

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

> (A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;
>
> (B) the record is kept in a public office; and
>
> (C) a statute authorizes recording documents of that kind in that office.

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose -- unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. A statement in a document that is at least 20 years old that was prepared before January 1, 1998, and whose authenticity is established.

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

> (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
>
> (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit. A treatise used in direct examination must be disclosed to an

opposing party without charge in discovery.

(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage--or among a person's associates or in the community--concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) Reputation Concerning Boundaries or General History. A reputation in a community--arising before the controversy--concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:

> (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
>
> (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
>
> (C) the evidence is admitted to prove any fact essential to the judgment; and
>
> (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgments Involving Personal, Family, or General History, or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

> (A) was essential to the judgment; and
>
> (B) could be proved by evidence of reputation.

(24) Other Exceptions. A statement not specifically covered by this Rule if:

(A) the statement has equivalent circumstantial guarantees of trustworthiness;

(B) it is offered as evidence of a material fact;

(C) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;

(D) admitting it will best serve the purposes of these rules and the interests of justice; and

(E) before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

> In *Parker v. State*, 606 So. 2d 1132, 1138 (Miss. 1992), we analyzed the five requirements for the admission of hearsay under M.R.E. 803(24), which provides the same residual exception for the admission of hearsay as M.R.E. 804(b)(5), regardless of whether the declarant is available to testify. The five requirements are
>
> trustworthiness,
> materiality,
> probative value,
> interests of justice, and
> notice.
>
> An on-the-record finding as to these five factors is generally required, and the trial judge has considerable discretion in determining whether to admit hearsay evidence under this exception and his decision will not be overturned except for an abuse of discretion**. *Rubenstein v. State*, 941 So. 2d 735, 751-52 (Miss. 2006)**

(25) Tender Years Exception. A statement by a child of tender years describing any act of sexual contact with or by another is admissible if:

(A) the court -- after a hearing outside the jury's presence -- determines that the statement's time, content, and circumstances provide substantial indicia of reliability; and

(B) the child either:

(i) testifies; or
(ii) is unavailable as a witness, and other evidence corroborates the act.

Hearsay Exceptions - Declarant Unavailable

Mississippi Rule of Evidence 804, Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness:

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness;

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4); or

(6) is a child for whom testifying in the physical presence of the accused is substantially likely to impair the child's emotional or psychological health substantially.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of Personal or Family History. A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) Other Exceptions. A statement not specifically covered by this Rule if:

(A) the statement has equivalent circumstantial guarantees of

trustworthiness;

(B) it is offered as evidence of a material fact;

(C) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;

(D) admitting it will best serve the purposes of these rules and the interests of justice; and

(E) before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

> We [have] held [that this] analysis [should be] applied to M.R.E. 804(b)(5). The five requirements [for admissibility] are
>
> trustworthiness,
> materiality,
> probative value,
> interests of justice, and
> notice.
>
> An on-the-record finding as to these five factors is generally required, and the trial judge has considerable discretion in determining whether to admit hearsay evidence under this exception and his decision will not be overturned except for an abuse of discretion. ***Rubenstein v. State*, 941 So. 2d 735, 751-52 (Miss. 2006)**

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.

Standard of Review for Admitting or Denying Evidence

This Court reviews a trial judge's decision to admit or deny evidence under an abuse-of-discretion standard. If an error involves the admission or exclusion of evidence, this Court will not reverse unless the error adversely affects a substantial right of a party. ***Robinson Property Group v. Mitchell*, 7 So. 3d 240, 244 (Miss. 2009).**

CHAPTER 9

LIMITATIONS OF ACTIONS

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CHAPTER 9

LIMITATIONS OF ACTIONS

Abatement, Survival and Revival of Actions

§ 15-1-69 Commencement of new action:

If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein, and his executor or administrator may, in case of the plaintiff's death, commence such new action, within the said one year.

Absence

§ 15-1-63 Person absent from state:

If, after any cause of action has accrued in this state, the person against whom it has accrued be absent from and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action, after he shall return.

Accounts

§ 15-1-29 Actions on an open account or account stated; unwritten contracts:

Except as otherwise provided in the Uniform Commercial Code, actions on an open account or account stated not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three (3) years next after the cause of such action accrued, and not after, except that an action based on an unwritten contract of employment shall be commenced within one (1) year next after the cause of such action accrued, and not after.

> [W]e conclude that an attorney's action against his client for fees for professional legal services rendered by the attorney to the client on open account pursuant to an unwritten agreement is subject to the three-year limitations period prescribed by § 15-1-29 for actions on an open account or any unwritten contract, not the one-year limitation period prescribed by the same statute for actions based on an unwritten contract of employment. ***Michael S. Fawer v. Evans*, 627 So. 2d 829 (Miss. 1993).**

§ 15-1-31 Actions to recover upon a mutual and open current account:

In all actions brought to recover the balance due upon a mutual and open current account, where both parties are merchants or traders, the cause of action shall be deemed to have accrued at the time of the true date of the last item proved in such account. In all other actions upon open accounts, the period of limitation shall commence to run against the several items thereof from the dates at which the same respectively became due and payable.

Actions Accruing Out of State

§ 15-1-65 Cause of action barred in foreign jurisdiction:

When a cause of action has accrued outside of this state, and by the laws of the place outside this state where such cause of action accrued, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state; provided, however, that where such a cause of action has accrued in favor of a resident of this state, this state's law on the period of limitation shall apply.

Adoption

§ 93-17-15 Limitations period, challenging final decree:

No action shall be brought to set aside any final decree of adoption, whether granted upon consent or personal process or on process by publication, except within six (6) months of the entry thereof.

Adverse Possession

§ 15-1-13 Adverse possession; exception:

(1) Ten (10) years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten (10) years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title, saving to persons under the disability of minority or unsoundness of mind the right to sue within ten (10) years after the removal of such disability, as provided in Section 15-1-7. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one (31) years.
(2) For claims of adverse possession not matured as of July 1, 1998, the provisions of subsection (1) shall not apply to a landowner upon whose property a

fence or driveway has been built who files with the chancery clerk within the ten (10) years required by this section a written notice that such fence or driveway is built without the permission of the landowner. Failure to file such notice shall not create any inference that property has been adversely possessed. The notice shall be filed in the land records by the chancery clerk and shall describe the property where said fence or driveway is constructed.

Alteration of Limitations by Contract

§ 15-1-5 Contractual change of period of limitation:

The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contracts stipulation whatsoever shall be absolutely null and void, the object of this section being to make the period of limitations for the various causes of action the same for all litigants.

Banks

§ 75-4-406 Customer's Duty to Discover and Report Unauthorized Signature or Alteration:

(f) Without regard to care or lack of care of either the customer or the bank, a customer who does not within one (1) year after the statement or items are made available to the customer (subsection (a)) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under Section 75-4-208 with respect to the unauthorized signature or alteration to which the preclusion applies.

§ 81-5-27 Stockholder liability:

The stockholders of every bank shall be individually liable, actually and ratably, and not for one another, for the benefit of the depositors in said bank at the amount of their stock at the par value thereof, and in addition to said stock. However, persons holding stock as executors, administrators, guardians or trustees shall not be personally liable as stockholders, but the assets and funds in their hands constituting the trust shall be liable to the same extent as the testator, intestate, ward, or person interested in such trust fund would be, if living or competent to act. Persons holding stock as collateral security shall not be personally liable as stockholders, but the person pledging such stock shall be deemed the stockholder and liable under this section. Such double liability may be enforced in a suit at law or in equity by the receiver of any bank in process of

liquidation. Such suit, however, shall be brought within six years from the date the bank went into liquidation and not thereafter. . . .

§ 15-1-79 Actions on debt issued by bank, moneyed corporation:

None of the provisions of this chapter shall apply to suits brought to enforce payment of notes, bills, or evidences of debt issued by any bank or moneyed corporation.

Bonds and Coupons

§ 31-19-33 Statute of limitations for action:

Action against the state or any county, municipality, school district or political subdivision of the state of Mississippi for the payment of any bond issued thereby or for the payment of any coupon representing interest on such bond shall be commenced within twenty (20) years after the maturity date of such bond.

§ 15-1-27 Actions by ward against a guardian or bond sureties:

All actions against a guardian and the sureties on his bond, or either of them, by the ward, shall be commenced within five years next after the ward shall have arrived at the age of twenty-one years, and not after.

Business Takeovers

§ 75-72-119 Investigation of violations:

(4) No action may be maintained under this section unless commenced before the expiration of three (3) years after the discovery of the facts constituting the violation. . . .

Concurrent Jurisdiction

§ 15-1-77 Concurrent jurisdiction; law and equity:

Whenever there be a concurrent jurisdiction in the courts of common law and in the courts of equity of any cause of action, the provisions of this chapter limiting a time for the commencement of a suit for such cause of action in a court of common law, shall apply to all suits to be brought for the same cause in a court of chancery.

Completion of Limitations

§ 15-1-3 Completion of period of limitation:

(1) The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy. . . .

Concealment

§ 15-1-67 Fraudulent concealment of claim:

If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

Construction Contracts and Works

§ 31-3-23 Appeals and remedies:

Within ten (10) days after any order, judgment or action of the board, any person aggrieved thereby may appeal such order, judgment or action either to the chancery court of the county wherein the appellant resides or to the Chancery Court of the First Judicial District of Hinds County, Mississippi. . . .

§ 85-7-189 Suit on bond; commencement:

(1) Suit on a performance claim by an obligee on a bond given in accordance with this chapter shall be commenced as follows:

(a) If the obligee is the owner of the project being constructed, such obligee shall bring suit within one (1) year after the earlier of final completion or actual use or occupancy of the project for its intended purpose; or

(b) If the obligee is other than an owner of the project being constructed, such obligee shall bring suit within one (1) year after such obligee receives final payment with respect to the project.

(2) When suit is instituted on a claim for payment on a payment bond given in accordance with this chapter, it shall be commenced within one (1) year after the day on which the last of the labor was performed or material or rental or lease equipment was supplied by the person bringing the action and not later. . . .

§ 15-1-41 Actions arising from construction deficiencies:

No action may be brought to recover damages for injury to property, real or personal, or for an injury to the person, arising out of any deficiency in the design, planning, supervision or observation of construction, or construction of an improvement to real property, and no action may be brought for contribution or indemnity for damages sustained on account of such injury except by prior written agreement providing for such contribution or indemnity, against any person, firm or corporation performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than six (6) years after the written acceptance or actual occupancy or use, whichever occurs first, of such improvement by the owner thereof. This limitation shall apply to actions against persons, firms and corporations performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property for the State of Mississippi or any agency, department, institution or political subdivision thereof as well as for any private or nongovernmental entity. This limitation shall not apply to any person, firm or corporation in actual possession and control as owner, tenant or otherwise of the improvement at the time the defective and unsafe condition of such improvement causes injury. This limitation shall not apply to actions for wrongful death.

Criminal Procedure

§ 99-1-5 Limitations; exceptions:

The passage of time shall never bar prosecution against any person for the offenses of murder, manslaughter, aggravated assault, aggravated domestic violence, kidnapping, arson, burglary, forgery, counterfeiting, robbery, larceny, rape, embezzlement, obtaining money or property under false pretenses or by fraud, felonious abuse or battery of a child as described in Section 97-5-39, touching or handling a child for lustful purposes as described in Section 97-5-23, sexual battery of a child as described in Section 97-3-95(1)(c), (d) or (2), exploitation of children as described in Section 97-5-33, promoting prostitution under Section 97-29-51(2) when the person involved is a minor, or for any human trafficking offense described in Section 97-3-54.1(1)(a), (1)(b) or (1)(c), Section 97-3-54.2, or Section 93-3-54.3. A person shall not be prosecuted for conspiracy, as described in Section 97-1-1, for felonious assistance-program fraud, as described in Section 97-19-71, or for felonious abuse of vulnerable persons, as described in Sections 43-47-18 and 43-47-19, unless the prosecution for the offense is commenced within five (5) years next after the commission thereof. A person shall not be prosecuted for larceny of timber as described in Section 97-17-59, unless the prosecution for the offense is commenced within six (6) years next after the commission thereof. A person shall not be prosecuted for any other offense not listed in this section unless the

prosecution for the offense is commenced within two (2) years next after the commission thereof. Nothing contained in this section shall bar any prosecution against any person who shall abscond or flee from justice, or shall absent himself from this state or out of the jurisdiction of the court, or so conduct himself that he cannot be found by the officers of the law, or that process cannot be served upon him.

§ 99-1-9 Limitations; additional year permitted:

When an indictment shall be lost or destroyed, or quashed or abated, or the judgment thereon arrested or reversed for any defect therein or in the record, or for any matter of form or other cause, not being an acquittal on the merits, the further time of one year from the time when such indictment shall be lost, destroyed, quashed or abated, or the judgment thereon arrested or reversed, shall be allowed for the finding of a new indictment.

§ 99-17-1 Trial within 270 days of arraignment:

Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned.

§ 99-39-5 Post-Conviction Collateral Relief: Motion for relief; grounds; limitations:

(2) A motion for relief under this article shall be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction. Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate either:

(a) (i) That there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence; or

(ii) That, even if the petitioner pled guilty or nolo contendere, or confessed or admitted to a crime, there exists biological evidence not tested, or, if previously tested, that can be subjected to additional DNA testing that would provide a reasonable likelihood

of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.

(b) Likewise excepted are those cases in which the petitioner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction. . . .

***See Rowland v. State*, 42 So. 3d 503, 507 (Miss. 2010) (holding errors affecting fundamental constitutional rights are excepted from the procedural bars of the UPCCRA).**

Death of Party

§ 15-1-55 Death of person before expiration of period of limitation:

If a person entitled to bring any of the personal actions herein mentioned, or liable to any such action, shall die before the expiration of the time herein limited therefor, such action may be commenced by or against the executor or administrator of the deceased person, after the expiration of said time, and within one year after the death of such person.

Disability of Infancy or Unsoundness of Mind

§ 15-1-59 Person under disability of infancy or unsoundness of mind:

If any person entitled to bring any of the personal actions mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the actions within the times in this chapter respectively limited, after his disability shall be removed as provided by law. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

§ 15-1-53 Actions against a trustee:

When the legal title to property or a right in action is in an executor, administrator, guardian, or other trustee, the time during which any statute of limitations runs against such trustee shall be computed against the person beneficially interested in such property or right in action, although such person may be under disability and within the saving of any statute of limitations; and may be availed of in any suit or actions by such person.

Easements - Highways

§ 65-1-49 Easements for highway purposes; procedures for conveyances and assignments:

The conveyance or assignment of easements for highway purposes may be made by the owner thereof to the Mississippi State Highway Commission or the board of supervisors of any county for highway purposes. All actions by any person owning any interest in the land involved in such conveyance or assignment accruing as a result thereof must be brought within three years after the date of such conveyance or assignment; provided, however, that the land involved is actually used for highway purposes or notice is posted thereon that it will be used for highway purposes within said three-year period, otherwise said period shall be six years from the date of such conveyance or assignment. . . .

Estates

§ 15-1-25 Action against executor or administrator:

An action or scire facias may not be brought against any executor or administrator upon any judgment or other cause of action against his testator or intestate, except within four years after the qualification of such executor or administrator.

§ 91-7-151 Limitations period; amending affidavits:

All claims against the estate of deceased persons, whether due or not, shall be registered, probated and allowed in the court in which the letters testamentary or of administration were granted within ninety (90) days after the first publication of notice to creditors to present their claim. . . .

§ 91-7-153 Presentation and registration toll limitations:
The presentation of a claim, and having it probated and registered as required by law, shall stop the running of the general statute of limitations as to such claim, whether the estate be solvent or insolvent.

§ 91-7-235 Actions for decedent's trespass:

When any decedent shall in his lifetime have committed any trespass, the person injured, or his executor or administrator, shall have the same action against the executor or administrator of the decedent as he might have had or maintained against the testator or intestate, and shall have like remedy as in other actions against executors and administrators. Vindictive damages shall not be allowed, and such action shall be commenced within one year after publication of notice to creditors to probate and register their claims.

Fines, Penalties and Forfeitures

§ 15-1-33 Actions for penalty or forfeiture on a penal statute:

All actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after.

Game and Fish Prosecutions

§ 49-5-41 Application of section 99-1-5:

Section 99-1-5 shall apply to all violations of the laws or regulations relating to wild animals, birds, or fish.

Governmental and Political Subdivisions, Actions Against

§ 11-46-11 Notice of claim requirements; infancy or unsoundness of mind:

(3)(a) All actions brought under this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after, except that filing a notice of claim within the required one-year period will toll the statute of limitations for ninety-five (95) days from the date the chief executive officer of the state entity or the chief executive officer or other statutorily designated official of a political subdivision receives the notice of claim.
(b) No action whatsoever may be maintained by the claimant until the claimant receives a notice of denial of claim or the tolling period expires, whichever comes first, after which the claimant has an additional ninety (90) days to file suit; failure to file within the time allowed is an absolute bar to any further proceedings under this chapter.
(c) All notices of denial of claim shall be served by governmental entities upon claimants by certified mail, return receipt requested, only.
(d)(i) To determine the running of limitations periods under this chapter, service of any notice of claim or notice of denial of claim is effective upon delivery by the methods statutorily designated in this chapter.
(ii) The limitations period provided in this section controls and shall be exclusive in all actions subject to and brought under the provisions of this chapter, notwithstanding the nature of the claim, the label or other characterization the claimant may use to describe it, or the provisions of any other statute of limitations that would otherwise govern the type of claim or legal theory if it were not subject to or brought under the provisions of this chapter. . . .

***See University of Mississippi Med. Ctr. v. Robinson*, 876 So. 2d 337 (Miss. 2004).**

§ 15-1-51 Actions against and in favor of the state:

Statutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporation thereof, except that any judgment or decree rendered in favor of the state, or any subdivision or municipal corporation thereof, shall not be a lien on the property of the defendant therein for a longer period than seven (7) years from the date of filing notice of the lien, unless an action is brought before the expiration of such time or unless the state or such subdivision or municipal corporation refiles notice of the lien. There shall be no limit upon the number of times that the state, or any subdivision or municipal corporation thereof, may refile such notices of lien. The statutes of limitation shall run in favor of the state, the counties, and municipal corporations beginning at the time when the plaintiff first had the right to demand payment of the officer or board authorized to allow or disallow the claim sued upon. The provisions of this section shall apply to all pending and subsequently filed notices of liens.

Insurance Policies - Time Limit Defense and Legal Actions

§ 83-9-5 Required Provisions:

Time limit on certain defenses:

After two (2) years from the date of issue of this policy, no misstatements, except fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such two-year period. . . .

After this policy has been in force for a period of two (2) years during the lifetime of the insured (excluding any period during which the insured is disabled), it shall become incontestable as to the statements in the application.

Legal actions:

No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty (60) days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three (3) years after the time written proof of loss is required to be furnished. . . .

Jointly Interested Persons

§ 15-1-75 Parties jointly interested:

In all cases where the interests are joint, one shall not be barred because another jointly interested is, and the statute of limitations provided in this chapter shall be severally applied, and not jointly, to the right of actions, in whatever cause, pertaining to each of all the parties, though jointly interested.

Judgments

§ 15-1-43 Actions founded on domestic judgment or decree:

All actions founded on any judgment or decree rendered by any court of record in this state, shall be brought within seven (7) years next after the rendition of such judgment or decree, or last renewal of judgment or decree, whichever is later. . . .

§ 15-1-45 Actions founded on foreign judgments:

All actions founded on any judgment or decree rendered by any court of record without this state shall be brought within seven years after the rendition of such judgment or decree, and not after. However, if the person against whom such judgment or decree was or shall be rendered, was, or shall be at the time of the institution of the action, a resident of this state, such action, founded on such judgment or decree, shall be commenced within three years next after the rendition thereof, and not after.

Judicial Sale of Property

§ 15-1-37 Actions to recover property sold, partited in kind or sold for partition:

An action shall not be brought to recover any property (a) sold by order of a chancery court, where the sale is in good faith and the purchase money paid, or (b) partited in kind or sold for partition where the purchase money is paid, unless such action is brought within two years after possession is taken by the purchaser under the sale of the property or by the taker under the decree of partition.

Land

§ 15-1-7 Actions to recover land:

A person may not make an entry or commence an action to recover land except within ten years next after the time at which the right to make the entry or to bring the action shall have first accrued to some person through whom he claims, or, if the right shall not have accrued to any person through whom he claims, then except within ten years next after the time at which the right to make the entry or bring the action shall have first accrued to the person making or bringing the same. However, if, at the time at which the right of any person to make an entry or to bring an action to recover land shall have first accrued, such person shall have been under the disability of infancy or unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of ten years hereinbefore limited shall have expired, make an entry or bring an action to recover the land at any time within ten years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under either disability, or shall have died, whichever shall have first happened. However, when any person who shall be under either of the disabilities mentioned, at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, no time shall be allowed, by reason of the disability of any other person, to make an entry or to bring an action to recover the land beyond the period of ten years next after the time at which such person shall have died.

§ 15-1-9 Action in equity to recover land:

A person claiming land in equity may not bring suit to recover the same except within the period during which, by virtue of section 15-1-7, he might have made an entry or brought an action to recover the same, if he had been entitled at law to such an estate, interest, or right in or to the same as he shall claim therein in equity. However, in every case of a concealed fraud, the right of any person to bring suit in equity for the recovery of land, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which the fraud shall, or, with reasonable diligence might, have been first known or discovered.

§ 15-1-11 Right of action to recover land, instrument defects:

Any person who has a right of action for the recovery of land because of any one or more of the following enumerated defects in any instrument, shall institute his suit therefor not later than 10 years next after the date when such instrument has been actually recorded in the office of the clerk of the chancery court of the county in which such real estate is situated and not afterwards. . . .

If, at the time at which the right of any person to bring an action for the recovery of land because of any such defects, shall have first accrued, such persons shall have been under the disability of infancy or unsoundness of mind, then such person or the person claiming through him, may, notwithstanding that the period of limitations hereinbefore provided for shall have expired, bring an action to recover the land at any time within the period of limitations provided herein next after the time at which the person to whom the right shall have first accrued shall have ceased to be under either disability, or shall have died, whichever shall have first happened. However, when any person who shall be under either of the disabilities mentioned, at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability no time to bring an action to recover the land beyond the period of limitations provided herein next after the time at which such persons shall have died, shall be allowed by reason of the disability of any other person. Moreover, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one years. This section shall not, however, apply to forged instruments.

Liens and Encumbrances

§ 15-1-47 Judgment lien:

A judgment or decree rendered in any court held in this state shall not be a lien on the property of the defendant therein for a longer period than seven years from the rendition thereof, unless an action be brought thereon before the expiration of such time. However, the time during which the execution of a judgment or decree shall be stayed or enjoined by supersedeas, injunction or other process, shall not be computed as any part of the period of seven years.

§ 89-5-19 Duration and barring of liens:

Where the remedy to enforce any mortgage, deed of trust, or other lien on real or personal property which is recorded, appears on the face of the record to be barred by the statute of limitations (which, as to a series of notes or a note payable in installments, shall begin to run from and after the maturity date of the last note or last installment), the lien shall cease and have no effect as to creditors and subsequent purchasers for a valuable consideration without notice, unless within six (6) months after such remedy is so barred the fact that such mortgage, deed of trust, or lien has been renewed or extended be entered on the margin of the record thereof, by the creditor, debtor, or trustee, attested by the clerk, or a new mortgage, deed of trust, or lien, noting the fact of renewal or extension, be duly filed for record within such time. If the date of final maturity of such indebtedness so secured cannot be ascertained from the face of the record the same shall be

deemed to be due one year from the date of the instrument securing the same for the purpose of this section. And where a suit shall have been brought to keep a judgment alive within seven (7) years from the rendition of such judgment, the general lien of such judgment shall expire as to creditors and subsequent purchasers for a valuable consideration, without notice, at the end of seven (7) years from the rendition of such judgment, notwithstanding such suit to keep alive the judgment unless a notation to keep alive such judgment shall be made on the judgment roll within six (6) months after the expiration of seven (7) years from the time of the rendition of such judgment.

Loans

§ 75-67-111 Requirements as to records kept by licensees:

Each licensee shall keep and use in his business such books, accounts and other records which shall be in accordance with sound and accepted business practices and shall be in such form as will clearly reflect all loan transactions for every borrower and will enable the commissioner to determine whether the licensee is complying with the provisions of this article, or the Small Loan Privilege Tax Law. Such records shall be kept with respect to each loan transaction for a period of at least twenty-four (24) months after the final transaction on such loan. . . .

Medical Malpractice

§ 15-1-36 Actions for medical malpractice:

(1) For any claim accruing on or before June 30, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered.
(2) For any claim accruing on or after July 1, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered, and, except as described in paragraphs (a) and (b) of this subsection, in no event more than seven (7) years after the alleged act, omission or neglect occurred:

(a) In the event a foreign object introduced during a surgical or medical procedure has been left in a patient's body, the cause of action shall be deemed to have first accrued at, and not before, the time at which the foreign object is, or with reasonable diligence should have been, first known or discovered to be in the patient's body.

(b) In the event the cause of action shall have been fraudulently concealed from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence should have been, first known or discovered.

(3) Except as otherwise provided in subsection (4) of this section, if at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be six (6) years of age or younger, then such minor or the person claiming through such minor may, notwithstanding that the period of time limited pursuant to subsections (1) and (2) of this section shall have expired, commence action on such claim at any time within two (2) years next after the time at which the minor shall have reached his sixth birthday, or shall have died, whichever shall have first occurred. . . .

Military Justice Actions

§ 33-13-315 Statute of limitations:

(1) A person charged with desertion or absence without leave in time of war, or with aiding the enemy or with mutiny, may be tried and punished at any time without limitation.

(2) Except as otherwise provided in this section, a person charged with offenses punishable under this code is not liable to be tried by court-martial if the offense was committed more than three (3) years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command. . . .

Mineral Interests

§ 11-17-33 Mineral interest, receivers for owners:

(2) The receiver shall hold, preserve and invest any such money so received in the same manner as other moneys held by the chancery clerk and on order of the court shall pay any money so held, with any interest accrued less costs of the receivership, to any person holding a valid claim thereto when said claim is asserted within ten (10) years of the date of the decree establishing the receivership. . . .

Miscellaneous Actions

§ 15-1-49 Actions without prescribed period of limitation; actions involving latent injury or disease:

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.
(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury. . . .

Mortgages and Deed of Trust

§ 15-1-15 Actual occupation under tax title:

Actual occupation for three years, after two years from the day of sale of land held under a conveyance by a tax collector in pursuance of a sale for taxes, shall bar any suit to recover such land or assail such title because of any defect in the sale of the land for taxes, or in any precedent step to the sale, saving to minors and persons of unsound mind the right to bring suit within such time, after the removal of their disabilities, and upon the same terms as is provided for the redemption of land by such persons.

§ 15-1-17 Actions to cancel tax titles:

The owner, mortgagee or other person interested in any land which has been sold or forfeited to the state for delinquent taxes may bring a suit or action to cancel the title of the state, or its patentees, or to recover said land from the state, or its patentees, on account of any defect, irregularity or illegality in the assessment, levy or sale of such land for delinquent taxes within two years after the period of redemption shall have expired, and not thereafter. However, the limitations herein fixed shall not apply when the taxes on such land had been paid prior to the time it was sold for taxes. If any person entitled to bring any such suit or action shall, at the time at which the cause of action accrues, be under the disability of infancy, or unsoundness of mind, he may bring the suit or action within the time in this section respectively limited after his disability shall be removed but the saving of persons under disability shall never extend longer than twenty-one years. . . .

§ 15-1-19 Suits to redeem mortgage:

When a mortgagee, after condition broken, shall obtain the actual possession or receipt of the profits or rent of land embraced in his mortgage, the mortgagor, or any person claiming through him, may not bring a suit to redeem the mortgage except within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given in writing, signed by the mortgagee, or the person claiming through him. In such case a suit may not be brought except within ten years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given. Such acknowledgment shall be effectual only as against, and to the extent of the interest of the party signing it.

§ 89-1-309 Tolling of limitations:

The statutes of limitation which would otherwise apply to any mortgage or mortgage debt, or to any other cause of action under Sections 89-1-301 through 89-1-329, shall cease to run upon the filing of any legal pleadings in the aforesaid court; and the period during which the same be pending in court under Sections 89-1-301 through 89-1-329 shall be added to the period of statutory limitations which would apply to said debt or mortgage or other obligation in which the cause of action arose.

Motor Vehicle Warranty Enforcement

§ 63-17-159 Manufacturer's rights and duties; remedies:

(6) Any action brought under Sections 63-17-151 et seq. shall be commenced within one (1) year following expiration of the terms, conditions or limitations of the express warranty, or within eighteen (18) months following the date of original delivery of the motor vehicle to a consumer, whichever is earlier, or, if a consumer resorts to an informal dispute settlement procedure as provided in Sections 63-17-151 et seq., within ninety (90) days following the final action of the panel. . . .

Municipal Employee's Retirement

§ 21-29-47 Review:

Appeal may be taken from any decision of the board by any member of the system or other person entitled to the benefits under this article to the chancery court. However, no appeal may be taken from any finding or decision of the board after the expiration of one year from the date of the finding or decision.

Oil and Gas Production

§ 53-3-11 Permit for well drilling:

(2)(b) The Secretary of State is hereby designated as the agent upon whom process may be served in any action against such nonresident operator to recover damages to the surface estate arising from mineral exploration and/or production. Any such action for damages shall be commenced within six (6) years next after the closing of the well. . . .

Prohibition to Sue

§ 15-1-57 Person prohibited from commencing an action or remedy:

When any person shall be prohibited by law, or restrained or enjoined by the order, decree, or process of any court in this state from commencing or prosecuting any action or remedy, the time during which such person shall be so prohibited, enjoined or restrained, shall not be computed as any part of the period of time limited by this chapter for the commencement of such action.

Public Utilities

§ 77-3-85 Jurisdiction; statute of limitations:

Actions to recover penalties under this article, and criminal prosecutions under subsection (2) of Section 77-3-81, shall be brought in the name of the State of Mississippi in any court of competent jurisdiction. No action for penalty under subsection (1) of Section 77-3-81 may be maintained after the expiration of one (1) year from the date of the act of which complaint is made.

Racketeer Influenced and Corrupt Organization Act (RICO)

§ 97-43-9 Seizure; forfeiture; proceedings; injunctions:

(8) Notwithstanding any other provision of law, a criminal or civil action or proceeding under this chapter may be commenced at any time within five (5) years after the conduct in violation of a provision of this chapter terminates or the cause of action accrues. If a criminal prosecution or civil action or other proceeding is brought, or intervened in, to punish, prevent or restrain any violation of the provisions of this chapter, the running of the period of limitations prescribed by this section with respect to any cause of action arising under subsections (5) or (6) of this section which is based in whole or in part upon any matter complained of in any such prosecution, action or proceeding shall be

suspended during the pendency of such prosecution, action or proceeding and for two (2) years following its termination. . . .

Road Districts

§ 65-19-17 Appeal by aggrieved parties:

Any party aggrieved by the order of the board of supervisors creating a road district or bringing territory therein, as herein provided, may appeal to the circuit court from the order of said board of supervisors as now provided by law for appeals from the orders of boards of supervisors, or may sue at law or in equity for relief therefrom; however, no action or suit attacking the validity of the said order, or in any manner questioning the same, shall be begun after the expiration of sixty days from the date of making or entering the said order. . . .

Sales Contract

§ 75-2-725 Statute of Limitations in Contracts for Sale:

(1) An action for breach of any contract for sale must be commenced within six (6) years after the cause of action has accrued. . . .

Taxes

Corporation Franchise Tax

§ 27-13-49 Limitation of actions; examination period; revisions:

(1) Returns shall be examined by the commissioner or his duly authorized agents within three (3) years from the due date or the date the return was filed, whichever is later, and no determination of a tax overpayment or deficiency shall be made by the commissioner after the expiration of the three-year period except as provided in this section. . . .

Gas (Liquified, Compressed) Tax

§ 27-59-25 Maintenance of distributor records:

All actions by the state for the recovery of additional amounts claimed as tax due under this chapter must be commenced within a period of three (3) years from the date of the filing of the required report with the commission, provided that in the case of fraudulent or false report with intent to evade tax or of a failure to file a report, action may be commenced at any time. . . .

Gas (Natural) Tax

§ 27-25-717 Time of payment:

Provided, however, the statute of limitations for examining returns or to recover taxes and interest on funds held in escrow on price increases shall be three (3) years from the time the tax and interest is withdrawn from the State Depository for distribution to the State Treasury and to the county or counties in which the gas was produced. . . .

Gasoline and Motor Fuel Tax

§ 27-55-37 Maintenance of gasoline transaction records:

All actions by the state for the recovery of additional amounts claimed as tax due under this article must be commenced within a period of three (3) years from the date of the filing of the required report with the commission, provided, that in the case of a fraudulent or false report with intent to evade tax or of a failure to file a report, action may be commenced at any time. . . .

Income Tax

§ 27-7-49 Returns to be examined:

(1) Returns shall be examined by the commissioner or his or her duly authorized agents within three (3) years from the due date or the date the return was filed, whichever is later, and no determination of a tax overpayment or deficiency shall be made by the commissioner after the expiration of the three-year period, except as provided in this section and as provided in Section 27-7-307. . . .

(5) Where the reported taxable income of a taxpayer has been increased or decreased by the Internal Revenue Service, the three-year examination period provided in subsection (1) of this section shall not be applicable, insofar as the Mississippi income tax liability is affected by the specific changes made by said Internal Revenue Service. However, no additional assessment or no refund shall be made under the provisions of this article after three (3) years from the date the Internal Revenue Service disposes of the tax liability in question.

(6) Where the reportable taxable income of a taxpayer has been decreased by the carryback of a net casualty loss deduction under Section 27-7-20 or the carryback of a net operating loss deduction under Section 27-7-17, the three-year examination period provided under subsection (1) of this section shall not be applicable insofar as the Mississippi income tax liability is affected by the carryback of the net casualty loss deduction or the carryback of the net operating loss deduction.

Oil (Lubricating) Tax

§ 27-57-25 Maintenance of distributor records:

All actions by the state for the recovery of additional amounts claimed as tax due under this article must be commenced within a period of three (3) years from the date of the filing of the required report with the commission, provided, that in the case of a fraudulent or false report with intent to evade tax or of a failure to file a report, action may be commenced at any time. . . .

Refunds

§ 27-73-5 Statute of limitations:

Except as otherwise provided in Sections 27-7-49, 27-13-49 and 27-65-42, all suits by any taxpayer for the recovery of any privilege, income,

franchise, or other excise tax, and all applications or proceedings for any refund or credit of these taxes shall be filed or made within three (3) years next after the return was filed, or from the date the assessment of the tax was made, or from the date the tax was paid, as the case may be, whichever is the earlier, and no recovery of taxes under any such suit shall be had and no refund of taxes shall be made unless the suit or application was filed within the period of limitation. However, as to income taxes the three-year statute of limitations shall be extended to six (6) years in cases where the reported net income of a taxpayer has been reduced by the Internal Revenue Service for any taxable period.

Property Tax

§ 27-3-41 Restriction:

The power of the Commissioner of Revenue to institute proceedings for the assessment of property which has escaped taxation by reason of not being assessed shall expire at the end of seven (7) years from the date when his right so to do first accrued, and it shall bring all suits he is authorized to bring within six (6) years after the cause of action accrues and not thereafter.

Sales Tax

§ 27-65-42 Limitation of actions:

(1) The amount of taxes due on any return which has been filed as required by this chapter shall be determined and assessed within thirty-six (36) months from the date the return was filed except as otherwise provided in this section and Section 27-65-55.

(2) When an examination of a taxpayer's records to verify returns made under this chapter has been initiated and the taxpayer notified of the examination, either by certified mail or personal delivery by an agent of the commissioner, within the thirty-six-month examination period provided for in subsection (1) of this section, the determination of the correct tax liability shall be made by the commissioner within one (1) year after the expiration of the thirty-six-month examination period; however, this limitation shall not apply:

(a) To any tax period for which the taxpayer failed to file a return, in which case the tax, including any applicable penalties and interest, may be assessed by the commissioner at any time and the tax, penalties and/or interest so assessed may be collected by the commissioner as otherwise provided by law.

(b) In the case of a false or fraudulent return with the intent to evade tax. In such a case the commissioner is authorized to compute, determine, and assess at any time

the estimated amount of tax due on the return, including any applicable penalties and interest, from any information in his or her possession, and after the tax, penalties and/or interest are assessed, to collect them as otherwise provided by law.

(c) In the case of an agreement in writing entered into by the commissioner and the taxpayer, made prior to the expiration of the applicable time periods provided for in subsections (1) and (2) of this section, consenting to the examination of a return. In such a case the determination of a tax overpayment or deficiency and/or the issuance of an assessment may be made within the agreed upon period. The period agreed upon may be extended by subsequent agreements in writing made before the expiration of the previously agreed upon period.

(d) In a case in which a taxpayer requests an extension of time for filing any return required by this chapter, and the request is granted. In such a case the limitation of time for examining the return and determining any tax overpayment or assessing any tax deficiency from the return shall be extended for a like period.

(3) A taxpayer may apply to the commissioner for revision of the tax assessed against him or her, or paid by him or her, at any time within thirty-six (36) months from the date of the assessment or from the date the return was filed. Unless a claim for credit or refund is filed by the taxpayer within thirty-six (36) months from the time the return was filed or assessment made, no credit or refund shall be allowed.

(4) Taxpayers shall keep and maintain an accurate and complete set of records and other information sufficient to allow the department to determine the correct amount of tax due. The records and other information shall be open and available for inspection by the department upon request at a reasonable time and location. Refusal or delay by the taxpayer to provide documentation for examination upon the department's request shall result in an assessment being made from any information available, which shall be prima facie correct.

Trespass

§ 95-5-29 Limitations; preclusive effect:

An action for the remedies and penalties provided by Section 95-5-10 may be prosecuted in any court of competent jurisdiction within twenty-four (24) months from the time the injury was committed and not after. All other actions for any specific penalty given by this chapter may be prosecuted in any court of competent jurisdiction within twelve (12) months from the time the injury was committed, and not after; and a recovery of any penalty herein given shall not be a bar to any action for further damages, or to any criminal prosecution for any such offense as herein enumerated. A party, if he so elect, may, under any of the provisions of this chapter, claim less than the penalty given.

Torts

§ 15-1-35 Actions for certain torts:

All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, for failure to employ, and for libels, shall be commenced within one (1) year next after the cause of such action accrued, and not after.

§ 15-1-49 Actions without prescribed period of limitation; actions involving latent injury or disease:

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.
(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury. . . .

Unclaimed Property Held by Financial/Business Organizations

§ 89-12-35 Limitation periods:

The expiration of any period of time specified by statute or court order, during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property, shall not prevent the money or property from being presumed abandoned property, nor affect any duty to file a report required by the provisions of this chapter, or to pay or deliver abandoned property to the treasurer.

Wills

§ 91-7-23 Time to contest probated will:

Any person interested may, at any time within two years, by petition or bill, contest the validity of the will probated without notice; and an issue shall be made up and tried as other issues to determine whether the writing produced be the will of the testator or not. If some person does not appear within two years to contest the will, the probate shall be final and forever binding, saving to infants and persons of unsound mind the period of two years to contest the will after the removal of their respective disabilities. In case of concealed fraud, the limitation shall commence to run at, and not before, the time when such fraud shall be, or with reasonable diligence might have been, first known or discovered.

Workers' Compensation

§ 71-3-35 Notice to employer of injury:

(1) No claim for compensation shall be maintained unless, within thirty (30) days after the occurrence of the injury, actual notice was received by the employer or by an officer, manager, or designated representative of an employer. If no representative has been designated by posters placed in one or more conspicuous places, then notice received by any superior shall be sufficient. Absence of notice shall not bar recovery if it is found that the employer had knowledge of the injury and was not prejudiced by the employee's failure to give notice. Regardless of whether notice was received, if no payment of compensation (other than medical treatment or burial expense) is made and no application for benefits filed with the commission within two years from the date of the injury or death, the right to compensation therefor shall be barred. . . .

CHAPTER 10

THE JURY SELECTION PROCESS

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CHAPTER 10

THE JURY SELECTION PROCESS

Jury Selection by Statute

Mississippi Rule of Civil Procedure 47(b), Jurors, states:

> Jurors shall be drawn and selected for jury service as provided by statute.

§ 13-5-2 Statement of public policy:

> It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this chapter to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose. A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status.

Competency of Jurors

§ 13-5-1 Competent juror qualifications:

> Every citizen not under the age of twenty-one (21) years, who is either a qualified elector, or a resident freeholder of the county for more than one (1) year, is able to read and write, and has not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five (5) years and who is not a common gambler or habitual drunkard, is a competent juror. No person who is or has been within twelve (12) months the overseer of a public road or road contractor shall, however, be competent to serve as a grand juror. The lack of any such qualifications on the part of one (1) or more jurors shall not, however, vitiate an indictment or verdict. Moreover, no talesman or tales juror shall be qualified who has served as such talesman or tales juror in the last preceding two (2) years, and no juror shall serve on any jury who has served as such for the last preceding two (2) years. No juror shall serve who has a case of his own pending in that court, provided there are sufficient qualified jurors in the district, and for trial at that term.
>
> In order to determine that prospective jurors can read and write, the presiding judge shall, with the assistance of the clerk, distribute to the jury panel a form to be completed personally by each juror prior to being empaneled as follows:

Juror Information Card

1. Your name _____ Last_____ First ____ Middle initial
2. Your home address _____
3. Your occupation _____
4. Your age _____
5. Your telephone number _____ If none, write none
6. If you live outside the county seat, the number of miles you live from the courthouse _____ Miles

_____
Sign your name

The judge shall personally examine the answers of each juror prior to empaneling the jury and each juror who cannot complete the above form shall be disqualified as a juror and discharged.

A list of any jurors disqualified for jury duty by reason of inability to complete the form shall be kept by the circuit clerk and their names shall not be placed in the jury box thereafter until such person can qualify as above provided.

Jury Selection Procedure

§ 13-5-4 Definitions:

As used in this chapter:

(a) "Court" means the circuit, chancery and county courts of this state and includes, when the context requires, any judge of the court.

(b) "Clerk" and "clerk of the court" means the circuit clerk of the county and any deputy clerk.

(c) "Master list" means the voter registration lists for the county.

(d) "Voter registration lists" means the official records of persons registered to vote in the county.

(e) "Jury wheel" means any physical device or electronic system for the storage of the names or identifying numbers of prospective jurors.

(f) "Jury box" means the jury wheel in which is placed the names or identifying numbers of prospective jurors whose names are drawn at random from the jury wheel and who are not disqualified.

(g) "Senior judge" means the circuit or chancery judge, as the case may be, who has the longest continuous service on the court in a particular judicial district which has more than one (1) such judge, or if the judges are equal in time of service, then the judge who has been engaged for the longest time continuously in the practice of law in this state.

Jury Commission & Its Duties

§ 13-5-6 Jury commission:

(1) A jury commission shall be established in each county to manage the jury selection process under the supervision and control of the court. The jury commission shall be composed of three (3) members who will serve a four-year term beginning on January 1, 1975, as follows:

-One (1) member shall be appointed by the circuit judge of said county;
-One (1) member shall be appointed by the chancery judge of said county; and
-One (1) member shall be appointed by the board of supervisors of said county.

If there is more than one (1) circuit judge in a judicial district, then the senior circuit or chancery judge, as the case may be, shall make the said appointment for each county in his district. Any unexpired term shall be filled by the appropriate appointing authority who is in office at the time the vacancy occurs.

(2) A jury commissioner shall have the following qualifications:

(a) He shall be a duly qualified elector at the time of his appointment;
(b) He shall be a resident citizen in the county in which he is to serve; and
(c) He shall not be an attorney nor an elected public official.

(3) Each jury commissioner shall receive compensation at a per diem rate as provided in Section 25-3-69.

§ 13-5-8 Master list:

(1) In April of each year, the jury commission for each county shall compile and maintain a master list consisting of the voter registration list for the county.

(2) The circuit clerk of the county and the registrar of voters shall have the duty to certify to the commission during the month of January of each year under the seal of his office the voter registration list for the county; the list shall exclude any person who has been permanently excused from jury service pursuant to Section 13-5-23(4). Any person who has been excluded from the master list for jury service may be reinstated to the master list after one (1) year by requesting that the circuit clerk reinstate him to the master list.

Jury Wheel

§ 13-5-12 Jury wheel name selection procedure:

Unless all the names on the master list are to be placed in the jury wheel pursuant to Section 13-5-10, the names or identifying numbers of prospective jurors to be placed in the jury wheel shall be selected by the jury commission at random from the master list in the following manner:

> The total number of names on the master list shall be divided by the number of names to be placed in the jury wheel; the whole number nearest the quotient shall be the "key number," except that the key number shall never be less than two (2). A "starting number" for making the selection shall then be determined by a random method from the number from one (1) to the key number, both inclusive. The required number of names shall then be selected from the master list by taking in order the first name on the master list corresponding to the starting number and then successively the names appearing in the master list at intervals equal to the key number, recommencing if necessary at the start of the list until the required number of names has been selected. The name of any person who is under the age of twenty-one (21) years and the name of any person who has been permanently excused from jury service pursuant to Section 13-5-23(4) shall be passed over without interrupting the sequence of selection. Any person who has been excluded from the master list for jury service may be reinstated to the master list after one (1) year by requesting that the circuit clerk reinstate him to the master list. Upon recommencing at the start of the list, names previously selected from the master list shall be disregarded in selecting the additional names.

The jury commission may use an electronic or mechanical system or device in carrying out its duties.

§ 13-5-10 Maintaining jury wheel:

The jury commission for each county shall maintain a jury wheel into which the commission shall place the names or identifying numbers of prospective jurors taken from the master list. If the total number of prospective jurors on the master list is one thousand (1,000) or less, the names or identifying numbers of all of them shall be placed in the jury wheel. In all other cases, the number of prospective jurors to be placed in the jury wheel shall be one thousand (1,000) plus not less than one percent (1%) of the total number of names on the master list. From time to time a larger or additional number may be determined by the jury commission or ordered by the court to be placed in the jury wheel. In April of each year, beginning in 1976, the wheel shall be emptied and refilled as prescribed in this chapter.

> It is not necessary to maintain a physical jury wheel and jury box if the clerk is using a computer, as long as the clerk is capable of printing out a physical record of the contents of the jury wheel and jury box if it becomes necessary to do so. **Computerized Jury Wheel, 92 Op. Att'y Gen. 0700 (Dec. 3, 1992).**

§ 13-5-14 Delivery of jury wheel names:

At any time the jury commission places names in the jury wheel, the jury commission shall also deliver to the senior circuit judge a list of all names placed on or in the jury wheel, and said circuit judge shall spread upon the minutes of the circuit court all of the names so placed in the jury wheel.

§ 13-5-16 Random drawing of jurors:

(1) Except as otherwise provided by subsection (2) of this section, from time to time and in a manner prescribed by the court, a private citizen who does not have an interest in a case pending trial and who is not a practicing attorney publicly shall draw at random from the jury wheel the names or identifying numbers of as many prospective jurors as the court by order requires. The clerk shall prepare an alphabetical list of the names drawn. Neither the names drawn nor the list shall be disclosed to any person other than pursuant to this chapter or specific order of the court.

(2) The court may order that the drawing of names or identifying numbers pursuant to subsection (1) of this section may be performed by random selection of a computer or electronic device pursuant to such rules and regulations as may be prescribed by the court.

Jury Box

§ 13-5-26 Drawing and assigning jurors:

(1) The circuit clerk shall maintain a jury box and shall place therein the names or identifying numbers of all prospective jurors drawn from the jury wheel.

(2) A judge or any court or any other state or county official having authority to conduct a trial or hearing with a jury within the county may direct the circuit clerk to draw and assign to that court or official the number of jurors he deems necessary for one (1) or more jury panels or as required by law for a grand jury, except as otherwise provided by subsection (3) of this section.

Upon receipt of the direction, and in a manner prescribed by the court, the circuit clerk shall publicly draw at random from the jury box the number or jurors specified.

(3) The court may order that the drawing and assigning of jurors pursuant to subsection (2) of this section may be performed by random selection of a computer or electronic device pursuant to such rules and regulations as may be prescribed by the court. The jurors drawn for jury service shall be assigned at random by the clerk to each jury panel in a manner prescribed by the court.

Summoning of Jurors

§ 13-5-28 Summoning person drawn for duty:

If a grand, petit or other jury is ordered to be drawn, the clerk thereafter shall cause each person drawn for jury service to be served with a summons, either personally or by mail, addressed to the juror at the juror's usual residence, business or post office address, requiring the juror to report for jury service at a specified time and place. The summons shall include instructions to the potential jurors that explain, in layman's terms, the provisions of Section 13-5-23.

§ 13-5-30 Summoning petit jurors where shortage:

If there is an unanticipated shortage of available petit jurors drawn from a jury box, the court may require the sheriff to summon a sufficient number of petit jurors selected at random by the clerk from the jury box in a manner prescribed by the court.

§ 13-5-18 Requirement of telephone answering device:

The clerk of the circuit court in each county shall purchase and install a telephone answering device for the purpose of providing a recorded message after 5:00 p.m. to jurors who have been summoned to jury duty, in order for such jurors to inquire as to whether their presence will be required in court the following day. The cost of purchasing and maintaining said telephone answering device shall be paid by the board of supervisors from the county general fund.

§ 13-5-32 Names of jurors made public:

The names of jurors drawn from the jury box shall be made available to the public unless the court determines in any instance that this information in the interest of justice should be kept confidential or its use limited in whole or in part.

§ 13-5-87 Laws as to listing, drawing, summoning and impaneling of juries are directory:

All the provisions of law in relation to the listing, drawing, summoning and impaneling juries are directory merely, and a jury listed, drawn, summoned or impaneled, though in an informal or irregular manner, shall be deemed a legal jury after it shall have been impaneled and sworn, and it shall have the power to perform all the duties devolving on the jury.

Exemptions & Excuses from Jury Service

§ 13-5-23 Grounds for service exemption:

(1) All qualified persons shall be liable to serve as jurors, unless excused by the court for one (1) of the following causes:

(a) When the juror is ill and, on account of the illness, is incapable of performing jury service;

An excuse of illness under subsection (1)(a) of this section may be made to the clerk of court outside of open court by providing the clerk with a certificate of a licensed physician, stating that the juror is ill and is unfit for jury service, in which case the clerk may excuse the juror. If the excuse of illness is not supported by a physician's certificate, a judge of the court for which the individual was called to jury service shall decide whether to excuse an individual under subsection (1)(a) of this section.

(b) When the juror's attendance would cause undue or extreme physical or financial hardship to the prospective juror or a person under his or her care or supervision; or

The test of an excuse under subsection (1)(b) of this section for undue or extreme physical or financial hardship shall be whether the individual would either:

(i) Be required to abandon a person under his or her personal care or supervision due to the impossibility of obtaining an appropriate substitute caregiver during the period of participation in the jury pool or on the jury; or
(ii) Incur costs that would have a substantial adverse impact on the payment of the individual's necessary daily living expenses or on those for whom he or she provides the principal means of support; or
(iii) Suffer physical hardship that would result in illness or disease.

"Undue or extreme physical or financial hardship" does not exist solely based on the fact that a prospective juror will be required to be absent from his or her place of employment or business.
A judge of the court for which the individual was called to jury service shall decide whether to excuse an individual under subsection (1)(b) of this section.

A person asking to be excused based on a finding of undue or extreme physical or financial hardship must take all actions necessary to have obtained a ruling on that request by no later than the date on which the individual is scheduled to appear for jury duty.

A person asking a judge to grant an excuse under subsection (1)(b) of this section may be required to provide the judge with documentation such as, but not limited to, federal and state income tax returns, medical statements from licensed physicians, proof of dependency or guardianship and similar documents, which the judge finds to clearly support the request to be excused. Failure to provide satisfactory documentation may result in a denial of the request to be excused.

(c) When the potential juror is a breast-feeding mother.

In cases under subsection (1)(c) of this section, the excuse must be made by the juror in open court under oath.

(4) A person is excused from jury service permanently only when the deciding judge determines that the underlying grounds for being excused are of a permanent nature. A person who has been summoned for jury duty who meets the age threshold for exemption from jury service shall have the option to be permanently excused from jury service due to age by filing with the circuit clerk a notarized request to be permanently excused.

(5) Grand jurors shall serve until discharged by the court.

§ 13-5-25 Personal privilege exemptions:

Every citizen over sixty-five (65) years of age, and everyone who has served as a grand juror or as a petit juror in the trial of a litigated case within two (2) years, shall be exempt from service if the juror claims the privilege. No qualified juror shall be excluded because of any such reasons, but the same shall be a personal privilege to be claimed by any person selected for jury duty. Any citizen over sixty-five (65) years of age may claim this personal privilege outside of open court by providing the clerk of court with information that allows the clerk to determine the validity of the claim. Provided, however, that no person who has served as a grand juror or as a petit juror in a trial of a litigated case in one (1) court may claim the exemption in any other court where the juror may be called to serve.

***See also* § 33-1-5 Jury duty exemption and § 47-5-55 Exemption from jury duty.**

§ 13-5-33 One time postponement; emergency postponement:

(1) Notwithstanding any other provisions of this chapter, individuals scheduled to appear for jury service have the right to postpone the date of their initial appearance for jury service 1 time only. Postponements shall be granted upon request, provided that:

(a) The juror has not been granted a postponement within the past 2 years;

(b) The prospective juror appears in person or contacts the clerk of the court by telephone, electronic mail or in writing to request a postponement; and

(c) Prior to the grant of a postponement with the concurrence of the clerk of the court, the prospective juror fixes a date certain to appear for jury service that is not more than 6 months or 2 terms of court after the date on which the prospective juror originally was called to serve and on which date the court will be in session, whichever is the longer period.

(2) A subsequent request to postpone jury service may be approved by a judicial officer only in the event of an extreme emergency, such as a death in the family, sudden illness, or a natural disaster or a national emergency in which the prospective juror is personally involved, that could not have been anticipated at the time the initial postponement was granted. Prior to the grant of a second postponement, the prospective juror must fix a date certain on which the individual will appear for jury service within 6 months or 2 terms of court after the postponement on a date when the court will be in session.

(3) The Administrative Office of Courts shall promulgate rules for the implementation of this section.

Failure to Appear or Unfit to Serve

§ 13-5-34 Punishment for failure to appear:

(1) A person summoned for jury service who fails to appear or to complete jury service as directed, and who has failed to obtain a postponement in compliance with the provisions for requesting a postponement, or who fails to appear on the date set pursuant to Section 13-5-33, may be ordered by the court to appear and show cause for failure to comply with the summons. If the juror fails to show good cause for noncompliance with the summons, the juror may be held in civil contempt of court and may be fined not more than Five Hundred Dollars ($500.00) or imprisoned not more than three (3) days, or both. The prospective juror may be excused from paying sanctions for good cause shown or in the interest of justice.

(2) In addition to, or in lieu of, the fine or imprisonment provided in subsection (1) of this section, the court may order that the prospective juror complete a period of community service for a period no less than if the prospective juror would have completed jury service, and provide proof of completion of this community service to the court.

§ 13-5-83 Juror intoxication:

If any juror summoned to appear at court, should render himself unfit for service by intoxication before his name is called in court, he shall be fined in a sum not exceeding One Hundred Dollars ($100.00), and be imprisoned for a term not exceeding twenty-four hours. After grand and petit jurors are impaneled they shall be under the control of the court, and, for any breach of duty or contempt of court, may be fined and imprisoned.

Fees for Jury Service

§ 25-7-61 Jurors; voluntary return of fees to county:

[Effective until January 1, 2008, or such time as the Lengthy Trial Fund is fully funded by a specific appropriation of the Legislature, whichever is later, this section shall read as follows:]

(1) Fees of jurors shall be payable as follows:

(a) Grand jurors and petit jurors in the chancery, county, circuit and special eminent domain courts shall be paid an amount to be set by the board of supervisors, not to be less than Twenty-five Dollars ($25.00) per day and not to be greater than Forty Dollars ($40.00) per day, plus mileage authorized in Section 25-3-41. In the trial of all cases where jurors are in charge of bailiffs and are not permitted to separate, the sheriff with the approval of the trial judge may pay for room and board of jurors on panel for actual time of trial.

No grand juror shall receive any compensation except mileage unless he has been sworn as provided by Section 13-5-45; and no petit juror except those jurors called on special venires shall receive any compensation authorized under this subsection except mileage unless he has been sworn as provided by Section 13-5-71. . . .

(2) Any juror may return the fees provided as compensation for service as a juror to the county that paid for the person's service as a juror. The fees returned to the county may be earmarked for a particular purpose to be selected by the juror, including:

(a) The local public library;
(b) Local law enforcement;
(c) The Mississippi Burn Care Fund created in Section 7-9-70; or
(d) Any other governmental agency.

[From and after January 1, 2008, or such time as the Lengthy Trial Fund is fully funded by a specific appropriation of the Legislature, whichever is later, this section shall read as follows:]

(1) Fees of jurors shall be payable as follows:

(a) Grand jurors and petit jurors in the chancery, county, circuit and special eminent domain courts shall be paid an amount to be set by the board of supervisors, not to be less than Twenty-five Dollars ($25.00) per day and

not to be greater than Forty Dollars ($40.00) per day, plus mileage authorized in Section 25-3-41. In the trial of all cases where jurors are in the charge of bailiffs and are not permitted to separate, the sheriff with the approval of the trial judge may pay for room and board of jurors on panel for actual time of trial.

No grand juror shall receive any compensation except mileage unless the juror has been sworn as provided by Section 13-5-45; and no petit juror except those jurors called on special venires shall receive any compensation authorized under this subsection except mileage unless the juror has been sworn as provided by Section 13-5-71. . . .

(2) Any juror may return the fees provided as compensation for service as a juror to the county that paid for the person's service as a juror. The fees returned to the county may be earmarked for a particular purpose to be selected by the juror, including:

(a) The local public library;
(b) Local law enforcement;
(c) The Mississippi Burn Care Fund created in Section 7-9-70; or
(d) Any other governmental agency.

(3) The Administrative Office of Courts shall promulgate rules to establish a Lengthy Trial Fund to be used to provide full or partial wage replacement or wage supplementation to jurors who serve as petit jurors in civil cases for more than ten (10) days.

(a) The Uniform Circuit and County Court Rules shall provide for the following:

(i) The selection and appointment of an administrator for the fund.
(ii) Procedures for the administration of the fund, including payments of salaries of the administrator and other necessary personnel.
(iii) Procedures for the accounting, auditing and investment of money in the Lengthy Trial Fund.
(iv) A report by the Administrative Office of Courts on the administration of the Lengthy Trial Fund in its annual report on the judicial branch, setting forth the money collected for and disbursed from the fund.
(v) The Lengthy Trial Fund Administrator and all other necessary personnel shall be employees of the Administrative Office of Courts.

(b) The administrator shall use any monies deposited in the Lengthy Trial Fund to pay full or partial wage replacement or supplementation to jurors whose employers pay less than full regular wages when the period of jury service lasts more than ten (10) days.

(c) To the extent funds are available in the Lengthy Trial Fund, and in accordance with any rules or regulations promulgated by the Administrative Office of Courts, the court may pay replacement or supplemental wages out of the Lengthy Trial Fund not to exceed Three Hundred Dollars ($300.00) per day per juror beginning on the eleventh day of jury service. In addition, for any jurors who qualify for payment by virtue of having served on a jury for more than ten (10) days, the court, upon finding that the service posed a significant financial hardship to a juror, even in light of payments made with respect to jury service after the tenth day, may award replacement or supplemental wages out of the Lengthy Trial Fund not to exceed One Hundred Dollars ($100.00) per day from the fourth to the tenth day of jury service.

(d) Any juror who is serving or has served on a jury that qualifies for payment from the Lengthy Trial Fund, provided the service began on or after January 1, 2008, may submit a request for payment from the Lengthy Trial Fund on a form that the administrator provides. Payment shall be limited to the difference between the jury fee specified in subsection (1) of this section and the actual amount of wages a juror earns, up to the maximum level payable, minus any amount the juror actually receives from the employer during the same time period.

(i) The form shall disclose the juror's regular wages, the amount the employer will pay during the term of jury service starting on the eleventh day and thereafter, the amount of replacement or supplemental wages requested, and any other information the administrator deems necessary for proper payment.
(ii) The juror also shall be required to submit verification from the employer as to the wage information provided to the administrator, for example, the employee's most recent earnings statement or similar document, before initiation of payment from the fund.
(iii) If an individual is self-employed or receives compensation other than wages, the individual may provide a sworn affidavit attesting to his or her approximate gross weekly income, together with such other information as the administrator may require, in order to verify weekly income.

(4) Nothing in this section shall be construed to impose an obligation on any county to place monies in the Lengthy Trial Fund or to pay replacement or supplemental wages to any juror from county funds.

§ 25-7-63 Jurors; amount:

The amount of compensation due to each grand juror, petit juror, and juror summoned on a special venire and regularly discharged by the court shall, after the discharge of such juror, be determined on the oath of the juror, allowed in open court, and entered on the minutes thereof. The clerk shall thereupon give a certificate of the same to the juror, and said certificate shall be negotiable and shall be paid by the county treasurer upon presentation by the payee or the holder in due course. In all other cases the court or officer before whom the juror serves shall determine the sum due and give certificate accordingly.

CHAPTER 11

THE GRAND JURY & INDICTMENTS

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THE GRAND JURY & INDICTMENTS

The Grand Jury

Impaneling the Grand Jury

Mississippi Rule of Criminal Procedure 13, The Grand Jury, states in part:

> Grand juries may be impaneled and serve both in term time and vacation. . . . Upon impanelment, a grand jury may be convened and reconvened by order of the court. The grand jury will continue to serve until the next grand jury is impaneled and it may return indictments to court in term time or vacation notwithstanding intervening terms of court between the time the grand jury is impaneled and the time an indictment is returned.

§ 13-5-43 Impaneling as evidence of qualifications:

> Before swearing any grand juror as such, he shall be examined by the court, on oath, touching his qualification. After the grand jurors shall have been sworn and impaneled, no objection shall be raised, by plea or otherwise, to the grand jury, but the impaneling of the grand jury shall be conclusive evidence of its competency and qualifications. However, any party interested may challenge or except to the array for fraud.

§ 13-5-39 Grand jury terms limited:

> Unless otherwise directed by an order of the senior circuit judge, not more than two (2) grand juries shall be drawn or impaneled during a calendar year at or for a term or terms of the circuit court in any county or judicial district of a county; provided, however, upon impanelment, a grand jury may be convened and reconvened in term time and in vacation. It shall continue to serve from term to term until the next grand jury is impaneled, and it may return indictments to any term of court, notwithstanding that a term of court at which criminal business may be conducted shall intervene between the time the grand jury is impaneled and the time an indictment is returned.

***See* § 13-5-83 Juror intoxication** (After grand jurors are impaneled they shall be under the control of the court, and, for any breach of duty or contempt of court, may be fined and imprisoned.).

Number of Grand Jurors

Mississippi Rule of Criminal Procedure 13.1, Selection and Preparation of Grand Jurors, states:

> The grand jury shall consist of at least fifteen (15) persons, but not more than twenty-five (25) persons, the exact number to be within the discretion of the judge impaneling the jury.

***See* § 13-5-41 Quantity of grand jurors.**

Additional Grand Jurors May Be Drawn

Mississippi Rule of Criminal Procedure 13.1, Selection and Preparation of Grand Jurors, states:

> If during the service of a grand jury the number of grand jurors able to serve on the grand jury shall become less than fifteen (15), then the circuit judge may have additional grand jurors summoned, impaneled, and charged in the same manner as the original grand jurors.

§ 13-5-51 Filling juror vacancies:

> If, after the grand jury has been sworn, any of the members thereof should absent themselves from any cause, or become incompetent to sit, or be excused by the court, the court shall have power to cause others to be sworn in their places.

Grand Jury Foreman

Mississippi Rule of Criminal Procedure 13.3, Grand Jury Foreperson, states:

> The court shall appoint a foreperson of the grand jury to whom the . . . oath shall be administered in open court. . . . If a foreperson becomes unable to continue service as a grand juror, the court shall appoint another member of the grand jury as replacement. The fact that the original foreperson was replaced shall not be grounds for attacking the validity of the acts or indictments of the grand jury.

***See* § 13-5-45 Appointment of foreman.**

Oath of the Grand Jurors & Foreman

§ 13-5-45 Appointment of foreman:

The court shall appoint one (1) of the grand jurors to be foreman of the grand jury, to whom the following oath shall be administered in open court, in the presence of the rest of the grand jurors, to wit:

Foreman's Oath

You, as foreman of this grand inquest, shall diligently inquire into, and true presentment make, of all such matters and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service. The counsel of the state, your fellows, and your own you will keep secret. You shall not present any person through malice, hatred or ill will, nor shall you leave any person unpresented through fear, favor or affection, or for any reward, hope or promise thereof, but in all your presentments, you shall present the truth, the whole truth, and nothing but the truth, to the best of your skill and understanding. So help you God.

And the following oath shall be administered to the other jurors, to wit:

Grand Jurors' Oath

The same oath that your foreman has now taken before you on his part, you, and each of you, shall well and truly observe, and keep on your respective parts. So help you God.

***See* Mississippi Rule of Criminal Procedure 13.3, Grand Jury Foreperson**.

Court's Charge to the Grand Jury

Mississippi Rule of Criminal Procedure 13.2, Duties and Powers of Grand Jury, states in part:

> Only the circuit judge may deliver the charge to the grand jury, except that the circuit clerk or deputy court clerk may read the charge as proposed by the circuit judge when the judge shall be unable to deliver the charge by reason of physical infirmity. The circuit judge shall charge the grand jury according to the matters required by law as the judge deems fit and proper. A sample charge which may be used is attached as an Appendix to these Rules.

§ 13-5-47 Judge's charges to grand jury:

> The judge shall charge the grand jury concerning its duties and expound the law to it as he shall deem proper, and he shall particularly charge it concerning enforcement of the following statutes:
>
> (1) those against gambling and the unlawful selling and handling of intoxicating liquors;
>
> (2) those relating to gambling with minors, and the giving or selling to them tobacco, narcotics, or liquors;
>
> (3) those providing for the assessment, collection and disbursement of the public revenues, both state and county;
>
> (4) those defining the duties of public officers;
>
> (5) those relating to the collection and paying over of fines and forfeitures;
>
> (6) those relating to providing fire escapes in hotels, theaters and other buildings;
>
> (7) those relating to the management of sixteenth section school trust lands; and
>
> (8) all such other statutes as he shall deem proper at any time.
>
> Moreover, the judge shall especially charge the grand jury with respect to the state forest fire laws as set forth in Section 95-5-25 and Section 92-17-13, and charge that the grand jury shall report to him as to the status of forest protection in the county. It shall be unlawful for the district attorney or other officer, or person, to deliver to the grand jury the charge required by this section to be delivered by the judge, but this shall not prevent the judge from having the circuit clerk read the charge proposed by the judge, to the grand jury in the presence of the judge, when, by reason of physical infirmity, the judge shall be unable to deliver his charge.

Grand Jury's Authority

Mississippi Rule of Criminal Procedure 13.6, Grand Jury Proceedings, provides in part:

> A grand jury has the power to indict any person upon affirmative vote of twelve (12) or more grand jurors. The grand jury report should not accuse any person by name of an offense, malfeasance, or misfeasance unless an indictment is returned. If accusations are included in a grand jury report, the comments may be expunged upon the motion of the individual or on motion of the court.

§ 13-5-63 Subpoena of grand jury witness:

> The foreman of the grand jury shall have power to order subpoenas for all witnesses desired to be produced, and he shall also have power to swear all witnesses. A record shall be kept by the foreman and returned to court, certified and signed by the foreman, of the names of all witnesses sworn before the grand jury.

§ 99-9-23 Witness subpoenaed in vacation:

> Any district attorney or conservator of the peace may apply to the clerk of the circuit court in vacation for writs of subpoena for any witness to attend before the grand jury. It shall be the duty of the clerk to issue all subpoenas thus applied for, and it shall be the duty of all witnesses subpoenaed to attend in obedience to the command of such subpoena. If such witnesses fail to appear, the foreman of the grand jury may apply for and obtain an attachment, as in other cases of defaulting witnesses, and such witnesses shall be liable to all the penalties to which any defaulting witness is subject.

Mississippi Rule of Criminal Procedure 13.4 Recalcitrant Witnesses; Contempt, provides in part:

> When a witness under examination before the grand jury refuses to testify, to answer a question or to give evidence, the foreperson and/or the district attorney shall present to the court the question or evidence requested and the refusal of the witness. If, after inquiry, the court decides that the witness is bound to testify, answer, or give the evidence, the court shall so inform the witness. If the witness persists in refusing to testify, answer the question, or give evidence, the court shall proceed with the witness as in cases of similar refusal in other judicial proceedings.

Grand Jury's Other Duties

§ 13-5-55 Grand jury inspection of jail:

Each grand jury which is impaneled shall make a personal inspection of the county jail, its condition, sufficiency for the safekeeping of prisoners, and their accommodation and health, and make reports thereof to the court. For any violation or neglect of duty as to the jail, the sheriff may be punished as for a misdemeanor, or may be fined as for a contempt, such not to exceed $50.00.

§ 13-5-57 Examination of county records:

The grand jury shall have free access at all proper hours to the papers, records, accounts and books of all county officers, for all examinations which, in its discretion, it may see fit to make, and may make report to the court in relation thereto.

§ 13-5-59 Examination of tax collector's books:

It shall be the duty of each grand jury which is impaneled to examine the tax collector's books and his reports and settlements, and make report thereon.

§ 47-1-27 Maltreatment and abuse prohibited:

An official, or guard, or other employee, having the custody of any county prisoner, or any official or employee of the county having custody of any county prisoner, who shall maltreat or abuse any such convict, or who shall knowingly permit the same to be done, or who being under duty to provide sufficient and wholesome food, clothing, shelter, bathing facilities, or medical attention to such convict, shall wilfully fail to furnish the same to such convict, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in any sum not less than Ten Dollars ($10.00) nor more than Five Hundred Dollars ($500.00), or shall be imprisoned not less than one (1) month, or shall suffer both such fine and imprisonment, in the discretion of the court, and it shall be the duty of the judge of the circuit court of such county to so charge the grand jury.

§ 47-1-31 Grand jury examinations:

Each grand jury which is impaneled shall examine the records of county prisoners and their treatment and condition and report the same to the court.

§ 65-7-119 Neglect of duty; penalty:

> The circuit judge shall at each term of the court especially charge the grand jury to inquire into the condition of the roads of any county. Any contractor or overseer or supervisor who neglects his duty shall be guilty of a misdemeanor and be liable to indictment and, upon conviction, shall be fined not more than one hundred dollars.

§ 99-23-17 Breach of bonds; grand jury:

> It shall be the duty of the clerk of the circuit court, at each term of court, to deliver to the grand jury all peace bonds that have been filed with him or in his office within two (2) years then next past, which bonds shall be returned by the grand jury to said clerk before its final adjournment. It shall be the duty of the grand jury to inquire into whether or not there has been a breach of said bonds, and to notify the district attorney of any breaches. The grand jury shall examine the person at whose instance the bond was required, if he can be found and examined; and it may examine other witnesses. If it finds that there has been a breach of the bond, it shall furnish the district attorney a list of the witnesses by whom the facts can be established.

Grand Jury's Secrecy in its Proceedings

Mississippi Rule of Criminal Procedure 13.5 Grand Jury Secrecy, provides in part:

> A grand juror, except when called as a witness in court, shall keep secret the proceedings and actions taken in reference to matters brought before the grand jury for six (6) months after final adjournment of the grand jury, and the name and testimony of any witness appearing before the grand jury shall be kept secret. No attorney general, district attorney, county attorney, other prosecuting attorney, or other officer of the court shall announce to any unauthorized person what the grand jury will consider in its deliberations. If such information is disclosed, the disclosing person may be found in contempt of court punishable by fine or imprisonment. No grand juror, witness, attorney general, district attorney, county attorney, other prosecuting attorney, clerk, sheriff or other officer of the court shall disclose to any unauthorized person that an indictment is being found or returned into court against a defendant or disclose any action or proceeding in relation to the indictment before the finding of an indictment, within six (6) months thereafter, or before the defendant is arrested or gives bail or recognizance.

§ 13-5-61 Non-disclosure of jury-room secrets:

A grand juror, except when called as a witness in court, shall not disclose any proceeding or action had by the grand jury in relation to offenses brought before it, within six (6) months after final adjournment of the grand jury upon which he served, nor shall any grand juror disclose the name or testimony of any witness who has been before the grand jury on pain of fine or imprisonment for contempt of court.

§ 97-9-53 Disclosure of indictment facts:

If a grand juror, witness, district attorney, clerk, sheriff, or any other officer of the court, disclose the fact of an indictment being found or returned into court against a defendant, or disclose any action or proceeding had in relation thereto, before the finding of the indictment, or in six (6) months thereafter, or until after the defendant shall have been arrested or given bail or recognizance to answer thereto, he shall be fined not more than $200.00.

GRAND JURIES IN GENERAL		
Provisions for Grand Jury	§ 13-5-39	Two grand juries drawn in calendar year unless court orders otherwise
	Rule 13.1, § 13-5-41	Grand jury should consist of 15 - 25 jurors
	§ 13-5-43	Court examines potential jurors for qualifications Being sworn & impaneled is conclusive evidence of the grand jury's competency
	Rule 13.1, § 13-5-39	Upon impanelment, grand jury may be convened & reconvened in term time and in vacation
	Rule 13.1, § 13-5-51	Court can have other jurors sworn to fill vacancies in the grand jury
	Rule 13.1, § 13-5-39	Grand jury may return indictment to any term of court
Grand Jury Foreman	Rule 13.3, § 13-5-45	Court appoints a grand jury foreman who is then sworn
	§ 13-5-63	Foreman can subpoena witnesses before the grand jury and swear them in
	§ 13-5-63	Foreman keeps a record of all witnesses sworn before the grand jury and returns it to the court
Grand Jury Members	§ 13-5-45	Grand juror members are sworn
	Rule 13.5, § 13-5-61	Grand jurors are not to disclose any proceedings conducted by the grand jury within 6 months after final adjournment
	§ 97-9-53	Grand juror is fined for disclosing facts relating to an indictment

Duties	Rule 13.2, § 13-5-47	Court charges grand jury concerning its duties & the law
	§ 13-5-55	Grand jury may inspect the county jail & reports to the court
	§ 13-5-57	Grand jury may examine all county offices & report to the court
	§ 13-5-59	Grand jury may examine the tax collector's books & reports to the court
Compensation	§ 13-5-53	Grand jurors are paid only for the number of days they actually perform their duties

INDICTMENTS

Right to Indictment for Alleged Offense

Mississippi Constitution, Article III, § 27 states:

> No person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or the military when in actual service, or by leave of court for misdemeanor in office or where a defendant represented by counsel by sworn statement waives indictment; but the legislature, in cases not punishable by death or by imprisonment in the penitentiary, may dispense with the inquest of the grand jury, and may authorize prosecution before justice court judges, or such other inferior court or courts as may be established, and the proceedings in such cases shall be regulated by law.

Votes Required to Return an Indictment

Mississippi Rule of Criminal Procedure 13.6, Grand Jury Proceedings, states:

> A grand jury has the power to indict any person upon affirmative vote of twelve (12) or more grand jurors. . . .

§ 99-7-11 Concurrence of grand jurors:

> The concurrence of twelve (12) of the grand jurors shall be necessary to the finding of an indictment or making a presentment.

Form of the Indictment

Mississippi Rule of Criminal Procedure 14.1, Nature and Contents, states:

> The indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts and elements constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them.
>
> An indictment shall also include the following:

(A) the name of the accused;
(B) the date on which the indictment was filed in court;
(C) a statement that the prosecution is brought in the name and by the authority of the State of Mississippi;
(D) the county and, in two-district counties, the judicial district in which the indictment is brought;
(E) the date and, if applicable, the time at which the offense was alleged to have been committed;
(F) the signature of the foreperson of the grand jury issuing it; and
(G) the words "against the peace and dignity of the state."

It is a well-established principle of law that in order for an indictment to be sufficient, it must contain the essential elements of the crime charged. . . . This Court [has] stated [that] it is fundamental that an indictment, to be effective as such, must set forth the constituent elements of a criminal offense; if the facts alleged do not constitute such an offense within the terms and meaning of the law or laws on which the accusation is based, or if the facts alleged may all be true and yet constitute no offense, the indictment is insufficient. Every material fact and essential ingredient of the offense--every essential element of the offense--must be alleged with precision and certainty, or, as has been stated, every fact which is an element in a prima facie case of guilt must be stated in the indictment. ***Peterson v. State*, 671 So. 2d 647, 652-53 (Miss. 1996) (citations omitted), *abrogated by Caston v. State*, 949 So. 2d 852 (Miss. Ct. App. 2007).**

§ 99-7-1 Charging of offenses:

Offenses at common law, indictable and punishable by special statutory provision, may be indicted as described or charged according to the common law or according to the statute, and, on conviction, the offenders shall be punished.

§ 99-7-5 Allegations of time; venue:

An indictment for any offense shall not be insufficient for omitting to stated the time at which the offense was committed in any cases where time is not of the essences of the offense, not for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for the want of a proper or perfect venue.

Amendment of Indictment

Mississippi Rule of Criminal Procedure 14.4, Amendment of Indictments, states in part:

> For good cause shown, indictments may be amended as to form but not as to the substance of the offense charged. Amendment may be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised.
>
> ***See* Mississippi Rule of Criminal Procedure 14.1(b) Enhanced Punishment for Subsequent Offenses.**

§ 99-17-13 Variance between indictment and evidence:

> Whenever, on the trial of an indictment for any offense, there shall appear to be any variance between the statement in the indictment and the evidence offered in proof thereof, in the name of any county, city, town, village, division, or any other place mentioned in such indictment, or in the name or description of any person or body politic or corporate, therein stated or alleged to be the owner of any property, real or personal, which shall form the subject of any offense charged therein, or in the name or description of any person, body politic or corporate, therein stated or alleged to be injured or damaged; or intended to be injured or damaged, by the commission of such offense, or in the Christian name or surname, or both, or other description whatever, of any person whomsoever, therein named or described, or in the ownership of any property named or described therein, or in the description of any property or thing, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defense on the merits, to order such indictment and the record and proceedings in the court to be amended according to the proof, whenever it may be deemed necessary by the court to amend such indictment, record, and proceedings, on such terms as to postponing the trial, to be had before the same or another jury, as the court shall think reasonable. After such amendment, the trial shall proceed in the same manner, and with the same consequences in all respects, as if a variance had not occurred; but if the court shall, on application, refuse a continuance, the defendant may take a bill of exceptions thereto, and assign such refusal for error.

§ 99-17-15 Variance between indictment and proof; amendment of record and indictment; order for amendment:

The order of the court for amendment of the indictment, record or proceedings provided in Section 99-17-13 shall be entered on the minutes, and shall specify precisely the amendment, and shall be a part of the record of said case, and shall have the same effect as if the indictment or other proceeding were actually changed to conform to the amendment; and wherever necessary or proper for the guidance of the jury, or otherwise, the clerk shall attach to the indictment a copy of the order for amendment.

Whether an Amendment to an Indictment is Allowed

It is fundamental that courts may amend indictments only to correct defects of form; however, defects of substance must be corrected by the grand jury. It is well settled in this state, as was noted by the learned circuit judge, that a change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case. An indictment may only be amended at trial if the amendment is immaterial to the merits of the case and the defense will not be prejudiced by the amendment. . . . The test is whether the defense as it originally stood would be equally available after the amendment is made. ***Moss v. State*, 727 So. 2d 720, 723 (Miss. Ct. App. 1998) (citations omitted).**

An amendment to an indictment at trial is permissible so long as such amendment is not "material to the merits of the case" and the defendant is not prejudiced in "his defense on the merits." ***Carter v. State*, 783 So. 2d 783, 785 (Miss. Ct. App. 2001) (citation omitted).**

[T]he test of whether an accused is prejudiced by the amendment of an indictment or information has been said to be whether or not a defense under the indictment or information as it originally stood would be equally available after the amendment is made and whether or not any evidence [the] accused might have would be equally applicable to the indictment or information in the one form as in the other; if the answer is in the affirmative, the amendment is one of form and not of substance. ***Adams v. State*, 772 So. 2d 1010, 1021 (Miss. 2000) (citations omitted).**

Amendments to Form (Non-Substantive) of an Indictment Are Allowed

If both the defense and the evidence remain unhindered after amending the indictment, then the amendment is considered to be an amendment of form rather than substance. ***Givens v. State*, 730 So. 2d 81, 87 (Miss. Ct. App. 1998) (citations omitted).**

County of Offense

> Shortly before trial, the district attorney moved the trial court for an amendment to the indictment to add the words "Jones County," which had been inadvertently left out due to clerical error. Over objections from the defense, the judge allowed the amendment. [The defendant] argues that the amendment was one of substance, not form, and could be made only by the grand jury. . . . The indictment in the present case was signed by the foreman of the grand jury, clearly designated as "State of Mississippi, Jones County," and marked filed by the Circuit Clerk of Jones County. There was no error in allowing the State to amend the indictment to show Jones County on the face of the instrument when Jones County was on the page containing the grand jury foremen's signature and was marked "filed" by the Circuit Clerk of Jones County. [The defendant] had sufficient notice that he was being brought to trial in Jones County and suffered no prejudice because of the amendment to the indictment. ***Moss v. State*, 727 So. 2d 720, 723 (Miss. Ct. App. 1998) (citations omitted).**
>
> The first claim alleges the indictments were fatally defective because the record does not identify them as the indictments returned by the grand jury of Lowndes County. . . . This [issue] is [without merit] because the indictments charging [the defendant] with various and sundry offenses were each signed by the foreman of the grand jury and marked "filed" by the circuit clerk of Lowndes County. This provided sufficient "legal evidence" to negate the claims made by [the defendant]. ***Brooks v. State*, 573 So. 2d 1350, 1353-54 (Miss. 1990) (citations omitted).**

Date of Offense

The indictment originally stated that the drug transaction occurred "on or about the 9th day of September, 1997." At trial, the proof showed that the transaction actually occurred on September 18, 1997. [The defendant] claims that he was prejudiced by the amendment of the date on the indictment because, had he been properly informed of the correct date of the alleged criminal activity, he "might have" been able to provide an alibi defense. The State points out, however, that all of the discovery engaged in by the parties and all of the police reports showed that the date in question was September 18 and that [the defendant] cannot claim surprise. When [the defendant] moved to quash the indictment, the circuit court ruled that the amendment to the date was not a substantive matter. [The defendant] claims prejudice because he could have possibly provided an alibi defense if he had known the indictment had been amended, but he does not present any such concrete evidence of an alibi such as names of witnesses and the substance of their testimony. We have, on many occasions, upheld cases where amendments have been made to indictments to change the date of the offense charged. Therefore, this issue is without merit. ***Moore v. State*, 785 So. 2d 285, 286 (Miss. 2001) (citations omitted).**

[The defendant] also contends that the indictment was defective because it did not set forth specific dates. While Rule [7.06] sets forth the requirement of the date the offense occurred, it also states that failure to state the correct date shall not render the indictment insufficient. ***Eakes v. State*, 665 So. 2d 852, 860 (Miss. 1995) (citations omitted).**

Unless time is an essential element or factor in the crime, however, an amendment to change the date on which the offense occurred is one of form only. ***Baine v. State*, 604 So. 2d 258, 261 (Miss. 1992) (citations omitted).**

Name of Victim

At the close of the State's evidence, the State made a motion to amend the indictment to change the name of "Tom Seese" to "Tim Seese." The change of one letter of the victim's name was also not a material variance on the face of the indictment when the amendment did not alter the criminal charge brought against [the defendant]. Any errors complained of in the indictment above are matters of form and not of substance, and therefore the indictment is not fatally defective. Section 99-17-13 states that if there is a variance between a statement in the indictment and the evidence offered in proof, then the trial court may order the amendment changed if it finds that the variance is not material. The rule concerning a variance in the victim's name in an indictment is "an indictment must state the name of the victim of an offense where that is an element of the offense, and a failure to state it, or a material variance between statement and proof is fatal, but an immaterial variance is not." ***Burks v. State*, 770 So. 2d 960, 962-63 (Miss. 2000) (citations omitted).**

Finally, the three Appellants argue that the trial court erred when it allowed the prosecution to obtain an amendment of the original indictment during the course of trial. The indictment was amended to change the name of one of the victims from Madison Ecol Station to its parent company, Emerald Marketing, Inc. The trial court allowed the amendments, holding that (1) the amendment was not of a material nature and (2) the amendment would not deprive the defendants of any defense which they might have had prior to the amendment. In [previous cases], this Court [has] held that an indictment amended during trial to reflect the proper corporate name of the victim of a burglary was proper. This is precisely the issue in the instant case, the only difference being that this case involves an armed robbery charge. . . . The assignment of error is without merit and is denied. ***Evans v. State*, 499 So. 2d 781, 784-85 (Miss. 1986) (citations omitted).**

Habitual Status of or Enhanced Punishment for the Defendant

[The defendant] argues that it was error for the trial court to allow the State to amend the indictment a week before trial to charge [the defendant] as a habitual offender. . . . Rule 7.09 of the Uniform Rules of Circuit and County Court Practice allows for the amendment of an indictment in order to charge an offender as an habitual offender. . . . Thus, an indictment may be amended to charge an offender as an habitual offender only if the offender is given a "fair opportunity to present a defense and is not unfairly surprised." ***Adams v. State*, 772 So. 2d 1010, 1019-20 (Miss. 2000) (citations omitted).**

The Mississippi Supreme Court has clearly stated that amendments to indictments to charge the defendant as an habitual offender are allowed. These amendments are not viewed as one of substance and are allowed by Uniform Circuit and County Court Rule 7.09. The amendment is allowed because it affects only the sentence imposed and does not affect the substance of the offense for which the individual was originally indicted. ***Bell v. State*, 769 So. 2d 247, 253 (Miss. Ct. App. 2000) (citations omitted).**

Amendment of indictments is permitted for the purpose of charging the defendant as a habitual offender or elevating the level of the offense for purposes of enhanced punishment "only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised.". . . It is well settled in this state that a change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case. Under these guidelines, amending an indictment in order to charge a defendant as a habitual offender affects only sentencing and not the substance of the offense charged. Therefore such an amendment is permissible. ***Williams v. State*, 766 So. 2d 815, 816-17 (Miss. Ct. App. 2000) (citations omitted).**

Substantive Amendments to an Indictment Are Not Allowed

It is true that an indictment may not be amended to change the nature of the charge, except by action of the grand jury which returned the indictment. ***Greenlee v. State*, 725 So. 2d 816, 821 (Miss. 1998) (citations omitted).**

Adding Language to the Indictment

On the morning of the trial, the State moved to amend the indictment to charge the following:

> intentionally or recklessly under circumstances manifesting extreme indifference to the value of human life contrary to Section 97-3-7(2)(a) and (b) of Mississippi Code of 1972.

The record discloses no order allowing the amendment, but the jury instructions were changed to reflect the language of the requested instruction. Having been convicted of aggravated assault, the defendant has appealed to this Court complaining, among other things, that he was convicted for an offense for which he had not been indicted. . . . We agree and reverse for that reason. . . . We hold here that when the grand jury returned this indictment under sub-section (b), requiring purposeful and wilfull and knowing actions, that stated the charge upon which this defendant could be tried. When the proposed amendment was offered to allow the jury to convict under section (a) of the statute to include recklessly causing serious bodily injury under circumstances manifesting extreme indifference to the value of human life, this proposed a change of substance and not of form. ***Quick v. State*, 569 So. 2d 1197, 1198-1200 (Miss. 1990).**

[T]he appellant contends that the lower court erred in permitting the State to amend the indictment at the close of the State's case, over objection, and at a time when he had indicated his desire to file a motion for directed verdict from the charge "by shooting the said [victim] in the head" to that of "a pistol, a means likely to produce serious bodily harm." Had the lower court not permitted the amendment of the indictment, the appellant would have been entitled to a directed verdict of not guilty on the aggravated assault charge of shooting [the victim] in the head with the pistol, since the evidence was uncontradicted that the gun accidentally fired and that [the victim] was not wounded by the firing of the weapon. . . . In the case sub judice, the State recognized that it had failed to meet its burden of proving that appellant had committed aggravated assault by shooting [the victim] and the amendment

brought about an entirely new charge. We are of the opinion that the amendment amounted to a substantive change in the indictment. . . . ***Griffin v. State*, 540 So. 2d 17, 20-21 (Miss. 1989).**

> The appellant in *Griffin v. State*, above, filed an interlocutory appeal after the State re-indicted him for the same offense. In that appeal, the supreme court wrote:
>
> > We observed in *Griffin I* that "[h]ad the lower court not permitted the amendment of the indictment, appellant would have been entitled to a directed verdict of not guilty on the aggravated assault charge. . . ." That conclusion dictates that [the defendant] be acquitted of the charge. The evidence presented failed to sustain the charge of aggravated assault as contained in the original indictment. . . . We reverse the judgment of the circuit court and remand for entry of judgment of acquittal. ***Griffin v. State*, 584 So. 2d 1274, 1276 (Miss. 1991).**

Deleting Elements of the Offense Charged

The State amended this indictment after the trial began by omitting the word "secretly." [The defendant] maintains that this amendment is substantive and is thus prohibited by Section 99-17-13. The State asserts that the amendment is permissible, because it only amends the form of the indictment. The State asserts that the amendment was not substantive, because including the word "secretly" in the indictment was "mere surplusage," since secretly confining is not a necessary element of kidnapping. We disagree. . . . The issue here is not the sufficiency of the indictment, but whether amending the indictment compromised the defendant's rights by prejudicing his defense. "Due Process requires the State to prove each element of the offense charged in the indictment beyond a reasonable doubt." Once the prosecution made the decision to include the element of "secretly confined" in [the defendant's] indictment, it was constrained to prove that element beyond a reasonable doubt. Removing the word "secretly" from the indictment deleted an element of the offense charged, and in the process omitted one of the defenses otherwise available to [the defendant]. Review of the trial transcript reveals that part of [the defendant] trial strategy was to present evidence that his wife was not secretly confined. During cross-examination, his wife admitted that none of the places where [the defendant] took her were "secret

places." It was after this testimony that the prosecution made its motion to amend the indictment. Deleting the element of "secretly confined" from the indictment was a substantive change, and could only have been made by the grand jury. ***Chevalier v. State*, 730 So. 2d 1111, 1113-14 (Miss. 1998) (citations omitted) *overruled by Conley v. State*, 790 So. 2d 773, 795 (Miss. 2001)** ("A plain reading of the statute leads to the sound conclusion that one may commit the crime of kidnapping either by secretly confining a victim or by confining or imprisoning another against his or her will regardless of whether the confinement is secret. Indeed, in most cases of trickery, as in the instant case, the victim's confinement will not be in secret.").

