

**SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI  
NO. 2006-KA-01015-COA**

**DAVE GENE BURNETT BUTT**

**APPELLANT**

**VERSUS**

**STATE OF MISSISSIPPI**

**APPELLEE**

**APPEAL FROM THE CIRCUIT COURT OF  
FORREST COUNTY, MISSISSIPPI**

**BRIEF OF THE APPELLANT**

**ORAL ARGUMENT NOT REQUESTED**

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STATEMENT REGARDING ORAL ARGUMENT

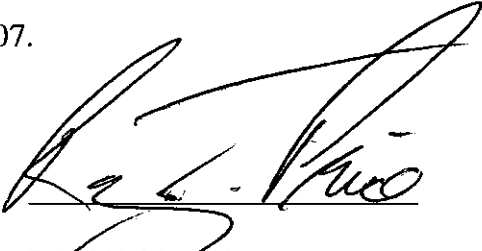
Appellant does not request oral argument.

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. David Gene Burnett, Appellant
2. Ray T. Price, trial and appeal counsel for Appellant
3. Hon. Robert Helfrich, Forrest County Circuit Court Judge
4. Jon Mark Weathers, Esq., District Attorney
5. Jim Hood, Esq., Attorney General

Respectfully submitted on this the 30<sup>th</sup> day of January, 2007.



RAY T. PRICE  
Attorney for Appellant

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### STATEMENT OF THE ISSUES

I. THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI LACKED SUBJECT MATTER JURISDICTION OVER THIS OFFENSE AND THEREFORE, THE CHARGE OF BIGAMY SHOULD HAVE BEEN DISMISSED AS THE OFFENSE DID NOT OCCUR WITHIN THE STATE OF MISSISSIPPI.

II. THE COURT ERRED IN REFUSING THE DEFENDANT'S INSTRUCTION D-11 WHICH WOULD HAVE PROPERLY INSTRUCTED THE JURY ON THE OWNERSHIP OF MONEY PLACED IN JOINT BANK ACCOUNTS.

III. THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION IN LIMINE AND IN ALLOWING PAMELA DWYER, DAVE'S STILL LIVING PREVIOUS WIFE, TO TESTIFY.

### STATEMENT OF THE CASE

David Gene Burnett was charged by Grand Jury indictment rendered on December 6, 2005, with four felony counts, those being bigamy, two counts of false pretense, and one count of grand larceny. Pretrial motions to dismiss were filed, heard, and denied prior to the trial date of May 10, 2006. At the conclusion of the jury trial, the jury returned guilty verdicts on Counts I through III and a verdict of not guilty on Count IV of the indictment.

On May 25, 2006, Burnett filed a Motion for New Trial or for Judgement Notwithstanding Verdict, which was heard and denied. The Defendant was sentenced to 10 years custody of Mississippi Department of Corrections on Counts I, II, and III with Counts I and II to run concurrently and with Count III to run consecutively to the sentences imposed in Counts I and II. From this verdict, judgement, and denial of the post trial motions, Mr. Burnett now perfects this appeal.

## STATEMENT OF FACTS

The facts in this case would make for an excellent movie, but do not make up sufficient facts to find Mr. Burnett guilty of the crimes charged in the indictment. Margaret Corley, the alleged victim in this case, met Dave Burnett at a square-dance in Forrest County, Mississippi, in 1998, and later married him in 1999, in Sevierville, Tennessee. After the marriage in Tennessee, the couple returned to Petal, Forrest County Mississippi, where they resided for a period of time before they began to travel the country. Margaret suffered a stroke in May of 1999 which rendered her dependent upon Dave for her care. Dave subsequently stopped working at Mrs. Butt's request and the couple began traveling across the country in a travel trailer.

Subsequent to her illness, Margaret consulted with Hattiesburg attorney Kearny Travis, Esq., who prepared a power of attorney in favor of Dave, giving him full authority to act on her behalf in all business matters. Margaret, a former business office manager, knew the significance of the power of attorney, and knew as well the significance of jointly held bank accounts. Tr. 168-171. Dave remained on the power of attorney as well as the joint accounts with Mrs. Butt until the time when he disappeared, and did not return home on or about August 9, 2003. Margaret reported Dave missing, then subsequently found out that he had transferred funds from their jointly held bank account to Monex for the purchase of gold, which was delivered to the home address in Petal, Mississippi. She also discovered that Dave had withdrawn \$7,500 from the joint checking account and he had taken the jointly titled truck which had previously been purchased and titled in both names.