Omitting Elements of the Offense Charged

Defendant argues that the prosecutor's failure to include the word "serious" as a modifier for the phrase "bodily injury," denied him actual notice of whether he was being charged with the felony crime of aggravated assault under Section 97-3-7(2) or the misdemeanor crime of simple assault under Section 97-3-7(1). Defendant argues that the indictment's ambiguity prevented him from being fully apprised of the charges he was facing, and more precisely, the minimum and maximum penalties that the charges carried, when he entered his guilty plea. The crux of this case is centered around Defendant's argument that the prosecutor's failure to include, in counts two and three of the indictment, the word "serious" as a modifier for the phrase "bodily injury" constitutes a failure to charge a crime under subsection (a) of the aggravated assault statute Section 97-3-7(2). In support of his position, Defendant cites *Hawthorne v. State*, 751 So. 2d 1090, 1094 (Miss. Ct. App. 1999), for the proposition that the absence of the word "serious" from the phrase "serious bodily injury" in the aggravated assault count results in the omission of an essential element of the offense and renders the indictment fatally defective. The *Hawthorne* decision relied heavily on *Peterson v. State*, 671 So. 2d 647, 653 (Miss. 1996), in which a five-to-four majority of our supreme court held that an indictment must set forth every essential element of an offense with precision and certainty or every fact which is an element of a prima facie case of guilt. Justice Pittman penned a fervent dissent to the *Peterson* majority holding in which he exposed the majority's reliance on cases which were decided prior to the 1979 enactment of the Uniform Rules of Circuit Court, now the Uniform Rules of Circuit and County Court. The majority of this Court is in agreement with Justice Pittman's dissent that the

Peterson majority applied in error the strict standard of review under which the sufficiency of indictments were analyzed prior to the enactment of the Rules. Justice Pittman's dissent went on to reiterate our supreme court's holding in *Harden*, that since the adoption of the Rules "all questions regarding the sufficiency of indictments have been determined by reference to Rule 2.05," now URCCC 7.06. Under the Rules, the standard under which the sufficiency of an indictment is analyzed is decidedly less stringent. The post-rules standard requires only that the indictment include the seven enumerated items of Rule 7.06 and provide the defendant with actual notice of the crime charged so that "from a fair reading of the indictment taken as a whole the nature of the charges against the accused are clear." The Rule makes clear that formal and technical words are not necessary if the offense can be substantially described without them. This post-rules standard for determining the sufficiency of indictments has, with the exception of the holdings of *Peterson* and *Hawthorne*, been repeatedly followed by our supreme court and by this Court. Although the law may have differed in former days, it is clear that our starting point today for determining the validity of an indictment is Rule 7.06 of the Uniform Rules of Circuit and County Court. . . . When the indictment against Defendant is reviewed under our post-rules standard, it is clear that the indictment is legally sufficient. Each of the enumerated items of Rule 7.06 can be found within the indictment as well as a plain and concise statement of the facts notifying Defendant that he is being charged with one count of vehicular homicide and two counts of aggravated assault arising out of his unlawful and felonious, negligent and reckless, operation of a motor vehicle under the influence of a controlled substance, on or about February 3, 2002. . . . Based upon our review of the indictment, we find the requirements of Rule 7.06 to have been met, and that Defendant was, at a minimum, given fair notice of the crimes with which he was charged. This Court's pivotal consideration when considering the validity of an indictment on appeal, is whether the defendant was prejudiced in the preparation of his defense. We do not find that, in this case, the failure to include the word "serious" prejudiced Defendant's defense in any way. ***Caston v. State*, 949 So. 2d 852, 855-59 (Miss. Ct. App. 2007) (citations omitted).**

[The defendant] also contends that the trial court erred in allowing an amendment to the [aggravated assault] indictment so that the word "serious" was interlined as a modifier of "bodily injury." . . . The State, recognizing what they deemed to be a clerical error, made a motion to amend the indictment. The trial court denied the defense's motion to dismiss, finding that it was in reality an untimely demurrer to the sufficiency of the indictment, and allowed the State to amend the indictment to add the word "serious" as a modifier of "bodily injury." . . . [This issue] raises the problem of a missing element; again the indictment referred to the controlling statute and at trial the omission was corrected by amendment. . . . Serious bodily injury is an element of aggravated assault. Therefore the absence of the word "serious" results in the omission of an essential element of the offense. Here, however, the State was granted the right to amend the indictment. We must decide if that cures the problem. . . . Returning to the case law discussed under Count I, we find the controlling consideration to be that "every fact which is an element in a prima facie case of guilty must be stated in the indictment." Though this can appear formalistic, it is a formula endorsed by the supreme court. To permit an amendment to add what the grand jury cannot leave out, is to undermine the clarity that cases such as *Peterson* require in the indictment. Amendments can correct other matters if the nature of the defense is not changed, but cannot add a necessary element to the description of the offense. . . . The State failed to include each element of the offense in this indictment. The defect was therefore substantive and could not be cured by amendment. The conviction is reversed. ***Hawthorne v. State*, 751 So. 2d 1090, 1094-95 (Miss. Ct. App. 1999) (citations omitted), *abrogated by Caston v. State*, 949 So. 2d 852 (Miss. Ct. App. 2007).**

Multiple Offenses Charged in a Single Indictment

Mississippi Rule of Criminal Procedure 14.2, Multi-Count Indictments, provides in part:

> (a) Joinder of Offenses. The indictment may charge a defendant in separate counts with two (2) or more offenses triable in the same court if the offenses charged – whether felonies, misdemeanors or both – are:
>
> > (1) based on the same act or transaction; or
> > (2) connected with or constitute parts of a common scheme or plan.
>
> . . . .
>
> (c) Trial of Joined Offenses.
>
> > (1) Where two (2) or more offenses are properly charged in separate counts of a single indictment, all such charges may be tried in a single proceeding.
> > (2) The trier of fact shall return a separate verdict for each count of an indictment drawn under section (a).
>
> (d) Sentencing. When a defendant is convicted of two (2) or more offenses charged in separate counts of an indictment, the court shall impose separate sentences for each such conviction. Nothing contained in this Rule, however, shall be construed to prohibit the court from exercising its authority to suspend either the imposition or execution of any sentence(s) or to prohibit the court from exercising its discretion to impose such sentences to run either concurrently with or consecutively to each other or to any other sentence(s) previously imposed upon the defendant.

§ 99-7-2 Multiple offenses and single indictment:

> (1) Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if:
>
> > (a) the offenses are based on the same act or transaction; or
> > (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.

> (2) Where two (2) or more offenses are properly charged in separate counts of a single indictment, all such charges may be tried in a single proceeding.
>
> (3) When a defendant is convicted of two (2) or more offenses charged in separate counts of an indictment, the court shall impose separate sentences for each such conviction.
>
> (4) The jury or the court, in cases in which the jury is waived, shall return a separate verdict for each count of an indictment drawn under subsection (1) of this section.
>
> (5) Nothing contained in this section shall be construed to prohibit the court from exercising its statutory authority to suspend either the imposition or execution of any sentence or sentences imposed hereunder, nor to prohibit the court from exercising its discretion to impose such sentences to run either concurrently with or consecutively to each other or any other sentence or sentences previously imposed upon the defendant.

[The defendant] alleges the indictment under which she was ultimately convicted incorrectly contained five separate counts of embezzlement which should have been combined into one count of embezzlement, thus constituting multiplicity. We look to Mississippi statutory authority and case law for guidance. Multiple count indictments are addressed by section 99-7-2. The State charged [the defendant] with four distinct and separate counts of embezzlement in Counts I--IV. . . . The above referenced statute allows offenses charged in one indictment to be listed as separate counts if the offenses are based on the same act or transaction or are a part of a common scheme or plan. ***Taylor v. State*, 754 So. 2d 598, 604 (Miss. Ct. App. 2000).**

Following enactment of section 99-7-2, the first case in which we addressed multi-count indictments was *Woodward v. State*. Speaking for the Court, Justice Prather announced that although this Court had historically disapproved a "single multiple count indictment:" The Legislature has now addressed the use of the single indictment containing multi-counts, and it has stated that as a matter of state policy no objections may be validly raised to an indictment containing multi-counts if the statute is otherwise followed. Thus, this Court holds that there is no error in the State's charging of three felony counts within a single indictment since this indictment was returned after the effective date of the statute and followed its dictates. ***Corley v. State*, 584 So. 2d 769, 774 (Miss. 1991) (citations omitted).**

Multiple Defendants May be Charged in a Single Indictment

Mississippi Rule of Criminal Procedure 14.2, Multi-Count Indictments, provides in part:

> (b) Joinder of Defendants. Two (2) or more defendants may be charged in the same indictment upon which they are to be tried when:
>
> (1) Each defendant is charged with accountability for each offense charged;
>
> (2) Each defendant is charged with conspiracy and some of the defendants are also charged with one (1) or more offenses alleged to have been committed in furtherance of the conspiracy; or
>
> (3) All defendants are not charged in each count, but it is alleged that the several offenses charged were part of a common scheme or plan.

Standard of Review for Defects in an Indictment

The question of whether an indictment is fatally defective is an issue of law and deserves a relatively broad standard of review by this Court. ***Nguyen v. State*, 761 So. 2d 873, 874 (Miss. 2000) (citation omitted).**

[T]his Court conducts de novo review on questions of law. The question of whether an indictment is fatally defective is an issue of law and deserves a relatively broad standard of review by this court. ***Simmons v. State*, 784 So. 2d 985, 987 (Miss. Ct. App. 2001) (citations omitted).**

Waiver of Non-Jurisdictional Defects in an Indictment

Generally speaking, a valid guilty plea . . . admits all elements of a formal charge and operates as a waiver of all non-jurisdictional defects contained in an indictment [or information] against a defendant. ***Conerly v. State*, 607 So. 2d 1153, 1156 (Miss. 1992) (citations omitted).**

Outside the constitutional realm, the law is settled that with only two exceptions, the entry of a knowing and voluntary guilty plea waives all other defects or insufficiencies in the indictment. A defendant's right to claim that he is not the person named in the indictment may be waived if not timely asserted. The principal exception to the general rule is that the failure of the indictment to charge a criminal offense or, more specifically, to charge an essential element of a criminal offense, is not waived. And, of course, a guilty plea does not waive subject matter jurisdiction. ***Jefferson v. State*, 556 So. 2d 1016, 1019 (Miss. 1989) (citations omitted).**

CHAPTER 12

PETIT JURY & JURY VERDICTS

CHARTS

CHAPTER 12

PETIT JURY & JURY VERDICTS

Right to a Trial by Jury

Civil Trials

Mississippi Constitution, Article III, § 31 provides:

> The right to trial by jury shall remain inviolate, but the legislature may, by enactment, provide that in all civil suits tried in the circuit and chancery court, nine (9) or more jurors may agree on the verdict and return it as the verdict of the jury.

> > Section 31 of the Mississippi Constitution provides that the right to trial by jury shall remain inviolate. This Court has interpreted that constitutional provision to apply to all cases where the right to trial by jury existed at common law. ***Isaac v. McMorris*, 461 So. 2d 714, 715 (Miss. 1984) (citations omitted).**
>
> > Section 31 of the Constitution of the State of Mississippi guarantees a jury trial only in those cases where a jury was necessary according to the principles of common law. ***Walters v. Blackledge*, 71 So. 2d 433, 444 (Miss. 1954) (citations omitted).**

Mississippi Rule of Civil Procedure 38, Jury Trial of Right, states:

> (a) The right of the trial by jury as declared by the Constitution or any statute of the State of Mississippi shall be preserved to the parties inviolate.
>
> (b) Parties to an action may waive their rights to a jury trial by filing with the court a specific, written stipulation that the right has been waived and requesting that the action be tried by the court. The court may in its discretion, require that the action be tried by a jury notwithstanding the stipulation of waiver.

Criminal Trials

Unites States Constitution, Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .
>
> > Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which--were they to be tried in a federal court--would come within the Sixth Amendment's guarantee**.** ***Duncan v. Louisiana*****, 391 U.S. 145, 149, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491 (1968).**

Mississippi Constitution, Article III, § 31 provides:

> The right to trial by jury shall remain inviolate . . . .

Petty Offenses - No Right to Jury Trial

> It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses. ***Duncan v. Louisiana*****, 391 U.S. 145, 159, 88 S. Ct. 1444, 1453, 20 L. Ed. 2d 491 (1968).**
>
> To determine whether an offense is petty, courts consider the maximum penalty attached to the offense. The maximum penalty set by the legislature is the most relevant criterion with which to assess the character of an offense, because it reveals the legislature's judgment of the severity of the offense. An offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious. ***Walls v. Spell*****, 722 So. 2d 566, 572 (Miss. 1998) (citations omitted).**
>
> We conclude that no jury trial right exists where a defendant is prosecuted for multiple petty offenses. The Sixth Amendment's guarantee of the right to a jury trial does not extend to petty offenses, and its scope does not change where a defendant faces a potential aggregate prison term in excess of six months for petty offenses charged. ***Lewis v. United States*****, 518 U.S. 322, 323-24, 116 S. Ct. 2163, 2165, 135 L. Ed. 2d 590 (1996).**

We agree with the reasoning of the United States Supreme Court in *Bloom v. Illinois*, that the punishment imposed should be looked to to determine whether the offense is petty or serious. We conclude that where the confinement is not more than six months and the fine not more than $500, that the offense is a petty one and the accused is not entitled to a jury trial under the Sixth Amendment to the Constitution of the United States. ***Hinton v. State*, 222 So. 2d 690, 692 (Miss. 1969).**

Serious Offenses - Right to Jury Trial

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." It is well established that the Sixth Amendment, like the common law, reserves this jury trial right for prosecutions of serious offenses, and that "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision." ***Lewis v. United States*, 518 U.S. 322, 325, 116 S. Ct. 2163, 2166, 135 L. Ed. 2d 590 (1996).**

In *Duncan v. Louisiana*, we held that the Sixth Amendment, as applied to the States through the Fourteenth, requires that defendants accused of serious crimes be afforded the right to trial by jury. We also reaffirmed the long-established view that so- called 'petty offenses' may be tried without a jury. Thus the task before us in this case is the essential if not wholly satisfactory one, of determining the line between 'petty' and 'serious' for purposes of the Sixth Amendment right to jury trial. Prior cases in this Court narrow our inquiry and furnish us with the standard to be used in resolving this issue. In deciding whether an offense is 'petty,' we have sought objective criteria reflecting the seriousness with which society regards the offense, and we have found the most relevant such criteria in the severity of the maximum authorized penalty. Applying these guidelines, we have held that a possible six-month penalty is short enough to permit classification of the offense as 'petty,' but that a two-year maximum is sufficiently 'serious' to require an opportunity for jury trial. The question in this case is whether the possibility of a one-year sentence is enough in itself to require the opportunity for a jury trial. We hold that it is. More specifically, we have concluded that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized. ***Baldwin v. New York*, 399 U.S. 66, 68, 90 S. Ct. 1886, 1887-88, 26 L. Ed. 2d 437 (1970).**

Trials on Appeal from Lower Court

Mississippi Rule of Criminal Procedure 29.5, Proceedings, states in part:

> In appeals from justice or municipal court, when the maximum possible sentence is six (6) months or less, the case may be tried without a jury.

> > The State confesses reversible error in the present case, acknowledging that the trial court erred in refusing [the defendant's] request for a jury trial. [Previous] Rule 12.02(c) provides in part that "[i]n appeals from justice or municipal court when the maximum possible sentence is six months or less, the case may be tried without a jury at the court's discretion." [Previous] Rule 12.02(c) thus only grants the trial court discretion to deny a defendant's request for a jury trial in cases in which the maximum possible sentence is six months or less. This provision is based upon United States Supreme Court decisions presumption that offenses carrying maximum sentences of six months or less are "petty offenses" to which the Sixth Amendment right to trial by jury does not apply. . . . [The defendant] was tried pursuant to [a statute which provided for] a statutory maximum sentence of one year. . . . It is thus apparent that the trial court committed reversible error in denying [the defendant's] request for a jury trial. ***Harkins v. State*, 735 So. 2d 317, 318-19 (Miss. 1999) (citations omitted).**

Petit Jury

> A group of persons selected according to law and given the power to decide questions of fact and return a verdict in the case submitted to them. ***Black's Law Dictionary*** **(10th ed. 2014).**

Number of Jurors

Civil Trials

Mississippi Rule of Civil Procedure 48, Juries and Jury Verdicts, provides:

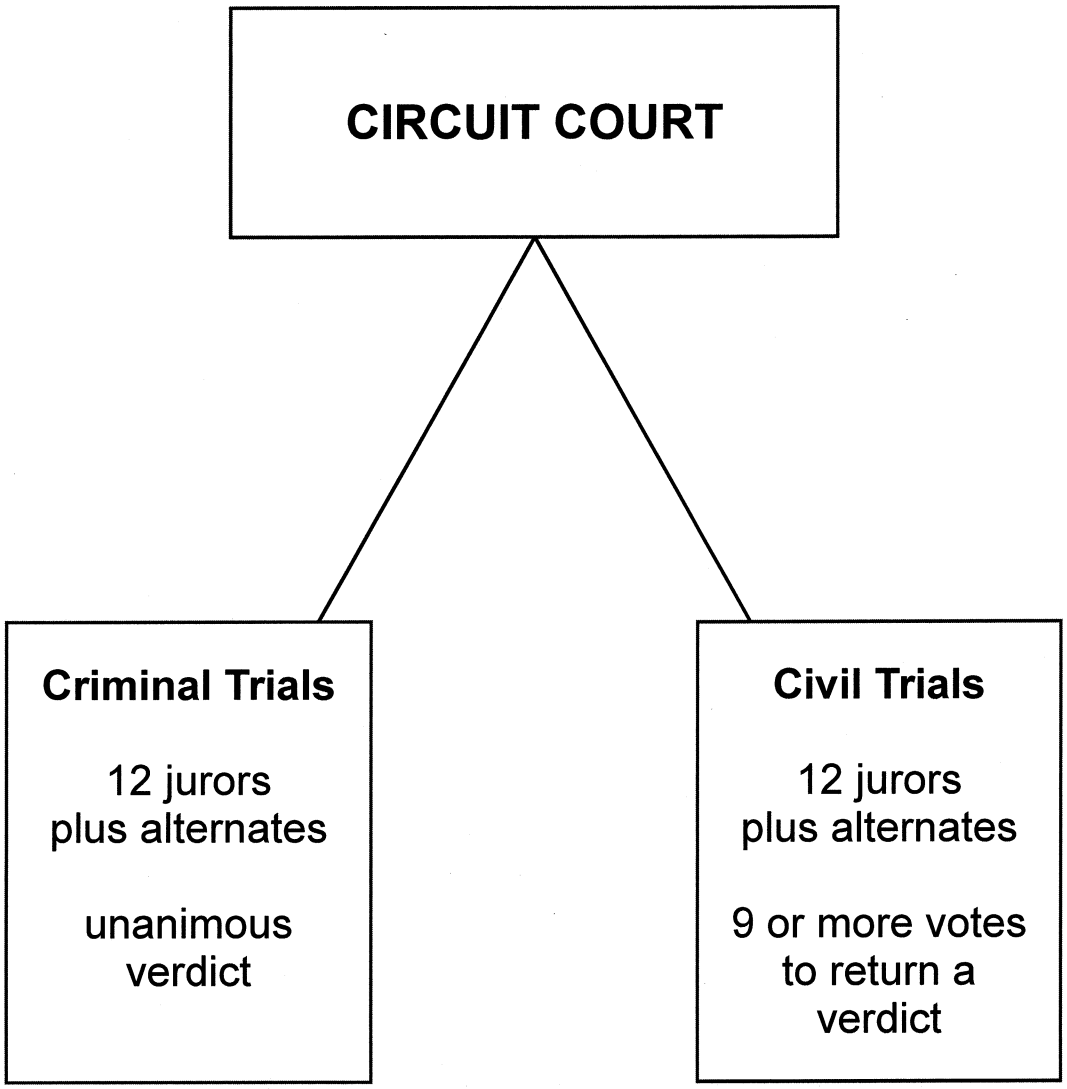
> **(a) Circuit and Chancery Courts.** Jurors in circuit and chancery court actions shall consist of twelve (12) persons, plus alternates as provided by Rule 47(d). . . .
>
> **(b) County Court.** Juries in county court actions shall consist of six (6) persons, plus alternates as provided by Rule 47(d). . . .
>
> > Rule 47(d) places the decision to have alternate jurors within the trial court's sound discretion. ***See*** **Miss. R. Civ. P 47(d).**

Criminal Trials

Mississippi Rule of Criminal Procedure 18.1, Trial by Jury, states:

> In felony cases, conviction requires the unanimous consent of twelve (12) impartial jurors.
>
> > The constitutional right to trial by jury includes as its essential elements that the jury shall consist of twelve (12) impartial men, neither more nor less. ***Markham v. State*****, 46 So. 2d 88, 89 (Miss. 1950).**

THE PETIT JURY



Impaneling the Venire

Uniform Civil Rule of Circuit and County Court 3.03, Number of Petit Jurors Summoned, states:

> The court may direct the clerk of court concerning the number of petit jurors needed to be summoned for jury duty. The circuit and county court may employ the same jury venire in the selection of petit juries. Special Courts of Eminent Domain may employ the jury venire of either county or circuit court in the selection of petit juries, or may direct the clerk of court concerning the number of petit jurors needed to be summoned for jury duty.

§ 13-5-65 Impaneling of petit juries:

After the drawing of the grand jury, the remaining jurors in attendance shall be impaneled into three (3) petit juries for the first week of court if there be a sufficient number left, and, if not, the court may direct a sufficient number for that purpose to be drawn and summoned. If there be more than enough jurors for the three (3) juries, or for two (2) juries if the court shall direct only two (2) to be impaneled, the excess may be discharged, or they may be retained, in the discretion of the court, to serve as talesmen. If so retained, they shall have the privilege of members of the regular panel, of exemption from service.

> ***See* § 13-5-89 Juries in condemnation proceedings (special procedures for selecting a jury for eminent domain proceedings).**

§ 13-5-30 Summoning of jurors where there is shortage of petit jurors drawn from jury box:

If there is an unanticipated shortage of available petit jurors drawn from a jury box, the court may require the sheriff to summon a sufficient number of petit jurors selected at random by the clerk from the jury box in a manner prescribed by the court.

> The circuit judge could have directed the [circuit] clerk to draw more names from the jury wheel. . . . A circuit judge should not hesitate in enlarging the jury panel when legitimate questions for cause, for whatever reason, arise. ***Scott v. Ball*, 595 So. 2d 848, 850 (Miss. 1992).**

§ 13-5-77 Special venire facias to issue in certain criminal cases:

When any person charged with a capital crime, or with the crime of manslaughter,

shall have been arraigned and the plea of not guilty entered, the accused or the district attorney in any such case shall, upon demand, be entitled to a special venire. If at a term of court a special venire has been demanded for any case or cases, it shall be the duty of the court to cause to be drawn, in open court, from the jury box as many names as the judge in his discretion may direct, not to be less than 40 for each special venire as the judge in his discretion may direct to be called, and it shall be the duty of the clerk to issue a special venire facias, commanding the sheriff to summon the persons whose names are so drawn, to attend the court on a particular day to be named in the writ. . . .

> The defendant was entitled to make a request and to receive a special venire; however, [the defendant] was required to make this request in a timely manner. Several cases have held that [a defendant who had made a request for a special venire on the day of trial had] made an untimely request for special venire. Because [the defendant] did not make any request for special venire prior to [the day of] trial, we find that the trial court was not in error for denying his motion to quash the regular venire. This Court will not overrule the lower court's denial of a motion for special venire except upon a showing of abuse of discretion. ***Davis v. State*, 684 So. 2d 643, 650 (Miss. 1996) (citations omitted).**

§ 13-5-81 Challenge to array; quashing of venire:

A challenge to the array shall not be sustained, except for fraud, nor shall any venire facias, except a special venire facias in a criminal case, be quashed for any cause whatever.

Juror Examination - Voir Dire

The purpose of voir dire is to select a fair and impartial jury. ***Puckett v. State*, 737 So. 2d 322, 332 (Miss. 1999).**

The circuit judge has an absolute duty, however, to see that the jury selected to try any case is fair, impartial and competent. ***Scott v. Ball*, 595 So. 2d 848, 850 (Miss. 1992) (citations omitted).**

Preliminary Questions by the Court

As a practical matter, the trial judge usually begins voir dire by questioning the prospective jurors about general matters, in order to ascertain whether the individual jurors are qualified for jury service or whether they may be excused or exempt from jury service. The prospective jurors are sworn to answer truthfully the questions asked of them by the court and the parties. ***See Miller v. State*, 84 So. 161, 162 (Miss. 1920); Miss. R. Civ. Pro. 47(a).**

Today we adopt a bright line rule that the trial judge's general questioning of prospective jurors, to ascertain those who are qualified for, or exempt from, jury service is not a critical stage of the criminal proceedings during which a criminal defendant is guaranteed a right to be present. A defendant may choose to be present during this part of the proceedings, but has no guaranteed right to be present**.** ***Davis v. State*, 767 So. 2d 986, 992 (Miss. 2000).**

Questions by the Parties

Civil Trials

Mississippi Rule of Civil Procedure 47(a), Jurors, allows:

Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. The court may permit the parties or their attorneys to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties of their attorneys to supplement the examination by further inquiry.

Uniform Civil Rule of Circuit and County Court 3.05, Voir Dire, provides:

In the voir dire examination of jurors, the attorney will question the entire venire only on matters not inquired into by the court. Individual jurors may be examined only when proper to inquire as to answers given or for other good cause allowed by the court. No hypothetical questions requiring any juror to pledge a particular verdict will be asked. Attorneys will not offer an opinion on the law. The court may set a reasonable time limit for voir dire.

***See* § 13-5-69 Examination of jurors by attorneys or litigants.**

The trial court has broad discretion in passing on the extent and propriety of questions that are addressed to the venire. ***Davis v. State*, 684 So. 2d 643, 651 (Miss. 1996) (citations omitted).**

Under Rule 3.05, the posing of hypothetical questions to the venire during voir dire is prohibited. [However,] a hypothetical question does not create a per se reversible error where the prosecutor does not specifically request or require that the venire pledge a verdict one way or another in response to his questions and comments. Ascertaining whether jurors are capable of returning a specific verdict differs greatly from requiring them to pledge a specific verdict under a hypothetical question. ***Longmire v. State*, 749 So. 2d 366, 368 (Miss. 1999) (citations omitted).**

Criminal Trials

Mississippi Rule of Criminal Procedure 18.4, Procedure for Selecting a Jury, states in part:

(c) Voir dire Examination. The court shall permit the parties to conduct the examination of the prospective jurors and may itself conduct its own examination. The court may impose reasonable limitations with respect to questions allowed during a party's examination of the prospective jurors, giving due regard to the purpose of such examination.

Standard of Review for Voir Dire

The standard used in examining the conduct of the voir dire is abuse of discretion. ***Berry v. State*, 575 So. 2d 1, 9 (Miss. 1990).**

Jury Selection Process

Civil Trials

Uniform Civil Rule of Circuit and County Court 4.04, Jury Selection Process, states:

> A. Peremptory jury challenges shall be exercised as follows:
>
> > 1. The court shall consider all challenges for cause before the parties are required to exercise peremptory challenges.
> > 2. Next, the plaintiff shall tender to the defendant a full panel of accepted jurors having considered the jury in the order in which they appear, having exercised any peremptory challenges desired.
> > 3. Next, the defendant shall go down the juror list accepted by the plaintiff and exercise any peremptory challenge(s) to that panel.
> > 4. Once the defendant exercises peremptory challenges to the panel tendered, the plaintiff shall then be required to again tender to the defendant a full panel of accepted jurors.
> > 5. The above procedure shall be repeated until a full panel of jurors has been accepted by both sides.
> > 6. Once the jury panel is selected, alternate jurors shall be selected following the procedure set forth above for selecting the jury panel.
>
> B. Constitutional challenges to the use of peremptory challenges shall be made at the time each panel is tendered.

Criminal Trials

Mississippi Rule of Criminal Procedure 18.4, Procedure for Selecting a Jury, states in part:

> The court shall give all members of the panel the . . . oath. . . . The court shall initiate the examination of jurors by identifying the parties and their counsel, briefly outlining the nature of the case, and explaining the purposes of the examination. The court shall ask any questions which it thinks necessary relating to the prospective jurors' qualifications to serve in the case on trial. . . .

Jury Challenges

Civil Trials

Challenges for Cause[1]

Uniform Civil Rule of Circuit and County Court 4.04, Jury Selection Process, states in part:

> The court shall consider all challenges for cause before the parties are required to exercise peremptory challenges.
>
> > The circuit judge has wide discretion in determining whether to excuse any prospective juror, including one challenged for cause. ***Scott v. Ball*, 595 So. 2d 848, 849 (Miss. 1992).**
> >
> > To the extent that any juror, because of his relationship to one of the parties, his occupation, his past experience, or whatever, would normally lean in favor of one of the parties, or be biased against the other, or one's claim or the other's defense in the lawsuit, to this extent, of course, his ability to be fair and impartial is impaired. ***Scott v. Ball*, 595 So. 2d 848, 850 (Miss. 1992).**
> >
> > When a prospective juror assures the court that, despite the circumstance that raises some question as to his qualification, this will not affect his verdict, this promise is entitled to considerable deference. ***Scott v. Ball*, 595 So. 2d 848, 850 (Miss. 1992).**
> >
> > When a rational challenge is made by a party to a prospective juror, and other jurors against whom no challenge is made are available, the circuit judge should ordinarily excuse the challenged juror. ***Scott v. Ball*, 595 So. 2d 848, 850 (Miss. 1992).**
> >
> > In our recent decision, *Hudson v. Taleff*, 546 So. 2d 359 (Miss. 1989), we added a factor which the circuit judge should consider in reaching his decision whether or not to excuse a prospective juror when a rational reason to do so has been brought to his attention. *Hudson* involved a suit against a physician in which a number of the jury panel or members of their family had been patients of his. Because that suit was in a county in which the circuit court could have, without hardship or any significant

[1]A party's challenge supported by a specified reason, such as bias or prejudice, that would disqualify that potential juror. ***Black's Law Dictionary* (10th ed. 2014).**

> inconvenience, summoned additional jurors for the venire, we reversed. Our implicit, if not explicit, holding in *Hudson* is that the circuit judge's discretion in determining a juror's qualification where a reasonable challenge has been made is considerably narrowed where, without great inconvenience, other prospective jurors may be readily summoned. When a rational challenge is made by a party to a prospective juror, and other jurors against whom no challenge is made are available, the circuit judge should ordinarily excuse the challenged juror. ***Scott v. Ball*, 595 So. 2d 848, 850 (Miss. 1992); *see Hudson v. Taleff*, 546 So. 2d 359, 360-63 (Miss. 1989).**
>
> We have consistently held that the trial court may not be put in error for refusal to excuse jurors challenged for cause when the complaining party chooses not to exhaust his peremptory challenges. ***Scott v. Ball*, 595 So. 2d 848, 851 (Miss. 1992).**

Peremptory Challenges[2]

Mississippi Rule of Civil Procedure 47(c), Jurors, provides:

> In actions tried before a twelve (12) person jury, each side may exercise four (4) peremptory challenges; in actions tried before a six (6) person jury, each side may exercise two (2) peremptory challenges. Where one or both sides are composed of multiple parties, the court may allow challenges to be exercised separately or jointly, and may allow additional challenges; provided, however, in all actions the number of challenges allowed for each side shall be identical. Parties may challenge any juror for cause.

[2]One of a party's limited number of challenges that do not need to be supported by a reason unless the opposing party makes a prima facie showing that the challenge was used to discriminate. . . . ***Black's Law Dictionary* (10th ed. 2014).**

Criminal Trials

§ 13-5-79 When opinion as to guilt or innocence will not render one incompetent in a criminal case:

Any person, otherwise competent, who will make oath that he is impartial in the case, shall be competent as a juror in any criminal case, notwithstanding the fact that he has an impression or an opinion as to the guilt or innocence of the accused, if it appear to the satisfaction of the court that he has no bias or feeling or prejudice in the case, and no desire to reach any result in it, except that to which the evidence may conduct. Any juror shall be excluded, however, if the court be of opinion that he cannot try the case impartially, and the exclusion shall not be assignable for error.

Challenges for Cause

Mississippi Rule of Criminal Procedure 18.3, Challenges, states in part:

When there is reasonable ground to believe that a juror cannot render a fair and impartial verdict, the court, on its own initiative or on motion of any party, shall excuse the juror from service in the case. A challenge for cause may be made at any time, but may be denied for failure of the party making it to exercise due diligence. Challenges for cause and rulings thereon shall be made out of the hearing of the jurors, but shall be of record.

Jurors may be excused for cause when their views on the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." ***Hughes v. State*, 735 So. 2d 238, 249 (Miss. 1999).**

A defendant is allowed unlimited challenges for cause. ***Parker v. State*, 29 So. 2d 910, 914 (Miss. 1947) (Smith, J., dissenting).**

[D]efense counsel still had five (5) peremptory challenges remaining after the jury was selected, in addition to the unlimited number of challenges for cause. ***Laney v. State*, 421 So. 2d 1216, 1218 n.1 (Miss. 1982).**

Peremptory Challenges

Mississippi Rule of Criminal Procedure 18.3, Challenges, states in part:

(c) Peremptory Challenges.

(1) In General. Both parties shall be allowed the following number of peremptory challenges for the selection of jurors:
(A) Selection of Regular Jurors: Regarding regular jurors, the defendant and the prosecution shall each have peremptory challenges, as follows:

(i) In cases wherein the punishment may be death or life imprisonment, the defendant and the prosecution each shall have twelve (12) peremptory challenges for the selection of the regular twelve (12) jurors.
(ii) In felony cases not involving the possible sentence of death or life imprisonment, the defendant and the prosecution each shall have six (6) peremptory challenges for the selection of the twelve (12) regular jurors.
(iii) The defendant and the prosecution each shall have two (2) peremptory challenges in a trial with a six (6) person jury.

These challenges may not be used in the selection of alternate juror(s).

Mississippi Rule of Criminal Procedure 18.4, Procedure for Selecting a Jury, states in part:

(e) Exercise of Peremptory Challenges. Following examination of the jurors, the parties shall exercise their peremptory challenges, in the order in which the jurors have been seated, as follows:

(1) the court shall rule upon all challenges for cause before the parties are required to exercise peremptory challenges;
(2) next, the prosecuting attorney shall tender a full panel of accepted jurors to the defendant(s), after having exercised any peremptory challenges desired;
(3) next, the defendant(s) shall go down the juror list accepted by the prosecuting attorney and exercise any peremptory challenges to that panel;
(4) once the defendant(s) exercise peremptory challenges to the panel tendered, the prosecuting attorney shall then be required to tender sufficient additional jurors to constitute a full panel of accepted jurors;
(5) the above procedure shall be repeated until a full panel of jurors has been accepted by all parties; and
(6) once the jury panel is selected, alternate jurors shall be selected following the procedure set forth above for selecting the jury panel.

Constitutional challenges to the use of peremptory challenges shall be made at the time each panel is tendered. Peremptory challenges shall be made out of the hearing of the jurors, but shall be of record.

When Jury Challenges Cause a Shortage of Prospective Jurors

§ 13-5-30 Summoning petit jurors where shortage:

If there is an unanticipated shortage of available petit jurors drawn from a jury box, the court may require the sheriff to summon a sufficient number of petit

jurors selected at random by the clerk from the jury box in a manner prescribed by the court.

Impaneling Alternate Jurors

Civil Trials

Mississippi Rule of Civil Procedure 47(d), Jurors, instructs on impaneling alternate jurors. It states:

> The trial judge may, in his discretion, direct that one (1) or two (2) jurors in addition to the regular panel be called and empaneled to sit as alternate jurors.
>
> Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties.
>
> Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges for cause, shall take the same oath and shall have the same functions, powers, facilities, and privileges as the regular jurors.
>
> Each party shall be allowed one (1) peremptory challenge to alternate jurors in addition to those provided by subdivision (c) of this rule. The additional peremptory challenges provided for herein may be used against an alternate juror only, and other peremptory challenges, provided by subdivision (c) of this rule, may not be used against an alternate juror.
>
> > We take this opportunity to remind the trial courts that the law states that alternate jurors may replace a juror only prior to the time the jury retires to deliberate. The alternate juror(s) must be discharged as soon as the jury retires to deliberate. ***Department of Human Services v. Moore*, 632 So. 2d 929, 933 (Miss. 1994) (citations omitted).**

§ 13-5-67 Impaneling of alternate jurors:

> Except in cases in which jury selection and selection of alternate jurors is governed by rules promulgated by the Mississippi Supreme Court, whenever, in the opinion of a circuit judge, the trial is likely to be a protracted one, such circuit judge, in his discretion, may direct that one (1) or two (2) jurors in addition to the regular panel be called and impaneled to sit as alternate jurors.
>
> Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or

disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges for cause, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors.

An alternate juror who does not replace a regular juror shall be discharged at the time the jury retires to consider its verdict. . . .

In all other cases each party shall be allowed one (1) peremptory challenge to alternate jurors in addition to those otherwise provided by law. . . . The additional peremptory challenges provided for herein may be used against an alternate juror only, and other peremptory challenges allowed by law may not be used against an alternate juror.

Uniform Civil Rule of Circuit and County Court Practice 4.04, Jury Selection Process, provides:

Once the jury panel is selected, alternate jurors shall be selected following the procedure set forth [in this rule] for selecting the jury panel.

Criminal Trials

Mississippi Rule of Criminal Procedure 18.3, Challenges, states in part:

When the court has elected to impanel alternate juror(s), the defendant and the prosecution shall each have peremptory challenges, as follows:

(i) In death penalty cases, the peremptory challenges shall equal the number of alternate jurors the court has ordered to be selected.
(ii) In all other cases, the peremptory challenges shall be one (1) challenge for each two (2) alternate jurors, or part thereof, ordered by the court to be selected.

These challenges for alternate jurors may not be used in the selection of regular jurors.

§ 13-5-67 Impaneling of alternate jurors:

In capital cases the defendant and the state shall each be allowed two (2) peremptory challenges to alternate jurors in addition to those otherwise provided by law. . . . In any criminal case all peremptory challenges by the state shall be made before the alternate juror is presented to the defendant.

Trial courts in Mississippi do not have license to remove jurors and replace them with alternates, willy nilly. Section 13-5-67 of the Mississippi Code and [the case of *Myers v. State*] provide for the replacement with alternates of jurors who, prior to the time the jury retires to consider the verdict, become unable or disqualified to perform their duties. The dismissal of a juror for good cause and her replacement with an alternate is within the sound discretion of the trial judge. ***Horton v. State*, 726 So. 2d 238, 247 (Miss. Ct. App. 1998) (citations omitted); *see Myers v. State*, 565 So. 2d 554, 557-58 (Miss. 1990).**

A trial court judge has sound discretion in dismissing a juror for good cause and replacing him/her with an alternate. Failure by the trial court to enter into the record specific reasons or good cause shown for the dismissal and replacement of a juror is error, albeit a harmless one. ***Brown v. State*, 763 So. 2d 189, 194 (Miss. Ct. App. 2000) (citations omitted).**

PETIT JURIES IN CIVIL CASES				
Court	**# of jurors**	**# of peremptory challenges per each party**	**# of alternate jurors**	**# of peremptory challenges for alternates per each party**
Circuit	12	4	1 or 2	1
County	6	2	1 or 2	1

PETIT JURIES IN CRIMINAL CASES				
Court	**# of jurors**	**# of peremptory challenges per each party**	**# of alternate jurors**	**# of peremptory challenges for alternates per each party**
Circuit Capital case	12	12	court's discretion	# of challenges is equal to the # of alternate jurors the court has ordered to be selected
Circuit Non-capital case	12	6	court's discretion	1 challenge for each 2 alternate jurors ordered by the court to be selected
County Misdemeanor	6	2	court's discretion	1 challenge for each 2 alternate jurors ordered by the court to be selected

Oath of Petit Jurors

General Oath

13-5-71 Oath of petit jurors:

Petit jurors shall be sworn in the following form:

Oath

You, and each of you, do solemnly swear (or affirm) that you will well and truly try all issues and execute all writs of inquiry that may be submitted to you, or left to your decision by the court, during the present term, and true verdicts give according to the evidence. So help you God.

The oath shall authorize the jury to try all issues and execute all writs of inquiry which may be submitted to it during that term of the court. Talesmen, if any be summoned or retained, shall in like manner be sworn to try all issues and execute all writs of inquiry which may be submitted to them during the day for which they are summoned or the time for which they are retained.

> [The case of *Stark v. State*, a non-capital criminal case] held that an oath administered before the jury shall retire to consider the verdict is just as valid as one administered prior to the presentation of the evidence. We also note that when the trial judge swore in the jury in the case sub judice that he expressed to them that they should have been "sworn before we started this to try the issues in this case," implying retroactivity. Since the oath in this case was administered to the jurors prior to the State's having rested its case and prior to the time the jurors retired to deliberate, we find that the trial court correctly denied the motion for re-trial, relying on *Stark*. ***Lester v. State*, 767 So. 2d 219, 223 (Miss. Ct. App. 2000) (citations omitted).**

Presumption that the Jury is Sworn

> [The defendant] argues that the jury in this case was never sworn and thus a reversal is required. He points out that the record does not reflect that the trial judge administered the required oath to the jurors after they were selected and before opening statements. In *Young v. State*, 425 So. 2d 1022, 1025 (Miss. 1983), the defendant argued on appeal that because the record did not reflect that the jury was specially sworn to try the issues at the outset of the trial, the trial court committed reversible error. We noted that although the beginning of the record did not indicate whether the jury was specially sworn, the first part of the judgment so reflected. We declined to reverse, stating that "the presumption is that the trial judge properly performed his duties and that this rebuttable presumption has not been overcome." In the case sub judice, in his objection to a defense motion raised after the jury was selected and released for lunch, the prosecutor stated, without challenge by the defense, that "the jury has been sworn and impaneled." Furthermore, the first parts both of the "Judgment of Conviction" and of the "Judgment" state that the jury was duly sworn before hearing the evidence and arguments. We find that [the defendant] has failed to overcome the presumption that the jury was properly sworn. ***McFarland v. State*, 707 So. 2d 166, 177 (Miss. 1998).**

Oath in Capital Cases

13-5-73 Oath of jurors and bailiffs in capital cases:

The jurors in a capital case shall be sworn to:

Oath
[W]ell and truly try the issue between the state and the prisoner, and a true verdict give according to the evidence and the law. . . .

Effect of Not Administering the Special Oath in Capital Cases

The Court holds the failure, if any, to give the special oath was not error because the two oaths are substantially equivalent, if not substantially the same, since "all issues" inherently includes "the issue [joined] between the state and the prisoner." To suggest otherwise is to exalt form over substance. The purpose of the judicial oath is to impart to the oath-taker the idea he is bound in conscience to perform an act faithfully and truthfully and to awaken and stimulate his conscience and impress his mind with his duty and responsibility to do so. This Court finds no reversible error for the possible omission of the administration of two separate oaths under the facts of this case. ***Wilburn v. State*, 608 So. 2d 702, 704 (Miss. 1992).**

However, in the case sub judice, the Court's oversight in having the jury sworn as required by Section 13-5-73 was brought to its attention immediately after a few preliminary questions had been asked of the first witness in the case; after which, the jury was sworn as required by law and the few questions that had been asked where repeated. We are of the opinion that under the facts of this case there was a technical error but it was harmless error. . . . ***Thomas v. State*, 298 So. 2d 690, 692 (Miss. 1974).**

The preliminary oath administered to the jurors, before voir dire examination, for the purposes of ascertaining their qualifications as jurors, was certainly not an oath to try the issue joined between the state and accused, as specifically required by the statute. It seems clear to us that there is a marked distinction between the oath to answer questions as to qualifications and the oath to hear, consider, and try the issue joined between the state and the defendant. . . . [T]he law of our state guarantees that the accused in a capital case shall have a legal jury to sit as triers of the fact in his case; and, in order that the prisoner be afforded such legal jury, it must be impaneled and sworn to try the issue joined between the state and the prisoner, and a true verdict render according to the law and the evidence, as specifically required by the statutes heretofore mentioned. This was not done, and for the error committed the judgment of the lower court is reversed and the case remanded. ***Miller v. State*, 84 So. 161, 161-62 (Miss. 1920).**

PETIT JURIES IN GENERAL

After grand jury has been selected, 2 or 3 petit juries are impaneled from remaining jury pool

If there is an insufficient jury pool, court orders additional names drawn & summoned

Special venire may be drawn in open court for capital & manslaughter cases

Court can order additional jurors to be called & impaneled to serve as alternate jurors

Additional jurors not required for service on the petit juries are discharged

Parties to jury trials can question impaneled jurors

Petit jurors are sworn

Petit jurors in capital cases take a special oath

Petit jurors in a criminal case make an oath that they can be impartial in the case

Court can exclude jurors when it opines that the jurors can not try the case impartially

Jury Sequestration

Mississippi Rule of Criminal Procedure 18.8, Jury Sequestration, states in part:

> (a) Death Penalty Cases. In a death penalty case, the jury shall be sequestered during the entire trial.
> (b) Other Cases. In all other cases, the jury may be sequestered on request of either the defendant or the prosecuting attorney made at least forty-eight (48) hours in advance of the trial. The court may grant or refuse the request to sequester the jury. The court may, on its own initiative or upon request of either party, sequester a jury at any stage of a trial.

> Since this is not a death penalty case, the jury may be sequestered upon request of either the defendant or the state if made 48 hours in advance of the trial. The trial judge, in his sound discretion, may grant or deny the request. ***Burney v. State*, 515 So. 2d 1154, 1160 (Miss. 1987).**

> [Concerning a timely motion,] trial in this case began January 21, 1986. The motion to sequester was filed January 20, the day previous. [The defendant] therefore waived his right to have the jury sequestered. We do urge circuit judges in criminal cases of this magnitude [a non-capital murder trial] to sequester the jury, however. ***Whittington v. State*, 523 So. 2d 966, 973 (Miss. 1998).**

> The better practice would have been for the circuit court to advise venire members the night before final jury selection and swearing in to come to court with packed suitcases. However, allowing the jurors, with the consent of both parties, to go home and quickly pack their bags after they were sworn in but before they were sequestered for the actual trial and the introduction of any evidence, does not warrant reversal of the entire case for a new trial. The jurors were advised that both sides had agreed that they could have a few minutes to get their things ready. The potential for jury prejudice against the defendant upon which the rule against allowing any waiver of sequestration even with the defendant's consent is premised was eliminated when consent was obtained by both parties outside of the presence of the jury. ***Watts v. State*, 733 So. 2d 214, 243 (Miss. 1999).**

§ 13-5-95 Separate accommodations and bailiffs for male and female jurors:

> In selecting overnight accommodations for jurors, the court shall provide separate housing for men and women jurors. Male bailiffs shall accompany the male jurors, and female bailiffs the female jurors. At least one bailiff shall accompany each group, and the court in its sound discretion shall require as many bailiffs as are necessary. Either group may be housed in private premises if necessary.

Instructing The Jury

Civil Trials

Mississippi Rule of Civil Procedure 51, Instructions to Jury, states:

> **(a) Procedural Instructions.** At the commencement of and during the course of a trial, the court may orally give the jury cautionary and other instructions of law relating to trial procedure, the duty and function of the jury, and may acquaint the jury generally with the nature of the case. . . .
>
> **(c) Instructions to Be Written.** Except as allowed by Rule 51(a), all instructions shall be in writing.
>
> **(d) When Read; Available to Counsel and Jurors.** Instructions shall be read by the court to the jury at the close of all the evidence and prior to oral argument; they shall be available to counsel for use during argument. Instructions shall be carried by the jury into the jury room when it retires to consider its verdict.

Criminal Trials

Mississippi Rule of Criminal Procedure 22, Jury Instructions, states in part:

> Instructions shall be read by the court to the jury before closing arguments. Instructions will not be given after closing arguments have begun, except when justice so requires. All given instructions shall be available to the parties for use during closing arguments, and will be carried into the jury room when the jury retires to consider its verdict.

Petit Jury Authority & Powers

Jurors May Take Notes During a Trial

Uniform Civil Circuit and County Court Rule 3.14, Note Taking by Jurors, states:

1. Note Taking Permitted in the Discretion of the Court - The court may, in its discretion, permit jurors to take written notes concerning testimony and other evidence. If the court permits jurors to take written notes, jurors shall have access to their notes during deliberations. Immediately after the jury has rendered its verdict, all notes shall be collected by the bailiff or clerk and destroyed.

2. Instructions - The court shall instruct the jury as to whether note taking will be permitted. If the court permits jurors to take written notes, the trial judge shall give both a preliminary instruction and an instruction at the close of all the evidence on the appropriate use of juror notes. These instructions shall be given in the following manner.

(a) Preliminary Instruction - Note Taking Forbidden:

You may not take notes during the course of the trial. There are several reasons for this. It is difficult to take notes and, at the same time, pay attention to what a witness is saying. Further, in a group the size of yours, certain persons will take better notes than others will, and there is a risk that jurors who do not take good notes will depend on jurors who do. The jury system depends upon all jurors paying close attention and arriving at a decision. I believe that the jury system works better when the jurors do not take notes. You will notice that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

(b) Preliminary Instruction - Note Taking Permitted:

If you would like to do so, you may take notes during the course of the trial. On the other hand, you are not required to take notes if you prefer not to do so. Each of you should make your own decision about this. If you decide to take notes, be careful not to get so involved in note taking that you become distracted from the ongoing proceedings. Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you take notes or not, each of you must form and express your own opinion as to the facts of this case. An individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors. You will notice that we do have an official court

reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

(c) Use of Notes During Deliberations - Jury Instruction #

Members of the Jury, shortly after you were selected I informed you that you could take notes and I instructed you as to the appropriate use of any notes that you might take. Most importantly, an individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors. Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you took notes or not, each of you must form and express your own opinion as to the facts of this case. Be aware that during the course of your deliberations there might be the temptation to allow notes to cause certain portions of the evidence to receive undue emphasis and receive attention out of proportion to the entire evidence. But a juror's memory or impression is entitled to no greater weight just because he or she took notes, and you should not be influenced by the notes of other jurors. Thus, during your deliberations, do not assume simply because something appears in your notes that it necessarily took place in court.

***See* Mississippi Rule of Criminal Procedure 18.6, Note Taking by Jurors.**

The court allows juror note taking at the discretion of the trial judge subject to some restrictions. However, a significant danger of prejudice exists if jurors are allowed to use in deliberations notes taken during trial. Juror notes may give undue weight to that portion of the evidence covered by a juror's notes at the expense of evidence on which no notes were taken. The notes should not be read or used by any juror other than the juror who took the notes. We therefore hold that juror notes are permissible, but should not be allowed to be taken by that juror into the jury room during deliberations. ***Wharton v. State*, 734 So. 2d 985, 991 (Miss. 1998) (citations omitted).**

Jurors May Not Interrogate Witnesses

Although this Court has not written approvingly of the practice of juror interrogation of witnesses, the practice implemented by the judge in the present case is, in many respects, less objectionable than the practices which this Court considered in both *Myers* and *Lucas*. . . . The record reveals that the questions which were submitted to the witnesses all concerned factual matters. . . . [However] the most obvious problem with allowing jurors to question witnesses is the unfamiliarity of jurors with the rules of evidence. Other potential problems include:

(1) Counsel may be forced to either make an objection to a question in front of the juror who asks the question, at the risk of offending the juror, or withhold the objection and permit prejudicial testimony to come in without objection;
(2) Juror objectivity and impartiality may be lessened or lost;
(3) If the juror submits a question in open court, the other jurors are informed as to what the questioning juror is thinking, which may begin the deliberation process before the evidence is concluded and before final instructions from the court;
(4) If the juror is permitted to question the witness directly, the interaction may create tension or antagonism in the juror; and
(5) The procedure may disrupt courtroom decorum.

Today we hold that juror interrogation is no longer to be left to the discretion of the trial court, but rather is a practice that is condemned and outright forbidden by this Court. ***Wharton v. State*, 734 So. 2d 985, 989-90 (Miss. 1998).**

Jury May View Property

§ 13-5-91 Jury may view the place:

When, in the opinion of the court, on the trial of any cause, civil or criminal, it is proper, in order to reach the ends of justice, for the court and jury to have a view or inspection of the property which is the subject of litigation, or the place at which the offense is charged to have been committed, . . . the court may, at its discretion, enter an order providing for such view or inspection as is herein below directed.

After such order is entered, the whole organized court, consisting of the judge, jury, clerk, sheriff, and the necessary number of deputy sheriffs, shall proceed, in a body, to such place or places, property, object or thing to be so viewed or inspected, which shall be pointed out and explained to the court and jury by the witnesses in the case, who may, at the discretion of the court, be questioned by the court and by the representative of each side at the time and place of such view or

inspection, in reference to any material fact brought out by such view or inspection.

The court on such occasion shall remain in session from the time it leaves the courtroom till it returns thereto, and while so in session outside the courtroom it shall have full power to compel the attendance of witnesses, to preserve order, to prevent disturbance and to punish for contempt such as it has when sitting in the courtroom.

In criminal trials all such views or inspections must be had before the whole court and in the presence of the accused, and the production of all evidence from all witnesses or objects, animate or inanimate, must be in his presence.

Jury Deliberations

Civil Trials

Uniform Civil Rule of Circuit and County Court 3.10, Jury Deliberations and Verdict, states:

The court may direct the jury to select one (1) of its members to preside over the deliberations and to write out and return any verdict agreed upon, and admonish the jurors that, until they are discharged as jurors in the cause, they may communicate upon subjects connected with the trial only while the jury is convened in the jury room for the purpose of reaching a verdict.

> Trial judges should not appoint or select who is to serve as jury foreperson. ***See Hunter v. State*, 684 So. 2d 625, 636 (Miss. 1996); *Ballenger v. State*, 667 So. 2d 1242, 1259 (Miss. 1995).**

The jurors shall be kept together for deliberations as the court reasonably directs.

The court shall permit the jury, upon retiring for deliberation, to take to the jury room the instructions and exhibits and writings which have been received in evidence, except depositions.

After the jurors have retired to consider their verdict the court shall not recall the jurors to hear additional evidence.

The court, after notice to all attorneys, may recall the jury after it has retired and give such additional written instructions to the jury as the court deems appropriate.

> If the jury, after they retire for deliberation, desires to be informed of any point of law, the court shall instruct the jury to reduce its question to writing and the court in its discretion, after affording the parties an opportunity to state their objections or assent, may grant additional written instructions in response to the jury's request. . . .

***See* UCRCCC 3.11 Jury Recess.**

Mistrial

Civil Trials

Uniform Civil Rule of Circuit and County Court 3.10, Jury Deliberations and Verdict, states in pertinent part:

> If it appears to the court that there is no reasonable probability of agreement, the jury may be discharged without having agreed upon a verdict and a mistrial granted.

Uniform Civil Rule of Circuit and County Court 3.12, Mistrials, states in pertinent part:

> Upon motion of a party or its own motion, the court may declare a mistrial if . . . [i]t appears there is no reasonable probability of the jury's agreement upon a verdict.

Criminal Trials - Sharplin Instruction

Mississippi Rule of Criminal Procedure 23.4, Assisting Jurors at Impasse, states:

> If it appears to the court that the jury has reached an impasse in its deliberations, the court may, in the presence of counsel, make inquiry of the jury and require the jury to continue their deliberations, with an appropriate instruction.
>
> If the trial judge feels that there is a likelihood that the jury might reach a verdict, he may return the jury for further deliberations by simply stating to the jurors: "Please continue your deliberations," or he may give the following instruction:
>
> I know that it is possible for honest men and women to have honest different opinions about the facts of a case, but, if it is possible to reconcile your differences of opinion and decide this case, then you should do so. Accordingly, I remind you that the court originally instructed you that the verdict of the jury must represent the

considered judgment of each juror. It is your duty as jurors to consult with one another and to deliberate in view of reaching agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous, but do not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. Please continue your deliberations. ***Sharplin v. State*, 330 So. 2d 591, 595 (Miss. 1978); *see Coleman v. State*, 697 So. 2d 777, 782 (Miss. 1997)** (reaffirming the Mississippi Supreme Court's approval of the *Sharplin* instruction)**.**

Sharplin allows a trial court judge to continue the jury's deliberations if he or she feels there is a reasonable possibility that the jurors will reach an agreement. ***Sullivan v. State*, 749 So. 2d 983, 995 (Miss. 1999).**

A *Sharplin* instruction is one used to encourage further deliberations by a potential hung jury, instructing the jury to reexamine their own views and reconsider if they become convinced that their original opinion was wrong, but not to be swayed merely to reach a verdict. ***Coleman v. State*, 697 So. 2d 777, 782 (Miss. 1997).**

The decision to give the "*Sharplin* charge" is left to the discretion of the trial judge. ***Banks v. State*, 394 So. 2d 875, 877 (Miss. 1981).**

Jury Verdicts

Uniform Civil Rule of Circuit and County Court 3.10, Jury Deliberations and Verdict, states in pertinent part:

> When the jurors have agreed upon a verdict they shall be conducted into the courtroom by the officer having them in charge.
>
> The court shall ask the foreman or the jury panel if an agreement has been reached on a verdict. If the foreman or the jury panel answers in the affirmative, the judge shall call upon the foreman or any member of the panel to deliver the verdict in writing to the clerk or the court.
>
> The court may then examine the verdict and correct it as to matters of form. The clerk or the court shall then read the verdict in open court in the presence of the jury.

Civil Trials

Mississippi Rule of Civil Procedure 48, Juries and Jury Verdicts, addresses the number of votes required to return a verdict in a civil trial:

> **(a) Circuit and Chancery Courts.** Jurors in circuit and chancery court actions shall consist of twelve (12) persons . . . . A verdict or finding of nine (9) or more of the jurors shall be taken as the verdict or finding of the jury.
>
> **(b) County Court.** Juries in county court actions shall consist of six (6) persons. . . . A verdict or finding of five (5) or more of the jurors shall be taken as the verdict or finding of the jury.

§ 13-5-93 Nine jurors may return a verdict in civil cases:

> In the trial of all civil suits in the circuit or chancery courts of this state, nine (9) or more jurors may agree on the verdict and return it into court as the verdict of the jury. Either party may request an instruction in writing to this effect and it shall thereupon be the duty of the trial judge to instruct the jury in writing that if nine (9) or more jurors agree on the verdict that they may return the same into open court as the verdict of the jury.

Types of Civil Verdicts

Mississippi Rule of Civil Procedure 49, General Verdicts and Special Verdicts provides:

> **(a) General Verdicts.** Except as otherwise provided in this rule, jury determination shall be by general verdict. The remaining provisions of this rule should not be applied in simple cases where the general verdict will serve the ends of justice.
>
> **(b) Special Verdict.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.
>
> **(c) General Verdict Accompanied by Answers to Interrogatories.** The court, in its discretion, may submit to the jury, together with instructions for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered consistent with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.
>
> **(d) Court to Provide Attorneys With Questions.** In no event shall the procedures of subdivisions (b) or (c) of this rule be utilized unless the court,

within a reasonable time before final arguments are made to the jury, provides the attorneys for all parties a copy of the written questions to be submitted to the jury.

Form of the Verdict

Uniform Civil Rule of Circuit and County Court 3.10, Jury Deliberations and Verdict, states in pertinent part:

> If a verdict is so defective that the court cannot determine from it the intent of the jury, the court shall, with proper instructions, direct the jurors to reconsider the verdict. No verdict shall be accepted until it clearly reflects the intent of the jury. If the jury persists in rendering defective verdicts the court shall declare a mistrial.

§ 11-7-157 Form of verdict:

> No special form of verdict is required, and where there has been a substantial compliance with the requirements of the law in rendering a verdict, a judgment shall not be arrested or reversed for mere want of form therein.
>
> > The basic test with reference to whether or not a verdict is sufficient as to form is whether or not it is an intelligent answer to the issues submitted to the jury and expressed so that the intent of the jury can be understood by the court. This well-established rule of law has long been recognized by this Court. ***Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp.*, 743 So. 2d 954, 968 (Miss. 1999) (citations omitted); s*ee Byars v. Moore Planting Co.*, 755 So. 2d 415 (Miss. 2000); *Harrison v. Smith*, 379 So. 2d 517 (Miss. 1980)** (discussing defective verdicts).

§ 11-7-159 Reforming verdict at bar:

> If the verdict is informal or defective, the court may direct it to be reformed at the bar. Where there has been a manifest miscalculation of interest, the court may direct a computation thereof at the bar, and the verdict may, if the jury assent thereto, be reformed in accordance with such computation.

§ 11-7-161 Non-responsive verdicts:

> If the verdict is not responsive to the issue submitted to the jury, the court shall call their attention thereto and send them back for further deliberation.

Criminal Trials

Mississippi Rule of Criminal Procedure 18.1, Trial by Jury, states in part:

In felony cases, conviction requires the unanimous consent of twelve (12) impartial jurors.

> In order that there may be no confusion in the minds of jurors engaged in the trial of a criminal case we think it is proper to instruct them in such cases that their verdict must be unanimous. . . The constitutional right to trial by jury includes as its essential elements that the jury shall consist of twelve (12) impartial men, neither more nor less, . . . and that the verdict shall be unanimous. ***Markham v. State*, 46 So. 2d 88, 89 (Miss. 1950); *see Burch v. Louisiana*, 99 S. Ct. 1623, 1627 (1979)** (The United States Supreme Court has stated that a verdict rendered by a six (6) person jury in a non-petty offense trial must be unanimous.).

Form of the Verdict

Mississippi Rule of Criminal Procedure 24.6, Miscellaneous Provisions, states in part:

> If a verdict is so defective that the court cannot determine from it the intent of the jury, the court shall, with proper instructions, direct the jurors to reconsider the verdict. No verdict shall be accepted until it clearly reflects the intent of the jury. If the jury persists in rendering defective verdicts, the court shall declare a mistrial.

§ 99-19-11 Reform of verdict:

> If the verdict is informal or defective the court may direct it to be reformed at the bar.

Non-Capital Cases

> No special form of verdict is required [in a non-capital criminal case], and where there has been a substantial compliance with the requirements of the law in rendering a verdict, a judgment shall not be arrested or reversed for mere want of form therein. The basic test with reference to whether or not a verdict is sufficient as to form is whether or not it is an intelligent answer to the issues submitted to the jury and expressed so that the intent of the jury can be understood by the court. ***Coles v. State*, 756 So. 2d 12, 14 (Miss. 1999) (citations omitted).**

Capital Cases

Guilt Phase

> At the conclusion of the first phase, the jurors were instructed their verdict might take the following form: "We, the jury, find the defendant guilty of capital

murder." After deliberating for two hours and forty-three minutes, they returned a verdict which read: "We, the jury, find the accused guilty as charged." [N]o effort was made by the defendant to clarify the alleged discrepancy; the judge polled the jury, and each juror acknowledged the verdict reflected his or her vote, and none expressed any doubt about the verdict prior to or during the punishment phase of the trial. It is convincingly clear to us that the jurors understood "guilty as charged" to mean "guilty of capital murder." ***Culberson v. State*, 379 So. 2d 499, 506-07 (Miss. 1979).**

Penalty Phase

§ 99-19-101 Jury determination of death penalty [in pertinent part:]

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death, life imprisonment without eligibility for parole, or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose or may be conducted before the trial judge sitting without a jury if both the State of Mississippi and the defendant agree thereto in writing. . . .

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient factors exist as enumerated in subsection (7) of this section;
(b) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;
(c) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and
(d) Based on these considerations, whether the defendant should be sentenced to life imprisonment, life imprisonment without eligibility for parole, or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient factors exist as enumerated in subsection (7) of this section;

(b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and
(c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If, after the trial of the penalty phase, the jury does not make the findings requiring the death sentence or life imprisonment without eligibility for parole, or is unable to reach a decision, the court shall impose a sentence of life imprisonment. . . .

[Subsections (4) through (7) are omitted.]

Section 99-19-101(3) provides that, in order for a jury to impose a death sentence, it must unanimously find in writing:

(1) that the defendant actually killed, attempted to kill, or intended that a killing take place;
(2) that the capital offense was committed during the commission of another enumerated felony; and
(3) that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

When the jury first returned from deliberations, the trial judge determined that their verdict was not in proper form and asked them to retire for the purpose of correcting the form of the verdict. The trial judge directed that they make the required statutory findings pursuant to the trial court's initial instructions. Defense counsel made no objection at the time, and [the defendant] now claims this to be ineffective assistance of counsel. This Court has previously held that a trial court's oral instruction to the jury to reform its verdict is not error. In the present case, the trial judge properly instructed the jury to return for the purpose of making the verdict comply with the statute. ***Brown v. State*, 749 So. 2d 82, 91-92 (Miss. 1999) (citations omitted).**

Multiple Defendants

Mississippi Rule of Criminal Procedure 24.4, Partial Verdicts and Mistrials, states in part:

If there are multiple defendants, the jury shall return a verdict as to any defendant about whom it has agreed.

§ 99-19-7 Split verdicts:

> On the trial of two or more persons jointly indicted, the jury may render a verdict of guilty or not guilty as to some and disagree and be discharged as to others, without a verdict, if they cannot agree as to all; and the case of those as to whom a verdict was not found shall stand as if it had not been submitted to a jury and shall be tried accordingly before another jury.

Multiple Counts Against a Defendant

Mississippi Rule of Criminal Procedure 24.4, Partial Verdicts and Mistrials, states in part:

> If the jury cannot agree on all counts as to any defendant, the jury shall return a verdict on those counts on which it has agreed.

Polling The Jury

Civil Trials

Uniform Civil Rule of Circuit and County Court 3.10, Jury Deliberations and Verdict, states in pertinent part:

> The court shall inquire if either party desires to poll the jury, or the court may on its own motion poll the jury. If neither party nor the court desires to poll the jury, the verdict shall be ordered filed and entered of record and the jurors discharged from the cause. If the court, on its own motion, or on motion of either party, polls the jury, each juror shall be asked by the court if the verdict rendered is that juror's verdict. Where the required number of jurors have voted in the affirmative for the verdict, the court shall order the verdict filed and entered of record and discharge the jury. If less than the required number of jurors cannot agree, the court may:
>
> 1) return the jury for further deliberations or
> 2) declare a mistrial.
>
> No motion to poll the jury shall be entertained after the verdict is ordered to be filed and entered of record or the jury is discharged.

Criminal Trials

Mississippi Rule of Criminal Procedure 24.5, Jury Poll, states:

> After a verdict is returned, but before the jury is discharged, the court shall on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

Dismissing The Jury

Uniform Civil Rule of Circuit and County Court 3.10, Jury Deliberations and Verdict, states in pertinent part:

> [I]t is appropriate for the court to thank jurors at the conclusion of a trial for their public service. . . .

Mississippi Rule of Criminal Procedure 24.6, Miscellaneous Provisions, states in part:

> [I]t is appropriate for the court to thank jurors at the conclusion of a trial for their public service. . . .

Impeaching The Verdict

Uniform Civil Rule of Circuit and County Court 3.10, Jury Deliberations and Verdict, states in pertinent part:

> After the verdict has been received by the court and entered on the record, the testimony or affidavits of the jurors shall not be received to impeach the verdict, except as permitted by the Mississippi Rules of Evidence.

Mississippi Rule of Criminal Procedure 24.6, Miscellaneous Provisions, states in part:

> After the verdict has been received by the court and entered on the record, the testimony or affidavits of the jurors shall not be received to impeach the verdict, except as permitted by the Mississippi Rules of Evidence.

Mississippi Rule of Evidence 606(b) states:

> (b) During an Inquiry into the Validity of a Verdict or Indictment.
>
> > (1) Prohibited Testimony or Other Evidence. 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.
> >
> > (2) Exceptions. A juror may testify about whether:
> > > (A) extraneous prejudicial information was improperly brought to the jury's attention; or

(B) an outside influence was improperly brought to bear on any juror.

This Court holds that a very limited "clerical" error exception to Rule 606(b) is warranted and proper. We do not attempt to change the rule disallowing a jury's impeachment of its verdict. That has always been the law in this State and is not affected by this decision. However, we do believe that juror testimony may be received to show that the verdict delivered in court was not the verdict actually agreed upon by the jury, but was the result of clerical error. [In the instant case, the jury was confused as to which count in a three-count verdict was for what charge against the defendant.] Therefore, we remand the case sub judice to the trial court for a determination of whether a clerical error occurred in the jury's transmission of its verdict. If the trial court finds that there was a clerical error with respect to the verdict, then it will amend the verdict to reflect the true verdict of the jury. ***Martin v. State*, 732 So. 2d 847, 856 (Miss. 1998).**

CHAPTER 13

PROCEDURES FOR A BATSON CHALLENGE & HEARING

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PROCEDURES FOR A BATSON CHALLENGE & HEARING

Evolution of Batson by the United States Supreme Court

A Potential Juror May Not be Peremptorily Struck by the State on the Basis of His or Her Race

***Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986):**

The petitioner, an African-American, was convicted and sentenced for burglary and receipt of stolen goods. His convictions were affirmed on direct appeal. Before the United States Supreme Court, the petitioner argued that the State's use of its peremptory challenges to strike all of the African-American members from the venire violated the petitioner's right to equal protection. The Court agreed and remanded the case to the state trial court to conduct the first *Batson* hearing. The Court wrote:

> A defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the venire-men from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.
>
> If the State could not come forward with race-neutral reasons for the use of its peremptory challenges, then the petitioner's conviction would be reversed.

Retroactive Application of Batson v. Kentucky

***Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987):**

The petitioner was convicted of robbery. The Supreme Court granted certiorari to answer a question which had arisen since *Batson*, namely whether *Batson* was to be applied retroactively. The Court held that *Batson* was to be applied retroactively to all state and federal cases, pending on direct review or not yet final.

The Criminal Defendant and the Excluded Juror Do Not Have to be the Same Race for a Batson Objection to be Raised

***Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991):**

The petitioner, a Caucasian, was convicted of murder, aggravated murder, and attempted aggravated murder. During jury selection, he objected to the State's use of peremptory challenges against African-American venire members. On writ of certiorari, the Court considered whether a criminal defendant had standing to raise the equal protection rights of a prospective juror excluded from service by the prosecution because of his or her race. It concluded that a defendant could. Next, the Court held that a criminal defendant could object to race-based exclusions of jurors by the State whether or not that defendant and the excluded jurors shared the same race because the prosecutor's use of race-based peremptory challenges violated the equal protection rights of those excluded from jury service.

The Principles of Batson Apply in Civil Proceedings

***Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991):**

The plaintiff sued the defendant to recover for damages arising from the alleged negligence of the defendant. During jury selection, the defendant used its peremptory strikes to remove African-Americans from the jury pool. The Court granted certiorari to decide whether a private litigant in a civil case may use peremptory challenges to exclude jurors on the basis of their race. The Court again concluded that race-based exclusions violate the equal protection rights of the challenged jurors and that the non-striking party does have standing to object. The Court held that a private litigant may not use peremptory challenges to exclude members from the venire on the basis of their race.

The Supreme Court Restates What a Batson Hearing Requires

***Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991):**

The petitioner was convicted of attempted murder and criminal possession of a weapon. The petitioner claimed that the State had peremptorily struck prospective jurors of Hispanic origin. On writ of certiorari, the Court re-articulated the procedures to be followed in light of a *Batson* objection.

(1) The defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race.

(2) If the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question.

(3) The trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.
The Court also noted that once a prosecutor has offered race-neutral reasons for the challenges and the trial court has ruled on the question of discrimination, the issue of whether the defendant made the prima facie showing becomes moot.

A Criminal Defendant Can Not Strike a Potential Juror on the Basis of His or Her Race

***Georgia v. McCollum*, 505 U.S. 42, 112 S. Ct 2348, 120 L. Ed. 2d 33 (1992):**

The respondents, Caucasians, were charged with aggravated assault and battery. Before jury selection, the State asked the trial court to prohibit the respondents from using their peremptory challenges in a racially discriminatory manner to exclude African-Americans from the jury pool. The trial court denied the State's request. The Supreme Court granted certiorari to answer the question of whether a criminal defendant can engage in purposeful discrimination in the exercise of his or her peremptory challenges. The Court found that the State had standing to object to the defendant's use of peremptory challenges. The Court held that the Equal Protection Clause prohibits a criminal defendant from engaging in purposeful discrimination based on race in his or her use of peremptory challenges.

A Potential Juror May Not be Peremptorily Struck on the Basis of His or Her Gender

***J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1993):**

The petitioner was found to be the father of a minor in a paternity proceeding instituted by the State. During jury selection, the State used nine (9) of its ten (10) peremptory strikes to remove all but one (1) male from the venire. The petitioner objected, but the trial court rejected his argument. On writ of certiorari, the Court ruled that the Equal Protection Clause forbids peremptory challenges on the basis of gender as well as race.

A Facially-Neutral Reason for the Peremptory Strike Will be Upheld Absent a Discriminatory Intent

***Purkett v. Elem*, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995):**

The respondent was convicted of robbery. During jury selection, the respondent objected to the State's use of peremptory strikes against two (2) African-American men. The prosecutor's race-neutral reasons

concerned the long hair and facial hair of the two (2) men who were struck. In a *per curiam* opinion, the Court announced that the second step of a *Batson* inquiry concerning a race-neutral reason being tendered by the proponent of the strike, hinges on the issue of whether the reason tendered is facially neutral or valid and not a reason that violates the Equal Protection Clause. The trial court must then determine whether or not the reason offered is a pretext for discrimination.

A Peremptory Strike Shown to Have Been Motivated in Substantial Part by Discriminatory Intent Could Not Be Sustained

***Snyder v. Louisiana*, 552 U.S. 472, 128 S. Ct. 1203, 170 L.Ed.2d 175 (2008):**
The petitioner was convicted of murder and was sentenced to death. He alleged that the prosecution exercised some of its peremptory jury challenges based on race. During the process of jury selection, there were 36 prospective jurors, 5 of which were African-American. The state peremptorily struck all 5. The transcript of voir dire revealed that the reason offered by the state for one strike had been obviated by questioning between the trial court and the potential juror. The Supreme Court found that the offered reason was pretextual and held that the trial court erred in its ruling on the *Batson* objection, by allowing the state to strike an African-American from the venire where the reason given was similarly applicable to Caucasian venire members who were not struck. The Court reversed the conviction.

A Trial Court's Good Faith Error in Denying A Peremptory Challenge Does Not Violate the Constitution

***Rivera v. Illinois*, 556 U.S. 148, 129 S. Ct. 1446, 173 L.Ed.2d 320 (2009):**
The defendant was convicted of murder. During jury selection, the state trial court denied one of the defendant's peremptory challenges. He appealed arguing that it violated his right to a fair trial by an impartial jury. The Supreme Court commented that the right to exercise peremptory challenges in state court is determined by state law and held that "if a defendant is tried before a qualified jury composed of individuals who are not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error," does not violate the Constitution.

Evolution of Batson by the Mississippi Supreme Court

Supreme Court Remanded its First Case for a Batson Hearing

***Williams v. State*, 507 So. 2d 50 (Miss. 1987):**

Defendant had objected to the State's use of its peremptory challenges to exclude African-Americans from the jury pool. On appeal, the supreme court applied *Griffith v. Kentucky*, which held that *Batson v. Kentucky* would be retroactively applicable to those cases which were pending on direct appeal or not yet final at the time of the *Batson* decision. Because the defendant's case was not final, the court remanded the case to the circuit court to conduct a *Batson* hearing.

Trial Court's Batson Findings are Subject to a Clearly Erroneous Standard of Review

***Lockett v. State*, 517 So. 2d 1346 (Miss. 1987):**

On appeal from a conviction for capital murder, the defendant argued the State had used its peremptory challenges to strike members from the venire on the basis of their race. The court held that a trial judge's factual findings concerning a race-neutral reason offered by the striking party would be subject to a "clearly erroneous or against the overwhelming weight of the evidence standard." Finding that the record supported the trial judge's determination, the supreme court affirmed the defendant's conviction and sentence. The court also provided an appendix to the case of racially neutral reasons upheld by other jurisdictions in determining whether a party had used its peremptory strikes in a discriminatory manner.

Court Applied Batson to a Civil Case

***Scott v. Ball*, 595 So. 2d 848 (Miss. 1992):**

The plaintiff brought a wrongful death action to recover for damages for the death of the plaintiff's husband. The jury found for the defendant. On appeal, the plaintiff argued the defendant had unlawfully exercised all of his peremptory challenges against African-American members of the jury panel. The supreme court acknowledged the ruling in *Edmonson v. Leesville Concrete Co.*, which had held that the "principles of *Batson v. Kentucky* apply to civil cases." Accordingly, since *Batson* had been violated, the court remanded the case for a new trial.

Trial Court Must Make On-the-Record Findings Concerning Each Reason Offered for the Peremptory Challenges

***Hatten v. State*, 628 So. 2d 294 (Miss. 1993):**

On appeal from a robbery conviction, the defendant argued that the State unlawfully exercised its peremptory challenges against African-American venire members. The supreme court upheld the trial judge's determination that the reasons offered by the State were race-neutral. The court affirmed the conviction and sentence. Further, the court required trial courts in future cases to make on-the-record factual determinations of whether reasons proffered in exercising peremptory challenges were race-neutral.

Court Announced Five Indications of Pretext For Trial Courts to Consider

***Mack v. State*, 650 So. 2d 1289 (Miss. 1994):**

The defendant was convicted of capital murder and sentenced to death. On appeal, the defendant argued the State's reasons for its peremptory challenges were "pretextual" and that the State was actually excluding prospective jurors on the basis of their race. The court concluded the State's reasons were not pretextual and affirmed the defendant's conviction and sentence. The court announced five (5) indicia of pretext:

(1) Disparate treatment - the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge;
(2) The failure to voir dire as to the characteristic cited;
(3) The characteristic cited is unrelated to the facts of the case;
(4) Lack of support in the record for the stated reason; and
(5) Group-based traits.

A Potential Juror May Not be Peremptorily Struck on the Basis of His or Her Religion

***Thorson v. State*, 721 So. 2d 590 (Miss. 1998):**

The defendant was convicted of capital murder and sentenced to death. On direct appeal, the defendant argued the State had exercised its peremptory challenges to exclude prospective jurors from the venire on the basis of their race. The supreme court remanded instructing the circuit court to conduct a *Batson* hearing. The circuit court concluded that no *Batson* violation had occurred. The defendant again appealed regarding the court's ruling on the *Batson* issue. The supreme court found that the State had exercised two (2) peremptory challenges against venire members on the basis of their religion. The court held that both the Mississippi Constitution and statutory law prohibit a party from exercising peremptory challenges against a person on the basis of his or her religious beliefs. The case was reversed and remanded for a new trial. *See* Miss. Const. art. III, § 18; Miss. Code Ann. § 13-5-2 (1972).

Procedure for a Batson Hearing

In *Batson v. Kentucky*, the United States Supreme Court did not specify how a *Batson* hearing was to be conducted. However, subsequent case law indicated that it was not to be conducted like a mini-trial and that the striking party was not subject to cross-examination. ***Thorson v. State*, 721 So. 2d 590, 596-97 (Miss. 1998).**

Under the current case law, a *Batson* challenge to a peremptory strike should now proceed as follows:

(1) The opponent to the strike must establish a prima facie case of discrimination in the selection of the jury members.

(2) The proponent of the strike then has the burden of stating a non-race, non-gender, or non-religious-based reason given for the strike. Once the proponent gives a neutral explanation, the opponent can then attempt to rebut that explanation.

(3) The trial court must make an on-the-record factual finding for each peremptory challenge to determine if the proponent engaged in purposeful discrimination. ***Thorson v. State*, 721 So. 2d 590, 593 (Miss. 1998).**

Prima Facie Case

Originally, a *Batson* challenge entailed three elements that had to be shown for the opposing party to establish its prima facie case:

> 1. That he was a member of a "cognizable racial group;"
> 2. That the proponent had exercised peremptory challenges toward the elimination of venire members of his race; and
> 3. That facts and circumstances raised an inference that the proponent had used his peremptory challenges for the purpose of striking minorities.

However, those elements were modified by the Court in *Powers v. Ohio*, where the Court held that the defendant may object to the State's use of peremptory challenges even if he or she is not the same race as the stricken potential jurors. Under current case law, the opponent of a peremptory strike must now make a prima facie case by showing that the proponent of the strike has engaged in a pattern of peremptory strikes based on the race, gender, or religion of the potential jurors. ***Puckett v. State*, 788 So. 2d 752, 756-57 (Miss. 2001).**

One indication that a party has engaged in purposeful discrimination in the use of its strikes is if the party has peremptorily struck every venire member of a particular race, or arguably, gender or religion.

> ***See Horne v. State*, 819 So. 2d 1186, 1188 (Miss. 2001)** (holding that as a matter of law if the State uses a peremptory strike to remove every African-American from the venire, a prima facie case has been established).

Prima Facie Case May Become Moot

> If the striking party voluntarily gives its reasons for the use of its peremptory strikes *before the trial court has made a finding that a prima facie case has been established*, the issue of whether a prima facie case had in fact been established becomes moot. ***Brawner v. State,* 872 So. 2d 1, 11 n.1 (Miss. 2004) (emphasis added); *Mack v. State*, 650 So. 2d 1289, 1298 (Miss. 1994).**

If Trial Court Concludes No Prima Facie Case Has Been Made, the Court May Still Decide to Conduct a Batson Hearing

> Notwithstanding the finding that a prima facie showing had not been made, the judge nevertheless allowed the [striking party] to offer, for the record, its neutral reasons for striking [potential jurors]. This as a good practice for two reasons. First, if it becomes necessary to remand for a *Batson* hearing, this record would be invaluable assistance to the trial judge and would allay the difficulties caused by lost or misplaced documentation and faded memories, which may lessen the credibility of a party. Second, if on appeal this Court determines that a prima facie case has been made, this procedure gives the Court a complete record for reviewing the issue of pretext. . . . Where a trial judge finds that there is no prima facie showing of discrimination, but then allows the opposite party to make a record for appeal by stating their reasons for the strikes, the trial judge must ensure that the record is complete by allowing a rebuttal and by making specific on-the-record factual findings for each strike. ***Brawner v. State*, 872 So. 2d 1, 10-11 (Miss. 2004).**

Proponent Gives Its Reasons for Exercising the Peremptory Strikes

Once the prima facie case has been established, the striking party then gives its reason for exercising the peremptory strike. The reason does not need to equal that of a challenge for cause. ***Davis v. State*, 660 So. 2d 1228, 1242 (Miss. 1995).**

There is some indication that once the prima facie case has been established that the striking party must then come forward with reasons for each use of a peremptory challenge, not just the last one to which there was an objection. The court of appeals has offered this guidance:

> Where a defendant (1) properly objects and (2) establishes a prima facie case of racial motivation in the exercise of a peremptory challenge, that such objection relates back to the State's first exercise of a peremptory challenge and mandates a race-neutral explanation from the State of each person within the challenged class. ***Lard v. State*, No. 98-KA-00609 (Miss. Ct. App. 1999) (unpublished opinion).**

Reasons Offered by the Proponent of the Peremptory Challenge

Race/Gender/Religion-Neutral Reasons

The reason offered by the striking party must, on its face, be a race-neutral, gender-neutral, or religious-neutral reason. ***Thorson v. State*, 721 So. 2d 590, 593 (Miss. 1998).**

Reasons Based on Information from Third Parties

The reason offered for the peremptory strike may be based on information that was given to the striking party by a third person. ***Thorson v. State*, 721 So. 2d 590, 597 (Miss. 1998)** (information obtained from law enforcement officers about potential juror was neutral reason for peremptory strike); ***Nicholson ex rel. Gollott v. State*, 672 So. 2d 744, 749-50 (Miss. 1996)** (circuit clerk, upon request, may provide information to striking party).

Recently however, the Mississippi Supreme Court has given more guidance on this issue:

> [W]e [now will] address the issue of using outside information as the basis for striking jurors. We have upheld this practice in previous cases. However, we feel compelled to address the practice of striking potential jurors in criminal trials based on information gathered from outside sources, often law enforcement officers, when those sources are not revealed or are not available for questioning. . . . While we do not hold that our trial judges should conduct a "mini-hearing" within a *Batson* hearing each time a peremptory challenge is exercised based on information gained from outside sources, we do depend on the trial courts to exercise caution to ensure that peremptory challenges based on information from outside sources is credible and supported by on-the-record factual findings to this effect and that a complete record is made on this issue. If in doubt about the validity of outside information, the trial court should do what is necessary to ensure the proposed reasons are non-pretextual. This may include questioning the outside source on the record. ***Brawner v. State*, 872 So. 2d 1, 11-12 (Miss. 2004).**

Opponent's Rebuttal to the Reasons Offered by the Proponent

> [We have] stated that if a racially neutral explanation is offered the defendant can rebut the explanation. If the defendant makes no rebuttal, the trial judge must base his decision only on the explanations given by the State. Id. On appellate review this decision is given great deference, and we will reverse only when such decisions are clearly erroneous. ***Gary v. State*, 760 So. 2d 743, 748 (Miss. 2000) (citations omitted).**

> After reasons have been submitted, the opponent to the strike is then allowed to rebut the reasons offered by the striking party. If no rebuttal is offered, then the court decides whether purposeful discrimination has been shown. ***Manning v. State*, 735 So. 2d 323, 339 (Miss. 1999).**

Trial Court's Factual Determination of the Proponent's Reasons

> The trial court must decide if the reasons offered by the striking party are pretexts for intentional discrimination and whether the opponent has proven that the jurors were unlawfully stricken. This determination is a matter solely within the discretion of the trial judge. The court is directed to make such findings on the record for possible appellate review. ***Thorson v. State*, 721 So. 2d 590, 593 (Miss. 1998); *Hatten v. State*, 628 So. 2d 294, 298 (Miss. 1993); *see also Mack v. State*, 650 So. 2d 1289, 1298 (Miss. 1994)** ("If the opponent has made a strong prima facie case, the more cogent the explanations from the striking party and supporting evidence must be and vice versa.").

Five (5) Factors to Determine Pretext

> There are five (5) specific factors which the Mississippi Supreme Court has identified for the trial judge to weigh in determining whether the reasons that have been offered are actually pretext in an effort to hide purposeful discrimination.

(1) Disparate treatment, that is the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge

> Disparate treatment among jurors is strong evidence of discrimination by the striking party, but it is not dispositive of the issue. The court should look to whether the striking party has peremptorily struck potential jurors of another race for the same reason. ***Manning v. State*, 765 So. 2d 516, 520 (Miss. 2000).**

(2) The failure to voir dire as to the characteristic cited

This factor is at issue when the striking party has a suspicion or belief about the potential juror, but has not asked the juror about this reason during voir dire. If there has been no question concerning the party's belief during voir dire, this factor would weigh against the striking party. Likewise, if the striking party has inquired about its suspicion or belief, then it would weigh in favor of accepting the reason as valid. ***Mack v. State*, 650 So. 2d 1289, 1298 (Miss. 1994).**

(3) The characteristic cited is unrelated to the facts of the case

Pretext may be inferred when the reason offered has no relation to the facts of the case. To better understand the concept of this factor, the judge may take into consideration an instance when the reason for striking the juror is related to the case. One such example is when a defendant strikes a nurse in a sexual assault case, as the nurse may side with the victim. If however, the State struck the nurse in a sexual assault case, that reason may be a pretext for some discriminatory intent to remove the juror**.** ***Mack v. State*, 650 So. 2d 1289, 1297-98 (Miss. 1994); *see also Whitsey v. State*, 796 S.W.2d 707, 714-15 (Tex. Crim. App. 1989)** (striking African-American potential jurors for reasons such as occupation and age while not striking Caucasian jurors of same occupation and age was found to be pretext).

(4) Lack of support in the record for the stated reason

If the record reflects support for the reason offered for a strike, such as the demeanor of a potential juror, it must have been commented upon by either counsel or the trial judge. However, a lack of support in the record is just one indication, and it is not a requirement that every characteristic of each juror be stated in the record. ***Manning v. State*, 765 So. 2d 516, 520 (Miss. 2000).**

(5) Group-based traits

Other Factors to Determine Pretext

The demeanor of the attorney is one of the best factors for the trial court to consider in determining pretext. The credibility of the attorney making the challenge can often be decisive on this issue.

> ***See Stewart v. State*, 662 So. 2d 552, 559 (Miss. 1995)** (supreme court noted trial judge must have taken into consideration demeanor of attorney making strike, since after initially offering non-race-neutral reason and then offering two race-neutral reasons, trial judge refused to allow strike); ***see also Thorson v. State*, 721 So. 2d 590, 597 (Miss. 1998)** (trial court's determination of whether or not reason is race-neutral largely depends on credibility of prosecutor).

In addition to the demeanor of the attorney, the circumstances surrounding the use of prior peremptory challenges and the types of questions asked during voir dire may also indicate whether a reason is just pretext for intentional discrimination. ***Stewart v. State*, 662 So. 2d 552, 559 (Miss. 1995); *see also Webster v. State*, 754 So. 2d 1232, 1236 (Miss. 2000).**

Trial Court's Findings Must be on the Record

The trial court is instructed to make an on-the-record, factual determination of the merits of each reason offered by the striking party for its use of peremptory challenges against potential jurors. This record serves to protect the rights of both the defendants and the potential jurors, as well as makes a clear ruling on the issue for appellate review. ***Hatten v. State*, 628 So. 2d 294, 295-98 (Miss. 1993); *see also Johnson v. State*, 754 So. 2d 1178, 1180 (Miss. 2000)** (supreme court reaffirms *Hatton v. State*).

Furthermore, *Hatten* requires "an on the record, factual determination, of the merits of the reasons cited by the State." Mere broad conclusions at the end of the *Batson* process will not suffice. However, where a trial judge fails to elucidate such a specific explanation for each race neutral reason given, we will not remand the case for that *Batson*-related purpose alone. This Court is fully capable of balancing the *Batson* factors in cases such as this one. Continued remand of such cases only wastes the trial court's limited resources and acts to further delay justice. ***Gary v. State*, 760 So. 2d 743, 748 (Miss. 2000) (citations omitted).**

Standard of Review

The court of appeals and supreme court apply a clearly erroneous, abuse of discretion, and against the overwhelming weight of the evidence standard of review when reviewing a trial court's rulings on the reasons offered for a peremptory strike. ***Thorson v. State*, 721 So. 2d 590, 593 (Miss. 1998).**

Miscellaneous Points

Discovery of a Proponent's Juror Notes in a Batson Hearing

The opponent of a peremptory challenge is not entitled to the striking party's juror notes in order to establish its prima facie case. However, if the striking party has actual knowledge of information about a juror's ability to be fair and impartial, then the striking party should disclose this information to the court and the opposing party. ***Thorson v. State*, 721 So. 2d 590, 596 (Miss. 1998)** (discovery of State's notes made during voir dire is not required); ***see also Mack v. State*, 650 So. 2d 1289, 1299 (Miss. 1994)** (Uniform Rule of Circuit and County Court 9.04 does not require State to inform defense counsel of information about potential juror unless it concerns that juror's ability to be fair and impartial).

Trial Court Should Not Apply a Harmless Error Standard on Remand

When a case is remanded for a *Batson* hearing, the trial court should not apply a harmless error analysis in determining whether a peremptory strike should not have been allowed. The trial court should determine whether the opposing party made a prima facie case and, if so, evaluate the reasons for each peremptory strike for appellate review. ***Manning v. State*, 765 So. 2d 516, 521 (Miss. 2000).**

Peremptory Challenges Have Not Been Abolished in Mississippi

In an appeal raising the issue of whether to abolish peremptory challenges, the Mississippi Supreme Court wrote "that in the almost 20 years since *Batson* was decided no court, including this Court, has adopted [the position to abolish peremptory challenges]. [A] structure centuries in the building should hardly be radically altered, much less demolished, without painstaking study." Therefore, we decline to make such a sweeping change. ***Brawner v. State*, 872 So. 2d 1, 13 (Miss. 2004) (citations omitted).**

Facts about Racial Makeup of the Venire Contained in the Trial Record

In *States*, the supreme court was faced with a *Batson* challenge, but was not provided specific information in the record with regard to the percentage of

African American jurors in the venire. There, the supreme court quoted: We cannot override the trial court when this Court does not even know the racial makeup of the venire or the jury. . . . The case at hand presents similar facts. The record is lacking as to the race and gender of the venire, the final jury, and the other potential jurors the State eliminated. The only information we have before us regarding the racial characteristic of the jury is seen in the circuit court's notation that Caucasian jurors constituted the minority of the jury. We cannot find that the circuit court committed reversible error when we do not have before us a proper record showing the makeup of the venire, the jury, and the stricken jurors. ***Cannon v. State*, 141 So. 3d 442, 445 (Miss. Ct. App. 2013) (citations omitted).**

When determining whether a defendant has established a prima facie case of discrimination, we must consider all relevant circumstances. And a defendant can establish a prima facie case by demonstrating that the percentage of the State's peremptory strikes exercised on members of the protected class was significantly higher than the percentage of members of the protected class in the venire. In *Pitchford v. State*, the racial makeup of the venire subject to peremptory strikes was fourteen whites (seventy-four percent) and five blacks (twenty-six percent). The prosecution, however, used fifty-seven percent of its strikes on African-Americans. Because of this difference, we upheld the trial court's determination that the defendant had established a prima facie case of discrimination. But the record here does not contain the percentage of African-Americans in the venire. And as this Court stated in *Birkhead v. State*, "[w]e cannot override the trial court when this Court does not even know the racial makeup of the venire or the jury." In *Birkhead*, the first five jurors struck by the prosecution were African-American. We found the record insufficient to overturn the jury verdict. Likewise, we decline to reverse the trial judge's decision in this case when we do not know the race and gender of the venire, the race and gender of the final jury, or the race and gender of the other potential jurors struck by the State. The presumption is in favor of the trial court, and the burden is on the appellant to demonstrate reversible error. ***States v. State*, 88 So. 3d 749, 755 (Miss. 2012) (citations omitted).**

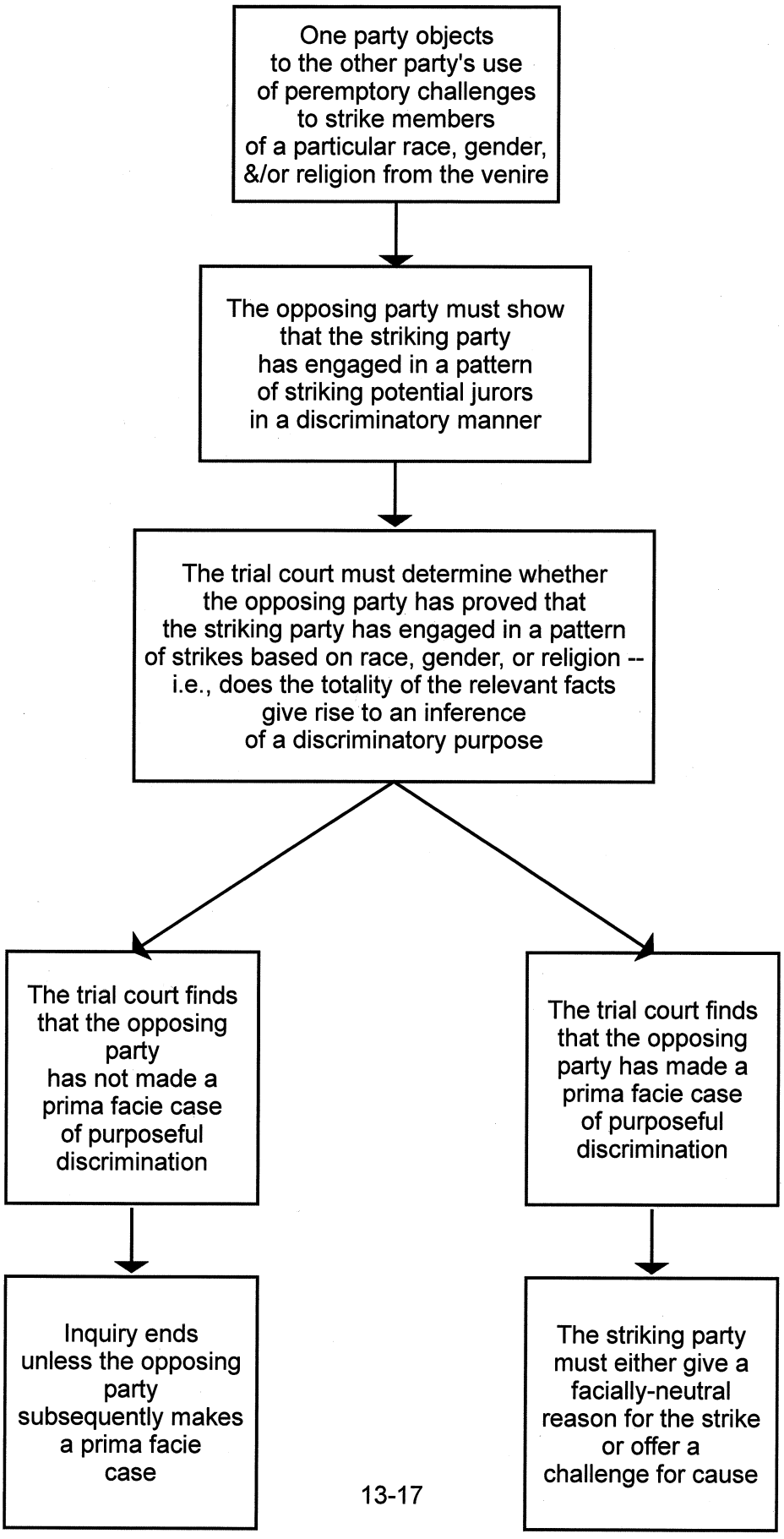
Race Neutral Reasons Supported in the Record

McCoy claims that the trial court erred in failing to find that the State had committed a *Batson* violation by using two of its peremptory strikes on African Americans. During the selection of alternate jurors, the State used peremptory strikes on . . . Juror 41, and . . . Juror 42, both of whom are African American. McCoy objected to these peremptory strikes. The State then offered race-neutral reasons for its strikes on the alternate jurors. The State explained that both of the stricken jurors had indicated during voir dire that they did not know if they could impose a life sentence for the crime of armed robbery. McCoy's counsel responded by claiming that the jurors in question had been rehabilitated during

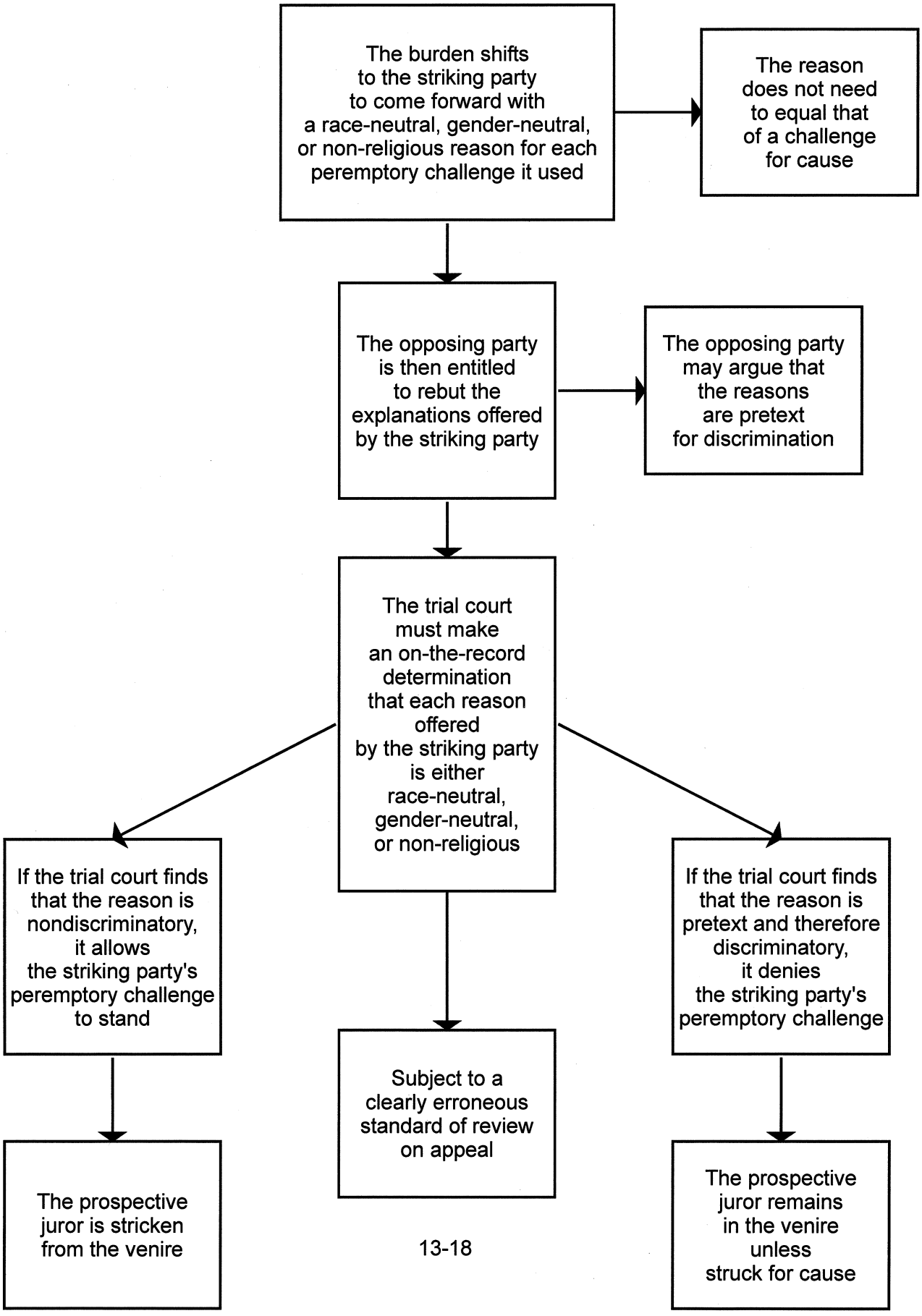
voir dire and therefore could not be challenged for that reason. The trial court ultimately denied McCoy's *Batson* challenge, finding that the State had offered a sufficient race-neutral reason for striking Jurors [41 and 42]. Considering the standard of review, and after careful scrutiny of the record, we find that the trial judge's denial of McCoy's *Batson* challenge was not clearly erroneous. The reasons offered by the State were race-neutral and supported by the record. . . . A peremptory challenge does not have to be supported by the same degree of justification required for a challenge for cause. A juror's unwillingness or inability to impose a legal sentence upon the defendant after reaching a guilty verdict certainly is a valid race-neutral reason for striking that juror. . . . Moreover, we do not find that the State's use of the two peremptory strikes in question evinces such a clear pattern of discrimination that its proffered explanations for the strikes are mere pretext. This argument is without merit. ***McCoy v. State*, 147 So. 3d 333, 348 (Miss. 2014) (citations omitted).**

The record reveals that the State used its three strikes to dismiss African-American venire members. At this point, defense counsel lodged a *Batson* challenge, contending that the strikes were racially motivated. The trial court informed the State: "It seems like to me, when you strike all African-Americans, I think a pretty good argument could be made that there's been a prima facie case of discrimination." The State then offered race-neutral reasons for all three strikes. The State explained that juror number fourteen was struck because her son was convicted of burglary. . . . Juror number fifteen had been employed less than a year, and failed to state her street address on her jury questionnaire form. The State also struck juror number nineteen for failing to completely fill out the questionnaire form. The State explained that it struck juror number twenty-eight because he stated that his uncle pled guilty to a possession charge. . . . The defense offered no response to this explanation. The trial court ultimately found that the State provided sufficient nondiscriminatory reasons for the strikes, and held that the States's reasons were not a pretext for discrimination. Our supreme court has offered guidance to the trial courts by approving a list of race-neutral reasons accepted by other jurisdictions. This list includes: living in a high crime area, body language, demeanor, a prosecutor's distrust of the juror, inconsistency between oral responses and a juror's card, criminal history of a juror or relative, a juror's employment, and a juror's religious beliefs. We recognize that this list is not exhaustive. Recognizing that the trial judge is given great deference in *Batson* matters, we cannot say that the trial court's decision to accept the State's race-neutral explanations for the strikes was clearly erroneous or against the overwhelming weight of the evidence. ***Flowers v. State*, 144 So. 3d 188, 197 (Miss. Ct. App.) (citations omitted).**

Procedure for a Batson Challenge



Procedure for a Batson Challenge, continued



APPENDIX

Examples of Peremptory Challenges

In *Lockett v. State*, 517 So. 2d 1346, 1356-57 (Miss. 1987), the Mississippi Supreme Court offered the following racially-neutral reasons which had been upheld by other courts in an effort to provide some guidance to the trial courts. It emphasized that these reasons were merely illustrative examples:

- Age
- Name association
- Marital status
  - Young and single
  - Single with children
  - Divorced
- Demeanor
  - Dress
  - Posture
  - Hostile to being in court
  - Body language
  - Lack of eye contact and attentiveness
  - Juror avoided eye contact with prosecutor
  - Juror smiled at defendant
  - Juror was hostile to prosecutor
  - Prosecutor distrusted juror
  - Juror arrived late, indicating lack of commitment to the importance of the proceedings
- Juror information card
  - Failure to complete juror's card
  - Indefinite answer on juror's card
  - Inconsistency between oral responses and juror's card
  - Illegible juror's card
  - Handwriting
- Juror's residence/neighborhood
  - Juror lived near the defendant
  - Juror lived in a "high crime" area
- Juror's educational background
- Juror's employment history
  - Short-term employment
  - Juror appeared to have a low income occupation
  - Unemployed with no roots in community
  - Employment of spouse and children
  - Employed by the police department

Juror a social worker (rape case)
Home health worker (believed to be more susceptible to claim of self-defense)

Juror's prior criminal activity or a family member's criminal activity

Juror had a criminal record
Previously arrested for theft
Father of juror imprisoned for some crime
Juror's two sons had been in trouble with the law
Prosecutor convicted brother
Juror's brother had been convicted of robbery
Relative in a contemporaneous criminal proceeding
Family member arrested
Relative of the juror had been convicted of DUI
Defense attorney previously represented juror

Other

Juror knew defendant's counsel
Friend charged with a crime
Previously a juror in a mistrial
Previously on a hung jury
Juror knew of a person whom the government expected would be called as an alibi witness for defendant
Juror was a member of a fraternity unknown to prosecution
Juror had reservation with respect to her ability to look at and appraise the tape recording evidence

Examples of Challenges for Cause

Not a qualified voter in the state and county
Juror has been convicted of a felony
Juror is under indictment for a felony
Insanity of the juror
Juror will be a witness in the case
Juror served on the grand jury which found the indictment
Juror served on a petit jury in a former trial of the same case
Juror is biased or prejudiced in favor of or against the defendant
Juror has a conclusion as to the guilt or innocence of the defendant
Juror has objections to capital punishment
Juror is related to the defendant
Juror is related to the victim
Juror is related to the prosecutor

CHAPTER 14

CONTRACTS

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CONTRACTS

Subject Matter Jurisdiction

Mississippi Constitution Art. 6, § 156, Jurisdiction of circuit court, states:

> The circuit court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law.

> > We nevertheless conclude, however, that the present case is essentially a breach of contract claim which is best heard in circuit court. ***Southern Leisure Homes, Inc. v. Hardin*, 742 So. 2d 1088, 1090 (Miss.1999).**

Venue

§ 11-11-3 Proper county; transfers; considerations; limitations waiver:

> (l)(a)(i) Civil actions of which the circuit court has original jurisdiction shall be commenced in the county where the defendant resides, or, if a corporation, in the county of its principal place of business, or in the county where a substantial alleged act or omission occurred or where a substantial event that caused the injury occurred. . . .

Formation of Contract

> The elements of a valid contract are:
> (1) two or more contracting parties,
> (2) consideration,
> (3) an agreement that is sufficiently definite,
> (4) parties with legal capacity to make a contract,
> (5) mutual assent, and
> (6) no legal prohibition precluding contract formation.
> ***Rotenberry v. Hooker*, 864 So. 2d 266, 270 (Miss. 2003).**
>
> A valid contract requires an offer and acceptance. Failure to communicate acceptance of an offer is fatal to creation of a valid contract. ***Anderton v. Bus. Aircraft, Inc.*, 650 So. 2d 473, 476 (Miss. 1995).**
>
> Consideration is, of course, one of the six elements required for the existence of a valid contract. The Mississippi Supreme Court has defined consideration for a

promise as (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise, bargained for and given in exchange for the promise. ***Marshall Durbin Food Corp. v. Baker*, 909 So. 2d 1267, 1273 (Miss. Ct. App. 2005).**

All that is needed to constitute a valid consideration to support an agreement or contract is that there must be either a benefit to the promissor or a detriment to the promisee. If either of these requirements exist, there is a sufficient consideration. ***Davis v. Paepke*, 3 So. 3d 131, 136 (Miss. Ct. App. 2009) (citations omitted).**

Parties and Capacity

The law presumes a person sane and mentally capable to enter into a contract. ***Frierson v. Delta Outdoor, Inc.*, 794 So. 2d 220, 224 (Miss. 2001) (citations omitted).**

***See* § 93-19-13 Personal property contracts; 18 year olds.**

Contract Interpretation

Courts may use a three-tiered approach to contract construction, if required. The *Perkins* Court construed a deed, but this analysis has been followed by this Court in the construction of various types of contracts. In the first tier, "the court will attempt to ascertain intent by examining the language contained within the four corners of the instrument in dispute. The *Perkins* Court stated the following:

> In cases in which an instrument is not so clear (e.g., different provisions of the instrument seem inconsistent or contradictory), the court will, if possible, harmonize the provisions in accord with the parties' apparent intent. A cursory examination of the provisions may lead one to conclude that the instrument is irreconcilably repugnant; however, this may not be a valid conclusion. If examination solely of the language within the instrument's four corners does not yield a clear understanding of the parties' intent, the court will generally proceed to another tier in the three-tiered process. This entails discretionary implementation of applicable "canons" of contract construction. For example, one rule espoused by this Court suggests that uncertainties should be resolved against the party who prepared the instrument. Application of "canons" of construction may provide a court with an objective inference of the parties' intent. But if, at this step in the process, intent remains unascertainable (i.e., the instrument is still considered ambiguous), then the court may resort to a final tier in the three-tiered process of construction. This final tier entails consideration of extrinsic or parol evidence.

***Dalton v. Cellular South, Inc.*, 20 So. 3d 1227, 1232-33 (Miss. 2009) (citations omitted).**

The primary purpose of all contract construction principles and methods is to determine and record the intent of the contracting parties. "In contract construction cases a court's focus is upon the objective fact - the language of the contract. [A reviewing court] is concerned with what the contracting parties have said to each other, not some secret thought of one not communicated to the other." A reviewing court should seek the legal purpose and intent of the parties from an objective reading of the words employed in the contract to the exclusion of parol or extrinsic evidence. The reviewing court is not at liberty to infer intent contrary to that emanating from the text at issue. ***Royer Homes, Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (Miss. 2003) (citations omitted).**

If the terms of a contract are subject to more than one reasonable interpretation, it is a question properly submitted to the jury. ***Royer Homes, Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (Miss. 2003) (citation omitted).**

Ambiguity

First, we must determine whether the contract is ambiguous, and if it is not, then it must be enforced as written. In making that determination, the Court must review the express wording of the contract as a whole. If the contract is unambiguous, "the intention of the contracting parties should be gleaned solely from the wording of the contract" and parole evidence should not be considered. This Court must "accept the plain meaning of a contract as the intent of the parties where no ambiguity exists." "An instrument that is clear, definite, explicit, harmonious in all its provisions, and is free from ambiguity will be enforced." ***Epperson v. SouthBank*, 93 So. 3d 10, 16 (Miss. 2012) (citations omitted).**

First, the "four corners" test is applied, wherein the reviewing court looks to the language that the parties used in expressing their agreement. If the language used in the contract is clear and unambiguous, the intent of the contract must be realized. Legal purpose or intent should first be sought in an objective reading of the words employed in the contract to the exclusion of parol or extrinsic evidence. ***In re Estate of Harris*, 840 So. 2d 742, 745 (Miss. Ct. App. 2003).**

Canons of Construction

Because we cannot "translate a clear understanding of the parties' intent" from the text alone, we must go to the second step of contract interpretation and apply the discretionary canons of contract construction. It is a "universal rule of construction that when the terms of a contract are vague or ambiguous, they are

always construed more strongly against the party preparing it." ***Austin v. Carpenter*, 3 So. 3d 147, 150 (Miss. Ct. App. 2009).**

The second step of the analysis is to apply the discretionary "canons" of contract construction. One such rule of construction is that "specific language controls over general inconsistent language in a contract." ***Harris v. Harris*, 988 So. 2d 376, 379 (Miss. 2008).**

Parol Evidence

Finally, if the contract continues to evade clarity as to the parties' intent, the court should consider extrinsic or parol evidence. It is only when the review of a contract reaches this point that prior negotiation, agreements and conversations might be considered in determining the parties' intentions in the construction of the contract. "Of course, the so-called three-tiered process is not recognized as a rigid 'step-by-step' process. Indeed, overlapping of steps is not inconceivable." ***Royer Homes, Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 753 (Miss. 2003) (citations omitted).**

Evidence is generally admissible to show a subsequent parol agreement, valid under the law and effective as to its subject matter, between the parties to a written instrument, although it may alter or abrogate such writing, and especially so where such parol agreement is acted upon by the parties. ***Renfroe v. Aswell*, 198 Miss. 159, 161, 21 So. 2d 812, 813 (1945).**

Standard of Review

Questions concerning the construction of contracts are questions of law that are committed to the court rather than questions of fact committed to the fact finder. ***Royer Homes, Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (Miss. 2003).**

Breach of Contract

A breach-of-contract case has two elements:

(1) the existence of a valid and binding contract, and

(2) a showing that the defendant has broken, or breached it.

A breach is material where there is a failure to perform a substantial part of the contract or one or more of its essential terms or conditions, or if there is such a breach as substantially defeats [the purpose of the contract]. ***Maness v. K & A Enterprises of Mississippi, LLC*, 250 So. 3d 402, 414 (Miss. 2018).**

We recognize that contracts, as legally binding and enforceable instruments, have intrinsic value to the parties entering into them, and that the failure of one party to carry out his side of the bargain necessarily may result in injury to the other party for the simple fact that a promise was broken, even if the damage resulting from that injury is nominal and/or not monetary. Monetary damages are a remedy for, not an element of, breach of contract. It has long been recognized that equitable remedies for breach of contract, such as specific performance or reformation, do not speak in terms of actual monetary damage to the plaintiff. Therefore, we hold that whether a plaintiff "has been thereby damaged monetarily" is not an element of a breach-of-contract claim. To the extent that *Warwick* and its progeny require a plaintiff to prove monetary damages to prevail on a breach-of-contract claim, they are overruled. We hold that a plaintiff is required to prove by a preponderance of the evidence only the first two factors set out by this Court in *Warwick* to prevail on a breach-of-contract claim, without regard to the remedy sought or the actual damage sustained. To be clear, monetary damages are a remedy for breach of contract, not an element of the claim. ***Business Communications, Inc. v. Banks*, 90 So. 3d 1221, 1225 (Miss. 2012).**

In any suit for a breach of contract, the plaintiff has the burden of proving by a preponderance of the evidence:

1. the existence of a valid and binding contract; and
2. that the defendant has broken, or breached it; and
3. that he has been thereby damaged monetarily.

***Warwick v. Matheney*, 603 So. 2d 330, 336 (Miss. 1992), *overruled by Business Communications, Inc. v. Banks*, 90 So. 3d 1221 (Miss. 2012).**

Burden of Proof

The plaintiff bears a burden of proof by a preponderance of the evidence in an issue of material breach. ***McCoy v. Gibson*, 863 So. 2d 978, 980 (Miss. Ct. App. 2003).**

Affirmative Defenses

Duress

Duress strikes at whether a party actually consented to a contract. A dominant party must conduct himself or herself in a manner that overrides the volition of the weaker party. To this end, a deprivation of a party's free exercise of his or her own will constitutes duress. But duress cannot be established with mere insistence by one party of a legal right to which the other party yields. Likewise, duress cannot be claimed when a party makes a lawful demand or exercises or threatens to exercise a legal right. "It should go without saying, however, that provisions in contracts contrary to public policy or where obtained by overreaching duress or undue influence are unenforceable." ***Estate of Davis v. O'Neill*, 42 So. 3d 520, 525 (Miss. 2010).**

Misrepresentation or Fraud

While it is true that a contract procured by fraud is voidable as to all provisions and the entire transaction may be avoided by the party who entered into the contract without knowing of the fraud, if it is impossible to elect a rescission, the only other remedy is to recover damages. ***Garris v. Smith's G & G, LLC*, 941 So. 2d 228, 232 (Miss. Ct. App. 2006).**

But if the writing is procured by false representations, or fraud, committed by one of the parties to the writing on the other, on which he might reasonably rely, the court will permit the facts to be shown, and if fraud was committed in the procurement of the contract, it will be avoided; in other words, no contract exists in legal contemplation which is procured by fraud. ***Fornea v. Goodyear Yellow Pine Co.*, 181 Miss. 50, 178 So. 914, 918 (1938).**

Mistake

Mutual

A mutual mistake between parties is where "a variance [exists] between their agreement and the instrument intended to express it." Further, a mutual mistake is a defense to contract formation. Reforming the agreement is justified when the mistake is in the drafting of the agreement, but not in the making of the agreement. Rescinding the agreement is appropriate where both parties are operating under a mutual mistake of fact, such as a mistake in the nature of the agreement or in the identity of the parties or subject matter. ***Tommy Brooks Oil Co. v. Wilburn*, 243 So. 3d 166, 170 (Miss. 2018) (citations omitted).**

A contract may be set aside, however, where both parties at the time of the agreement were operating under a mutual mistake of fact. Such mistake "may apply to the nature of the contract, the identity of the person with whom it is made, or the identity or existence of the subject matter." In any event, the mistake must relate to a past or present material fact to relieve a party(s) from liability. ***White v. Cooke*, 4 So. 3d 330, 334 (Miss. 2009) (citations omitted).**

However, it is important to note that a contract procured by fraud is voidable. ***Sumler v. East Ford, Inc.*, 915 So. 2d 1081, 1086 (Miss. Ct. App. 2005).**

Unilateral

The remedy for a unilateral mistake is rescission. The supreme court has stated the following regarding a unilateral mistake: "[E]quity will prevent an intolerable injustice such as where a party has gained an unconscionable advantage by mistake and the mistaken party is not grossly negligent." In order to rescind a contract on the basis of a unilateral mistake, it must be shown that:

(1) "the mistake is of so fundamental a character that, the minds of the parties have never, in fact, met; or where an unconscionable advantage has been gained, by mere mistake or misapprehension";
(2) "there was no gross negligence on the part of the plaintiff, either in falling into the error, or in not sooner claiming redress";
(3) "no intervening rights have accrued"; and
(4) "the parties may still be placed in status quo."

***Covington v. Griffin*, 19 So. 3d 805, 813-14 (Miss. Ct. App. 2009) (citations omitted).**

Unenforceable on Grounds of Against Public Policy

Contractual rights are fundamental, but contracts contrary to public policy are unenforceable. ***Estate of Reaves v. Owen*, 744 So. 2d 799, 801 (Miss. Ct. App. 1999).**

There is no doubt that the courts have the duty and the power to declare void and unenforceable contracts made in violation of law or in contravention of the public policy of the state. This Court has exercised this power in several classes of illegal contracts, including the following: (1) when the principal purpose of the contract directly furnishes aid and protection to an illegal enterprise; (2) when in order to enforce the contract a party must base his cause of action on his own illegal act; [and] (3) where the contract itself is unlawful. ***Smith v. Simon*, 224 So. 2d 565, 566 (Miss. 1969).**

Statute of Frauds

§ 15-3-1 Writing requirement for certain contracts:

An action shall not be brought whereby to charge a defendant or other party:

(a) upon any special promise to answer for the debt or default or miscarriage of another person;

(b) upon any agreement made upon consideration of marriage, mutual promises to marry excepted;

(c) upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year;

(d) upon any agreement which is not to be performed within the space of fifteen months from the making thereof; or

(e) upon any special promise by an executor or administrator to answer any debt or damage out of his own estate;

unless, in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing.

Damages

The standard appropriate for the measure of contract damages was reaffirmed in *Theobald v. Nosser*, 752 So. 2d 1036, 1042 (Miss.1999), when we held that

> the court's purpose in establishing a measure of damages for breach of contract is to put the injured party in the position where she would have been but for the breach. Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of the bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed.

***Frierson v. Delta Outdoor, Inc.*, 794 So. 2d 220, 225 (Miss. 2001).**

Compensatory Damages

However, a plaintiff seeking monetary damages for breach of contract must put into evidence, with "as much accuracy as" possible, proof of the damages being sought. Without proof of actual monetary damages, a plaintiff cannot recover compensatory damages under a breach-of-contract action. ***Business Communications, Inc. v. Banks*, 90 So. 3d 1221, 1225 (Miss. 2012).**

Liquidated Damages

In *Maxey v. Glindmeyer*, 379 So. 2d 297, 301 (Miss.1980), this Court stated, "Equity will enforce a contract for liquidated damages if such liquidated damages can be found to be reasonable and proper in the light of the circumstances of the case. Indeed, parties agree to the payment of liquidated damages where it is difficult to determine actual damages, resulting from a breach. Consequently, if such are not a reasonable pre-estimate of damages, but are unreasonable or constitute a penalty, their provision is unenforceable. To distinguish then liquidated damages from a penalty, courts must look to the parties' intentions. ***Board of Trustees of State Institutions of Higher Learning v. Johnson*, 507 So. 2d 887, 889-90 (Miss. 1987).**

Nominal Damages

"[W]here a suit is brought for a breach of a contract, and the evidence sustains the claim, the complainant is entitled to recover at least nominal damages for the failure of the defendant to carry out his agreement." ***Business Communications, Inc. v. Banks*, 90 So. 3d 1221, 1226 (Miss. 2012).**

Punitive Damages

Although punitive damages are not ordinarily recoverable in cases involving breach of contract, they are recoverable where the breach results from an intentional wrong, insult, or abuse as well as from such gross negligence as constitutes an independent tort. ***Blue Cross & Blue Shield, Inc. v. Maas*, 516 So. 2d 495, 496 (Miss. 1987) (citations omitted).**

Specific Performance

A claim for specific performance as a remedy for breach of contract is within the equity jurisdiction of the chancery court. ***Derr Plantation, Inc. v. Swarek*, 14 So. 3d 711, 717 (Miss. 2009).**

Limitations of Actions

§ 15-1-29 Actions on an open account or account stated; unwritten contracts:

Except as otherwise provided in the Uniform Commercial Code, actions on an open account or account stated not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three (3) years next after the cause of such action accrued, and not after, except that an action based on an unwritten contract of employment shall be commenced within one (1) year next after the cause of such action accrued, and not after.

§ 15-1-49 Actions without prescribed period of limitation:

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

> Causes of action for breach of contract are subject to the three-year statute of limitations set forth in Mississippi Code Annotated section 15-1-49. . . . ***Wallace v. Greenville Pub. Sch. Dist.*, 142 So. 3d 1104, 1106 (Miss. Ct. App. 2014).**

§ 75-2-725 Statute of limitations in contracts for sale:

(1) An action for breach of any contract for sale must be commenced within six (6) years after the cause of action has accrued. . . .

CHAPTER 15

SELECTED INTENTIONAL TORTS

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CHAPTER 15 ***SELECTED INTENTIONAL TORTS***		
CAUSE OF ACTION	**LIMITATION OF ACTION**	**STATUTE**
Abuse of Process Thus, the three elements of abuse of process are: (1) the party made an illegal use of a legal process, (2) the party had an ulterior motive, and (3) damage resulted from the perverted use of process. This Court has stated that the crucial element of this tort is the intent to abuse the privileges of the legal system. ***Ayles ex rel. Allen v. Allen*, 907 So. 2d 300, 303 (Miss. 2005).**	1 year ***Johnson v. Rhett*, 250 So. 3d 486, 491 (Miss. Ct. App. 2018).**	§ 15-1-35
Alienation of Affection The elements of the tort of alienation of affection are: (1) wrongful conduct of the defendant; (2) loss of affection or consortium; and (3) causal connection between such conduct and loss. ***Carter v. Reddix*, 115 So. 3d 851, 857 (Miss. Ct. App. 2012).**	3 years ***Hancock v. Watson*, 962 So. 2d 627, 631 (Miss. Ct. App. 2007).**	§ 15-1-49
Assault The intentional tort of assault occurs where a person (1) acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such contact, and (2) the other is thereby put in such imminent apprehension. ***Sanderson Farms, Inc. v. McCullough*, 212 So. 3d 69, 75 (Miss. 2017).**	1 year	§ 15-1-35

Battery The elements of the intentional tort of battery require: An assault occurs where a person (1) acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (2) the other is thereby put in such imminent apprehension. A battery goes one step beyond an assault in that a harmful contact actually occurs. ***Banks v. Lockhart*, 119 So. 3d 370, 372 (Miss. Ct. App. 2013).**	1 year	§ 15-1-35
Conversion This Court has held that to make out a conversion, there must be proof of a wrongful possession, or the exercise of a dominion in exclusion or defiance of the owner's right, or of an unauthorized and injurious use, or of a wrongful detention after demand. There is no conversion until the title of the lawful owner is made known and resisted or the purchaser exercises dominion over the property by use, sale, or otherwise. ***Community Bank v. Courtney*, 884 So. 2d 767, 772-73 (Miss. 2004).**	3 years ***Covington Cty. Bank v. Magee*,** **177 So. 3d 826, 828 (Miss. 2015).**	§ 15-1-49

Defamation - Libel Defamation is divided into two torts, including libel for written defamations and slander for oral ones. ***Williams v. City of Belzoni*, 229 So. 3d 171, 176 (Miss. Ct. App. 2017).** A claim of defamation requires that the following elements be established: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and, (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. ***McCullough v. Cook*, 679 So. 2d 627, 630 (Miss. 1996).**	1 year	§ 15-1-35

Defamation - Slander Defamation is divided into two torts, including libel for written defamations and slander for oral ones. ***Williams v. City of Belzoni*, 229 So. 3d 171, 176 (Miss. Ct. App. 2017).** What is needed in Mississippi to prove the tort are the following: (a) a false statement that has the capacity to injure the plaintiff's reputation; (b) an unprivileged publication, i.e., communication to a third party; (c) negligence or greater fault on part of publisher; and (d) either actionability of statement irrespective of special harm or existence of special harm caused by publication. Slander requires proof of "special harm" unless the statements were actionable per se. Discussed below are slanders that are actionable per se and need no special harm: (1) Words imputing the guilt or commission of some criminal offense involving moral turpitude and infamous punishment. (2) Words imputing the existence of some contagious disease. (3) Words imputing unfitness in an officer who holds an office of profit or emolument, either in respect of morals or inability to discharge the duties thereof. (4) Words imputing a want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession, trade or business; and . . . (5) words imputing to a female a want of chastity. ***Speed v. Scott*, 787 So. 2d 626, 631 (Miss. 2001) (citations omitted).**	1 year	§ 15-1-35

Defamation - Public Figure Where the defamed party is a public figure, however, that party is prohibited from recovering damages unless they prove that the statement was made with actual malice - that is, with knowledge that it was false or with reckless disregard of whether it was false or not, while entertaining subjective doubt as the truth of the statement. ***Journal Pub. Co. v. McCullough*, 743 So. 2d 352, 359 (Miss. 1999).** **Burden of Proof** Further, the burden of proving actual malice is by clear and convincing evidence, not a preponderance of the evidence. ***Journal Pub. Co. v. McCullough*, 743 So. 2d 352, 359-60 (Miss. 1999).**	1 year	§ 15-1-35
False Arrest However, to sustain a claim of false arrest a plaintiff must show that the defendant caused him to be arrested falsely, unlawfully, maliciously, and without probable cause. Therefore, if the plaintiff's arrest is supported by probable cause the claim must fail. ***Hudson v. Palmer*, 977 So. 2d 369, 382 (Miss. Ct. App. 2007).**	1 year	§ 15-1-35
False Imprisonment A plaintiff must prove two elements in order to succeed on a false-imprisonment claim: (1) the detention of the plaintiff; and (2) the unlawfulness of such detention. This Court has explained that the second element is determined by looking at whether, looking at the totality of the circumstances, the actions of the Defendant were objectively reasonable in their nature, purpose, extent and duration. ***Service Companies, Inc. v. Estate of Mautrice Vaughn*, 169 So. 3d 875, 879 (Miss. 2015).**	1 year	§ 15-1-35

Fraud The Mississippi Supreme Court has provided that the elements of fraud . . . include: 1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity or ignorance of its truth; 5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; 6) the hearer's ignorance of its falsity; 7) his reliance on its truth; 8) his right to rely thereon; and 9) his consequent and proximate injury. ***Dorman v. Power*, 203 So. 3d 33, 37-38 (Miss. Ct. App. 2016).** **Burden of Proof** Fraud must be proven by clear and convincing evidence. . . . ***Saucier v. Peoples Bank*, 150 So. 3d 719, 734 (Miss. Ct. App. 2014).**	3 years ***Stephens v. Equitable Life Assur. Soc'y*, 850 So. 2d 78, 82 (Miss. 2003).**	§ 15-1-49

Intentional Infliction of Emotional Distress A claim for IIED . . . requires proof of the following elements: 1. The defendant acted willfully or wantonly towards the plaintiff by [description of defendant's 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 acts of the defendant; and 5. Such resulting emotional distress was foreseeable from the intentional acts of the defendant. ***Carter v. Reddix*, 115 So. 3d 851, 858 (Miss. Ct. App. 2012).**	1 year ***Trustmark Nat'l Bank v. Meador*,** **81 So. 3d 1112, 1118 (Miss. 2012).**	§ 15-1-35
Invasion of Privacy The tort of invasion of privacy is composed of four separate sub-torts: (i) the intentional intrusion upon the solitude or seclusion of another; (ii) the appropriation of another's identity for an unpermitted use; (iii) the public disclosure of private facts; and (iv) holding another to the public eye in a false light. ***Ayles ex rel. Allen v. Allen*, 907 So. 2d 300, 306 (Miss. 2005).**	1 year ***Young v. Jackson*,** **572 So. 2d 378, 382 (Miss. 1990).**	§ 15-1-35

Invasion of Privacy - Intentional intrusion upon the solitude or seclusion of another In the case at bar, it is the first of the sub-torts which is at issue, the intentional intrusion upon the solitude or seclusion of another. *Candebat* is our only case that deals specifically with the sub-tort of intentional intrusion upon the solitude or seclusion of another. There we stated that to recover for an invasion of privacy, a plaintiff must meet a heavy burden of showing a substantial interference with his seclusion of a kind that would be highly offensive to the ordinary, reasonable man, as the result of conduct to which the reasonable man would strongly object. Further, the plaintiff must show some bad faith or utterly reckless prying to recover on an invasion of privacy cause of action. However, the general rule is that there is no requirement of publication or communication to a third party in cases of intrusion upon a plaintiff's seclusion or solitude. ***Plaxico v. Michael*, 735 So. 2d 1036, 1039 (Miss. 1999) (citations omitted).**	1 year ***Young v. Jackson*, 572 So. 2d 378, 382 (Miss. 1990).**	§ 15-1-35
Invasion of Privacy - Appropriation of another's identity for an unpermitted use (Appropriation of one's likeness for commercial gain) In order to prevail on a claim based on appropriation of one's likeness for commercial gain, a plaintiff must show that the defendant: (1) appropriated his name or likeness, (2) without consent, (3) for use in a commercial enterprise. ***Brasel v. Hair Co.*, 976 So. 2d 390, 392 (Miss. Ct. App. 2008).**	1 year ***Young v. Jackson*, 572 So. 2d 378, 382 (Miss. 1990).**	§ 15-1-35

Invasion of Privacy - Public disclosure of private facts Regarding the sub-tort of public disclosure of private facts, this Court has adopted the definition as outlined in Restatements (Second) of Torts § 652D (1977) which states: One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public. ***Williamson ex rel. Williamson v. Keith*, 786 So. 2d 390, 396 (Miss. 2001).**	1 year ***Young v. Jackson*, 572 So. 2d 378, 382 (Miss. 1990).**	§ 15-1-35
Invasion of Privacy - False light One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. Comment "a" makes clear that "it is essential to the rule stated in this section that the matter published concerning the plaintiff is not true." But, comment "b" expresses the institute's position that the falsity need not be defamatory. It states: The interest protected by this Section is the interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is. ***Prescott v. Bay St. Louis Newspapers, Inc.*, 497 So. 2d 77, 79-80 (Miss. 1986).**	1 year ***Young v. Jackson*, 572 So. 2d 378, 382 (Miss. 1990).**	§ 15-1-35

Malicious Prosecution The elements of the tort of malicious prosecution are: (1) The institution of a proceeding (2) by, or at the insistence of the defendant (3) the termination of such proceedings in the plaintiff's favor (4) malice in instituting the proceedings (5) want of probable cause for the proceedings (6) the suffering of injury or damage as a result of the prosecution. ***McClinton v. Delta Pride Catfish, Inc.*, 792 So. 2d 968, 973 (Miss. 2001).**	1 year ***Coleman v. Smith*, 841 So. 2d 192, 194 (Miss. Ct. App. 2003).**	§ 15-1-35

CHAPTER 16

NEGLIGENCE ACTIONS

CHAPTER 16

NEGLIGENCE ACTIONS

Subject Matter Jurisdiction

Mississippi Constitution Art. 6, § 156, Jurisdiction of circuit court, states:

The circuit court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law.

Venue

§ 11-11-3 Proper county; transfers; considerations; limitations waiver:

(l)(a)(i) Civil actions of which the circuit court has original jurisdiction shall be commenced in the county where the defendant resides, or, if a corporation, in the county of its principal place of business, or in the county where a substantial alleged act or omission occurred or where a substantial event that caused the injury occurred. . . .

Negligence

The legal definition of negligence is fairly simple, universally applied, and likewise needs no citation of authority. Negligence is doing what a reasonable, prudent person would not do, or failing to do what a reasonable, prudent person would do, under substantially similar circumstances. ***Glover ex rel. Glover v. Jackson State Univ.*, 968 So. 2d 1267, 1276-77 (Miss. 2007).**

Elements of a Negligence Action

The elements of a prima facie case of negligence are duty, breach, causation, and damages. Duty and breach must be established first. The elements of breach and proximate cause must be established by the plaintiff with supporting evidence. ***Todd v. First Baptist Church*, 993 So. 2d 827, 829 (Miss. 2008).**

The elements of a negligence action are well-settled in Mississippi. Under the negligence regime of tort law, a plaintiff must prove by a preponderance of the evidence

(1) duty,
(2) breach,
(3) causation, and
(4) injury.

To recover, a plaintiff must prove causation in fact and proximate cause. ***Gulledge v. Shaw*, 880 So. 2d 288, 292-93 (Miss. 2004).**

For a plaintiff to recover in a negligence action the conventional tort elements of duty, breach of duty, proximate causation and injury must be proven by a preponderance of the evidence. ***Palmer v. Anderson Infirmary Benev. Ass'n*, 656 So. 2d 790, 794 (Miss. 1995).**

Duty

Generally, one is under a duty to act "as a reasonable and prudent person would have acted under the same or similar circumstances." ***Prewitt v. Vance*, 16 So. 3d 37, 40 (Miss. Ct. App. 2009).**

While duty and causation both involve foreseeability, duty is an issue of law, and causation is generally a matter for the jury. Juries are not instructed in, nor do they engage in, consideration of the policy matters and the precedent which define the concept of duty. This Court has held that the existence vel non of a duty of care is a question of law to be decided by the Court. Therefore, the lower court properly decided a matter of law. ***Donald v. Amoco Prod. Co.*, 735 So. 2d 161, 174 (Miss. 1999) (citations omitted).**

The duty owed by a defendant to a plaintiff depends upon their relation to one another. ***Skelton ex rel. Roden v. Twin Cty. Rural Elec. Ass'n*, 611 So. 2d 931, 936 (Miss. 1992).**

Breach of Duty

§ 11-7-17 All negligence issue for jury:

All questions of negligence and contributory negligence shall be for the jury to determine.

> Foreseeability and breach of duty are also issues to be decided by the finder of fact once sufficient evidence is presented in a negligence case. ***Ladner v. Holleman*, 90 So. 3d 655, 661 (Miss. Ct. App. 2012).**

Proximate Cause

We have held proximate cause requires the plaintiff to show that the defendant's conduct was the cause in fact and the legal cause of the plaintiff's injury. ***Huynh v. Phillips*, 95 So. 3d 1259, 1263 (Miss. 2012).**

Proximate cause of an injury is that cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred. We have observed that in order for a person to be liable for an act which causes injury, "the act must be of such character, and done in such a situation, that the person doing it should reasonably have anticipated that some injury to another will probably result therefrom." The inquiry is not whether the thing is to be foreseen or anticipated as one which will probably happen, but whether it is likely to happen, even though the likelihood may not be sufficient to amount to a comparative probability. Thus, under this Court's jurisprudence, foreseeability is an essential element of causation. ***Gulledge v. Shaw*, 880 So. 2d 288, 293 (Miss. 2004).**

Perhaps the best definition of proximate cause is that contained in 38 American Jurisprudence Negligence Section 50 (1941):

> The proximate cause of an injury is that cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.

This Court attempted to define proximate cause in *Cumberland Telephone & Telegraph Company v. Woodham*, 99 Miss. 318, 54 So. 890 (1911), wherein it said:

> Without attempting to define proximate cause in such terms as will be applicable to all states of fact-for to do so is practically impossible-it will be sufficient to say that the negligent act of a person, resulting in injury, is the proximate cause thereof, and creates liability therefor, when the act is of such character that, by the usual course of events, some injury, not necessarily the particular injury, or injury received in the particular manner complained of, would result therefrom, provided the attendant circumstances are such that an ordinarily prudent man ought reasonably to have anticipated that some injury would probably result from the act done. In order that a person may be liable for damages resulting from his negligence, it is not necessary that his negligence should have been the sole cause of the injury. His negligence may be the proximate cause, where it concurs with one or more causes in producing an injury, and, although the author or authors of such cause or causes may also be liable therefor.

We have consistently followed this general definition of proximate cause. ***Griffin v. Harkey*, 215 So. 2d 866, 868-69 (Miss. 1968).**

Cause in Fact

In any tort case, identifying and proving the source of the harm that proximately caused a plaintiff's injuries is essential. Proximate cause of an injury is that cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred.

In order for an act of negligence to proximately cause the damage, the fact finder must find that the negligence was both the cause in fact and legal cause of the damage. ***Sharrieff v. DBA Auto. Two, LLC*, 242 So. 3d 944, 947 (Miss. Ct. App. 2018).**

When a plaintiff's injuries are brought about by the actions of multiple tortfeasors, a defendant's negligence is considered the cause in fact if it was a substantial [contributing] factor in bringing about the harm. The plaintiffs bear the burden of proof on the issue of causation and must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough. ***Sharrieff v. DBA Auto. Two*, LLC, 242 So. 3d 944, 948 (Miss. Ct. App. 2018).**

Cause in fact means that, but for the defendant's negligence, the injury would not have occurred. ***Huynh v. Phillips*, 95 So. 3d 1259, 1263 (Miss. 2012).**

A defendant's negligence is the "cause-in-fact" where the fact-finder concludes that, but for the defendant's negligence, the injury would not have occurred. Once established, the cause-in-fact also will be the legal cause of the damage "provided the damage is the type, or within the classification, of damage the negligent actor should reasonably expect (or foresee) to result from the negligent act." ***Spann v. Shuqualak Lumber Co.*, 990 So. 2d 186, 190 (Miss. 2008).**

In this, as in all cases, it is necessary to a cause of action on account of negligence that the latter shall have been the proximate, or a contributing, cause of injury to another; and in order that it shall be a proximate or contributing cause it must have been a substantial factor in producing the injury. And an actor's negligent conduct is not a substantial factor in bringing about harm to another if it would have been sustained even if the actor had not been guilty of the particular negligence charged. ***Goudy v. State*, 203 Miss. 366, 370-71, 35 So. 2d 308, 309 (1948).**

Legal Cause

A defendant's negligence which is found to be the cause in fact of a plaintiff's damage will also be the legal cause of that damage, provided the damage is the type, or within the classification, of damage the negligent actor should reasonably expect (or foresee) to result from the negligent act. ***Sharrieff v. DBA Auto. Two*, LLC, 242 So. 3d 944, 948 (Miss. Ct. App. 2018).**

After cause in fact has been established, negligence will be deemed the legal cause if the injury is the type, or within the classification, of damage the negligent actor

should reasonably expect (or foresee) to result from the negligent act. ***Huynh v. Phillips*, 95 So. 3d 1259, 1263 (Miss. 2012).**

Foreseeability

Foreseeability and breach of duty are also issues to be decided by the finder of fact once sufficient evidence is presented in a negligence case. ***Ladner v. Holleman*, 90 So. 3d 655, 661 (Miss. Ct. App. 2012).**

We reiterate today that, in satisfying the requirement of foreseeability, a plaintiff is not required to prove that the exact injury sustained by the plaintiff was foreseeable; rather, it is enough to show that the plaintiff's injuries and damages fall within a particular kind or class of injury or harm which reasonably could be expected to flow from the defendant's negligence. To illustrate, one who negligently drives an automobile reasonably should foresee that his or her negligence could be expected to cause certain kinds or categories of damages. Such categories would of course include (among others) traumatic injury, medical bills, lost wages, and pain and suffering. And in order to recover a particular damage (such as compensation for a broken leg or reimbursement for an MRI), the plaintiff will not be required to prove the tortfeasor actually contemplated that his or her negligence would lead to a broken leg or an MRI. To the contrary, the plaintiff will be allowed to recover for all injuries and damages reasonably expected to result from automobile accidents. However, if the accident also caused the plaintiff to miss a flight to London and, consequently, miss attending an auction and a once-in-a-lifetime opportunity to purchase a rare piece of art, the negligent automobile driver ordinarily would not be liable for such unforeseeable damages. This is so because they are not included within the type or category of damages a tortfeasor ordinarily should expect or foresee would result from careless driving. ***Glover ex rel. Glover v. Jackson State Univ.*, 968 So. 2d 1267, 1278-79 (Miss. 2007).**

Foreseeability means that a person of ordinary intelligence should have anticipated the dangers that his negligent act created for others. ***Johnson v. Alcorn State Univ.*, 929 So. 2d 398, 411 (Miss. Ct. App. 2006).**

The rule is settled in this state that, when an act or omission is negligent, it is not necessary, in order to render it the proximate cause, that the actor could or might have foreseen the particular consequence or precise form of the injury, if by the exercise of reasonable care he might have foreseen or anticipated that some injury might result. ***Tri-State Transit Co. v. Martin*, 181 Miss. 388, 179 So. 349, 351 (1938).**

Intervening Cause

A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about. For such [an] intervening and super[s]eding cause to extinguish the liability of the original actor, the cause must be unforeseeable. This Court considers the following six factors to determine whether an act constitutes a superseding cause:

> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him; [and]
> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

***Rausch v. Barlow Woods, Inc.*, 204 So. 3d 796, 801-02 (Miss. Ct. App. 2016).**

The law dealing with the duty to foresee the imprudent acts of others appears under the general rubric of the jurisprudence of 'intervening cause.' The *Second Restatement of Torts* defines a superseding cause as "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." Under this theory, an original actor's negligence may be superceded by a subsequent actor's negligence, if the subsequent negligence was unforeseeable. ***Entrican v. Ming*, 962 So. 2d 28, 35 (Miss. 2007) (citation omitted).**

Damages

It is primarily the province of the [fact-finder] to determine the amount of damages to be awarded. . . . ***City of Natchez v. Jackson*, 941 So. 2d 865, 877 (Miss. Ct. App. 2006).**

It is well-understood that in an action seeking damages, the plaintiff bears the burden of proof as to the amount of damages. This requires the plaintiff to place into evidence such proof of damages as the nature of case permits, with as much accuracy as is reasonably possible. "Where the existence of damages has been established, the plaintiff will not be denied the damages awarded by a [fact finder] merely because a 'measure of speculation and conjecture is required' in determining the amount of the damages." As it is well-recognized in Mississippi, "a party will not be permitted to escape liability because of the lack of a perfect measure of damages his wrong has caused." ***J.K. v. R.K.*, 30 So. 3d 290, 299 (Miss. 2009).**

With regard to the reasonableness of damages, this Court has specifically said:

> Each suit for personal injury must be decided by the facts shown in that particular case. The amount of physical injury, mental and physical pain, present and future, temporary and permanent disability, medical expenses, loss of wages and wage-earning capacity, sex, age and health of the injured plaintiff, are all variables to be considered by the jury in determining the amount of damages to be awarded.

Further, as to excessive verdicts, this Court has noted:

> The damages, therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable, and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess.

***United States Fid. & Guar. Co. v. Estate of Francis ex rel. Francis*, 825 So. 2d 38, 47 (Miss. 2002).**

The [plaintiffs] were required to provide proof of damages with as much certainty and accuracy as was reasonably possible. Though the exact loss might be uncertain, as long as the damage is certain and the proof is sufficient to afford a reasonable basis to estimate the [plaintiffs'] loss, the jury properly could determine an award. ***Purina Mills, Inc. v. Moak*, 575 So. 2d 993, 998 (Miss. 1990).**

§ 11-1-65 Punitive damages:

(1) In any action in which punitive damages are sought:

(a) Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.
(b) In any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages.
(c) If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing to determine whether punitive damages may be considered by the same trier of fact.
(d) The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount. . . .

§ 11-1-69 Hedonic damages; restrictions:

(1) In any civil action for personal injury there may be a recovery for pain and suffering and loss of enjoyment of life. However, there shall be no recovery for loss of enjoyment of life as a separate element of damages apart from pain and suffering damages, and there shall be no instruction given to the jury which separates loss of enjoyment of life from pain and suffering. The determination of the existence and extent of recovery for pain and suffering and loss of enjoyment of life shall be a question for the finder of fact, subject to appellate review, and the monetary value of the pain and suffering and loss of enjoyment of life shall not be made the subject of expert testimony.
(2) In any wrongful death action, there shall be no recovery for loss of enjoyment of life caused by death.

Burden of Proof

For a plaintiff to recover in a negligence action the conventional tort elements of duty, breach of duty, proximate causation and injury must be proven by a preponderance of the evidence. ***Palmer v. Anderson Infirmary Benev. Ass'n*, 656 So. 2d 790, 794 (Miss. 1995).**

Defenses

Assumption of the Risk

We take this opportunity to hold once again that the assumption of risk doctrine is subsumed into comparative negligence. Any actions which might constitute an assumption of risk should be dealt with only in the context of the comparative negligence doctrine. A jury is always free to decide that an act which constitutes an assumption of risk was the sole proximate cause of a plaintiff's injuries. We see no reason why acts which might constitute an assumption of risk should, as a matter of law, create a complete bar to recovery. The comparative negligence doctrine gives juries great flexibility in reaching a verdict. Any fault on the part of the plaintiff should be considered only in the context of comparative negligence. ***Churchill v. Pearl River Basin Dev. Dist.*, 757 So. 2d 940, 943-44 (Miss. 1999).**

Comparative Negligence

§ 11-7-15 Comparative negligence:

In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

Mississippi is a pure comparative-negligence state. Under the comparative-negligence doctrine, negligence is measured in terms of percentage, and any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is sought. "Where negligence by both parties is concurrent and contributes to injury, recovery is not barred under such doctrine, but the plaintiff's damages are diminished proportionately." Thus, even though the plaintiff was negligent, the plaintiff may recover from a defendant whose negligence contributed to the plaintiff's injury. However, comparative negligence only applies where there is more than one proximate cause. Comparative negligence is not applicable if the negligence of the injured party is the sole cause of the injuries. ***McDaniel v. Ferrell*, 232 So. 3d 814, 819 (Miss. Ct. App. 2017).**

§ 11-7-17 All negligence issue for jury:

All questions of negligence and contributory negligence shall be for the jury to determine.

Open & Obvious Condition

Most recently, the Court stated in *Tate v. Southern Jitney Jungle Company*, 650 So. 2d 1347, 1351 (Miss. 1995), while referring to Bunge, that the open and obvious doctrine is not a complete defense to negligence actions in premise liability cases where the condition complained of is unreasonably dangerous. ***Seymour v. Brunswick Corp.*, 655 So. 2d 892, 895 (Miss. 1995).**

We now abolish the so-called "open and obvious" defense and apply our true comparative negligence doctrine. The jury found that there was negligence in the case at hand; the trial judge erred in construing the open and obvious defense as a complete bar when it really is only a mitigation of damages on a comparative negligence basis under Miss. Code Ann. § 11-7-15. ***Tharp v. Bunge Corp.*, 641 So. 2d 20, 25 (Miss. 1994).**

Statute of Limitations

§ 15-1-49 Actions without prescribed period of limitation; actions involving latent injury or disease:

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

The three year statute of limitations applicable to negligence actions is codified in Miss.Code Ann. Section 15-1-49. ***McMorris v. Tally*, 163 So. 3d 289, 294 (Miss. 2015).**

Standard of Review

The standard of review for jury verdicts in this state is well established. Once the jury has returned a verdict in a civil case, we are not at liberty to direct that judgment be entered contrary to that verdict short of a conclusion on our part that, given the evidence as a whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury found. ***Sivira v. Midtown Restaurants Corp.*, 753 So. 2d 492, 494 (Miss. Ct. App. 1999).**

Negligence Per Se

To prevail in an action for negligence per se, a party must prove that he was a member of the class sought to be protected under the statute, that his injuries were of a type sought to be avoided, and that violation of the statute proximately caused his injuries. A finding of negligence per se does not end the inquiry - negligence per se supplies only the duty and the breach of a duty elements of a tort. The plaintiff must also prove that the breach of the duty proximately caused her damages. The Court has stated:

> The principle that violation of a statute constitutes negligence per se is so elementary that it does not require citation of authority. When a statute is violated, the injured party is entitled to an instruction that the party violating is guilty of negligence, and if that negligence proximately caused or contributed to the injury, then the injured party is entitled to recover.

***Gallagher Bassett Servs., Inc. v. Jeffcoat*, 887 So. 2d 777, 787 (Miss. 2004).**

To prevail in an action for negligence per se, a party must prove that he was a member of the class sought to be protected under the statute, that his injuries were of a type sought to be avoided, and that violation of the statute proximately caused his injuries. ***Snapp v. Harrison*, 699 So. 2d 567, 571 (Miss. 1997).**

Elements of a Legal Malpractice Action

To plead legal malpractice, a plaintiff must provide sufficient facts to establish three elements:

(1) an attorney-client relationship;
(2) the attorney's negligence in handling the client's affairs; and
(3) proximate cause of the injury.

***Great Am. E & S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A.*, 100 So. 3d 420, 424 (Miss. 2012).**

It is true - and well established - that a plaintiff in a negligence-based malpractice action must establish proximate cause by the so-called "trial-within-a-trial" test. That is to say, the client "must show that, but for [his] attorney's negligence, he would have been successful in the prosecution or defense of the underlying action." ***Crist v. Loyacono*, 65 So. 3d 837, 842 (Miss. 2011).**

A legal malpractice case requires proof by a preponderance of the evidence the following:

(1) existence of a lawyer-client relationship;
(2) negligence on the part of the lawyer in handling the affairs entrusted to him;
(3) proximate cause; and
(4) injury.

***Century 21 Deep S. Properties, Ltd. v. Corson*, 612 So. 2d 359, 372 (Miss. 1992).**

In the usual legal malpractice case, in order to prove proximate cause the plaintiff must show that but for his attorney's negligence he would have been successful in the prosecution or defense of the underlying action. In the context of the present case, the Meiers carry their burden because but for Steighner's negligence they would not have been named as defendants in the first place. Proof of the injury suffered by the Meiers is equally clear - the amount of damages they are ordered to pay the Corsons and the amount of attorney fees incurred in this action. The trial court was manifestly in error when it failed to award the Meiers a sum sufficient to cover the amount they were ordered to pay the Corsons and the amount of attorney fees incurred by the Meiers in this action. On remand the Meiers are entitled to indemnity from Steighner for the amount of nominal damages determined and for their attorney fees incurred in this action. ***Century 21 Deep S. Properties, Ltd. v. Corson*, 612 So. 2d 359, 372 (Miss. 1992).**

Damages

It is primarily the province of the [fact-finder] to determine the amount of damages to be awarded. . . . ***City of Natchez v. Jackson*, 941 So. 2d 865, 877 (Miss. Ct. App. 2006).**

It is well-understood that in an action seeking damages, the plaintiff bears the burden of proof as to the amount of damages. This requires the plaintiff to place into evidence such proof of damages as the nature of case permits, with as much accuracy as is reasonably possible. "Where the existence of damages has been established, the plaintiff will not be denied the damages awarded by a [fact finder] merely because a 'measure of speculation and conjecture is required' in determining the amount of the damages." As it is well-recognized in Mississippi, "a party will not be permitted to escape liability because of the lack of a perfect measure of damages his wrong has caused." ***J.K. v. R.K.*, 30 So. 3d 290, 299 (Miss. 2009).**

§ 11-1-65 Punitive damages:

(1) In any action in which punitive damages are sought:

(a) Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

(b) In any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages.

(c) If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing to determine whether punitive damages may be considered by the same trier of fact.

(d) The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount. . . .

> In its ruling, the circuit court opined that the extreme conduct required to allow for jury consideration of punitive damages was lacking. The circuit court found that "the actions of the defendant would only rise to simple negligence, if any." ***Gray v. Framme Law Firm of MS, P.C.*, 141 So. 3d 430, 435 (Miss. Ct. App. 2013).**

Standard of Review

The standard of review for jury verdicts in this state is well established. Once the jury has returned a verdict in a civil case, we are not at liberty to direct that judgment be entered contrary to that verdict short of a conclusion on our part that, given the evidence as a whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury found. ***Sivira v. Midtown Restaurants Corp.*, 753 So. 2d 492, 494 (Miss. Ct. App. 1999).**

Statute of Limitations

§ 15-1-49 Actions without prescribed period of limitation; actions involving latent injury or disease:

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

> Most other courts with an exoneration rule have found that exoneration essentially becomes an element of the criminal-malpractice cause of action and that the cause of action accrues only after the malpractice plaintiff is exonerated of the underlying criminal charges. [This holding] . . . establishes a bright-line rule that can easily be applied. . . . We therefore overrule [older cases] and adopt the majority rule that the criminal malpractice claim accrues and begins to run on the date of exoneration. . . . ***Trigg v. Farese*, 266 So. 3d 611, 626 (Miss. 2018).**

> Mississippi applies the discovery rule for legal malpractice actions. Therefore, the statute of limitations begins to run on the date that the client learns or, through the exercise of reasonable diligence, should learn of his lawyer's negligence. The rule is applied when the facts indicate that it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act. [T]he discovery rule applies when it would be impractical to require a layperson to have discovered the malpractice at the time it happened. This is because requiring a layperson to ascertain legal malpractice at the time it occurs would necessitate the retention of a second attorney to review the work of the first. ***Donovan v. Burwell*, 199 So. 3d 725, 729 (Miss. Ct. App. 2016) (citations omitted).**

Elements of a Medical Malpractice Action

In a medical-malpractice suit, a plaintiff must show:

(1) the existence of a duty on the part of the physician to conform to a specific standard of conduct;
(2) the specific standard of conduct;
(3) that the physician's breach of the duty was the proximate cause of the plaintiff's injury, and
(4) that damages resulted.

In order to satisfy the proximate-cause element, "[t]he plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough." Expert testimony is required to establish the first three elements, and without expert testimony supporting each element, a defendant is entitled to summary judgment. The expert's testimony must "identify and articulate the requisite standard that was not complied with, [and] the expert must also establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries." ***Barrow v. May*, 107 So. 3d 1029, 1034 (Miss. Ct. App. 2012).**

A prima facie case for medical malpractice must be made by proving the following elements:

(1) the existence of a duty by the defendant to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury;
(2) a failure to conform to the required standard; and
(3) an injury to the plaintiff proximately caused by the breach of such duty by the defendant.

When proving these elements in a medical malpractice suit, expert testimony must be used. Not only must this expert identify and articulate the requisite standard that was not complied with, the expert must also establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries. ***Hubbard v. Wansley*, 954 So. 2d 951, 956-57 (Miss. 2007).**

We note that, in a medical malpractice case, the plaintiff has the burden of proof to show that the defendant physician breached the standard of care. In McCaffrey v. Puckett, 784 So. 2d 197, 206 (Miss. 2001), the court stated, "[t]o prove a prima facie case of medical malpractice, the plaintiff (1) after establishing the doctor-patient relationship and its attendant duty, is generally required to present expert testimony (2) identifying and articulating the requisite standard of care and (3) establishing that the defendant physician failed to conform to the standard of care. In addition, (4) the plaintiff must prove the physician's noncompliance with the standard of care caused the plaintiff's injury, as well as proving (5) the extent

of the plaintiff's damages." ***Griffin v. McKenney*, 877 So. 2d 425, 446 (Miss. Ct. App. 2003).**

Recovery in a negligence action requires proof by a preponderance of the evidence of the conventional tort elements: duty, breach of duty, proximate causation, and injury (i.e., damages). Mississippi physicians are bound by nationally-recognized standards of care; they have a duty to employ "reasonable and ordinary care" in their treatment of patients. Given the circumstances of each patient, each physician has a duty to use his or her knowledge and therewith treat through maximum reasonable medical recovery, each patient, with such reasonable diligence, skill, competence, and prudence as are practiced by minimally competent physicians in the same specialty or general field of practice throughout the United States, who have available to them the same general facilities, services, equipment and options. Case law generally "demands" that "in a medical malpractice action, negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care." Expert testimony is required unless the matter in issue is within the common knowledge of laymen. An expert is necessitated to identify the action or inaction which allegedly constituted a breach of duty and which proximately caused the patient's injury. ***Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So. 2d 1346, 1354-55 (Miss. 1990).**

Statutory Requirements in Medical Malpractice Action

§ 11-1-58 Medical malpractice; certificate of expert consultation; exemptions; confidentiality:

(1) In any action against a licensed physician, health care provider or health care practitioner for injuries or wrongful death arising out of the course of medical, surgical or other professional services where expert testimony is otherwise required by law, the complaint shall be accompanied by a certificate executed by the attorney for the plaintiff declaring that:

(a) The attorney has reviewed the facts of the case and has consulted with at least one (1) expert qualified pursuant to the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence who is qualified to give expert testimony as to standard of care or negligence and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action; or

(b) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because a limitation of time established by Section 15-1-36 would bar the action and that the consultation could not reasonably be obtained before such time expired. A certificate executed

pursuant to this paragraph (b) shall be supplemented by a certificate of consultation pursuant to paragraph (a) or (c) within sixty (60) days after service of the complaint or the suit shall be dismissed; or

(c) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because the attorney had made at least three (3) separate good faith attempts with three (3) different experts to obtain a consultation and that none of those contacted would agree to a consultation.

(2) Where a certificate is required pursuant to this section only, a single certificate is required for an action, even if more than one (1) defendant has been named in the complaint or is subsequently named.

(3) A certificate under subsection (1) of this section is not required where the attorney intends to rely solely on either the doctrine of "res ipsa loquitur" or "informed consent." In such cases, the complaint shall be accompanied by a certificate executed by the attorney declaring that the attorney is solely relying on such doctrine and, for that reason, is not filing a certificate under subsection (1) of this section.

(4) If a request by the plaintiff for the records of the plaintiff's medical treatment by the defendants has been made and the records have not been produced, the plaintiff shall not be required to file the certificate required by this section until ninety (90) days after the records have been produced.

(5) For purposes of this section, an attorney who submits a certificate of consultation shall not be required to disclose the identity of the consulted or the contents of the consultation; provided, however, that when the attorney makes a claim under paragraph (c) of subsection (1) of this section that he was unable to obtain the required consultation with an expert, the court, upon the request of a defendant made prior to compliance by the plaintiff with the provisions of this section, may require the attorney to divulge to the court, in camera and without any disclosure by the court to any other party, the names of physicians refusing such consultation.

(6) The provisions of this section shall not apply to a plaintiff who is not represented by an attorney.

(7) The plaintiff, in lieu of serving a certificate required by this section, may provide the defendant or defendants with expert information in the form required by the Mississippi Rules of Civil Procedure. Nothing in this section requires the disclosure of any "consulting" or nontrial expert, except as expressly stated herein.

§ 11-1-61 Action against physician; expert witness:

In any action for injury or death against a physician, whether in contract or in tort, arising out of the provision of or failure to provide health care services, a person may qualify as an expert witness on the issue of the appropriate medical standard

of care if the witness is licensed in this state, or some other state, as a doctor of medicine.

§ 11-1-62 Damages caused by prescription drugs; pleadings; intent of section:

In any civil action alleging damages caused by a prescription drug that has been approved by the federal Food and Drug Administration, a physician, optometrist, nurse practitioner or physician assistant may not be sued unless the plaintiff pleads specific facts which, if proven, amount to negligence on the part of the medical provider. It is the intent of this section to immunize innocent medical providers listed in this section who are not actively negligent from forum-driven lawsuits.

Damages

It is primarily the province of the [fact-finder] to determine the amount of damages to be awarded. . . . ***City of Natchez v. Jackson*, 941 So. 2d 865, 877 (Miss. Ct. App. 2006).**

It is well-understood that in an action seeking damages, the plaintiff bears the burden of proof as to the amount of damages. This requires the plaintiff to place into evidence such proof of damages as the nature of case permits, with as much accuracy as is reasonably possible. "Where the existence of damages has been established, the plaintiff will not be denied the damages awarded by a [fact finder] merely because a 'measure of speculation and conjecture is required' in determining the amount of the damages." As it is well-recognized in Mississippi, "a party will not be permitted to escape liability because of the lack of a perfect measure of damages his wrong has caused." ***J.K. v. R.K.*, 30 So. 3d 290, 299 (Miss. 2009).**

§ 11-1-59 Medical malpractice action damages:

In any action at law against a licensed physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist or chiropractor to recover damages based upon a professional negligence theory, the complaint or counterclaim shall not specify the amount of damages claimed, but shall only state that the damages claimed are within the jurisdictional limits of the court to which the pleadings are addressed and whether or not the amount of such damages is ten thousand dollars ($10,000.00) or more, or such other minimum amount as shall be necessary to invoke federal jurisdiction if the action is brought in federal court.

§ 11-1-60 Medical malpractice; limitation on noneconomic damages:

(1) For the purposes of this section, the following words and phrases shall have the meanings ascribed herein unless the context clearly requires otherwise:

(a) "Noneconomic damages" means subjective, nonpecuniary damages arising from death, pain, suffering, inconvenience, mental anguish, worry, emotional distress, loss of society and companionship, loss of consortium, bystander injury, physical impairment, disfigurement, injury to reputation, humiliation, embarrassment, loss of the enjoyment of life, hedonic damages, other nonpecuniary damages, and any other theory of damages such as fear of loss, illness or injury. The term "noneconomic damages" shall not include punitive or exemplary damages.

(b) "Actual economic damages" means objectively verifiable pecuniary damages arising from medical expenses and medical care, rehabilitation services, custodial care, disabilities, loss of earnings and earning capacity, loss of income, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, loss of business or employment opportunities, and other objectively verifiable monetary losses.

(2) (a) In any cause of action filed on or after September 1, 2004, for injury based on malpractice or breach of standard of care against a provider of health care, including institutions for the aged or infirm, in the event the trier of fact finds the defendant liable, they shall not award the plaintiff more than Five Hundred Thousand Dollars ($500,000.00) for noneconomic damages.

(b) In any civil action filed on or after September 1, 2004, other than those actions described in paragraph (a) of this subsection, in the event the trier of fact finds the defendant liable, they shall not award the plaintiff more than One Million Dollars ($1,000,000.00) for noneconomic damages. It is the intent of this section to limit all noneconomic damages to the above.

(c) The trier of fact shall not be advised of the limitations imposed by this subsection (2) and the judge shall appropriately reduce any award of noneconomic damages that exceeds the applicable limitation.

(3) Nothing contained in subsection (1) of this section shall be construed as creating a cause of action or as setting forth elements of or types of damages that are or are not recoverable in any type of cause of action.

§ 11-1-65 Punitive damages:

(1) In any action in which punitive damages are sought:

(a) Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence

which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.
(b) In any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages.
(c) If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing to determine whether punitive damages may be considered by the same trier of fact.
(d) The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount. . . .

§ 11-1-69 Hedonic damages; restrictions:

(1) In any civil action for personal injury there may be a recovery for pain and suffering and loss of enjoyment of life. However, there shall be no recovery for loss of enjoyment of life as a separate element of damages apart from pain and suffering damages, and there shall be no instruction given to the jury which separates loss of enjoyment of life from pain and suffering. The determination of the existence and extent of recovery for pain and suffering and loss of enjoyment of life shall be a question for the finder of fact, subject to appellate review, and the monetary value of the pain and suffering and loss of enjoyment of life shall not be made the subject of expert testimony.
(2) In any wrongful death action, there shall be no recovery for loss of enjoyment of life caused by death.

Standard of Review

The standard of review for jury verdicts in this state is well established. Once the jury has returned a verdict in a civil case, we are not at liberty to direct that judgment be entered contrary to that verdict short of a conclusion on our part that, given the evidence as a whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury found. ***Sivira v. Midtown Restaurants Corp.*, 753 So. 2d 492, 494 (Miss. Ct. App. 1999).**

Statute of Limitations

§ 15-1-36 Actions for medical malpractice:

(2) For any claim accruing on or after July 1, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered. . . .

CHAPTER 17

MISSISSIPPI TORT CLAIMS ACT

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CHAPTER 17

MISSISSIPPI TORT CLAIMS ACT

Legislative Intent

§ 11-46-3 Declaration of legislative intent:

(1) The Legislature of the State of Mississippi finds and determines as a matter of public policy and does hereby declare, provide, enact and reenact that the "state" and its "political subdivisions," as such terms are defined in Section 11-46-1, are not now, have never been and shall not be liable, and are, always have been and shall continue to be immune from suit at law or in equity on account of any wrongful or tortious act or omission or breach of implied term or condition of any warranty or contract, including but not limited to libel, slander or defamation, by the state or its political subdivisions, or any such act, omission or breach by any employee of the state or its political subdivisions, notwithstanding that any such act, omission or breach constitutes or may be considered as the exercise or failure to exercise any duty, obligation or function of a governmental, proprietary, discretionary or ministerial nature and notwithstanding that such act, omission or breach may or may not arise out of any activity, transaction or service for which any fee, charge, cost or other consideration was received or expected to be received in exchange therefor.

(2) The immunity of the state and its political subdivisions recognized and reenacted herein is and always has been the law in this state, before and after November 10, 1982, and before and after July 1, 1984, and is and has been in full force and effect in this state except only in the case of rights which, prior to the date of final passage hereof, have become vested by final judgment of a court of competent jurisdiction or by the express terms of any written contract or other instrument in writing.

> Through the Mississippi Tort Claims Act (MTCA), the Legislature has provided that, as a matter of public policy, the state and its political subdivisions are immune from tortious acts or omissions by its employees while they are acting within the course and scope of their employment. ***City of Laurel v. Williams*, 21 So. 3d 1170, 1174 (Miss. 2009).**

Definitions

§ 11-46-1 Definitions:

As used in this chapter, the following terms shall have the meanings ascribed unless the context otherwise requires:

(a) "Claim" means any demand to recover damages from a governmental entity as compensation for injuries.

(b) "Claimant" means any person seeking compensation under the provisions of this chapter, whether by administrative remedy or through the courts.

(c) "Board" means the Mississippi Tort Claims Board.

(d) "Department" means the Department of Finance and Administration.

(e) "Director" means the executive director of the department who is also the executive director of the board.

(f) "Employee" means any officer, employee or servant of the State of Mississippi or a political subdivision of the state, including elected or appointed officials and persons acting on behalf of the state or a political subdivision in any official capacity, temporarily or permanently, in the service of the state or a political subdivision whether with or without compensation, including firefighters who are members of a volunteer fire department that is a political subdivision. The term "employee" shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the state or a political subdivision; and

(i) For purposes of the limits of liability provided for in Section 11-46-15, the term "employee" shall include:

1. Physicians under contract to provide health services with the State Board of Health, the State Board of Mental Health or any county or municipal jail facility while rendering services under the contract;

2. Any physician, dentist or other health care practitioner employed by the University of Mississippi Medical Center (UMMC) and its departmental practice plans who is a faculty member and provides health care services only for patients at UMMC or its affiliated practice sites, including any physician or other health care

practitioner employed by UMMC under an arrangement with a public or private health-related organization;

3. Any physician, dentist or other health care practitioner employed by any university under the control of the Board of Trustees of State Institutions of Higher Learning who practices only on the campus of any university under the control of the Board of Trustees of State Institutions of Higher Learning;

4. Any physician, dentist or other health care practitioner employed by the State Veterans Affairs Board and who provides health care services for patients for the State Veterans Affairs Board;

(ii) The term "employee" shall also include Mississippi Department of Human Services licensed foster parents for the limited purposes of coverage under the Tort Claims Act as provided in Section 11-46-8; and

(iii) The term "employee" also shall include any employee or member of the governing board of a charter school but shall not include any person or entity acting in the capacity of an independent contractor to provide goods or services under a contract with a charter school.

The Tort Claims Act, with a few enumerated exceptions, explicitly excludes independent contractors from its provisions. Pursuant to Miss. Code Ann. § 11-46-1(f), the definition of employee excludes "a person or other legal entity while acting in the capacity of an independent contractor under contract to the state of a political subdivision." The employer of an independent contractor is not responsible for torts committed by the contractor. ***Owens v. Thomae*, 759 So. 2d 1117, 1122 (Miss. 1999) (citations omitted).**

(g) "Governmental entity" means the state and political subdivisions.

The [school] District constitutes a "governmental entity" and a "political subdivision" pursuant to the Mississippi Tort Claims Act (MTCA), § 11-46-1. ***Covington County Sch. Dist. v. Magee*, 29 So. 3d 1, 4 (Miss. 2010).**

(h) "Injury" means death, injury to a person, damage to or loss of property or any other injury that a person may suffer that is actionable at law or in equity.

(i) "Political subdivision" means any body politic or body corporate other than the state responsible for governmental activities only in geographic areas smaller than

that of the state, including, but not limited to, any county, municipality, school district, charter school, volunteer fire department that is a chartered nonprofit corporation providing emergency services under contract with a county or municipality, community hospital as defined in Section 41-13-10, airport authority, or other instrumentality of the state, whether or not the body or instrumentality has the authority to levy taxes or to sue or be sued in its own name.

(j) "State" means the State of Mississippi and any office, department, agency, division, bureau, commission, board, institution, hospital, college, university, airport authority or other instrumentality thereof, whether or not the body or instrumentality has the authority to levy taxes or to sue or be sued in its own name.

(k) "Law" means all species of law, including, but not limited to, any and all constitutions, statutes, case law, common law, customary law, court order, court rule, court decision, court opinion, court judgment or mandate, administrative rule or regulation, executive order, or principle or rule of equity.

Waiver of Immunity

§ 11-46-5 Waiver of immunity; course and scope of employment; presumptions:

(1) Notwithstanding the immunity granted in Section 11-46-3, or the provisions of any other law to the contrary, the immunity of the state and its political subdivisions from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment is hereby waived from and after July 1, 1993, as to the state, and from and after October 1, 1993, as to political subdivisions; provided, however, immunity of a governmental entity in any such case shall be waived only to the extent of the maximum amount of liability provided for in Section 11-46-15.

> The MTCA provides the exclusive remedy against a governmental entity or its employee for the act or omission which gave rise to the suit. The intent of the MTCA is to provide immunity from suit to the state and its political subdivisions; however, the MTCA waives immunity for claims for money damages arising out of the torts of government entities and employees while acting within the course and scope of their employment to the extent set forth in the MTCA. ***Covington County Sch. Dist. v. Magee*, 29 So. 3d 1, 4 (Miss. 2010).**

(2) For the purposes of this chapter an employee shall not be considered as acting

within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense other than traffic violations.

(3) For the purposes of this chapter and not otherwise, it shall be a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment.

(4) Nothing contained in this chapter shall be construed to waive the immunity of the state from suit in federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.

§ 11-46-7 Exclusiveness of remedy; joinder of government employee; immunity for acts or omissions occurring within course and scope of employee's duties; provision of defense for and payment of judgments or settlements of claims against employees; contribution or indemnification by employee:

(1) The remedy provided by this chapter against a governmental entity or its employee is exclusive of any other civil action or civil proceeding by reason of the same subject matter against the governmental entity or its employee or the estate of the employee for the act or omission which gave rise to the claim or suit; and any claim made or suit filed against a governmental entity or its employee to recover damages for any injury for which immunity has been waived under this chapter shall be brought only under the provisions of this chapter, notwithstanding the provisions of any other law to the contrary.

(2) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties. For the purposes of this chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense.

(3) From and after July 1, 1993, as to the state, from and after October 1, 1993, as to political subdivisions, and subject to the provisions of this chapter, every governmental entity shall be responsible for providing a defense to its employees and for the payment of any judgment in any civil action or the settlement of any claim against an employee for money damages arising out of any act or omission within the course and scope of his employment; provided, however, that to the

extent that a governmental entity has in effect a valid and current certificate of coverage issued by the board as provided in Section 11-46-17, or in the case of a political subdivision, such political subdivision has a plan or policy of insurance and/or reserves which the board has approved as providing satisfactory security for the defense and protection of the political subdivision against all claims and suits for injury for which immunity has been waived under this chapter, the governmental entity's duty to indemnify and/or defend such claim on behalf of its employee shall be secondary to the obligation of any such insurer or indemnitor, whose obligation shall be primary. The provisions of this subsection shall not be construed to alter or relieve any such indemnitor or insurer of any legal obligation to such employee or to any governmental entity vicariously liable on account of or legally responsible for damages due to the allegedly wrongful error, omissions, conduct, act or deed of such employee.

(4) The responsibility of a governmental entity to provide a defense for its employee shall apply whether the claim is brought in a court of this or any other state or in a court of the United States.

(5) A governmental entity shall not be entitled to contribution or indemnification, or reimbursement for legal fees and expenses from its employee unless a court shall find that the act or omission of the employee was outside the course and scope of his employment. Any action by a governmental entity against its employee and any action by an employee against the governmental entity for contribution, indemnification, or necessary legal fees and expenses shall be tried to the court in the same suit brought on the claim against the governmental entity or its employee.

(6) The duty to defend and to pay any judgment as provided in subsection (3) of this section shall continue after employment with the governmental entity has been terminated, if the occurrence for which liability is alleged happened within the course and scope of duty while the employee was in the employ of the governmental entity.

(7) For the purposes of this chapter and not otherwise, it shall be a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment.

(8) Nothing in this chapter shall enlarge or otherwise adversely affect the personal liability of an employee of a governmental entity. Any immunity or other bar to a civil suit under Mississippi or federal law shall remain in effect. The fact that a governmental entity may relieve an employee from all necessary legal fees and expenses and any judgment arising from the civil lawsuit shall not under any circumstances be communicated to the trier of fact in the civil lawsuit.

§ 11-46-9 Exemption of governmental entity from liability on claims based on specified circumstances:

(1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:

(a) Arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;

> The failure of the municipal court clerk to send Smith's abstract to the Department of Public Safety was an "administrative action or inaction of a legislative or judicial nature." . . .Therefore we find that Smith's claim is clearly barred by the MTCA. ***Smith v. City of Saltillo*, 44 So. 3d 438, 441 (Miss. Ct. App. 2010).**

(b) Arising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid;

> On the other hand, "an act is ministerial if the duty is one which has been positively imposed by law and its performance required at a time and in a manner or under conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion." If the District's conduct is deemed ministerial, it is then protected from liability only if ordinary care is exercised in performing or failing to perform the statutory duty or regulation. ***Covington County Sch. Dist. v. Magee*, 29 So. 3d 1, 5 (Miss. 2010) (citations omitted).**
>
> Conversely, conduct will be considered ministerial, and, therefore, immunity will not apply, if the obligation is imposed by law leaving no room for judgment. ***Pettis v. Mississippi Transp. Comm'n*, 44 So. 3d 425, 427 (Miss. Ct. App. 2010) (citations omitted).**

(c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury;

Mississippi's public-policy function test has two parts. "This Court first must ascertain whether the activity in question involved an element of choice or judgment." If so, this Court also must decide whether that choice or judgment involved social, economic, or political-policy considerations. Only when both parts of the test are met does a government defendant enjoy discretionary-function immunity. This test, of course, presupposes the court has correctly identified "the activity in question" - the allegedly tortious act giving rise to the claim. ***Wilcher v. Lincoln Cty. Bd. of Supervisors*, 243 So. 3d 177, 187 (Miss. 2018) (citations omitted).**

This Court has stated that "apparent in the language of Miss. Code Ann. § 11-46-9[(c)] is that those officers who act within the course and scope of their employment, while engaged in the performance of duties relating to police protection, without reckless disregard for the safety and well being of others, will be entitled to immunity." Indeed, this Court noted that "the purpose of Miss. Code Ann. § 11-46-9 is to 'protect law enforcement personnel from lawsuits arising out of the performance of their duties in law enforcement, with respect to the alleged victim.'" ***City of Jackson v. Brister*, 838 So. 2d 274, 278 (Miss. 2003) (citations omitted).**

Reckless Disregard

> Further, Officer . . . violated various mandates of his department's General Order 600–20 and failed to perform the requisite balancing of the gravity of the offenses the driver had committed versus the danger posed to the public by pursuing a fleeing vehicle. Most egregious was Officer['s] wanton defiance of the order of his superior to terminate pursuit and his failure to comply with the standard articulated by this Court for communicating termination to the pursued party. . . . Based on the totality of the circumstances, Officer . . . recklessly disregarded the safety of the public by pursuing [suspect]. We cannot say that the trial court's finding was unsupported by substantial evidence. Nevertheless, on rehearing, we reverse the judgment of the Circuit Court . . . and remand the case for further proceedings. . . . The City . . . raised the issue of apportionment in its Reply Brief before the Court of Appeals, but argued that the trial court failed to apportion percentages of fault for each party alleged to be at fault. We

find that the court did, in fact, apportion percentages of fault. . . . We therefore reverse and remand for an apportionment of damages, which shall take into account this contributing cause. ***City of Jackson v. Lewis*, 153 So. 3d 689, 700-01 (Miss. 2014).**

The applicable exception in this case provides that when a police officer acts within the scope of his or her employment, the city will not be held civilly liable unless the officer acted with reckless disregard of the safety and well-being of a person not engaged in criminal conduct. . . . To recover damages in such a matter, a plaintiff must "prove by a preponderance of evidence that the defendants acted in reckless disregard of his safety and that the plaintiff was not engaged in criminal activity at the time of injury." "Reckless disregard has been defined by this Court as a higher standard than gross negligence, and it embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act." "Reckless disregard usually is accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow." Reckless disregard occurs when the "conduct involved evinced not only some appreciation of the unreasonable risk involved, but also a deliberate disregard of that risk and the high probability of harm involved." In addition, "the nature of the officers' actions is judged on an objective standard with all the factors that they were confronted with." ***City of Laurel v. Williams*, 21 So. 3d 1170, 1174-75 (Miss. 2009) (citations omitted).**

To be entitled to immunity, the officer must not have acted with reckless disregard for the safety of others. Reckless disregard is more than mere negligence, but less than an intentional act. While we agree that reckless disregard would encompass gross negligence, we hold that reckless disregard is a higher standard than gross negligence by which to judge the conduct of officers. "Disregard" of the safety of others is at least negligence if not gross negligence. Because "reckless" precedes "disregard," the standard is elevated. As quoted above from Black's Law Dictionary, "reckless," according to the circumstances, "may mean desperately heedless, wanton or willful, or it

may mean only careless, inattentive or negligence." In the context of the statute, reckless must connote "wanton or willful," because immunity lies for negligence. And this Court has held that "wanton" and "reckless disregard" are just a step below specific intent. "Our case law indicates 'reckless disregard' embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act." "Reckless disregard usually is accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow." ***Mississippi Department of Public Safety v. Durn*, 861 So. 2d 990, 994-95 (Miss. 2003) (citations omitted).**

Factors which support a finding of reckless disregard in connection with police pursuits include: (1) the length of the chase; (2) type of neighborhood; (3) characteristics of the streets; (4) the presence of vehicular or pedestrian traffic; (5) weather conditions and visibility; (6) the seriousness of the offense for which the police are pursuing the suspect; (7) whether the officer proceeded with sirens and blue lights; (8) whether the officer had available alternatives which would lead to the apprehension of the suspect besides pursuit; (9) the existence of police policy which prohibits pursuit under the circumstances; and (10) the rate of speed of the officer in comparison to the posted speed limit. ***Johnson v. City of Cleveland*, 846 So. 2d 1031, 1037 (Miss. 2003) (citations omitted).**

***See Rayner v. Pennington*, 25 So. 3d 305 (Miss. 2010)** (deputy who crossed an intersection against a red stop light in responding to a disturbance call was not acting in reckless disregard).

***See City of Laurel v. Williams*, 21 So. 3d 1170 (Miss. 2009)** (police officers did not act in reckless disregard when they did not arrest a man who caused a domestic disturbance and he subsequently killed the victim).

***See Davis v. City of Clarksdale*, 18 So. 3d 246 (Miss. 2009)** (police officer's alleged failure to properly respond to a 911 call did not constitute reckless disregard conduct).

***See City of Jackson v. Lipsey*, 834 So. 2d 687 (Miss. 2003)**

(police officer responded to an emergency call without turning on his headlights, blue lights, or siren and thereby caused an automobile accident was acting in reckless disregard).

***See City of Jackson v. Perry*, 764 So. 2d 373 (Miss. 2000)** (police officer who was on his way to dinner and speeding was acting in reckless disregard when he caused an automobile accident).

***See Turner v. City of Ruleville*, 735 So. 2d 226 (Miss. 1999)** (police officer wrongfully and intentionally allowed a visibly intoxicated driver to continue driving showing a reckless or wanton or willful disregard for the safety of other drivers on the road).