Margaret, on the advice of her counsel, reported the truck as stolen even though it was jointly titled, and received payment from her insurance carrier. It was discovered that Dave was alive and well and living in the state of Oregon when he attempted to transfer the title of the truck to his name



only and the title was found to be in question because of the charges filed by Ms. Corley. It was subsequently determined that Dave Butt was one and the same person as David Burnett, who had previously disappeared from the state of Florida and had been declared dead by a Florida Court action filed by his previous wife after his arrival in Mississippi. His previous wife was allowed to testify over Dave's objection through counsel about his disappearance from Florida when he took out his boat, failed to return, and the boat was found adrift at sea.

## SUMMARY OF THE ARGUMENT

The Circuit Court of Forrest County, Mississippi had no jurisdiction to hear a bigamy charge on a marriage which occurred in the state of Tennessee. The Circuit Court granted an instruction in this case which advised the jury that cohabitation in the state of Mississippi constitutes bigamy, expanding the plain language of the statute, which clearly forbids the act of marrying, not following cohabitation. Miss. Code Ann. § 97-29-13 (1972 as amended) The court erred in refusing the Defendant's Instruction D-11 which would have properly instructed the jury on the ownership of money placed in joint bank accounts. Mr. Burnett was charged in this matter with false pretense for obtaining funds, of which he was a co-owner. The funds allegedly taken were in the joint bank account of Mr. Burnett and Margaret Corley. Mr. Burnett requested jury instructions informing the jury that, if it found that he was a co-owner of the funds, that he could not be guilty of false pretense. The trial court denied these instructions, in error, and denial of these instructions resulted in the jury being improperly instructed. Had they been properly instructed, he would have been acquitted on Counts II and III as he was on Count IV, the grand larceny charge, on which a similar requested instruction was granted and the jury acquitted Mr. Burnett.

The trial court allowed clear error in allowing the testimony of Pamela Dwyer, Mr. Burnett's still living previous wife to testify. Every case ever decided under the bigamy statute has found that the testimony of the previous wife is inadmissible. Not only did the court err in allowing her testimony to establish proof of the previous marriage, the court compounded its error in allowing over objection testimony as to other crimes, wrongs, or acts, which should not have been allowed pursuant to Mississippi Rules of Evidence 404 (b).

In sum, the Circuit Court took what should have been a civil matter between the parties and allowed a prosecution to proceed based upon denial of the defendant's right to a fair trial, and the judgement of the circuit court should be reversed and rendered and the defendant discharged from custody.

## ARGUMENT

### **I. THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI LACKED SUBJECT MATTER JURISDICTION OVER THE BIGAMY COUNT AND THEREFORE, THE CHARGE OF BIGAMY SHOULD HAVE BEEN DISMISSED AS THE OFFENSE DID NOT OCCUR WITHIN THE STATE OF MISSISSIPPI.**

The bigamy charge in this case alleged a violation of Miss. Code Ann. § 97-29-13(1972 as amended). That statute provides that “Every person that has a husband or wife living, who shall marry again, and every unmarried person who shall knowingly marry the husband or wife of another living, except in the cases hereinafter named, shall be guilty of bigamy, and be imprisoned in the penitentiary not longer than 10 years.” Mr. Burnett argued in a pretrial motion to dismiss, at his motion for directed verdict, at the Jury Instruction conference, and again on post trial motions that the act prohibited, that is the act of marrying again, occurred outside the state of Mississippi and in the state of Tennessee, and that the state of Mississippi therefore had no jurisdiction in this case.

The prosecution argued, and the trial Court accepted the argument, that the statute was violated as a result of cohabitation occurring in the state of Mississippi subsequent to the date of the marriage. This is a matter of first impression upon this Court. Mr. Burnett has diligently reviewed every bigamy case ever reported in the case of Mississippi and is unable to find any reported case on point, so that this matter is simply a question of basic jurisdiction and statutory construction as to the meaning of the statute. It is fundamental jurisdictional law that the state of Mississippi cannot punish conduct occurring solely outside the state of Mississippi. It further is clear law that a Defendant is entitled to fair notice of what conduct is being prohibited before being prosecuted for a criminal offense. Under this statute and under these facts, Mr. Burnett not only did not commit an offense within the state of Mississippi, but further under the prosecution’s theory, would not have had notice that his actions were illegal pursuant to Mississippi law.