(d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused;

The trial court granted the Lincoln County Board of Supervisors' and the City of Brookhaven, Mississippi's motions to dismiss Samuel Wilcher, Jr.'s personal injury suit, finding both governmental entities enjoyed discretionary-function immunity. In doing so, the judge employed this Court's recently created "*Brantley*" test. On appeal, we face head on one of the unintended but predicted consequences of *Brantley* - that the test forces parties and judges to wade through an ever-deepening quagmire of regulations and ordinances to locate "ministerial" or "discretionary" duties, over complicating the process of litigating and deciding claims involving governmental entities. Unfortunately, this methodology, though well-intentioned, has over time proved unworkable. Instead of trying to retool the *Brantley* test to somehow make it workable, we concede this short-lived idea, which was meant to be a course correction, has ultimately led this Court even farther adrift. Because the *Brantley* line of cases has not fulfilled its purpose - getting our discretionary-function analysis back on track - we abandon this failed venture. We find it best to return to our original course of applying the widely recognized public-policy function test - the original Mississippi Tort Claims Act (MTCA) test first adopted by this Court in 1999 in *Jones*. Applying the *Jones* test to this case, we hold that Wilcher's claim that County and City employees negligently left an

unfinished culvert installation overnight, without warning drivers they had removed but not yet replaced a bridge, is not barred by discretionary-function immunity. Wilcher is not trying to second-guess a policy decision through tort. He is seeking to recover for injuries caused by run-of-the-mill negligence. Because, from the face of the complaint, the County and City are not immune, we reverse the grant of their motions to dismiss. We thus remand this case to the trial court for further proceedings consistent with this opinion. ***Wilcher v. Lincoln Cty. Bd. of Supervisors*, 243 So. 3d 177, 180 (Miss. 2018).**

We admit the public-policy function test is not perfect and has been misapplied in the past. We are particularly mindful of this Court's decision in *Pratt*, which stretched the bounds of "policy" beyond credulity. [*See*] *Pratt v. Gulfport-Biloxi Reg'l Airport Auth.*, 97 So. 3d 68, 75 (Miss. 2012) (holding the placement of nonslip tape on tarmac stairs was an operational decision involving economic policy and was thus immune). And we agree with and adopt as part of our public-policy function analysis Chief Justice Waller's dissent from that case. ***Wilcher v. Lincoln Cty. Bd. of Supervisors*, 243 So. 3d 177, 188 (Miss. 2018).**

Because I would hold that the actions at issue in this case - maintaining passenger air stairs - do not enjoy discretionary-function immunity, I respectfully dissent. I agree with the plurality that the decision to operate an airport is an immune discretionary function. However, the act at issue does not encompass a policy decision or act properly the subject of governmental immunity. Pratt does not claim to have been injured by the decision to operate the Gulfport–Biloxi Regional Airport. In fact, neither party argues that the decision to operate the airport is the act at issue. Rather, it is the alleged negligent placement of anti-slip tape on the air stairs on which Pratt slipped that he claims caused his injuries. In applying the discretionary-function exception, "this Court must distinguish between real policy decisions implicating governmental functions and simple acts of negligence which injure innocent citizens." The exception "protects only governmental actions and decisions based on considerations of public policy." When reviewing whether a challenged action is afforded immunity, a court's focus is "on the nature of the actions taken and whether they are susceptible to policy analysis." As the Court of Appeals recognized, no "policy" was involved in the placing of the anti-slip tape. . . . The Court of

Appeals noted that there was an adequate supply of tape to cover the entire surface. I agree, then, with the Court of Appeals that the manner in which the maintenance personnel placed the anti-slip tape did not implicate social, economic, or political policy, but was simply "a completely random decision." . . . Rather, Pratt's claim is based on the airport's alleged failure to provide a safe means of exiting an airplane - a simple act of negligence. . . . The action complained of by Pratt does not implicate social, economic, or political policy. As such, I would hold that it does not enjoy discretionary-function immunity. For the above reasons, I respectfully dissent. ***Pratt v. Gulfport-Biloxi Reg'l Airport Auth.*, 97 So. 3d 68, 76-77 (Miss. 2012) (Waller, C.J., dissenting), *abrogated by Wilcher v. Lincoln Cty. Bd. of Supervisors*, 243 So. 3d 177, 188 (Miss. 2018).**

The method of determining whether an act is discretionary or ministerial has been clearly established. A duty is discretionary when it is not imposed by law and depends upon the judgment or choice of the government entity or its employee. A duty is ministerial if it is positively imposed by law and required to be performed at a specific time and place, removing an officer's or entity's choice or judgment. This Court has adopted a two-part public-function test to determine if "governmental conduct is discretionary so as to afford the governmental entity immunity." This Court first must ascertain whether the activity in question involved an element of choice or judgment. If so, this Court also must decide whether that choice or judgment involved social, economic, or political-policy considerations. ***Mississippi Transp. Comm'n v. Montgomery*, 80 So. 3d 789, 795 (Miss. 2012) (citations omitted).**

The United States Supreme Court has recognized that the majority of acts in the day-to-day operations of governmental activities involve the exercise of some form of discretion, however, not all of these acts are protected under the exception. In determining the scope of the acts protected under the exception, the Supreme Court held that only those functions which by nature are policy decisions, whether made at the operational or planning level, are protected. The purpose of the exception is to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. In discerning whether a function is afforded immunity under the discretionary exception, it must first be determined whether the

activity involved "an element of choice or judgment." If so, it must then be determined "whether the choice involved social, economic or political policy." In determining whether governmental conduct is discretionary so as to afford the governmental entity immunity, this Court adopts the public policy function test as set out in *United States v. Gaubert*, 499 U.S. 315, 322, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991). ***Jones v. Mississippi Dep't of Transp.*, 744 So. 2d 256, 260 (Miss. 1999) (citations omitted).**

Although not raised by the parties, we address whether immunity exists under Section 11-46-9(1)(d), which provides immunity for claims "[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused." The MTCA provides no exception to immunity for ministerial actions. A duty is ministerial if it is positively imposed by law and required to be performed at a specific time and place, removing an officer's or entity's choice or judgment. This Court held in *Little v. Mississippi Department of Transportation*, 129 So. 3d 132, 136 (Miss. 2013), that the language of Section 11-46-9(1)(d) requires us to look at the function performed not the acts that are committed in furtherance of that function to determine whether immunity exists. We further held that where a statute mandates the government or its employees to act, all acts fulfilling that duty are considered mandated as well, and neither the government nor its employees enjoys immunity. Plainly, Section 27-41-79 mandates the tax collector to act; the statute positively imposes upon the tax collector the duty to file the tax-sale list with the chancery clerk. There is no element of choice or judgment. Therefore, the duty is ministerial, and the MTCA affords no immunity. This Court holds that an action under Section 27-41-79 is not a tort action subject to the MTCA, but a separate statutory action, and that BCR stated a claim under the statute. We further find that the MTCA does not afford the City . . . immunity from suit on BCR's negligence claim. We reverse the grant of the motions to dismiss and remand the case for further proceedings. ***Booneville Collision Repair, Inc. v. City of Booneville*, 152 So. 3d 265, 276 (Miss. 2014) (citations omitted).**

Previously, we have said that, while a certain act may be mandated by statute, how that act is performed can be a matter of discretion. It is the function of a governmental entity not the acts performed in order to achieve that function to which immunity does or does not

ascribe under the MTCA. Today we make it clear that, pursuant to *Montgomery*, the line of cases holding otherwise is overruled. We hold that, where a statute mandates the government or its employees to act, all acts fulfilling that duty are considered mandated as well, and neither the government nor its employees enjoys immunity. Because Section 65-1-65 requires the Department to maintain and repair state highways, that duty and all acts in furtherance of that duty are ministerial unless, as in *Montgomery*, another statute makes a particular act discretionary. Today, we overrule the line of cases holding otherwise. The Department is not entitled to discretionary-function immunity for failure to properly maintain and repair highways because that function is ministerial. Therefore, the circuit court erred in granting the Department's motion to dismiss on that basis, and we reverse and remand for further proceedings consistent with this opinion. ***Little v. Mississippi Dep't of Transp.*, 129 So. 3d 132, 137-38 (Miss. 2013) (citations omitted).**

A duty is discretionary if it requires the official to use her own judgment and discretion in the performance thereof. ***Covington County Sch. Dist. v. Magee*, 29 So. 3d 1, 5 (Miss. 2010).**

To determine whether an act or a failure to act is a discretionary function, we use the following two-part test: (1) whether the activity involved an element of choice or judgment, and if so; (2) whether the choice or judgment in supervision involves social, economic or political policy alternatives. ***Pettis v. Mississippi Transp. Comm'n*, 44 So. 3d 425, 427 (Miss. Ct. App. 2010) (citations omitted).**

The supreme court further held that the ordinary-care standard does not apply to section 11-46-9(1)(d). ***Pettis v. Mississippi Transp. Comm'n*, 44 So. 3d 425, 427 (Miss. Ct. App. 2010) (citations omitted).**

(e) Arising out of an injury caused by adopting or failing to adopt a statute, ordinance or regulation;

(f) Which is limited or barred by the provisions of any other law;

(g) Arising out of the exercise of discretion in determining whether or not to seek or provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and,

in general, the provision of adequate governmental services;

(h) Arising out of the issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any privilege, ticket, pass, permit, license, certificate, approval, order or similar authorization where the governmental entity or its employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked unless such issuance, denial, suspension or revocation, or failure or refusal thereof, is of a malicious or arbitrary and capricious nature;

(i) Arising out of the assessment or collection of any tax or fee;

(j) Arising out of the detention of any goods or merchandise by any law enforcement officer, unless such detention is of a malicious or arbitrary and capricious nature;

(k) Arising out of the imposition or establishment of a quarantine, whether such quarantine relates to persons or property;

(l) Of any claimant who is an employee of a governmental entity and whose injury is covered by the Workers' Compensation Law of this state by benefits furnished by the governmental entity by which he is employed;

(m) Of any claimant who at the time the claim arises is an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution, regardless of whether such claimant is or is not an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution when the claim is filed;

(n) Arising out of any work performed by a person convicted of a crime when the work is performed pursuant to any sentence or order of any court or pursuant to laws of the State of Mississippi authorizing or requiring such work;

(o) Under circumstances where liability has been or is hereafter assumed by the United States, to the extent of such assumption of liability, including, but not limited to, any claim based on activities of the Mississippi National Guard when such claim is cognizable under the National Guard Tort Claims Act of the United States, 32 USCS 715 (32 USCS 715), or when such claim accrues as a result of active federal service or state service at the call of the Governor for quelling riots and civil disturbances;

(p) Arising out of a plan or design for construction or improvements to public property, including, but not limited to, public buildings, highways, roads, streets, bridges, levees, dikes, dams, impoundments, drainage channels, diversion channels, harbors, ports, wharfs or docks, where such plan or design has been approved in advance of the construction or improvement by the legislative body or governing authority of a governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval, and where such plan or design is in conformity with engineering or design standards in effect at the time of preparation of the plan or design;

(q) Arising out of an injury caused solely by the effect of weather conditions on the use of streets and highways;

(r) Arising out of the lack of adequate personnel or facilities at a state hospital or state corrections facility if reasonable use of available appropriations has been made to provide such personnel or facilities;

(s) Arising out of loss, damage or destruction of property of a patient or inmate of a state institution;

(t) Arising out of any loss of benefits or compensation due under a program of public assistance or public welfare;

(u) Arising out of or resulting from riots, unlawful assemblies, unlawful public demonstrations, mob violence or civil disturbances;

(v) Arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that a governmental entity shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care;

> Here, the allegedly tortious act was the construction crew's alleged failure to barricade or warn against the significant drop-off in the road - a condition it created. This alleged failure was not the result of noncompliance with Section 63-3-305. And applying the public-policy function test, it certainly was not the result of a policy decision. Rather, if indeed there was such a failure, it was the result of straight-up negligence. . . . Because

discretionary-function immunity "protects only governmental actions and decisions based on considerations of public policy," when "applying the discretionary-function exception, this Court must distinguish between real policy decisions implicating governmental functions and simple acts of negligence which injure innocent citizens." Thus, "[w]hen reviewing whether a challenged action is afforded immunity, a court's focus is on the nature of the actions taken and whether they are susceptible to policy analysis." Wilcher has alleged a "simple act of negligence," and not a real policy decision, caused his injury. Therefore, the County and City cannot take refuge in discretionary-function immunity. ***Wilcher v. Lincoln Cty. Bd. of Supervisors*, 243 So. 3d 177, 188 (Miss. 2018).**

Accordingly, we find that the trial court erred in denying the Commission's motion for summary judgment without first considering whether the Commission's duty to warn of the pothole was a discretionary duty under the public-function test. If the nature of the Commission's duty to warn of this pothole indeed involves choice or judgment and is grounded in policy considerations, then the Commission is immune under Section 11-46-9(1)(d). The trial court's order reveals that it denied the Commission's motion for summary judgment because issues of fact existed as to whether the Commission had notice of the pothole. We find the trial court erred by failing first to consider whether the failure to warn was a discretionary function under the public-function test. Accordingly, we reverse the trial court's denial of summary judgment and remand this case to the Circuit Court . . . for proceedings consistent with this opinion. Specifically, we remand for a determination of whether the Commission's duty to warn was discretionary under Section 11-46-9(1)(d). If the trial court determines that the duty to warn of a dangerous pothole on a highway is not discretionary under the public-function test, then the trial court may consider the extent to which genuine issues of material fact exist under Section 11-46-9(1)(v). ***Mississippi Transp. Comm'n v. Montgomery*, 80 So. 3d 789, 800 (Miss. 2012) (citations omitted).**

(w) Arising out of the absence, condition, malfunction or removal by third parties of any sign, signal, warning device, illumination device, guardrail or median barrier, unless the absence, condition, malfunction or removal is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice;

> The MTCA also grants immunity to governmental employees for failure to warn, unless the absence [of a] warning device is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. This provision is additionally limited by the fact that the MTCA grants immunity where a governmental entity fails to warn of a dangerous condition which is obvious to one exercising due care. In other words, a governmental agency can suffer no liability for dangers that are open and obvious to a person exercising due care. ***Willingham v. Mississippi Transp. Comm'n*, 944 So. 2d 949, 952 (Miss. Ct. App. 2006) (citations omitted).**

(x) Arising out of the administration of corporal punishment or the taking of any action to maintain control and discipline of students, as defined in Section 37-11-57, by a teacher, assistant teacher, principal or assistant principal of a public school district in the state unless the teacher, assistant teacher, principal or assistant principal acted in bad faith or with malicious purpose or in a manner exhibiting a wanton and willful disregard of human rights or safety; or

(y) Arising out of the construction, maintenance or operation of any highway, bridge or roadway project entered into by the Mississippi Transportation Commission or other governmental entity and a company under the provisions of provisions of Section 65-43-1 or 65-43-3, where the act or omission occurs during the term of any such contract.

(2) A governmental entity shall also not be liable for any claim where the governmental entity:

(a) Is inactive and dormant;
(b) Receives no revenue;
(c) Has no employees; and
(d) Owns no property.

(3) If a governmental entity exempt from liability by subsection (2) becomes active, receives income, hires employees or acquires any property, such governmental entity shall no longer be exempt from liability as provided in subsection (2) and shall be subject to the provisions of this chapter.

Notice of Claim

§ 11-46-11 Statute of limitations; notice of claim requirements; savings clause in favor of infants and those of unsound mind:

(1) After all procedures within a governmental entity have been exhausted, any person having a claim under this chapter shall proceed as he might in any action at law or in equity, except that at least ninety (90) days before instituting suit, the person must file a notice of claim with the chief executive officer of the governmental entity.

> Pursuant to Mississippi Code Section 11-46-11(1), a potential plaintiff must provide the governmental entity ninety days' written notice before filing suit. ***Saul v. South Central Regional Medical Center, Inc.*, 25 So. 3d 1037, 1041 (Miss. 2010) (prior version of § 11-46-11).**

(2) (a) Service of notice of claim shall be made as follows:

(i) For local governments:

1. If the governmental entity is a county, then upon the chancery clerk of the county sued;
2. If the governmental entity is a municipality, then upon the city clerk.

(ii) If the governmental entity to be sued is a state entity as defined in Section 11-46-1(j), or is a political subdivision other than a county or municipality, service of notice of claim shall be had only upon that entity's or political subdivision's chief executive officer. The chief executive officer of a governmental entity participating in a plan administered by the board pursuant to Section 11-46-7(3) shall notify the board of any claims filed within five (5) days after receipt thereof.

(b) Every notice of claim shall:

(i) Be in writing;

(ii) Be delivered in person or by registered or certified United States mail; and

(iii) Contain a short and plain statement of the facts upon which the claim is based, including the circumstances which brought about the injury, the extent of the injury, the time and place the injury occurred, the names of

all persons known to be involved, the amount of money damages sought, and the residence of the person making the claim at the time of the injury and at the time of filing the notice.

> ***See University of Mississippi Med. Ctr. v. Robinson*, 876 So. 2d 337 (Miss. 2004).**
>
> In *Thornburg*, the Mississippi Supreme Court addressed circumstances in which a plaintiff proceeding under the MTCA sent the statutory notice-of-claim letter by first-class mail instead of by personal delivery or registered or certified mail. The supreme court held that "failure to comply with this provision should not, as a matter of law, serve as a basis for dismissing a lawsuit." The supreme court went on to hold that "in cases in which notice is sent by first[-]class mail, a governmental entity must demonstrate actual prejudice resulting from the failure to comply with the 'registered or certified mail' requirement in order to be entitled to a dismissal on this basis." Finally, the supreme court instructed that "there is no valid reason why the sending of the notice by first[-]class mail should result in a dismissal in cases in which the governmental entity has (1) received the notice and (2) suffered no actual prejudice as a result of the plaintiff's failure to comply with [§] 11-46-11(2)." Consequently, the supreme court reversed the circuit court's decision to dismiss the complaint and remanded the case for further proceedings. The question is whether a MTCA plaintiff substantially complies with section 11-46-11(2) by faxing a notice-of-claim letter. The Guthries' attorney noted that he had received a confirmation fax indicating that the faxed notice of claim had been successfully transmitted and that the District had received it. The District has never claimed that it did not receive the faxed notice of claim on February 23, 2010. In *McNair v. University of Mississippi Medical Center*, the supreme court held that a plaintiff substantially satisfied the notice requirements of 11-46-11(2) despite the fact that the plaintiff had sent the notice-of-claim letter "to the wrong person and . . . via an improper route." Similarly, the Guthries sent their notice-of-claim letter via an improper route, albeit a different improper route than in *Thornburg* and *McNair*. There is no dispute that the District received the faxed notice-of-claim letter on February 23, 2010. The supreme court has clearly held that substantial compliance with section 11-46-11(2) is sufficient to toll the one-year statute of limitations that applies to MTCA cases. We find that the Guthries substantially complied with section 11-46-11(2). The District did

not argue that it had not received the Guthries' faxed notice-of-claim letter on February 23, 2009. Likewise, the District did not argue that it was prejudiced by the manner in which the Guthries delivered their notice-of-claim letter. Accordingly, we find the circuit court erred when it held that the Guthries' notice of claim was insufficient because they were obligated to strictly comply with section 11-46-11(2). We, therefore, reverse the judgment of the circuit court and remand this matter for further proceedings. ***Guthrie v. Jones County Sch. Dist.*, 102 So. 3d 1224, 1226-27 (Miss. Ct. App. 2012) (citations omitted).**

Subsection (2) of Section 11-46-11 provides the "seven required categories of information which must be included" in the notice of claim. . . . According to SCRMC, even if Saul's action is not barred by the statute of limitations, the case should be dismissed because the notice-of-claim letter was insufficient. Although the written notice identified Saul as one of Cook's surviving children, it did not give her address. Instead, the notice-of-claim letter gave the address of Dale Cook, because Dale sent the notice. Thus, SCRMC asserts that notice was insufficient because it did not identify Saul's residence. We disagree. The written notice-of-claim letter sent by Dale Cook contained a statement of the facts upon which the claim was based, including the circumstances which brought about Raymond Cook's injuries, and the time, place, and extent of those injuries, including his alleged wrongful death. The notice also included the names of all persons known to be involved, including Saul, Dale Cook, Dewayne Cook, the doctor who performed the surgery, and the allegedly negligent hospital and nursing staff. The letter also specified the amount of money damages sought by Saul and the Cooks. Finally, the letter gave the residence address of Dale Cook, one of the persons making the claim and the person who sent the notice. Therefore, we find that the notice-of-claim letter complied fully with the requirements of Section 11-46-11(2). ***Saul v. South Central Regional Medical Center, Inc.*, 25 So. 3d 1037, 1041 (Miss. 2010) (prior version of § 11-46-11).**

Lee argues the trial judge applied strict compliance to the notice of claim. The trial judge explicitly stated that Lee's notice of claim failed to provide information for all seven categories required by Section 11-11-46(2). The trial court applied *South Central Regional Medical Center v. Guffy*, 930 So. 2d 1252 (Miss. 2006), and found the notice amounted to noncompliance with Section 11-46-11(2). After reviewing the notice of claim, this Court finds

that Lee substantially complied with the notice requirements of Section 11-46-11(2). First, Lee listed the circumstances which brought about the injury. . . . Lee also provided the extent of her injuries when she noted "multiple sternum fractures, devitalized cartilage and the Robicsek wire reinforcement had pulled completely pulled through the left sternum." In light of her res ipsa loquitur claim, Lee provided sufficient dates of her injury when she informed MHG she had been hospitalized from July 25, 2005, to August 23, 2005, and her injuries were discovered on August 8, 2005. Accordingly, she substantially complied with the statute's requirement that she list "all persons known to be involved" by stating multiple MHG employees caused her injuries. This is a res ipsa loquitur claim, and Lee set forth in her complaint that she was unconscious a majority of her time at MHG and was unable to verify who cared for her or when the injury occurred. If the identity of these persons is not known, obviously Lee was not required to provide their names. Furthermore, Lee clearly provided the place of her injury: Memorial Hospital at Gulfport. Lee also stated her medical special damages exceeded $100,000, which we find substantially complies with the statutory requirement concerning notice of money damages sought. Last, the notice of claim contained the letterhead of Lee's attorney, Lee's name, and Lee's date of birth. While Lee did not provide her residence at the time of the injury or at the time of the notice, we find the information provided to be in substantial compliance with the statutory requirements. While there may be some cases in which the claimant's residence is a critical issue, clearly it was not in this case. The address of Lee's counsel was provided, and Lee's date-of-birth and dates of hospitalization were provided for identification purposes. Clearly, MHG was able to identify Lee as a patient and investigate and conduct a "review of the matter" as evidenced by its letter of denial. Our holding today should not be interpreted as holding that the required elements do not need to be explicitly stated in the notice of claim. However, we continue to apply a substantial compliance standard to the notice requirements under Section 11-46-11(2). ***"What constitutes substantial compliance, while not a question of fact but one of law, is a fact-sensitive determination."*** Based on the facts and circumstances of this case, we find the information provided in Lee's letter substantially complied with the statutory requirements of Section 11-46-11(2). . . . ***Lee v. Memorial Hosp. at Gulfport*, 999 So. 2d 1263, 1266-67 (Miss. 2008) (citations omitted) (emphasis added).**

(3) (a) All actions brought under this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after, except that filing a notice of claim within the required one-year period will toll the statute of limitations for ninety-five (95) days from the date the chief executive officer of the state entity or the chief executive officer or other statutorily designated official of a political subdivision receives the notice of claim.
(b) No action whatsoever may be maintained by the claimant until the claimant receives a notice of denial of claim or the tolling period expires, whichever comes first, after which the claimant has an additional ninety (90) days to file suit; failure to file within the time allowed is an absolute bar to any further proceedings under this chapter.

(c) All notices of denial of claim shall be served by governmental entities upon claimants by certified mail, return receipt requested, only.

(d) (i) To determine the running of limitations periods under this chapter, service of any notice of claim or notice of denial of claim is effective upon delivery by the methods statutorily designated in this chapter.
(ii)The limitations period provided in this section controls and shall be exclusive in all actions subject to and brought under the provisions of this chapter, notwithstanding the nature of the claim, the label or other characterization the claimant may use to describe it, or the provisions of any other statute of limitations that would otherwise govern the type of claim or legal theory if it were not subject to or brought under the provisions of this chapter.

Discovery Rule - Wrongful Death Actions - Medical Malpractice

> Our decision in *Caves* reaffirmed the application of the discovery rule in wrongful-death actions predicated on allegations of medical malpractice and brought under the MTCA. We followed the "judicially created" discovery rule we originally had incorporated into the MTCA in *Barnes v. Singing River Hospital*, 733 So. 2d 199 (Miss. 1999), finding that "justice is best served by applying a discovery standard to such cases." Thus, we held in *Caves* that "the limitations period for MTCA claims does not begin to run until all the elements of a tort exist," and we concluded that "the operative question is whether statutory notice was provided within a year next following the earliest date the decedent (or his personal representative), by exercise of reasonable diligence, should have known of the injury and the acts or omission which caused them." We further held in *Caves* that "the finder of fact must decide when

those requirements are satisfied." *Caves* also "explained" that the wrongful-death statute allows an action which includes not only the beneficiaries' "wrongful-death" claims, such as loss of consortium, society, and companionship, but also the decedent's own pre-death "survival-type" claims, such as claims for his or her personal injury, property damage, and medical expenses. "The statute of limitations for 'wrongful-death' claims, however, can not begin to run until, at the earliest, the date of death, and the date the wrongful-death claimant's damages accrued." ***Saul v. South Central Regional Medical Center, Inc.*, 25 So. 3d 1037, 1039-40 (Miss. 2010) (citations omitted) (prior version of § 11-46-11) (explaining *Caves v. Yarbrough*, 991 So. 2d 142 (Miss. 2008)).**

The MTCA includes within its provisions and language no discovery rule which tolls or delays the beginning of the running of the statute of limitations until the claimant discovers the injury or the claim. Because it is this Court's duty to apply the law as written, not as we think it should have been written, we concluded in our original opinion in this case that the absence of any discovery rule within the provisions of the MTCA was binding on this Court. On rehearing, both Mrs. Caves and amici forcefully argue that, even though the MTCA has no discovery provision, previous decisions of this Court have held otherwise, and the doctrine of stare decisis requires us to follow those prior decisions, whether or not this Court now agrees with them. . . . Pursuant to the doctrine of stare decisis, we therefore shall continue to recognize a discovery rule with respect to Section 11-46-11(3). Having held that a discovery rule applies to claims under the MTCA, we must now proceed to discuss its effect on the case before us today. . . . Thus, we hold today that the limitations period for MTCA claims does not begin to run until all the elements of a tort exist, and the claimant knows or, in the exercise of reasonable diligence, should know of both the injury and the act or omission which caused it. . . . We hold today that the MTCA's one-year statute of limitations begins to run when the claimant knows, or by exercise of reasonable diligence should know, of both the damage or injury, and the act or omission which proximately caused it. We further hold that the finder of fact (in this case, the trial judge) must decide when those requirements are satisfied. ***Caves v. Yarbrough*, 991 So. 2d 142, 150-55 (Miss. 2008) (citations omitted) (prior version of § 11-46-11).**

(4) From and after April 1, 1993, if any person entitled to bring any action under this chapter shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the action within the time allowed in this section after his disability shall be removed as provided by law. The savings in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

Unconstitutionality of this Subsection

At the outset, we recount the relevant amendments to the MTCA. The MTCA was enacted in 1993 to create a limited waiver of sovereign immunity of the state and its political subdivisions. As first enacted, the MTCA provided a strict one-year statute of limitations. In *Marcum*, this Court considered whether the general savings clause applies to the MTCA and held "that § 11-46-11's one (1) year statute of limitations is not tolled by the general minor savings clause." "The MTCA clearly mandates that a one (1) year statute of limitations be applied to any actions brought under the Act. . . ." In April of 2000, subsection (4) was added to § 11-46-11. Subsection (4) provided:

> From and after May 15, 2000, if any person entitled to bring any action under this chapter shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the action within the time allowed in this section after his disability shall be removed as provided by law. The savings in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

The practical result of this amendment is that as of May 15, 2000, any injured party under disability of infancy or unsoundness of mind whose remedy is not yet barred by the statute of limitations may avail themselves of the savings clause. Because it was prospective in nature, this amendment created no constitutional issues. Indeed, this amendment only enhanced or extended the rights of actions still existing. It did not include any retroactive language nor did the language indicate that the Legislature sought to revive any barred claims. In 2002, the Legislature again amended § 11-46-11 by changing the effective date of subsection (4). This final version, and that which is presently before the Court, provides:

> (4) From and after April 1, 1993, if any person entitled to bring any action under this chapter shall, at the time at which the cause of action accrued, be under the disability of

> infancy or unsoundness of mind, he may bring the action within the time allowed in this section after his disability shall be removed as provided by law. The savings in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.
>
> It is this second amendment which today we find unconstitutional under Miss. Const. § 97. . . . Article 4, § 97 of the Mississippi Constitution provides: "The legislature shall have no power to revive any remedy which may have become barred by lapse of time, or by any statute of limitations of this state." The principle espoused in § 97 of the 1890 constitution is firmly grounded under Mississippi law. . . . The March 2002 amendment to § 11-46-11(4) is unconstitutional to the extent that it makes the savings clause applicable to all claims since April 1, 1993. However, the savings clause as first enacted in April of 2000 is valid and enforceable. Those claims in existence on May 15, 2000, are subject to the savings clause. The Legislature is invited to amend § 11-46-11 in accordance with this opinion. Until such is done, the application of the savings clause will differ from that which is provided in the code. ***University of Mississippi Medical Center v. Robinson*, 876 So. 2d 337, 339-41 (Miss. 2004) (citations omitted).**

Jurisdiction and Venue

§ 11-46-13 Jurisdiction; appeals; venue:

(1) Jurisdiction for any suit filed under the provisions of this chapter shall be in the court having original or concurrent jurisdiction over a cause of action upon which the claim is based. The judge of the appropriate court shall hear and determine, without a jury, any suit filed under the provisions of this chapter. Appeals may be taken in the manner provided by law.

(2) The venue for any suit filed under the provisions of this chapter against the state or its employees shall be in the county in which the act, omission or event on which the liability phase of the action is based, occurred or took place. The venue for all other suits filed under the provisions of this chapter shall be in the county or judicial district thereof in which the principal offices of the governing body of the political subdivision are located. The venue specified in this subsection shall control in all actions filed against governmental entities, notwithstanding that other defendants which are not governmental entities may be joined in the suit, and notwithstanding the provisions of any other venue statute that otherwise would apply.

Limitations of Liability

§ 11-46-15 Limitation of liability; exemplary or punitive damages; interest; attorney's fees; reduction of award:

(1) In any claim or suit for damages against a governmental entity or its employee brought under the provisions of this chapter, the liability shall not exceed the following for all claims arising out of a single occurrence for all damages permitted under this chapter:

(a) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1993, but before July 1, 1997, the sum of Fifty Thousand Dollars ($50,000.00);
(b) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1997, but before July 1, 2001, the sum of Two Hundred Fifty Thousand Dollars ($250,000.00);
(c) For claims or causes of action arising from acts or omissions occurring on or after July 1, 2001, the sum of Five Hundred Thousand Dollars ($500,000.00).

(2) No judgment against a governmental entity or its employee for any act or omission for which immunity is waived under this chapter shall include an award for exemplary or punitive damages or for interest prior to judgment, or an award of attorney's fees unless attorney's fees are specifically authorized by law.

(3) Except as otherwise provided in Section 11-46-17(4), in any suit brought under the provisions of this chapter, if the verdict which is returned, when added to costs and any attorney's fees authorized by law, would exceed the maximum dollar amount of liability provided in subsection (1) of this section, the court shall reduce the verdict accordingly and enter judgment in an amount not to exceed the maximum dollar amount of liability provided in subsection (1) of this section.

Standard of Review

The standard of review of a judgment entered following a bench trial is well-settled. The trial court is entitled to the same deference accorded to a chancellor, that is, we will uphold the trial court's findings of fact, so long as they are supported by "substantial, credible, and reasonable evidence." However, we review conclusions of law, including the proper application of the MTCA, de novo. ***City of Jackson v. Presley*, 40 So. 3d 520, 522 (Miss. 2010).**

CHAPTER 18

EMINENT DOMAIN

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CHAPTER 18

EMINENT DOMAIN

Mississippi Constitution, Article III, § 17, Taking property for public use; due compensation, provides:

> Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

> > The right of eminent domain is an inherent and essential element of sovereignty. . . . ***Morley v. Jackson Redevelopment Auth.*, 874 So. 2d 973, 976 (Miss. 2004).**

> > Now, it is true, that when the State grants property to individuals, she retains what is termed the right of eminent domain, which is the ultimate right of a sovereign power to resume the grant for public purposes, on payment of just compensation. ***Homochitto River Comm'rs v. Withers*, 29 Miss. 21, 26 (Miss. Err. & App. 1855), *aff'd sub nom. Withers v. Buckley*, 61 U.S. 84, 15 L. Ed. 816 (1857).**

Special Court of Eminent Domain

§ 11-27-3 Creation of court:

A special court of eminent domain is hereby created, to consist of a judge, jury, and such other officers and personnel as hereinafter set out, and it shall have and exercise the jurisdiction and powers hereinafter enumerated. The original powers and jurisdiction shall be and is hereby fixed in the county court in each county that has elected to come under the provisions of Section 9-9-1 Mississippi Code of 1972, or that may hereafter come under the provisions of said Section 9-9-1, and in every other county of this state, the original powers and jurisdiction shall be and is hereby fixed in the circuit court of such county, which said powers and jurisdiction may be exercised in full either in termtime or vacation, or both.

§ 11-27-1 Persons having right:

Any person or corporation having the right to condemn private property for public use shall exercise that right as provided in this chapter, except as elsewhere specifically provided under the laws of the state of Mississippi.

Pursuant to Miss. Code Ann. § 65-1-47, the MTC's eminent domain power is limited to the land "necessary" for the state highway system. Public necessity is determined by a duly authorized governing body in its exercise of legislative power at the time the need is recognized. This legislative determination is for the condemning authority. Selection of the particular land to condemn as well as the amount of land necessary are legislative questions to be determined by the condemnor. The condemnor's determination of public necessity will be disturbed only when fraud or abuse of discretion is proven by the landowner. So long as the condemnor exercised its authority in a reasonable manner in adopting the plan to condemn, there will be no finding of abuse of discretion. ***St. Andrew's Episcopal Day Sch. v. Mississippi Transp. Comm'n*, 806 So. 2d 1105, 1111 (Miss. 2002) (citations omitted).**

An application for special court of eminent domain was filed on March 9, 1987, by the Governor's Office of General Services in the circuit court of Sunflower County in order to institute condemnation proceedings against the . . . property. . . . The application recites that the plaintiff is an agency of the State . . . and that pursuant to the provisions of Section 31-11-25 it is granted the authority to exercise the power of eminent domain. The application states the property is contiguous to realty owned by the State, is for the use and benefit of the Department of Corrections, and necessary for the development and security of the penitentiary. It also states the defendant is James Carter, and that the applicant has been unable to reach an agreement with him for the purchase of the property. Carter's answer affirmatively pleaded that the petitioner had no right of eminent domain because Miss. Code Ann. § 31-11-25 had not been complied with. Carter also filed a motion to dismiss July 25 on the ground the plaintiff was not a legal entity, that there was no public necessity for taking his property, and the use sought was not public. . . . Whether the circuit judge or this Court agreed, however, is not the test. Whether the State needs all this land for its penitentiary is not for any Court to decide, but a legislative question left for determination by the condemning authority, in this case the Office of General Services and the Public Procurement Review Board. It is only where there has been fraud or clear abuse of discretion shown that a court can interfere, and the burden is upon the landowner to prove one or the other. The circuit judge found neither fraud nor clear abuse of discretion. . . . There would have to be a far greater showing of absence of necessity for the property to be condemned than was shown in this case to justify judicial interference. The circuit judge erred in reducing the acreage sought to be condemned, and we must reverse. ***Governor's Office of Gen. Servs. v. Carter*, 573 So. 2d 736, 738-39 (Miss. 1990) (citations omitted).**

Complaint & Pleadings

§ 11-27-5 Complaint to condemn:

Any person or corporation having the right to condemn private property for public use shall file a complaint to condemn with the circuit clerk of the county in which the affected property, or some part thereof, is situated and shall make all the owners of the affected property involved, and any mortgagee, trustee or other person having any interest therein or lien thereon a defendant thereto. The complaint shall be considered a matter of public interest and shall be a preference case over other cases except other preference causes. The complaint shall describe in detail the property sought to be condemned, shall state with certainty the right to condemn, and shall identify the interest or claim of each defendant.

> As the proceedings have reached judicial proportions, there are certain elemental principles involved. Among them being, as said by this Court in *Wise v. Yazoo City*, 96 Miss. 507, 51 So. 453 (1910):
>
> > No power conferred on any corporation, either private or municipal, is to be more strictly construed than the power to exercise the right of eminent domain. The power of eminent domain being in derogation of the common right, acts conferring it are to be strictly construed, and are not to be extended beyond their plain provisions. The right to exercise the power is strictly limited to the purposes specified in the statute conferring it. The proposed use of the lands of the owner must be clearly embraced within the legitimate object of the power conferred. Where there is any doubt in regard to the extent of the power, the landowner must have the benefit of that doubt. This Court recently has held that it is a general rule of statutory construction that where there is doubt of the right to exercise the power of eminent domain, the statutes will be strictly construed most favorably to the land owner.
>
> ***Mississippi Power & Light Co. v. Conerly*, 460 So. 2d 107, 111 (Miss. 1984).**

§ 11-27-31 Property in multiple counties:

In case the property sought to be condemned be in more than one (1) county, proceedings may be instituted in either of the counties in which a part of said property is situated.

§ 11-27-7 Commencement, hearing and pleadings:

The complaint shall be filed with the circuit clerk and shall be assigned a number

and placed on the docket as other pleadings in circuit court or county court. The plaintiff shall also file a lis pendens notice in the office of the chancery clerk immediately after filing the complaint. The circuit clerk, or the plaintiff by his attorney, shall forthwith present such complaint to the circuit judge or county judge, as the case may be, who shall by written order directed to the circuit clerk fix the time and place for the hearing of the matter, in termtime or vacation, and the time of hearing shall be fixed on a date to allow sufficient time for each defendant named to be served with process as is otherwise provided by the Mississippi Rules of Civil Procedure, for not less than thirty (30) days prior to the hearing. If a defendant, or other party in interest, shall not be served for the specified time prior to the date fixed, the hearing shall be continued to a day certain to allow the thirty-day period specified. Not less than twenty (20) days prior to the date fixed for such hearing, the plaintiff shall file with the circuit clerk and serve upon the defendants, or their respective attorneys, a statement showing:

> (1) the fair market value of the property to be condemned, determined as of the date of the filing of the complaint;
> (2) the damages, if any, to the remainder if less than the whole is taken, giving a total compensation and damages to be due as determined by the plaintiff.

Not less than ten (10) days prior to the date fixed for such hearing, each of the defendants shall file with the circuit clerk and serve upon the plaintiff, or his attorney, a statement showing:

> (1) the fair market value of the property to be condemned, determined as of the date of the filing of the complaint;
> (2) the damages, if any, to the remainder if less than the whole is taken, giving a total compensation and damages to be due as determined by the defendants.

In each such instance, both the plaintiff and the defendant shall set out in such statement the asserted highest and best use of the property and shall itemize the elements of damage, if any, to the remainder if less than the whole is taken. The statements required by this section shall constitute the pleadings of the parties with respect to the issue of value, and shall be treated as pleadings are treated in civil actions in the circuit court. The judge, for good cause shown, may increase or decrease the time for pleading by the plaintiff or by the defendant.

§ 11-27-15 Motion to dismiss:

Any defendant may, not less than five (5) days prior to the date fixed for the hearing of the complaint and in the same court where the complaint is pending,

serve and file a motion to dismiss under the Mississippi Rules of Civil Procedure for failure to state a claim upon which relief can be granted on any of the following grounds:

> (1) that the plaintiff seeking to exercise the right of eminent domain is not, in character, such a corporation, association, district or other legal entity as is entitled to the right;
> (2) that there is no public necessity for the taking of the particular property or a part thereof which it is proposed to condemn; or
> (3) that the contemplated use alleged to be a public use is not in law a public use for which private property may be taken or damaged.

Any such motion, if served and filed, shall be heard and decided by the judge as a preference proceeding, without a jury, prior to the hearing on the complaint. Any party may appeal directly to the Supreme Court from an order overruling or granting any such motion to dismiss, as in other cases, but if the order be to overrule the motion, the appeal therefrom shall not operate as a supersedeas and the court of eminent domain may nevertheless proceed with the trial on the complaint. Any appeal from an order overruling or granting a motion to dismiss shall be a preference action in the Supreme Court and advanced on the docket as appropriate.

> There are three bases for dismissal of an eminent domain action:
> > (1) plaintiff is not a legal entity entitled to the right of eminent domain;
> > (2) there is no public necessity for the taking of the particular property; and
> > (3) the contemplated use for the property is not a public use.
>
> Pursuant to Miss. Code Ann. § 65-1-47, the MTC's eminent domain power is limited to the land "necessary" for the state highway system. Public necessity is determined by a duly authorized governing body in its exercise of legislative power at the time the need is recognized. This legislative determination is for the condemning authority. Selection of the particular land to condemn as well as the amount of land necessary are legislative questions to be determined by the condemnor. The condemnor's determination of public necessity will be disturbed only when fraud or abuse of discretion is proven by the landowner. So long as the condemnor exercised its authority in a reasonable manner in adopting the plan to condemn, there will be no finding of abuse of discretion. ***St. Andrew's Episcopal Day Sch. v. Mississippi Transp. Comm'n*, 806 So. 2d 1105, 1110-11 (Miss. 2002) (citations omitted).**

§ 11-27-11 Operation:

The circuit clerk shall deliver a copy of said order of the court fixing the time and place for the hearing to the sheriff of the county and to the official court reporter. The sheriff shall attend the court and execute all process. The court reporter shall take the testimony. The circuit clerk, in the presence of the sheriff and chancery clerk, shall draw from the jury box of the court the names of twenty-four (24) jurors, or such numbers of jurors as shall be ordered by the court, who shall serve in said court, and shall issue a venire facias to the sheriff, commanding him to summon the jurors so drawn to appear at the time and place designated by the order of the court. All acts and actions of the clerk and sheriff, including the return endorsed on each summons issued, shall be filed by the clerk and made a part of the record in the cause.

§ 11-27-39 Entry for examinations and surveys:

Railroads, street or interurban railroads, mining, lighting, power, telephone, and telegraph corporations, and all other corporations, companies, persons and associations of persons, having rights and powers to condemn property may cause to be made such examinations and surveys for their proposed railroads, lines and stations, as may be necessary to the selection of the most advantageous routes and sites, and for such purpose may, by their officers, agents and servants, enter upon the lands and waters of any person, but subject to liability for all damages done thereto.

Trial

§ 11-27-19 Conduct of trial; interest:

Evidence may be introduced by either party, and the jury may, in the sound discretion of the judge, go to the premises, under the charge of the court as to conduct, conversation and actions as may be proper in the premises. Evidence of fair market value shall be established as of the date of the filing of the complaint. Any judgment finally entered in payment for property to be taken shall provide legal interest on the award of the jury from the date of the filing of the complaint until payment is actually made; provided, however, that interest need not be paid on any funds deposited by the plaintiff and withdrawn by the defendants prior to judgment. At the conclusion of the trial, the court shall instruct the jury in accordance with the Mississippi Rules of Civil Procedure.

> Mississippi jurisprudence makes clear that the date of the filing of the complaint is the date as to which the land derives its immediately before and after value for assessment of damages. ***Mississippi Transp. Comm'n v. Highland Dev., L.L.C.*, 836 So. 2d 731, 742 (Miss. 2002).**

§ 11-27-13 Separate trials; right to jury:

Each different property, identified by separate ownership, shall constitute a separate civil action and shall require a separate trial, unless otherwise agreed by all parties with the approval of the court. Trial shall be to a jury which shall be examined and impaneled in accordance with the Mississippi Rules of Civil Procedure. Alternatively, trial may be to the court, as provided by the Mississippi Rules of Civil Procedure.

§ 11-27-17 Jury oath:

When the jury shall be so impaneled, the jurors shall be sworn as follows:

> I do solemnly swear or affirm that as a member of this jury I will discharge my duty honestly and faithfully, to the best of my ability, and that I will a true verdict render according to the evidence, without fear, favor, or affection, and that I will be governed by the instructions of the court. So help me God.

Burden of Proof

In eminent-domain cases, the condemnor has the burden of proving the value of the condemned property. After a prima facie case has been made out by the condemnor, then, if the landowner expects to receive more compensation than that shown, he must go forward with the evidence showing such damage. ***Gulf S. Pipeline Co., LP v. Pitre*, 35 So. 3d 494, 498 (Miss. 2010) (citations omitted).**

The burden of proof in an eminent domain case is unique, because the government is depriving the citizen of his or her property. Therefore, the State has the "non-delegable" burden to establish a prima facie case of the value of the property taken. If the condemnor fails to establish the prima facie case, a dismissal of the proceedings would be required. The supreme court explained that "[t]he reason for placing the burden on the condemnor is that if it offers no evidence of the value of the property taken there is no basis for awarding any damages and there could be no compliance with Section 17, Mississippi Constitution." After a prima facie case has been established, if the party whose property is being condemned desires to receive greater compensation, then it must present evidence of a higher valuation. ***Martin v. Mississippi Transp. Comm'n*, 953 So. 2d 1163, 1166 (Miss. Ct. App. 2007) (citations omitted).**

The burden is upon the agency seeking to acquire property by eminent domain to prove the value of the property, and in so doing it is necessary to show the damages due to the landowner as a result of the condemnation proceedings. ***Emerson v. Mississippi State Highway Comm'n*, 208 So. 2d 441, 443 (Miss. 1968).**

Expert Witness Testimony

We have said that when the jury has had an opportunity to view the premises, observe the location, and hear the opinions of the appraisers from both parties, the weight that the evidence will carry is a question for the jury to resolve. Further, the Mississippi Supreme Court has noted that expert opinions can vary widely in condemnation cases, and the disparity in the experts' valuations alone is not indicative of bias, passion and prejudice. Both experts were subject to direct and cross-examination with rebuttal testimony in the presence of the jury. More importantly, the jury viewed the property and drew their own conclusions. The jury gave more credibility to Buchanan's expert, and we find no reason to disturb that finding. ***Mississippi Transp. Comm'n v. Buchanan*, 99 So. 3d 230, 235 (Miss. Ct. App. 2012) (citations omitted).**

Under Rule 702, trial courts are charged with being gatekeepers in evaluating the admissibility of expert testimony. In short, the trial judge has the sound discretion to admit or refuse expert testimony; an abuse of discretion standard means the judge's discretion will stand unless the discretion he used is found to be arbitrary and clearly erroneous. However, merely speculative expert opinions should not be admitted. Neither expert's testimony as to diminution of the remainder satisfies the requirements of our rules and established caselaw. Both failed to use time-tested techniques, supported by peer review or publications, and/or industry standards generally accepted within his field of expertise. Neither offered comparable sales, whether from Warren County, or any other county in this state. Hamilton offered no pretense that he was following any recognized method or procedure acceptable in the appraisal industry, and he admitted he was not relying on peer-reviewed articles or industry publications. Furthermore, Hamilton's claim that no comparisons were available defies both judicial knowledge and the evidence excluded by the trial court. . . . As such, finding comparable sales with utility or pipeline rights of way should present no impediment to applying the methods utilized in the appraisal industry and previously accepted by the courts of this State. Although there is no dispute that both experts were qualified appraisers, the lack of an acceptable methodology to formulate the subject opinions fails a *Daubert* analysis. ***Gulf S. Pipeline Co., LP v. Pitre*, 35 So. 3d 494, 499 (Miss. 2010) (citations omitted).**

This Court has refused to accept testimony of values of comparables for a highest and best use different from that of the subject property. However the trial court is vested with a gatekeeping responsibility to prevent the admission of expert testimony based on guess or conjecture. The trial court must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning and methodology properly can

be applied to the facts in issue. Testimony concerning the valuation of the land is certainly relevant; it is the reliability of this testimony that is at issue. Tunica questions the reliability of the testimony, taking issue with Dunklin's conclusion not changing after the trial court's ruling. . . . The methodology employed by Dunklin in this case, however, meets the criteria of both Rule 702 and *McLemore*. The experts both agreed on using the comparable land sales approach as the proper methodology to value the land, a methodology that easily meets the *Daubert* factors. . . . The testimony was admissible, thus placing before the jury the issue of what weight or credit to afford to this testimony. We have long held that the jury may reject or accept any expert testimony it chooses in cases involving land valuation. The jury in the trial of a case of this kind is not required to accept the opinion evidence of an expert witness who testifies for the land owner or the county. The jury may disregard the testimony of a witness whose testimony the jury has reasonable grounds to believe is worthless. In addition, the jury had the opportunity to inspect the subject land in this case, and was to use this, too, in coming to its decision. The opinions of experts as to values in cases of this kind are not to be passively received and blindly followed, but are to be weighed by the jury and judged in view of all of the testimony in the case and the jury's own general knowledge of affairs, and are to be given only such consideration as the jury may believe them entitled to receive. . . . For these reasons, we find that the correct valuation of the land was entirely a jury question, and, we thus find no fault in the trial judge's decision to admit this testimony. ***Tunica County v. Matthews*, 926 So. 2d 209, 214-15 (Miss. 2006) (citations omitted).**

Walker's testimony in this case is entirely speculative. None of the illustrative factors approved by the United States Supreme Court in *Daubert* and *Kumho Tire* weigh in favor of allowing Walker's testimony here. . . . First, it is apparent that Walker's 750-foot line method has not been tested in the appraisal field since Walker himself testified that his appraisal method was unique to the McLemore appraisal. Moreover, it is clear that Walker's theory cannot be tested. Under the theory, there is some portion of the McLemore property that will be more adversely affected by the construction than the rest of the property. This portion abuts the proposed interstate and extends a distance of between 500 and 1000 feet onto the McLemore property. Walker concluded that this most affected portion of the property terminates at a distance of 750 feet from the interstate right-of-way. This theory cannot be tested since the location of the imaginary boundary line is not based on any principle. Walker merely split the difference between 500 and 1000 feet. . . . This theory is clearly not capable of being tested since Walker simply chose the 750-foot offset at random. Second, there is no evidence that Walker's theory has been the subject of any peer review. It is also evident from the record that the theory has not been the subject of any publication. Walker himself testified that the theory is not printed in textbooks or taught in courses and

seminars. Third, there is a high potential rate of error associated with Walker's theory. Again, the key to Walker's theory is the placement of the imaginary buffer zone boundary line. There is no evidence that the location of this line is based on anything more than Walker's speculation. Thus, there is a very real and high potential for error associated with the 750-foot line method. Fourth, there is no evidence of standards that control the operation of Walker's 750-foot line method. . . . In essence, Walker's speculation alone determines the location of the buffer zone boundary line; therefore, it is clear that there are, in fact, no standards that control this method. Finally, Walker himself testified the method was unique to the McLemore appraisal. If this method is peculiar to a single appraisal, that the appraisal community has not adopted this method. Therefore, it is clear that this theory is not generally accepted in the appraisal field. Walker's testimony was inadmissible under the modified *Daubert* standard since it wholly fails to comport with the non-exhaustive, illustrative list of factors set out in *Daubert* and *Kumho Tire*. The trial court therefore clearly erred in admitting Walker's testimony. ***Mississippi Transp. Comm'n v. McLemore*, 863 So. 2d 31, 41-42 (Miss. 2003) (citations omitted).**

This state's case law is replete with cases in which expert witnesses testify to the legal conclusion of the value of a specific tract of land and the various uses for which it can best be applied. As such, the trial court did not err allowing expert testimony as to what effect the development agreement had on the properties' values. ***Harris Propane, Inc. v. Mississippi Transp. Comm'n*, 827 So. 2d 6, 9 (Miss. Ct. App. 2002) (citations omitted).**

Landowner's Testimony

It is settled that a landowner in an eminent-domain case may give his or her opinion of the fair-market value of his or her property. The landowner is exempt from showing that he possesses the qualifications necessary in law to be accepted as an expert witness under Rule 702. The reason for allowing the landowner to offer an opinion is that he or she has acquired through his or her ownership a unique view of the property, which can and ought to be allowed to be shared with the jury. ***Mississippi Transp. Comm'n v. Buchanan*, 99 So. 3d 230, 235-36 (Miss. Ct. App. 2012).**

It is settled in eminent domain practice that a landowner may give his opinion of the fair market value of his property. A landowner is exempt from showing that he possesses the qualifications necessary in law to be accepted as an expert witness. This rests on the premise that the landowner through his ownership has acquired a unique view of the property and that he can and ought to be allowed to share this view with the jury. ***Clark v. Mississippi Transp. Comm'n*, 767 So. 2d 173, 178 (Miss. 2000).**

It is settled in eminent domain practice that a landowner may give his opinion of the fair market value of his property. This does not, however, mean the landowner can get on the witness stand and say anything he wants. Properly understood, the rule exempts the landowner from showing that he possesses the qualifications necessary in law to be accepted as an expert witness. It proceeds on the premise that the landowner through his ownership has acquired a unique view of the property and that he can and ought be allowed to share this view with the jury. Because landowners ordinarily are not experts and trained in the field of property valuation, we do not hold them to precise modes of articulation of the way in which they arrived at the values they give. Nothing in this rule, however, empowers a landowner to present an opinion based upon legally irrelevant factors. ***Potters II v. State Highway Comm'n of Mississippi*, 608 So. 2d 1227, 1235 (Miss. 1992).**

Jury View

§ 11-27-19 Conduct of trial; interest:

Evidence may be introduced by either party, and the jury may, in the sound discretion of the judge, go to the premises, under the charge of the court as to conduct, conversation and actions as may be proper in the premises. . . .

> The Blanchards contend that the trial court erred in denying their request for an inspection of the premises. Mississippi Code Annotated section 11-27-19 permits jury views of property in an eminent-domain proceeding. However, whether to allow a jury view is a matter left to "the sound discretion of the judge." ***Davidson v. Tarpon Whitetail Gas Storage, LLC*, 90 So. 3d 691, 700-01 (Miss. Ct. App. 2012).**

§ 13-5-91 View by jury:

When, in the opinion of the court, on the trial of any cause, civil or criminal, it is proper, in order to reach the ends of justice, for the court and jury to have a view or inspection of the property which is the subject of litigation. . . .

Damages

Mississippi Constitution, Article III, § 17:

> Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof. . . .

§ 11-27-21 Damage to remainder of property:

> In determining damages, if any, to the remainder if less than the whole of a defendant's interest in property is taken, nothing shall be deducted therefrom on account of the supposed benefits incident to the public use for which the petitioner seeks to acquire the property.

Fair Market Value

Three standards are accepted in determining fair market value for real property:

(1) the cost approach,
(2) the income-capitalization approach, and
(3) the market-data or comparative-sales approach.

These approaches do not, considered singly, establish value. Each rather is one approach to value, with the appraiser's estimate of value being, in the end, an opinion which is the product of a reconciliation of the indications yielded by the three approaches. The market-data or comparable-sales approach was used by the experts for both parties for the property actually taken, but not for the remainder. Using that approach, the value estimate is predicated upon prices actually paid in open market transactions for various properties similar to the one at issue in the appraisal. ***Gulf S. Pipeline Co., LP v. Pitre*, 35 So. 3d 494, 498 (Miss. 2010) (citations omitted).**

In *Ellis v. Mississippi State Highway Commission*, 487 So. 2d 1339, 1342 (Miss. 1986), this Court held that in eminent domain cases, the condemnor must prove the value of the condemned property. This Court further stated:

> The only burden on the condemnor is simply to go forward with enough evidence as to the damages suffered by the landowner to make out a prima facie case. Whether the condemnor has made a prima facie case is a question of law to be determined by the Court. After a prima facie case has been made out by the condemnor, then, if the landowner expects to receive more compensation than that shown, he must go forward with the evidence showing such damage.

When this Court is faced with an eminent domain proceeding, the Court uses the "before and after" rule "to determine the compensation due a landowner when a portion of his property is taken through eminent domain." In *Mississippi State*

Highway Commission v. Hillman, 189 Miss. 850, 866, 198 So. 565, 569 (1940), this Court held:

> When part of a larger tract of land is taken for public use, the owner should be awarded the difference between the fair market value of the whole tract immediately before the taking, and the fair market value of that remaining immediately after the taking, without considering general benefits or injuries resulting from the use to which the land taken is to be put, that are shared by the general public.

***Adcock v. Mississippi Transp. Comm'n*, 981 So. 2d 942, 951-52 (Miss. 2008) (citations omitted).**

Before and After Rule

In eminent domain proceedings in Mississippi, the before and after rule is used to determine the compensation due a landowner when a portion of his property is taken through eminent domain. In *Hillman*, this Court said the following:

> When part of a larger tract of land is taken for public use, the owner should be awarded the difference between the fair market value of the whole tract immediately before the taking, and the fair market value of that remaining immediately after the taking, without considering general benefits or injuries resulting from the use to which the land taken is to be put that are shared by the general public.

This has become known generally as the "before and after rule." One mandate under the before and after rule is that items such as increased noise due to traffic or increased proximity to a highway may not form the basis of separate and distinct elements of damage. As this Court stated in *Mississippi State Highway Comm'n v. Hall*:

> The before and after rule swallows and absorbs all of the damages of every kind and character, and while it is proper to put on evidence of special items so that the jury can properly determine the after value, it is not proper to comment on any particular aspect of the damages in the instructions.

***Blanton v. Board of Supervisors of Copiah County*, 720 So. 2d 190, 193-94 (Miss. 1998) (citations omitted).**

This Court has repeatedly held that the method of determining the damages to a landowner in eminent domain proceedings where part of the land is acquired or destroyed is to ascertain the difference between the fair market values of the landowner's whole tract of land immediately before and immediately after the appropriation is made, taking into consideration the best or most valuable use to which the property is adaptable. ***Emerson v. Mississippi State Highway Comm'n*, 208 So. 2d 441, 442 (Miss. 1968).**

Highest and Best Use

In eminent domain cases, the highest and best use of the subject property is a factor to be considered in determining what just compensation should be: The rule is well settled that the present value of land sought to be condemned in eminent domain proceedings is not to be estimated simply with reference to the condition in which the owner has maintained it or for the use to which it is at the time applied, but with reference to any use to which it is reasonably adapted. The best or most valuable use to which the property, which is taken for the public use, is adapted should be considered. Mississippi courts routinely consider highest and best use in eminent domain cases. ***Dedeaux Util. Co. v. City of Gulfport*, 938 So. 2d 838, 844 (Miss. 2006).**

Jury Instructions

Jury Instruction P-2 reads as follows:

> The Mississippi Transportation Commission is entitled to acquire property for Highway purposes through statutory procedures and the deposit of funds for the benefit of the landowner as ordered by the Court. In this case, the Mississippi Transportation Commission was awarded title and possession of the property on October 18, 2001, by Order of this Court. In your decision to award just compensation, you shall not consider the fact that the Mississippi Transportation Commission has acquired the subject property and begun construction of the new highway.

Instruction P-2 outlines the statutory authority of MTC to secure land for highway purposes and instructs the jury that MTC had already gained title and possession of the property by an October 18, 2001, order of the court. Further the instruction tells the jury that in its decision to award compensation, it should not consider the fact that MTC had already acquired the property and had begun construction of the new highway. We find no error in this instruction. On the second day of trial the jury was taken to the property to view it in accordance with section 11-27-19. Instruction P-2 was necessary to explain the authority of MTC to take a property by eminent domain and was a correct statement of the so-called "quick take law," Mississippi Code Annotated §§ 11-27-81 to -91. The fact that the instruction tells the jury that there had been a deposit of funds for the benefit of the landowner by MTC is no more than a summary of Mississippi Code Annotated § 11-27-85(2). That section states that the party seeking to take the property by eminent domain must deposit with the clerk of court eight-five percent of the value of the property as determined by the court-appointed appraiser in order to obtain title to the property and the right of immediate entry onto it. It is true, as North Biloxi Development points out, that the October 18, 2001, date used in the instruction was not the date of the taking, that date being August 2, 2001. However, the instruction only references October 18, 2001, as the date when the quick take

order was entered by the court in favor of MTC and does not imply or state that the date should be used by the jury as the date for determining a valuation of the property. The instruction provided a correct statement of the statutory procedure involved in eminent domain and instructed the jury that in its consideration of damages after it viewed the property the jury was not to consider the fact that MTC was already on the property working on the new highway. ***North Biloxi Dev. Co. v. Mississippi Transp. Comm'n*, 912 So. 2d 1118, 1124 (Miss. Ct. App. 2005).**

North Biloxi Development's Instruction D-5 instructs the jury that North Biloxi Development is entitled "to recover just compensation in this cause, and it devolves upon [the jury to] honestly and impartially determine the sum thereof, according to the evidence adduced at trial, the weight and credibility of which you are the sole judge." Instruction D-5 further states that North Biloxi Development is entitled to "just compensation, not only for the value of the property to be actually taken," . . . but also for damages "which may result as a consequence of the taking." Instruction D-5 told the jury that it was not to deduct anything because of the supposed benefits incident to the public use for which the taking was made. We note also that the jury was told in opening statements and in final arguments and in the testimony about the established minimum and maximum amounts that it could award to North Biloxi Development. ***North Biloxi Dev. Co. v. Mississippi Transp. Comm'n*, 912 So. 2d 1118, 1124-25 (Miss. Ct. App. 2005).**

Jury Instruction P-4 reads as follows:

> The Court instructs the Jury that where access to the subject property is altered, and Defendant is left with reasonable access to its remaining property, then no damages should be awarded to Defendant for such alteration in access.

In *Maples*, the landowner argued that an instruction was confusing and misleading that instructed the jury that in assessing the landowner's damages "the jury shall not consider any elements of inconvenience or other elements [of damages] which are speculative and remote." The court held that any error in granting the instruction was harmless because the jury was obviously not mislead because its award contained several thousand dollars as compensation for the landowner's loss of access. In essence the *Maples* court allowed the jury to determine the reasonableness of access and to assess damages based upon that reasonableness. We find that Instruction P-4 was an accurate statement of the law as set out in *Maples*. ***North Biloxi Dev. Co. v. Mississippi Transp. Comm'n*, 912 So. 2d 1118, 1125-26 (Miss. Ct. App. 2005).**

Jury Instruction P-5 reads as follows:

> The Court instructs the Jury that an appraiser's testimony as it relates to damages and fair market value of the subject property must be based upon sufficient facts or data, be the product of reliable principles and methods, and not based on speculation or guesswork of the appraiser. If it is your opinion that any part of an appraiser's testimony in this case was not supported by sufficient facts or data, or was not the product of reliable principles or methods, you should disregard any such testimony of that appraiser.

Instruction P-5 instructs the jury to determine the credibility of the appraisers for both MTC and North Biloxi Development, including assessing whether there was speculation and guesswork involved in making their appraisals or whether the appraisals were the result of reliable principles and methods. . . . Both parties presented evidence by way of experts of the appraised value of the property. We note that the instruction did not say which expert testimony to disregard. Further Instruction P-6 . . . instructed the jury that it was the sole judge of the weight and credibility of the evidence and of the evidence's reasonableness. We find that Instruction P-5 when read together with Instruction P-6 contains a correct statement of the law. ***North Biloxi Dev. Co. v. Mississippi Transp. Comm'n*, 912 So. 2d 1118, 1126 (Miss. Ct. App. 2005).**

Jury Instruction D-6 reads as follows:

> The Court instructs the Jury that no recovery at a later date will be permitted to the Defendant/Landowner, North Biloxi Development Co., L.L.C., as a result of the taking of its land for the relocation of Highway 67, as shown by the evidence.

In denying the instruction the trial court ruled that Instruction D-6 was too confusing and had no basis in the record. We agree. After a review of the testimony, we find that there was no reference to any future or latent effects the acquisition might have on the landowner's property. Also the instruction tells the jury that “no recovery” to the landowners will be allowed for the taking at a later date. This instruction could be interpreted by the jury to mean that MTC could take additional property from North Biloxi Development without paying the landowner any additional compensation. Such an interpretation would be erroneous and thus the jury could be confused. We find that the trial court was correct in rejecting the instruction. ***North Biloxi Dev. Co. v. Mississippi Transp. Comm'n*, 912 So. 2d 1118, 1127-28 (Miss. Ct. App. 2005).**

Jury Verdict

§ 11-27-23 Verdict, required majority and form:

In the trial of all cases provided for herein, nine (9) jurors may bring in a verdict as in other civil cases. The verdict of the jury shall be in the following form:

> We, the jury, find that the _____ defendant (naming him) will be damaged by the acquisition of his property for the public use, in the sum of _____ Dollars.

Judgment

§ 11-27-25 Form of judgment:

Upon the return of the verdict, the court shall enter a judgment as follows, viz:

> In this case the claim of _____ (naming him or them) to have condemned certain lands named in the complaint, to-wit: _____ (here describe the property), being the property of _____ (here name the owner), was submitted to a jury composed of _____ (here insert their names) on the ___ day of _____, A. D., _____, and the jury returned a verdict fixing said defendant's compensation and damages at _____ Dollars, and the verdict was received and entered. Now, upon payment of the said award, with legal interest from the date of the filing of the complaint, ownership of the said property shall be vested in plaintiff and it may be appropriated to the public use as prayed for in the complaint. Let the plaintiff pay the costs, for which execution may issue.

§ 11-27-27 Payment; transfer of title:

Upon the return of the verdict and entry of the judgment, the applicant shall pay to defendants, or to the clerk if defendants absent themselves, the differences between the judgment and deposits previously made, if any; shall pay the costs of court, including the cost of jury service as is otherwise provided by law for the court in which the case is tried. Then, ownership of the property described in the petition shall be vested in petitioner and it may use said property as specified in the petition. If deposits previously made exceed the judgment, then the clerk or defendant to whom disbursement thereof has been made, as the case may be, shall pay such excess to the petitioner.

Not only may the landowner not constitutionally be assessed with costs in such a manner that diminishes his compensation received, we have a statutory mandate that the condemning authority "shall pay the costs of court." ***Mississippi State Highway Comm'n v. Herban*, 522 So. 2d 210, 213 (Miss. 1988).**

Right to Appeal

§ 11-27-29 Review:

(1) Every party shall have the right to appeal directly to the Supreme Court from the judgment entered in the special court of eminent domain, whether tried in county court or circuit court, by giving notice within ten (10) days from the date of the judgment or final order entered by the court to the court reporter to transcribe the record as taken and by prepaying all costs that may be adjudged against him; and said notice to the court reporter shall be given and the costs shall be paid as is otherwise required by law for appeals to the Supreme Court. If the judgment be in excess of the sum, if any, deposited, and the plaintiff, other than the State of Mississippi or any political subdivision thereof, desires an appeal, he shall deposit a sum, or a good and sufficient surety bond with a surety company authorized to do business in the State of Mississippi acceptable to the clerk, equal to double the amount of the judgment, less the amount of the deposit, if any, which shall be held exclusively to secure all damages assessed against plaintiff. In any case where the deposit exceeds the compensation to be paid the defendants as determined by the final judgment, the excess shall be returned to the plaintiff. If the appeal is by the defendant, it shall not operate as a supersedeas, nor shall the right of the plaintiff to enter in and upon the land and to appropriate the same to public use be delayed. If the appeal be by the State of Mississippi or any political subdivision thereof, no bond or prepayment of costs shall be required, except the Supreme Court filing fee as required by Section 25-7-3.

(2) The term of a special court of eminent domain shall begin when the court is convened as provided by statute and shall continue for ten (10) days immediately following the entry and filing of a judgment or final order with the clerk of the court, and thereafter the court shall have jurisdiction to dispose of any post trial motions or proceedings filed within said ten (10) days. The jurisdiction of a special court of eminent domain shall expire upon the entry and filing with the clerk of a final judgment or order disposing of any post trial motions or proceedings.

The standard of review of eminent domain proceedings is as follows:

> This Court reviews decisions of a special court of eminent domain as it would any trial court. We review questions of law de novo, and we will not overturn findings of fact where they are supported by substantial evidence in the record unless there was abuse of discretion by the trial judge or the findings were manifestly wrong or clearly erroneous.

***Mississippi Transp. Comm'n v. Williamson*, 908 So. 2d 154, 157 (Miss. Ct. App. 2005).**

Trial courts faced with such motions in eminent domain cases operate under familiar principles. The compensation award must neither be so high nor so low as to evince bias, passion or prejudice. Rather, it must be based upon competent facts, not conjecture, supposition or mere possibilities. Courts should be particularly loathe to disturb a jury's eminent domain award where, as here, the jury has personally viewed the premises. We have gone so far as to suggest that, where the jury has viewed the property being taken, any substantial evidence in the record supporting the jury's damage assessment will preclude reversal. ***Crocker v. Mississippi State Highway Comm'n*, 534 So. 2d 549, 554 (Miss. 1988) (citations omitted).**

In *State Highway Comm'n of Mississippi v. Havard*, 508 So. 2d 1099 (Miss. 1987), this Court quite thoroughly set forth the standard of review for jury verdicts in eminent domain cases as follows:

> As in the case of any other jury determination of damages, we are not at liberty to order a new trial unless the verdict is so at variance with the evidence as to shock the conscience of the court. Except where the verdict is grossly excessive and evinces bias, passion and prejudice by the jury, we have no authority to require the prevailing party to submit to a second adjudication. This rule applies in eminent domain cases as in others. We are particularly loathe to disturb a jury's eminent domain award where, as here, the jury has personally viewed the premises. We have gone so far as to suggest that, where the jury has viewed the property being taken, any substantial evidence in the record supporting the jury's damage assessment will preclude reversal in this Court.

***Mississippi Transp. Comm'n v. Bridgforth*, 709 So. 2d 430, 441 (Miss. 1998) (citations omitted).**

§ 11-27-37 Defendant's expenses recoverable:

In case the plaintiff shall fail to pay the damages and costs awarded to the defendant within ninety (90) days from the date of the rendering of the final judgment, if such judgment is not appealed from, or in case the suit shall be dismissed by the plaintiff except pursuant to settlement, or the judgment be that the plaintiff is not entitled to a judgment condemning property, the defendant may recover of the plaintiff in an action brought therefor all reasonable expenses, including attorneys' fees, incurred by him in defending the suit.

Section 11-27-37 permits the award of attorney's fees in eminent-domain cases when "the suit shall be dismissed by the plaintiff . . . or the judgement be that the plaintiff is not entitled to a judgment condemning property." HCUA did not voluntarily dismiss the condemnation action. Nor was there a finding that HCUA was not entitled to a judgment condemning the property. Here, the trial court erroneously dismissed the case without prejudice for HCUA's failure to join necessary parties to the action. We have found that the trial court erred in dismissing the case. Therefore, we reverse the award of attorney's fees. ***Harrison County Util. Auth. v. Helen Peterson Walker*, 143 So. 3d 608, 614 (Miss. Ct. App. 2014).**

Right to Immediate Possession

§ 11-27-81 Persons eligible:

The right of immediate possession pursuant to Sections 11-27-81 through 11-27-89, Mississippi Code of 1972, may be exercised only:

(a) By the State Highway Commission for the acquisition of highway rights-of-way only;

(b) By any county or municipality for the purpose of acquiring rights-of-way to connect existing roads and streets to highways constructed or to be constructed by the State Highway Commission;

(c) By any county or municipality for the purpose of acquiring rights-of-way for widening existing roads and streets of such county or municipality; provided, however, that said rights-of-way shall not displace a property owner from his dwelling or place of business;

(d) By the boards of supervisors of any county of this state for the acquisition of highway or road rights-of-way in connection with a state-aid project designated and approved in accordance with Sections 65-9-1 through 65-9-31, Mississippi Code of 1972;

(e) By any county, municipality or county utility authority created under the Mississippi Gulf Region Utility Act, Section 49-17-701 et seq., for the purpose of acquiring rights-of-way for water, sewer, drainage and other public utility purposes; provided, however, that such acquisition shall not displace a property owner from his dwelling or place of business. A county utility authority should prioritize utilizing easements within ten (10) feet of an existing right-of-way when economically feasible. A county utility authority may not exercise the right to immediate possession under this paragraph after July 1, 2013. Provisions of this paragraph (f) shall not apply to House District 109;

(f) By any county authorized to exercise the power of eminent domain under Section 19-7-41 for the purpose of acquiring land for construction of a federal correctional facility or other federal penal institution;

(g) By the Mississippi Major Economic Impact Authority for the purpose of acquiring land, property and rights-of-way for a project as defined in Section 57-75-5(f)(iv)1 or any facility related to the project as provided in Section 57-75-11(e)(ii);

(h) By the boards of supervisors of any county of this state for the purpose of constructing dams or low-water control structures on lakes or bodies of water under the provisions of Section 19-5-92;

(i) By the board of supervisors of any county of this state for the purpose of acquiring land, property and/or rights-of-way for any project the board of supervisors, by a duly adopted resolution, determines to be related to a project as defined in Section 57-75-5(f)(iv). The board of supervisors of a county may not exercise the right to immediate possession under this paragraph (j) after July 1, 2003;

(j) By a regional economic development alliance created under Section 57-64-1 et seq., for the purpose of acquiring land, property and/or rights-of-way within the project area and necessary for any project such an alliance, by a duly adopted resolution, determines to be related to a project as defined in Section 57-75-5(f)(xxi). An alliance may not exercise the right to immediate possession under this paragraph (k) after July 1, 2012; or

(k) By the board of supervisors of any county of this state for the purpose of acquiring or clearing title to real property, property and/or rights-of-way within the project site and necessary for any project such board of supervisors, by a duly adopted resolution, determines to be related to a project as defined in Section 57-75-5(f)(xxii). A county may not exercise the right to immediate possession under this paragraph (l) after July 1, 2012.

> This Court has recognized such a necessity in *Hudspeth v. State Highway Comm'n*, a case discussing taking under an older statute, as follows:
>
> > The "quick take" statute is a major public policy pronouncement appropriately emanating from the legislative branch of our government. It was designed to enhance the State's highway program by providing the highway department access to the needed right-of-way as quickly as practicable consistent with the legitimate interests of the landowner. The idea was to prevent landowners holding up the highway construction project by dragging out the eminent domain proceedings for as long as possible.
>
> ***Lemon v. Mississippi Transp. Comm'n*, 735 So. 2d 1013, 1018 (Miss. 1999).**

§ 11-27-83 Declaration in complaint; appraisal:

If a plaintiff eligible to claim the right of immediate possession under the provisions of Sections 11-27-81 through 11-27-89 shall desire immediate possession of the property sought to be condemned, other than property devoted to a public use, the plaintiff shall so state in the complaint to condemn property filed with the circuit clerk pursuant to Sections 11-27-1 through 11-27-49, Mississippi Code of 1972, and shall therein make and substantiate the following declaration concerning the governmental project for which the property is being condemned:

> That the plaintiff shall suffer irreparable harm and delay by exercising the right to condemn said property through eminent domain proceedings pursuant to Sections 11-27-1 through 11-27-49, as opposed to claiming the right of immediate possession of said property pursuant to Sections 11-27-81 through 11-27-89.The court, or the judge thereof in vacation, as soon as practicable after being satisfied that service of process has been obtained, shall appoint a disinterested, knowledgeable person qualified to make an appraisal of the property described in the complaint to act as appraiser.

The appraiser, after viewing the property, shall return to the clerk of court within ten (10) days after his appointment, his report in triplicate, under oath, which report shall state:

> (1) the fair market value of the property to be condemned, determined as of the date of the filing of the complaint;
>
> (2) the damages, if any, to the remainder if less than the whole is taken, giving a total compensation and damages to be due as determined by the appraiser; and
>
> (3) his opinion as to the highest and best use of the property, and a narrative of the facts pertaining to his appraisal.

> Mississippi's “quick take” statute provides that a condemning authority may take immediate possession of property where it can substantiate that the authority will “suffer irreparable harm and delay” if regular eminent domain procedures are followed rather than the quick take procedures. ***Winters v. City of Columbus*, 735 So. 2d 1104, 1108 (Miss. Ct. App. 1999).**

§ 11-27-85 Order and deposit:

(1) Upon the filing of the report of the appraiser, the clerk shall within three (3) days mail notice to the parties and the court that the report has been filed. The court shall review the report of the appraiser and shall, after not less than five (5) days' notice thereof to the defendants, enter an order granting to the plaintiff title to the property, less and except all oil, gas and other minerals which may be produced through a well bore, and the right to immediate entry unless, for other cause shown or for uncertainty concerning the immediate public need for such property pursuant to Section 11-27-83, the judge shall determine that such passing of title, and right of entry should be denied. However, no person lawfully occupying real property shall be required to move from a dwelling or to move his business or farm operation without at least ninety (90) days' written notice prior to the date by which such move is required.

(2) Upon entry of said order, the plaintiff may deposit not less than eighty-five percent (85%) of the amount of the compensation and damages as determined by the appraiser with the clerk of the court, and upon so doing, the plaintiff shall be granted title to the property, less and except all oil, gas and other minerals which may be produced through a well bore, and shall have the right to immediate entry to said property. The defendant, or defendants, shall be entitled to receive the amount so paid to the clerk of the court, which shall be disbursed as their interest may appear, pursuant to order of the court.

(3) Notwithstanding any provisions of subsections (1) and (2) of this section to the contrary, title and immediate possession to real property, including oil, gas and other mineral interests, may be granted under this section to

(a) any county authorized to exercise the power of eminent domain under Section 19-7-41 for the purpose of acquiring land for construction of a federal correctional facility or other federal penal institution,

(b) the Mississippi Major Economic Impact Authority for the purpose of acquiring land, property and rights-of-way for a project as defined in Section 57-75-5(f)(iv) 1 and any facility related to such project,

(c) a regional economic development alliance for the purpose of acquiring land, property and rights-of-way for a project as defined in Section 57-75-5(f)(xxi) and any facility related to the project; and

(d) any county for the purpose of acquiring or clearing title to real property, property and rights-of-way for a project as defined in Section 57-75-5(f)(xxii).

§ 11-27-87 Inaccuracy of deposit:

If the plaintiff takes title to and possession of the land condemned pursuant to the order of the court and the amount of compensation as determined upon final disposition of the case is in excess of the amount of the deposit, the plaintiff shall pay interest to the owner at the rate of eight percent (8%) per annum upon the amount of such excess from the date of the filing of the complaint until payment is actually made. If the plaintiff takes title to and possession of the land condemned pursuant to the order of the court and the amount of the compensation as determined upon final disposition of the case is less than the amount of the deposit, the plaintiff shall be entitled to a personal judgment against the owner for the amount of the difference.

§ 11-27-89 Appraiser's pay; right to jury:

The appraiser shall receive as compensation for his services such sum, plus expenses, as the court allows, which shall be taxed as cost in the proceedings. The sum allowed shall be based upon the degree of difficulty and the time required to perform the appraisal, but may not exceed One Thousand Dollars ($1,000.00) unless, in the opinion of the court, special circumstances warrant a greater sum. An order granting a sum greater than One Thousand Dollars ($1,000.00) must describe in detail the special circumstances that warrant payment of a greater sum. The making of a deposit by the plaintiff or the withdrawal of said deposit by the defendant or defendants shall not prejudice the right of any party to a trial by jury in the special court of eminent domain to determine the fair market value of the property to be condemned and the damages, if any, to the remainder if less than the whole is taken, as provided in Sections 11-27-1 through 11-27-49, Mississippi Code of 1972.

> Consequently, we hold the maximum fee which may be awarded to any court appointed appraiser of the property now in question with its component interests may not exceed $300 as is set forth in Section 11-27-89. ***State Highway Comm'n of Mississippi v. Rankin Cty. Bd. of Educ.*, 531 So. 2d 612, 614 (Miss. 1988) (discussing prior version of statute).**

§ 11-27-91 Highway commission:

The highway commission of the State of Mississippi is hereby authorized to set up and maintain such special funds and accounts as it may consider necessary and proper to make the deposits and pay the costs as authorized by Sections 11-27-81 through 11-27-89, and to pay such judgments as may be entered and such other costs as may be incidental to the acquisition of property for right-of-way purposes.

Disbursement from such special funds shall be by check properly drawn against said fund signed by such personnel as may be duly authorized by the highway commission of the State of Mississippi.

CHAPTER 19

REPLEVIN

CHAPTER 19

REPLEVIN

Replevin is one of the most ancient and well-defined writs known to the common law. But despite its deep common-law roots, replevin is now purely governed by statute. ***Lacoste v. Systems & Servs. Technologies, Inc.*, 126 So. 3d 111, 114 (Miss. Ct. App. 2013) (citations omitted).**

The recently enacted replevin statutes, Section 11-37-101 through 11-37-157 still provide for an immediate remedy where a chattel is unlawfully held or detained to gain possession thereof, in term time or vacation after five days notice. ***General Motors Acceptance Corp. v. Fairley*, 359 So. 2d 1386, 1388 (Miss. 1978).**

A replevin action is a possessory action for specific property and not a suit for monetary damages. ***General Motors Acceptance Corp. v. Failey*, 359 So. 2d 1386, 1388 (Miss. 1978).**

We now hold that replevin proceedings are governed by our statutes, Section 11-37-101, *et seq*., supplemented only by so much of the Miss. R. Civ. Pro. as are not inconsistent with those statutes. ***Hall v. Corbin*, 478 So. 2d 253, 256 (Miss. 1985).**

Commencement of a Replevin Action - Requesting Immediate Seizure

§ 11-37-101 Commencement of replevin:

If any person, his agent or attorney, shall file a complaint under oath setting forth:

(a) A description of any personal property;
(b) The value thereof, giving the value of each separate article and the value of the total of all articles;
(c) The plaintiff is entitled to the immediate possession thereof, setting forth all facts and circumstances upon which the plaintiff relies for his claim, and exhibiting all contracts and documents evidencing his claim;
(d) That the property is in the possession of the defendant; and
(e) That the defendant wrongfully took and detains or wrongfully detains the same;

and shall present such pleadings to a justice of the Supreme Court, a judge of the circuit court, a chancellor, a county judge, a justice court judge or other duly elected judge, such justice or judge may issue an order directing the clerk of such court to issue a writ of replevin for the seizure of the property described in said complaint, upon the plaintiff posting a good and valid replevin bond in favor of the defendant,

for double the value of the property as alleged in the complaint, conditioned to pay any damages which may arise from the wrongful seizure of said property by the plaintiff. The said writ shall be directed to the sheriff or other lawful officer, returnable as a summons before the proper circuit or county court where the value of the property, as alleged in the complaint, exceeds the jurisdictional amount of the justice court, or to the circuit or county court or the proper justice court if the value shall not exceed such amount. The complaint along with the order of the court, the writ of replevin with the officer's return thereon, and the bond of the plaintiff shall be filed in the proper court at once. Writs of replevin may be made returnable to the proper court of another county where the property may be found.

> As mentioned, Mississippi's replevin statute gives plaintiffs like SST two options when commencing a replevin - (1) seek immediate possession under section 11–37–101 or (2) wait until the court determines the plaintiff's right to possess under section 11–37–131. Only under the first "immediate-possession" option is a bond required. This is because, when an action is commenced under section 11–37–101, the court issues a writ directing the sheriff to seize the property from the defendant and turn it over to the plaintiff. Since the writ issues solely on the plaintiff's unchallenged allegations of his right to possess, the statute requires he post a bond double the value of the property, to protect the defendant if it turns out the plaintiff's immediate seizure of the property was wrongful. ***Lacoste v. Systems & Servs. Technologies, Inc.*, 126 So. 3d 111, 114 (Miss. Ct. App. 2013) (citations omitted).**
>
> The requirements of a replevin action are enumerated in Miss. Code Ann. Section 11-37-101. The trial court's construction of a tort on the basis of a possessory action contains basically the same vital elements of Section 11-37-101. Although Ivy is a prisoner and proceeding pro se, he should be held to the same substantive requirements as a represented person pursuing this cause of action. The law requires Ivy to set forth that his property is in the possession of the officers, and Ivy did not set out such proof. Therefore, he fails to meet an essential element of his claim, and the officers were entitled to judgment as a matter of law. ***Ivy v. Merchant*, 666 So. 2d 445, 449-50 (Miss. 1995).**
>
> The foundation of a replevin proceeding is the affidavit of the person seeking the issuance of the writ. In the absence of the affidavit, the plaintiff is not entitled to the property, and the court is without jurisdiction of the cause. ***Giles v. Friendly Finance Co.*, 199 So. 2d 265, 266 (Miss. 1967).**

§ 11-37-105 Bond form:

The plaintiff's bond in replevin shall be in the following form, to-wit:

Be it known, that we, _____, the principal and plaintiff, and _____ and _____, sureties, agree and bind ourselves to pay to _____, the defendant, the sum of $_____, unless the said principal and plaintiff shall prosecute to effect his replevin action against the defendant for possession of (here describe the property in detail), now to be seized and delivered to the plaintiff; and shall, without delay, return said property to the defendant, if return thereof be adjudged, and shall pay to the defendant such damages as he may sustain by the wrongful suing out of a writ of replevin, and such costs as may be awarded against the plaintiff, and save harmless the officer who seizes and delivers said property to the plaintiff herein; otherwise to be of no force and effect.

WITNESS OUR SIGNATURES, this ___ day of _____, 2___.

_____

The above bond is approved by me this ___ day of _____, 2___.

_____

Writ of Replevin

§ 11-37-109 Contents of writ:

The writ of replevin shall command the sheriff, or other lawful officer, to immediately seize and take possession of the property described in the writ and deliver it to the plaintiff after two (2) days, unless bonded by the defendant, and summon the defendant to appear before the court shown in the writ, in termtime or in vacation, and to answer to the action of the plaintiff.

§ 11-37-123 Duplicate writs:

The plaintiff shall be entitled to duplicate writs or process to other counties, and alias and pluries writs or process to take the property or to summon the defendant, as in other actions. When property shall be taken under the writ, but the defendant cannot be found, the defendant shall be notified by publication, as provided in case of attachment under like circumstances, as provided in Section 11-33-37, except that said cause may be triable five (5) days after completion of publication.

§ 11-37-111 Writ form:

The writ of replevin shall be in the following form, to-wit:

State of Mississippi
County of _____
To the sheriff of any lawful officer of _____ County:

We command you to immediately seize and take into your possession _____ (here describe the property as shown in the declaration) alleged by _____, the plaintiff, to be wrongfully detained by _____, the defendant, and to deliver said property to the plaintiff unless bonded by the defendant; and to summon the said defendant to appear before the _____ court of _____ County, Mississippi, at _____ o'clock _____.M., on the ___ day of _____, 19___, to answer the suit of the plaintiff for the wrongful detention of said property, and have then and there this writ.

WITNESS MY HAND, this ___ day of _____, 20___.

_____

§ 11-37-113 Execution of writ:

The writ may be executed by seizing the property described therein and summoning the defendant as in other civil actions, with a copy of the declaration and exhibits attached thereto to be attached to said writ, so as to fully inform the defendant as to the claim being made against him.

§ 11-37-117 Form of officer's return:

The officer's return on such writ may be in the following form, to-wit:

Executed the within writ, by taking possession of (here describe the property described in the writ which has been seized by the officer) found in the possession of the defendant, and by summoning the defendant (naming him) according to the command of said writ, and I have delivered him a true copy of the writ, declaration and exhibits (or otherwise, as the case may be). The plaintiff (or defendant) having entered into bond, conditioned according to law, I delivered said property to the plaintiff (or defendant) and now return said writ.

This ___ day of _____, 20___.

_____
Sheriff

Defendant to Post a Replevin Bond

§ 11-37-115 Restoration of property on bond:

If the defendant shall, within two (2) days from the seizure of the property, enter into bond, with sufficient sureties, to be approved by the officer or the court, payable to the plaintiff, in double the value of the property, conditioned that it shall be forthcoming to satisfy the judgment of the court, the property shall be restored to him pending final judgment.

Defendant Can Petition the Court to Determine the Sufficiency of the Bond

§ 11-37-119 New and sufficient bond required:

If the defendant in a replevin suit shall at any time deem any bond taken to be insufficient, such defendant may, upon filing a motion in the court where the suit is pending, obtain a hearing to determine the sufficiency of such bond. The court shall, after hearing the evidence upon such motion determine the sufficiency or insufficiency of the bond. If the bond given by the plaintiff be adjudged insufficient, the plaintiff shall be required to give a new and sufficient bond, or restore the property to the defendant within the time limited by the court; and, in default thereof, the defendant shall be entitled to proceed and enter judgment as in case the plaintiff had nonsuited or otherwise made default.

§ 11-37-103 Judicial bond requirement:

Should the judge to whom such pleadings are presented determine that the property in question is not properly valued, then he may, in his order, require a bond in an amount double the value of the property in question, as determined by such judge.

Defendant May Be in Contempt for Concealing Property

§ 11-37-137 Contempt for concealing property:

If the defendant be found to be in possession of the property in question at the time of the service of process upon him, and if he shall conceal said property or dispose of the same, or fail to have the same within the jurisdiction of the court for such final judgment as may be rendered by the court in said replevin action, upon the return day of process herein, he shall be subject to penalties of contempt, upon motion of the plaintiff or order of the court.

Plaintiff May Recover Value of the Property

§ 11-37-121 Plaintiff's election to recover damages:

If the return of the officer on the writ shows a failure to take the goods and chattels, but the defendant has been summoned, the plaintiff may declare and prosecute the action for the recovery of the value of the property, and damages for the taking or detention of the property, as if he had thus commenced his action, and the plaintiff and his sureties shall, upon motion, be discharged on their bond.

In order to avail of the privileges of this section, there must be a change not merely of purpose but of pleading. The plaintiff must "declare" his action as for value before he can so "prosecute" it. The declaration here remains as one for possession as in replevin. The defendant had the right by default in joining issue to waive his defenses to such claim. By his default he did not waive for the plaintiff his duty to follow the procedural requirements of the statute. The defendant may have been willing to stand judgment for possession but not for value, and it is no answer that in a proper case plaintiff in replevin may procure an alternative judgment for possession or value. ***Grissom v. General Contract Purchase Corp.*, 4 So. 2d 303, 304 (Miss. 1941).**

Venue in a Replevin Action

§ 11-37-107 Venue:

The action of replevin may be instituted in the circuit or county court of a county or in the justice court of a county in which the defendant, or one (1) of several defendants, or property, or some of the property, may be found, and all proper process may be issued to other counties.

Trial

§ 11-37-125 Trial:

All replevin actions, whether followed by writ of replevin as herein provided or by summons, as hereinafter provided, shall be triable in termtime or in vacation, and the court or judge having jurisdiction shall proceed at such hearing to a final determination of the rights of the parties to possession, provided at least five (5) days process has been had upon the defendant.

§ 11-37-147 Request for jury trial:

All replevin actions shall be tried by the court without a jury, unless one (1) of the parties thereto shall file a written request for a jury trial.

> [T]he value of the [property] was a question for the jury. ***Davis v. Universal C.I T. Credit Corp.*, 89 So. 2d 851, 853 (Miss. 1956).**

§ 11-37-145 Priority of actions:

All replevin actions shall be treated by the court as preference cases and shall be heard on the merits at the earliest possible date, with the view of reaching an early determination as to the rights of the parties to the property in question.

Judgment for Plaintiff

§ 11-37-127 Effect of judgment for plaintiff:

If, upon a trial, the judgment shall be for the plaintiff, he shall retain possession of the property delivered to him under the writ of replevin, or if said property has not been found, then the plaintiff shall have a judgment for its value as determined by such hearing, or the value of the plaintiff's interest therein. Upon the entry of a judgment for the plaintiff in such replevin action, the plaintiff and the sureties on his bond shall be fully and finally discharged and said bond cancelled. If the

defendant shall have bonded the property after seizure and the judgment shall be for the plaintiff, then such judgment shall be that the defendant shall immediately deliver up said property to the plaintiff, with the defendant and the sureties on his bond to be liable to the plaintiff for any damage to or depreciation in the value of such property from the date of its surrender to the defendant under his bond until the date of its surrender by the defendant in obedience to the judgment of the court, in addition to any other damage the plaintiff may have sustained by reason of the wrongful taking or detention of such property by the defendant, all as determined upon writ of inquiry; or that the plaintiff recover from the defendant and his sureties the value of said property at the date of its return to the defendant under bond.

Section 11-37-127 and 129 provide that either plaintiff or defendant may recover damages under the conditions set forth in the statute upon a writ of inquiry. The question of damages may not be submitted until trial on the declaration has been completed and judgment rendered either for the plaintiff or the defendant. If judgment is for the plaintiff, no provision is made for the defendant to recover damages. ***Finance America Private Brands, Inc. v. Durbin*, 370 So. 2d 1356, 1357 (Miss. 1979).**

Although Section 11-37-127 authorizes a judgment for the value of the property if the property cannot be found, only the recovery of the property or value plus any statutory damages as therein provided is allowed. ***General Motors Acceptance Corp. v. Fairley*, 359 So. 2d 1386, 1388 (Miss. 1978).**

Judgment for Defendant

§ 11-37-129 Judgment for defendant:

If the judgment be for the defendant, the plaintiff and the sureties on the plaintiff's bond shall restore to the defendant the property, if to be had, or pay to him the value thereof and any damages for the wrongful suing out of the writ, as assessed upon writ of inquiry. If the defendant shall have made bond for such property, he and his sureties shall be fully discharged and he may recover any damages from the plaintiff and his sureties for the wrongful suing out of said writ. In case the plaintiff make default in prosecuting the replevin action, or be nonsuited, after seizure under writ of replevin, the defendant may have a writ of inquiry to assess the value of the property, or the damages sustained by the wrongful suing out of the writ, or both, as the case may be; and like judgment shall be rendered upon the finding as upon an issue found for him.

If the judgment be for the defendant, then Section 11-37-129 sets the statutory limits of his recovery. ***General Motors Acceptance Corp. v. Fairley*, 359 So. 2d 1386, 1388 (Miss. 1978).**

Commencement of a Replevin Action - Without Requesting Immediate Seizure

§ 11-37-131 Commencement without requesting immediate seizure:

If any person, his agent or attorney, shall desire to institute an action of replevin without the necessity of posting bond, and without requesting the immediate seizure of the property in question, he shall file a declaration under oath setting forth those matters shown in subparagraphs (a) through (e) of Section 11-37-101:

> [(a) A description of any personal property;
> (b) The value thereof, giving the value of each separate article and the value of the total of all articles;
> (c) The plaintiff is entitled to the immediate possession thereof, setting forth all facts and circumstances upon which the plaintiff relies for his claim, and exhibiting all contracts and documents evidencing his claim;
> (d) That the property is in the possession of the defendant; and
> (e) That the defendant wrongfully took and detains or wrongfully detains the same]

and shall present such pleadings to a judge of the supreme court, a judge of the circuit court, a chancellor, a county judge, a justice of the peace or other duly elected judge, and such judge shall issue a fiat directing the clerk of such court, or a deputy clerk, to issue a summons to the defendant, to appear before a court or judge having jurisdiction, as determined by the value of the property as alleged in the declaration, and as outlined in Section 11-37-101, with said process being returnable in termtime or in vacation, upon at least five (5) days' notice, summoning the defendant to appear for a final hearing to determine the rights of the parties as to possession, and upon such final hearing the court shall enter judgment accordingly.

> Richard first argues the circuit court failed to follow the replevin statute by not requiring SST to post bond. In support, Richard cites Mississippi Code Annotated section 11–37–101, which requires a replevin plaintiff to post a bond double the value of the personal property when "immediate possession " of the property is sought. But this route is just one of two replevin options authorized by statute. And here, SST did not seek immediate possession, so section 11–37–101's bond requirement did not apply. . . . As mentioned, Mississippi's replevin statute gives plaintiffs like SST two options when commencing a replevin - (1) seek immediate possession under section 11–37–101 or (2) wait until the court determines the plaintiff's right to possess under section 11–37–131. . . . However, when an action is commenced under section 11–37–131, instead of a writ, the court issues a summons. This summons directs the defendant "to appear for a final hearing to determine the rights of the parties as to possession." Because, under this option, possession is awarded after an adjudication of the merits of the plaintiff's claim, there is not the same

concern that the defendant may be damaged by the plaintiff's wrongful possession. Thus, no bond is required**. *Lacoste v. Systems & Servs. Technologies, Inc.*, 126 So. 3d 111, 114 (Miss. Ct. App. 2013) (citations omitted).**

The requirements of a replevin action are enumerated in Section 11-37-101. The trial court's construction of a tort on the basis of a possessory action contains basically the same vital elements of Section 11-37-101. Although Ivy is a prisoner and proceeding pro se, he should be held to the same substantive requirements as a represented person pursuing this cause of action. The law requires Ivy to set forth that his property is in the possession of the officers, and Ivy did not set out such proof. Therefore, he fails to meet an essential element of his claim, and the officers were entitled to judgment as a matter of law. ***Ivy v. Merchant*, 666 So. 2d 445, 449-50 (Miss. 1995).**

The foundation of a replevin proceeding is the affidavit of the person seeking the issuance of the writ. In the absence of the affidavit, the plaintiff is not entitled to the property, and the court is without jurisdiction of the cause. ***Giles v. Friendly Finance Co.*, 199 So. 2d 265, 266 (Miss. 1967).**

Summons

§ 11-37-133 Summons form:

The summons may be in the following form, to-wit:

The State of Mississippi
To the sheriff of _____ County, Greetings:

We command you hereby that you summons _____, (put full address) defendant, if to be found in your county, so that he be and appear before the _____ court, to be holden in and for the County of _____, at the courthouse thereof in the City of _____, Mississippi, on the ___ day of _____, 19___, at _____ o'clock _____.M., to answer the plaintiff's declaration in replevin filed herein, a copy of which is attached hereto, and for a final hearing to determine the rights of the parties herein as to the possession of the property as described in the declaration in replevin.

Declaration filed when summons issued.

ISSUED THIS ___ day of _____, 20___.

_____ Clerk

§ 11-37-135 Execution of summons:

The summons in replevin shall be executed by summoning the defendant as in other civil cases, a copy of the declaration and exhibits being attached to said summons, directing the defendant to appear before the court shown in said summons, to answer the plaintiff's declaration under oath. The officer serving said process shall determine whether or not the defendant is then in possession of the property described in the declaration and shall so indicate on his return.

Defendant May be in Contempt for Concealing Property

§ 11-37-137 Contempt for concealing property:

If the defendant be found to be in possession of the property in question at the time of the service of process upon him, and if he shall conceal said property or dispose of the same, or fail to have the same within the jurisdiction of the court for such final judgment as may be rendered by the court in said replevin action, upon the return day of process herein, he shall be subject to penalties of contempt, upon motion of the plaintiff or order of the court.

Venue in a Replevin Action

§ 11-37-107 Venue:

The action of replevin may be instituted in the circuit or county court of a county or in the justice court of a county in which the defendant, or one (1) of several defendants, or property, or some of the property, may be found, and all proper process may be issued to other counties.

Trial

§ 11-37-125 Trial:

All replevin actions, whether followed by writ of replevin as herein provided or by summons, as hereinafter provided, shall be triable in termtime or in vacation, and the court or judge having jurisdiction shall proceed at such hearing to a final determination of the rights of the parties to possession, provided at least five (5) days process has been had upon the defendant.

§ 11-37-139 Order resetting action:

Where process in any replevin action is by way of a summons in replevin, said cause shall be triable on its merits upon at least five (5) days process upon the

defendant, and said cause shall be triable in termtime or in vacation and at such place as the court may direct. In the event it shall appear at the return day that there is secondary service of process, or less than five (5) days process upon the defendant, the court may enter an order resetting said matter for trial on a future date, so as to insure that said cause will not be tried on its merits except upon a resetting on secondary process or except upon at least five (5) days process upon the defendant. In the event of such order resetting said cause for such later date, it shall not be necessary that further process be served upon the defendant.

§ 11-37-147 Request for jury trial:

All replevin actions shall be tried by the court without a jury, unless one (1) of the parties thereto shall file a written request for a jury trial.

> [T]he value of the [property] was a question for the jury. ***Davis v. Universal C.I T. Credit Corp.*, 89 So. 2d 851, 853 (Miss. 1956).**

§ 11-37-145 Priority of actions:

All replevin actions shall be treated by the court as preference cases and shall be heard on the merits at the earliest possible date, with the view of reaching an early determination as to the rights of the parties to the property in question.

Judgment for Plaintiff

§ 11-37-141 Judgment for plaintiff without prior seizure:

Upon the trial of any replevin action in which the property has not previously been seized under writ of replevin, if the judgment be for the plaintiff, the court shall enter judgment awarding to the plaintiff the immediate possession of the property and such judgment shall order and direct the sheriff or other lawful officer to immediately seize the property in question, without further process upon the defendant, and deliver said property to the plaintiff, a certified copy of the final judgment rendered in such case being furnished to the sheriff as evidence of his authority to seize such property and deliver it to the plaintiff.

Judgment for Defendant

§ 11-37-143 Judgment for defendant without prior seizure:

In any replevin action in which the property has not been previously seized by writ of replevin, if the defendant be successful in such action, the judgment of the court shall be that the declaration of the plaintiff be dismissed and court costs assessed against the plaintiff.

Third Party Intervention

§ 11-37-149 Intervention by third person:

If a third person, not a party to the action of replevin, shall claim to be the owner or entitled to the possession of goods or chattels involved in a replevin action, he shall not be allowed to institute another action of replevin while the former is pending, but may intervene in said action and present his claim under oath.

§ 11-37-151 Trial of third party claim:

After the trial of the action of replevin, an issue shall be made between the successful party and the claimant as to the validity of his claim, and a trial shall be had to determine the right of possession as between them and judgment entered accordingly.

Miscellaneous Points Concerning Replevin

§ 11-37-153 Death of party, laws applicable:

All the provisions of law in reference to the death of either party, and the revival of the cause in personal actions, and the death of any of the obligors in a bond given in a replevin action, and the proceedings thereon before and after judgment, shall apply in like case to the action of replevin, and to a claim of property in such action.

§ 11-37-155 Action not maintainable:

The action of replevin shall not be maintainable in any case of the seizure of property under execution or attachment when a remedy is given to claim the property by making claim to it in some mode prescribed by law, but the person claiming must resort to the specific mode prescribed in such case, and shall not resort to the action of replevin.

§ 11-37-157 Action cumulative:

The action created and established by this chapter shall be cumulative and in addition to all other actions presently available at law or in equity.

Standard of Review

> Our standard of review [in a replevin action] is limited to whether the circuit judge's decision was manifestly wrong or clearly erroneous. After a review of the record, we find that the circuit judge's decision that Caterpillar Financial was entitled to immediate possession of the Skid–Steer was not manifestly wrong or clearly erroneous and was supported by substantial evidence. ***Hammond v. Caterpillar Fin. Servs. Corp.*, 66 So. 3d 700, 702 (Miss. Ct. App. 2011).**

CHAPTER 20

INTERVENTION COURT

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CHAPTER 20

INTERVENTION COURT

Establishment and Purpose of Intervention Court

§ 9-23-1 Short title:

This chapter shall be known and may be cited as the "Alyce Griffin Clarke Intervention Court Act."

§ 9-23-3 Purpose:

(1) The Legislature of Mississippi recognizes the critical need for judicial intervention to reduce the incidence of alcohol and drug use, alcohol and drug addiction, and crimes committed as a result of alcohol and drug use and alcohol and drug addiction. It is the intent of the Legislature to facilitate local intervention court alternative orders adaptable to chancery, circuit, county, youth, municipal and justice courts.

(2) The goals of the intervention courts under this chapter include the following:

(a) To reduce alcoholism and other drug dependencies among adult and juvenile offenders and defendants and among respondents in juvenile petitions for abuse, neglect or both;

(b) To reduce criminal and delinquent recidivism and the incidence of child abuse and neglect;

(c) To reduce the alcohol-related and other drug-related court workload;

(d) To increase personal, familial and societal accountability of adult and juvenile offenders and defendants and respondents in juvenile petitions for abuse, neglect or both;

(e) To promote effective interaction and use of resources among criminal and juvenile justice personnel, child protective services personnel and community agencies; and

(f) To use corrections resources more effectively by redirecting prison-bound offenders whose criminal conduct is driven in part by drug and alcohol dependence to intensive supervision and clinical treatment available in the intervention court.

§ 9-23-21 Immunity:

The director and members of the professional and administrative staff of the intervention court who perform duties in good faith under this chapter are immune from civil liability for:

(a) Acts or omissions in providing services under this chapter; and

(b) The reasonable exercise of discretion in determining eligibility to participate in the intervention court.

§ 9-23-5 Definitions:

For the purposes of this chapter, the following words and phrases shall have the meanings ascribed unless the context clearly requires otherwise:

(a) “Chemical” tests means the analysis of an individual's: (i) blood, (ii) breath, (iii) hair, (iv) sweat, (v) saliva, (vi) urine, or (vii) other bodily substance to determine the presence of alcohol or a controlled substance.

(b) “Crime of violence” means an offense listed in Section 97-3-2.

(c) “Intervention court” means a drug court, mental health court, veterans court or problem-solving court that utilizes an immediate and highly structured intervention process for eligible defendants or juveniles that brings together mental health professionals, substance abuse professionals, local social programs and intensive judicial monitoring.

(d) “Evidence-based practices” means supervision policies, procedures and practices that scientific research demonstrates reduce recidivism.

(e) “Risk and needs assessment” means the use of an actuarial assessment tool validated on a Mississippi corrections population to determine a person's risk to reoffend and the characteristics that, if addressed, reduce the risk to reoffend.

Administrative Office of Courts - Authority to Certify Intervention Courts

§ 9-23-7 Administrative Office of Courts to certify and monitor Intervention courts:

The Administrative Office of Courts shall be responsible for certification and monitoring of local intervention courts according to standards promulgated by the State Intervention Courts Advisory Committee.

§ 9-23-17 Powers of Administrative Office of Courts:

With regard to any intervention court, the Administrative Office of Courts shall do the following:

(a) Certify and re-certify intervention court applications that meet standards established by the Administrative Office of Courts in accordance with this chapter.

(b) Ensure that the structure of the intervention component complies with rules adopted under this section and applicable federal regulations.

(c) Revoke the authorization of a program upon a determination that the program does not comply with rules adopted under this section and applicable federal regulations.

(d) Make agreements and contracts to effectuate the purposes of this chapter with:

(i) Another department, authority or agency of the state;
(ii) Another state;
(iii) The federal government;
(iv) A state-supported or private university; or
(v) A public or private agency, foundation, corporation or individual.

(e) Directly, or by contract, approve and certify any intervention component established under this chapter.

(f) Require, as a condition of operation, that each intervention court created or funded under this chapter be certified by the Administrative Office of Courts.

(g) Collect monthly data reports submitted by all certified intervention courts, provide those reports to the State Intervention Courts Advisory Committee, compile an annual report summarizing the data collected and the outcomes achieved by all certified intervention courts and submit the annual report to the Oversight Task Force.

(h) Every three (3) years contract with an external evaluator to conduct an evaluation of the effectiveness of the intervention court program, both statewide and individual intervention court programs, in complying with the key components of the intervention courts adopted by the National

Association of Drug Court Professionals.

(i) Adopt rules to implement this chapter.

§ 9-23-9 State Intervention Courts Advisory Committee:

(1) The State Intervention Courts Advisory Committee is established to develop and periodically update proposed statewide evaluation plans and models for monitoring all critical aspects of intervention courts. The committee must provide the proposed evaluation plans to the Chief Justice and the Administrative Office of Courts. The committee shall be chaired by the Director of the Administrative Office of Courts or a designee of the director and shall consist of eleven (11) members all of whom shall be appointed by the Supreme Court. The members shall be broadly representative of the courts, mental health, veterans affairs, law enforcement, corrections, criminal defense bar, prosecutors association, juvenile justice, child protective services and substance abuse treatment communities.

(2) The State Intervention Courts Advisory Committee may also make recommendations to the Chief Justice, the Director of the Administrative Office of Courts and state officials concerning improvements to intervention court policies and procedures including the intervention court certification process. The committee may make suggestions as to the criteria for eligibility, and other procedural and substantive guidelines for intervention court operation.

(3) The State Intervention Courts Advisory Committee shall act as arbiter of disputes arising out of the operation of intervention courts established under this chapter and make recommendations to improve the intervention courts; it shall also make recommendations to the Supreme Court necessary and incident to compliance with established rules.

(4) The State Intervention Courts Advisory Committee shall establish through rules and regulations a viable and fiscally responsible plan to expand the number of adult and juvenile intervention court programs operating in Mississippi. These rules and regulations shall include plans to increase participation in existing and future programs while maintaining their voluntary nature.

(5) The State Intervention Courts Advisory Committee shall receive and review the monthly reports submitted to the Administrative Office of Courts by each certified intervention court and provide comments and make recommendations, as necessary, to the Chief Justice and the Director of the Administrative Office of Courts.

Intervention Court Funding

§ 9-23-19 Funding for Intervention courts:

(1) All monies received from any source by the intervention court shall be accumulated in a fund to be used only for intervention court purposes. Any funds remaining in this fund at the end of a fiscal year shall not lapse into any general fund, but shall be retained in the Intervention Court Fund for the funding of further activities by the intervention court.

(2) An intervention court may apply for and receive the following:

(a) Gifts, bequests and donations from private sources.
(b) Grant and contract money from governmental sources.
(c) Other forms of financial assistance approved by the court to supplement the budget of the intervention court.

(3) The costs of participation in an alcohol and drug intervention program required by the certified intervention court may be paid by the participant or out of user fees or such other state, federal or private funds that may, from time to time, be made available.

(4) The court may assess such reasonable and appropriate fees to be paid to the local Intervention Court Fund for participation in an alcohol or drug intervention program; however, all fees may be waived if the applicant is determined to be indigent.

§ 9-23-51 [Intervention] Court Fund established:

There is created in the State Treasury a special interest-bearing fund to be known as the [Intervention] Court Fund. The purpose of the fund shall be to provide supplemental funding to all [intervention] courts in the state. Monies from the funds derived from assessments under Section 99-19-73 shall be distributed by the State Treasurer upon warrants issued by the Administrative Office of Courts, pursuant to procedures set by the State [Intervention] Courts Advisory Committee to assist both juvenile [intervention] courts and adult [intervention] courts. Funds from other sources shall be distributed to the [intervention] courts in the state based on a formula set by the State [Intervention] Courts Advisory Committee. The fund shall be a continuing fund, not subject to fiscal-year limitations, and shall consist of:

(a) monies appropriated by the Legislature for the purposes of funding [intervention] courts;

(b) the interest accruing to the fund;

(c) monies received under the provisions of Section 99-19-73;

(d) monies received from the federal government; and

(e) monies received from such other sources as may be provided by law.

***See* § 99-19-73 Standard State monetary assessment for certain violations, misdemeanors and felonies; suspension or reduction of assessment prohibited; collection and deposit of assessments; refunds.**

Who Is Eligible to Participate in Intervention Court

§ 9-23-15 Alternative sentencing eligibility criteria and conditions:

(1) In order to be eligible for alternative sentencing through a local intervention court, the participant must satisfy each of the following criteria:

(a) The participant cannot have any felony convictions for any offenses that are crimes of violence as defined in Section 97-3-2 within the previous ten (10) years.

(b) The crime before the court cannot be a crime of violence as defined in Section 97-3-2.

(c) Other criminal proceedings alleging commission of a crime of violence cannot be pending against the participant.

(d) The participant cannot be charged with burglary of a dwelling under Section 97-17-23(2) or 97-17-37.

(e) The crime before the court cannot be a charge of driving under the influence of alcohol or any other drug or drugs that resulted in the death of a person.

(f) The crime charged cannot be one of trafficking in controlled substances under Section 41-29-139(f), nor can the participant have a prior conviction for same.

(2) Participation in the services of an alcohol and drug intervention component shall be open only to the individuals over whom the court has jurisdiction, except that the court may agree to provide the services for individuals referred from

another intervention court. In cases transferred from another jurisdiction, the receiving judge shall act as a special master and make recommendations to the sentencing judge.

(3) (a) As a condition of participation in an intervention court, a participant may be required to undergo a chemical test or a series of chemical tests as specified by the intervention court. A participant is liable for the costs of all chemical tests required under this section, regardless of whether the costs are paid to the intervention court or the laboratory; however, if testing is available from other sources or the program itself, the judge may waive any fees for testing. The judge may waive all fees if the applicant is determined to be indigent.

(b) A laboratory that performs a chemical test under this section shall report the results of the test to the intervention court.

(4) A person does not have a right to participate in intervention court under this chapter. The court having jurisdiction over a person for a matter before the court shall have the final determination about whether the person may participate in intervention court under this chapter. However, any person meeting the eligibility criteria in subsection (1) of this section shall, upon request, be screened for admission to intervention court.

> [T]his Court has held that there is no right to attend drug court, stating:
>
> > The Mississippi Legislature created the drug courts in part to "reduce the alcohol-related and other drug-related court workload." However, the Code intentionally refrained from creating a right by expressly stating, "A person does not have a right to participate in drug court under this chapter." Thus, [the defendant] does not have a right to transfer his case to drug court nor does he have an equal protection claim since no one has the right to attend the drug court.
>
> ***Phillips v. State*, 25 So. 3d 404, 409 (Miss. Ct. App. 2010)(citations omitted).**

Alcohol and Drug Intervention

§ 9-23-11 Alcohol and drug intervention component; requirements; rules and special orders; appointment of employees; participation costs:

(1) The Administrative Office of Courts shall establish, implement and operate a uniform certification process for all intervention courts and other problem-solving courts including juvenile courts, veterans courts or any other court designed to adjudicate criminal actions involving an identified classification of criminal defendant to ensure funding for intervention courts supports effective and proven practices that reduce recidivism and substance dependency among their participants.

(2) The Administrative Office of Courts shall establish a certification process that ensures any new or existing intervention court meets minimum standards for intervention court operation.

(a) These standards shall include, but are not limited to:

(i) The use of evidence-based practices including, but not limited to, the use of a valid and reliable risk and needs assessment tool to identify participants and deliver appropriate interventions;
(ii) Targeting medium to high-risk offenders for participation;
(iii) The use of current, evidence-based interventions proven to reduce dependency on drugs or alcohol, or both;
(iv) Frequent testing for alcohol or drugs;
(v) Coordinated strategy between all intervention court program personnel involving the use of graduated clinical interventions;
(vi) Ongoing judicial interaction with each participant; and
(vii) Monitoring and evaluation of intervention court program implementation and outcomes through data collection and reporting.

(b) Intervention court certification applications shall include:

(i) A description of the need for the intervention court;
(ii) The targeted population for the intervention court;
(iii) The eligibility criteria for intervention court participants;
(iv) A description of the process for identifying appropriate participants including the use of a risk and needs assessment and a clinical assessment;
(v) A description of the intervention court intervention components, including anticipated budget and implementation

plan;
(vi) The data collection plan which shall include collecting the following data:

1. Total number of participants;
2. Total number of successful participants;
3. Total number of unsuccessful participants and the reason why each participant did not complete the program;
4. Total number of participants who were arrested for a new criminal offense while in the intervention court program;
5. Total number of participants who were convicted of a new felony or misdemeanor offense while in the intervention court program;
6. Total number of participants who committed at least one (1) violation while in the intervention court program and the resulting sanction(s);
7. Results of the initial risk and needs assessment or other clinical assessment conducted on each participant; and
8. Total number of applications for screening by race, gender, offenses charged, indigence and, if not accepted, the reason for nonacceptance; and
9. Any other data or information as required by the Administrative Office of Courts.

(c) Every intervention court shall be certified under the following schedule:

(i) An intervention court application submitted after July 1, 2014, shall require certification of the intervention court based on the proposed drug court plan.
(ii) An intervention court initially established and certified after July 1, 2014, shall be recertified after its second year of funded operation on a time frame consistent with the other certified courts of its type.
(iii) A certified adult felony intervention court in existence on December 31, 2018, must submit a recertification petition by July 1, 2019, and be recertified under the requirements of this section on or before December 31, 2019; after the recertification, all certified adult felony intervention courts must submit a recertification petition every two (2) years to the Administrative Office of Courts. The recertification process must be completed by December 31st of every odd calendar year.

(iv) A certified youth, family, misdemeanor or chancery intervention court in existence on December 31, 2018, must submit a recertification petition by July 31, 2020, and be recertified under the requirements of this section by December 31, 2020. After the recertification, all certified youth, family, misdemeanor and chancery intervention courts must submit a recertification petition every two (2) years to the Administrative Office of Courts. The recertification process must be completed by December 31st of every even calendar year.

(3) All certified intervention courts shall measure successful completion of the drug court based on those participants who complete the program without a new criminal conviction.

(4) (a) All certified [intervention] courts must collect and submit to the Administrative Office of Courts each month, the following data:

(i) Total number of participants at the beginning of the month;
(ii) Total number of participants at the end of the month;
(iii) Total number of participants who began the program in the month;
(iv) Total number of participants who successfully completed the intervention court in the month;
(v) Total number of participants who left the program in the month;
(vi) Total number of participants who were arrested for a new criminal offense while in the intervention court program in the month;
(vii) Total number of participants who were convicted for a new criminal arrest while in the intervention court program in the month; and
(viii) Total number of participants who committed at least one (1) violation while in the intervention court program and any resulting sanction(s).

(b) By August 1, 2015, and each year thereafter, the Administrative Office of Courts shall report to the PEER Committee the information in subsection (4)(a) of this section in a sortable, electronic format.

(5) All certified intervention courts may individually establish rules and may make special orders and rules as necessary that do not conflict with the rules promulgated by the Supreme Court or the Administrative Office of Courts.

(6) A certified intervention court may appoint the full- or part-time employees it deems necessary for the work of the intervention court and shall fix the compensation of those employees. Such employees shall serve at the will and pleasure of the judge or the judge's designee.

(7) The Administrative Office of Courts shall promulgate rules and regulations to carry out the certification and re-certification process and make any other policies not inconsistent with this section to carry out this process.

(8) A certified intervention court established under this chapter is subject to the regulatory powers of the Administrative Office of Courts as set forth in Section 9-23-17.

§ 9-23-13 Court intervention services:

(1) An intervention court's alcohol and drug intervention component shall provide for eligible individuals, either directly or through referrals, a range of necessary court intervention services, including, but not limited to, the following:

(a) Screening using a valid and reliable assessment tool effective for identifying alcohol and drug dependent persons for eligibility and appropriate services;
(b) Clinical assessment; for a DUI offense, if the person has two (2) or more DUI convictions, the court shall order the person to undergo an assessment that uses a standardized evidence-based instrument performed by a physician to determine whether the person has a diagnosis for alcohol and/or drug dependence and would likely benefit from a court-approved medication-assisted treatment indicated and approved for the treatment of alcohol and/or drug dependence by the United States Food and Drug Administration, as specified in the most recent Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. Upon considering the results of the assessment, the court may refer the person to a rehabilitative program that offers one or more forms of court-approved medications that are approved for the treatment of alcohol and/or drug dependence by the United States Food and Drug Administration;
(c) Education;
(d) Referral;
(e) Service coordination and case management; and
(f) Counseling and rehabilitative care.

(2) Any inpatient treatment or inpatient detoxification program ordered by the court shall be certified by the Department of Mental Health, other appropriate

state agency or the equivalent agency of another state.

(3) All intervention courts shall make available the option for participants to use court-approved medication-assisted treatment while participating in the programs of the court in accordance with the recommendations of the National Drug Court Institute.

When a Participant Successfully Completes Intervention Court

§ 9-23-23 Completion of program; expunction of record:

If the participant completes all requirements imposed upon him by the intervention court, including the payment of fines and fees assessed and not waived by the court, the charge and prosecution shall be dismissed. If the defendant or participant was sentenced at the time of entry of plea of guilty, the successful completion of the intervention court order and other requirements of probation or suspension of sentence will result in the record of the criminal conviction or adjudication being expunged. However, no expunction of any implied consent violation shall be allowed.

CHAPTER 21

SENTENCING OPTIONS

CHARTS

CHAPTER 21

SENTENCING OPTIONS

Sentencing Rules

Mississippi Rule of Criminal Procedure 26.2(b) Judgment; Time, states in part:

> **(b) On Conviction.**
> (1) On a determination of guilt on any charge, judgment pertaining to that charge shall be pronounced and entered together with the sentence.
> (2) On a determination of guilt, the court shall, after receipt of the presentence report (unless a presentence report is not required), set a date for sentencing.
> (3) Sentence shall be imposed without unreasonable delay.

Mississippi Rule of Criminal Procedure 26.3(a), Pre-Sentence Report, states in part:

> A presentence investigation may be conducted and a report thereof shall be made as required for cases where the court has discretion in imposition of sentence. Contents of this report shall be disclosed only to the parties. A copy of said report shall be delivered to both the prosecutor and the defendant or the defense attorney within a reasonable time prior to sentencing so as to afford a reasonable opportunity for verification of the material. Prior to the sentencing proceeding, each party is required to notify the opposing party and the court of any part of the presentence report which the party intends to controvert by the production of evidence. The presentence report may contain, but is not limited to, the following information:
>
> (1) a description of the offense and the circumstances surrounding it, not limited to aspects developed for the record as part of the determination of guilt;
> (2) any prior criminal convictions of the defendant, or juvenile adjudications of delinquency;
> (3) a statement considering the economic, physical, and psychological impact of the offense on the victim and the victim's immediate family;
> (4) the defendant's financial condition;
> (5) the defendant's educational background;
> (6) a description of the defendant's employment background, including any military record and present employment status and capabilities;
> (7) the social history of the defendant, including family relationships, marital status, residence history, and alcohol or drug use;
> (8) information about environments to which the defendant might return or to which the defendant could be sent should probation be granted;

(9) information about special resources which might be available to assist the defendant, such as treatment centers, rehabilitative programs, or vocational training centers;
(10) a physical and mental examination of the defendant, if ordered by the court; and
(11) any other information required by the court. . . .

Mississippi Rule of Criminal Procedure 26.4, Sentencing Hearing, states:

(a) Generally. If the court has either discretion as to the penalty to be imposed or power to suspend execution of the sentence, the court shall conduct a sentencing hearing in all felony cases, unless waived by the parties with consent of the court. The sentencing hearing may commence immediately after a determination of guilt or may be continued to a later date. If a presentence report is required, the sentencing hearing shall not be conducted until copies thereof have been furnished or made available to the court and the parties.
(b) Enhanced Punishment Based on Prior Conviction(s). Absent stipulation, the court shall hold a hearing in order to establish the alleged prior conviction(s) to determine the defendant's status as a habitual or enhanced offender. The prosecution must establish the defendant's prior conviction(s) beyond a reasonable doubt. If the defendant disputes any conviction presented by the prosecution, the court may allow the prosecution to present additional evidence of the disputed conviction. . . .

Mississippi Rule of Criminal Procedure 26.5, Pronouncement of Judgment and Sentence, states:

(a) Pronouncement of Judgment. The judgment shall be pronounced in open court at any time after conviction, in the presence of the defendant (unless waived pursuant to Rule 10.1(b)), and recorded in the minutes of the court. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly.

***See* § 99-43-27 Plea bargaining; victim's rights.**

(b) Pronouncement of Sentence. In pronouncing sentence, the court shall:
(1) afford the defendant an opportunity, personally and/or through the defendant's attorney, to make a statement on the defendant's behalf before imposing sentence;
(2) state that a credit will be allowed on the sentence, as provided by law, for time during which the defendant has been incarcerated on the present offense; and
(3) explain to the defendant the terms of the sentence.

Mississippi Rule of Criminal Procedure 26.6, Fine, Restitution, and/or Court Costs following Adjudication of Guilt, states:

> **(a) Scope.** Rule 26.6 applies only following a determination of guilt and, therefore has no applicability to pretrial diversion, non-adjudication, and the like.
> **(b) Method of Payment; Installments.** When the defendant is sentenced to pay a fine, restitution, and/or court costs, the court may permit payment to be made within a specified period of time or in specified installments. Restitution shall be payable as promptly as possible, taking into account the defendant's indigency or economic ability to pay.
> **(c) Method of Payment; To Whom.** Unless the court expressly directs otherwise:
>
> (1) the payment of a fine, restitution, and/or court costs shall be made to the clerk of court; and
>
> (2) monies received from the defendant shall be applied as follows:
>
> (A) first, to pay any and all court costs (as designated by statute) assessed against the defendant;
>
> (B) second, to pay any restitution the defendant has been ordered to make; and
>
> (C) third, to pay any fines imposed against the defendant.
>
> The clerk shall, as promptly as practicable, forward restitution payments to the victim.
>
> **(d) Court Action upon Failure of Defendant to Pay Fine, Restitution, and/or Court Costs.** Upon the defendant's failure to pay a fine, restitution, and/or court costs, the court first must require the defendant to appear and show cause why said defendant should not be held in contempt of court. A summons requiring the defendant's appearance shall be personally served on the defendant and shall set forth the time and location of the hearing. If the defendant fails to appear, the court may issue a warrant for the defendant's arrest. During the hearing, the court shall inquire and cause an investigation to be made into the reasons for nonpayment, including whether nonpayment was willful or due to indigency or economic inability to pay. In that review:
>
> (1) If it appears to the satisfaction of the court that nonpayment is not willful, the court shall enter an order allowing the defendant additional time for payment, reducing the amount thereof or of each installment, or revoking the fine or order of restitution or the unpaid portion thereof in whole or in part. However, the court shall not suspend or reduce an assessment imposed pursuant to Mississippi Code Section 99-19-73.
>
> (2) If the court finds nonpayment is willful and finds the defendant in contempt of court, the court may direct that the defendant be incarcerated until the unpaid obligation is paid, subject, however, to section (e).
>
> **(e) Incarceration for Nonpayment of Fine, Restitution, and/or Court Costs.**
>
> (1) Incarceration shall not automatically follow the nonpayment of a fine, restitution, and/or court costs. Incarceration may be employed only after

the court has conducted a hearing and examined the reasons for nonpayment and finds, on the record, that the defendant could have made payment but refused to do so. . . .
(2) After consideration of the defendant's situation, means, and conduct with regard to the nonpayment, the court shall determine the period of any incarceration, subject to the limitations set by statute.
(3) If, at the time the fine, restitution and/or court costs was ordered, a sentence of incarceration was also imposed, the aggregate of the period of incarceration imposed pursuant to this Rule and the term of the sentence originally imposed may not exceed the maximum term of imprisonment authorized for the offense.

Mississippi Rule of Criminal Procedure 26.7, Consecutive or Concurrent Sentences, provides:

> Unless otherwise provided by law, the court may direct that the sentence being imposed will be served concurrently with, or consecutively to, any other sentence previously or simultaneously imposed upon the defendant by any court. When sentencing orders are silent, sentences shall run concurrently.

***See* § 99-19-21 Consecutive or concurrent sentences; felonies committed while under supervision or suspended sentence:**

> (1) When a person is sentenced to imprisonment on two (2) or more convictions, the imprisonment on the second, or each subsequent conviction shall, in the discretion of the court, commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction.
>
> (2) When a person is sentenced to imprisonment for a felony committed while the person was on parole, probation, earned-release supervision, post-release supervision or suspended sentence, the imprisonment shall commence at the termination of the imprisonment for the preceding conviction. The term of imprisonment for a felony committed during parole, probation, earned-release supervision, post-release supervision or suspended sentence shall not run concurrently with any preceding term of imprisonment. If the person is not imprisoned in a penitentiary for the preceding conviction, he shall be placed immediately in the custody of the Department of Corrections to serve the term of imprisonment for the felony committed while on parole, probation, earned-release supervision, post-release supervision or suspended sentence.

Non-Adjudication

§ 99-15-26 Release after successful completion of conditions:

(1)(a) In all criminal cases, felony and misdemeanor, other than crimes against the person, a crime of violence as defined in Section 97-3-2, a violation of Section 97-11-31 or crimes in which a person unlawfully takes, obtains or misappropriates funds received by or entrusted to the person by virtue of his or her public office or employment, the circuit or county court shall be empowered, upon the entry of a plea of guilty by a criminal defendant made on or after July 1, 2014, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

(b) In all misdemeanor criminal cases, other than crimes against the person, the justice or municipal court shall be empowered, upon the entry of a plea of guilty by a criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

(c) Notwithstanding paragraph (a) of this subsection (1), in all criminal cases charging a misdemeanor of domestic violence as defined in Section 99-3-7(5), a circuit, county, justice or municipal court shall be empowered, upon the entry of a plea of guilty by the criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

(d) No person having previously qualified under the provisions of this section shall be eligible to qualify for release in accordance with this section for a repeat offense. A person shall not be eligible to qualify for release in accordance with this section if charged with the offense of trafficking of a controlled substance as provided in Section 41-29-139(f) or if charged with an offense under the Mississippi Implied Consent Law. Violations under the Mississippi Implied Consent Law can only be nonadjudicated under the provisions of Section 63-11-30.

(2)(a) Conditions which the circuit, county, justice or municipal court may impose under subsection (1) of this section shall consist of:

(i) Reasonable restitution to the victim of the crime.

(ii) Performance of not more than nine hundred sixty (960) hours of public service work approved by the court.

(iii) Payment of a fine not to exceed the statutory limit.

(iv) Successful completion of drug, alcohol, psychological or psychiatric treatment, successful completion of a program designed to bring about the cessation of domestic abuse, or any combination thereof, if the court deems treatment necessary.

(v) The circuit or county court, in its discretion, may require the defendant to remain in the program subject to good behavior for a period of time not to exceed five (5) years. The justice or municipal court, in its discretion, may require the defendant to remain in the program subject to good behavior for a period of time not to exceed two (2) years.

(b) Conditions which the circuit or county court may impose under subsection (1) of this section also include successful completion of an effective evidence-based program or a properly controlled pilot study designed to contribute to the evidence-based research literature on programs targeted at reducing recidivism. Such program or pilot study may be community based or institutionally based and should address risk factors identified in a formal assessment of the offender's risks and needs.

(3) When the court has imposed upon the defendant the conditions set out in this section, the court shall release the bail bond, if any.

(4) Upon successful completion of the court-imposed conditions permitted by subsection (2) of this section, the court shall direct that the cause be dismissed and the case be closed.

(5) Upon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped, there was no disposition of such case, or the person was found not guilty at trial.

As to Polk's criminal records pertaining to Counts II and III, which were remanded to file based on Polk's guilty plea, we find that those records are eligible for expungement pursuant to Mississippi Code Section 99-15-26(5). ***Polk v. State*, 150 So. 3d 967, 970-71 (Miss. 2014).**

However, section 99-15-26 grants a circuit or county court the power to expunge a felony conviction pursuant to a guilty plea under certain conditions. ***Eubanks v. State*, 53 So. 3d 846, 848 (Miss. Ct. App. 2011).**

Purpose of Non-Adjudication

Section 99-15-26 is an extraordinary provision which allows certain misdemeanor and first-time felony offenders to be sanctioned for their offenses by means other than incarceration. A conditional dismissal under this statute is a matter of legislative grace, and it is granted in the first instance at the discretion of the court. In other words, a request to be sentenced pursuant to Section 99-15-26 can be offered during plea negotiations, but it is within the circuit or county judge's discretion to accept such a request. ***Turner v. State*, 876 So. 2d 1056, 1059 (Miss. Ct. App. 2004).**

If Defendant Fails to Comply with Conditions

In *Wallace v. State*, 607 So. 2d 1184, 1186 (Miss. 1992), Wallace received a three-year nonadjudication probationary period under section 99-15-26. When Wallace violated the terms of his nonadjudication probationary period, the trial court accepted his guilty plea and sentenced him to forty-nine years in prison. The Mississippi Supreme Court upheld Wallace's sentence, stating:

> In [section] 99-15-26 proceedings, the trial court never accepts the guilty plea and never imposes a sentence if the defendant fulfills the court-imposed conditions. Where a guilty plea is accepted and a suspended sentence is imposed, the court cannot later impose a period of incarceration exceeding the original suspended sentence where the defendant fails to maintain a standard of good behavior. . . . In the instant case, the court's imposition of a forty-nine and a half-year sentence was not an extension of a preexisting sentence. Indeed, Wallace could not have been sentenced prior to February 9, 1990 (the day on which the forty-nine and a half year sentence was imposed), because he had never been adjudged guilty before that date.

The supreme court applied the same reasoning in *Porter v. State*, 777 So. 2d 671, 672 (Miss. 2001). In *Porter*, Porter received a two-year nonadjudication probationary period under section 99-15-26. When Porter failed to make restitution payments, a condition of his nonadjudication probationary period, the trial court accepted his guilty plea and sentenced him to five years in prison. In *Porter*, the trial court "specifically stated that [it] was withholding 'acceptance of defendant's plea and adjudication of guilt and imposition of sentence in accord with [s]ection 99-15-26 pending successful completion of the conditions imposed in [the] order.'" Seago's nonadjudication order contains the same exact language. As in *Porter*, the order here clearly shows that Seago was not adjudicated guilty, nor was she sentenced for the original charge. Since Seago was never sentenced for the original charge, the trial court was not limited to the four-year nonadjudication probationary period imposed. In her plea petition, Seago acknowledged the statutory minimum and maximum sentence she could receive

for the charge of false pretense, which was zero to ten years. Seago's sentence of ten years falls within the statutory limits. This issue is without merit. ***Seago v. State*, 169 So. 3d 975, 977-78 (Miss. Ct. App. 2015) (citations omitted).**

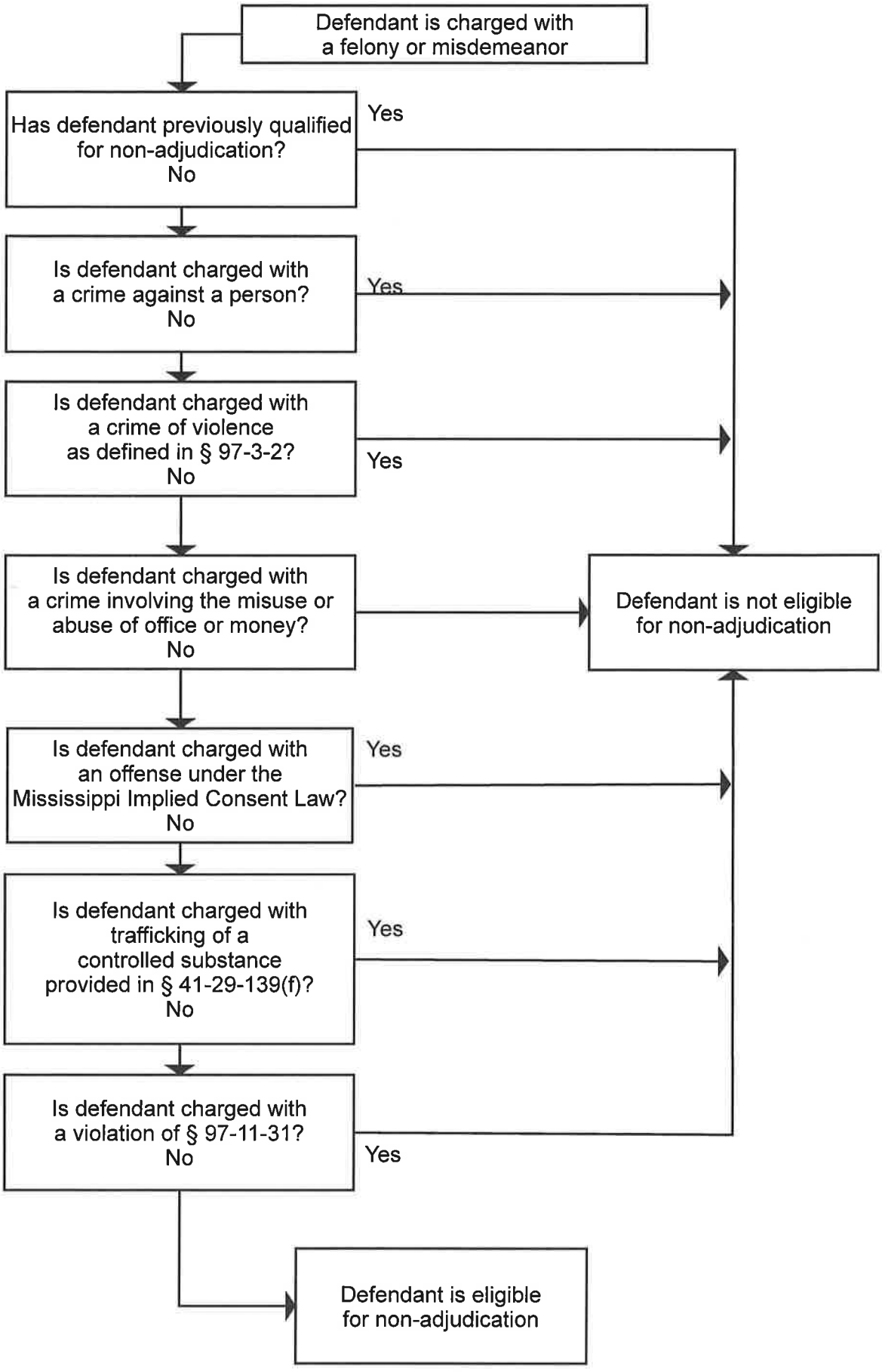
Burden of Proof of a Violation of Conditions

A § 99-15-26 conditional dismissal, like parole, is a matter of legislative grace. It is granted in the first instance at the discretion of the court, and there appears to be no principled reason why it may not, like parole, be revoked upon a showing that the defendant has more likely than not violated the terms thereof. ***Wallace v. State*, 607 So. 2d 1184, 1189-90 (Miss. 1992).**

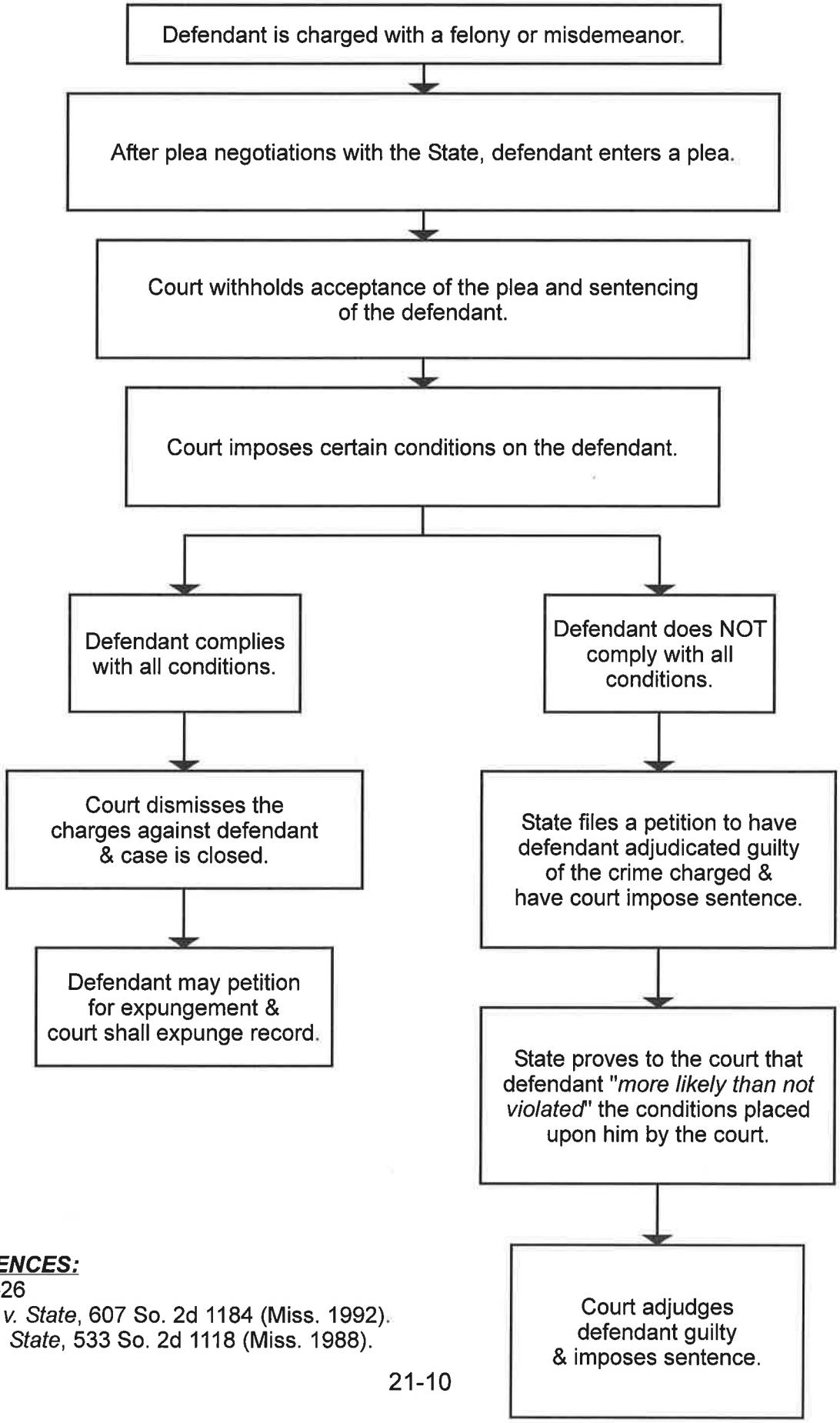
Defendant Does Not Have the Right to Withdraw Plea

There are two very practical reasons why we believe and we hold that the legislature did not intend that a defendant has a right to withdraw a guilty plea made under the provisions of § 99-15-26. First, since a defendant may be required to remain in the program for a period of time up to one-half the maximum sentence allowable for the crime committed, there could be a substantial period of time between the date of the defendant's guilty plea and the scheduled date for completion of the program. . . . A second reason, and this is a corollary of the first, is that if a defendant were allowed to withdraw his guilty plea and demand a trial whenever he violated the conditions imposed by the court, prosecutors would refuse to make plea bargain arrangements recommending the use of the program, and judges would be understandably reluctant to place defendants in the program authorized under § 99-15-26. The end result would be to severely limit, if not eliminate, the opportunity which the legislature intended to provide for non-violent misdemeanor or first-time felony offenders. The legislature surely did not intend to defeat the very purpose of the statute. . . . We hold that § 99-15-26 of the Mississippi Code did not require the trial court to allow Brown to withdraw his guilty plea. ***Brown v. State*, 533 So. 2d 1118, 1123-24 (Miss. 1988).**

Is the Defendant Eligible for Non-Adjudication?



Non-Adjudication Procedures



REFERENCES:

§ 99-15-26

Wallace v. State, 607 So. 2d 1184 (Miss. 1992).

Brown v. State, 533 So. 2d 1118 (Miss. 1988).

Probation & Suspended Sentences

§ 47-7-33 Probation; notice to Department of Corrections; support payments:

(1) When it appears to the satisfaction of any circuit court or county court in the State of Mississippi having original jurisdiction over criminal actions, or to the judge thereof, that the ends of justice and the best interest of the public, as well as the defendant, will be served thereby, such court, in termtime or in vacation, shall have the power, after conviction or a plea of guilty,

> except in a case where a death sentence or life imprisonment is the maximum penalty which may be imposed,

to suspend the imposition or execution of sentence, and place the defendant on probation as herein provided, except that the court shall not suspend the execution of a sentence of imprisonment after the defendant shall have begun to serve such sentence. In placing any defendant on probation, the court, or judge, shall direct that such defendant be under the supervision of the Department of Corrections.

> In 2014, the Legislature amended the statute and removed the portion that prohibited a convicted felon from being placed on probation. ***Davis v. State*, 199 So. 3d 701, 704 (Miss. Ct. App. 2016).**

(2) When any circuit or county court places an offender on probation, the court shall give notice to the Mississippi Department of Corrections within fifteen (15) days of the court's decision to place the offender on probation. Notice shall be delivered to the central office of the Mississippi Department of Corrections and to the regional office of the department which will be providing supervision to the offender on probation.

(3) When any circuit court or county court places a person on probation in accordance with the provisions of this section and that person is ordered to make any payments to his family, if any member of his family whom he is ordered to support is receiving public assistance through the State Department of Human Services, the court shall order him to make such payments to the county welfare officer of the county rendering public assistance to his family, for the sole use and benefit of said family.

§ 99-19-25 Suspension of sentence:

The circuit courts and the county courts, in misdemeanor cases, are hereby authorized to suspend a sentence and to suspend the execution of a sentence, or any part thereof, on such terms as may be imposed by the judge of the court. Provided, the suspension of imposition or execution of a sentence hereunder may not be revoked after a period of five (5) years. . . .

Length of Probation

§ 47-7-37 Probation & post-release supervision violations; procedure; duration:

(1) The period of probation shall be fixed by the court, and may at any time be extended or terminated by the court, or judge in vacation. Such period with any extension thereof shall not exceed five (5) years. . . .

Terms of Suspended Sentence & Probation

§ 47-7-35 Permissible conditions of probation or post-release supervision; Sex Offender Registry check:

(1) The courts referred to in Section 47-7-33 or 47-7-34 shall determine the terms and conditions of probation or post-release supervision and may alter or modify, at any time during the period of probation or post-release supervision, the conditions and may include among them the following or any other:

That the offender shall:

(a) Commit no offense against the laws of this or any other state of the United States, or of any federal, territorial or tribal jurisdiction of the United States;
(b) Avoid injurious or vicious habits;
(c) Avoid persons or places of disreputable or harmful character;
(d) Report to the probation and parole officer as directed;
(e) Permit the probation and parole officer to visit him at home or elsewhere;
(f) Work faithfully at suitable employment so far as possible;
(g) Remain within a specified area;
(h) Pay his fine in one (1) or several sums;
(i) Support his dependents;
(j) Submit, as provided in Section 47-5-601, to any type of breath, saliva or urine chemical analysis test, the purpose of which is to detect the possible presence of alcohol or a substance prohibited or controlled by any law of the State of Mississippi or the United States;
(k) Register as a sex offender if so required under Title 45, Chapter 33.

(2) When any court places a defendant on misdemeanor probation, the court must cause to be conducted a search of the probationer's name or other identifying information against the registration information regarding sex offenders maintained under Title 45, Chapter 33. The search may be conducted using the Internet site maintained by the Department of Public Safety Sex Offender Registry.

Procedure for Placing the Defendant on Probation

In *Artis v. State*, . . . this Court . . . stated as follows:

> We find pursuant to the foregoing Code sections that the normal course of procedure, when the court exercises its authority to suspend the execution of a portion of a defendant's sentence, is as follows:
>
> (1) impose a sentence;
> (2) determine what portion is to be suspended;
> (3) impose a period of probation (up to five years); and,
> (4) specify the terms and conditions upon which the probation/suspended sentence is contingent.
>
> Then, any time during the period of probation . . . if upon hearing it is determined that the probationer violated any of the specified conditions of his probation, the court has the authority to revoke any part or all of the probation or any part or all of the suspended sentence, as if the decision to suspend the sentence and place the defendant on probation had never been made. . . . The courts are empowered to revoke any part or all of the suspended sentence if, during the period of probation, it is found that the defendant violated the conditions of his probation/suspended sentence.

***Davis v. State*, 844 So. 2d 1142, 1144 (Miss. 2000).**

Suspended Sentence - In Whole or in Part

Section 47-7-33 authorizes a circuit or county court judge to suspend the execution of a sentence in a felony case, and instead place the defendant on probation. While this statute does not expressly authorize a suspension in part, we hold the greater power to suspend entirely the execution of a sentence includes the lesser power to suspend in part the execution of a sentence. ***Moore v. State*, 585 So. 2d 738, 740 (Miss. 1991).**

Probation

Supervised or Unsupervised

Thus, it is within the trial court's discretion to order supervised or unsupervised [probation and/or] PRS. ***Monroe v. State*, 203 So. 3d 1140, 1143 (Miss. Ct. App. 2016).**

"Unsupervised probation" is the functional equivalent to "a straight suspended sentence" to the extent that the sentence is not under the supervision of the Department of Corrections, but under the watchful eye of the sentencing judge. Therefore, when we endorse "unsupervised probation" or "non-reporting post-release supervision" under Section 47-7-34, we are merely sanctioning a

straight suspended sentence under Section 47-7-33(1). ***Johnson v. State*, 925 So. 2d 86, 93 n.5 (Miss. 2006).**

Length of Probation

[W]e note that the trial court in the case sub judice sentenced Miller as follows:

> The Defendant is hereby sentenced to a term of one (1) year in the Mississippi Department of Corrections followed by supervised probation under the supervision of the Mississippi Department of Corrections for a period of ten (10) years or until the court in term time or the Judge in vacation shall alter, extend, terminate or direct the execution of the above sentence. . . . The Defendant is only required to meet with [the] probation officer at the statutory minimum guidelines.

Thus, it is clear that the trial judge was placing Miller on probation, but only five (5) years of which would be served under the supervision of the MDOC with the remaining five (5) years being in essence "unsupervised probation." There is no doubt that Miller could not be required to serve more than five (5) years by way of reporting to a MDOC probation officer (supervised probation), but upon release from the reporting requirements by the MDOC officer and/or the trial court, Miller no doubt could serve the remainder of his sentence by way of unsupervised probation. The sentence was not violative of Sections 47-7-33, 47-7-34 or 47-7-37. ***Miller v. State*, 875 So. 2d 194, 200 (Miss. 2004).**

Tolling the Probationary Period

Probation may be lawfully revoked beyond the probationary period if a revocation petition is filed prior to the end of the probationary period-an act deemed to "toll" the running of the probationary period-and the State acts on the petition within a reasonable time. ***Leech v. State*, 994 So. 2d 850, 853-54 (Miss. Ct. App. 2008).**

This is an issue of apparent first impression in this State, and to begin our analysis we look first to the plain language of Section 47-7-37:

> The period of probation shall be fixed by the court, and may at any time be extended or terminated by the court, or judge in vacation. Such period with any extension thereof shall not exceed five (5) years. . . . At any time during the period of probation the court, or judge in vacation, may issue a warrant for violating any of the conditions of probation or suspension of sentence and cause the probationer to be arrested. . . .

We agree with Ellis's assertion that when the Leflore County Circuit Court revoked her probation and subsequently detained and returned her to Mississippi, the court lacked the jurisdiction. At the time of her arrest, on or about November 20, 1996, the five year term of her probation had already expired by several months and, therefore, could not be revoked. . . . Had the "written statement" been

received by an officer who then lawfully arrested the probationer prior to the running of the five year term, that would have been sufficient to toll the running of the five year period in accord with *Jackson v. State*, 483 So. 2d 1353 (Miss. 1986). In *Jackson* we held that a petition for revocation filed eleven days prior to the expiration of the probationary period tolled the running of the five year period. . . . Because our statutes do not specifically require the filing of a petition of revocation, we do not today adopt a rule that the filing of such petition is a specific requirement for tolling the running of the probationary period. ***Ellis v. State*, 748 So. 2d 130, 133-34 (Miss. 1999).**

Court records show that a petition for revocation of probation was filed January 13, 1977, approximately eleven (11) days prior to the expiration of the probationary period. We hold that this tolled the running of the five (5) year period, and since the petition was filed prior to the end of the probationary period and the lower court acted on the petition within a reasonable time (13 days) that the revocation of probation and sentence of three (3) years was lawful. If this were not the law, then a probationer who violates his probation on the last day of the five (5) year period would have to be caught and given a hearing that day or his probation could not be revoked. ***Jackson v. State*, 483 So. 2d 1353, 1356 (Miss. 1986).**

Notification of Terms of Suspended Sentence & Probation

[T]he Mississippi Supreme Court has noted that a defendant may be placed on probation where the trial court orally informs him of the terms and conditions attached to the suspended sentence. ***Harwell v. State*, 817 So. 2d 598, 600 (Miss. Ct. App. 2002).**

Nevertheless, we find that due process requires that the trial judge at least orally inform the defendant of the terms and conditions upon which his suspended sentence is contingent before it may be properly revoked for the violation of those terms and conditions. ***Artis v. State*, 643 So. 2d 533, 538 (Miss. 1994).**

Revocation of Probation

§ 47-7-37 Probation & post-release supervision violations; procedure; duration:

(1) The period of probation shall be fixed by the court, and may at any time be extended or terminated by the court, or judge in vacation. Such period with any extension thereof shall not exceed five (5) years, except that in cases of desertion and/or failure to support minor children, the period of probation may be fixed and/or extended by the court for so long as the duty to support such minor children exists. The time served on probation or post-release supervision may be reduced pursuant to Section 47-7-40.

(2) At any time during the period of probation, the court, or judge in vacation, may issue a warrant for violating any of the conditions of probation or suspension of sentence and cause the probationer to be arrested. Any probation and parole officer may arrest a probationer without a warrant, or may deputize any other officer with power of arrest to do so by giving him a written statement setting forth that the probationer has, in the judgment of the probation and parole officer, violated the conditions of probation. Such written statement delivered with the probationer by the arresting officer to the official in charge of a county jail or other place of detention shall be sufficient warrant for the detention of the probationer.

(3) Whenever an offender is arrested on a warrant for an alleged violation of probation as herein provided, the department shall hold an informal preliminary hearing within seventy-two (72) hours of the arrest to determine whether there is reasonable cause to believe the person has violated a condition of probation. A preliminary hearing shall not be required when the offender is not under arrest on a warrant or the offender signed a waiver of a preliminary hearing. The preliminary hearing may be conducted electronically. If reasonable cause is found, the offender may be confined no more than twenty-one (21) days from the admission to detention until a revocation hearing is held. If the revocation hearing is not held within twenty-one (21) days, the probationer shall be released from custody and returned to probation status.

(4) If a probationer or offender is subject to registration as a sex offender, the court must make a finding that the probationer or offender is not a danger to the public prior to release with or without bail. In determining the danger posed by the release of the offender or probationer, the court may consider the nature and circumstances of the violation and any new offenses charged; the offender or probationer's past and present conduct, including convictions of crimes and any record of arrests without conviction for crimes involving violence or sex crimes; any other evidence of allegations of unlawful sexual conduct or the use of violence by the offender or probationer; the offender or probationer's family ties, length of residence in the community, employment history and mental condition; the offender or probationer's history and conduct during the probation or other

supervised release and any other previous supervisions, including disciplinary records of previous incarcerations; the likelihood that the offender or probationer will engage again in a criminal course of conduct; the weight of the evidence against the offender or probationer; and any other facts the court considers relevant.

(5) (a) The probation and parole officer after making an arrest shall present to the detaining authorities a similar statement of the circumstances of violation. The probation and parole officer shall at once notify the court of the arrest and detention of the probationer and shall submit a report in writing showing in what manner the probationer has violated the conditions of probation. Within twenty-one (21) days of arrest and detention by warrant as herein provided, the court shall cause the probationer to be brought before it and may continue or revoke all or any part of the probation or the suspension of sentence. If the court revokes probation for one or more technical violations, the court shall impose a period of imprisonment to be served in either a technical violation center or a restitution center not to exceed ninety (90) days for the first revocation and not to exceed one hundred twenty (120) days for the second revocation. For the third revocation, the court may impose a period of imprisonment to be served in either a technical violation center or a restitution center for up to one hundred eighty (180) days or the court may impose the remainder of the suspended portion of the sentence. For the fourth and any subsequent revocation, the court may impose up to the remainder of the suspended portion of the sentence. The period of imprisonment in a technical violation center imposed under this section shall not be reduced in any manner.

(b) If the offender is not detained as a result of the warrant, the court shall cause the probationer to be brought before it within a reasonable time and may continue or revoke all or any part of the probation or the suspension of sentence, and may cause the sentence imposed to be executed or may impose any part of the sentence which might have been imposed at the time of conviction. If the court revokes probation for one or more technical violations, the court shall impose a period of imprisonment to be served in either a technical violation center or a restitution center not to exceed ninety (90) days for the first revocation and not to exceed one hundred twenty (120) days for the second revocation. For the third revocation, the court may impose a period of imprisonment to be served in either a technical violation center or a restitution center for up to one hundred eighty (180) days or the court may impose the remainder of the suspended portion of the sentence. For the fourth and any subsequent revocation, the court may impose up to the remainder of the suspended portion of the sentence. The period of imprisonment in a technical violation center imposed under this section shall not be reduced in any manner.

(c) If the court does not hold a hearing or does not take action on the violation within the twenty-one-day period, the offender shall be released from detention and shall return to probation status. The court may subsequently hold a hearing

and may revoke probation or may continue probation and modify the terms and conditions of probation. If the court revokes probation for one or more technical violations, the court shall impose a period of imprisonment to be served in either a technical violation center operated by the department or a restitution center not to exceed ninety (90) days for the first revocation and not to exceed one hundred twenty (120) days for the second revocation. For the third revocation, the court may impose a period of imprisonment to be served in either a technical violation center or a restitution center for up to one hundred eighty (180) days or the court may impose the remainder of the suspended portion of the sentence. For the fourth and any subsequent revocation, the court may impose up to the remainder of the suspended portion of the sentence. The period of imprisonment in a technical violation center imposed under this section shall not be reduced in any manner.

(d) For an offender charged with a technical violation who has not been detained awaiting the revocation hearing, the court may hold a hearing within a reasonable time. The court may revoke probation or may continue probation and modify the terms and conditions of probation. If the court revokes probation for one or more technical violations the court shall impose a period of imprisonment to be served in either a technical violation center operated by the department or a restitution center not to exceed ninety (90) days for the first revocation and not to exceed one hundred twenty (120) days for the second revocation. For the third revocation, the court may impose a period of imprisonment to be served in either a technical violation center or a restitution center for up to one hundred eighty (180) days or the court may impose the remainder of the suspended portion of the sentence. For the fourth and any subsequent revocation, the court may impose up to the remainder of the suspended portion of the sentence. The period of imprisonment in a technical violation center imposed under this section shall not be reduced in any manner.

(6) If the probationer is arrested in a circuit court district in the State of Mississippi other than that in which he was convicted, the probation and parole officer, upon the written request of the sentencing judge, shall furnish to the circuit court or the county court of the county in which the arrest is made, or to the judge of such court, a report concerning the probationer, and such court or the judge in vacation shall have authority, after a hearing, to continue or revoke all or any part of probation or all or any part of the suspension of sentence, and may in case of revocation proceed to deal with the case as if there had been no probation. In such case, the clerk of the court in which the order of revocation is issued shall forward a transcript of such order to the clerk of the court of original jurisdiction, and the clerk of that court shall proceed as if the order of revocation had been issued by the court of original jurisdiction. Upon the revocation of probation or suspension of sentence of any offender, such offender shall be placed in the legal custody of the State Department of Corrections and shall be subject to the requirements thereof.

(7) Any probationer who removes himself from the State of Mississippi without

permission of the court placing him on probation, or the court to which jurisdiction has been transferred, shall be deemed and considered a fugitive from justice and shall be subject to extradition as now provided by law. No part of the time that one is on probation shall be considered as any part of the time that he shall be sentenced to serve.
(8) The arresting officer, except when a probation and parole officer, shall be allowed the same fees as now provided by law for arrest on warrant, and such fees shall be taxed against the probationer and paid as now provided by law.
(9) The arrest, revocation and recommitment procedures of this section also apply to persons who are serving a period of post-release supervision imposed by the court.
(10) Unless good cause for the delay is established in the record of the proceeding, the probation revocation charge shall be dismissed if the revocation hearing is not held within thirty (30) days of the warrant being issued. . . .

§ 47-7-37.1 Revocation of probation:

Notwithstanding any other provision of law to the contrary, if a court finds by a preponderance of the evidence, that a probationer or a person under post-release supervision has committed a felony or absconded, the court may revoke his probation and impose any or all of the sentence. For purposes of this section, "absconding from supervision" means the failure of a probationer to report to his supervising officer for six (6) or more consecutive months.

§ 99-19-29 Vacation of suspension or conditional pardon:

Whenever any court granting a suspended sentence, or the governor granting a pardon, based on conditions which the offender has violated or failed to observe, shall be convinced by proper showing, of such violation of sentence or pardon, then the governor or the judge of the court granting such suspension of sentence shall be authorized to annul and vacate such suspended sentence or conditional pardon in vacation or court time. The convicted offender shall thereafter be subject to arrest and court sentence service, as if no suspended sentence or conditional pardon had been granted, and shall be required to serve the full term of the original sentence that has not been served. The offender shall be subject, after such action by the court or the governor, to arrest and return to proper authorities as in the case with ordinary escaped prisoner.

Procedure for Revoking a Suspended Sentence & Probation

Mississippi Rule of Criminal Procedure 27.1, Initiation of Revocation Proceedings; Securing the Probationer's Presence, states:

> **(a) Initiation of Revocation Proceedings.** If a probationer has violated a condition of probation or has acted contrary to a lawful instruction issued by the supervising officer, the supervising officer or the prosecuting attorney may petition the sentencing court to revoke or modify probation.
>
> > Section (a) provides a mechanism for probation revocation that permits initiation of the proceeding by the supervising officer or the prosecuting attorney. The court may issue an arrest warrant or a summons to compel the probationer's appearance or, if necessary, the supervising officer (or the officer's agent) may take the probationer into custody without a warrant. *See* Miss. Code Ann. § 47-7-37(2). ***Cmt.***
>
> **(b) Securing the Probationer's Presence.** Pursuant to a petition to revoke or modify, the sentencing court may, when appropriate, issue a warrant for the probationer's arrest or issue a summons directing the probationer to appear on a specified date for a revocation hearing.
>
> **(c) Arrest by Supervising Officer.** The probationer may be arrested without a warrant by the supervising officer responsible for the probationer's supervision or by the officer's agent, pursuant to statute, for violation of a condition of probation imposed or an instruction issued.

Mississippi Rule of Criminal Procedure 27.2, Preliminary Hearing After Arrest, states:

> Whenever a probationer is arrested for an alleged violation of probation, an informal preliminary hearing shall be conducted as prescribed by statute.
>
> > Rule 27.2 refers to the applicable statute(s) on preliminary hearings in the context of probation-revocation proceedings. *See, e.g.*, Miss. Code Ann. § 47-7-37(3). ***Cmt.***

Mississippi Rule of Criminal Procedure 27.3, Revocation of Probation, states:

> **(a) Hearing.** A hearing to determine whether probation should be revoked shall be held before the sentencing court, as prescribed by statute.
>
> > Rule 27.3 is drafted to comply with the constitutional requirements articulated in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed.

656 (1973). Rules 27.2 and 27.3 together set up a two-hearing process specifically required by *Gagnon*. Rule 27.2 provides for an informal preliminary hearing as prescribed by statute. Rule 27.3(a) then provides for the revocation hearing itself, as prescribed by statute. *See, e.g.*, Miss. Code Ann. § 47-7-37. ***Cmt.***

(b) Summary Disposition. The probationer may waive the hearing prescribed by Rule 27.3(a) and the sentencing court may make a final disposition of the issue, if:

(1) the probationer has been given sufficient notice of the charges and sufficient notice of the evidence to be relied upon; and

(2) the probationer admits, under the requirements of Rule 27.3(e), commission of the alleged violation.

Section (b) allows the probationer to waive a revocation hearing within carefully defined limits. Two hearings are not necessary if, at the first hearing, the probationer has received sufficient notice of the charges and of the evidence of the probation violation, and the probationer admits commission of the alleged violation consistent with section (e). ***Cmt.***

(c) Presence. The probationer is entitled to be present at the hearing.

(d) Counsel.

(1) The probationer may be represented by retained counsel.

(2) Counsel shall be appointed to represent an indigent probationer if the probationer makes a colorable claim that:

(A) the probationer has not committed the alleged violation of the conditions of probation or the instructions issued by the supervising officer; or

(B) even when the violation is a matter of public record or is uncontested, there are substantial reasons that justify or mitigate the violation and make revocation inappropriate, and those reasons are complex or otherwise difficult to develop or present.

Section (d)(1) provides a probationer may be represented by retained counsel. Section (d)(2) states the right to appointed counsel for indigent probationers is determined on a case-by-case basis, through a due-process analysis. *See Riely v. State*, 562 So. 2d 1206 (Miss. 1990). ***Cmt.***

[P]robationers (and parolees) do not "have, per se, a right to counsel at revocation hearings." Whether probationers have a right to counsel must be answered "on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system." Because the "facts and circumstances in

[revocation] hearings are susceptible of almost infinite variation," the United States Supreme Court opined that "[i]t is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines" for determining when counsel must be provided in order to meet due process requirements. "Presumptively, it may be said that counsel should be provided in cases complex or otherwise difficult to develop." Finally, "[i]n every case in which a request for counsel at a hearing is refused, the grounds for refusal should be stated succinctly in the record." ***Riely v. State*, 562 So. 2d 1206, 1209 (Miss. 1990) (citations omitted).**

(e) Admissions by the Probationer. Before accepting an admission by a probationer that the probationer has violated a condition of probation or a lawful instruction issued by the supervising officer, the court shall determine that the probationer understands the following:

(1) the nature of the violation to which an admission is offered;

(2) the right to be represented by counsel as provided by Rule 27.3(d);

(3) the right to testify and to present witnesses and other evidence on the probationer's own behalf and to cross-examine adverse witnesses under subsection (f)(1); and

(4) that, if the alleged violation involves a criminal offense for which the probationer has not yet been tried, the probationer may still be tried for that offense and, although the probationer may not be required to testify, that any statement made by the probationer at the present proceeding may be used against the probationer at a subsequent proceeding or trial.

The court shall also determine that the probationer waives these rights, that the admission is voluntary and not the result of force, threats, coercion, or promises, and that there is a factual basis for the admission.

The procedure for accepting an admission under section (e) applies at either the informal preliminary hearing or the revocation hearing. If there is no admission, the hearing is conducted pursuant to section (f). ***Cmt.***

(f) Nature of the Hearing.

(1) The judge must find by a preponderance of the evidence that a violation of the conditions of probation or the instructions occurred. Each party shall have the right to present evidence and the right to confront and cross-examine adverse witnesses who appear and testify in person. The court may receive any reliable, relevant evidence not legally privileged, including hearsay.

(2) If the alleged violation involves a criminal offense for which the probationer has not yet been tried, the probationer shall be advised at the beginning of the revocation hearing that, regardless of the outcome of the revocation hearing, the probationer may still be held for that offense and

that any statement made by the probationer at the hearing may be used against the probationer at a subsequent proceeding or trial.
(3) In cases involving breach of a condition of probation because of nonpayment of a fine, restitution, or court costs, incarceration shall not automatically follow nonpayment. Incarceration may be employed only after the court has examined the reasons for nonpayment and finds, on the record, that the probationer could have satisfied payment but refused to do so.

Section (f)(3) recognizes the constitutional limits on revocation of probation for non-payment. As the United States Supreme Court explained in *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983):

> [I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation. . . . If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment.

Id. at 672. ***Cmt.***

(g) Disposition. If the judge finds that a violation of the conditions of probation or lawful instructions occurred, it may revoke, modify, or continue probation.

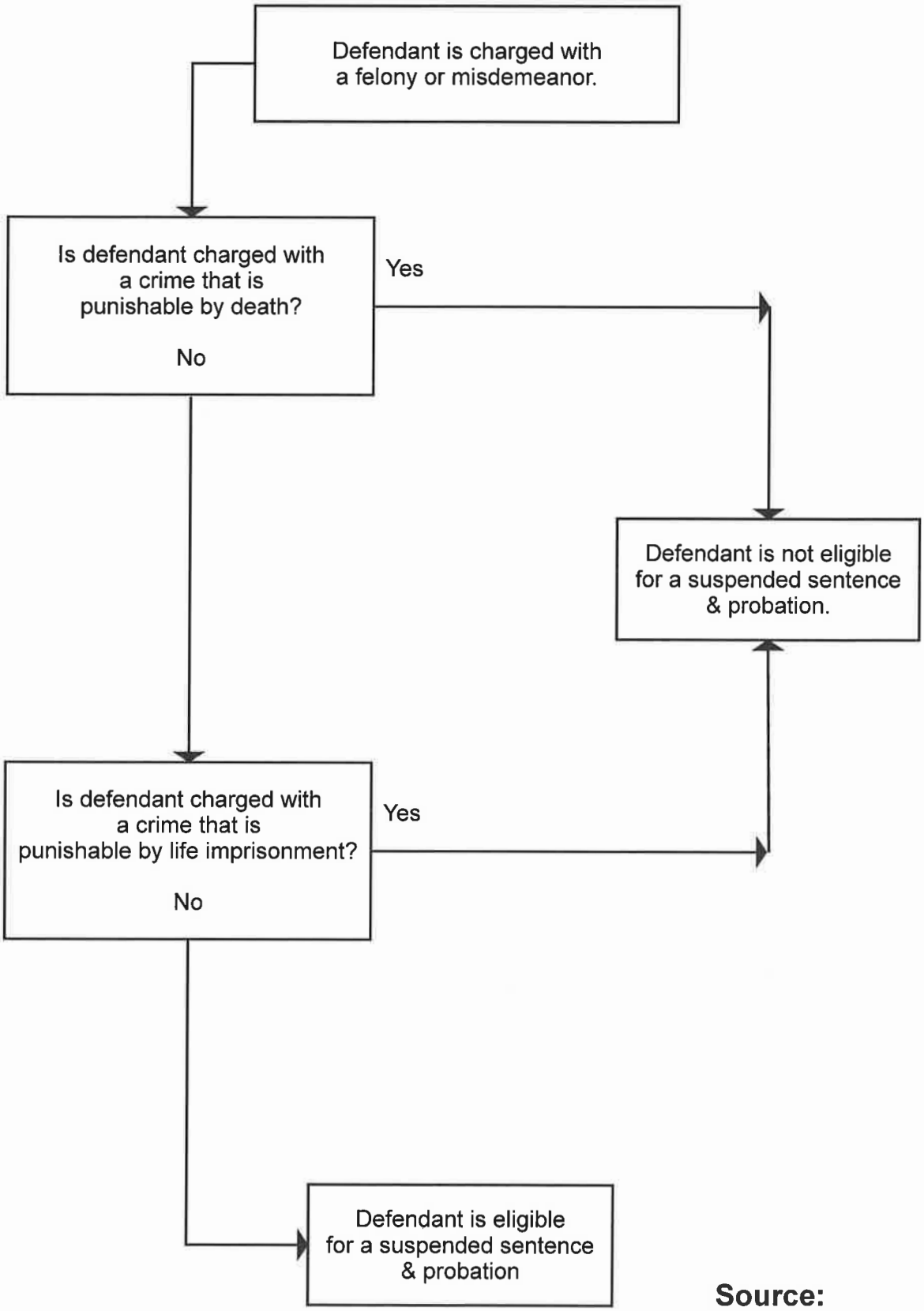
(h) Record. The judge shall make a written statement or state for the record the evidence relied upon, and the reasons for, revoking probation.

Section (h) is included to give a reviewing court a basis for evaluating the revocation hearing and decision. *Gagnon* requires that a written statement be made as to the evidence relied upon, and the reasons for, revoking probation. A written judgment entry would constitute a sufficient written statement. ***Cmt.***

Mississippi Rule of Criminal Procedure 27.4, Other Proceedings, states:

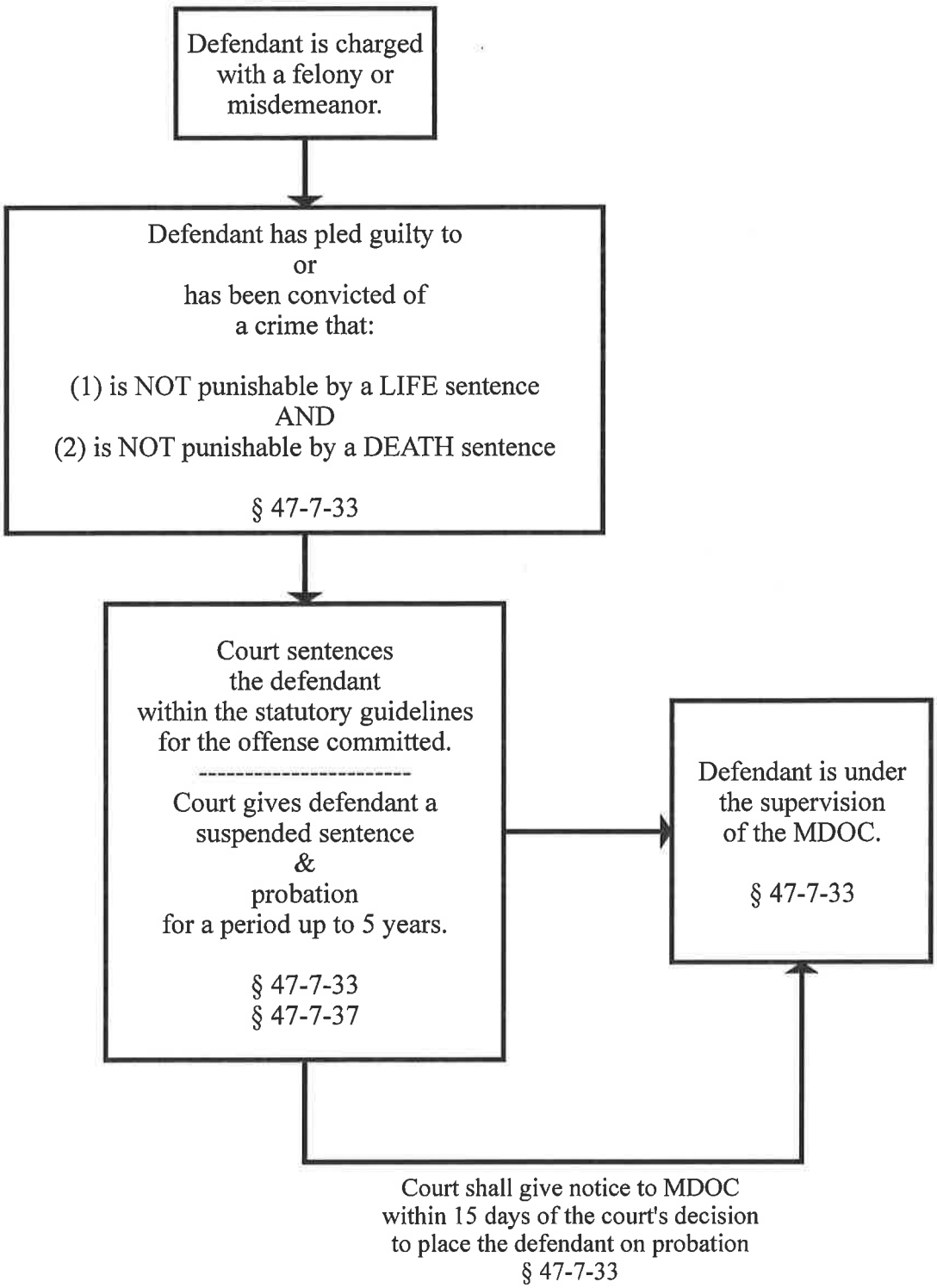
Proceedings to revoke or modify any other suspended sentence or period of post-release supervision shall be conducted in accordance with Rule 27.

Is the Defendant Eligible for a Suspended Sentence & Probation?



Source:
§ 47-7-33

Procedure for Imposing a Suspended Sentence & Probation



Revoking Probation & Suspended Sentence

Defendant (Probationer) is placed on probation

→ Probationer violates a condition of probation or suspension of sentence

↓

The court issues a warrant for probationer for violating a condition of probation or suspension of sentence

↓

Probationer is arrested

↓ 72 hours

Probationer has a preliminary hearing

↓ 21 days

The court has probationer brought before it for revocation hearing

← If a hearing is not held within 21 days, probationer is released & returned to probation status

↓

If the court finds that it is more likely than not that probationer violated a condition of probation or suspension of sentence, the court can revoke all or any part of the probation or suspension of sentence according to § 47-7-37(5)

→ If a court finds by a preponderance of the evidence, that a probationer has committed a felony or absconded, the court may revoke probation & impose any or all of the sentence

← If the court revokes probation for a technical violation (t.v.),

1st t.v. - court shall impose up to 90 days in t.v. center or restitution center

2nd t.v. - court shall impose up to 120 days in t.v. center or restitution center

3rd t.v. - court may impose up to 180 days in t.v. center or restitution center or up to the remainder of the suspended portion of sentence

4th or more t.v. - court may impose up to the remainder of the suspended portion of sentence

↓

Technical violation is defined as an act or omission by the probationer that violates a condition or conditions of probation placed on the probationer by the court or the probation officer

Sources:
§§ 47-7-2, 47-7-37, & 47-7-37.1

Post-Release Supervision

§ 47-7-34 Post-release supervision; imposition by court; restrictions; termination:

(1) When a court imposes a sentence upon a conviction for any felony committed after June 30, 1995, the court, in addition to any other punishment imposed if the other punishment includes a term of incarceration in a state or local correctional facility, may impose a term of post-release supervision. However, the total number of years of incarceration plus the total number of years of post-release supervision shall not exceed the maximum sentence authorized to be imposed by law for the felony committed. The defendant shall be placed under post-release supervision upon release from the term of incarceration. The period of supervision shall be established by the court.

> It is clear that Section 47-7-34 applies only to felonies, not misdemeanors, as is the case here. ***Conner v. State*, 750 So. 2d 1258, 1260 (Miss. 2000).**

(2) The period of post-release supervision shall be conducted in the same manner as a like period of supervised probation, including a requirement that the defendant shall abide by any terms and conditions as the court may establish. Failure to successfully abide by the terms and conditions shall be grounds to terminate the period of post-release supervision and to recommit the defendant to the correctional facility from which he was previously released. Procedures for termination and recommitment shall be conducted in the same manner as procedures for the revocation of probation and imposition of a suspended sentence as required pursuant to Section 47-7-37.

(3) Post-release supervision programs shall be operated through the probation and parole unit of the Division of Community Corrections of the department. The maximum amount of time that the Mississippi Department of Corrections may supervise an offender on the post-release supervision program is five (5) years.

> Finally, we suggest to our learned trial judges that when sentencing a defendant to a period of incarceration followed by a period of supervision by the MDOC, post-release supervision under the provisions of Miss. Code Ann. § 47-7-34, is the better procedure. Additionally, we suggest to our trial judges that when sentencing a defendant to either supervised probation or post-release supervision, it should be made clear in the sentencing order that any MDOC supervision is limited to no more than the statutory maximum of five years. ***Miller v. State*, 875 So. 2d 194, 200 (Miss. 2004).**

Purpose of Post-Release Supervision

Supervised probation and post-release supervision are totally different statutory creatures. Section 47-7-33 provides for supervised probation, while section 47-7-34 provides for post-release supervision. At least two major differences in these two statutes are (1) supervised probation may not be imposed on a convicted felon while post-release supervision may be imposed on a convicted felon; and, (2) supervised probation is limited to five years while post-release supervision is not. Section 47-7-34 states inter alia that "the total number of years of incarceration plus the total number of years of post-release supervision shall not exceed the maximum sentence authorized to be imposed by law for the felony committed." While the statute unquestionably limits to five years the period of time that the MDOC may supervise an offender who is on post-release supervision, the clear language of the statute does not limit the total number of years of post-release supervision to five years. ***Miller v. State*, 875 So. 2d 194, 199 (Miss. 2004).**

Section 47-7-34 created the post-release supervision program which provides for a term of post-release supervision in addition to any term of incarceration imposed upon those already convicted of a felony. . . . Post-release supervision is separate and distinct from probation. This is evidenced by the statutory provision that a "period of post-release supervision shall be conducted in the same manner as a like period of supervised probation. . . ." ***Carter v. State*, 754 So. 2d 1207, 1208 (Miss. 2000).**

Revocation of Post-Release Supervision

The establishing statute permits a court to impose a term of post-release supervision to follow a term of incarceration, provided that the term of incarceration plus the term of post-release supervision do not exceed the maximum sentence for the crime. Also, a "period of post-release supervision shall be conducted in the same manner as a like period of supervised probation, including a requirement that the defendant shall abide by any terms and conditions as the court may establish." The procedures for revocation of post-release supervision and re-commitment of the offender to the correctional facility must be "conducted in the same manner as procedures for the revocation of probation and imposition of a suspended sentence." The revocation of probation or post-release supervision involves a loss of liberty and requires that the offender be afforded due process. ***Ivory v. State*, 999 So. 2d 420, 427 (Miss. Ct. App. 2008) (citations omitted).**

Terms of Post-Release Supervision

§ 47-7-35 Permissible conditions of probation or post-release supervision; Sex Offender Registry check:

(1) The courts referred to in Section 47-7-33 or 47-7-34 shall determine the terms and conditions of probation or post-release supervision and may alter or modify, at any time during the period of probation or post-release supervision, the conditions and may include among them the following or any other:

That the offender shall:

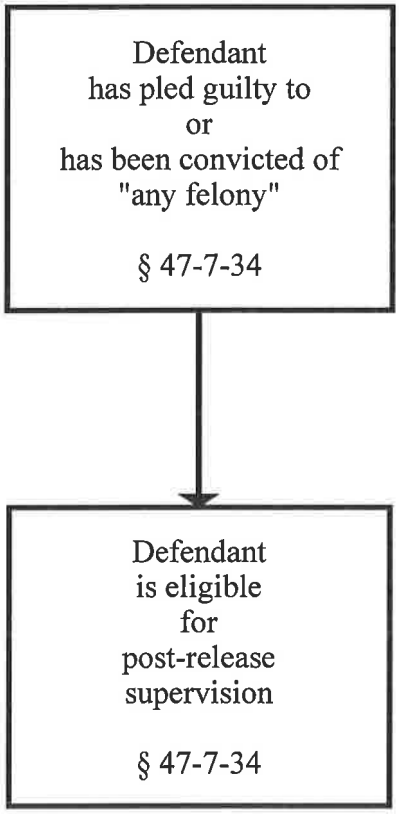
(a) Commit no offense against the laws of this or any other state of the United States, or of any federal, territorial or tribal jurisdiction of the United States;
(b) Avoid injurious or vicious habits;
(c) Avoid persons or places of disreputable or harmful character;
(d) Report to the probation and parole officer as directed;
(e) Permit the probation and parole officer to visit him at home or elsewhere;
(f) Work faithfully at suitable employment so far as possible;
(g) Remain within a specified area;
(h) Pay his fine in one (1) or several sums;
(i) Support his dependents;
(j) Submit, as provided in Section 47-5-601, to any type of breath, saliva or urine chemical analysis test, the purpose of which is to detect the possible presence of alcohol or a substance prohibited or controlled by any law of the State of Mississippi or the United States;
(k) Register as a sex offender if so required under Title 45, Chapter 33.

(2) When any court places a defendant on misdemeanor probation, the court must cause to be conducted a search of the probationer's name or other identifying information against the registration information regarding sex offenders maintained under Title 45, Chapter 33. The search may be conducted using the Internet site maintained by the Department of Public Safety Sex Offender Registry.

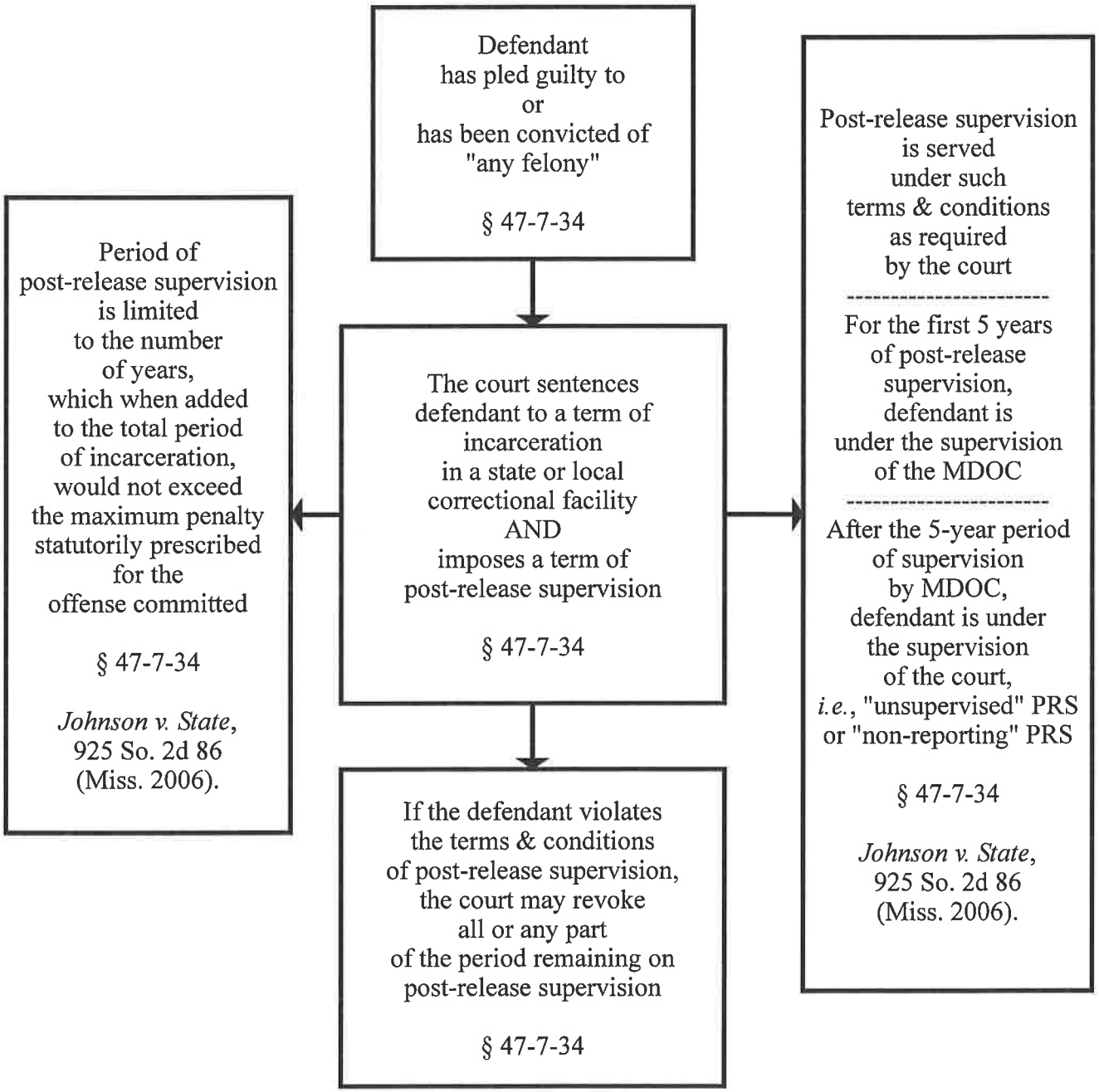
§ 47-7-37.1 Revocation of probation:

Notwithstanding any other provision of law to the contrary, if a court finds by a preponderance of the evidence, that a probationer or a person under post-release supervision has committed a felony or absconded, the court may revoke his probation and impose any or all of the sentence. For purposes of this section, "absconding from supervision" means the failure of a probationer to report to his supervising officer for six (6) or more consecutive months.