The general criminal jurisdiction statute, Miss. Code Ann. § 99-11-1 (1972 as amended) provides that “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.” “It is bedrock law in Mississippi that criminal statutes are to be strictly construed against the State and liberally in favor of the accused.” McLamb v. State, 456 So. 2d 743, 745 (Miss. 1984). “When the words of a statute are plain and unambiguous there is no room for interpretation or construction, and we apply the statute according to the meaning of those words.” Harrison v. State, 800 So. 2d 1134, 1137 (Miss. 2001). “It is only when a statute is unclear or ambiguous that we look beyond the language of the statute to determine its meaning.” Id. (Citing Kurr Magee Chemical Corp. v. Buelow, 670 So. 2d 12, 17 (Miss. 1995); Alread v. Webb, 641 So. 2d 1218, 1222 (Miss. 1994); and Clark v. State ex rel Mississippi State Medical Association, 381 So. 2d 1046, 1048 (Miss. 1980)). In State v. Trailer, 100 MS 544, 558-559, 56 So. 2d 521, 523 (1911), this Court outlined our duty when statutes are presented for judicial interpretation: “The Court has no right to add anything to or take anything from a statute, when meaning in the statute is clear... the law is that criminal statutes must be strictly construed. Such has been the law from time immemorial.” Coleman v. State of Mississippi, 2004-CT-00346-SCT (Miss. 2006 at ¶10).

The Court further erred in allowing the jury to be read instruction S-3. This instruction informed the jury that:

The Court instructs the jury that the actual marriage ceremony need not be held in the State of Mississippi. All that is required is that an individual consummate a second marriage and cohabit in this state as husband and wife on or about the date as alleged. It shall be no defense to bigamy that an individual did not actually consummate the marriage, if any, in this state. (CP 75)

As pointed out above, this instruction goes outside the language of the statute and adds additional language allowing the jury to convict Mr. Burnett of conduct which occurred outside the state of Mississippi and of which he had no notice by a plain reading of the statute. The plain language of the statute of issue here clearly forbids only the act of marrying again while having a living husband or wife and specifically does not prohibit subsequent cohabitation. The Court here, at the prosecution's urging, expanded the scope of the statute beyond the plain language of the statute, which is clear and unambiguous. Had the legislature wished to include the act of cohabiting as husband and wife after undertaking a bigamous marriage, it clearly could have, but did not do so. The argument advanced to the trial court that people could undertake bigamous marriages with impunity is simply wrong-headed and misdirected. The act complained of here presumably would be punishable in the state of Tennessee where the bigamous marriage occurred, but is clearly not punishable within the state of Mississippi under the bigamous statute under which Mr. Burnett was indicted. Thus, the conviction in Count I was erroneous and should be reversed and rendered.

**II. THE COURT ERRED IN REFUSING THE DEFENDANT'S INSTRUCTION D-11 WHICH WOULD HAVE PROPERLY INSTRUCTED THE JURY ON THE OWNERSHIP OF MONEY PLACED IN JOINT BANK ACCOUNTS.**

Dave's defense regarding the false pretense Counts, II and III of the indictment throughout the trial of this case has been that he was a joint owner of the funds placed into the parties' joint checking account therefore could not possibly be guilty of false pretense, being the owner of the

funds which were allegedly the subject of the false pretense. The proof at trial showed that Mr. Burnett had held a general power of attorney, and was a joint owner of the checking account from which the funds were taken in this case for a period of several years. Mr. Burnett offered instruction D-11 in order to properly allow the jury to be instructed as to his defense. This instruction was based on Miss. Code Ann. § 81-14-359 (1972 as amended) and stated:

The Court instructs the jury that in the state of Mississippi accounts may be in the name of two or more persons, whether minor or adult, in such form that the money in the accounts are payable to either adult, or their survivors, in such money due other accounts and such money due under such accounts, and all additions thereto, shall be the property of such persons jointly with the right of survivorship. The money due under such accounts may be paid to, or on the order of, any one of such persons during his lifetime.

If you find that the money charged to have been the subject of the false pretense counts was legally owned by both the Defendant and Margaret M. Corley(Butt), then you must find the Defendant not guilty.

The purpose of this instruction was to inform the jury of Dave's defense, that in fact, the money had been deposited not directly from an account solely in Margaret's account to an account in Dave's name, but that the money had been placed into the parties' joint checking account, at which time it became the equal property of each. If deemed Mr. Burnett's property, he was entitled to deal with it as he chose, and could not therefore be charged with false pretense for transferring funds of which he was a co-owner.

With the denial of this instruction, the jury was left to deal with this case solely upon the basis of jury instructions S-6 and S-8, both of which totally ignored the facts of the case as regards to the joint account. Thus, the jury was not instructed that the money became joint property of Margaret and David Butt upon being deposited into the joint account, and that the Defendant had the right to use that account and all funds in it as he desired as a joint owner. Even the supposed victim in this case, Margaret, testified that she fully understood joint accounts as a former office manager

and knew that once any funds were deposited into a joint account, they became joint property.