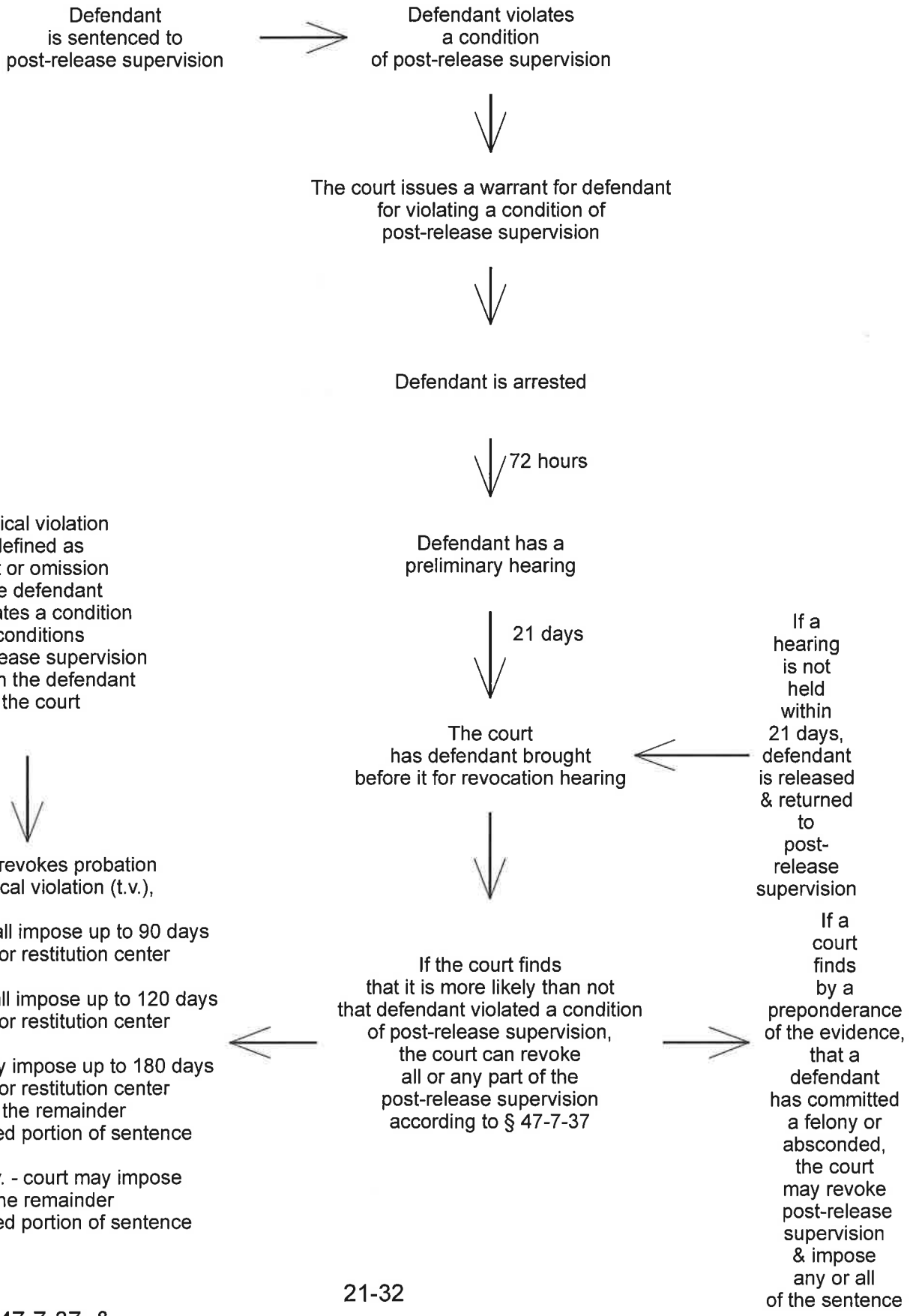
Is the Defendant Eligible for Post-Release Supervision?



Procedures for Sentencing to Post-Release Supervision



Revoking Post-Release Supervision



Sources:
§§ 47-7-2, 47-7-37, & 47-7-37.1

Earned Probation

§ 47-7-47 Probation; notification; additional conditions authorized; restitution; alcohol and drug tests:

(1) The judge of any circuit court may place an offender on a program of earned probation after a period of confinement as set out herein and the judge may seek the advice of the commissioner and shall direct that the defendant be under the supervision of the department.

(2) (a) Any circuit court or county court may, upon its own motion, acting upon the advice and consent of the commissioner not earlier than thirty (30) days nor later than one (1) year after the defendant has been delivered to the custody of the department, to which he has been sentenced, suspend the further execution of the sentence and place the defendant on earned probation, except when a death sentence or life imprisonment is the maximum penalty which may be imposed or if the defendant has been confined two (2) or more times for the conviction of a felony on a previous occasion in any court or courts of the United States and of any state or territories thereof or has been convicted of a felony involving the use of a deadly weapon.

> First, the circuit court did not retain sentencing authority over Johnson, and even if it had attempted to retain sentencing authority over him, it could have only done so for one year pursuant to section 47-7-47(2)(a). . . . Without retention of sentencing jurisdiction pursuant to section 47-7-47, the circuit court's authority to modify Johnson's sentence terminated at the expiration of the term of court. ***Johnson v. State*, 77 So. 3d 1152, 1155 (Miss. Ct. App. 2012).**
>
> The circuit court judge stated in Order No. 1 that, as Owens failed to pursue a hearing on these two post-trial motions and there was no order carrying these motions from term to term, it appeared that Owens waived the motions and the circuit court's jurisdiction to consider them was "questionable." We agree in part. The circuit court has jurisdiction to consider a motion regarding sentencing if "it is made within the term of court, the motion is pending at the end of the term under section 11-1-16, or the trial court retains jurisdiction pursuant to section 47-7-47." In this case, the court did not retain jurisdiction pursuant to section 47-7-47. Additionally, the term of court ended on March 21, 2003; therefore, Owens's March 20, 2003, motion for reconsideration was filed before the

term of court ended, but his March 27, 2003, motion was not. As such, the circuit court had jurisdiction to consider only Owens's first motion for reconsideration; Owens's March 27, 2003, motion for reconsideration was filed untimely, as the term of court had already expired. Accordingly, the circuit court was without jurisdiction to consider that motion. ***Owens v. State*, 17 So. 3d 628, 632–33 (Miss. Ct. App. 2009) (citations omitted).**

The circuit court does not have jurisdiction to hear a motion regarding sentencing unless it is made within the term of court, the motion is pending at the end of the term under section 11-1-16, or the trial court retains jurisdiction pursuant to section 47-7-47. Prior to a statutory amendment in 2001, section 47-7-47 stated that the trial court could suspend a sentence "at the time of the initial sentencing only." This provision was interpreted to mean that the initial sentencing order had to state the court retained jurisdiction in order to suspend the sentence. In 2001, however, this "initial sentencing" language was deleted, indicating that the trial court might retain sentencing jurisdiction during the statutory time frame (between thirty days and one year) without stating so at the initial sentencing. To the extent Ducote may be correct that section 47-7-47 gives the trial judge between thirty days and one year to modify or suspend sentences, the authority to do so is within the sound discretion of the court. Here, the judge determined not to do so, and we find no error in this choice. ***Ducote v. State*, 970 So. 2d 1309, 1313 (Miss. Ct. App. 2007) (citations omitted).**

We first note that the statute does not pertain to re-sentencing - it pertains only to a suspension of the further execution of a sentence and to the placement of the convicted felon on earned probation. ***Creel v. State*, 944 So. 2d 891, 893 (Miss. 2006).**

(b) The authority granted in this subsection shall be exercised by the judge who imposed sentence on the defendant, or his successor.

(c) The time limit imposed by paragraph (a) of this subsection is not applicable to those defendants sentenced to the custody of the department prior to April 14, 1977. Persons who are convicted of crimes that carry mandatory sentences shall not be eligible for earned probation.

(3) When any circuit or county court places an offender on earned probation, the court shall give notice to the Mississippi Department of Corrections within fifteen (15) days of the court's decision to place the offender on earned probation. Notice

shall be delivered to the central office of the Mississippi Department of Corrections and to the regional office of the department which will be providing supervision to the offender on earned probation.

(4) If the court places any person on probation or earned probation, the court may order the person, as a condition of probation, to a period of confinement and treatment at a private or public agency or institution, either within or without the state, which treats emotional, mental or drug-related problems. Any person who, as a condition of probation, is confined for treatment at an out-of-state facility shall be supervised pursuant to Section 47-7-71, and any person confined at a private agency shall not be confined at public expense. Time served in any such agency or institution may be counted as time required to meet the criteria of subsection (2)(a).

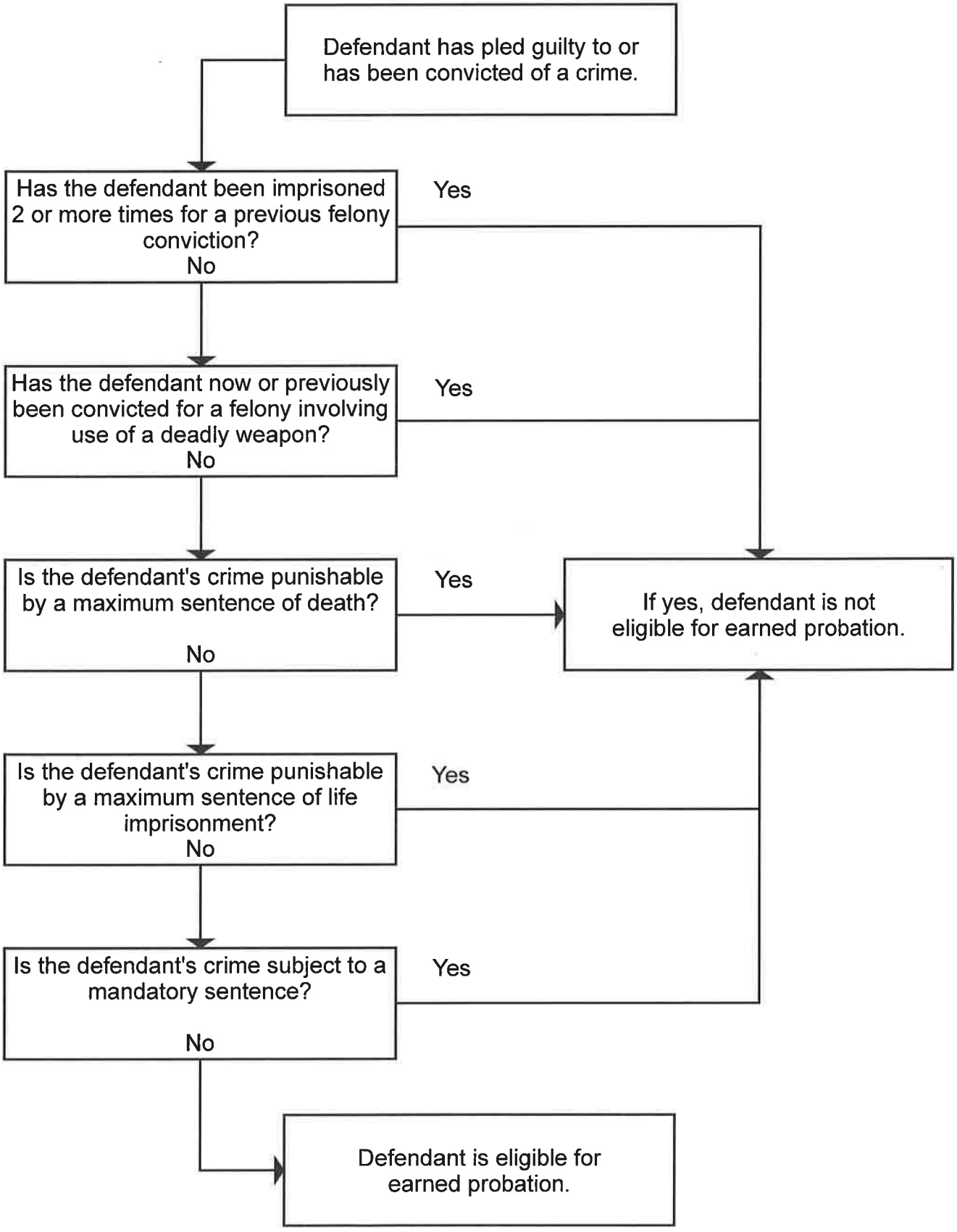
(5) If the court places any person on probation or earned probation, the court may order the person to make appropriate restitution to any victim of his crime or to society through the performance of reasonable work for the benefit of the community.

(6) If the court places any person on probation or earned probation, the court may order the person, as a condition of probation, to submit, as provided in Section 47-5-601, to any type of breath, saliva or urine chemical analysis test, the purpose of which is to detect the possible presence of alcohol or a substance prohibited or controlled by any law of the State of Mississippi or the United States.

§ 47-5-110.2 Repeal of authority to sentence persons to Regimented Inmate Discipline program:

From and after January 1, 2017, no person to be sentenced to the custody of the Mississippi Department of Corrections shall be ordered to a Regimented Inmate Discipline (RID) program by any court of this state. The Department of Corrections shall either operate RID programs for inmates sentenced to such a program prior to January 1, 2017, or devise and implement suitable alternatives for any such inmates.

Is the Defendant Eligible for Earned Probation?



Intensive Supervision Program

§ 47-5-1001 Definitions:

For purposes of Sections 47-5-1001 through 47-5-1015, the following words shall have the meaning ascribed herein unless the context shall otherwise require:

(a) "Approved electronic monitoring device" means a device approved by the department which is primarily intended to record and transmit information regarding the offender's presence or nonpresence in the home.
(b) "Correctional field officer" means the supervising probation and parole officer in charge of supervising the offender.
(c) "Court" means a circuit court having jurisdiction to place an offender into the intensive supervision program.
(d) "Department" means the Department of Corrections.
(e) "House arrest" means the confinement of a person convicted or charged with a crime to his place of residence under the terms and conditions established by the department or court.
(f) "Operating capacity" means the total number of state offenders which can be safely and reasonably housed in facilities operated by the department and in local or county jails or other facilities authorized to house state offenders as certified by the department, subject to applicable federal and state laws and rules and regulations.
(g) "Participant" means an offender placed into an intensive supervision program.

§ 47-5-1003 Program eligibility; court placement procedure; notification:

(1) An intensive supervision program may be used as an alternative to incarceration for offenders who are not convicted of a crime of violence pursuant to Section 97-3-2 as selected by the court and for juvenile offenders as provided in Section 43-21-605. Any offender convicted of a sex crime shall not be placed in the program.

(2) The court may place the defendant on intensive supervision, except when a death sentence or life imprisonment is the maximum penalty which may be imposed by a court or judge.

(3) To protect and to ensure the safety of the state's citizens, any offender who violates an order or condition of the intensive supervision program may be arrested by the correctional field officer and placed in the actual custody of the Department of Corrections. Such offender is under the full and complete jurisdiction of the department and subject to removal from the program by the classification hearing officer.

(4) When any circuit or county court places an offender in an intensive supervision program, the court shall give notice to the Mississippi Department of Corrections within fifteen (15) days of the court's decision to place the offender in an intensive supervision program. Notice shall be delivered to the central office of the Mississippi Department of Corrections and to the regional office of the department which will be providing supervision to the offender in an intensive supervision program. The courts may not require an offender to participate in the intensive supervision program during a term of probation or post-release supervision. . . .

> Additionally, the circuit court has no authority over Jones while he is in the ISP. The ISP is an alternative custodial classification; an offender in the ISP is serving time "confined as a prisoner under the jurisdiction of the [MDOC] in the normally-understood sense of that term." "In other words, an offender in the ISP is an inmate in the custody of the MDOC who is serving time on house arrest instead of being housed in a MDOC facility." An offender in the ISP is "under the full and complete jurisdiction of the [MDOC]." ***Jones v. State*, 97 So. 3d 1254, 1258 (Miss. Ct. App. 2012) (citations omitted).**

Terms & Conditions of the Intensive Supervision Program

§ 47-5-1013 Conditions of continued participation:

Participants enrolled in an intensive supervision program shall be required to:

(a) Maintain employment if physically able, or full-time student status at an approved school or vocational trade, and make progress deemed satisfactory to the correctional field officer, or both, or be involved in supervised job searches.

(b) Pay restitution and program fees as directed by the department. Program fees shall not be less than Eighty-eight Dollars ($88.00) per month. The sentencing judge may charge a program fee of less than Eighty-eight Dollars ($88.00) per month in cases of extreme financial hardship, when such judge determines that the offender's participation in the program would provide a benefit to his community. Juvenile offenders shall not pay a program fee but shall pay a monthly fee as provided in Section 47-5-1007. Program fees shall be deposited in the special fund created in Section 47-5-1007.

(c) Establish a place of residence at a place approved by the correctional field officer, and not change his residence without the officer's approval. The correctional officer shall be allowed to inspect the place of residence for alcoholic beverages, controlled substances and drug paraphernalia.

(d) Remain at his place of residence at all times except to go to work, to attend school, to perform community service and as specifically allowed in each instance by the correctional field officer.

(e) Allow administration of drug and alcohol tests as requested by the field officer.

(f) Perform not less than ten (10) hours of community service each month.

(g) Meet any other conditions imposed by the court to meet the needs of the offender and limit the risks to the community.

Department of Corrections' Regulations for the Intensive Supervision Program

§ 47-5-1005 Implementation; acquisition of electronic monitoring devices:

(1) The department shall promulgate rules that prescribe reasonable guidelines under which an intensive supervision program shall operate. These rules shall include, but not be limited to, the following:

(a) The participant shall remain within the interior premises or within the property boundaries of his or her residence at all times during the hours designated by the correctional field officer.
(b) Approved absences from the home may include, but are not limited to, the following:
(i) Working or employment approved by the court or department and traveling to or from approved employment;
(ii) Unemployed and seeking employment approved for the participant by the court or department;
(iii) Undergoing medical, psychiatric, mental health treatment, counseling or other treatment programs approved for the participant by the court or department;
(iv) Attending an educational institution or a program approved for the participant by the court or department;
(v) Participating in community work release or a community service program approved for the participant by the court or department; or
(vi) For another compelling reason consistent with the public interest, as approved by the court or department.
(c) Except in case of a medical emergency and approval by the Commissioner of the Department of Corrections, or his designee, or by circuit court order for medical purposes, no participant in the intensive supervision program may leave the jurisdiction of the State of Mississippi.

(2) The department shall select and approve all electronic monitoring devices used under Sections 47-5-1001 through 47-5-1015.

(3) The department may lease the equipment necessary to implement the intensive supervision program and to contract for the monitoring of such devices. The department is authorized to select the lowest price and best source in contracting for these services.

§ 47-5-1007 Monthly fee; participant's responsibilities:

(1) Any participant in the intensive supervision program who engages in employment shall pay a monthly fee to the department for each month such person is enrolled in the program. The department may waive the monthly fee if the offender is a full-time student or is engaged in vocational training. Juvenile offenders shall pay a monthly fee of not less than Ten Dollars ($10.00) but not more than Fifty Dollars ($50.00) based on a sliding scale using the standard of need for each family that is used to calculate TANF benefits. Money received by the department from participants in the program shall be deposited into a special fund which is hereby created in the State Treasury. It shall be used, upon appropriation by the Legislature, for the purpose of helping to defray the costs involved in administering and supervising such program. Unexpended amounts remaining in such special fund at the end of a fiscal year shall not lapse into the State General Fund, and any interest earned on amounts in such special fund shall be deposited to the credit of the special fund.

(2) The participant shall admit any correctional officer into his residence at any time for purposes of verifying the participant's compliance with the conditions of his detention.

(3) The participant shall make the necessary arrangements to allow for correctional officers to visit the participant's place of education or employment at any time, based upon the approval of the educational institution or employer, for the purpose of verifying the participant's compliance with the conditions of his detention.

(4) The participant shall acknowledge and participate with the approved electronic monitoring device as designated by the department at any time for the purpose of verifying the participant's compliance with the conditions of his detention.

(5) The participant shall be responsible for and shall maintain the following:

(a) A working telephone line in the participant's home;
(b) A monitoring device in the participant's home, or on the participant's

person, or both; and

(c) A monitoring device in the participant's home and on the participant's person in the absence of a telephone.

(6) The participant shall obtain approval from the correctional field officer before the participant changes residence.

(7) The participant shall not commit another crime during the period of home detention ordered by the court or department.

(8) Notice shall be given to the participant that violation of the order of home detention shall subject the participant to prosecution for the crime of escape as a felony.

(9) The participant shall abide by other conditions as set by the court or the department.

§ 47-5-1009 Absolute immunity:

(1) The department shall have absolute immunity from liability for any injury resulting from a determination by a judge or correctional officer that an offender shall be allowed to participate in the electronic home detention program. . . .

§ 47-5-1011 Notice provided; additional participant responsibilities:

(1) Before entering an order for commitment for electronic house arrest, the department shall inform the participant and other persons residing in the home of the nature and extent of the approved electronic monitoring devices by doing the following:

(a) Securing the written consent of the participant in the program to comply with the rules and regulations of the program.

(b) Advising adult persons residing in the home of the participant at the time an order or commitment for electronic house arrest is entered and asking such persons to acknowledge the nature and extent of approved electronic monitoring devices.

(c) Insuring that the approved electronic devices are minimally intrusive upon the privacy of other persons residing in the home while remaining in compliance with Sections 47-5-1001 through 47-5-1015.

(2) The participant shall be responsible for the cost of equipment and any damage

to such equipment. Any intentional damage, any attempt to defeat monitoring, any committing of a criminal offense or any associating with felons or known criminals, shall constitute a violation of the program.

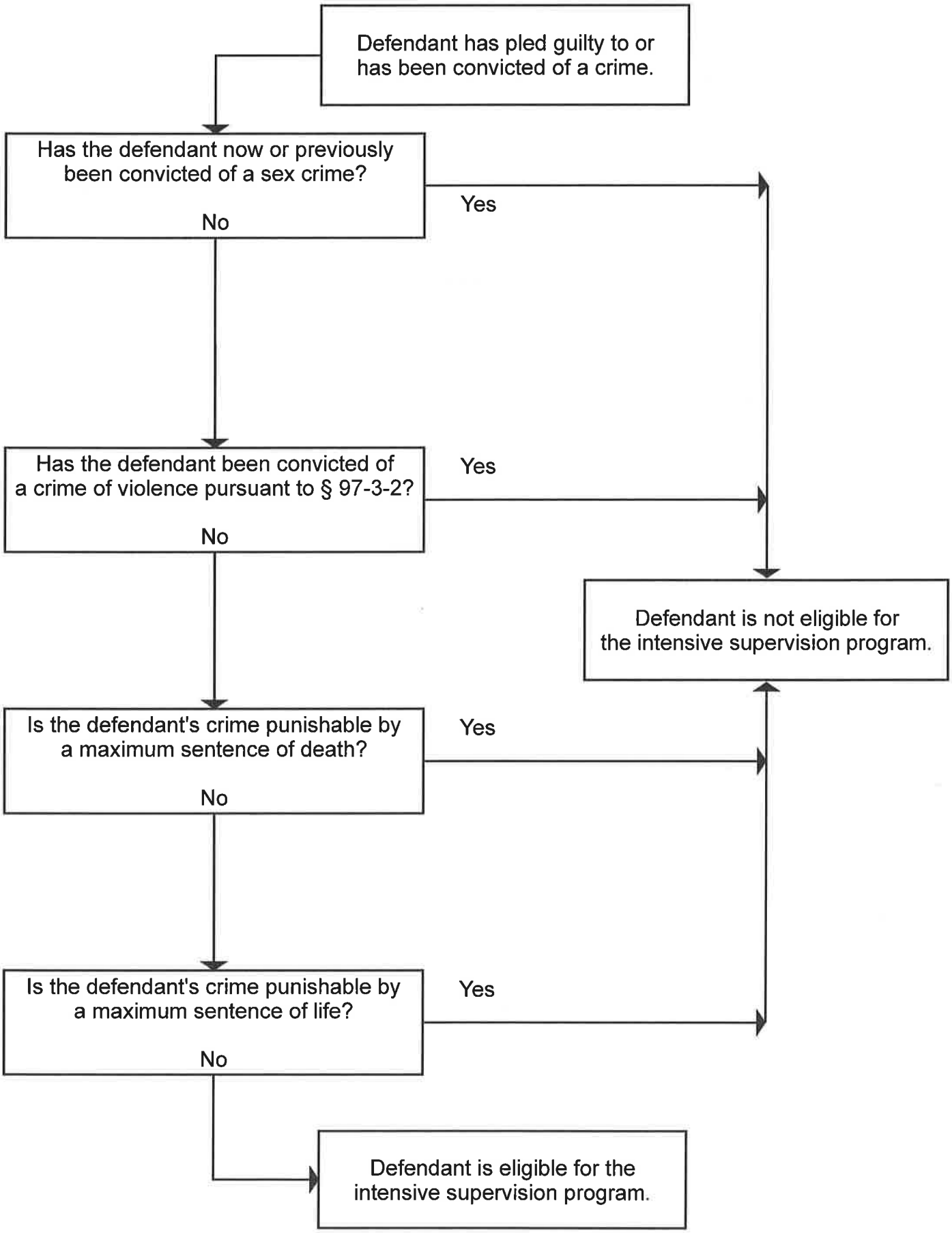
(3) Any person whose residence is utilized in the program shall agree to keep the home drug and alcohol free and to exclude known felons and criminals in order to provide a noncriminal environment.

Repeal of the Intensive Supervision Program

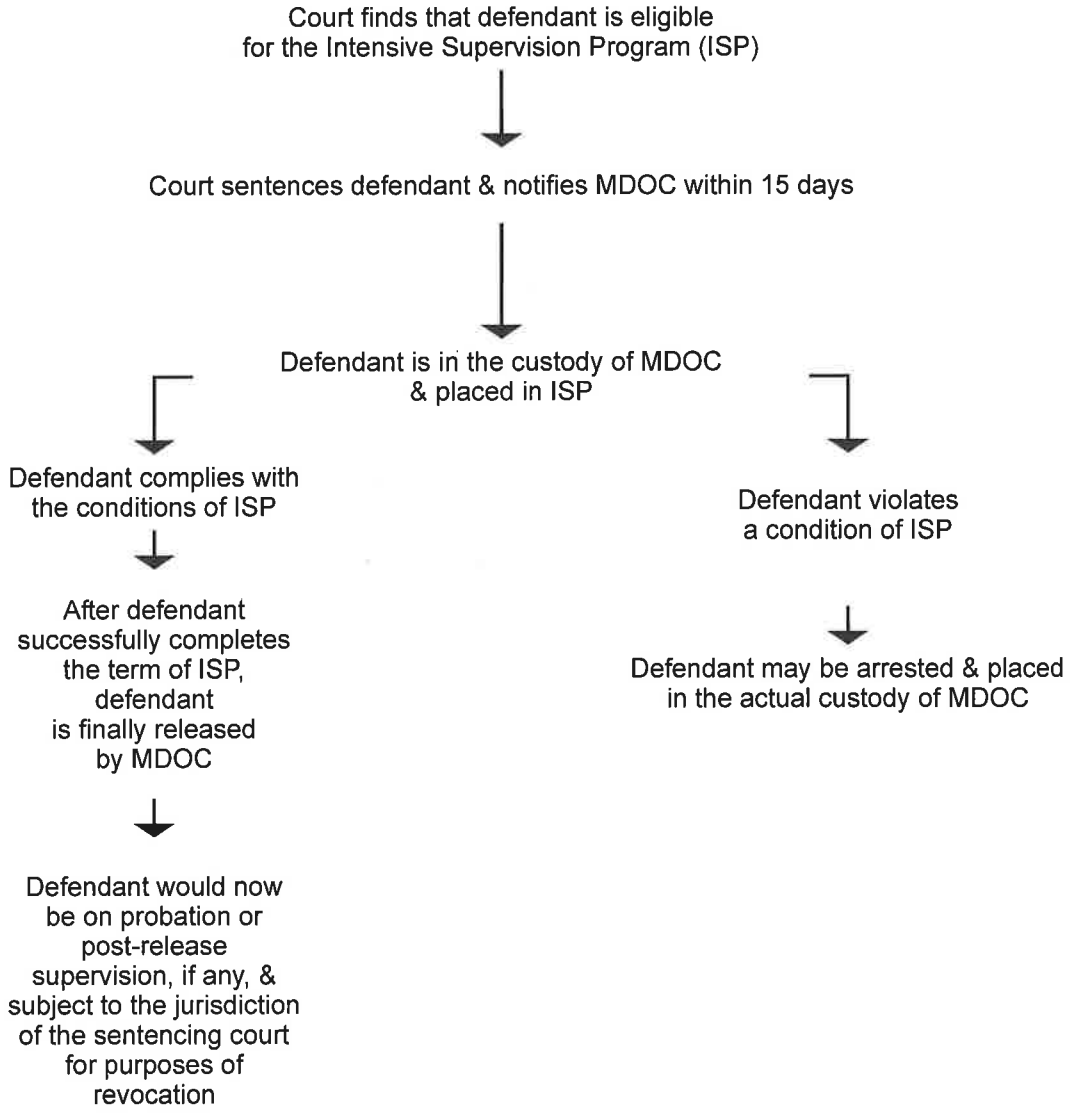
§ 47-5-1015 Expiration:

Sections 47-5-1001 through 47-5-1015 shall stand repealed after June 30, 2022.

Is the Defendant Eligible for the Intensive Supervision Program?



Procedures for Sentencing a Defendant to the Intensive Supervision Program



References:

§§ 47-5-1001 to -1013

Re-Sentencing under the Post-Conviction Collateral Relief Act

§ 99-39-5 Motion for relief; grounds; limitations; definitions:

(1) Any person sentenced by a court of record of the State of Mississippi, including a person currently incarcerated, civilly committed, on parole or probation or subject to sex offender registration for the period of the registration or for the first five (5) years of the registration, whichever is the shorter period, may file a motion to vacate, set aside or correct the judgment or sentence, a motion to request forensic DNA testing of biological evidence, or a motion for an out-of-time appeal if the person claims:

(a) That the conviction or the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of Mississippi;
(b) That the trial court was without jurisdiction to impose sentence;
(c) That the statute under which the conviction and/or sentence was obtained is unconstitutional;
(d) That the sentence exceeds the maximum authorized by law;
(e) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
(f) That there exists biological evidence secured in relation to the investigation or prosecution attendant to the petitioner's conviction not tested, or, if previously tested, that can be subjected to additional DNA testing, that would provide a reasonable likelihood of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.
(g) That his plea was made involuntarily;
(h) That his sentence has expired; his probation, parole or conditional release unlawfully revoked; or he is otherwise unlawfully held in custody;
(i) That he is entitled to an out-of-time appeal; or
(j) That the conviction or sentence is otherwise subject to collateral attack upon any grounds of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy. . . .

Under most circumstances, circuit courts do not have jurisdiction to resentence convicted felons. In the absence of some statute authorizing such modification, once the case has been terminated and the term of court ends, a circuit court is powerless to alter or vacate its judgment. It is clear that there is no inherent authority to alter or vacate a judgment, but rather legislation is required. Therefore, a judge may not alter or vacate a sentence once the term of court in which the defendant was sentenced has ended. However, the Legislature created an exception to this general rule when it enacted the Mississippi Post-Conviction Collateral Relief Act, Sections 99-39-1 to -27. [In *Dickerson*, the court wrote:]

> The only statutory authority to resentence a convicted felon is the Post Conviction Relief Act. This act establishes the criteria which must be present before the court acquires jurisdiction to consider resentencing a criminal.

Section 99-39-5(1) provides for nine different claims for relief under the Act:

> . . . .
> (e) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice; . . . .
> (g) That his sentence has expired; his probation, parole or conditional release unlawfully revoked; or he is otherwise unlawfully held in custody; . . . .

We conclude that the Defendant's petition raises claims under subsection (e) and/or subsection (g). Because his petition was filed under the PCCRA, the circuit court erred in finding that it did not have jurisdiction and dismissing the petition. Therefore, we find that the trial court had jurisdiction over the petition. . . . It is clear that the circuit judge who ordered the Defendant to complete the RID program and then report back for possible alteration of the terms of the sentence intended that the Defendant should not be required to serve the remainder of his sentence as an inmate in a state penitentiary. [Prior cases have provided that] subsequent events [may constitute] "material facts, not previously presented and heard, that requires vacation of the sentence in the interest of justice" within the meaning of Section 99-39-5(1)(e). Here, the circuit judge should consider whether Section 99-39-5(1)(e) likewise applies to the Defendant. The incomplete record does not allow us to determine if, under Section 99-39-5(1)(g), the Defendant's release was unlawfully revoked. . . . We remand this case to the circuit court for (1) an expansion of the record under Section 99-39-17; (2) if necessary, an evidentiary hearing under Section 99-39-19; and (3) consideration of and a ruling on the merits of the Defendant's petition. ***Creel v. State*, 944 So. 2d 891, 895 (Miss. 2006) (citations omitted).**

Modifying a Sentence on Remand from an Appellate Court

Sentencing lies within the complete discretion of a sentencing judge and is not subject to appellate review if it is within the limits prescribed by statute. Generally, as was the case in both *Leonard* and *Eastman*, once a criminal case "has been terminated and the term of court ends, a circuit court is powerless to alter or vacate its judgment." As well, the circuit court in most instances loses jurisdiction to amend or modify its sentence once a case has been appealed from the circuit court to this Court. On appeal, both this Court and the Court of Appeals "ha[ve] appellate jurisdiction to either affirm, reverse and remand, or reverse and render the judgment the lower court should have rendered." Neither court has the authority to review a case "and make an arbitrary decision to amend the original sentence in any way." If a case is affirmed on appeal, "the lower court is issued a mandate to perform purely ministerial acts in carrying out the original sentence." But if the case is remanded for a new trial, the circuit court again is invested with jurisdiction and discretionary sentencing authority with regard to that particular case. In such instances, the same or even a greater sentence than the one previously ordered may be imposed upon the defendant following a new trial and conviction for the same charge(s). The question here, though, is whether the circuit court had discretionary sentencing authority to modify its original sentence after this Court affirmed Sallie's convictions but vacated Sallie's sentence on the finding that using the firearm enhancement to increase his sentence violated Sallie's right to due process. We find the answer to this question is yes. While we know of no prior decision either from this Court or the Court of Appeals that has addressed the precise question presented in this case, a number of cases illustrate the general understanding that when an original sentence has been vacated for illegality, a subsequent sentencing court has discretionary authority over the new sentence. ***Sallie v. State*, 237 So. 3d 749, 753-54 (Miss. 2018) (citations omitted).**

Court Recommendation on Parole Eligibility

§ 47-7-3 Parole eligibility; earned time; tentative hearing date; program priority:

(1) Every prisoner who has been convicted of any offense against the State of Mississippi, and is confined in the execution of a judgment of such conviction in the Mississippi Department of Corrections for a definite term or terms of one (1) year or over, or for the term of his or her natural life, whose record of conduct shows that such prisoner has observed the rules of the department, and who has served the minimum required time for parole eligibility, may be released on parole as set forth herein:

(a) Habitual offenders. Except as provided by Sections 99-19-81 through 99-19-87, no person sentenced as a confirmed and habitual criminal shall be eligible for parole;

(b) Sex offenders. Any person who has been sentenced for a sex offense as defined in Section 45-33-23(h) shall not be released on parole except for a person under the age of nineteen (19) who has been convicted under Section 97-3-67;

(c) Capital offenders. No person sentenced for the following offenses shall be eligible for parole:

(i) Capital murder committed on or after July 1, 1994, as defined in Section 97-3-19(2);

(ii) Any offense to which an offender is sentenced to life imprisonment under the provisions of Section 99-19-101; or

(iii) Any offense to which an offender is sentenced to life imprisonment without eligibility for parole under the provisions of Section 99-19-101, whose crime was committed on or after July 1, 1994;

(d) Murder. No person sentenced for murder in the first degree, whose crime was committed on or after June 30, 1995, or murder in the second degree, as defined in Section 97-3-19, shall be eligible for parole;

(e) Human trafficking. No person sentenced for human trafficking, as defined in Section 97-3-54.1, whose crime was committed on or after July 1, 2014, shall be eligible for parole;

(f) Drug trafficking. No person sentenced for trafficking and aggravated trafficking, as defined in Section 41-29-139(f) through (g), shall be eligible for parole;

(g) Offenses specifically prohibiting parole release. No person shall be eligible for parole who is convicted of any offense that specifically prohibits parole release;

(h) (i) Offenders eligible for parole consideration for offenses committed after June 30, 1995. Except as provided in paragraphs

(a) through (g) of this subsection, offenders may be considered eligible for parole release as follows:

1. Nonviolent crimes. All persons sentenced for a nonviolent offense shall be eligible for parole only after they have served twenty-five percent (25%) or ten (10) years, whichever is less, of the sentence or sentences imposed by the trial court. For purposes of this paragraph, "nonviolent crime" means a felony not designated as a crime of violence in Section 97-3-2.

2. Violent crimes. A person who is sentenced for a violent offense as defined in Section 97-3-2, except robbery with a deadly weapon as defined in Section 97-3-79, drive-by shooting as defined in Section 97-3-109, and carjacking as defined in Section 97-3-117, shall be eligible for parole only after having served fifty percent (50%) or twenty (20) years, whichever is less, of the sentence or sentences imposed by the trial court. Those persons sentenced for robbery with a deadly weapon as defined in Section 97-3-79, drive-by shooting as defined in Section 97-3-109, and carjacking as defined in Section 97-3-117, shall be eligible for parole only after having served sixty percent (60%) or twenty-five (25) years, whichever is less, of the sentence or sentences imposed by the trial court.

3. Nonviolent and nonhabitual drug offenses. A person who has been sentenced to a drug offense pursuant to Section 41-29-139(a) through (d), whose crime was committed after June 30, 1995, shall be eligible for parole only after he has served twenty-five percent (25%) or ten (10) years, whichever is less, of the sentence or sentences imposed.

(ii) Parole hearing required. All persons eligible for parole under subparagraph (i) of this paragraph (h) who are serving a sentence or sentences for a crime of violence, as defined in Section 97-3-2, shall be required to have a parole hearing before the Parole Board pursuant to Section 47-7-17, prior to parole release.

(iii) Geriatric parole. Notwithstanding the provisions in subparagraph (i) of this paragraph (h), a person serving a sentence who has reached the age of sixty (60) or older and who has served no less than ten (10) years of the sentence or sentences imposed by the trial court shall be eligible for parole. Any person eligible for parole under this subparagraph (iii) shall be required to have a parole hearing before the board prior to parole release. No inmate

shall be eligible for parole under this subparagraph (iii) of this paragraph (h) if:

1. The inmate is sentenced as a habitual offender under Sections 99-19-81 through 99-19-87;
2. The inmate is sentenced for a crime of violence under Section 97-3-2;
3. The inmate is sentenced for an offense that specifically prohibits parole release;
4. The inmate is sentenced for trafficking in controlled substances under Section 41-29-139(f);
5. The inmate is sentenced for a sex crime; or
6. The inmate has not served one-fourth (¼) of the sentence imposed by the court.

(iv) Parole consideration as authorized by the trial court. Notwithstanding the provisions of paragraph (a) of this subsection, any offender who has not committed a crime of violence under Section 97-3-2 and has served twenty-five percent (25%) or more of his sentence may be paroled by the State Parole Board if, after the sentencing judge or if the sentencing judge is retired, disabled or incapacitated, the senior circuit judge authorizes the offender to be eligible for parole consideration; or if the senior circuit judge must be recused, another circuit judge of the same district or a senior status judge may hear and decide the matter. A petition for parole eligibility consideration pursuant to this subparagraph (iv) shall be filed in the original criminal cause or causes, and the offender shall serve an executed copy of the petition on the District Attorney. The court may, in its discretion, require the District Attorney to respond to the petition. . . .

CHAPTER 22

UNIQUE FEATURES OF A CAPITAL CASE

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CHAPTER 22

UNIQUE FEATURES OF A CAPITAL CASE

Capital Murder Statute

§ 97-3-19 Homicide; murder defined; capital murder; lesser-included offenses:

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means any state or federal law enforcement officer, including, but not limited to, a federal park ranger, the sheriff of or police officer of a city or town, a conservation officer, a parole officer, a judge, senior status judge, special judge, district attorney, legal assistant to a district attorney, county prosecuting attorney or any other court official, an agent of the Alcoholic Beverage Control Division of the Department of Revenue, an agent of the Bureau of Narcotics, personnel of the Mississippi Highway Patrol, and the employees of the Department of Corrections who are designated as peace officers by the Commissioner of Corrections pursuant to Section 47-5-54, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;

(f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felony;

(g) Murder which is perpetrated on educational property as defined in Section 97-37-17;

(h) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official;

(i) Murder of three (3) or more persons who are killed incident to one (1) act, scheme, course of conduct or criminal episode;

(j) Murder of more than three (3) persons within a three-year period;

(k) Murder which is perpetrated by the killing of a person who:

(i) is or would be a witness for the state or federal government in a criminal trial;

(ii) is a confidential informant for any agency of the state or federal government; or

(iii) is any other person who was cooperating or assisting the state or federal government or was suspected of cooperation or assistance to the state or federal government, if the motive for the killing was either the person's status as a witness, potential witness or informant, or was to prevent the cooperation or assistance to the prosecution. It shall not be a defense to a killing under this subsection that the defendant erroneously suspected or believed the victim to have cooperated or assisted the state or federal government.

(3) An indictment for murder or capital murder shall serve as notice to the defendant that the indictment may include any and all lesser included offenses thereof, including, but not limited to, manslaughter.

Bail

Mississippi Constitution, Article III, § 29 Excessive bail prohibited; revocation or denial of bail:

> (1) Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses
>
> (a) when the proof is evident or presumption great; or
>
> (b) when the person has previously been convicted of a capital offense or any other offense punishable by imprisonment for a maximum of twenty (20) years or more.
>
> (2) If a person charged with committing any offense that is punishable by death, life imprisonment or imprisonment for one (1) year or more in the penitentiary or any other state correctional facility is granted bail and (a) if that person is indicted for a felony committed while on bail; or (b) if the court, upon hearing, finds probable cause that the person has committed a felony while on bail, then the court shall revoke bail and shall order that the person be detained, without further bail, pending trial of the charge for which bail was revoked. For the purposes of this subsection (2) only, the term "felony" means any offense punishable by death, life imprisonment or imprisonment for more than five (5) years under the laws of the jurisdiction in which the crime is committed. . . .
>
> (4) In any case where bail is denied before conviction, the judge shall place in the record his reasons for denying bail. Any person who is charged with an offense punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment and who is denied bail prior to conviction shall be entitled to an emergency hearing before a justice of the Mississippi Supreme Court. The provisions of this subsection (4) do not apply to bail revocation orders.
>
> ***See* § 99-5-35 Bail for certain capital offenses:**
>
> > Any person having been twice tried on an indictment charging a capital offense, wherein each trial has resulted in a failure of the jury to agree upon his guilt or innocence, shall be entitled to bail in an amount to be set by the court.
>
> ***See* M.R.Cr.P. 8.2, Right to Pretrial Release on Personal Recognizance or on Bond.**

Appointment of Counsel

Mississippi Rule of Criminal Procedure 7.4, Standards for Appointment of Trial and Appellate Counsel in Death Penalty Cases, states:

> **(a) In General.** To be eligible for appointment in a death penalty case, an attorney:
>
> > (1) shall have been a member in good standing of the State Bar of Mississippi for at least five (5) years immediately preceding the appointment, or admitted pro hoc vice pursuant to an order entered under Rule 46 of the Mississippi Rules of Appellate Procedure and be a member in good standing of that attorney's home jurisdiction for a like period immediately preceding the appointment;
> >
> > (2) shall have practiced in the area of state criminal litigation for three (3) years immediately preceding the appointment;
> >
> > (3) shall have in the three (3) years before appointment completed twelve (12) hours of training or educational programs in the area of death penalty defense through a program accredited by the Mississippi Commission on Continuing Legal Education or the American Bar Association; and
> >
> > (4) shall have demonstrated the necessary proficiency and commitment to zealous advocacy which exemplify the quality of representation appropriate to death penalty cases.
>
> **(b) Additional Qualification Requirements.**
>
> At least one (1) appointed attorney must meet the qualifications set forth in section (a) and the following:
>
> > (1) shall have practiced in the area of state criminal litigation for five (5) years immediately preceding the appointment; and
> >
> > (2) shall have been counsel in at least five (5) felony jury trials that were tried to completion, including at least one (1) death penalty murder jury trial that was tried to completion in which the attorney participated.
>
> **(c) Appellate Counsel.** To be eligible for appointment as appellate counsel on behalf of a defendant sentenced to death, an attorney must meet the qualifications set forth in section (a) and, within five (5) years immediately preceding the appointment, have been counsel in an appeal or post-conviction proceeding in a

case in which a death sentence was imposed, as well as have experience as counsel in the appeal of at least three (3) felony convictions. Alternatively, an attorney must have been counsel in the appeal of at least six (6) felony convictions, at least two (2) of which were appeals from murder convictions.

(d) Exceptional Circumstances. In exceptional circumstances enumerated by the trial judge on the record, an attorney may be appointed who does not meet the qualifications set forth in sections (a)(1)-(3), (b) and/or (c), provided that the attorney's experience, stature and record in a different type of practice (e.g., civil litigation, academic work, or work for a court or prosecutor) enable the court to conclude that the attorney's ability meets or exceeds the standards set forth in this Rule.

Mississippi Capital Defense Counsel

§ 99-18-3 Office of Capital Defense Counsel created; personnel; appointment to office; qualifications; removal:

There is hereby created the Capital Defense Counsel Division within the Office of the State Public Defender. This office shall consist of a director, sometimes referred to as Capital Defender, who shall be an attorney qualified to serve as lead counsel in death penalty eligible cases and staffed by any necessary personnel as determined and hired by the State Defender. The Capital Defender shall be appointed by the State Defender. The remaining attorneys and other staff shall be appointed by the State Defender and shall serve at the will and pleasure of the State Defender. The Capital Defender and all other attorneys in the office shall be active members of The Mississippi Bar, or, if a member in good standing of the bar of another jurisdiction, must apply to and secure admission to The Mississippi Bar within twelve (12) months of the commencement of the person's employment by the office. The Capital Defender may be removed by the State Defender upon finding that the Capital Defender is not qualified under law, has failed to perform the duties of the office, or has acted beyond the scope of the authority granted by law for the office.

§ 99-18-5 Purpose of office:

The Capital Defense Counsel Division is created within the Office of the State Public Defender for the purpose of providing representation to indigent parties under indictment for death penalty eligible offenses and to perform such other duties as set forth by law.

§ 99-18-7 Duties of office; attorneys appointed to office to be full time:

The Capital Defense Counsel Division shall limit its activities to representation of defendants accused of death-eligible offenses and ancillary matters related directly to death-eligible offenses and other activities expressly authorized by statute. Representation by the division or by other court-appointed counsel under this chapter shall terminate upon completion of trial or direct appeal. The attorneys appointed to serve in the Capital Defense Counsel Division shall devote their entire time to the duties of the division, shall not represent any persons in other litigation, civil or criminal, nor in any other way engage in the practice of law, and shall in no manner, directly or indirectly, engage in lobbying activities for or against the death penalty. Any violation of this provision shall be grounds for termination from employment by the State Defender.

Motion for a Change of Venue

The usual procedure employed when the accused believes he cannot get an impartial jury in a particular county is a motion for a change of venue. ***Hoops v. State*, 681 So. 2d 521, 526 (Miss. 1996).**

Fundamentally, the trial judge and this Court as well must keep ever in mind that a motion for change of venue raises not only a procedural point; rather, the office of the motion is to afford the accused that most fundamental of all rights he possesses under our law: his right to a fair trial before an impartial jury, secured to him by sections 14 and 26 of the Mississippi Constitution. ***Fisher v. State*, 481 So. 2d 203, 215 (Miss. 1985) (citations omitted).**

Procedure

§ 99-15-35 Change of venue:

On satisfactory showing, in writing, sworn to by the prisoner, made to the court, or to the judge thereof in vacation, supported by the affidavits of two or more credible persons, that, by reason of prejudgment of the case, or grudge or ill will to the defendant in the public mind, he cannot have a fair and impartial trial in the county where the offense is charged to have been committed, the circuit court, or the judge thereof in vacation, may change the venue in any criminal case to a convenient county, upon such terms, as to the costs in the case, as may be proper.

An application for change of venue must conform strictly to the statute. ***Baldwin v. State*, 732 So. 2d 236, 241 (Miss. 1999) (citations omitted).**

§ 99-15-43 Venue in capital cases:

In capital cases the application for change of venue must be made before the drawing of any special venire which is summoned to appear on the day the case is set for trial, or it will be too late, except where the ground on which such application is based occurred after the drawing of such venire.

Mississippi Rule of Criminal Procedure 11.1, Change of Venue, states:

(a) Grounds. The trial judge, for good cause, may grant the defendant a change of venue. Good cause includes a satisfactory showing made to the court in writing, supported by the affidavits of two (2) or more credible persons, that the defendant cannot have a fair and impartial trial in the county where the offense is charged to have been committed.

Rule 11.1(a) is in accord with Article 3, Section 26 of the Mississippi Constitution, Mississippi Code Section 99-15-35, and former Rule 6.06 of the Uniform Rules of Circuit and County Court. If the request for a change of venue is based on pretrial publicity, section (b) requires the trial judge to consider the level of adverse publicity and its potential effect on the venire. ***Cmt.***

(b) Prejudicial Pretrial Publicity. Whenever the grounds for change of venue are based on pretrial publicity, the trial judge shall consider the level of adverse publicity (both in extent of coverage and its inflammatory nature) and the potential effect of such publicity on the venire.

(c) Time for Filing Motion. A motion for change of venue should be made at the earliest opportunity after learning of the cause for challenge.

(d) Venue Upon Remand. When an action is remanded by an appellate court for a new trial or jury sentencing, all rights to request a change of venue may be asserted de novo.

Under section (d), an application for change of venue may be made when the matter is remanded by an appellate court for a new trial or jury sentencing. ***Cmt.***

Defendant Raises a Rebuttable Presumption

A presumption of inability to conduct a fair trial in a venue arises with an application for change of venue, supported by two affidavits affirming the defendant's inability to receive a fair trial. ***Holland v. State*, 705 So. 2d 307, 336 (Miss. 1997).**

[The defendant] attached five form affidavits to his motion for change of venue. These affidavits indicated that the affiant(s) thought that [the defendant] could not get a fair trial in [the county where the offense took place] because of ill will toward the defendant. Accordingly, [the defendant] successfully raised a rebuttable presumption under our statutory law to demonstrate that an impartial jury could not be impaneled. . . . ***Morgan v. State*, 681 So. 2d 82, 91 (Miss. 1996).**

Defendant Raises an Irrebuttable Presumption if Certain Elements Are Present

However, the presumption that an impartial jury can not be obtained may at times be irrebuttable. Elements which should serve to indicate an irrebuttable presumption are:

(1) Capital cases based on considerations of a heightened standard of review;
(2) Crowds threatening violence toward the accused;
(3) An inordinate amount of media coverage, particularly in cases of
(a) serious crimes against influential families;
(b) serious crimes against public officials;
(c) serial crimes;
(d) crimes committed by a black defendant upon a white victim;
(e) where there is an inexperienced trial counsel.

***Evans v. State*, 725 So. 2d 613, 647 (Miss. 1997) (citations omitted).**

While the presumption may be rebutted during voir dire, "in some circumstances pretrial publicity can be so damaging and the presumption so great, that no voir dire can rebut it." We have set forth certain elements which, when present would serve as an indicator to the trial court as to when the presumption is irrebuttable. ***White v. State*, 495 So. 2d 1346, 1349 (Miss. 1986) (citations omitted).**

When these and similar circumstances exist, particularly in combination, it is incumbent that trial be had in as dispassionate an environment as possible. Judicial efficiency and economy would be better served by a change of venue prior to trial, than by trial, reversal and retrial. Justice would be better served by a fair trial initially. ***Johnson v. State*, 476 So. 2d 1195, 1215 (Miss. 1985).**

A motion for a change of venue is not automatically granted in a capital case. There must be a satisfactory showing that a defendant cannot receive a fair and impartial trial in the county where the offense is charged. ***Gray v. State*, 728 So. 2d 36, 65 (Miss. 1998).**

State's Rebuttal of the Defendant's Presumption

[T]he prosecution was charged with rebutting the presumption that [the defendant] could not obtain an impartial jury panel in [the county where the offense is charged]. ***Morgan v. State*, 681 So. 2d 82, 91 (Miss. 1996).**

The venire chosen in [the] [c]ounty [with venue] was thoroughly examined and questioned about whether they had been exposed to any form of

publicity. The venire was questioned about their amount of exposure to any of the various forms of publicity. In addition, if any member was exposed, they were also questioned about whether such publicity would influence or affect their impartiality. The linchpin is whether the venire members stated that they could be fair and impartial jurors if chosen. The record reflects that each of the impaneled jury members affirmatively stated that they could serve as fair and impartial jurors. ***Simon v. State*, 688 So. 2d 791, 804 (Miss. 1997) (citations omitted).**

At [the change of venue] hearing, the State called seven witnesses with extensive ties to Leake County, who all testified that they were unaware of any general feelings of ill will in the community against [the defendant]. The witnesses were also unable to recall any extensive pre-trial publicity associated with the case. . . . After a careful review of the record, we are unconvinced that the defendant was denied a fair trial. ***Mason v. State*, 736 So. 2d 1053, 1055-56 (Miss. Ct . App. 1999).**

It is true that the great majority of those called for jury service nevertheless insisted that they could give [the defendant] a fair trial and would set aside what they had learned through the news media and heard otherwise about the case. All twelve of those seated so proclaimed. No doubt these jurors were responding in good faith and no doubt the trial judge accepted their responses in good faith. The saturation pre-trial publicity described above, however, suggests that there was and remains substantial doubt that [the defendant] could then or ever get a fair trial in Lauderdale County. ***Fisher v. State*, 481 So. 2d 203, 221-22 (Miss. 1985).**

Trial Court's Discretion

We have repeatedly held that the matter of whether venue should be changed in a criminal proceeding is committed to the sound discretion of the trial judge. . . . We have repeated these notions so often in recent years that we have tended to overlook that the venue decision is committed to the trial judge's sound discretion, not his unfettered discretion. ***Fisher v. State*, 481 So. 2d 203, 215 (Miss. 1985).**

A motion for change of venue ordinarily should be granted where, under the totality of the circumstances it appears reasonably likely that, in the absence of such relief, the accused's right to a fair trail may be lost. ***Cabello v. State*, 490 So. 2d 852, 854 (Miss. 1986) (citations omitted).**

The sound exercise of the discretion vested in the trial judge when faced with a motion for change of venue must be informed by the evidence

presented at the venue hearing coupled with the trial judge's reasoned application of his sense of the community and, particularly in a case such as this, an awareness of the incontrovertible impact of saturation media publicity upon the attitudes of a community. ***Fisher v. State*, 481 So. 2d 203, 215 (Miss. 1985).**

[We] are of the opinion that the trial court should have granted the motion for a change of venue at this point [after the defendant had presented the witnesses on his behalf]. [The defendant] made a prima facie showing of community prejudice by complying with the [statute's] formalities, i.e., submitting an affidavit signed by two witnesses with knowledge. The presumption was then raised to an irrebuttable level by the testimony of the fifteen defense witnesses [who included members of the news media] who stated specific reasons why [the defendant] could not receive a fair trial in Lauderdale County. ***Johnson v. State*, 476 So. 2d 1195, 1213 (Miss. 1985).**

Other Factors to Consider

1. The number of witnesses presented by the defendant at the hearing & who they are, i.e., members of the media - ***Johnson v. State*, 476 So. 2d 1195, 1211-12 (Miss. 1985).**
2. The number of articles in the newspaper and the number of reports played on television and radio about the case - ***Fisher v. State*, 481 So. 2d 203, 219 (Miss. 1985).**
3. The type of coverage the media is giving to the public, i.e., is the media telling information that would be inadmissible at trial, information about evidence uncovered in the case, or is someone involved in the case talking to the media - ***Fisher v. State*, 481 So. 2d 203, 217-20 (Miss. 1985).**
4. Who the State calls as witnesses to rebut the defendant's presumption - ***Fisher v. State*, 481 So. 2d 203, 222 (Miss. 1985).**
5. The number of potential jurors who raised their hands when asked if they knew or had heard about the case - ***White v. State*, 495 So. 2d 1346, 1348 (Miss. 1986); *Fisher v. State*, 481 So. 2d 203, 220 (Miss. 1985).**
6. The jurors statements that they can be fair and impartial - ***Hickson v. State*, 707 So. 2d 536, 543 (Miss. 1997); *Fisher v. State*, 481 So. 2d 203, 221-22 (Miss. 1985).**

Standard of Review for a Change of Venue

> This Court reviews the trial court's finding under an abuse of discretion standard. ***Holland v. State*, 705 So. 2d 307, 336 (Miss. 1997) (citation omitted).**
>
> When the defendant alleges that he cannot obtain an impartial jury without a change of venue, the lower court's decision to deny such as motion is within the trial judge's sound discretion. Where this discretion has not been abused the decision of the lower court will not be overturned. ***Morgan v. State*, 681 So. 2d 82, 91 (Miss. 1996) (citations omitted).**

If a Change of Venue is Granted

Mississippi Rule of Criminal Procedure 11.2, Transfer to Another County, states:

> **(a) Proceedings on Transfer.** If a change of venue is granted pursuant to Rule 11.1, the judge shall direct that a certified copy of the order granting the change of venue be transmitted to the circuit clerk of the county to which the venue has been changed. The circuit clerk of the county to which the venue has been changed must file the certified order and designate a docket number for said case for future reference. Unless otherwise directed by the judge, all pleadings, motions, orders of the court, and other matters thereafter filed shall bear both the original number of the county of original venue and the assigned number of the county of changed venue, and shall be filed with the circuit clerk of the county of original venue. The judge may hear or determine all pretrial and post-trial matters in the county to which venue has been changed or in any county of the judge's district.
>
> **(b) Place of Trial.** In all cases in which venue has been changed, it shall be within the judge's discretion, after the jury has been selected, to conduct the trial in the county of original venue or in the county to which venue has been transferred.
>
> **(c) Costs.** All costs of a trial transferred from one county to another county, including the cost of transporting the jury from one county to another where the same is ordered, shall be borne by the county of original venue. The clerk of the county of original venue shall handle any appeal.

§ 99-15-37 Transfer of records to removal court:

> Upon the order being made changing the venue in a criminal case, the clerk shall make out a transcript of the caption of the record, also of the proceedings impaneling the grand jury, of the indictment, with the entries or indorsements thereon, and all entries relative thereto in the records of his office, of the bonds and recognizances of the defendant, of the names of all the witnesses, and of all

orders, judgments, or other papers or proceedings belonging to or had in said cause and attach his certificate thereto, under his hand, with the seal of the court annexed, and forward it, sealed up, by a special messenger, or deliver it himself, together with all the original subpoenas in the case, to the clerk of the circuit court to which the trial is ordered to be removed.

§ 99-15-39 Trial on indictment:

The defendant, on a change of venue, shall be tried on the copy of the indictment so certified; and the record, proceedings, and papers therein copied and certified, shall, in all respects become, be received, read, and taken as the original record, papers and proceedings in the said cause, and shall have the same force and effect. Defects in the transcript shall not avail the accused if he do not object to them specifically before trial.

§ 99-15-45 Costs of change of venue:

The county from which the venue is changed shall pay the costs and expenses incident to such change and trial in another county as if such change of venue had not been made.

Jury Selection

§ 13-5-77 Special venire facias to issue in certain criminal cases:

When any person charged with a capital crime, or with the crime of manslaughter, shall have been arraigned and the plea of not guilty entered, the accused or the district attorney in any such case shall, upon demand, be entitled to a special venire. If at a term of court a special venire has been demanded for any case or cases, it shall be the duty of the court to cause to be drawn, in open court, from the jury box as many names as the judge in his discretion may direct, not to be less than forty (40) for each special venire as the judge in his discretion may direct to be called, and it shall be the duty of the clerk to issue a special venire facias, commanding the sheriff to summon the persons whose names are so drawn, to attend the court on a particular day to be named in the writ. It shall not be necessary that a separate special venire be drawn for each case in which a special venire is demanded. Those persons summoned pursuant to the issuance of a special venire facias shall attend the court on the day named in the writ and shall serve as the court may direct on any case for which a special venire has been demanded; provided, however, no juror summoned as a special venireman shall be impaneled or serve on more than one (1) case. In the event a special venire be exhausted in a case without a jury being impaneled from those summoned and in attendance, the court shall proceed to make up the jury for the trial of the case from the regular panel and tales jurors who may have been summoned for the day. If, after exhausting said regular panel and tales jurors, a competent jury be not obtained, the court shall direct the sheriff to summon forthwith as many tales jurors as shall be sufficient to complete the jury.

In the event that there should be no such box, or the same should be mislaid, or the names therein have been exhausted, then the court may order a special venire facias to be issued by the clerk, directing the sheriff to summon as many jurors as may be necessary, not less than forty (40) for each special venire as the judge in his discretion may direct to be called and, after exhausting a special venire in any case, to impanel the jury as hereinbefore directed. The slips containing the names of all jurors drawn or summoned on a special venire, and not impaneled on a jury, shall be returned to the box from which they were drawn immediately after a jury shall be impaneled. If a special venire be not demanded, the jury in each case shall be composed of the regular venire for the week and as many talesmen and bystanders as may be required, to be summoned under the order of the court.

> The defendant was entitled to make a request and to receive a special venire; however, [the defendant] was required to make this request in a timely manner. Several cases have held that [a defendant who had made a request for a special venire on the day of trial had] made an untimely request for special venire. Because [the defendant] did not make any

> request for special venire prior to [the day of] trial, we find that the trial court was not in error for denying his motion to quash the regular venire. This Court will not overrule the lower court's denial of a motion for special venire except upon a showing of abuse of discretion. ***Davis v. State*, 684 So. 2d 643, 650 (Miss. 1996) (citations omitted).**

Mississippi Rule of Criminal Procedure 18.3, Challenges, states in part:

> Both parties shall be allowed the following number of peremptory challenges for the selection of jurors:
>
> > Regarding regular jurors, the defendant and the prosecution shall each have peremptory challenges, as follows:
> >
> > > (i) In cases wherein the punishment may be death or life imprisonment, the defendant and the prosecution each shall have twelve (12) peremptory challenges for the selection of the regular twelve (12) jurors. . . .
> >
> > When the court has elected to impanel alternate juror(s), the defendant and the prosecution shall each have peremptory challenges, as follows:
> >
> > > (i) In death penalty cases, the peremptory challenges shall equal the number of alternate jurors the court has ordered to be selected. . . .

Oath in Capital Cases

Mississippi Rule of Criminal Procedure 18.5, Oath and Preliminary Instructions, states:

> **(a) Oath of Jurors.** The court shall, on the record of each trial, give the jurors the following oath or remind the jurors that they are still under the following oath:
>
> > You, and each of you, do solemnly swear (or affirm) that you will well and truly try all issues and execute all writs of inquiry that may be submitted to you, or left to your decision by the court, or under its direction, during the present term, and true verdicts give according to the evidence. So help you God.
>
> Additionally, in each capital case, the jurors shall be sworn to
>
> > "well and truly try the issue between the state and the defendant, and a true verdict give according to the evidence and the law."
>
> **(b) Oath of Bailiffs.** In capital cases, bailiffs may be specially sworn by the court, or under its direction, to attend on such jury and perform such duties as the court

may prescribe for them. . . .

13-5-73 Oath of jurors and bailiffs in capital cases:

The jurors in a capital case shall be sworn to:

Oath
[W]ell and truly try the issue between the state and the prisoner, and a true verdict give according to the evidence and the law. . . .

Effect of Not Administering the Special Oath in Capital Cases

The Court holds the failure, if any, to give the special oath was not error because the two oaths are substantially equivalent, if not substantially the same, since "all issues" inherently includes "the issue [joined] between the state and the prisoner." To suggest otherwise is to exalt form over substance. The purpose of the judicial oath is to impart to the oath-taker the idea he is bound in conscience to perform an act faithfully and truthfully and to awaken and stimulate his conscience and impress his mind with his duty and responsibility to do so. This Court finds no reversible error for the possible omission of the administration of two separate oaths under the facts of this case. ***Wilburn v. State*, 608 So. 2d 702, 704 (Miss. 1992).**

> However, in the case sub judice, the Court's oversight in having the jury sworn as required by § 13-5-73 was brought to its attention immediately after a few preliminary questions had been asked of the first witness in the case; after which, the jury was sworn as required by law and the few questions that had been asked where repeated. We are of the opinion that under the facts of this case there was a technical error but it was harmless error. . . . ***Thomas v. State*, 298 So. 2d 690, 692 (Miss. 1974).**
>
> The preliminary oath administered to the jurors, before voir dire examination, for the purposes of ascertaining their qualifications as jurors, was certainly not an oath to try the issue joined between the state and accused, as specifically required by the statute. It seems clear to us that there is a marked distinction between the oath to answer questions as to qualifications and the oath to hear, consider, and try the issue joined between the state and the defendant. . . . [T]he law of our state guarantees that the accused in a capital case shall have a legal jury to sit as triers of the fact in his case; and, in order that the prisoner be afforded such legal

jury, it must be impaneled and sworn to try the issue joined between the state and the prisoner, and a true verdict render according to the law and the evidence, as specifically required by the statutes heretofore mentioned. This was not done, and for the error committed the judgment of the lower court is reversed and the case remanded. ***Miller v. State*, 84 So. 161, 161-62 (Miss. 1920).**

Jury Sequestration

Mississippi Rule of Criminal Procedure 18.8, Jury Sequestration, provides:

In a death penalty case, the jury shall be sequestered during the entire trial.

In all other cases, the jury may be sequestered on request of either the defendant or the prosecuting attorney made at least forty-eight (48) hours in advance of the trial. The court may grant or refuse the request to sequester the jury. The court may, on its own initiative or upon request of either party, sequester a jury at any stage of a trial.

> [Concerning a timely motion,] trial in this case began January 21, 1986. The motion to sequester was filed January 20, the day previous. [The defendant] therefore waived his right to have the jury sequestered. We do urge circuit judges in criminal cases of this magnitude [a non-capital murder trial] to sequester the jury, however. ***Whittington v. State*, 523 So. 2d 966, 973 (Miss. 1998).**

> The better practice would have been for the circuit court to advise venire members the night before final jury selection and swearing in to come to court with packed suitcases. However, allowing the jurors, with the consent of both parties, to go home and quickly pack their bags after they were sworn in but before they were sequestered for the actual trial and the introduction of any evidence, does not warrant reversal of the entire case for a new trial. The jurors were advised that both sides had agreed that they could have a few minutes to get their things ready. The potential for jury prejudice against the defendant upon which the rule against allowing any waiver of sequestration even with the defendant's consent is premised was eliminated when consent was obtained by both parties outside of the presence of the jury. ***Watts v. State*, 733 So. 2d 214, 243 (Miss. 1999).**

§ 13-5-95 Separate accommodations and bailiffs for male and female jurors:

In selecting overnight accommodations for jurors, the court shall provide separate housing for men and women jurors. Male bailiffs shall accompany the male

jurors, and female bailiffs the female jurors. At least one bailiff shall accompany each group, and the court in its sound discretion shall require as many bailiffs as are necessary. Either group may be housed in private premises if necessary.

Jury Verdict in Guilt Phase

At the conclusion of the first phase, the jurors were instructed their verdict might take the following form: "We, the jury, find the defendant guilty of capital murder." After deliberating for two hours and forty-three minutes, they returned a verdict which read: "We, the jury, find the accused guilty as charged." [N]o effort was made by the defendant to clarify the alleged discrepancy; the judge polled the jury, and each juror acknowledged the verdict reflected his or her vote, and none expressed any doubt about the verdict prior to or during the punishment phase of the trial. It is convincingly clear to us that the jurors understood "guilty as charged" to mean "guilty of capital murder." ***Culberson v. State*, 379 So. 2d 499, 506-07 (Miss. 1979).**

Jury Verdict in Sentencing Phase

§ 99-19-101 Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered:

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death, life imprisonment without eligibility for parole, or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose or may be conducted before the trial judge sitting without a jury if both the State of Mississippi and the defendant agree thereto in writing. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Mississippi. The state and the defendant and the defendant's counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient factors exist as enumerated in subsection (7) of this section;
(b) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;
(c) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and
(d) Based on these considerations, whether the defendant should be sentenced to life imprisonment, life imprisonment without eligibility for parole, or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient factors exist as enumerated in subsection (7) of this section;
(b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and
(c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If, after the trial of the penalty phase, the jury does not make the findings requiring the death sentence or life imprisonment without eligibility for parole, or is unable to reach a decision, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Mississippi within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period by the Supreme Court for good cause shown. The review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.
(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.
(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse or battery of a child in violation of subsection (2) of Section 97-5-39, or the unlawful use or detonation of a bomb or explosive device.
(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(f) The capital offense was committed for pecuniary gain.
(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
(h) The capital offense was committed to influence the policy of a governmental entity by intimidation or coercion, or to affect the conduct of a governmental entity by mass destruction or assassination.
(i) The capital offense was especially heinous, atrocious or cruel.
(j) The capital offense was committed to intimidate or coerce a civilian population.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.
(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.
(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(g) The age of the defendant at the time of the crime.

(7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:

(a) The defendant actually killed;
(b) The defendant attempted to kill;
(c) The defendant intended that a killing take place;
(d) The defendant contemplated that lethal force would be employed.

(8) For the purposes of this section, to “intimidate” or “coerce” do not include peaceful picketing, boycotts or other nonviolent action.

§ 99-19-103 Instructions; aggravating circumstances shall be designated by jury in writing upon recommending death; effect of jury's failure to agree on punishment:

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravated circumstances enumerated in Section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

Mississippi Supreme Court Review

§ 99-19-105 Review of death sentence by Mississippi Supreme Court:

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Mississippi Supreme Court, a copy of which shall be served upon counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;
(b) Whether the evidence supports the jury's or judge's finding of a

statutory aggravating circumstance as enumerated in § 99-19-101;
(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and
(d) Should one or more of the aggravating circumstances be found invalid on appeal, the Mississippi Supreme Court shall determine whether the remaining aggravating circumstances are outweighed by the mitigating circumstances or whether the inclusion of any invalid circumstance was harmless error, or both.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death;

(b) Reweigh the remaining aggravating circumstances against the mitigating circumstances should one or more of the aggravating circumstances be found to be invalid, and

(i) affirm the sentence of death or
(ii) hold the error in the sentence phase harmless error and affirm the sentence of death or
(iii) remand the case for a new sentencing hearing; or

(c) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

CHAPTER 23

DRIVING UNDER THE INFLUENCE

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CHAPTER 23

DRIVING UNDER THE INFLUENCE

Driving Under the Influence

§ 63-11-30 Operation under influence of alcohol or other impairing substance:

(1) It is unlawful for a person to drive or otherwise operate a vehicle within this state if the person:

(a) Is under the influence of intoxicating liquor;

Huhn was convicted under Mississippi Code Annotated section 63-11-30(1)(a). A conviction under this statute is often referred to as common-law DUI. Common-law DUI can be proven "in cases where the defendant's blood-alcohol results are unavailable but there is sufficient evidence that the defendant operated a vehicle under circumstances indicating her ability to operate the vehicle was impaired by the consumption of alcohol." ***Huhn v. City of Brandon*, 121 So. 3d 947, 950 (Miss. Ct. App. 2013) (citations omitted).**

Section 63-11-30(1)(a) is referred to as "common law DUI," and it is distinguishable from section 63-11-30(1)(c), which is referred to as "per se DUI." "Common law DUI" is often used to prosecute defendants when BAC test results are unavailable, or the defendant's BAC tests are under the legal limit, but there is sufficient evidence to prove the defendant's ability to operate a vehicle was impaired by the consumption of alcohol. This evidence of impairment may include slurred speech, bloodshot eyes, or erratic driving. ***Evans v. State*, 25 So. 3d 1061, 1066 (Miss. Ct. App. 2008).**

(b) Is under the influence of any other substance that has impaired the person's ability to operate a motor vehicle;

(c) Is under the influence of any drug or controlled substance, the possession of which is unlawful under the Mississippi Controlled Substances Law; or

Section 63-11-30(1)(a) is referred to as "common law DUI," and it is distinguishable from section 63-11-30(1)(c), which is referred to

as "per se DUI." ***Evans v. State*, 25 So. 3d 1061, 1066 (Miss. Ct. App. 2008).**

While section (a) provides the method for prosecuting the charge of common law DUI, and section (c) provides the method for prosecuting DUI "per se," Mississippi law provides that the sections charge the same crime. ***Deloach v. City of Starkville*, 911 So. 2d 1014, 1017 (Miss. Ct. App. 2005).**

Therefore, a person can be convicted of a violation of Section 63-11-30(1) if he (a) drives under the influence of intoxicating liquor; (b) drives under the influence of another substance that impaired his ability to drive; or (c) drives with an alcohol concentration of .08% or higher. These are not different elements of DUI, they are merely different ways one may be found in violation of Section 63-11-30(1). ***Heidelberg v. State*, 976 So. 2d 948, 950 (Miss. Ct. App. 2007).**

Young states that Miss. Code Ann. § 63-11-30(1)(a) and 63-11-30(1)(c) constitute separate crimes which must be defended in different ways. . . . Young asserts that since the subsections are separated by "or" that the state has an option of charges. . . . The state discounts this assertion by stating that § 63-11-30(1) contains four different ways to commit the same offense. . . . Alabama has a similar statute [to Mississippi's]. . . . The Alabama Court has also found that "subsections (1) and (2) are not separate offenses, but are two methods of proving the same offense-driving under the influence of alcohol." We interpret the Mississippi Statute in the same manner. Miss. Code Ann. § 63-11-30 merely sets forth numerous methods of committing the same crime. ***Young v. City of Brookhaven*, 693 So. 2d 1355, 1358 (Miss. 1997) (citations omitted).**

(d) Has an alcohol concentration in the person's blood, based upon grams of alcohol per one hundred (100) milliliters of blood, or grams of alcohol per two hundred ten (210) liters of breath, as shown by a chemical analysis of the person's breath, blood or urine administered as authorized by this chapter, of:

(i) Eight one-hundredths percent (.08%) or more for a person who is above the legal age to purchase alcoholic beverages under state law;

> In securing Turner's conviction for violation of § 63-11-30(1)(a) and (b), the State did not have to prove that Turner's blood alcohol content was .08 percent or more when he operated the vehicle. Such proof is required for guilt only under section [(d)] of the statute. ***Turner v. State*, 910 So. 2d 598, 602 (Miss. Ct. App. 2005) (prior version of statute).**

(ii) Two one-hundredths percent (.02%) or more for a person who is below the legal age to purchase alcoholic beverages under state law; or

(iii) Four one-hundredths percent (.04%) or more for a person operating a commercial motor vehicle. . . .

First Offense DUI

§ 63-11-30 Operation under influence of alcohol or other impairing substance:

(2) Except as otherwise provided in subsection (3) of this section (Zero Tolerance for Minors):

(a) First offense DUI.

(i) Upon conviction of any person for the first offense of violating subsection (1) of this section where chemical tests under Section 63-11-5 were given, or where chemical test results are not available, the person shall be fined not less than Two Hundred Fifty Dollars ($250.00) nor more than One Thousand Dollars ($1,000.00), or imprisoned for not more than forty-eight (48) hours in jail, or both; the court shall order the person to attend and complete an alcohol safety education program as provided in Section 63-11-32 within six (6) months of sentencing. The court may substitute attendance at a victim impact panel instead of forty-eight (48) hours in jail.

(ii) Suspension of commercial driving privileges is governed by Section 63-1-216.

(iii) A qualifying first offense may be nonadjudicated by the court under subsection (14) of this section. The holder of a commercial driver's license or a commercial learning permit at the time of the offense is ineligible for nonadjudication.

(iv) Eligibility for an interlock-restricted license is governed by Section 63-11-31 and suspension of regular driving privileges is governed by Section 63-11-23. . . .

(f) The use of ignition-interlock devices is governed by Section 63-11-31. . . .

No Right to Jury Trial

Mississippi Rule of Criminal Procedure Rule 29.5, Proceedings, provides:

> The appeal shall proceed as a trial de novo. In appeals from justice or municipal court, when the maximum possible sentence is six (6) months or less, the case may be tried without a jury.

> > Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses. ***Duncan v. Louisiana*, 391 U.S. 145, 159, 88 S. Ct. 1444, 1453, 20 L. Ed. 2d 491 (1968).**

Elements

> Next, Carlson argues the City failed to prove, beyond a reasonable doubt, that he was under the influence of alcohol such that he could not safely operate a motor vehicle under section 63-11-30(1)(a). Carlson further contends that his impairment on the night in question was the result of a medical condition that manifested itself in a seizure. The county court judge, sitting without a jury at a trial de novo, did not find Carlson's claim credible and found that the City proved he was driving under the influence beyond a reasonable doubt. "In a bench trial, the trial judge is 'the jury' for all purposes of resolving issues of fact." As such, a "judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor, and his findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence." As for determining whether the evidence the county court judge based his decision upon was sufficient, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." During the county court trial, Carlson admitted the Electric Cowboy does not serve food and that, while there, he consumed two to three beers. Officer Webb also testified that after he pulled Carlson over, Carlson admitted he probably should not have been driving. In addition, Carlson's performance on the field sobriety tests administered by Officer Webb suggested he was impaired. Finally, a video of Carlson, while at the Ridgeland Police Department waiting to take the Intoxilyzer breath exam, depicts Carlson as unsteady, eventually losing his balance and falling off the stool at the examination table. Carlson contended at trial that he had a seizure while waiting to take the Intoxilyzer test. However, he offered no medical testimony to that effect, nor did he present any evidence of a medical condition. His testimony was only that while at the Electric Cowboy, he started to feel "loopy," "dizzy," and as if "the walls were coming on [him]." Given the above evidence, a reasonable trier of fact could have found the essential elements of DUI, first offense, under section 63-11-30(1)(a), as the county court did. Since there was

substantial, credible, and reasonable evidence, we affirm the conviction. ***Carlson v. City of Ridgeland*, 131 So. 3d 1220, 1223-24 (Miss. Ct. App. 2013) (citations omitted).**

Stuckey was charged with violating Mississippi Code Annotated section 63-11-30(1)(a) and (c), [first offense] which reads in pertinent part follows:

> (1) It is unlawful for any person to drive or otherwise operate a vehicle within this state who (a) is under the influence of intoxicating liquor . . . [or] (c) has an alcohol concentration of eight one-hundredths percent (.08%) or more for persons who are above the legal age to purchase alcoholic beverages under state law.

***Stuckey v. State*, 975 So. 2d 271, 272 (Miss. Ct. App. 2008).**

The supreme court has held that the elements required to prove one is in violation of Section 63-11-30(1) are: (1) that a defendant was operating a motor vehicle, and (2) that the defendant was under the influence of intoxicating liquor. ***Heidelberg v. State*, 976 So. 2d 948, 950 (Miss. Ct. App. 2007) (citation omitted).**

Evidence

"Common law DUI" is often used to prosecute defendants when BAC test results are unavailable, or the defendant's BAC tests are under the legal limit, but there is sufficient evidence to prove the defendant's ability to operate a vehicle was impaired by the consumption of alcohol. This evidence of impairment may include slurred speech, bloodshot eyes, or erratic driving. ***Evans v. State*, 25 So. 3d 1061, 1066 (Miss. Ct. App. 2008).**

Likewise, in the present case, the circuit court found that there was sufficient, circumstantial evidence that Stuckey was operating a vehicle under section 63-11-30, as Stuckey admitted that he was headed home. The circuit court accepted Officer Mobley's testimony that he watched Stuckey exit the vehicle from the driver's side; that he smelled alcoholic beverages; and that Stuckey displayed signs of intoxication, such as his slurred speech and unsteadiness on his feet. For those reasons, the circuit court denied the motion to dismiss. It is a reasonable inference from the evidence presented that Stuckey had driven the car in violation of section 63-11-30. Further, with the results of the Intoxilyzer and Stuckey's behavior witnessed by Officer Mobley, which were admitted into evidence, there was sufficient evidence to support a verdict of guilty. ***Stuckey v. State*, 975 So. 2d 271, 273 (Miss. Ct. App. 2008).**

Christian was charged with driving while under the influence of intoxicating liquor. The applicable statute distinguishes this charge from driving while under

the influence of another substance that impairs driving ability. Given the distinction in statutory language, we hold that the State was not obligated to offer proof on impairment of Christian's driving ability only proof of his driving under the influence of intoxicating liquor. Despite the fact that the State was not required to offer proof of Christian's impaired driving ability, the State offered this proof anyway. Officer Adams testified that Christian ran a stop sign and failed to turn off his high beams as he passed the officer. Clearly Christian's actions were evidence of his driving impairment. Keeping in mind our standard of review, the trial court's decision was in no way clearly erroneous and was supported by evidence contained in the record. ***Christian v. State*, 859 So. 2d 1068, 1073 (Miss. Ct. App. 2003).**

In the alternative, there was sufficient evidence to convict Palmer under Miss. Code Ann. § 63-11-30. Block "a" of the ticket states that a person is in violation of the statute if he "willfully and unlawfully drive[s] or otherwise operate[s] a motor vehicle within this state (a) [u]nder the influence of intoxicating liquor." Palmer argues that Officer Sockwell witnessed no erratic driving by him, and therefore, block "a" is inapplicable to him. Palmer's argument is without merit. The officer stopped Palmer for speeding. When he spoke to Palmer, the officer noticed the smell of an intoxicating beverage from Palmer's breath. The officer had Palmer step away from the car to determine if the smell was coming from the car or from Palmer himself. As Palmer stepped out of the vehicle he had to support himself on the vehicle. The officer then determined that the smell was from Palmer. The officer noticed that Palmer had some of the classic signs of intoxication such as the smell of an intoxicating beverage, slurred speech and unsteadiness. The officer then had Palmer perform a number of field sobriety tests, such as the walk and turn and one legged stand, all of which indicated that Palmer was impaired and was under the influence of intoxicating beverages. Officer Sockwell initially stopped Palmer for speeding, Palmer was driving the vehicle at the time the officer stopped him. The officer then determined that observed Palmer and determined that he was impaired and operating the vehicle under the influence of intoxicating beverages. ***Palmer v. City of Oxford*, 860 So. 2d 1203, 1213 (Miss. 2003).**

Operating a Motor Vehicle

Holloway contends that the trial court erred by failing to grant his motion for a judgment notwithstanding the verdict (JNOV). He claims there was insufficient evidence to show that he was "operating the vehicle within the meaning of Section 63-11-30(1)(a) or (c)." . . . In support of his argument, Holloway cites *Lewis v. State*, 831 So. 2d 553, 557 (Miss. Ct. App. 2002), where this Court indicated that Mississippi Code Annotated Section 63-11-30 required "that the vehicle at least be capable of being moved by the defendant, whether the accused

was then in the act of causing it to move or not. Both the accused and the vehicle must have a present ability to cause the hazards against which this statute attempts to protect. That hazard is a moving vehicle with an intoxicated person in control." In the instant case, Holloway did not indicate that anyone else had been driving. In fact, he testified that he was the person who drove the vehicle. Where the defendant admits having driven the vehicle to its present location, no additional proof of its ability to be driven is required. Pursuant to *Lewis*, "to be guilty of driving or operating a motor vehicle while under the influence of drugs or alcohol, or with an illegally high blood-alcohol content, the person must be shown by direct proof or reasonable inferences to have driven the vehicle while in that condition, or as in *Jones* to be 'operating' the vehicle while sitting behind the wheel, in control with the motor running." A person may be arrested, tried, and convicted of operating a motor vehicle while under the influence of an intoxicating liquor even if there is no eyewitness presented who viewed the defendant operating the vehicle, provided there is sufficient evidence. Reasonable doubt need not be removed about whether the defendant had actually driven the vehicle prior to his discovery. Holloway was charged with the felonious operation of a motor vehicle while under the influence of intoxicating liquor pursuant to Mississippi Code Annotated Section 63-11-30. Holloway's statement to Deputy Goleman that he had consumed some beer prior to driving the vehicle to its then location, in conjunction with Deputy Goleman's observations of Holloway, and the results of the intoxilyzer test, provided sufficient evidence that Holloway was guilty of DUI. ***Holloway v. State*, 860 So. 2d 1244, 1246-47 (Miss. Ct. App. 2003) (citations omitted).**

What we find required by the statute is that the vehicle at least be capable of being moved by the defendant, whether the accused was then in the act of causing it to move or not. Both the accused and the vehicle must have a present ability to cause the hazards against which this statute attempts to protect. That hazard is a moving vehicle with an intoxicated person in control. We hold that to be guilty of driving or operating a motor vehicle while under the influence of drugs or alcohol, or with an illegally high blood-alcohol content, the person must be shown by direct proof or reasonable inferences to have driven the vehicle while in that condition, or as in *Jones* to be "operating" the vehicle while sitting behind the wheel, in control with the motor running. Reasonable doubt need not be removed about whether the defendant had actually driven the vehicle prior to his discovery. Proof of the imminence of such driving by being the "operator" of a vehicle that has its motor running is itself an offense even if the offender has yet to move the vehicle. Driving under the influence is a serious crime with serious risks to the public. It may often be difficult to catch an offender in the act. He or she may be discovered only after causing a horrendous accident or perhaps, as alleged by the State here, only after the intoxication causes the driver to stop for awhile. In order to avoid the former harm we do not believe that we have the authority to relax the proof

necessary to convict in the latter instance. Perhaps intoxicated individuals in vehicles for whom no proof exists of past act or future intent to move the vehicle should be guilty of some offense, such as public intoxication if the vehicle is in a public place. Being found alone in a vehicle alongside the road, even when an excuse is later offered, may be sufficient to infer past driving. If the motor is running, the separate element of operating the vehicle is proven. We find it error, though, to give jurors an instruction that being behind the wheel of a stopped motor vehicle that does not have its motor running is by itself sufficient for the driving or operating element. ***Lewis v. State*, 831 So. 2d 553, 557-58 (Miss. Ct. App. 2002) (citations omitted).**

Admissibility of Alcohol Concentration Tests

Intoxilyzer Test

Johnston sets forth the following three prong test for laying the predicate prior to admitting the results of a D.U.I. test. The court must determine whether the

1) proper procedures were followed,
2) whether the operator of the machine was properly certified to perform the test, and
3) whether the accuracy of the machine was properly certified.

The *Johnston* requirements are based on Miss. Code Ann. § 63-11-19 which sets forth the following:

> The State Crime Laboratory shall make periodic, but not less frequently than quarterly, tests of the methods, machines or devices used in making chemical analysis of a person's breath as shall be necessary to ensure the accuracy thereof, and shall issue its certificate to verify the accuracy of the same.

***McIlwain v. State*, 700 So. 2d 586, 590 (Miss. 1997) (Intoxilyzer test).**

A chemical analysis of a person's breath, blood, or urine is deemed valid only when performed according to approved methods; performed by a person certified to do so; and performed on a machine certified to be accurate. Certification of the machines must take place at least quarterly. These safeguards insure a more accurate result in the gathering of scientific evidence through intoxilyzers and are strictly enforced. Where one of the safeguards is deficient the State bears the burden of showing that the deficiency did not affect the accuracy of the result. Johnston challenges the admissibility of the result by arguing that a proper predicate to authenticate accuracy was not laid to accept the test into evidence. The argument is based on (a) the procedures followed, (b) the certification of the operator, and (c) the certification of the machine. There is sufficient evidence in the record to indicate that Trooper Thompson reasonably followed the normal procedures. . . . Exhibit 1 shows that Trooper Thompson was certified to operate a

4011-A & AS model intoxilyzer. Trooper Thompson testified that he was certified to operate an intoxilyzer. Although no evidence was introduced to show that the intoxilyzer used was a 4011-A & AS model, the statute only requires that the person performing the test be certified to do so. The trial court did not abuse its discretion in accepting Trooper Thompson's certification for a 4011-A & AS model intoxilyzer as the required predicate. Trooper Thompson testified that the intoxilyzer was calibrated every month. Johnston's objection to this testimony as not the best evidence and request for the certificate of calibrations was overruled. The trial court simply accepted the testimony of Trooper Thompson without requiring the production of a certificate. Johnston presented a certificate, which was attached to the record, dated August 3, 1988, 130 days after the test was given on March 26. The preceding date of calibration could be no earlier than April 3, 1988, to be within the required statutory period. There is no evidence in the record to establish that the machine had been calibrated within the statutory period, or 120 days before August 3, 1988. It is certainly clear that the machine was not calibrated every month as Trooper Thompson testified. Trooper Thompson's testimony notwithstanding, the State did not produce any evidence that the machine was properly certified and made no effort to carry its burden that even if the intoxilyzer was not properly certified the deficiency did not affect the accuracy of the test. The intoxilyzer had no certificate of calibration to meet the requirements of the statute. Strictly enforcing the statutory requirements, there is no support for the accuracy of the results absent evidence of proper certification. The trial court abused its discretion in finding a sufficient predicate for admitting the results of the intoxilyzer in the testimony of Trooper Thompson. This error substantially prejudiced the defendant's right to a fair trial. ***Johnston v. State*, 567 So. 2d 237, 238-39 (Miss. 1990).**

In his only issue on appeal, Dobbins argues that the trial court erred in allowing the Intoxilyzer results into evidence. Specifically, Dobbins claims that the State was required to put on proof as to why the Intoxilyzer machine used to test him was replaced by another machine some time after he was tested. Dobbins also states that a second calibration should have been done on the Intoxilyzer after his test. Our standard of review regarding the admission or exclusion of evidence is abuse of discretion. We first note that Dobbins concedes that he has found no case requiring two calibrations of the Intoxilyzer machine. Furthermore, Dobbins also "admits that the test would be admissible as long as the City of Starkville substantially complied with the requirements of § 63-11-19." Mississippi Code Annotated Section 63-11-19 states that the Intoxilyzer machines shall be subject to periodic tests, "but not less frequently than quarterly," in order to ensure the accuracy of the machines. According to the record, the particular Intoxilyzer machine used to test Dobbins was calibrated thirteen days prior to its use upon Dobbins. The trial court stated that "[t]here is no evidence that anything was wrong with the machine or that it was giving improper readings or anything." The

trial court found that the machine was working properly on the date in question. We can find no error in the trial court's determination; thus, this issue is without merit. ***Dobbins v. City of Starkville*, 938 So. 2d 296, 297-98 (Miss. Ct. App. 2006) (citations omitted).**

Lepine argues that no proper predicate was laid for the introduction of the blood-alcohol-content test results showing that approximately two hours after the accident, he had a blood-alcohol concentration of .09 percent. In *Jones v. State*, 881 So. 2d 209, 216 (Miss. Ct. App. 2002), this Court distinguished *Johnston*, which involved Intoxilyzer tests, from other testing methods such as a blood analysis, holding that "the procedures used in the analysis must pass a test of reasonableness." No Intoxilyzer test was used in Lepine's case. Instead, hospital personnel drew Lepine's blood and submitted it for blood testing by the Mississippi Crime Laboratory. The results were admitted into evidence at trial through the forensic toxicologist who tested the sample. There was extensive testimony about the forensic toxicologist's qualifications to perform the tests and about the lab's procedures and protocols. The only requirement was one of proof that the procedure was reasonable, and we find that it was adequately established through the trial testimony. Therefore, this issue is without merit. ***Lepine v. State*, 10 So. 3d 927, 935 (Miss. Ct. App. 2009) (citations omitted).**

Blood Test

Deeds's argument that the blood test results were inadmissible due to failure to comply with Section 63-11-9 is simply misplaced. Admissibility of evidence is governed by the Mississippi Rules of Evidence, not by statutory enactment. This Court has held that the Mississippi Rules of Evidence supercede statutory provisions which would render inadmissible evidence that otherwise would be admissible under the Rules of Evidence. Thus, having found that the admissibility of the blood test results is not governed by compliance with statutory requirements, we shift our analysis to whether the results of Deeds's blood test were admissible under the Mississippi Rules of Evidence. Deeds's argument that the State failed to prove "chain of custody" is a challenge to the authenticity of the evidence. However, Deeds never substantively questioned the genuineness of the blood sample. Rather, Deeds merely suggests that because the prosecution could not provide the name of the individual who drew Deeds's blood, tampering or contamination could have taken place. Officer Gibbs testified that he witnessed the attending nurse draw the blood and that the nurse signed her name on the blood sample before she gave it to him. Officer Gibbs, however, did not otherwise note the nurse's name in his report, and the Mississippi Crime Laboratory disposed of the blood sample as a biological hazard six months after analysis, pursuant to standard procedures. Rule 901 of the Mississippi Rules of Evidence provides that "[t]he requirement of authentication or identification as a condition

precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." Our precedent is clear that "Mississippi law has never required a proponent of evidence to produce every handler of evidence." In order for the defendant to show a break in the chain of custody, there must be an "indication or reasonable inference of probable tampering with the evidence or substitution of the evidence." The defendant has the burden of proving tampering or substitution of the evidence, and "[a] mere suggestion that substitution could possibly have occurred does not meet the burden of showing probable substitution." Deeds has not attempted to prove that such tampering or substitution occurred. The trial judge found no indication or reasonable inference of tampering with evidence or substitution of evidence. In examining the record, we find sufficient evidence, under an abuse of discretion standard, to support the judge's finding that the blood sample was what it was claimed to be. For the reasons stated, we find this argument to be without merit. ***Deeds v. State*, 27 So. 3d 1135, 1141-42 (Miss. 2009) (citations omitted).**

Evidence Not Allowed to Prove DUI

We find that the HGN test is a scientific test. The potential of a juror placing undue weight upon testimony about the administration of the test is high. Whereas most other field sobriety tests arise out of a juror's common experiences, i.e., one stumbles, slurs words, and staggers when drunk, the HGN test relies upon a scientifically or at least professionally relevant set of observations. Therefore, this Court finds that the HGN test is not generally accepted within the scientific community and cannot be used as scientific evidence to prove intoxication or as a mere showing of impairment. However, the HGN test can still be used to prove probable cause to arrest and administer the intoxilyzer or blood test. This is the only allowable use for the test results. ***Young v. City of Brookhaven*, 693 So. 2d 1355, 1360-61 (Miss. 1997).**

Standard of Review

This standard of review permits this Court to reverse the trial court's judgment of [a defendant]'s guilt of driving under the influence, whether felony or misdemeanor, only if it can say that "the facts and inferences in the case sub judice so considered point in favor of [the defendant] with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty." ***Porter v. State*, 749 So. 2d 250, 257 (Miss. Ct. App. 1999) (citation omitted).**

Second Offense DUI

§ 63-11-30 Operation under influence of alcohol or other impairing substance:

(2)(b) Second offense DUI.