It is fundamental that a Defendant is entitled to an instruction which presents his theory of the case to the jury, if supported by the evidence. Shumpert v. State, 2004 KA-02533 SCT. (2006). Interestingly, the court did grant a similar instruction to the Defendant regarding Count IV of the indictment concerning the jointly titled truck belonging to both David Burnett and Margaret Corley, (Instruction D-12) and the jury acquitted Mr. Burnett on Count IV of the indictment, we submit because they were properly instructed on that Count. Had the jury been properly instructed on Counts II and III, as Mr. Burnett was entitled to have them so instructed, he would have been acquitted on those Counts as well.

As it stood, the jury had to solely rely on S-6 and S-8, which misled the jury by totally omitting consideration of the fact that the funds had passed through the joint account, stating only that the funds had been taken from an account in the name of Margaret Corley Butt and deposited into an account solely in the name of David Butt Burnett. Counsel for Mr. Burnett made this objection to S-6 at page 203 of the transcript as to Count II, in page 206-07 as to Count III.

**III. THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION IN LIMINE AND IN ALLOWING PAMELA DWYER, DAVE'S STILL LIVING PREVIOUS WIFE, TO TESTIFY.**

Prior to trial, Dave filed a motion *in limine* to exclude the testimony of Pamela Dwyer. Previous case law has made it clear that in a bigamy prosecution testimony of the Defendant's wife is not admissible in evidence to prove the charge of bigamy. Bryant v. State, 179 Miss. 739, 176 So. 2d 739 (1937); Bell v. State, 244 Miss. 867, 147 So. 2d. 624(1962) The Circuit Court in this case chose to ignore the clear case law as well as the provisions of Miss. Code Ann. § 13-1-5 (1972, as amended) and Rule 504 of the Mississippi Rules of Evidence, which provide both a privilege on behalf of a defendant such as Dave to prevent the spouse from testifying and a rule that the spouse



is not a competent witness to testify against the defendant.

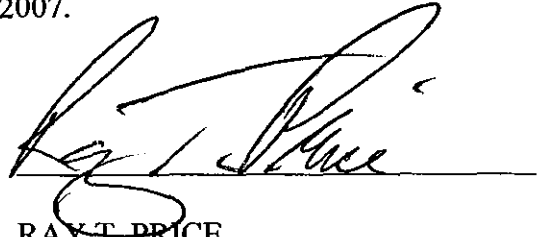
The Circuit Court's error in allowing the testimony of Ms. Dwyer was compounded when the Court allowed Ms. Dwyer to testify to facts not relevant to the issues laid forth in the indictment and which were simply an attempt by the State to put in evidence of other crimes, wrongs, or acts which were inadmissible under rule 404 (b) of the Mississippi Rules of Evidence. The State asked, at page 84 of the trial record "In 1998, did a traumatic event occur concerning David Burnett?", which the witness answered "Yes." The defense then objected as to relevance, which the Court overruled.

Ms. Dwyer was then allowed to testify as to the circumstances surrounding Dave's disappearance from Florida, which we submit to this Court was not relevant and was merely an attempt by the defense to show other crimes, wrongs, or acts or to prejudice the jury against the defendant in this case. Ms. Dwyer was allowed to testify not only to the fact that Mr. Burnett disappeared similar to the way he did in the indictment charged, but was allowed to go into an extensive search and rescue operation by the Coast Guard, the fact that she had Mr. Burnett later declared legally dead and claims that Mr. Burnett had absconded with property which belonged to her at the time he disappeared. She was also allowed to testify as to communications with the supposed victim in this case, as well as connect a golf bag bearing the name David Burnett, which the supposed victim also testified as to, testimony was clearly inadmissible, clearly calculated to lead the jury to be inflamed and prejudiced against the Defendant and is grounds to reverse the conviction of the judgement of the Forrest County Circuit Court.

CONCLUSION

For all of the above and forewarned reasons, Mr. Burnett prays that this Court reverse and render the decision of the Circuit Court and order that the Defendant be immediately discharged from custody.

Respectfully submitted on this 30<sup>th</sup> day of January, 2007.

A handwritten signature in black ink, appearing to read "Ray T. Price", is written over a horizontal line.

RAY T. PRICE  
Of Counsel for Appellant

CERTIFICATE OF SERVICE AS TO FILING

I, Ray T. Price, being the attorney of record for the Appellant in this case, certify that I have this date mailed, postage prepaid, the original and three copies of the foregoing Brief of the Appellant to the Clerk of the Supreme Court, Supreme Court of Mississippi, P. O. Box 117, Jackson, MS 39205.

This 30<sup>th</sup> day of January, 2007.



RAY T. PRICE


CERTIFICATE

I, Ray T. Price, of counsel for Appellant, certify that I have this date mailed, postage prepaid, a true copy of the foregoing Brief of Appellant to the following:

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This 30<sup>th</sup> day of January, 2007.



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