(i) Upon any second conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, the person shall be guilty of a misdemeanor, fined not less than Six Hundred Dollars ($600.00) nor more than One Thousand Five Hundred Dollars ($1,500.00), shall be imprisoned not less than five (5) days nor more than six (6) months and sentenced to community service work for not less than ten (10) days nor more than six (6) months. The minimum penalties shall not be suspended or reduced by the court and no prosecutor shall offer any suspension or sentence reduction as part of a plea bargain.

(ii) Suspension of commercial driving privileges is governed by Section 63-1-216.

(iii) Eligibility for an interlock-restricted license is governed by Section 63-11-31 and suspension of regular driving privileges is governed by Section 63-11-23. . . .

(e) Any person convicted of a second or subsequent violation of subsection (1) of this section shall receive an in-depth diagnostic assessment, and if as a result of the assessment is determined to be in need of treatment for alcohol or drug abuse, the person must successfully complete treatment at a program site certified by the Department of Mental Health. Each person who receives a diagnostic assessment shall pay a fee representing the cost of the assessment. Each person who participates in a treatment program shall pay a fee representing the cost of treatment.

(f) The use of ignition-interlock devices is governed by Section 63-11-31. . . .

Right to Jury Trial

The issue presented in this case, as to whether a defendant charged with DUI second offense under Mississippi Code Annotated Section 63-11-30(2)(b) has a right to a jury trial, was addressed by our supreme court in *Harkins v. State*, 735 So. 2d 317, 318 (Miss. 1999). The *Harkins* court reversed and remanded a conviction when a trial court denied the request for a jury trial under the same facts and law present in this case. Therefore, we reverse and remand the conviction of DUI second offense for further proceedings not inconsistent with this opinion. ***Skinner v. State*, 809 So. 2d 782, 784 (Miss. Ct. App. 2002).**

The State confesses reversible error in the present case, acknowledging that the trial court erred in refusing Harkins' request for a jury trial. Uniform Rule of Circuit and County Court Practice 12.02 provides in part that "in appeals from justice or municipal court when the maximum possible sentence is six months or less, the case may be tried without a jury at the court's discretion. . . ." Rule 12.02 thus only grants the trial court discretion to deny a defendant's request for a jury trial in cases in which the maximum possible sentence is six months or less. This provision is based upon United States Supreme Court decisions' presumption that offenses carrying maximum sentences of six months or less are "petty offenses" to which the Sixth Amendment right to trial by jury does not apply. Harkins was tried pursuant to Miss. Code Ann. § 63-11-30(2)(b), which provided (in its version effective July 1, 1995) for a statutory maximum sentence of one year for second offense D.U.I. It is thus apparent that the trial court committed reversible error in denying Harkins' request for a jury trial. The judgment of the trial court is reversed, and the case is remanded for a trial before a jury. ***Harkins v. State*, 735 So. 2d 317, 318-19 (Miss. 1999) (citations omitted).**

No Bifurcation of Trial

During pre-trial motions, Rigby moved to bifurcate the trial and to prohibit the State from using evidence of any prior bad acts. In support of these motions, Rigby requested that the State not be allowed to introduce evidence of Rigby's prior DUI convictions in its case. These motions were denied by the trial court. Rigby then offered to concede his prior convictions to the State, but he did not want to concede them in front of the jury. This issue has been addressed by this Court numerous times. This Court has consistently held that each previous conviction is an element of the felony offense. Rigby suggests, following the general concept of *Old Chief*, that it is better to bifurcate the proceedings so as to disallow prejudicial convictions to be put before the jury prior to a verdict on the current charge. This Court has repeatedly held that prior DUI convictions are necessary elements of a felony DUI charge. Thus, they must be proven beyond a reasonable doubt to the jury. Simply put, bifurcation of the guilt phase of a trial is

inappropriate under Mississippi law. To do as Rigby suggests would set up a system where a defendant charged with felony DUI first be tried on the newest DUI before a jury. Then, if the jury returns with a guilty verdict, the prior convictions would be put before that same jury, and it would then deliberate on the felony DUI charge. This procedure would be a direct violation of our Uniform Rules of Circuit and County Court Practice. Rule 3.10 states in pertinent part that "[a]fter the jurors have retired to consider their verdict the court shall not recall the jurors to hear additional evidence." Only two states have adopted the procedure suggested by Rigby. Other sister states have considered this very issue and have come to different conclusions. The majority of states that classify prior DUI convictions as an element of felony DUI, however, have rejected bifurcation. In Mississippi, the issue of prior DUIs is clearly an element of the offense required to be proven to the jury. At first blush, it might appear that having a judge conduct such a second phase of a bifurcated trial is a better procedure. However, such a procedure would produce several problems. Thus, we reject Rigby's allegation of error on this issue. Prior DUI convictions are elements of a felony DUI charge and are required to be submitted to a jury. Despite this finding, certain procedural safeguards are warranted if a defendant offers to stipulate to previous DUI convictions. The trial court should accept such stipulations, and they should be submitted to the jury with a proper limiting instruction. The instruction should explain to the jury that the prior DUI convictions should be considered for the sole purpose of determining whether the defendant is guilty of felony DUI and that such evidence should not be considered in determining whether the defendant acted in conformity with such convictions in the presently charged offense. A balance is therefore struck between the prosecution's burden to prove the elements of a crime and the evidentiary rules which safeguard a defendant's right to a fair trial. We suggest that trial judges facing this situation in the future grant an instruction similar to the following:

> The court instructs the jury that the Defendant has stipulated to one element of the crime of which he/she is currently charged. That element is two prior DUI convictions. The court instructs the jury that these prior convictions of the Defendant may not be considered as evidence that the Defendant committed the DUI with which he/she is currently charged. They may, however, be used for the limited and sole purpose of proving the prior convictions element of the crime of felony DUI.

Although it would have been more appropriate for the trial court to have accepted the defendant's offer of stipulation and have granted a limiting instruction, Rigby merely offered to concede his prior convictions to the State, and not before the jury; further, accepting such a stipulation as we now hold is appropriate was not required by our caselaw. With no clear precedent requiring a limiting instruction on a constitutional basis, it was not reversible error for the trial court sua sponte to refuse to give a limiting instruction. ***Rigby v. State*, 826 So. 2d 694, 699-703 (Miss. 2002) (citation omitted).**

Moreover, in the case sub judice, the circuit court took steps to minimize the potentially prejudicial effects of Dove's prior convictions. The jury was given a cautionary instruction mandating that Dove's prior DUI convictions were not to be considered as evidence against Dove. ***Dove v. State*, 912 So. 2d 1091, 1094 (Miss. Ct. App. 2005).**

Elements

However, the Mississippi Supreme Court has since found that a "prior conviction is a necessary element of second-offense DUI." "Since the State is required to prove all the essential elements of the crime charged, it is not unfair prejudice to present evidence of prior DUI convictions." ***Carter v. State*, 117 So. 3d 689, 690-91 (Miss. Ct. App. 2013) (citations omitted).**

Ostrander first argues that proof of a prior DUI conviction is a necessary element for his conviction of a second offense DUI. The State agrees. Ostrander was on trial for the following violations of Miss. Code Ann. § 63-11-30(2)(b). "Upon any second conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be fined not less than Six Hundred Dollars ($600.00) nor more than One Thousand Five Hundred Dollars ($1,500.00) and shall be imprisoned not less than ten (10) days nor more than one (1) year and sentenced to community service work for not less than ten (10) days nor more than one (1) year." Following this analysis in the case presently before us, it necessarily follows that a prior DUI conviction is a necessary element of a DUI second offense. ***Ostrander v. State*, 803 So. 2d 1172, 1175 (Miss. 2002) (citations omitted).**

Evidence

Lyle was charged with second-offense DUI, and his case proceeded to trial in the Circuit Court of Leake County. After the state rested, Lyle moved for a directed verdict because the prosecution failed to put on any proof that he had been previously convicted of DUI. The trial judge stated that his understanding of the law required proof of the first DUI conviction in a bifurcated proceeding subsequent to the end of both parties' cases. After reconsidering this ruling, the judge allowed the state to reopen its case-in-chief for the purpose of proving Lyle's previous DUI conviction. The state attempted to prove Lyle's previous conviction by submitting an uncertified abstract of the prior conviction. Lyle objected to the introduction of this evidence as hearsay. The objection was sustained, but the judge granted the state a continuance to obtain a certified copy of the prior conviction. In light of these cases, Lyle was not "twice placed in jeopardy" when the court granted the brief recess. The resumed hearing was simply a continuation of that day's trial and did not expose Lyle to double

jeopardy. In addition, the mistake made by the prosecution cannot be characterized as "inexcusable," and the brief recess was not "unreasonable." ***Lyle v. State*, 987 So. 2d 948, 947-52 (Miss. 2008).**

On February 24, 1996, Ronald Ostrander was arrested by Mississippi Highway Patrol Sergeant Tommy Henderson at a road block in Greene County for driving under the influence of alcohol. The arrest was based on Henderson's observations of indicia of intoxication, Ostrander's admission that he had been drinking, and the presence of beer in Ostrander's car. Ostrander refused to submit to the intoxilyzer test. He was charged with a D.U.I. second offense. Ostrander was tried and convicted in the Justice Court of Greene County with his sentencing delayed "pending a DUI appealed from the Municipal Court of Leakesville." Ostrander filed a notice of appeal pursuant to Miss. Code Ann. § 99-35-1 to the Circuit Court of Greene County. His motion for a jury trial was granted. The State offered one witness at the trial, the Mississippi Highway Patrolman who issued the DUI, Trooper Tommy Henderson. The State attempted to introduce a court abstract to support the charge of a second offense DUI. Defense counsel objected and argued, inter alia, that the first conviction had been dismissed, and thus, could not be used to support the charge of a second offense DUI. The trial judge sustained the objection to the introduction of the abstract. The trial then proceeded with the cross-examination of Trooper Henderson. After brief redirect examination, the State rested. Ostrander moved for a directed verdict asserting that the State failed to prove the element of a prior conviction, and as a result, failed to prove a required element of its case. The trial judge overruled the motion for a directed verdict as to the case as a whole, but ruled that a first offense DUI is a lesser-included offense of a DUI second offense. He allowed the case to go the jury as a DUI first offense. The jury found that Ostrander was guilty of a DUI first offense. In the case at bar, the trial judge expressly limited his directed verdict to the second-offense DUI. Such an acquittal, accompanied by an indication that the judgment did not encompass acquittal of the lesser-included offense, does not protect Ostrander from liability for the lesser offense necessarily included in the second-offense DUI. ***Ostrander v. State*, 803 So. 2d 1172, 1173-77 (Miss. 2002).**

Operating a Motor Vehicle

Holloway contends that the trial court erred by failing to grant his motion for a judgment notwithstanding the verdict (JNOV). He claims there was insufficient evidence to show that he was "operating the vehicle within the meaning of Section 63-11-30(1)(a) or (c)." In support of his argument, Holloway cites *Lewis v. State*, 831 So. 2d 553, 557 (Miss. Ct. App. 2002), where this Court indicated that Mississippi Code Annotated Section 63-11-30 required "that the vehicle at least be capable of being moved by the defendant, whether the accused was then in the act of causing it to move or not. Both the accused and the vehicle must have

a present ability to cause the hazards against which this statute attempts to protect. That hazard is a moving vehicle with an intoxicated person in control." In the instant case, Holloway did not indicate that anyone else had been driving. In fact, he testified that he was the person who drove the vehicle. Where the defendant admits having driven the vehicle to its present location, no additional proof of its ability to be driven is required. Pursuant to *Lewis*, "to be guilty of driving or operating a motor vehicle while under the influence of drugs or alcohol, or with an illegally high blood-alcohol content, the person must be shown by direct proof or reasonable inferences to have driven the vehicle while in that condition, or as in *Jones* to be 'operating' the vehicle while sitting behind the wheel, in control with the motor running." A person may be arrested, tried, and convicted of operating a motor vehicle while under the influence of an intoxicating liquor even if there is no eyewitness presented who viewed the defendant operating the vehicle, provided there is sufficient evidence. Reasonable doubt need not be removed about whether the defendant had actually driven the vehicle prior to his discovery. Holloway was charged with the felonious operation of a motor vehicle while under the influence of intoxicating liquor pursuant to Mississippi Code Annotated Section 63-11-30. Holloway's statement to Deputy Goleman that he had consumed some beer prior to driving the vehicle to its then location, in conjunction with Deputy Goleman's observations of Holloway, and the results of the intoxilyzer test, provided sufficient evidence that Holloway was guilty of DUI. ***Holloway v. State*, 860 So. 2d 1244, 1246-47 (Miss. Ct. App. 2003) (citations omitted).**

What we find required by the statute is that the vehicle at least be capable of being moved by the defendant, whether the accused was then in the act of causing it to move or not. Both the accused and the vehicle must have a present ability to cause the hazards against which this statute attempts to protect. That hazard is a moving vehicle with an intoxicated person in control. We hold that to be guilty of driving or operating a motor vehicle while under the influence of drugs or alcohol, or with an illegally high blood-alcohol content, the person must be shown by direct proof or reasonable inferences to have driven the vehicle while in that condition, or as in *Jones* to be "operating" the vehicle while sitting behind the wheel, in control with the motor running. Reasonable doubt need not be removed about whether the defendant had actually driven the vehicle prior to his discovery. Proof of the imminence of such driving by being the "operator" of a vehicle that has its motor running is itself an offense even if the offender has yet to move the vehicle. Driving under the influence is a serious crime with serious risks to the public. It may often be difficult to catch an offender in the act. He or she may be discovered only after causing a horrendous accident or perhaps, as alleged by the State here, only after the intoxication causes the driver to stop for awhile. In order to avoid the former harm we do not believe that we have the authority to relax the proof necessary to convict in the latter instance. Perhaps intoxicated individuals in vehicles for whom no proof exists of past act or future intent to move the vehicle

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Admissibility of Alcohol Concentration Tests

Intoxilyzer Test

Johnston sets forth the following three prong test for laying the predicate prior to admitting the results of a D.U.I. test. The court must determine whether the

1) proper procedures were followed,
2) whether the operator of the machine was properly certified to perform the test, and
3) whether the accuracy of the machine was properly certified.

The *Johnston* requirements are based on Miss. Code Ann. § 63-11-19 which sets forth the following:

> The State Crime Laboratory shall make periodic, but not less frequently than quarterly, tests of the methods, machines or devices used in making chemical analysis of a person's breath as shall be necessary to ensure the accuracy thereof, and shall issue its certificate to verify the accuracy of the same.

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A chemical analysis of a person's breath, blood, or urine is deemed valid only when performed according to approved methods; performed by a person certified to do so; and performed on a machine certified to be accurate. Certification of the machines must take place at least quarterly. These safeguards insure a more accurate result in the gathering of scientific evidence through intoxilyzers and are strictly enforced. Where one of the safeguards is deficient the State bears the burden of showing that the deficiency did not affect the accuracy of the result. Johnston challenges the admissibility of the result by arguing that a proper predicate to authenticate accuracy was not laid to accept the test into evidence. The argument is based on (a) the procedures followed, (b) the certification of the operator, and (c) the certification of the machine. There is sufficient evidence in the record to indicate that Trooper Thompson reasonably followed the normal procedures. Exhibit 1 shows that Trooper Thompson was certified to operate a 4011-A & AS model intoxilyzer. Trooper Thompson testified that he was certified to operate an intoxilyzer. Although no evidence was introduced to show that the

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In his only issue on appeal, Dobbins argues that the trial court erred in allowing the Intoxilyzer results into evidence. Specifically, Dobbins claims that the State was required to put on proof as to why the Intoxilyzer machine used to test him was replaced by another machine some time after he was tested. Dobbins also states that a second calibration should have been done on the Intoxilyzer after his test. Our standard of review regarding the admission or exclusion of evidence is abuse of discretion. We first note that Dobbins concedes that he has found no case requiring two calibrations of the Intoxilyzer machine. Furthermore, Dobbins also "admits that the test would be admissible as long as the City of Starkville substantially complied with the requirements of § 63-11-19." Mississippi Code Annotated Section 63-11-19 states that the Intoxilyzer machines shall be subject to periodic tests, "but not less frequently than quarterly," in order to ensure the accuracy of the machines. According to the record, the particular Intoxilyzer machine used to test Dobbins was calibrated thirteen days prior to its use upon Dobbins. The trial court stated that "[t]here is no evidence that anything was wrong with the machine or that it was giving improper readings or anything." The trial court found that the machine was working properly on the date in question. We can find no error in the trial court's determination; thus, this issue is without

merit. ***Dobbins v. City of Starkville*, 938 So. 2d 296, 297-98 (Miss. Ct. App. 2006) (citations omitted).**

Lepine argues that no proper predicate was laid for the introduction of the blood-alcohol-content test results showing that approximately two hours after the accident, he had a blood-alcohol concentration of .09 percent. In *Jones v. State*, 881 So. 2d 209, 216 (Miss. Ct. App. 2002), this Court distinguished *Johnston*, which involved Intoxilyzer tests, from other testing methods such as a blood analysis, holding that "the procedures used in the analysis must pass a test of reasonableness." No Intoxilyzer test was used in Lepine's case. Instead, hospital personnel drew Lepine's blood and submitted it for blood testing by the Mississippi Crime Laboratory. The results were admitted into evidence at trial through the forensic toxicologist who tested the sample. There was extensive testimony about the forensic toxicologist's qualifications to perform the tests and about the lab's procedures and protocols. The only requirement was one of proof that the procedure was reasonable, and we find that it was adequately established through the trial testimony. Therefore, this issue is without merit. ***Lepine v. State*, 10 So. 3d 927, 935 (Miss. Ct. App. 2009) (citations omitted).**

Blood Test

Deeds's argument that the blood test results were inadmissible due to failure to comply with Section 63-11-9 is simply misplaced. Admissibility of evidence is governed by the Mississippi Rules of Evidence, not by statutory enactment. This Court has held that the Mississippi Rules of Evidence supercede statutory provisions which would render inadmissible evidence that otherwise would be admissible under the Rules of Evidence. Thus, having found that the admissibility of the blood test results is not governed by compliance with statutory requirements, we shift our analysis to whether the results of Deeds's blood test were admissible under the Mississippi Rules of Evidence. Deeds's argument that the State failed to prove "chain of custody" is a challenge to the authenticity of the evidence. However, Deeds never substantively questioned the genuineness of the blood sample. Rather, Deeds merely suggests that because the prosecution could not provide the name of the individual who drew Deeds's blood, tampering or contamination could have taken place. Officer Gibbs testified that he witnessed the attending nurse draw the blood and that the nurse signed her name on the blood sample before she gave it to him. Officer Gibbs, however, did not otherwise note the nurse's name in his report, and the Mississippi Crime Laboratory disposed of the blood sample as a biological hazard six months after analysis, pursuant to standard procedures. Rule 901 of the Mississippi Rules of Evidence provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." Our precedent is clear

that "Mississippi law has never required a proponent of evidence to produce every handler of evidence." In order for the defendant to show a break in the chain of custody, there must be an "indication or reasonable inference of probable tampering with the evidence or substitution of the evidence." The defendant has the burden of proving tampering or substitution of the evidence, and "[a] mere suggestion that substitution could possibly have occurred does not meet the burden of showing probable substitution." Deeds has not attempted to prove that such tampering or substitution occurred. The trial judge found no indication or reasonable inference of tampering with evidence or substitution of evidence. In examining the record, we find sufficient evidence, under an abuse of discretion standard, to support the judge's finding that the blood sample was what it was claimed to be. For the reasons stated, we find this argument to be without merit. ***Deeds v. State*, 27 So. 3d 1135, 1141-42 (Miss. 2009) (citations omitted).**

Evidence Not Allowed to Prove DUI

We find that the HGN test is a scientific test. The potential of a juror placing undue weight upon testimony about the administration of the test is high. Whereas most other field sobriety tests arise out of a juror's common experiences, i.e., one stumbles, slurs words, and staggers when drunk, the HGN test relies upon a scientifically or at least professionally relevant set of observations. Therefore, this Court finds that the HGN test is not generally accepted within the scientific community and cannot be used as scientific evidence to prove intoxication or as a mere showing of impairment. However, the HGN test can still be used to prove probable cause to arrest and administer the intoxilyzer or blood test. This is the only allowable use for the test results. ***Young v. City of Brookhaven*, 693 So. 2d 1355, 1360-61 (Miss. 1997).**

Standard of Review

This standard of review permits this Court to reverse the trial court's judgment of [a defendant]'s guilt of driving under the influence, whether felony or misdemeanor, only if it can say that "the facts and inferences in the case sub judice so considered point in favor of [the defendant] with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty." ***Porter v. State*, 749 So. 2d 250, 257 (Miss. Ct. App. 1999) (citation omitted).**

Third DUI

§ 63-11-30 Operation under influence of alcohol or other impairing substance:

(2)(c) Third offense DUI.

(i) For a third conviction of a person for violating subsection (1) of this section, the offenses being committed within a period of five (5) years, the person shall be guilty of a felony and fined not less than Two Thousand Dollars ($2,000.00) nor more than Five Thousand Dollars ($5,000.00), and shall serve not less than one (1) year nor more than five (5) years in the custody of the Department of Corrections. For any offense that does not result in serious injury or death to any person, the sentence of incarceration may be served in the county jail rather than in the State Penitentiary at the discretion of the circuit court judge. The minimum penalties shall not be suspended or reduced by the court and no prosecutor shall offer any suspension or sentence reduction as part of a plea bargain.

(ii) The suspension of commercial driving privileges is governed by Section 63-1-216.

(iii) The suspension of regular driving privileges is governed by Section 63-11-23. . . .

(e) Any person convicted of a second or subsequent violation of subsection (1) of this section shall receive an in-depth diagnostic assessment, and if as a result of the assessment is determined to be in need of treatment for alcohol or drug abuse, the person must successfully complete treatment at a program site certified by the Department of Mental Health. Each person who receives a diagnostic assessment shall pay a fee representing the cost of the assessment. Each person who participates in a treatment program shall pay a fee representing the cost of treatment.

(f) The use of ignition-interlock devices is governed by Section 63-11-31. . . .

Right to Jury Trial

In *Duncan v. Louisiana*, we held that the Sixth Amendment, as applied to the States through the Fourteenth, requires that defendants accused of serious crimes be afforded the right to trial by jury. We also reaffirmed the long-established view that so- called 'petty offenses' may be tried without a jury. Thus the task before us in this case is the essential if not wholly satisfactory one, of determining the line between 'petty' and 'serious' for purposes of the Sixth Amendment right to jury

trial. Prior cases in this Court narrow our inquiry and furnish us with the standard to be used in resolving this issue. In deciding whether an offense is 'petty,' we have sought objective criteria reflecting the seriousness with which society regards the offense, and we have found the most relevant such criteria in the severity of the maximum authorized penalty. Applying these guidelines, we have held that a possible six-month penalty is short enough to permit classification of the offense as 'petty,' but that a two-year maximum is sufficiently 'serious' to require an opportunity for jury trial. The question in this case is whether the possibility of a one-year sentence is enough in itself to require the opportunity for a jury trial. We hold that it is. More specifically, we have concluded that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized. ***Baldwin v. New York*, 399 U.S. 66, 68, 90 S. Ct. 1886, 1887-88, 26 L. Ed. 2d 437 (1970).**

***See* Mississippi Rule of Criminal Procedure Rule 29.5, Proceedings,** provides:

> The appeal shall proceed as a trial de novo. In appeals from justice or municipal court, when the maximum possible sentence is six (6) months or less, the case may be tried without a jury.

No Bifurcation of Trial

During pre-trial motions, Rigby moved to bifurcate the trial and to prohibit the State from using evidence of any prior bad acts. In support of these motions, Rigby requested that the State not be allowed to introduce evidence of Rigby's prior DUI convictions in its case. These motions were denied by the trial court. Rigby then offered to concede his prior convictions to the State, but he did not want to concede them in front of the jury. This issue has been addressed by this Court numerous times. This Court has consistently held that each previous conviction is an element of the felony offense. Rigby suggests, following the general concept of *Old Chief*, that it is better to bifurcate the proceedings so as to disallow prejudicial convictions to be put before the jury prior to a verdict on the current charge. This Court has repeatedly held that prior DUI convictions are necessary elements of a felony DUI charge. Thus, they must be proven beyond a reasonable doubt to the jury. Simply put, bifurcation of the guilt phase of a trial is inappropriate under Mississippi law. To do as Rigby suggests would set up a system where a defendant charged with felony DUI first be tried on the newest DUI before a jury. Then, if the jury returns with a guilty verdict, the prior convictions would be put before that same jury, and it would then deliberate on the felony DUI charge. This procedure would be a direct violation of our Uniform Rules of Circuit and County Court Practice. Rule 3.10 states in pertinent part that "[a]fter the jurors have retired to consider their verdict the court shall not recall the jurors to hear additional evidence." Only two states have adopted the

procedure suggested by Rigby. Other sister states have considered this very issue and have come to different conclusions. The majority of states that classify prior DUI convictions as an element of felony DUI, however, have rejected bifurcation. In Mississippi, the issue of prior DUIs is clearly an element of the offense required to be proven to the jury. At first blush, it might appear that having a judge conduct such a second phase of a bifurcated trial is a better procedure. However, such a procedure would produce several problems. Thus, we reject Rigby's allegation of error on this issue. Prior DUI convictions are elements of a felony DUI charge and are required to be submitted to a jury. Despite this finding, certain procedural safeguards are warranted if a defendant offers to stipulate to previous DUI convictions. The trial court should accept such stipulations, and they should be submitted to the jury with a proper limiting instruction. The instruction should explain to the jury that the prior DUI convictions should be considered for the sole purpose of determining whether the defendant is guilty of felony DUI and that such evidence should not be considered in determining whether the defendant acted in conformity with such convictions in the presently charged offense. A balance is therefore struck between the prosecution's burden to prove the elements of a crime and the evidentiary rules which safeguard a defendant's right to a fair trial. We suggest that trial judges facing this situation in the future grant an instruction similar to the following:

> The court instructs the jury that the Defendant has stipulated to one element of the crime of which he/she is currently charged. That element is two prior DUI convictions. The court instructs the jury that these prior convictions of the Defendant may not be considered as evidence that the Defendant committed the DUI with which he/she is currently charged. They may, however, be used for the limited and sole purpose of proving the prior convictions element of the crime of felony DUI.

Although it would have been more appropriate for the trial court to have accepted the defendant's offer of stipulation and have granted a limiting instruction, Rigby merely offered to concede his prior convictions to the State, and not before the jury; further, accepting such a stipulation as we now hold is appropriate was not required by our caselaw. With no clear precedent requiring a limiting instruction on a constitutional basis, it was not reversible error for the trial court sua sponte to refuse to give a limiting instruction. ***Rigby v. State*, 826 So. 2d 694, 699-703 (Miss. 2002) (citation omitted).**

Moreover, in the case sub judice, the circuit court took steps to minimize the potentially prejudicial effects of Dove's prior convictions. The jury was given a cautionary instruction mandating that Dove's prior DUI convictions were not to be considered as evidence against Dove. ***Dove v. State*, 912 So. 2d 1091, 1094 (Miss. Ct. App. 2005).**

Elements

Smith's second allegation of error is that he was denied a fair trial since evidence was introduced of prior bad acts. Specifically, he claims it was prejudicial to introduce evidence of the prior DUI convictions during the guilt phase of the trial. Smith relies upon *Strickland v. State*, 784 So. 2d 957, 962 (Miss. 2001), which stated that the "prior convictions are only relevant as to sentencing and should only be admitted during a separate sentencing phase." The supreme court has since clarified that each prior conviction is an element of a charge for the crime of DUI third offense. Since the earlier convictions are elements of the charge of DUI third offense, if we prevented the State from proving the prior convictions to the jury then we "would preclude the State from proving an essential element of the crime and the circuit court would breach its duty to instruct the jury on all the essential elements of the crime charged." Since the State is required to prove all the essential elements of the crime charged, it was not unfair prejudice to present evidence of prior DUI convictions. ***Smith v. State*, 950 So. 2d 1056, 1060 (Miss. Ct. App. 2007) (citations omitted).**

In order to prove guilt of third offense felony DUI, the State has the burden to prove beyond a reasonable doubt that an accused was driving or operating a vehicle while either under the influence of an intoxicating liquor or with a blood alcohol content of at least 0.08%. Additionally, the State is required to prove that the accused has been twice convicted of separate DUI charges within the previous five years of the arrest for the third DUI charge. ***Starkey v. State*, 941 So. 2d 899, 902-03 (Miss. Ct. App. 2006).**

This Court has repeatedly held that prior DUI convictions are necessary elements of a felony DUI charge. Thus, they must be proven beyond a reasonable doubt to the jury. ***Rigby v. State*, 826 So. 2d 694, 700 (Miss. 2002).**

Evidence

Smith claims that error was with the second conviction that the State entered into evidence. For the second DUI conviction, the State entered into evidence a judgment dated September 3, 2002, convicting Smith of a DUI. Smith is correct that the judgment does not contain the date of when the offense occurred. Thus, the State failed to introduce evidence that the conviction under this judgment occurred within five years of the offense for which Smith was on trial. The State offered no further evidence of the date on which the second DUI offense occurred. The statute requires that the offenses must have been committed within a period of five years of each other, not the convictions. Proof of the convictions is required by the statute, but without including the date of the offense on the second DUI conviction there is no evidence to show that it occurred within five years of

the most recent offense. While we find that there was insufficient evidence to prove Smith's violation of DUI third offense, it is undisputed that Smith was in violation of Section 63-11-30(1) whereby he operated a motor vehicle with a blood alcohol concentration greater than .08%. Smith correctly alleges that the State failed to prove that Smith had two prior DUI convictions, where the offenses occurred within five years. Without evidence of when the offense for the September 3, 2002, conviction occurred, there is insufficient evidence to convict Smith of felony DUI. Accordingly, we remand this case to the Circuit Court of Leake County with direction to sentence Smith for violation of Section 63-11-30(2)(b) and not Section 63-11-30(2)(c). ***Smith v. State*, 950 So. 2d 1056, 1058-61 (Miss. Ct. App. 2007).**

In the case sub judice, the State's evidence consisted of testimony from Officer Mucciarone and Officer Barker. Both officers are trained in field sobriety procedures and certified to administer the tests that Starkey received. Officer Mucciarone testified that he observed Starkey unsteady on his feet, with red, watery eyes, a dazed stare, slurred speech and he sensed a strong odor of an intoxicating beverage coming from inside the vehicle. Officer Barker testified to the same indicators of intoxication. Officer Barker testified that Starkey also failed the two field sobriety tests conducted and that he refused the Intoxilyzer test. Additionally, both officers testified that Starkey admitted to drinking "a couple" prior to the stop. The State also introduced into evidence two prior sentencing orders in which Starkey had been convicted of separate DUI charges in Shelby County, Tennessee, within the five year time period previous to his arrest on September 18, 2004. The jury considered the evidence and returned a verdict against Starkey. We find that there was sufficient evidence to find Starkey guilty. ***Starkey v. State*, 941 So. 2d 899, 903 (Miss. Ct. App. 2006).**

When there is other sufficient evidence of impaired operation, no eyewitness testimony of impaired operation is needed to sustain a conviction. In this case, there was sufficient credible evidence from which it could be reasonably inferred that Turner had been operating the vehicle prior to being stopped by Officer Riggs. The police dispatch informed Riggs of a white van driving erratically and, later, that the van had stopped. There were tire marks leading from the road to the van. Officer Riggs discovered Turner in the driver's seat of the white van. Turner told Officer Rowell he had driven to that location from Memphis. Turner stated that the van had a flat tire. There was no evidence that anyone else had been driving the van. ***Turner v. State*, 910 So. 2d 598, 601 (Miss. Ct. App. 2005) (citations omitted).**

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In his only issue on appeal, Dobbins argues that the trial court erred in allowing the Intoxilyzer results into evidence. Specifically, Dobbins claims that the State was required to put on proof as to why the Intoxilyzer machine used to test him was replaced by another machine some time after he was tested. Dobbins also states that a second calibration should have been done on the Intoxilyzer after his test. Our standard of review regarding the admission or exclusion of evidence is abuse of discretion. We first note that Dobbins concedes that he has found no case requiring two calibrations of the Intoxilyzer machine. Furthermore, Dobbins also “admits that the test would be admissible as long as the City of Starkville substantially complied with the requirements of § 63-11-19.” Mississippi Code Annotated Section

63-11-19 states that the Intoxilyzer machines shall be subject to periodic tests, "but not less frequently than quarterly," in order to ensure the accuracy of the machines. According to the record, the particular Intoxilyzer machine used to test Dobbins was calibrated thirteen days prior to its use upon Dobbins. The trial court stated that "[t]here is no evidence that anything was wrong with the machine or that it was giving improper readings or anything." The trial court found that the machine was working properly on the date in question. We can find no error in the trial court's determination; thus, this issue is without merit. ***Dobbins v. City of Starkville*, 938 So. 2d 296, 297-98 (Miss. Ct. App. 2006) (citations omitted).**

Lepine argues that no proper predicate was laid for the introduction of the blood-alcohol-content test results showing that approximately two hours after the accident, he had a blood-alcohol concentration of .09 percent. In *Jones v. State*, 881 So. 2d 209, 216 (Miss. Ct. App. 2002), this Court distinguished *Johnston*, which involved Intoxilyzer tests, from other testing methods such as a blood analysis, holding that "the procedures used in the analysis must pass a test of reasonableness." No Intoxilyzer test was used in Lepine's case. Instead, hospital personnel drew Lepine's blood and submitted it for blood testing by the Mississippi Crime Laboratory. The results were admitted into evidence at trial through the forensic toxicologist who tested the sample. There was extensive testimony about the forensic toxicologist's qualifications to perform the tests and about the lab's procedures and protocols. The only requirement was one of proof that the procedure was reasonable, and we find that it was adequately established through the trial testimony. Therefore, this issue is without merit. ***Lepine v. State*, 10 So. 3d 927, 935 (Miss. Ct. App. 2009) (citations omitted).**

Blood Test

Deeds's argument that the blood test results were inadmissible due to failure to comply with Section 63-11-9 is simply misplaced. Admissibility of evidence is governed by the Mississippi Rules of Evidence, not by statutory enactment. This Court has held that the Mississippi Rules of Evidence supercede statutory provisions which would render inadmissible evidence that otherwise would be admissible under the Rules of Evidence. Thus, having found that the admissibility of the blood test results is not governed by compliance with statutory requirements, we shift our analysis to whether the results of Deeds's blood test were admissible under the Mississippi Rules of Evidence. Deeds's argument that the State failed to prove "chain of custody" is a challenge to the authenticity of the evidence. However, Deeds never substantively questioned the genuineness of the blood sample. Rather, Deeds merely suggests that because the prosecution could not provide the name of the individual who drew Deeds's blood, tampering or contamination could have taken place. Officer Gibbs testified that he witnessed the attending nurse draw the blood and that the nurse signed her name on the blood

sample before she gave it to him. Officer Gibbs, however, did not otherwise note the nurse's name in his report, and the Mississippi Crime Laboratory disposed of the blood sample as a biological hazard six months after analysis, pursuant to standard procedures. Rule 901 of the Mississippi Rules of Evidence provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." Our precedent is clear that "Mississippi law has never required a proponent of evidence to produce every handler of evidence." In order for the defendant to show a break in the chain of custody, there must be an "indication or reasonable inference of probable tampering with the evidence or substitution of the evidence." The defendant has the burden of proving tampering or substitution of the evidence, and "[a] mere suggestion that substitution could possibly have occurred does not meet the burden of showing probable substitution." Deeds has not attempted to prove that such tampering or substitution occurred. The trial judge found no indication or reasonable inference of tampering with evidence or substitution of evidence. In examining the record, we find sufficient evidence, under an abuse of discretion standard, to support the judge's finding that the blood sample was what it was claimed to be. For the reasons stated, we find this argument to be without merit. ***Deeds v. State*, 27 So. 3d 1135, 1141-42 (Miss. 2009) (citations omitted).**

Evidence Not Allowed to Prove DUI

We find that the HGN test is a scientific test. The potential of a juror placing undue weight upon testimony about the administration of the test is high. Whereas most other field sobriety tests arise out of a juror's common experiences, i.e., one stumbles, slurs words, and staggers when drunk, the HGN test relies upon a scientifically or at least professionally relevant set of observations. Therefore, this Court finds that the HGN test is not generally accepted within the scientific community and cannot be used as scientific evidence to prove intoxication or as a mere showing of impairment. However, the HGN test can still be used to prove probable cause to arrest and administer the intoxilyzer or blood test. This is the only allowable use for the test results. ***Young v. City of Brookhaven*, 693 So. 2d 1355, 1360-61 (Miss. 1997).**

Standard of Review

This standard of review permits this Court to reverse the trial court's judgment of [a defendant]'s guilt of driving under the influence, whether felony or misdemeanor, only if it can say that "the facts and inferences in the case sub judice so considered point in favor of [the defendant] with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty." ***Porter v. State*, 749 So. 2d 250, 257 (Miss. Ct. App. 1999) (citation omitted).**

Fourth & Subsequent Offense DUI

§ 63-11-30 Operation under influence of alcohol or other impairing substance:

(2)(d) Fourth and subsequent offense DUI.

(i) For any fourth or subsequent conviction of a violation of subsection (1) of this section, without regard to the time period within which the violations occurred, the person shall be guilty of a felony and fined not less than Three Thousand Dollars ($3,000.00) nor more than Ten Thousand Dollars ($10,000.00), and shall serve not less than two (2) years nor more than ten (10) years in the custody of the Department of Corrections.

(ii) The suspension of commercial driving privileges is governed by Section 63-1-216.

(iii) A person convicted of a fourth or subsequent offense is ineligible to exercise the privilege to operate a motor vehicle that is not equipped with an ignition-interlock device for ten (10) years.

(e) Any person convicted of a second or subsequent violation of subsection (1) of this section shall receive an in-depth diagnostic assessment, and if as a result of the assessment is determined to be in need of treatment for alcohol or drug abuse, the person must successfully complete treatment at a program site certified by the Department of Mental Health. Each person who receives a diagnostic assessment shall pay a fee representing the cost of the assessment. Each person who participates in a treatment program shall pay a fee representing the cost of treatment.

(f) The use of ignition-interlock devices is governed by Section 63-11-31. . . .

Right to Jury Trial

In *Duncan v. Louisiana*, we held that the Sixth Amendment, as applied to the States through the Fourteenth, requires that defendants accused of serious crimes be afforded the right to trial by jury. We also reaffirmed the long-established view that so- called 'petty offenses' may be tried without a jury. Thus the task before us in this case is the essential if not wholly satisfactory one, of determining the line between 'petty' and 'serious' for purposes of the Sixth Amendment right to jury trial. Prior cases in this Court narrow our inquiry and furnish us with the standard to be used in resolving this issue. In deciding whether an offense is 'petty,' we have sought objective criteria reflecting the seriousness with which society regards the offense, and we have found the most relevant such criteria in the severity of the maximum authorized penalty. Applying these guidelines, we have

held that a possible six-month penalty is short enough to permit classification of the offense as 'petty,' but that a two-year maximum is sufficiently 'serious' to require an opportunity for jury trial. The question in this case is whether the possibility of a one-year sentence is enough in itself to require the opportunity for a jury trial. We hold that it is. More specifically, we have concluded that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized. ***Baldwin v. New York*, 399 U.S. 66, 68, 90 S. Ct. 1886, 1887-88, 26 L. Ed. 2d 437 (1970).**

***See* Mississippi Rule of Criminal Procedure Rule 29.5, Proceedings,** provides:

> The appeal shall proceed as a trial de novo. In appeals from justice or municipal court, when the maximum possible sentence is six (6) months or less, the case may be tried without a jury.

No Bifurcation of Trial

During pre-trial motions, Rigby moved to bifurcate the trial and to prohibit the State from using evidence of any prior bad acts. In support of these motions, Rigby requested that the State not be allowed to introduce evidence of Rigby's prior DUI convictions in its case. These motions were denied by the trial court. Rigby then offered to concede his prior convictions to the State, but he did not want to concede them in front of the jury. This issue has been addressed by this Court numerous times. This Court has consistently held that each previous conviction is an element of the felony offense. Rigby suggests, following the general concept of *Old Chief*, that it is better to bifurcate the proceedings so as to disallow prejudicial convictions to be put before the jury prior to a verdict on the current charge. This Court has repeatedly held that prior DUI convictions are necessary elements of a felony DUI charge. Thus, they must be proven beyond a reasonable doubt to the jury. Simply put, bifurcation of the guilt phase of a trial is inappropriate under Mississippi law. To do as Rigby suggests would set up a system where a defendant charged with felony DUI first be tried on the newest DUI before a jury. Then, if the jury returns with a guilty verdict, the prior convictions would be put before that same jury, and it would then deliberate on the felony DUI charge. This procedure would be a direct violation of our Uniform Rules of Circuit and County Court Practice. Rule 3.10 states in pertinent part that "[a]fter the jurors have retired to consider their verdict the court shall not recall the jurors to hear additional evidence." Only two states have adopted the procedure suggested by Rigby. Other sister states have considered this very issue and have come to different conclusions. The majority of states that classify prior DUI convictions as an element of felony DUI, however, have rejected bifurcation. In Mississippi, the issue of prior DUIs is clearly an element of the offense required to be proven to the jury. At first blush, it might appear that having a

judge conduct such a second phase of a bifurcated trial is a better procedure. However, such a procedure would produce several problems. Thus, we reject Rigby's allegation of error on this issue. Prior DUI convictions are elements of a felony DUI charge and are required to be submitted to a jury. Despite this finding, certain procedural safeguards are warranted if a defendant offers to stipulate to previous DUI convictions. The trial court should accept such stipulations, and they should be submitted to the jury with a proper limiting instruction. The instruction should explain to the jury that the prior DUI convictions should be considered for the sole purpose of determining whether the defendant is guilty of felony DUI and that such evidence should not be considered in determining whether the defendant acted in conformity with such convictions in the presently charged offense. A balance is therefore struck between the prosecution's burden to prove the elements of a crime and the evidentiary rules which safeguard a defendant's right to a fair trial. We suggest that trial judges facing this situation in the future grant an instruction similar to the following:

> The court instructs the jury that the Defendant has stipulated to one element of the crime of which he/she is currently charged. That element is two prior DUI convictions. The court instructs the jury that these prior convictions of the Defendant may not be considered as evidence that the Defendant committed the DUI with which he/she is currently charged. They may, however, be used for the limited and sole purpose of proving the prior convictions element of the crime of felony DUI.

Although it would have been more appropriate for the trial court to have accepted the defendant's offer of stipulation and have granted a limiting instruction, Rigby merely offered to concede his prior convictions to the State, and not before the jury; further, accepting such a stipulation as we now hold is appropriate was not required by our caselaw. With no clear precedent requiring a limiting instruction on a constitutional basis, it was not reversible error for the trial court sua sponte to refuse to give a limiting instruction. ***Rigby v. State*, 826 So. 2d 694, 699-703 (Miss. 2002) (citation omitted).**

Moreover, in the case sub judice, the circuit court took steps to minimize the potentially prejudicial effects of Dove's prior convictions. The jury was given a cautionary instruction mandating that Dove's prior DUI convictions were not to be considered as evidence against Dove. ***Dove v. State*, 912 So. 2d 1091, 1094 (Miss. Ct. App. 2005).**

Elements

Smith's second allegation of error is that he was denied a fair trial since evidence was introduced of prior bad acts. Specifically, he claims it was prejudicial to introduce evidence of the prior DUI convictions during the guilt phase of the trial. Smith relies upon *Strickland v. State*, 784 So. 2d 957, 962 (Miss. 2001), which stated that the "prior convictions are only relevant as to sentencing and should only be admitted during a separate sentencing phase." The supreme court has since clarified that each prior conviction is an element of a charge for the crime of DUI third offense. Since the earlier convictions are elements of the charge of DUI third offense, if we prevented the State from proving the prior convictions to the jury then we "would preclude the State from proving an essential element of the crime and the circuit court would breach its duty to instruct the jury on all the essential elements of the crime charged." Since the State is required to prove all the essential elements of the crime charged, it was not unfair prejudice to present evidence of prior DUI convictions. ***Smith v. State*, 950 So. 2d 1056, 1060 (Miss. Ct. App. 2007) (citations omitted).**

In order to prove guilt of third offense felony DUI, the State has the burden to prove beyond a reasonable doubt that an accused was driving or operating a vehicle while either under the influence of an intoxicating liquor or with a blood alcohol content of at least 0.08%. Additionally, the State is required to prove that the accused has been twice convicted of separate DUI charges within the previous five years of the arrest for the third DUI charge. ***Starkey v. State*, 941 So. 2d 899, 902-03 (Miss. Ct. App. 2006).**

This Court has repeatedly held that prior DUI convictions are necessary elements of a felony DUI charge. Thus, they must be proven beyond a reasonable doubt to the jury. ***Rigby v. State*, 826 So. 2d 694, 700 (Miss. 2002).**

Evidence

Smith claims that error was with the second conviction that the State entered into evidence. For the second DUI conviction, the State entered into evidence a judgment dated September 3, 2002, convicting Smith of a DUI. Smith is correct that the judgment does not contain the date of when the offense occurred. Thus, the State failed to introduce evidence that the conviction under this judgment occurred within five years of the offense for which Smith was on trial. The State offered no further evidence of the date on which the second DUI offense occurred. The statute requires that the offenses must have been committed within a period of five years of each other, not the convictions. Proof of the convictions is required by the statute, but without including the date of the offense on the second DUI conviction there is no evidence to show that it occurred within five years of

the most recent offense. While we find that there was insufficient evidence to prove Smith's violation of DUI third offense, it is undisputed that Smith was in violation of Section 63-11-30(1) whereby he operated a motor vehicle with a blood alcohol concentration greater than .08%. Smith correctly alleges that the State failed to prove that Smith had two prior DUI convictions, where the offenses occurred within five years. Without evidence of when the offense for the September 3, 2002, conviction occurred, there is insufficient evidence to convict Smith of felony DUI. Accordingly, we remand this case to the Circuit Court of Leake County with direction to sentence Smith for violation of Section 63-11-30(2)(b) and not Section 63-11-30(2)(c). ***Smith v. State*, 950 So. 2d 1056, 1058-61 (Miss. Ct. App. 2007).**

In the case sub judice, the State's evidence consisted of testimony from Officer Mucciarone and Officer Barker. Both officers are trained in field sobriety procedures and certified to administer the tests that Starkey received. Officer Mucciarone testified that he observed Starkey unsteady on his feet, with red, watery eyes, a dazed stare, slurred speech and he sensed a strong odor of an intoxicating beverage coming from inside the vehicle. Officer Barker testified to the same indicators of intoxication. Officer Barker testified that Starkey also failed the two field sobriety tests conducted and that he refused the Intoxilyzer test. Additionally, both officers testified that Starkey admitted to drinking "a couple" prior to the stop. The State also introduced into evidence two prior sentencing orders in which Starkey had been convicted of separate DUI charges in Shelby County, Tennessee, within the five year time period previous to his arrest on September 18, 2004. The jury considered the evidence and returned a verdict against Starkey. We find that there was sufficient evidence to find Starkey guilty. ***Starkey v. State*, 941 So. 2d 899, 903 (Miss. Ct. App. 2006).**

When there is other sufficient evidence of impaired operation, no eyewitness testimony of impaired operation is needed to sustain a conviction. In this case, there was sufficient credible evidence from which it could be reasonably inferred that Turner had been operating the vehicle prior to being stopped by Officer Riggs. The police dispatch informed Riggs of a white van driving erratically and, later, that the van had stopped. There were tire marks leading from the road to the van. Officer Riggs discovered Turner in the driver's seat of the white van. Turner told Officer Rowell he had driven to that location from Memphis. Turner stated that the van had a flat tire. There was no evidence that anyone else had been driving the van. ***Turner v. State*, 910 So. 2d 598, 601 (Miss. Ct. App. 2005) (citations omitted).**

Operating a Motor Vehicle

Holloway contends that the trial court erred by failing to grant his motion for a judgment notwithstanding the verdict (JNOV). He claims there was insufficient evidence to show that he was "operating the vehicle within the meaning of Section 63-11-30(1)(a) or (c)." In support of his argument, Holloway cites *Lewis v. State*, 831 So. 2d 553, 557 (Miss. Ct. App. 2002), where this Court indicated that Mississippi Code Annotated Section 63-11-30 required "that the vehicle at least be capable of being moved by the defendant, whether the accused was then in the act of causing it to move or not. Both the accused and the vehicle must have a present ability to cause the hazards against which this statute attempts to protect. That hazard is a moving vehicle with an intoxicated person in control." In the instant case, Holloway did not indicate that anyone else had been driving. In fact, he testified that he was the person who drove the vehicle. Where the defendant admits having driven the vehicle to its present location, no additional proof of its ability to be driven is required. Pursuant to *Lewis*, "to be guilty of driving or operating a motor vehicle while under the influence of drugs or alcohol, or with an illegally high blood-alcohol content, the person must be shown by direct proof or reasonable inferences to have driven the vehicle while in that condition, or as in *Jones* to be 'operating' the vehicle while sitting behind the wheel, in control with the motor running." A person may be arrested, tried, and convicted of operating a motor vehicle while under the influence of an intoxicating liquor even if there is no eyewitness presented who viewed the defendant operating the vehicle, provided there is sufficient evidence. Reasonable doubt need not be removed about whether the defendant had actually driven the vehicle prior to his discovery. Holloway was charged with the felonious operation of a motor vehicle while under the influence of intoxicating liquor pursuant to Mississippi Code Annotated Section 63-11-30. Holloway's statement to Deputy Goleman that he had consumed some beer prior to driving the vehicle to its then location, in conjunction with Deputy Goleman's observations of Holloway, and the results of the intoxilyzer test, provided sufficient evidence that Holloway was guilty of DUI. ***Holloway v. State*, 860 So. 2d 1244, 1246-47 (Miss. Ct. App. 2003) (citations omitted).**

What we find required by the statute is that the vehicle at least be capable of being moved by the defendant, whether the accused was then in the act of causing it to move or not. Both the accused and the vehicle must have a present ability to cause the hazards against which this statute attempts to protect. That hazard is a moving vehicle with an intoxicated person in control. We hold that to be guilty of driving or operating a motor vehicle while under the influence of drugs or alcohol, or with an illegally high blood-alcohol content, the person must be shown by direct proof or reasonable inferences to have driven the vehicle while in that condition, or as in *Jones* to be "operating" the vehicle while sitting behind the wheel, in control with the motor running. Reasonable doubt need not be removed about whether the

defendant had actually driven the vehicle prior to his discovery. Proof of the imminence of such driving by being the "operator" of a vehicle that has its motor running is itself an offense even if the offender has yet to move the vehicle. Driving under the influence is a serious crime with serious risks to the public. It may often be difficult to catch an offender in the act. He or she may be discovered only after causing a horrendous accident or perhaps, as alleged by the State here, only after the intoxication causes the driver to stop for awhile. In order to avoid the former harm we do not believe that we have the authority to relax the proof necessary to convict in the latter instance. Perhaps intoxicated individuals in vehicles for whom no proof exists of past act or future intent to move the vehicle should be guilty of some offense, such as public intoxication if the vehicle is in a public place. Being found alone in a vehicle alongside the road, even when an excuse is later offered, may be sufficient to infer past driving. If the motor is running, the separate element of operating the vehicle is proven. We find it error, though, to give jurors an instruction that being behind the wheel of a stopped motor vehicle that does not have its motor running is by itself sufficient for the driving or operating element. ***Lewis v. State*, 831 So. 2d 553, 557-58 (Miss. Ct. App. 2002) (citations omitted).**

Admissibility of Alcohol Concentration Tests

Intoxilyzer Test

Johnston sets forth the following three prong test for laying the predicate prior to admitting the results of a D.U.I. test. The court must determine whether the

1) proper procedures were followed,
2) whether the operator of the machine was properly certified to perform the test, and
3) whether the accuracy of the machine was properly certified.

The *Johnston* requirements are based on Miss. Code Ann. § 63-11-19 which sets forth the following:

> The State Crime Laboratory shall make periodic, but not less frequently than quarterly, tests of the methods, machines or devices used in making chemical analysis of a person's breath as shall be necessary to ensure the accuracy thereof, and shall issue its certificate to verify the accuracy of the same.

***McIlwain v. State*, 700 So. 2d 586, 590 (Miss. 1997) (Intoxilyzer test).**

A chemical analysis of a person's breath, blood, or urine is deemed valid only when performed according to approved methods; performed by a person certified to do so; and performed on a machine certified to be accurate. Certification of the machines must take place at least quarterly. These safeguards insure a more accurate result in the gathering of scientific evidence through intoxilyzers and are strictly enforced. Where one of the safeguards is deficient the State bears the burden of showing that

the deficiency did not affect the accuracy of the result. Johnston challenges the admissibility of the result by arguing that a proper predicate to authenticate accuracy was not laid to accept the test into evidence. The argument is based on (a) the procedures followed, (b) the certification of the operator, and (c) the certification of the machine. There is sufficient evidence in the record to indicate that Trooper Thompson reasonably followed the normal procedures. Exhibit 1 shows that Trooper Thompson was certified to operate a 4011-A & AS model intoxilyzer. Trooper Thompson testified that he was certified to operate an intoxilyzer. Although no evidence was introduced to show that the intoxilyzer used was a 4011-A & AS model, the statute only requires that the person performing the test be certified to do so. The trial court did not abuse its discretion in accepting Trooper Thompson's certification for a 4011-A & AS model intoxilyzer as the required predicate. Trooper Thompson testified that the intoxilyzer was calibrated every month. Johnston's objection to this testimony as not the best evidence and request for the certificate of calibrations was overruled. The trial court simply accepted the testimony of Trooper Thompson without requiring the production of a certificate. Johnston presented a certificate, which was attached to the record, dated August 3, 1988, 130 days after the test was given on March 26. The preceding date of calibration could be no earlier than April 3, 1988, to be within the required statutory period. There is no evidence in the record to establish that the machine had been calibrated within the statutory period, or 120 days before August 3, 1988. It is certainly clear that the machine was not calibrated every month as Trooper Thompson testified. Trooper Thompson's testimony notwithstanding, the State did not produce any evidence that the machine was properly certified and made no effort to carry its burden that even if the intoxilyzer was not properly certified the deficiency did not affect the accuracy of the test. The intoxilyzer had no certificate of calibration to meet the requirements of the statute. Strictly enforcing the statutory requirements, there is no support for the accuracy of the results absent evidence of proper certification. The trial court abused its discretion in finding a sufficient predicate for admitting the results of the intoxilyzer in the testimony of Trooper Thompson. This error substantially prejudiced the defendant's right to a fair trial. ***Johnston v. State*, 567 So. 2d 237, 238-39 (Miss. 1990).**

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Blood Test

Deeds's argument that the blood test results were inadmissible due to failure to comply with Section 63-11-9 is simply misplaced. Admissibility of evidence is governed by the Mississippi Rules of Evidence, not by statutory enactment. This Court has held that the Mississippi Rules of Evidence supercede statutory provisions which would render inadmissible evidence that otherwise would be admissible under the Rules of Evidence. Thus, having found that the admissibility of the blood test results is not governed by compliance with statutory requirements, we shift our analysis to whether the results of Deeds's blood test were admissible under the Mississippi Rules of Evidence. Deeds's argument that the State failed to prove "chain of custody" is a challenge to the authenticity of the evidence. However, Deeds never substantively questioned the genuineness of the blood sample. Rather, Deeds merely suggests that because the prosecution could not provide the name of the individual who drew Deeds's blood, tampering or contamination could have taken place. Officer Gibbs testified that he witnessed the attending nurse draw the blood and that the nurse signed her name on the blood

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Evidence Not Allowed to Prove DUI

We find that the HGN test is a scientific test. The potential of a juror placing undue weight upon testimony about the administration of the test is high. Whereas most other field sobriety tests arise out of a juror's common experiences, i.e., one stumbles, slurs words, and staggers when drunk, the HGN test relies upon a scientifically or at least professionally relevant set of observations. Therefore, this Court finds that the HGN test is not generally accepted within the scientific community and cannot be used as scientific evidence to prove intoxication or as a mere showing of impairment. However, the HGN test can still be used to prove probable cause to arrest and administer the intoxilyzer or blood test. This is the only allowable use for the test results. ***Young v. City of Brookhaven*, 693 So. 2d 1355, 1360-61 (Miss. 1997).**

Standard of Review

This standard of review permits this Court to reverse the trial court's judgment of [a defendant]'s guilt of driving under the influence, whether felony or misdemeanor, only if it can say that "the facts and inferences in the case sub judice so considered point in favor of [the defendant] with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty." ***Porter v. State*, 749 So. 2d 250, 257 (Miss. Ct. App. 1999) (citation omitted).**

Zero Tolerance for Minors

§ 63-11-30 Operation under influence of alcohol or other impairing substance:

(3) Zero Tolerance for Minors.

(a) This subsection shall be known and may be cited as Zero Tolerance for Minors. The provisions of this subsection shall apply only when a person under the age of twenty-one (21) years has a blood alcohol concentration of two one-hundredths percent (.02%) or more, but lower than eight one-hundredths percent (.08%). If the person's blood alcohol concentration is eight one-hundredths percent (.08%) or more, the provisions of subsection (2) shall apply.

> The Mississippi Legislature has enacted a like statutory scheme in an attempt to proscribe the use of alcohol by under-age persons and particularly to prevent such persons from driving while intoxicated. These statutes protect not only the under-age drivers themselves, but also the public at large. . . . As the U.S. Supreme Court has stated, in the appellate review of a statute involving classification, the law must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. We conclude that the distinction made by § 63-11-30(1) is rationally related to the legitimate governmental ends of protecting public safety and prohibiting under-age drinking and driving. Mason's argument that he has been deprived of his equal protection rights is therefore rejected. ***Mason v. State*, 781 So. 2d 99, 103-04 (Miss. 2000).**

(b)

(i) A person under the age of twenty-one (21) is eligible for nonadjudication of a qualifying first offense by the court pursuant to subsection (14) of this section.

(ii) Upon conviction of any person under the age of twenty-one (21) years for the first offense of violating subsection (1) of this section where chemical tests provided for under Section 63-11-5 were given, or where chemical test results are not available, the person shall be fined Two Hundred Fifty Dollars ($250.00); the court shall order the person to attend and complete an alcohol safety education program as provided in Section 63-11-32 within six (6) months. The court may also require attendance at a victim impact panel.

(c) A person under the age of twenty-one (21) years who is convicted of a second violation of subsection (1) of this section, the offenses being committed within a period of five (5) years, shall be fined not more than Five Hundred Dollars ($500.00).

(d) A person under the age of twenty-one (21) years who is convicted of a third or subsequent violation of subsection (1) of this section, the offenses being committed within a period of five (5) years, shall be fined not more than One Thousand Dollars ($1,000.00).

(e) License suspension is governed by Section 63-11-23 and ignition interlock is governed by Section 63-11-31.

(f) Any person under the age of twenty-one (21) years convicted of a third or subsequent violation of subsection (1) of this section must complete treatment of an alcohol or drug abuse program at a site certified by the Department of Mental Health.

> Contained within the DUI statute is the "Zero Tolerance for Minors" law, which establishes less severe penalties for persons under the age of twenty-one. But, the "Minors" law applies only to underage persons with a BAC of more than .02%, but less than .08%. . . . Although Winters was under twenty-one at the time of his arrest, the "Zero Tolerance for Minors" law does not apply, because the trial judge, as the trier of fact, found Winters's BAC to be higher than .08%. So Winters's conviction falls under Section 63-11-30(2), which applies to all individuals with a BAC of more than .08%. ***Winters v. State*, 52 So. 3d 1172, 1175 (Miss. 2010).**

DUI Test Refusal

§ 63-11-30 Operation under influence of alcohol or other impairing substance:

(4) DUI test refusal. In addition to the other penalties provided in this section, every person refusing a law enforcement officer's request to submit to a chemical test of the person's breath as provided in this chapter, or who was unconscious at the time of a chemical test and refused to consent to the introduction of the results of the test in any prosecution, shall suffer an additional administrative suspension of driving privileges as set forth in Section 63-11-23.

Aggravated DUI

§ 63-11-30 Operation under influence of alcohol or other impairing substance:

(5) Aggravated DUI.

(a) Every person who operates any motor vehicle in violation of the provisions of subsection (1) of this section and who in a negligent manner causes the death of another or mutilates, disfigures, permanently disables or destroys the tongue, eye, lip, nose or any other limb, organ or member of another shall, upon conviction, be guilty of a separate felony for each victim who suffers death, mutilation, disfigurement or other injury and shall be committed to the custody of the State Department of Corrections for a period of time of not less than five (5) years and not to exceed twenty-five (25) years for each death, mutilation, disfigurement or other injury, and the imprisonment for the second or each subsequent conviction, in the discretion of the court, shall commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction. Any person charged with causing the death of another as described in this subsection shall be required to post bail before being released after arrest.

(b) A holder of a commercial driver's license who is convicted of operating a commercial motor vehicle with an alcohol concentration of eight one-hundreths percent (.08%) or more shall be guilty of a felony and shall be committed to the custody of the Department of Corrections for not less than two (2) years and not more than ten (10) years.

> The State must prove that [a defendant] not only consumed alcohol prior to the accident, but that he performed a negligent act that caused the death of another. It has been made clear that § 63-11-30(5) contains no requirement that the negligence has to be caused by the alcohol. Mississippi Code Annotated section 63-11-30(5) only requires simple negligence – not gross or culpable negligence. It is elementary in tort law that a person is negligent for failing to maintain control over the vehicle he is driving. ***Lepine v. State*, 10 So. 3d 927, 943 (Miss. Ct. App. 2009) (citations omitted).**
>
> To be guilty of a felony under § 63-11-30(5) requires proof of a person operating a motor vehicle with a blood alcohol content of .10% or greater, and "who in a negligent manner causes the death of another or mutilates. . . . " ***McCollum v. State*, 785 So. 2d 279, 283 (Miss. 2001) (prior version of statute).**

(c) The court shall order an ignition-interlock restriction on the offender's privilege to drive as a condition of probation or post-release supervision not to exceed five (5) years unless a longer restriction is required under other law. The ignitions-interlock restriction shall not be applied to commercial license privileges until the driver serves the full disqualification period required by Section 63-1-216.

DUI Citations

§ 63-11-30 Operation under influence of alcohol or other impairing substance:

(6) DUI citations.

(a) Upon conviction of a violation of subsection (1) of this section, the trial judge shall sign in the place provided on the traffic ticket, citation or affidavit stating that the person arrested either employed an attorney or waived his right to an attorney after having been properly advised. If the person arrested employed an attorney, the name, address and telephone number of the attorney shall be written on the ticket, citation or affidavit. The court clerk must immediately send a copy of the traffic ticket, citation or affidavit, and any other pertinent documents concerning the conviction or other order of the court, to the Department of Public Safety as provided in Section 63-11-37.

(b) A copy of the traffic ticket, citation or affidavit and any other pertinent documents, having been attested as true and correct by the Commissioner of Public Safety, or his designee, shall be sufficient proof of the conviction for purposes of determining the enhanced penalty for any subsequent convictions of violations of subsection (1) of this section. The Department of Public Safety shall maintain a central database for verification of prior offenses and convictions.

Out-of-State Prior Convictions

§ 63-11-30 Operation under influence of alcohol or other impairing substance:

(7) Out-of-state prior convictions. Convictions in another state, territory or possession of the United States, or under the law of a federally recognized Native American tribe, of violations for driving or operating a vehicle while under the influence of an intoxicating liquor or while under the influence of any other substance that has impaired the person's ability to operate a motor vehicle occurring within five (5) years before an offense shall be counted for the purposes of determining if a violation of subsection (1) of this section is a second, third, fourth or subsequent offense and the penalty that shall be imposed upon conviction for a violation of subsection (1) of this section.

Other Provisions

§ 63-11-30 Operation under influence of alcohol or other impairing substance:

(8) Charging of subsequent offenses.

(a) For the purposes of determining how to impose the sentence for a second, third, fourth or subsequent conviction under this section, the affidavit or indictment shall not be required to enumerate previous convictions. It shall only be necessary that the affidavit or indictment states the number of times that the defendant has been convicted and sentenced within the past five (5) years for a second or third offense, or without a time limitation for a fourth or subsequent offense, under this section to determine if an enhanced penalty shall be imposed. The amount of fine and imprisonment imposed in previous convictions shall not be considered in calculating offenses to determine a second, third, fourth or subsequent offense of this section.

(b) Before a defendant enters a plea of guilty to an offense under this section, law enforcement must submit certification to the prosecutor that the defendant's driving record, the confidential registry and National Crime Information Center record have been searched for all prior convictions, nonadjudications, pretrial diversions and arrests for driving or operating a vehicle while under the influence of an intoxicating liquor or while under the influence of any other substance that has impaired the person's ability to operate a motor vehicle. The results of the search must be included in the certification.

(9) License eligibility for underage offenders. A person who is under the legal age to obtain a license to operate a motor vehicle at the time of the offense and who is convicted under this section shall not be eligible to receive a driver's license until the person reaches the age of eighteen (18) years.

(10) License suspensions and restrictions to run consecutively. Suspension or restriction of driving privileges for any person convicted of or nonadjudicated for violations of subsection (1) of this section shall run consecutively to and not concurrently with any other administrative license suspension.

Ignition Interlock

§ 63-11-30 Operation under influence of alcohol or other impairing substance:

(11) Ignition interlock. If the court orders installation and use of an ignition-interlock device as provided in Section 63-11-31 for every vehicle operated by a person convicted or nonadjudicated under this section, each device shall be installed, maintained and removed as provided in Section 63-11-31.

Child Endangerment

§ 63-11-30 Operation under influence of alcohol or other impairing substance:

(12) DUI child endangerment. A person over the age of twenty-one (21) who violates subsection (1) of this section while transporting in a motor vehicle a child under the age of sixteen (16) years is guilty of the separate offense of endangering a child by driving under the influence of alcohol or any other substance which has impaired the person's ability to operate a motor vehicle. The offense of endangering a child by driving under the influence of alcohol or any other substance which has impaired the person's ability to operate a motor vehicle shall not be merged with an offense of violating subsection (1) of this section for the purposes of prosecution and sentencing. An offender who is convicted of a violation of this subsection shall be punished as follows:

(a) A person who commits a violation of this subsection which does not result in the serious injury or death of a child and which is a first conviction shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than One Thousand Dollars ($1,000.00) or shall be imprisoned for not more than twelve (12) months, or both;

(b) A person who commits a violation of this subsection which does not result in the serious injury or death of a child and which is a second conviction shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than One Thousand Dollars ($1,000.00) nor more than Five Thousand Dollars ($5,000.00) or shall be imprisoned for one (1) year, or both;

(c) A person who commits a violation of this subsection which does not result in the serious injury or death of a child and which is a third or subsequent conviction shall be guilty of a felony and, upon conviction, shall be fined not less than Ten Thousand Dollars ($10,000.00) or shall be imprisoned for not less than one (1) year nor more than five (5) years, or both; and

(d) A person who commits a violation of this subsection which results in the serious injury or death of a child, without regard to whether the offense was a first, second, third or subsequent offense, shall be guilty of a felony and, upon conviction, shall be punished by a fine of not less than Ten Thousand Dollars ($10,000.00) and shall be imprisoned for not less than five (5) years nor more than twenty-five (25) years.

Expunction

§ 63-11-30 Operation under influence of alcohol or other impairing substance:

(13) Expunction.

(a) Any person convicted under subsection (2) or (3) of this section of a first offense of driving under the influence and who was not the holder of a commercial driver's license or a commercial learning permit at the time of the offense may petition the circuit court of the county in which the conviction was had for an order to expunge the record of the conviction at least five (5) years after successful completion of all terms and conditions of the sentence imposed for the conviction. Expunction under this subsection will only be available to a person:

(i) Who has successfully completed all terms and conditions of the sentence imposed for the conviction;

(ii) Who did not refuse to submit to a test of his blood or breath;

(iii) Whose blood alcohol concentration tested below sixteen one-hundredths percent (.16%) if test results are available;

(iv) Who has not been convicted of and does not have pending any other offense of driving under the influence;

(v) Who has provided the court with justification as to why the conviction should be expunged; and

(vi) Who has not previously had a nonadjudication or expunction of a violation of this section.

(b) A person is eligible for only one (1) expunction under this subsection, and the Department of Public Safety shall maintain a permanent confidential registry of all cases of expunction under this subsection for the sole purpose of determining a person's eligibility for expunction, for nonadjudication, or as a first offender under this section.

(c) The court in its order of expunction shall state in writing the justification for which the expunction was granted and forward the order to the Department of Public Safety within five (5) days of the entry of the order.

Nonadjudication

§ 63-11-30 Operation under influence of alcohol or other impairing substance:

(14) Nonadjudication.

(a) For the purposes of this chapter, "nonadjudication" means that the court withholds adjudication of guilt and sentencing, either at the conclusion of a trial on the merits or upon the entry of a plea of guilt by a defendant, and places the defendant in a pretrial diversion program conditioned upon the successful completion of the requirements imposed by the court under this subsection.

(b) A person is eligible for nonadjudication of an offense under this Section 63-11-30 only one (1) time under any provision of a law that authorizes nonadjudication and only for an offender:

(i) Who has successfully completed all terms and conditions imposed by the court after placement of the defendant in a nonadjudication program;

(ii) Who was not the holder of a commercial driver's license or a commercial learning permit at the time of the offense;

(iii) Who has not previously been convicted of and does not have pending any former or subsequent charges under this section; and

(iv) Who has provided the court with justification as to why nonadjudication is appropriate.

(c) Nonadjudication may be initiated upon the filing of a petition for nonadjudication or at any stage of the proceedings in the discretion of the court; the court may withhold adjudication of guilt, defer sentencing, and upon the agreement of the offender to participate in a nonadjudication

program, enter an order imposing requirements on the offender for a period of court supervision before the order of nonadjudication is entered. Failure to successfully complete a nonadjudication program subjects the person to adjudication of the charges against him and to imposition of all penalties previously withheld due to entrance into a nonadjudication program. The court shall immediately inform the commissioner of the conviction as required in Section 63-11-37.

(i) The court shall order the person to:

1. Pay the nonadjudication fee imposed under Section 63-11-31 if applicable;

2. Pay all fines, penalties and assessments that would have been imposed for conviction;

3. Attend and complete an alcohol safety education program as provided in Section 63-11-32 within six (6) months of the date of the order;

4. a. If the court determines that the person violated this section with respect to alcohol or intoxicating liquor, the person must install an ignition-interlock device on every motor vehicle operated by the person, obtain an interlock-restricted license, and maintain that license for one hundred twenty (120) days or suffer a one-hundred-twenty-day suspension of the person's regular driver's license, during which time the person must not operate any vehicle.

b. If the court determines that the person violated this section by operating a vehicle when under the influence of a substance other than alcohol that has impaired the person's ability to operate a motor vehicle, including any drug or controlled substance which is unlawful to possess under the Mississippi Controlled Substances Law, the person must submit to a one-hundred-twenty-day period of a nonadjudication program that includes court-ordered drug testing at the person's own expense not less often than every thirty (30) days, during which time the person may drive if compliant with the terms of the program, or suffer a one-hundred-twenty-day suspension of the person's regular driver's license,

during which time the person will not operate any vehicle.

(ii) Other conditions that may be imposed by the court include, but are not limited to, alcohol or drug screening, or both, proof that the person has not committed any other traffic violations while under court supervision, proof of immobilization or impoundment of vehicles owned by the offender if required, and attendance at a victim-impact panel.

(d) The court may enter an order of nonadjudication only if the court finds, after a hearing or after ex parte examination of reliable documentation of compliance, that the offender has successfully completed all conditions imposed by law and previous orders of the court. The court shall retain jurisdiction over cases involving nonadjudication for a period of not more than two (2) years.

(e)

(i) The clerk shall immediately forward a record of every person placed in a nonadjudication program and of every nonadjudication order to the Department of Public Safety for inclusion in the permanent confidential registry of all cases that are nonadjudicated under this subsection (14).

(ii) Judges, clerks and prosecutors involved in the trial of implied consent violations and law enforcement officers involved in the issuance of citations for implied consent violations shall have secure online access to the confidential registry for the purpose of determining whether a person has previously been the subject of a nonadjudicated case and 1. is therefore ineligible for another nonadjudication; 2. is ineligible as a first offender for a violation of this section; or 3. is ineligible for expunction of a conviction of a violation of this section.

(iii) The Driver Services Bureau of the department shall have access to the confidential registry for the purpose of determining whether a person is eligible for a form of license not restricted to operating a vehicle equipped with an ignition-interlock device.

(iv) The Mississippi Alcohol Safety Education Program shall have secure online access to the confidential registry for research purposes only.

DUI Penalties
§ 63-11-30(2) & (5)

	Minimum Sentence	Maximum Sentence	Minimum Fine	Maximum Fine
DUI - 1st	----	48 hours	$250.00	$1,000.00
DUI - 2nd	5 days	6 months	$600.00	$1,500.00
DUI - 3rd	1 year *In the county jail if no serious injury or death or in the penitentiary at the discretion of the circuit judge.	5 years *In the county jail if no serious injury or death or in the penitentiary at the discretion of the circuit judge.	$2,000.00	$5,000.00
DUI - 4rd	2 years	10 years	$3,000.00	$10,000.00
Aggravated DUI	5 years	25 years	----	----

Ignition-Interlock device

§ 63-11-31 Vehicle impoundment, immobilization and ignition locks:

(1) (a) The provisions of this section are supplemental to the provisions of Section 63-11-30.

(b) (i) "Ignition-interlock device" means a device approved by the Department of Public Safety that connects a motor vehicle ignition system to a breath-alcohol analyzer and prevents a motor vehicle ignition from starting if the driver's blood alcohol level exceeds the calibrated setting on the device.
(ii) "Interlock-restricted license" means a driver's license bearing a restriction that limits the person to operation of vehicles equipped with an ignition-interlock device.

(c) A person who can exercise the privilege of driving only under an interlock-restricted license must have an ignition-interlock device installed and operating on all motor vehicles owned or operated by the person.

(d) A person who installs an ignition-interlock device may obtain an interlock-restricted license.

(2) (a) The cost of installation and operation of an ignition-interlock device shall be borne by the person to whom an interlock-restricted driver's license is issued, and the costs of court-ordered drug testing shall be borne by the person so ordered, unless the person is determined by the court to be indigent.

(b) (i) A person convicted under Section 63-11-30 shall be assessed by the court, in addition to the criminal fines, penalties and assessments provided by law for violations of Section 63-11-30, a fee of Fifty Dollars ($50.00), to be deposited in the Interlock Device Fund in the State Treasury unless the person is determined by the court to be indigent.
(ii) A person nonadjudicated under Section 63-11-30 shall be assessed by the court, in addition to the criminal fines, penalties and assessments provided by law for violations of Section 63-11-30, a fee of Two Hundred Fifty Dollars ($250.00) to be deposited in the Interlock Device Fund in the State Treasury unless the person is determined by the court to be indigent.

(3) (a) The Department of Public Safety shall promulgate rules and regulations

for the use of an ignition-interlock device. The Department of Public Safety shall approve which vendors shall be used to furnish the systems, may assess fees to the vendors, and shall prescribe the maximum costs to the offender for installation, removal, monthly operation, periodic inspections, calibrations and repairs.

(b) A person who has an ignition-interlock device installed in a vehicle shall:

(i) Provide proof of the installation of the device and periodic reporting for verification of the proper operation of the device;
(ii) Have the system monitored for proper use and accuracy as required by departmental regulation;
(iii) Pay the reasonable cost of leasing or buying, monitoring, and maintaining the device unless the person is determined to be indigent; and
(iv) Obtain an ignition-interlock driver's license.

(4) (a) (i) A person who is limited to driving only under an interlock-restricted driver's license shall not operate a vehicle that is not equipped with an ignition-interlock device.
(ii) A person prohibited from operating a motor vehicle that is not equipped with an ignition-interlock device may not solicit or have another person attempt to start or start a motor vehicle equipped with such a device.
(iii) A person may not start or attempt to start a motor vehicle equipped with an ignition-interlock device for the purpose of providing an operable motor vehicle to a person who is prohibited from operating a motor vehicle that is not equipped with an ignition-interlock device.
(iv) A person may not tamper with, or in any way attempt to circumvent, the operation of an ignition-interlock device that has been installed in a motor vehicle.
(v) A person may not knowingly provide a motor vehicle not equipped with a functioning ignition-interlock device to another person who the provider of the vehicle knows or should know is prohibited from operating a motor vehicle not equipped with an ignition-interlock device.

(b) A violation of this subsection (4) is a misdemeanor and upon conviction the violator shall be fined an amount not less than Two Hundred Fifty Dollars ($250.00) nor more than One Thousand Dollars ($1,000.00) or imprisoned for not more than six (6) months, or both, unless the starting of a

motor vehicle equipped with an ignition-interlock device is done for the purpose of safety or mechanical repair of the device or the vehicle, and the person subject to the restriction does not operate the vehicle.

(5) In order to obtain an interlock-restricted license, a person must:

(a) Be otherwise qualified to operate a motor vehicle, and will be subject to all other restrictions on the privilege to drive provided by law;

(b) Submit proof that an ignition-interlock device is installed and operating on all motor vehicles operated by the person; and

(c) Pay the fee set forth in Section 63-1-43 to obtain the license without regard to indigence; no license reinstatement fee under Section 63-1-46 shall be charged for a person obtaining an interlock-restricted license.

(6) (a) In addition to the penalties authorized for any second or subsequent conviction under Section 63-11-30, the court shall order that all vehicles owned by the offender that are not equipped with an ignition-interlock device must be either impounded or immobilized pending further order of the court lifting the offender's driving restriction. However, no county, municipality, sheriff's department or the Department of Public Safety shall be required to keep, store, maintain, serve as a bailee or otherwise exercise custody over a motor vehicle impounded under the provisions of this section. The cost associated with any impoundment or immobilization shall be paid by the person convicted without regard to ability to pay.

(b) A person may not tamper with, or in any way attempt to circumvent, vehicle immobilization or impoundment ordered by the court under this section. A violation of this paragraph (b) is a misdemeanor and, upon conviction, the violator shall be fined an amount not less than Two Hundred Fifty Dollars ($250.00) nor more than One Thousand Dollars ($1,000.00) or imprisoned for not more than six (6) months, or both.

(7) (a) The Department of Public Safety shall promulgate rules and regulations for the use of monies in the Interlock Device Fund to offset the cost of device installation and operation by and court-ordered drug testing of indigent offenders.

(b) The court shall determine a defendant's indigence based upon whether the defendant has access to adequate resources to pay the ignition-interlock fee and the costs of installation and maintenance of an ignition-interlock device, or the costs of court-ordered drug testing or both, and may further

base the determination of indigence on proof of enrollment in one or more of the following types of public assistance:

(i) Temporary Assistance for Needy Families (TANF);
(ii) Medicaid assistance;
(iii) The Supplemental Nutritional Assistance Program (SNAP), also known as “food stamps”;
(iv) Supplemental security income (SSI);
(v) Participation in a federal food distribution program;
(vi) Federal housing assistance;
(vii) Unemployment compensation; or
(viii) Other criteria determined appropriate by the court.

(c) No more than ten percent (10%) of the money in the Interlock Device Fund in any fiscal year shall be expended by the department for the purpose of administering the fund.

(d) (i) Money in the Interlock Device Fund will be appropriated to the department to cover part of the costs of installing, removing and leasing ignition-interlock devices for indigent people who are required, because of a conviction or nonadjudication under Section 63-11-30, to install an ignition-interlock device in all vehicles operated by the person.
(ii) If money is available in the Interlock Device Fund, the department shall pay to the vendor, for one (1) vehicle per offender, up to Fifty Dollars ($50.00) for the cost of installation, up to Fifty Dollars ($50.00) for the cost of removal, and up to Thirty Dollars ($30.00) monthly for verified active usage of the ignition-interlock device. The department shall not pay any amount above what an offender would be required to pay for the installation, removal or usage of an ignition-interlock device.

(8) In order to reinstate a form of driver's license that is not restricted to operation of an ignition-interlock equipped vehicle, the person must submit proof to the Department of Public Safety to substantiate the person's eligibility for an unrestricted license, which may be a court order indicating completion of sentence or final order of nonadjudication; in the absence of a court order, the proof may consist of the following or such other proof as the commissioner may set forth by regulation duly adopted under the Administrative Procedures Act:

(a) Proof of successful completion of an alcohol safety program as provided in Section 63-11-32 if so ordered by the court;

(b) Payment of the reinstatement fee required under Section 63-1-46(1)(a);

(c) Payment of the driver's license fee required under Section 63-1-43;

(d) A certificate of liability insurance or proof of financial responsibility; and

(e) (i) For those driving under an interlock-restricted license, a declaration from the vendor, in a form provided or approved by the Department of Public Safety, certifying that there have been none of the following incidents in the last thirty (30) days:

1. An attempt to start the vehicle with a breath alcohol concentration of 0.04 or more;
2. Failure to take or pass any required retest; or
3. Failure of the person to appear at the ignition-interlock device vendor when required for maintenance, repair, calibration, monitoring, inspection, or replacement of the device; or

(ii) For a person who violated Section 63-11-30 with respect to drugs other than alcohol, proof of successful compliance with all court-ordered drug testing; or
(iii) Both subparagraphs (i) and (ii) of this paragraph (e) if applicable.

(9) The court may extend the interlock-restricted period if the person had a violation in the last thirty (30) days.

(10) The court that originally ordered installation of the ignition-interlock device for a violation of Section 63-11-30 and a court in the municipality or county in which the violation occurred have jurisdiction over an offense under this section.

(11) A person who voluntarily obtains an interlock-restricted license may convert at any time to any other form of license for which the person is qualified.

(12) The Department of Public Safety shall require all manufacturers of ignition-interlock devices to report ignition-interlock data in a consistent and uniform format as prescribed by the Department of Public Safety. Ignition-interlock vendors must also use the uniform format when sharing data with courts ordering an ignition interlock, with alcohol safety education programs, or with other treatment providers.

Driver Improvement Program

§ 63-11-32 Driver improvement program, first offenders:

(1) The State Department of Public Safety in conjunction with the Governor's Highway Safety Program, the State Board of Health, or any other state agency or institution shall develop and implement a driver improvement program for persons identified as first offenders convicted of driving while under the influence of intoxicating liquor or another substance which had impaired such person's ability to operate a motor vehicle, including provision for referral to rehabilitation facilities.

(2) The program shall consist of a minimum of ten (10) hours of instruction. Each person who participates shall pay a nominal fee to defray a portion of the cost of the program.

(3) Such assessments as are collected under subsection (2) of Section 99-19-73 shall be deposited in a special fund hereby created in the State Treasury and designated the "Mississippi Alcohol Safety Education Program Fund." Monies deposited in such fund shall be expended by the Board of Trustees of State Institutions of Higher Learning as authorized and appropriated by the Legislature to defray the costs of the Mississippi Alcohol Safety Education Program operated pursuant to the provisions of this section. Any revenue in the fund which is not encumbered at the end of the fiscal year shall lapse to the General Fund.

(4) Such assessments as are collected under subsection (2) of Section 99-19-73 shall be deposited in a special fund hereby created in the State Treasury and designated the "Federal-State Alcohol Program Fund." Monies deposited in such fund shall be expended by the Department of Public Safety as authorized and appropriated by the Legislature to defray the costs of alcohol and traffic safety programs. Any revenue in the fund which is not encumbered at the end of the fiscal year shall lapse to the General Fund.

(5) Such assessments as are collected under subsection (2) of Section 99-19-73 shall be deposited in a special fund hereby created in the State Treasury and designated the "Mississippi Forensics Laboratory Implied Consent Law Fund." Monies deposited in such fund shall be expended by the Department of Public Safety as authorized and appropriated by the Legislature to defray the costs of equipment replacement and operational support of the Mississippi Forensics Laboratory relating to enforcement of the Implied Consent Law. Any revenue in the fund which is not encumbered at the end of the fiscal year shall not lapse to the General Fund but shall remain in the fund.

CHAPTER 24

SELECTED CRIMINAL OFFENSES

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CHAPTER 24

SELECTED CRIMINAL OFFENSES			
CRIMINAL OFFENSE	**STATUTE**	**LIMITATION OF ACTION**	**STATUTE**
Accessory after the fact	§ 97-1-5	2 years	§ 99-1-5
Assault			
1. aggravated	§ 97-3-7(2)	none	§ 99-1-5
2. simple	§ 97-3-7(1)	2 years	
Arson			
1. first degree, burning dwelling house or outbuilding	§ 97-17-1	none	§ 99-1-5
2. first degree, burning established place of worship	§ 97-17-3		
3. second degree, other buildings or structures	§ 97-17-5		
4. third degree, personal property	§ 97-17-7		
5. fourth degree, attempt to burn	§ 97-17-9		
6. insured property	§ 97-17-11		
7. willfully or negligently firing woods, etc.	§ 97-17-13		
Burglary			
1. inhabited dwelling; breaking in at night armed with deadly weapon	§ 97-17-23	none	§ 99-1-5
2. breaking out of dwelling	§ 97-17-25		
3. breaking inner door of dwelling by one lawfully in house	§ 97-17-29		
4. breaking and entering building other than dwelling	§ 97-17-33		
5. with explosives	§ 97-17-37		

CRIMINAL OFFENSE	STATUTE	LIMITATION OF ACTION	STATUTE
Car theft	§ 97-17-42	none	§ 99-1-5
Carjacking	§ 97-3-117	2 years	§ 99-1-5
Crimes against children 1. abuse 2. exploitation of 3. sexual battery 4. touching or handling for lustful purposes	 § 97-5-39 § 97-5-33 § 97-3-95 § 97-5-23	 none	§ 99-1-5
Conspiracy to commit a crime	§ 97-1-1	5 years	§ 99-1-5
Controlled or counterfeit substance 1. dispensing amphetamines for weight control 2. possession of controlled substance 3. possession of marijuana in motor vehicle 4. possession of paraphernalia 5. sale, etc. of controlled substance 6. sale, etc. of counterfeit substance 7. sale of paraphernalia 8. trafficking in controlled substances 9. unlawful advertisement of paraphernalia	 § 41-29-139 § 41-29-139 § 41-29-139 § 41-29-139 § 41-29-139 § 41-29-139 § 41-29-139 § 41-29-139 § 41-29-139	 2 years	§ 99-1-5
Desecration of cemetery	§ 97-29-25	2 years	§ 99-1-5

CRIMINAL OFFENSE	STATUTE	LIMITATION OF ACTION	STATUTE
Destroying or defacing certain cemetery property, public buildings, schools or churches, or property thereof	§ 97-17-39	2 years	§ 99-1-5
Driving under the influence	§ 63-11-30	2 years	§ 99-1-5
Embezzlement 1. by agents, bailees, trustees, servants and persons generally 2. property held in trust or received on contract 3. property borrowed or hired	 § 97-23-19 § 97-23-25 § 97-23-27	none	§ 99-1-5
Escape 1. aiding escapees 2. aiding, forcibly rescuing felons 3. concealing or harboring escaped prisoner 4. conveying article useful for escape to felons 5. from jail, custody, or under arrest, wilful failure to return to jail	 § 97-9-33 § 97-9-29 § 97-9-41 § 97-9-23 § 97-9-49	2 years	§ 99-1-5
Extortion	§ 97-3-82	2 years	§ 99-1-5
False pretenses	§ 97-19-39	none	§ 99-1-5
Forgery	§ 97-21-7 *et seq.*	none	§ 99-1-5
Kidnaping	§ 97-3-53	none	§ 99-1-5

CRIMINAL OFFENSE	STATUTE	LIMITATION OF ACTION	STATUTE
Larceny 1. grand larceny 2. petit larceny	§ 97-17-41 § 97-17-43	none	§ 99-1-5
Leaving scene of accident 1. accident resulting in personal injury or death 2. accident resulting in property damage to attended vehicle	§ 63-3-401 § 63-3-403	2 years	§ 99-1-5
Manslaughter 1. killing without malice in the heat of passion 2. all other killings	§ 97-3-35 § 97-3-47	none	§ 99-1-5
Murder	§ 97-3-19	none	§ 99-1-5
Perjury	§ 97-9-59	2 years	§ 99-1-5
Prostitution	§ 97-29-49	2 years	§ 99-1-5
Rape 1. statutory rape 2. assault with intent to ravish	§ 97-3-65 § 97-3-71	none	§ 99-1-5

CRIMINAL OFFENSE	STATUTE	LIMITATION OF ACTION	STATUTE
Receiving embezzled goods	§ 97-23-25	2 years	§ 99-1-5
Receiving stolen property	§ 97-17-70	2 years	§ 99-1-5
Robbery 1. unarmed 2. threat to injure person or relative at another time 3. use of deadly weapon	§ 97-3-73 § 97-3-77 § 97-3-79	none	§ 99-1-5
Sexual battery Note: Exception for § 97-3-95(1)(c), (d) or (2).	§ 97-3-95	2 years none	§ 99-1-5

CRIMINAL OFFENSE	STATUTE	LIMITATION OF ACTION	STATUTE
Trespass			
1. defacing, altering or destroying notices posted on land	§ 97-17-91	2 years	§ 99-1-5
2. destruction or carrying away of vegetation	§ 97-17-89		
3. entering lands of another without permission	§ 97-17-93		
4. entry on premises where atomic machinery, rockets and other dangerous devices are manufactured, etc.	§ 97-17-95		
5. inciting or soliciting etc., persons to go into or upon, or remain in or upon, buildings, premises or lands of another	§ 97-17-99		
6. going into or upon, or remaining in or upon, buildings, premises or lands of another after being forbidden to do so	§ 97-17-97		
7. going upon inclosed lands of another	§ 97-17-85		
8. less than larceny	§ 97-17-61		
9. wilful or malicious	§ 97-17-87		
Weapons	§ 97-37-1	2 years	§ 99-1-5
1. Carrying concealed weapon	§ 97-37-19		
2. Exhibiting in rude, angry, or threatening manner	§ 97-37-5		
3. Possession by convicted felon			

*****This chart provides only a partial listing of criminal offenses in Mississippi.*****

CHAPTER 25

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CHAPTER 26

APPEALS TO CIRCUIT COURT

CHAPTER 26

APPEALS TO CIRCUIT COURT

Mississippi Constitution, Article VI, § 156, Jurisdiction of circuit court, reads:

> The circuit court shall have . . . such appellate jurisdiction as shall be prescribed by law.

Civil Appeals

Statutory Authority

§ 11-51-85 From justice court judgment:

Either party may appeal to the circuit court of the county from the judgment of any justice court judge if appeal be demanded and bond given within (10) days after the rendition of the judgment.

The party taking the appeal shall give bond with a sufficient surety, to be approved by the clerk of the justice court payable to the opposite party, in the penalty of double the amount of the judgment, or double the value of the property involved, and all costs accrued and likely to accrue in the case, and in no case to be less than one hundred dollars ($100.00), conditioned for the payment of such judgment as the circuit court may render against him; and the appeal, when demanded and bond given, shall operate as a supersedeas of execution on such judgment.

Any defendant against whom a civil judgment may have been entered by a justice court judge who, by reason of his poverty, is not able to give bond may nevertheless appeal from such judgment on his making an affidavit that, by reason of his poverty, he is unable to give bond or other security to obtain such appeal, but the appeal in such case shall not operate as a supersedeas of the judgment.

The clerk of the justice court shall at once make up a transcript of the record and properly transmit the same to the clerk of the circuit court, within fifteen (15) days after the bond has been filed. In counties where there is a county court, appeals from justice courts shall be to the county court.

> This Court has held where there is conflict between a statute and a procedural rule created by the Supreme Court, the rule controls and the statute is void and of no effect. ***Murray v. State*, 870 So. 2d 1182, 1184 (Miss. 2004) (citations omitted).**

§11-51-81 To county court:

All appeals from courts of justices of the peace, special and general, and from all municipal courts shall be to the county court under the same rules and regulations as are provided on appeals to the circuit court, but appeals from orders of the board of supervisors, municipal boards, and other tribunals other than courts of justice of the peace and municipal courts, shall be direct to the circuit court as heretofore.

And from the final judgment of the county court in a case appealed to it under this section, a further appeal may be taken to the circuit court on the same terms and in the same manner as other appeals from the county court to the circuit court are taken.

Provided that where the judgment or record of the justice of the peace, municipal or police court is not properly certified, or is not certified at all, that question must be raised in the county court in the absence of which the defect shall be deemed as waived and by such waiver cured and may not thereafter be raised for the first time in the circuit court on the appeal thereto; and provided further that there shall be no appeal from the circuit court to the supreme court of any case civil or criminal which originated in a justice of the peace, municipal or police court and was thence appealed to the county court and thence to the circuit court unless in the determination of the case a constitutional question be necessarily involved and then only upon the allowance of the appeal by the circuit judge or by a judge of the supreme court.

> We find that the effect of this statute is that it prevents this Court from hearing appeals from cases originating in the justice or municipal courts of the twenty counties having county courts; thus, the statute usurps this Court's constitutional power to establish procedural rules. Accordingly, today we announce that the "three-court rule" in Section 11–51–81 is unconstitutional and void. . . . Having found a portion of Section 11–51–81 to be unconstitutional, we need to make perfectly clear that our finding on this issue in no way affects the constitutionality of the remainder of Section 11–51–81. . . . Thus, it is without question from express legislative language that this statute is severable, and the remainder of the statute is effective. ***Jones v. City of Ridgeland*, 48 So. 3d 530, 535-39 (Miss. 2010).**

§11-51-79 From county court:

No appeals or certiorari shall be taken from any interlocutory order of the county court, but if any matter or cause be unreasonably delayed of final judgment therein, it shall be good cause for an order of transfer to the circuit or chancery court upon application therefor to the circuit judge or chancellor.

Appeals from the law side of the county court shall be made to the circuit court, and those from the equity side to the chancery court on application made therefor and bond given according to law, except as hereinafter provided. Such appeal shall operate as a supersedeas only when such would be applicable in the case of appeals to the Supreme Court.

Appeals should be considered solely upon the record as made in the county court and may be heard by the appellate court in termtime or in vacation. If no prejudicial error be found, the matter shall be affirmed and judgment or decree entered in the same manner and against the like parties and with like penalties as is provided in affirmances in the Supreme Court.

If prejudicial error be found, the court shall reverse and shall enter judgment or decree in the manner and against like parties and with like penalties as is provided in reversals in the Supreme Court; provided, that if a new trial is granted the cause shall be remanded to the docket of such circuit or chancery court and a new trial be had therein de novo.

Appeals from the county court shall be taken and bond given within thirty (30) days from the date of the entry of the final judgment or decree on the minutes of the court; provided, however, that the county judge may within said thirty (30) days, for good cause shown by affidavit, extend the time, but in no case exceeding sixty (60) days from the date of the said final judgment or decree.

Judgments or decrees of affirmance, except as otherwise hereinafter provided, may be appealed to the Supreme Court under the same rules and regulations and under the same penalties, in case of affirmance, as appertain to appeals from other final judgments or decrees of said courts, but when on appeal from the county court a case has been reversed by the circuit or chancery court there shall be no appeal to the Supreme Court until final judgment or decree in the court to which it has been appealed.

When the result of an appeal in the Supreme Court shall be a reversal of the lower court and in all material particulars in effect an affirmance of the judgment or decree of the county court, the mandate may go directly to the county court, otherwise to the proper lower court. Provided, however, that when appeals are taken in felony cases which have been transferred from the circuit court to the county court for trial, and have been there tried, such appeals from the judgment of the county court shall be taken directly to the Supreme Court.

***See Uniform Civil Rules of Circuit and County Court 5.01 through 5.10*.**

Rule Authority - Uniform Civil Rules of Circuit and County Court (UCRCCC)

An appeal from county court to circuit court is controlled by the Mississippi Rules of Civil Procedure, the Uniform Rules of Circuit and County Court (URCCC), and the Mississippi Rules of Appellate Procedure. ***Van Meter v. Alford*, 774 So. 2d 430, 432 (Miss. 2000) (citations omitted).**

Uniform Civil Rule of Circuit and County Court 5.04, Notice of Appeal:

The party desiring to appeal a decision from a lower court must file a written notice of appeal with the circuit court clerk. A copy of that notice must be provided to all parties or their attorneys of record and the lower court or lower authority whose order or judgment is being appealed. A certificate of service must accompany the written notice of appeal. The court clerk may not accept a notice of appeal without a certificate of service, unless so directed by the court in writing.

In all appeals, whether on the record or by trial de novo, the notice of appeal and payment of costs must be simultaneously filed and paid with the circuit court clerk within thirty (30) days of the entry of the order or judgment being appealed. The timely filing of this written notice and payment of costs will perfect the appeal. The appellant may proceed in forma pauperis upon written approval of the court acting as the appellate court.

The written notice of appeal must specify the party or parties taking the appeal; must designate the judgment or order from which the appeal is taken; must state if it is on the record or an appeal de novo; and must be addressed to the appropriate court.

Uniform Civil Rule of Circuit and County Court 5.09, Cost Bond:

In all appeals, unless the court allows an appeal in forma pauperis, the appellant or appellants shall pay all court costs incurred below and likely to be incurred on appeal as estimated by the circuit court clerk. Should a dispute arise, a party may apply to the court for relief.

Uniform Civil Rule of Circuit and County Court 5.08, Supersedeas:

The perfecting of an appeal, whether on the record or by trial de novo, does not act as supersedeas.

In cases being appealed that involve a money judgment, the party against whom money judgment was rendered may post with the court clerk of the court acting as the appellate court a bond that is 125% of the money judgment, such bond to be approved by the circuit clerk.

The posting of this bond shall automatically act as a supersedeas solely on the money judgment, but not any other part of the order or judgment. Upon application the court may reduce the amount of the supersedeas bond.

In appeals from lower authorities, when the statute provides for automatic supersedeas, the statute shall govern. In all other cases the court may grant a supersedeas upon proof of the party requesting the same, applying the same standards as for a preliminary injunction. However, except in those cases in which the statute provides for automatic supersedeas, no supersedeas will be granted on appeals from a denial, revocation or suspension of a license to practice a profession or a trade. The court may grant an expedited hearing, may alter the briefing schedules, and may require the record to be expedited. In all cases in which a discretionary supersedeas is granted, the court may require a bond sufficient to protect the interests of the other parties.

Uniform Civil Rule of Circuit and County Court 5.02, Duty to Make Record:

In appeals on the record it is the duty of the lower court or lower authority (which includes, but is not limited to, state and local administrative agencies and governing authorities of any political subdivision of the state) to make and preserve a record of the proceedings sufficient for the court to review. Such record may be made with or without the assistance of a court reporter. The time and manner for the perfecting of appeals from lower authorities shall be as provided by statute.

Uniform Civil Rule of Circuit and County Court 5.05, Filing of Record in Appeals on the Record:

In appeals in which the appeal is solely on the record, the record from the lower court or lower authority must be filed with the court clerk within thirty (30) days of filing of the notice of appeal. Provided, however, in cases involving a transcript, the court reporter or lower authority may request an extension of time. The court, on its own motion or on application of any party, may compel the compilation and transmission of the record of proceedings. Failure to file the record with the court clerk or to request the assistance of the court in compelling the same within thirty (30) days of the filing of the written notice of appeal may be deemed an abandonment of the appeal and the court may dismiss the same with costs to the appealing party or parties.

Uniform Civil Rule of Circuit and County Court 5.06, Briefs on Appeals on the Record:

Briefs filed in an appeal on the record must conform to the practice in the Supreme Court, including form, time of filing and service, except that the parties should file only an original and one copy of each brief. The consequences of failure to timely file a brief will be the same as in the Supreme Court.

Appeals from Justice or Municipal Court - Trial de Novo

Uniform Civil Rule of Circuit and County Court 5.01, Appeals to Be on the Record/Exceptions:

Direct appeals from justice court and municipal court shall be by trial de novo.

Uniform Civil Rule of Circuit and County Court 5.07, Procedure on Appeals by Trial De Novo:

In appeals by trial de novo, the circuit court clerk, upon the filing of the written notice of appeal, must enter the case on the docket, noting that it is an appeal with trial de novo.

The appeal will proceed as if a complaint and answer had been filed, but the court may require the filing of any supplemental pleadings to clarify the issues.

All proceedings on an appeal de novo will be governed by the Mississippi Rules of Civil Procedure, where applicable, the Mississippi Rules of Evidence, and these Rules.

Appeals from County Court - On the Record

Uniform Civil Rule of Circuit and County Court 5.01, Appeals to Be on the Record/Exceptions:

Except for cases appealed directly from justice court or municipal court, all cases appealed to circuit court shall be on the record and not a trial de novo.

Writ of Certiorari

Uniform Civil Rule of Circuit and County Court 5.10, Writ of Certiorari:

The availability of writs of certiorari shall be as provided by the Constitution and Statutes of the State of Mississippi. Upon the filing of a record pursuant to a writ of certiorari, the case shall proceed as an appeal on the record.

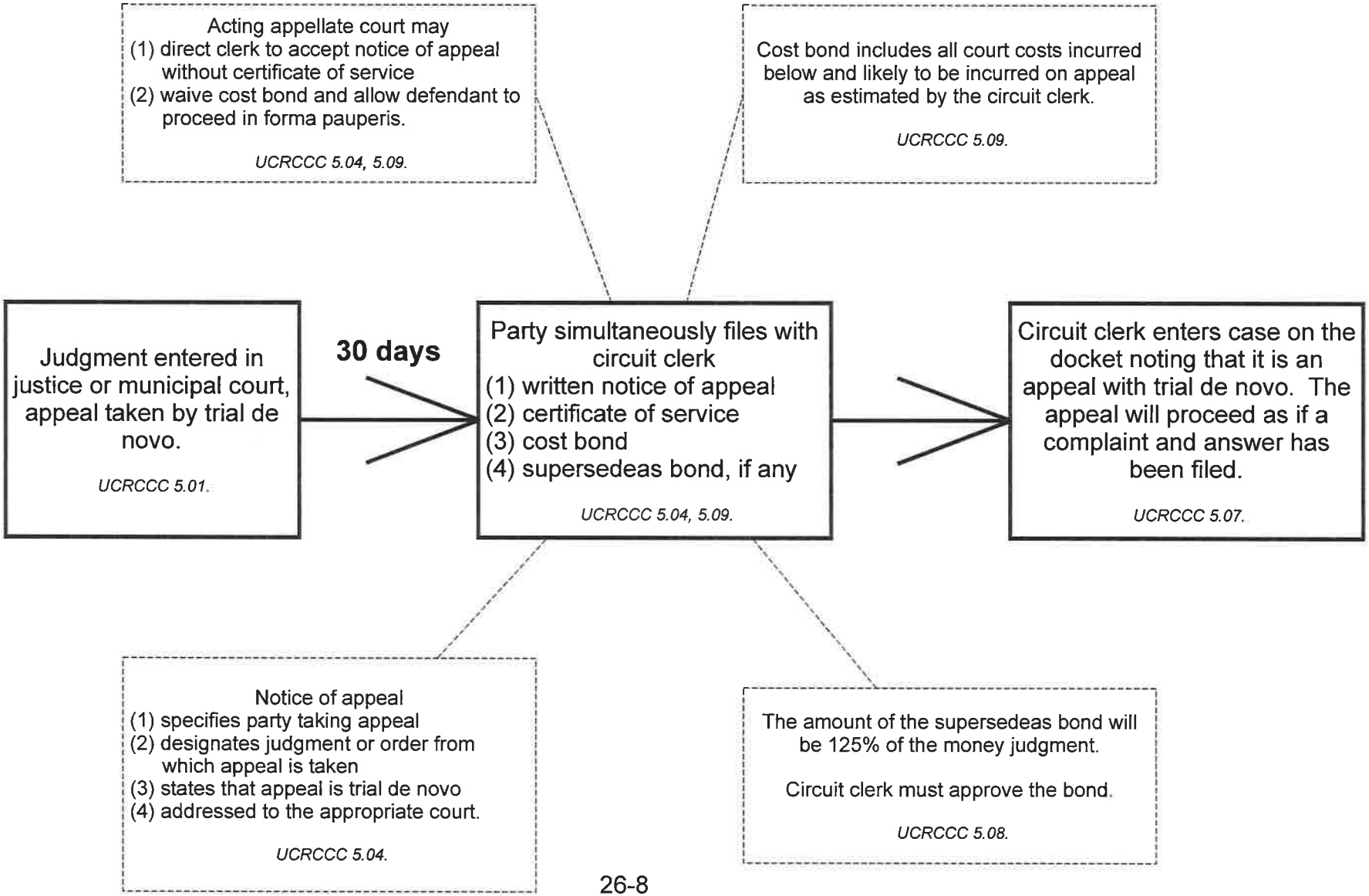
Notice of Deficiencies

Mississippi Rule of Appellate Procedure 2, Penalties for Noncompliance with Rules; Suspension of Rules, states in part:

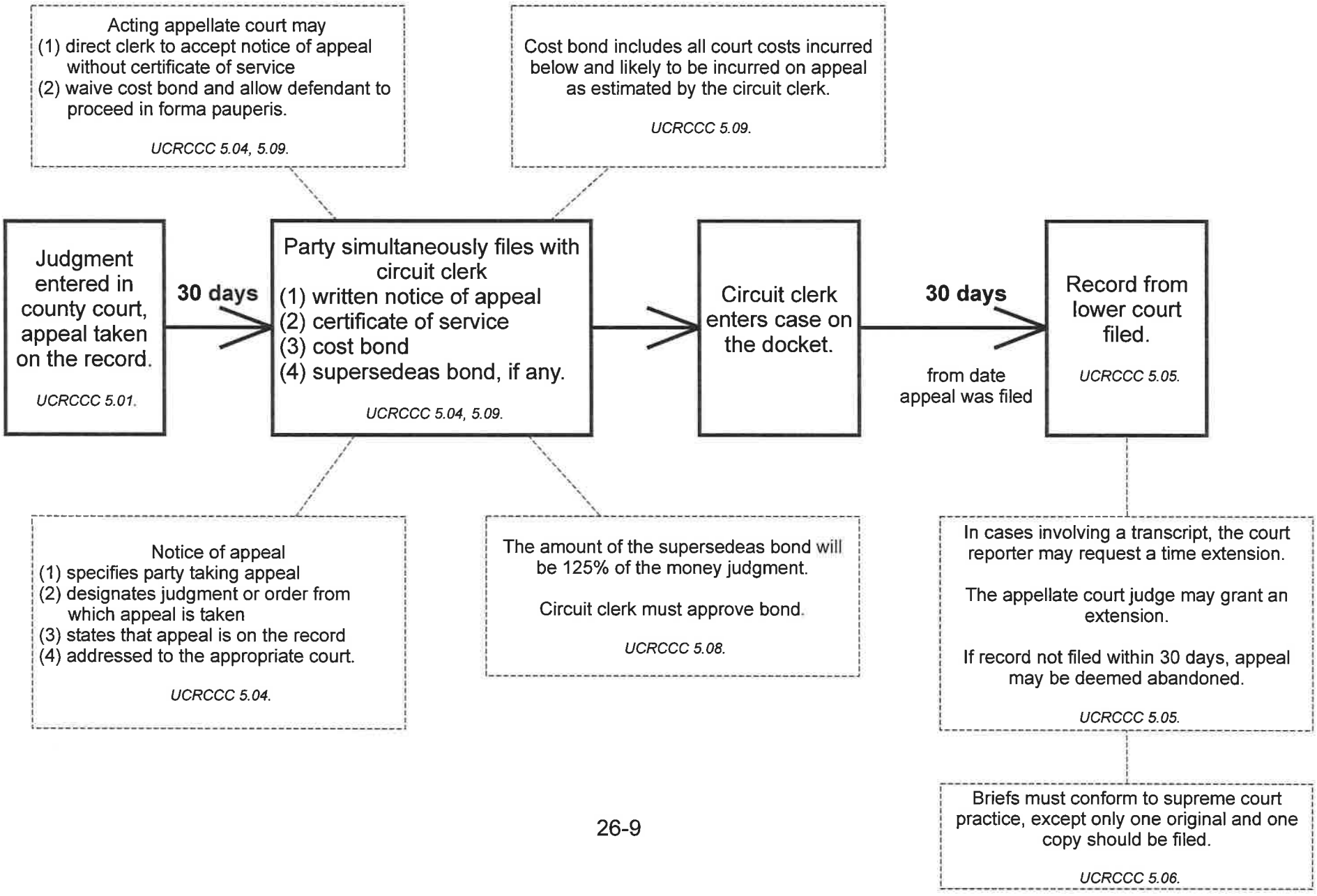
> (a)(2) Discretionary Dismissal. An appeal may be dismissed upon motion of a party or on motion of the appropriate appellate court (i) when the court determines that there is an obvious failure to prosecute an appeal; or (ii) when a party fails to comply substantially with these rules. When either court, on its own motion or on motion of a party, determines that dismissal may be warranted under this Rule 2(a)(2), the clerk of the Supreme Court shall give written notice to the party in default, apprising the party of the nature of the deficiency. If the party in default fails to correct the deficiency within fourteen (14) days after notification, the appeal shall be dismissed by the clerk of the Supreme Court. The attorney for the party in default has the burden to correct promptly any deficiency or to see that the default is corrected by the appropriate official. Motions for additional time in which to file briefs will not be entertained after the notice of the deficiency has issued.

> > We specifically held that M.R.A.P. 2(a)(2) applies to appeals from county court to circuit court. Rule 2(a)(2) mandates that, after a motion to dismiss has been filed, the court clerk (the circuit clerk in this instance) officially notify an appellant of deficiencies in his appeal and that the appellant be given fourteen (14) days therefrom to correct any deficiencies. [The appellant] was therefore deprived of due process when his appeal was dismissed because he was not given an official notice of deficiencies in his appeal by the circuit clerk. [Appellee's] motion to dismiss cannot be substituted for an official notice of deficiencies from the court clerk. Even where a party has moved to dismiss, the plain language of the rule requires a notice from the clerk of the deficiency and a fourteen day opportunity to cure the deficiency. ***Van Meter v. Alford*, 774 So. 2d 430, 432 (Miss. 2000)(citations omitted).**

CIVIL APPEALS FROM JUSTICE OR MUNICIPAL COURT



CIVIL APPEALS FROM COUNTY COURT



Criminal Appeals

Statutory Authority

§ 99-35-1 Right to appeal:

In all cases of conviction of a criminal offense against the laws of the state by the judgment of a justice court, or by a municipal court, for the violation of an ordinance thereof, an appeal may be taken within forty (40) days from the date of such judgment of conviction to the county court of the county, in counties in which a county court is in existence, or the circuit court of the county, in counties in which a county court is not in existence, which shall stay the judgment appealed from.

Any person appealing a judgment of a justice court or a municipal court under this section shall post bond for court costs relating to such appeal. The amount of such bond shall be determined by the justice court judge or municipal judge, payable to the state in an amount of not less than $100.00 nor more than $1,000.00.

On appearance of the appellant in the circuit court the case shall be tried anew and disposed of as other cases pending therein.

> This Court has held where there is conflict between a statute and a procedural rule created by the Supreme Court, the rule controls and the statute is void and of no effect. ***Murray v. State*, 870 So. 2d 1182, 1184 (Miss. 2004) (citations omitted).**

Rule Authority - Mississippi Rules of Criminal Procedure (MRCrP)

Appeals From Justice or Municipal Court - Trial de Novo

Mississippi Rule of Criminal Procedure 29.1, Notice of Appeal; Contents; Defects; Dismissal:

(a) Notice of Appeal. Any person adjudged guilty of a criminal offense by a justice or municipal court may appeal to county court or, if there is no county court, to circuit court, by filing simultaneously a written notice of appeal, and both a cost bond and an appearance bond (or cash deposit), as provided in Rules 29.3(a) and 29.4(a), with the clerk of the circuit court having jurisdiction within thirty (30) days of such judgment. This written notice of appeal and posting of the cost bond and the appearance bond (or cash deposit) perfects the appeal. After the filing of the written notice of appeal, cost bond, and appearance bond (or cash deposit), all further correspondence concerning the case shall be mailed directly to

the circuit clerk for inclusion in the file.

(b) Contents. The written notice of appeal shall specify the party or parties taking the appeal; specify the current residence address and the current mailing address, if different, of each party taking the appeal; designate the judgment or order from which the appeal is taken; be addressed to county or circuit court, whichever appropriate; and state that the appeal is taken for a trial de novo.

(c) Defects in the Notice of Appeal; Dismissal. Upon a failure of a party to comply with the requirements of this rule as to content of the written notice of appeal, the court, on its own motion or on motion of a party, shall direct the clerk of the court to give written notice to the party in default, apprising the party of the nature of the deficiency. If the party in default fails to correct the deficiency within fourteen (14) days after notification, the appeal shall be dismissed by the clerk of the court. The county or circuit court shall promptly notify the lower court of any such dismissal.

Mississippi Rule of Criminal Procedure 29.3 Cost Bonds:

(a) Cost Bonds. Unless excused by the county or circuit court by the making of an affidavit of poverty like that specified in Mississippi Code Section 99-35-7, every defendant who appeals under this rule shall post a cash deposit, or bond with sufficient resident sureties (or licensed guaranty companies) to be approved by the circuit clerk, for all estimated court costs incurred both in the appellate and lower courts (including, but not limited to, fees, court costs, and amounts imposed pursuant to statute). The amount of such cash deposit or bond shall be determined by the judge of the lower court, payable to the State in an amount of not less than One Hundred Dollars ($100.00) nor more than Twenty-Five Hundred Dollars ($2,500.00). Upon a bond forfeiture, the costs of the lower court shall be recovered after the costs of the appellate court.

***See* Mississippi Rule of Criminal Procedure 8.1. Definitions and Requirements:**

(d) Cash Deposit Bond. A “cash deposit bond” is an appearance bond secured by deposit with the clerk of security, in the form of a cash deposit or certified funds, in an amount set by the judge. The following requirements shall be met for a cash deposit bond:

(1) The accused must never have been convicted in any court of this state, another state or a federal court, of a crime punishable by more than one (1) year's imprisonment, currently is not charged with or previously been convicted of escape, or had an order nisi entered on a previous bond;
(2) The amount of the bond must be set by the proper authority;

(3) A return date must be set by the proper authority;
(4) The accused must tender to the clerk of the circuit court ten percent (10%) of the amount of the bond as set, in cash, or $250.00 in cash, whichever is greater;
(5) The accused must sign an appearance bond guaranteeing his/her appearance and binding himself/herself unto the State of Mississippi in the full amount of the bond as set to be used in the case of default;
(6) The accused, by affidavit duly notarized, must swear in substantially the following form:

State of Mississippi
County of _____

Personally appeared before me, the undersigned authority in and for said county and state, _____, who after being duly sworn states:
(a) I have never been convicted in any court of this state, another state, or a federal court of a crime punishable by more than one (1) year's imprisonment. I am not charged with escape and I have never been convicted of escape. I have had no order nisi entered on a bail bond executed by me.
(b) The proper authority has set the sum of $ _____ as the amount of bail bond to be executed by me. This bond was set by _____.
(c) A return date has been set for this bond. Its return date is _____ and was set by _____.
(d) I have tendered to the clerk of the Circuit Court of _____ County, Mississippi, ten percent (10%) of the amount of said bond in cash, which sum is not less than $250.00. Said cash is my property. I authorize the clerk of said court to dispose of the same as follows: If the bond is forfeited, the cash tendered will be paid by the clerk, less a fee of not more than $10.00, to the county, and the amount so paid will be credited on the bond forfeited. If I appear on the return day and a final disposition is made of the case, the amount deposited with the clerk, less a fee of not more than $10.00 to be retained by the clerk, will be disposed of as ordered by the court.
(e) I agree to report to the clerk of the court by telephone, or in person, and in writing on the first Monday of each month as to my current address and telephone number. If I fail to do so, I agree that the bond may be declared in default.

(7) The amount of money tendered under this rule shall not be disbursed to any person except on written order of the court. The money deposited with the clerk shall be disbursed in the following manner: first, to pay any court costs assessed against the defendant; second, to pay any restitution the defendant has been ordered to make; third, to pay any fines imposed against the defendant; fourth, to pay any assignment of the sum made by the defendant to defendant's attorney; and fifth, any refund to the defendant or other disbursements as allowed by the court. . . .

Mississippi Rule of Criminal Procedure 29.4 Appearance Bonds:

(a) Appearance Bond. Unless excused by the county or circuit court by the making of an affidavit as specified in Mississippi Code Section 99-35-7, a cash deposit, or bond with sufficient resident sureties (or licensed guaranty companies) to be approved by the circuit clerk, shall be given and conditioned on appearance before the county or circuit court from day to day and term to term until the appeal is finally determined or dismissed. The amount of such cash deposit or appearance bond shall be determined by the judge of the lower court.

***See* Mississippi Rule of Criminal Procedure 8.1. Definitions and Requirements:**

(b) Unsecured Appearance Bond. An "unsecured appearance bond" is an undertaking to pay a specified sum of money to the clerk of the circuit, county, justice, or municipal court, for the use of the State of Mississippi or the municipality, on the failure of a person released to comply with its conditions.
(c) Secured Appearance Bond. A "secured appearance bond" is an appearance bond secured by deposit with the clerk of security equal to the full amount thereof.

Mississippi Rule of Criminal Procedure 29.5 Proceedings:

Upon the filing with the circuit clerk of the written notice of appeal and bonds or cash deposits required by this Rule, unless excused therefrom, the prior judgment of conviction shall be stayed. The appeal shall proceed as a trial de novo. In appeals from justice or municipal court, when the maximum possible sentence is six (6) months or less, the case may be tried without a jury.

Appeals From County Court - On the Record

Mississippi Rule of Criminal Procedure Rule 30.1, Notice of Appeal; Contents; Proceedings:

> (a) Notice of Appeal. Any person adjudged guilty of a criminal offense by a county court, where the case was not a felony action transferred to that court from circuit court, may appeal to the circuit court having jurisdiction by filing written notice with the clerk of the circuit court within thirty (30) days of the entry of the final judgment. Extensions may be granted as provided in Mississippi Rule of Appellate Procedure 4(g).
>
> (b) Contents. The notice of appeal shall specify the party or parties taking the appeal; designate the judgment or order from which the appeal is taken; state that the appeal is to circuit court; and state that the appeal is taken on the record. The clerk, upon receiving written notice of appeal, shall immediately send notice to the prosecuting attorney. Thereafter, appeals shall proceed as if in the Supreme Court and in accordance with the Mississippi Rules of Appellate Procedure.
>
> (c) Proceedings. On appeal, legal arguments may be heard in any county within the jurisdiction of the circuit court and shall be considered solely on the record made in county court. If no prejudicial error be found, the circuit court shall affirm and enter judgment in like manner as affirmances in the Supreme Court. If prejudicial error be found, the circuit court shall reverse as is provided for reversals in the Supreme Court. If a new trial is granted, the cause shall be placed on the docket of the circuit court and a new trial held therein de novo.

Mississippi Rule of Criminal Procedure Rule 30.2, Bond:

> Defendants who appeal a conviction in county court to circuit court shall be entitled to release pursuant to Rule 8.3. All time that the defendant has been in custody on the present charge shall be credited against any sentence imposed.

Mississippi Rule of Criminal Procedure Rule 30.3, Felony Transfers:

> Final judgments in felony cases transferred from circuit court to county court shall be appealed to the Supreme Court in the same manner as if the judgment were rendered in the circuit court.

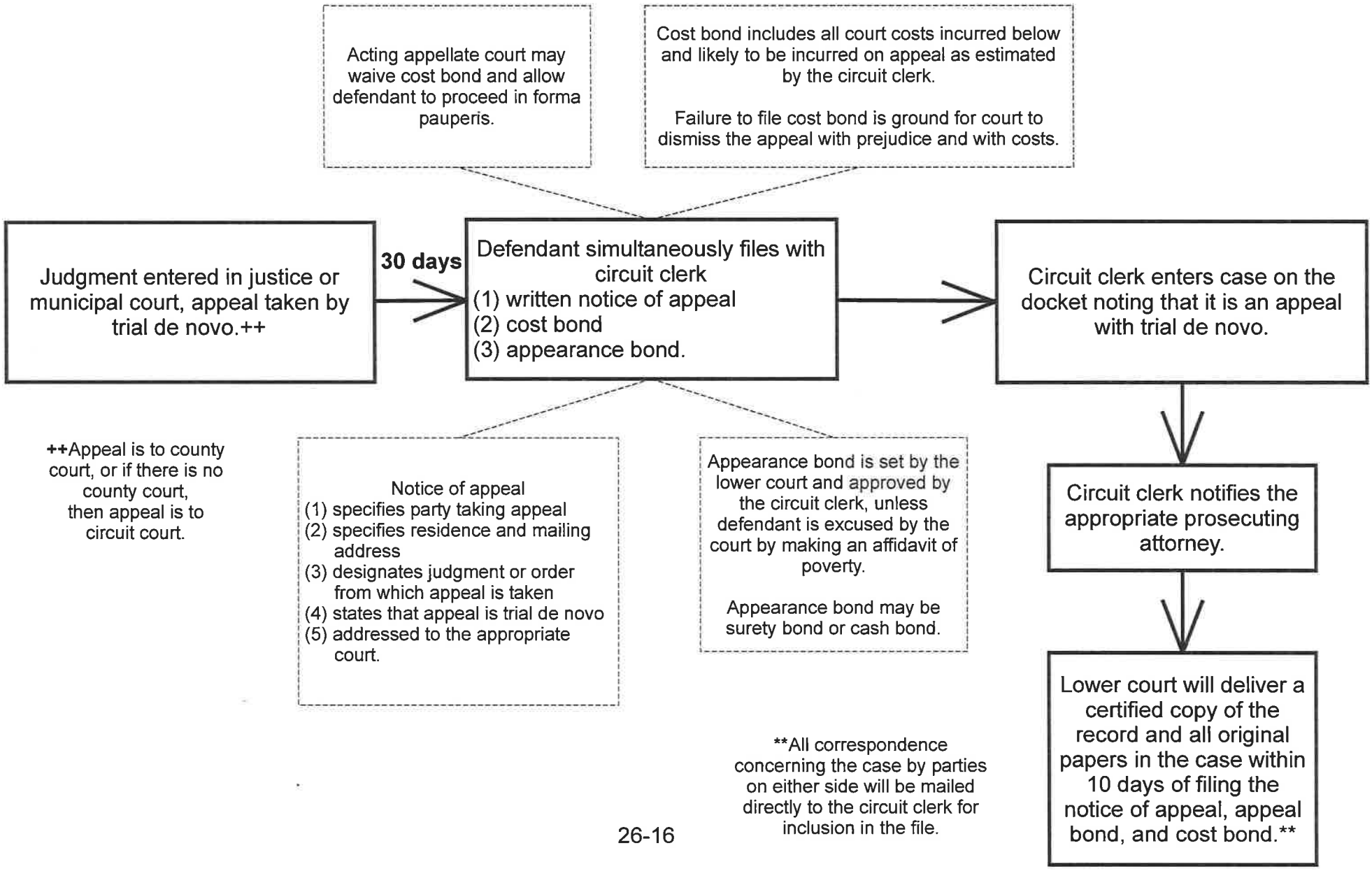
Notice of Deficiencies

Mississippi Rule of Appellate Procedure 2, Penalties for Noncompliance with Rules; Suspension of Rules, states in part:

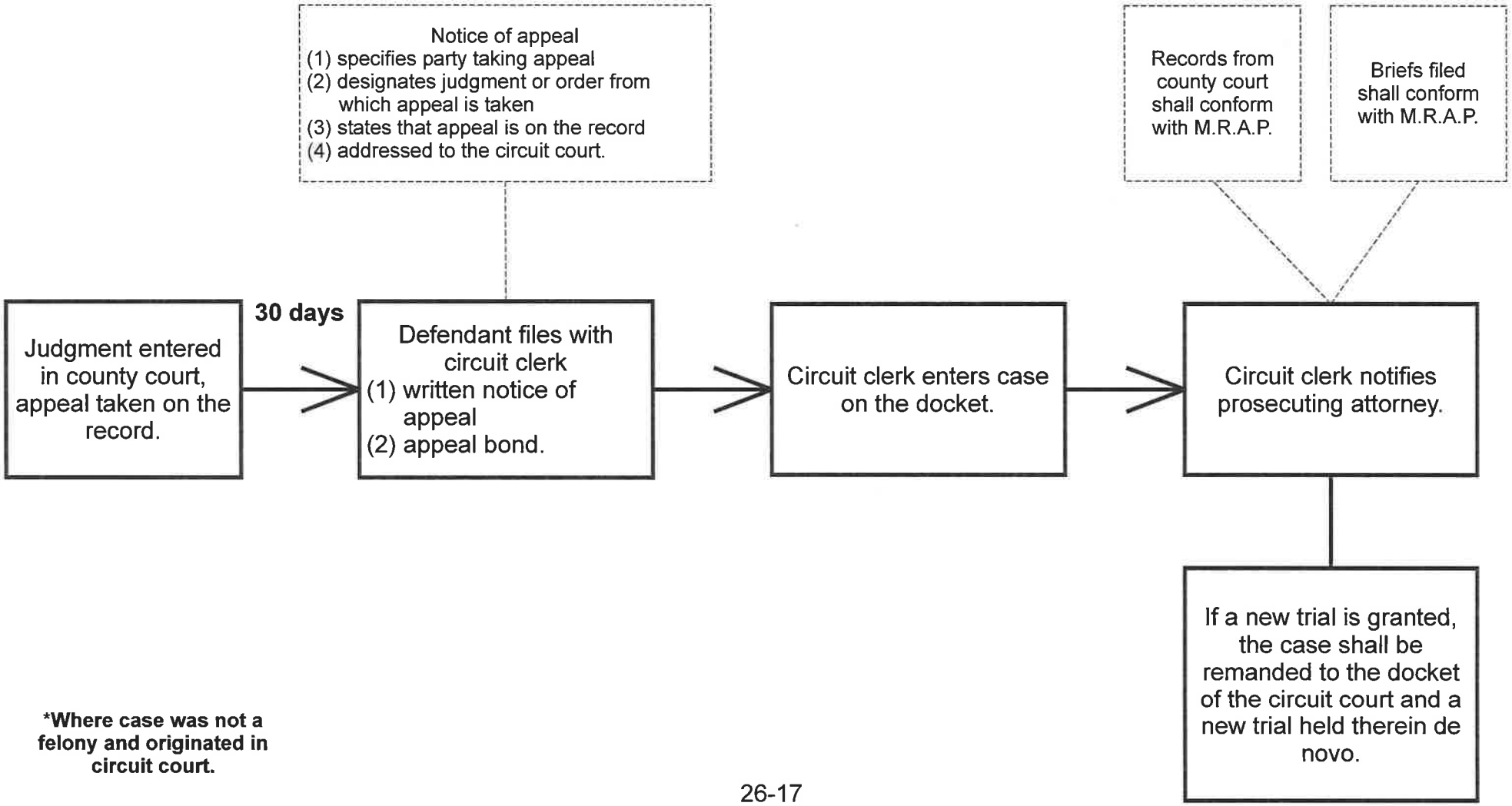
> (a)(2) Discretionary Dismissal. An appeal may be dismissed upon motion of a party or on motion of the appropriate appellate court (i) when the court determines that there is an obvious failure to prosecute an appeal; or (ii) when a party fails to comply substantially with these rules. When either court, on its own motion or on motion of a party, determines that dismissal may be warranted under this Rule 2(a)(2), the clerk of the Supreme Court shall give written notice to the party in default, apprising the party of the nature of the deficiency. If the party in default fails to correct the deficiency within fourteen (14) days after notification, the appeal shall be dismissed by the clerk of the Supreme Court. The attorney for the party in default has the burden to correct promptly any deficiency or to see that the default is corrected by the appropriate official. Motions for additional time in which to file briefs will not be entertained after the notice of the deficiency has issued.

> > We specifically held that M.R.A.P. 2(a)(2) applies to appeals from county court to circuit court. Rule 2(a)(2) mandates that, after a motion to dismiss has been filed, the court clerk (the circuit clerk in this instance) officially notify an appellant of deficiencies in his appeal and that the appellant be given fourteen (14) days therefrom to correct any deficiencies. [The appellant] was therefore deprived of due process when his appeal was dismissed because he was not given an official notice of deficiencies in his appeal by the circuit clerk. [Appellee's] motion to dismiss cannot be substituted for an official notice of deficiencies from the court clerk. Even where a party has moved to dismiss, the plain language of the rule requires a notice from the clerk of the deficiency and a fourteen day opportunity to cure the deficiency. ***Van Meter v. Alford*, 774 So. 2d 430, 432 (Miss. 2000) (citations omitted).**

CRIMINAL APPEALS FROM JUSTICE OR MUNICIPAL COURT
Mississippi Rule of Criminal Procedure 29



CRIMINAL APPEALS FROM COUNTY COURT*
Mississippi Rules of Criminal Procedure 30 & 8.3



***Where case was not a felony and originated in circuit court.**

Remittance of Fees & Fines

§ 99-35-13 Remittance of fines and forfeitures:

In the event there is an acquittal or the case is nolle prosequi, the order of the court shall direct that any fine or forfeiture paid in the lower court be remitted, and a certified copy of the said order shall be sufficient authority for the remittance of said fine or forfeiture by the board of supervisors in the event the case was appealed from a judgment of a justice of the peace, or by the governing authorities of a municipality in the event the case was appealed from a judgment of a mayor or police justice of a city, town or village.

> In August of 1995, Nathan Mitchell was arrested for various misdemeanors. He was convicted of public intoxication, resisting arrest and disturbing the peace by the Municipal Court of Gulfport on January 12, 1996. He received a suspended sentence and fines totaling $950. On February 12, 1996, Mitchell appealed the three convictions to the County Court of Harrison County. He obtained an appeal bond in the amount of $950 to cover the amount of the fine assessed in municipal court. Mitchell also paid, in cash, to the Circuit Clerk of Harrison County, the sum of $100 for each charge that he was appealing. In the records of the appeal, the three $100 payments were characterized by the circuit clerk as "filing fees." These are the charges at issue in this case. Mitchell also paid $20 as an "appearance bond fee." There is no explanation in the record of this last $20 assessment. No dispute regarding that fee is made and we ignore it in our analysis. A trial in county court was conducted on May 28 and 29, 1997. Mitchell was found not guilty on each charge. The $20 appearance bond fee was refunded. Mitchell also demanded that the three $100 "filing fees" be returned, but the circuit clerk initially denied the request. Later this charge was refunded after Mitchell's lawyer made demand. On April 7, 1998, Mitchell brought suit to challenge on statutory and constitutional grounds the clerk's practice of requiring the $100 payment on appeals from municipal to county court. The defendants' summary judgment motion was granted. Mitchell appealed. . . . The trial court found that the $100 charged by the circuit clerk had long been referred to within the clerk's office as a "filing fee," the designation having predated this clerk's service. . . . [In] order to docket an appeal from a criminal case that commenced in municipal court, a $100 "fee" had to be paid. The trial court held that charging a filing fee for a criminal appeal would be improper, relying on section 25–7–13. The Supreme Court has held that the circuit clerk should not charge the filing fee under section 25–7–13 for docketing an appeal from a lower tribunal as opposed to filing a complaint. In *Staples*, the only relief given was a refund of the fee. The "fee" in Mitchell's criminal appeal

has already been refunded. However, because of Mitchell's claim of an improper even if temporary violation of his rights under color of state law, we examine the propriety of the clerk's requiring this payment. . . . We agree with Mitchell that when the lower court accepted the circuit clerk's argument that the payment of a $100 “fee” should be transformed into the required cost bond, that the new creation was not without its blemishes. Among the differences between what occurred in this case and the provisions of the rule are that this clerk required the payment of $100 in cash, while Rule 12.02 requires a bond of not less than $100 nor more than $1,000, with the option of payment in cash. Mitchell has never argued that this distinction creates his constitutional claim. Secondly, the amount of the bond is to be set on a case-specific basis by the municipal judge, not set as a universal amount by the circuit clerk. However, the cost bond must be delivered to the circuit clerk. If the municipal court does not obtain the cost bond, we find no taking of property without due process of law if the circuit clerk then requires that it be provided as opposed to the circuit clerk's demanding that the municipal judge demand the bond. . . . The trial court found that the clerk had been collecting a proper charge but doing so in an improper manner. The proof is weak that the circuit clerk realized that security for costs was needed. There is some suggestion that the clerk may have been mechanically applying the filing fee requirement for a complaint to the filing of an appeal. From Mitchell's viewpoint, a certain serendipity factor is unfairly in play. We find no unfairness. Even if it is fortuitous for the circuit clerk that this other security was needed and was not being collected, the need was no less real for an appellant. If the wrong label was used to collect what had to be collected, injury did not occur. The court further found that court costs are not subject to an automatic refund even if the municipal court defendant is acquitted on appeal. That issue is not before us since the circuit clerk refunded the entirety of the $300 upon demand by Mitchell's counsel. We agree that since Mitchell could not appeal without posting a bond of between $100 and $1,000 to secure costs, this $100 per conviction fee may properly be recast as the necessary bond. As did the circuit court judge in granting summary judgment, we find relevant that Rule 12.02 does not permit the circuit clerk to docket the appeal without the bond. Cash is a possible form of bond. . . . Even without a specific provision in the rule, there is a statute that every “court shall have control over all proceedings in the clerk's office,” and is to exercise that control in a manner consistent with the Rules of Civil Procedure. The circuit clerk is the clerk for a county court, and therefore for purposes of proceedings then occurring in his court, a county judge could exercise this authority. The reference in section 9–1–29 to the civil rules certainly cannot mean that the clerk is uncontrollable in criminal cases. Instead, the civil rules only provide

analogous procedures for exercising control. One civil rule states that any action of the clerk that is normally done without court order "may be suspended or altered or rescinded by the court upon cause shown." Under the express authority of section 9–1–29, such a motion could have been filed in this case. Regardless of the statute, considering a motion such as this is within the powers of the court. A trial court has inherent power to manage its docket and protect the integrity of the judicial process. Specifically addressing the inherent powers of circuit courts sitting in review of a justice court decision about an appeal bond, the Supreme Court held that the circuit court should hear evidence on the appellant's complaints about the bond. Also of importance is that the Supreme Court has concluded that a criminal defendant may file a motion with the circuit court on appeal from a justice or municipal court to correct deficiencies in his appearance bond. We find that the same right exists under section 99–35–1 for complaints about the cost bond. If a litigant has complaints about the validity of demands being made by the court's clerk, the clerk's court is available to hear them. Therefore, we reject Mitchell's argument that he was without remedy in the initial appeal. Had such a complaint been made and these issues thoroughly explored, the proper relief would have been to have security for costs imposed from $100 to $1,000 in amount and not to collect a "fee." The effect would have been very close to what the circuit clerk had already required but would have had an accurate label. According to the trial court's opinion in this case, the circuit clerk has altered her procedures to conform to Rule 12.02. We find no injury to Mitchell in this case. ***Mitchell v. Parker*, 804 So. 2d 1066, 1068-72 (Miss. Ct. App. 2001) (citations omitted) (discussing prior versions of rules).**

The general statute authorizing fees provides that the clerk of the circuit court should charge for the following services:

> (a) Docketing, filing, marking and registering each complaint, petition, indictment and all answers, claims, orders, continuances and other papers filed therein, issuing each writ, summons, subpoena or other such instruments and swearing witnesses, taking and recording bonds and pleas, recording judgments, orders, fiats and certificates. . . .

We hold that this section does not authorize the circuit clerk to charge the customary filing fee in cases where, as here, the circuit court is acting as an appellate court. Accordingly, we order the clerk to refund the charge of $44.50. ***Staples v. Blue Cross & Blue Shield of Mississippi, Inc.*, 585 So. 2d 747, 749–50 (Miss. 1991) (citing Miss. Code Ann. § 25–7–13).**

Administrative Appeals

Uniform Civil Rule of Circuit and County Court 5.01, Appeals to Be on the Record/Exceptions:

Except for cases appealed directly from justice court or municipal court, all cases appealed to circuit court shall be on the record and not a trial de novo.

Uniform Civil Rule of Circuit and County Court 5.03, Scope of Appeals from Administrative Agencies:

On appeals from administrative agencies the court will only entertain an appeal to determine if the order or judgment of the lower authority:

1. Was supported by substantial evidence; or
2. Was arbitrary or capricious; or
3. Was beyond the power of the lower authority to make; or
4. Violated some statutory or constitutional right of the complaining party.

Uniform Civil Rule of Circuit and County Court 5.02, Duty to Make Record:

In appeals on the record it is the duty of the lower court or lower authority (which includes, but is not limited to, state and local administrative agencies and governing authorities of any political subdivision of the state) to make and preserve a record of the proceedings sufficient for the court to review. Such record may be made with or without the assistance of a court reporter. The time and manner for the perfecting of appeals from lower authorities shall be as provided by statute.

Uniform Civil Rule of Circuit and County Court 5.05, Filing of Record in Appeals on the Record:

In appeals in which the appeal is solely on the record, the record from the lower court or lower authority must be filed with the court clerk within thirty (30) days of filing of the notice of appeal. Provided, however, in cases involving a transcript, the court reporter or lower authority may request an extension of time. The court, on its own motion or on application of any party, may compel the compilation and transmission of the record of proceedings. Failure to file the record with the court clerk or to request the assistance of the court in compelling the same within thirty (30) days of the filing of the written notice of appeal may be deemed an abandonment of the appeal and the court may dismiss the same with costs to the appealing party or parties.

Uniform Civil Rule of Circuit and County Court 5.06, Briefs on Appeals on the Record:

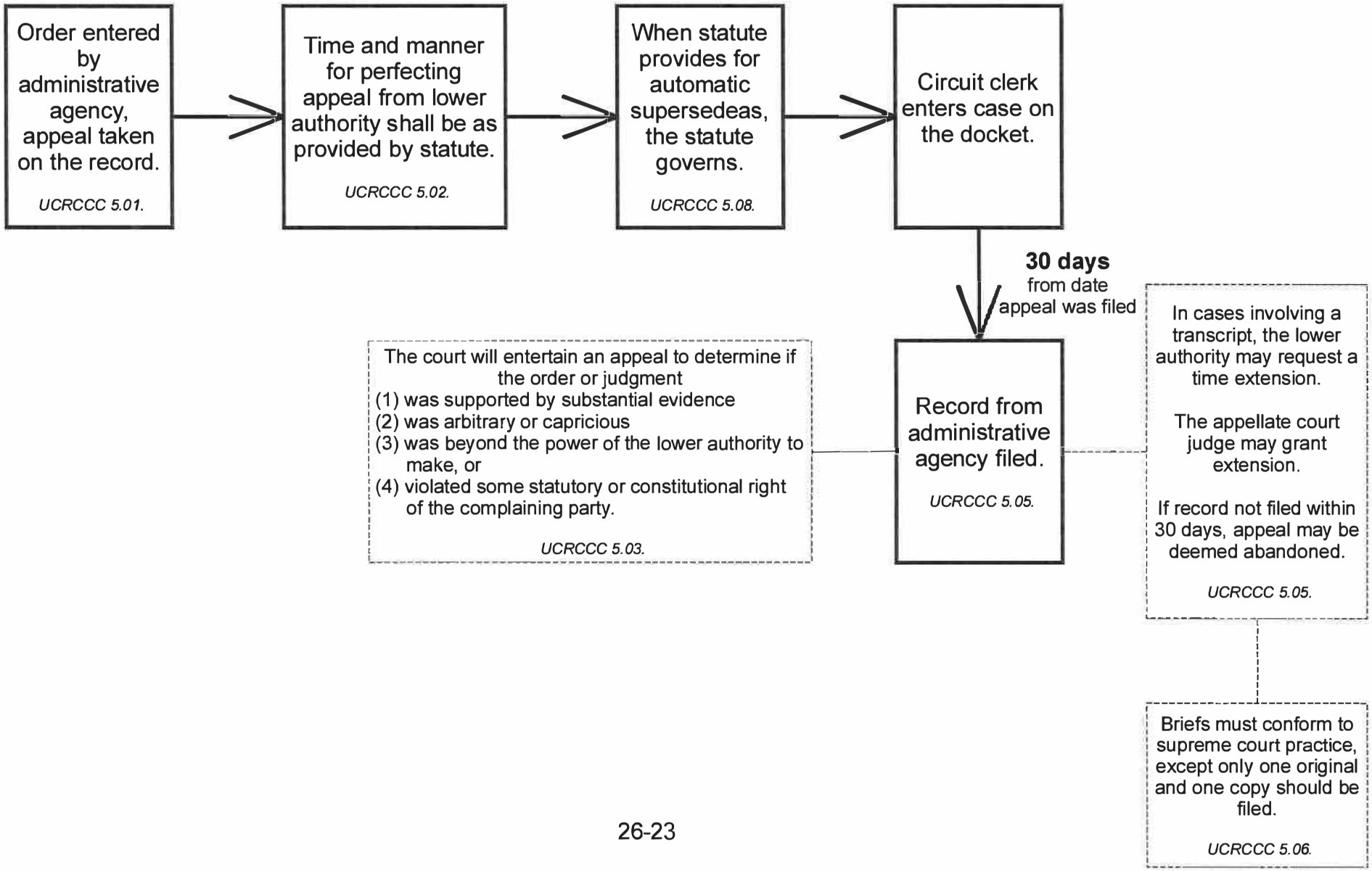
> Briefs filed in an appeal on the record must conform to the practice in the Supreme Court, including form, time of filing and service, except that the parties should file only an original and one copy of each brief. The consequences of failure to timely file a brief will be the same as in the Supreme Court.

Notice of Deficiencies

Mississippi Rule of Appellate Procedure 2, Penalties for Noncompliance with Rules; Suspension of Rules, states in part:

> **(a)(2) Discretionary Dismissal.** An appeal may be dismissed upon motion of a party or on motion of the appropriate appellate court (i) when the court determines that there is an obvious failure to prosecute an appeal; or (ii) when a party fails to comply substantially with these rules. When either court, on its own motion or on motion of a party, determines that dismissal may be warranted under this Rule 2(a)(2), the clerk of the Supreme Court shall give written notice to the party in default, apprising the party of the nature of the deficiency. If the party in default fails to correct the deficiency within fourteen (14) days after notification, the appeal shall be dismissed by the clerk of the Supreme Court. The attorney for the party in default has the burden to correct promptly any deficiency or to see that the default is corrected by the appropriate official. Motions for additional time in which to file briefs will not be entertained after the notice of the deficiency has issued.
>
> > We specifically held that M.R.A.P. 2(a)(2) applies to appeals from county court to circuit court. Rule 2(a)(2) mandates that, after a motion to dismiss has been filed, the court clerk (the circuit clerk in this instance) officially notify an appellant of deficiencies in his appeal and that the appellant be given fourteen (14) days therefrom to correct any deficiencies. [The appellant] was therefore deprived of due process when his appeal was dismissed because he was not given an official notice of deficiencies in his appeal by the circuit clerk. [Appellee's] motion to dismiss cannot be substituted for an official notice of deficiencies from the court clerk. Even where a party has moved to dismiss, the plain language of the rule requires a notice from the clerk of the deficiency and a fourteen day opportunity to cure the deficiency. ***Van Meter v. Alford*, 774 So. 2d 430, 432 (Miss. 2000)(citations omitted).**

APPEALS FROM ADMINISTRATIVE AGENCIES



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CHAPTER 27

STANDARDS OF REVIEW

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CHAPTER 27

STANDARDS OF REVIEW **(Listed alphabetically by issue presented on appeal.)**		
Issue	**Standard of Review**	**Case**
Agency or board ruling, trial court review of	Arbitrary & capricious	When this Court reviews a decision by a chancery or circuit court concerning an agency action, it applies the same standard of review that the lower courts are bound to follow. We will entertain the appeal to determine whether the order of the administrative agency 1) was unsupported by substantial evidence; 2) was arbitrary or capricious; 3) was beyond the power of the administrative agency to make; or 4) violated some statutory or constitutional right of the complaining party. *Miss. Sierra Club v. Miss. Dep't of Envtl. Quality*, 819 So. 2d 515, 519 (Miss. 2002).
Attorney's fees	Abuse of discretion	Whether to award attorney's fees rests entirely within the discretion of the trial court. A trial court's decision on attorney's fees is subject to an abuse of discretion standard. Unless the trial court is manifestly wrong, its decision regarding attorney's fees will not be disturbed on appeal. *Ward v. Ward*, 825 So. 2d 713, 720 (Miss. Ct. App. 2002).
Batson findings	Clearly erroneous or against the overwhelming weight of the evidence	We give great deference to the trial court's findings of whether or not a peremptory challenge was race neutral. Such deference is necessary because finding that a striking party engaged in discrimination is largely a factual finding and thus should be accorded appropriate deference on appeal. Indeed, we will not overrule a trial court on a *Batson* ruling unless the record indicates that the ruling was clearly erroneous or against the overwhelming weight of the evidence. *Manning v. State*, 765 So. 2d 516, 519 (Miss. 2000).
Contempt of court (civil)	Manifest error	In civil contempt actions, the trial court's findings are affirmed unless there is manifest error. *Riley v. Wiggins*, 908 So. 2d 893, 897 (Miss. Ct. App. 2005).

STANDARDS OF REVIEW (Listed alphabetically by issue presented on appeal.)		
Contempt of court (criminal)	Ab initio	This Court proceeds ab initio to determine whether the record proves the appellant guilty of contempt beyond a reasonable doubt. *Brame v. State*, 755 So. 2d 1090, 1093 (Miss. 2000).
Death penalty issues	Heightened review	On appeal to this Court convictions of capital murder and sentences of death must be subjected to what has been labeled "heightened scrutiny." Under this method of review, all bona fide doubts are to be resolved in favor of the accused because "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." *Balfour v. State*, 598 So. 2d 731, 738 (Miss. 1992).
Domestic relations	Manifest error/ clearly erroneous	In domestic relations cases the scope of review is limited by the substantial evidence/manifest error rule. This Court may reverse a chancellor's findings of fact only when there is no substantial credible evidence in the record to justify his finding. Our scope of review in domestic relations matters is limited under the familiar rule that this Court will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard. *Jundoosing v. Jundoosing*, 826 So. 2d 85, 88 (Miss. 2002).
Eminent domain	Verdict is grossly excessive and evinces bias, passion and prejudice by the jury	This Court has quite thoroughly set forth the standard of review for jury verdicts in eminent domain cases as follows: As in the case of any other jury determination of damages, we are not at liberty to order a new trial unless the verdict is so at variance with the evidence as to shock the conscience of the court. Except where the verdict is grossly excessive and evinces bias, passion and prejudice by the jury, we have no authority to require the prevailing party to submit to a second adjudication. This rule applies in eminent domain cases as in others. *Miss. Transp. Comm'n v. Bridgforth*, 709 So. 2d 430, 441 (Miss. 1998).

STANDARDS OF REVIEW (Listed alphabetically by issue presented on appeal.)		
Evidence, admission or exclusion	Abuse of discretion	The standard of review regarding the admission or exclusion of evidence is abuse of discretion. *Yoste v. Wal-Mart Stores, Inc.*, 822 So. 2d 935, 936 (Miss. 2002).
Expert testimony	Abuse of discretion	Our standard of review for challenges to the qualifications of an expert witness has been stated as follows: The qualification of an expert in fields of scientific knowledge are left to the sound discretion of the trial court. Its determination on this issue will not be reversed unless it clearly appears that the witness is not qualified. This Court reviews the trial court's decision to allow expert testimony under the well-known clearly erroneous standard. Similarly, an expert's testimony is always subject to M.R.E. 702. For a witness to give a M.R.E. 702 opinion, the witness must have experience or expertise beyond that of an average adult. Thus, we generally defer to the discretion of the trial court in determining whether an expert is qualified to testify, and we will only reverse when there was clear error or clear abuse of discretion in the decision to admit the testimony. *Cowart v. State*, 910 So. 2d 726, 728-29 (Miss. Ct. App. 2005).
Findings of fact	Manifest error	Findings of fact are given deferential treatment and are subject to the manifest error/substantial evidence standard. *Russell v. Performance Toyoto, Inc.*, 826 So. 2d 719, 721 (Miss. 2002).
Findings of fact by Chancellor	Manifest error/ clearly erroneous	A chancellor's findings of fact will not be disturbed unless manifestly wrong or clearly erroneous. This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his or her discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Sanderson v. Sanderson*, 824 So. 2d 623, 625-26 (Miss. 2002).

STANDARDS OF REVIEW (Listed alphabetically by issue presented on appeal.)		
Findings of fact by Trial Judge	Manifest error/ clearly erroneous	A circuit court judge sitting without a jury is afforded the same deference as a chancellor. We will not disturb a circuit court's findings after a bench trial unless they are manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *City of Jackson v. Sandifer*, 107 So. 3d 978, 983 (Miss. 2013).
JNOV/directed verdict, motion for (civil case)	Evidence viewed in the light most favorable to the verdict	The standard of review for the denial of a motion for judgment notwithstanding the verdict and a motion for directed verdict are identical. This Court will consider the evidence in the light most favorable to the appellee, giving the appellee the benefit of all favorable inferences that may be reasonably drawn from the evidence. If the facts are so overwhelmingly in favor of the appellant that a reasonable juror could not have arrived at a contrary verdict, this Court must reverse and render. On the other hand, if substantial evidence exists in support of the verdict, that is, evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, then this Court must affirm. *Harrah's Vicksburg Corp. v. Pennebaker*, 812 So. 2d 163, 170 (Miss. 2002).

STANDARDS OF REVIEW (Listed alphabetically by issue presented on appeal.)		
JNOV/directed verdict, motion for (criminal case)	Evidence viewed in the light most favorable to the verdict	When one argues on appeal concerning the legal sufficiency of the evidence supporting a conviction, the standard is as follows: This Court has often stated the standard of review to be used on motions for a directed verdict: In passing upon a motion for a directed verdict, all evidence introduced by the State is accepted as true, together with any reasonable inferences that may be drawn from that evidence, and, if there is sufficient evidence to support a verdict of guilty, the motion for directed verdict must be overruled. A motion for judgment notwithstanding the verdict, after the jury verdict is returned, essentially tests the legal sufficiency of the evidence that supports a guilty verdict. The standard of review for such a claim is familiar: Where a defendant has moved for jnov, the trial court must consider all of the evidence which supports the State's case--in a light most favorable to the State. The State must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences 'so considered' point in favor of the defendant with sufficient force that reasonable men could not have found 'beyond a reasonable doubt' that the defendant was guilty, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion--that is, evidence of such quality and weight that having in mind the beyond a reasonable doubt burden of proof standard, reasonable fairminded men in the exercise of impartial judgment might reach different conclusions--the motion should be denied. *Corbin v. State*, 585 So. 2d 713, 715 (Miss. 1991).

STANDARDS OF REVIEW (Listed alphabetically by issue presented on appeal.)		
Judicial Performance	De novo	We review judicial disciplinary matters under a de novo standard, though the findings of fact and recommendations of the Commission are carefully reviewed. In a judicial disciplinary proceeding the Supreme Court must conduct an independent inquiry and make its own final determination of the appropriate sanction, although the Court accords careful consideration to the findings of fact and recommendations of the Commission on Judicial Performance or its committee. *Miss. Comm'n on Jud. Performance v. Hartzog*, 822 So. 2d 941, 943 (Miss. 2002).
Jurisdiction, in personam	De novo	An appellate court reviews jurisdictional issues de novo by examining the facts set out in the pleadings and exhibits to determine the propriety of the proceedings. *American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545, 549 (Miss. Ct. App. 2000).
Jurisdiction, subject matter	De novo	Whether the trial court had jurisdiction to hear a particular matter is a question of law, to which this Court must apply a de novo standard of review. *Edwards v. Booker*, 796 So. 2d 991, 994 (Miss. 2001).
Jury instructions (civil case)	Read as a whole	This Court's standard of review in reviewing jury instructions is as follows: In determining whether reversible error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found. *Whitten v. Cox*, 799 So. 2d 1, 16 (Miss. 2000).

STANDARDS OF REVIEW (Listed alphabetically by issue presented on appeal.)		
Jury instructions (criminal case)	Read as a whole	Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence. *Poole v. State*, 826 So. 2d 1222, 1230 (Miss. 2002).
Law, questions of	De novo	We conduct a de novo review for determinations of legal questions. *Russell v. Performance Toyoto, Inc.*, 826 So. 2d 719, 721 (Miss. 2002).
Mistrial, failure to grant (civil case)	Abuse of discretion	In civil cases, this Court leaves the grant or denial of a mistrial or new trial founded upon juror misconduct to the sound discretion of the trial court. A mistrial or a new trial should not be granted on this ground in a civil case, unless the circumstances indicate some prejudice, wrongful intent, or unfairness. *Fielder v. Magnolia Beverage Co.*, 757 So. 2d 925, 936-37 (Miss. 1999).
Mistrial, failure to grant (criminal case)	Abuse of discretion	Whether to grant a motion for mistrial is within the sound discretion of the trial court. The standard of review for denial of a motion for mistrial is abuse of discretion. *Caston v. State*, 823 So. 2d 473, 492 (Miss. 2002).
New trial, motion for Verdict is against the overwhelming weight of the evidence, or the result of bias, passion, or prejudice on the part of the jury (civil case)	Abuse of discretion in failing to grant a new trial	In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. *Wal-Mart Stores, Inc. v. Frierson*, 818 So. 2d 1135, 1143 (Miss. 2002).

STANDARDS OF REVIEW (Listed alphabetically by issue presented on appeal.)		
New trial, motion for Verdict is against the overwhelming weight of the evidence, or the result of bias, passion, or prejudice on the part of the jury (criminal case)	Abuse of discretion in failing to grant a new trial	In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. *Montana v. State*, 822 So. 2d 954, 967-68 (Miss. 2002).
Post-conviction relief motion, denial of	Clearly erroneous	In reviewing a trial court's decision to deny a motion for post-conviction relief the standard of review is clear. The trial court's denial will not be reversed absent a finding that the trial court's decision was clearly erroneous. *Smith v. State*, 806 So. 2d 1148, 1150 (Miss. Ct. App. 2002).
Recusal	Abuse of discretion (M.R.A.P. 48B) or Manifest error (by case law)	The Supreme Court will not order recusal unless the decision of the trial judge is found to be an abuse of discretion. Miss. R. App. P. 48B. This Court reviews a trial court judge's refusal to recuse themselves under the manifest error standard of review. *State v. Culp*, 823 So. 2d 510, 514 (Miss. 2002).
Sentencing	Abuse of discretion (not within the limits of the statute)	Sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute. *Nichols v. State*, 826 So. 2d 1288, 1290 (Miss. 2002).

STANDARDS OF REVIEW (Listed alphabetically by issue presented on appeal.)		
Statutory interpretation	De novo	Statutory interpretation is a matter of law and is therefore reviewed de novo. *Grand Casino Tunica v. Shindler*, 772 So. 2d 1036, 1038 (Miss. 2000).
Summary judgment	De novo	This Court employs a de novo standard of review of a lower court's grant or denial of a summary judgment and examines all the evidentiary matters before it -- admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his or her favor. Otherwise, the motion should be denied. Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says to the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of the doubt. *McMillan v. Rodriguez*, 823 So. 2d 1173, 1176 (Miss. 2002).
Venue, change of	Abuse of discretion	A trial court's decision whether or not to grant a change of venue is reviewed for an abuse of discretion. *Grayson v. State*, 806 So. 2d 241, 250 (Miss. 2002).
Venue, transfer of	Abuse of discretion	An application for a change of venue is addressed to the discretion of the trial judge, and his or her ruling thereon will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion or that the discretion has not been justly and properly exercised under the circumstances of the case. *Donald v. Amoco Prod. Co.*, 735 So. 2d 161, 181 (Miss. 1999).

STANDARDS OF REVIEW (Listed alphabetically by issue presented on appeal.)		
Voir dire, conduct of	Abuse of discretion	The standard of review in examining the conduct of voir dire is abuse of discretion. *Berry v. State*, 575 So. 2d 1, 9 (Miss.1990).

CHAPTER 28

EXPUNGEMENTS

CHARTS

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CHAPTER 28

EXPUNGEMENTS

Expungement Statutes

§ 9-23-23 Completion of program; expunction of record:

If the participant completes all requirements imposed upon him by the intervention court, including the payment of fines and fees assessed and not waived by the court, the charge and prosecution shall be dismissed. If the defendant or participant was sentenced at the time of entry of plea of guilty, the successful completion of the intervention court order and other requirements of probation or suspension of sentence will result in the record of the criminal conviction or adjudication being expunged. However, no expunction of any implied consent violation shall be allowed.

§ 21-23-7 Operation of [municipal] court:

(6) Upon prior notice to the municipal prosecuting attorney and upon a showing in open court of rehabilitation, good conduct for a period of two (2) years since the last conviction in any court and that the best interest of society would be served, the court may, in its discretion, order the record of conviction of a person of any or all misdemeanors in that court expunged, and upon so doing the said person thereafter legally stands as though he had never been convicted of the said misdemeanor(s) and may lawfully so respond to any query of prior convictions. This order of expunction does not apply to the confidential records of law enforcement agencies and has no effect on the driving record of a person maintained under Title 63, Mississippi Code of 1972, or any other provision of said Title 63.

(7) Notwithstanding the provisions of subsection (6) of this section, a person who was convicted in municipal court of a misdemeanor before reaching his twenty-third birthday, excluding conviction for a traffic violation, and who is a first offender, may utilize the provisions of Section 99-19-71, to expunge such misdemeanor conviction. . . .

(13) A municipal court judge shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped, there was no disposition of such case or the person was found not guilty at trial.

§ 41-29-139 Prohibited acts and penalties; indictments for trafficking:

(c)(2)(A) Marijuana and synthetic cannabinoids:

1. If thirty (30) grams or less of marijuana or ten (10) grams or less of synthetic cannabinoids, by a fine of not less than One Hundred Dollars ($100.00) nor more than Two Hundred Fifty Dollars ($250.00). The provisions of this paragraph (2)(A) may be enforceable by summons if the offender provides proof of identity satisfactory to the arresting officer and gives written promise to appear in court satisfactory to the arresting officer, as directed by the summons. A second conviction under this section within two (2) years is a misdemeanor punishable by a fine of Two Hundred Fifty Dollars ($250.00), not more than sixty (60) days in the county jail, and mandatory participation in a drug education program approved by the Division of Alcohol and Drug Abuse of the State Department of Mental Health, unless the court enters a written finding that a drug education program is inappropriate. A third or subsequent conviction under this paragraph (2)(A) within two (2) years is a misdemeanor punishable by a fine of not less than Two Hundred Fifty Dollars ($250.00) nor more than One Thousand Dollars ($1,000.00) and confinement for not more than six (6) months in the county jail.

Upon a first or second conviction under this paragraph (2)(A), the courts shall forward a report of the conviction to the Mississippi Bureau of Narcotics which shall make and maintain a private, nonpublic record for a period not to exceed two (2) years from the date of conviction. The private, nonpublic record shall be solely for the use of the courts in determining the penalties which attach upon conviction under this paragraph (2)(A) and shall not constitute a criminal record for the purpose of private or administrative inquiry and the record of each conviction shall be expunged at the end of the period of two (2) years following the date of such conviction; . . .

§ 41-29-150 Rehabilitation; probation; escape; expungement; legislative intent:

(d)(1) If any person who has not previously been convicted of violating Section 41-29-139, or the laws of the United States or of another state relating to narcotic drugs, stimulant or depressant substances, other controlled substances or marihuana is found to be guilty of a violation of subsection (c) or (d) of Section 41-29-139, after trial or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him on probation upon such reasonable conditions as it may require and for such period, not to exceed three (3) years, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him from probation before the

expiration of the maximum period prescribed for such person's probation. If during the period of his probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the bureau solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the penalties prescribed under this article for second or subsequent conviction, or for any other purpose. Discharge and dismissal under this subsection may occur only once with respect to any person; and

(d)(2) Upon the dismissal of a person and discharge of proceedings against him under paragraph (1) of this subsection, the person may apply to the court for an order to expunge from all official records, other than the nonpublic records to be retained by the bureau under paragraph (1) of this subsection, all recordation relating to his arrest, indictment, trial, finding of guilt, and dismissal and discharge pursuant to this section. If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged, or that the person had satisfactorily served his sentence or period of probation and parole, it shall enter an order of expunction. The effect of the order shall be to restore the person, in the contemplation of the law, to the status he occupied before such arrest or indictment. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, indictment or trial in response to any inquiry made of him for any purpose. A person as to whom an order has been entered, upon request, shall be required to advise the court, in camera, of the previous conviction and expunction in any legal proceeding wherein the person has been called as a prospective juror. The court shall thereafter and before the selection of the jury advise the attorneys representing the parties of the previous conviction and expunction.

> A plain-language reading of Mississippi Code Annotated section 41-29-150(d)(2) allows for expungement if the person has been charged with a certain crime and is under the age of twenty-six at the time of the offense. The statute clearly does not enumerate possession of pseudoephedrine and ephedrine as one of the offenses that allows for the possibility of expungement. Fields would have us insert expungable offenses into Mississippi Code Annotated section 41-29-150(d)(2) and expand its application. “To do so would be to tread on the domain of the Legislature, as it alone has the power to create and modify statutes. It is not the

province of the Court to insert requirements where the Legislature did not do so." Accordingly, we find that Fields's crime is not an expungable offense under the statute; thus, the trial court did not err in denying his petition. ***Fields v. State*, 17 So. 3d 1159, 1161 (Miss. Ct. App. 2009).**

§ 43-21-159 Transfer of cases:

(1) When a person appears before a court other than the youth court, and it is determined that the person is a child under jurisdiction of the youth court, such court shall, unless the jurisdiction of the offense has been transferred to such court as provided in this chapter, or unless the child has previously been the subject of a transfer from the youth court to the circuit court for trial as an adult and was convicted, immediately dismiss the proceeding without prejudice and forward all documents pertaining to the cause to the youth court; and all entries in permanent records shall be expunged. The youth court shall have the power to order and supervise the expunction or the destruction of such records in accordance with Section 43-21-265. Upon petition therefor, the youth court shall expunge the record of any case within its jurisdiction in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped, there was no disposition of such case, or the person was found not delinquent. . . .

§ 63-9-11 Criminal liability; first time violators:

(3)(b)(ii) If a person pleads not guilty to a misdemeanor offense under any of the provisions of Chapter 3, 5 or 7 of this title but is convicted, and the person meets all the requirements under paragraph (a) of this subsection, upon request of the defendant the court shall suspend the sentence for such offense to allow the defendant forty-five (45) days to successfully complete not less than four (4) hours of a court-approved traffic safety violator course at his own cost. Upon successful completion by the defendant of the course, the court shall set the conviction aside, dismiss the prosecution and direct that the case be closed. The court on its own motion shall expunge the record of the conviction, and the only record maintained thereafter shall be the nonpublic record required under Section 63-9-17 solely for use by the courts in determining an offender's eligibility under this subsection (3).

§ 63-11-30 Operation under influence of alcohol or other impairing substance:

(13) Expunction.
(a) Any person convicted under subsection (2) or (3) of this section of a first offense of driving under the influence and who was not the holder of a commercial driver's license or a commercial learning permit at the time of the offense may petition the circuit court of the county in which the conviction was had for an order to expunge the record of the conviction at least five (5) years after successful completion of all

terms and conditions of the sentence imposed for the conviction. Expunction under this subsection will only be available to a person:

(i) Who has successfully completed all terms and conditions of the sentence imposed for the conviction;

(ii) Who did not refuse to submit to a test of his blood or breath;

(iii) Whose blood alcohol concentration tested below sixteen one-hundredths percent (.16%) if test results are available;

(iv) Who has not been convicted of and does not have pending any other offense of driving under the influence;

(v) Who has provided the court with justification as to why the conviction should be expunged; and

(vi) Who has not previously had a nonadjudication or expunction of a violation of this section.

(b) A person is eligible for only one (1) expunction under this subsection, and the Department of Public Safety shall maintain a permanent confidential registry of all cases of expunction under this subsection for the sole purpose of determining a person's eligibility for expunction, for nonadjudication, or as a first offender under this section.

(c) The court in its order of expunction shall state in writing the justification for which the expunction was granted and forward the order to the Department of Public Safety within five (5) days of the entry of the order.

§ 67-3-70 Age of purchaser; penalties; conviction:

(6) Any person who has been charged with a violation of subsections (1) or (2) of this section may, not sooner than one (1) year after the dismissal and discharge or completion of any sentence and/or payment of any fine, apply to the court for an order to expunge from all official records all recordation relating to his arrest, trial, finding or plea of guilty, and dismissal and discharge. If the court determines that such person was dismissed and the proceedings against him discharged or that such person had satisfactorily served his sentence and/or paid his fine, it shall enter such order.

§ 97-32-9 Purchase by juvenile; possession on school property:

No person under eighteen (18) years of age shall purchase any tobacco product. No student of any high school, junior high school or elementary school shall possess tobacco on any educational property as defined in Section 97-37-17.

(a) If a person under eighteen (18) years of age is found by a court to be in violation of any other statute and is also found to be in possession of a tobacco product, the court may order the minor to perform up to three (3) hours of community service, in addition to any other punishment imposed by the court.

(b) A violation under this section is not to be recorded on the criminal history

of the minor and, upon proof of satisfaction of the court's order, the record shall be expunged from any records other than youth court records.

§ 97-45-27 Petition for expunction of charges, arrest record or conviction resulting from stolen identity:

Any person whose name or other identification has been used without his consent or authorization by another person, with the use resulting in charges, an arrest record, or a conviction putatively on the record of the person whose name or other identification was appropriated, the person whose name or other identification has been used without his consent or authorization may file a petition for expunction of such charges or arrest record or conviction, or any of them, with any court which has jurisdiction over the matter.

§ 99-15-26 Release after successful completion of conditions:

(5) Upon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped, there was no disposition of such case, or the person was found not guilty at trial.

The section was subsequently amended and changed to Mississippi Code Annotated section 99-15-26(5) and now reads:

> Upon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped or there was no disposition of such case.

We find that the trial court was without discretion to deny [the] . . . motion to expunge the 1979 arrest following the 2003 amendment to section 99-15-26. ***A.E.W. v. State*, 925 So. 2d 136, 137-38 (Miss. Ct. App. 2006) (prior version of statute).**

We find that the trial court erred in relying upon the March 31, 1983, effective date to determine that the court was not required to expunge cases which arose prior to 1983. The effective date clearly deals with the original statutory provisions regarding non-adjudicated cases, not with expungement, which was introduced thirteen years later. In *McGrew v. State*, 733 So. 2d 816, 819 (Miss. 1999), the supreme court specifically found that subsection (4), granting the circuit and county courts the power to expunge public records in certain instances, was independent from and did not implicitly relate back to the subsections dealing with non-adjudicated cases. The court determined that a trial court has authority under subsection (4) to expunge cases concerning "crimes against the person" although such cases are not

appropriate for non-adjudication under subsection (1). We find nothing in the statute limiting former subsection (4) (current subsection (5)) expungement to crimes committed after 1983. The subsection clearly provides for expungement in "any case," without limit as to the date. Had the legislature so intended, the statute could have easily provided for expungement in "any case arising after March 31, 1983." The legislature did not do so, and we do not find that the effective date regarding non-adjudication should be read to modify the term "any case" in the expungement subsection which did not come into existence until more than thirteen years thereafter. Further, if the trial court's analysis were correct, the court would have had no authority to expunge the record of the 1980 arrest for rape as it, too, arose prior to 1983. . . . In the instant case, A.E.W. has established that, by being denied employment opportunities because of the 1979 arrest, he has been convicted in the "court of public opinion." We find that the legislature enacted section 99-15-26(5) to remedy situations of this exact nature. Had the State had sufficient evidence to retry A.E.W. for the 1979 incident, it should have done so within the next twenty-five years. We find that the trial court was without discretion to deny A.E.W.'s motion to expunge the 1979 arrest following the 2003 amendment to section 99-15-26. This Court therefore reverses and remands with direction to the circuit court that expungement be granted. ***A.E.W. v. State*, 925 So. 2d 136, 138 (Miss. Ct. App. 2006) (prior version of statute).**

Most applications such as those required for employment, enlistment in the armed services, consumer loans, etc., require the applicant, under the pain and penalty of perjury, to state whether or not he has ever been arrested or convicted of a crime. Prohibiting expungement would serve as a tremendous obstacle to those who were arrested, but whose case was dismissed or the charges dropped or there was no disposition of such case. Although such a person was deemed innocent in a court of law, without the opportunity for expungement, he or she would always be guilty in the all important court of public opinion. Therefore, this Court holds that the circuit court may consider expungement in such situations. Subsection [(5)] of § 99-15-26 gives circuit and county court judges the discretion to expunge the record of "any person" whose case was dismissed or the charges were dropped or there was no disposition of such case. ***McGrew v. State*, 733 So. 2d 816, 820 (Miss. 1999) (prior version of statute).**

The effect of an expungement order is to "to restore the person, in the contemplation of the law, to the status he occupied before" his or her arrest. ***Stewart v. The Mississippi Bar*, 84 So. 3d 9, 14 (Miss. 2011) (prior version of statute).**

§ 99-15-57 Relief under previous law; expunging of record:

(1) Any person who pled guilty within six (6) months prior to the effective date of Section 99-15-26, Mississippi Code of 1972, and who would have otherwise been eligible for the relief allowed in such section, may apply to the court in which such person was sentenced for an order to expunge from all official public records all recordation relating to his arrest, indictment, trial, finding of guilty and sentence. If the court determines, after hearing, that such person has satisfactorily served his sentence or period of probation and parole, pled guilty within six (6) months prior to the effective date of Section 99-15-26 and would have otherwise been eligible for the relief allowed in such section, it may enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or trial in response to any inquiry made of him for any purpose.

(2) Upon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped, there was no disposition of such case, or the person was found not guilty at trial.

§ 99-15-59 Expunging of misdemeanor charges:

Any person who is arrested, issued a citation, or held for any misdemeanor and not formally charged or prosecuted with an offense within twelve (12) months of arrest, or upon dismissal of the charge, may apply to the court with jurisdiction over the matter for the charges to be expunged.

§ 99-15-123 Disposition of charges; expungement of record:

(1) In the event an offender successfully completes a pretrial intervention program, the court shall make a noncriminal disposition of the charge or charges pending against the offender.

(2) In the event the offender violates the conditions of the program agreement:

(a) the district attorney may terminate the offender's participation in the program,
(b) the waiver executed pursuant to Section 99-15-115 shall be void on the date the offender is removed from the program for the violation, and
(c) the prosecution of pending criminal charges against the offender shall be

resumed by the district attorney.

(3) Upon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped or there was no disposition of such case.

§ 99-19-71 Expungement of conviction; eligible offenses; notice; procedure; order; effect; expungement of arrest record:

(1) Any person who has been convicted of a misdemeanor that is not a traffic violation, and who is a first offender, may petition the justice, county, circuit or municipal court in which the conviction was had for an order to expunge any such conviction from all public records.

(2) (a) Any person who has been convicted of one (1) of the following felonies may petition the court in which the conviction was had for an order to expunge one (1) conviction from all public records five (5) years after the successful completion of all terms and conditions of the sentence for the conviction:

-a bad check offense under Section 97-19-55;
-possession of a controlled substance or paraphernalia under Section 41-29-139(c) or (d);
-false pretense under Section 97-19-39;
-larceny under Section 97-17-41;
-larceny of consigned motor fuels under Section 4 of this act;
-malicious mischief under Section 97-17-67; or
-shoplifting under Section 97-23-93.

A person is eligible for only one (1) felony expunction under this paragraph.

(b) Any person who was under the age of twenty-one (21) years when he committed a felony may petition the court in which the conviction was had for an order to expunge one (1) conviction from all public records five (5) years after the successful completion of all terms and conditions of the sentence for the conviction; however, eligibility for expunction shall not apply to a felony classified as a crime of violence under Section 97-3-2 and any felony that, in the determination of the circuit court, is related to the distribution of a controlled substance and in the court's discretion it should not be expunged.

A person is eligible for only one (1) felony expunction under this paragraph.

(c) The petitioner shall give ten (10) days' written notice to the district

attorney before any hearing on the petition. In all cases, the court wherein the petition is filed may grant the petition if the court determines, on the record or in writing, that the applicant is rehabilitated from the offense which is the subject of the petition. In those cases where the court denies the petition, the findings of the court in this respect shall be identified specifically and not generally.

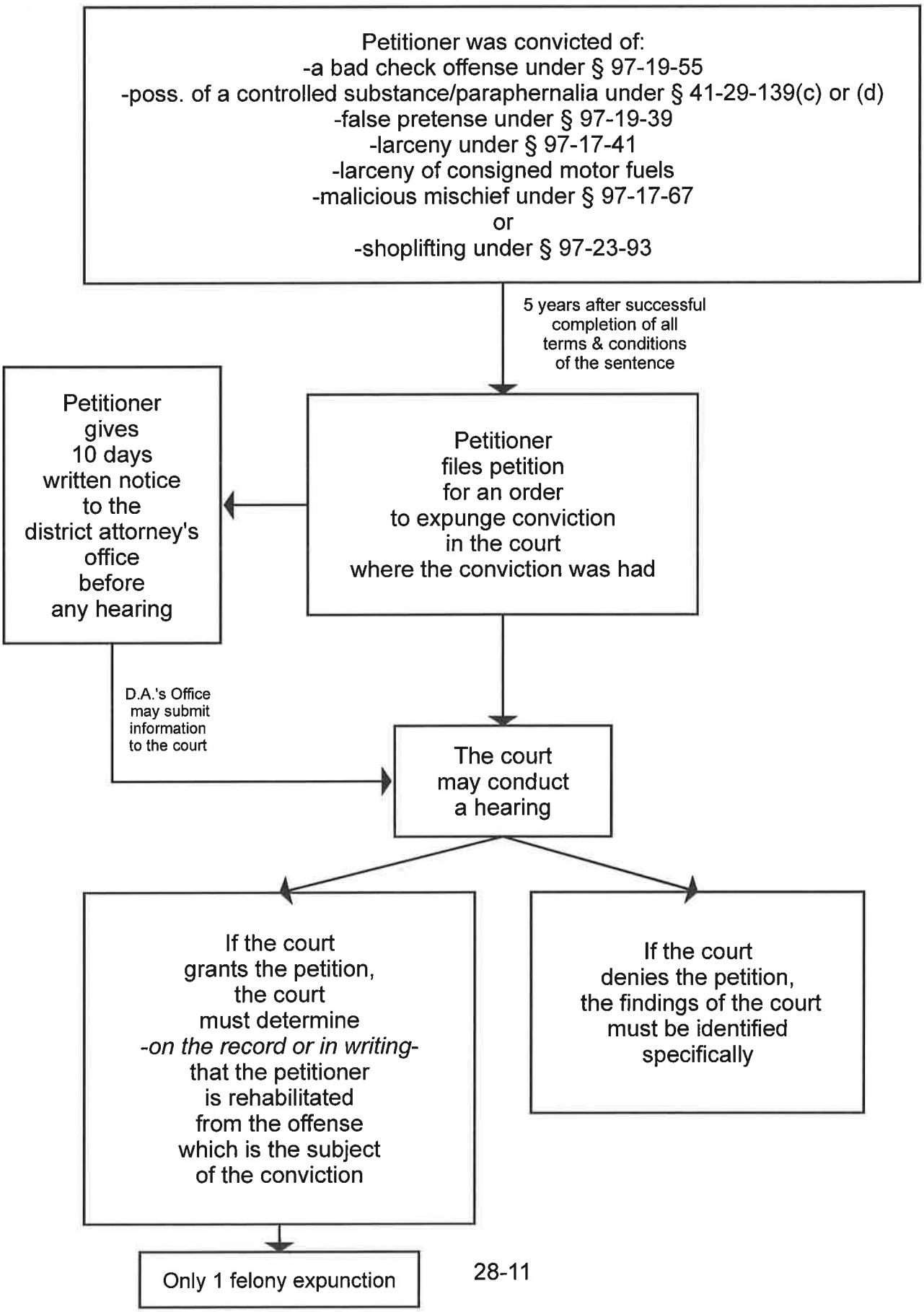
(3) Upon entering an order of expunction under this section, a nonpublic record thereof shall be retained by the Mississippi Criminal Information Center solely for the purpose of determining whether, in subsequent proceedings, the person is a first offender. The order of expunction shall not preclude a district attorney's office from retaining a nonpublic record thereof for law enforcement purposes only. The existence of an order of expunction shall not preclude an employer from asking a prospective employee if the employee has had an order of expunction entered on his behalf. The effect of the expunction order shall be to restore the person, in the contemplation of the law, to the status he occupied before any arrest or indictment for which convicted. No person as to whom an expunction order has been entered shall be held thereafter under any provision of law to be guilty of perjury or to have otherwise given a false statement by reason of his failure to recite or acknowledge such arrest, indictment or conviction in response to any inquiry made of him for any purpose other than the purpose of determining, in any subsequent proceedings under this section, whether the person is a first offender. A person as to whom an order has been entered, upon request, shall be required to advise the court, in camera, of the previous conviction and expunction in any legal proceeding wherein the person has been called as a prospective juror. The court shall thereafter and before the selection of the jury advise the attorneys representing the parties of the previous conviction and expunction.

(4) Upon petition therefor, a justice, county, circuit or municipal court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped or there was no disposition of such case.

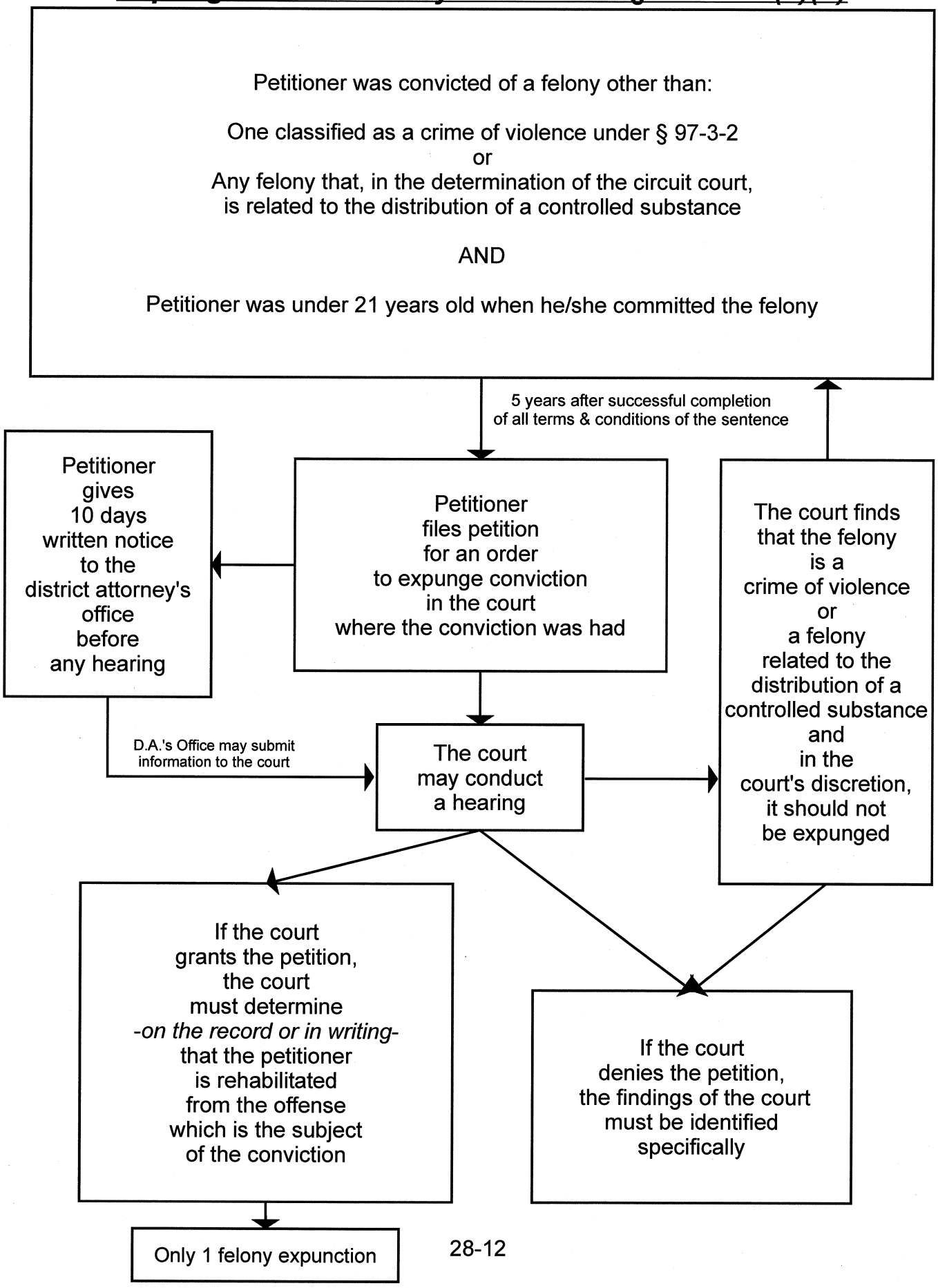
(5) No public official is eligible for expunction under this section for any conviction related to his official duties.

***See* § 99-19-72 Petition for expungement; filing fees.**

Expungement of Felony Conviction: § 99-19-71(2)(a)



Expungement of Felony Conviction: § 99-19-71(2)(b)



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