IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CP-00887-COA

WILEY Z. CARROLL A/K/A WILEY ZACHARY CARROLL — **APPELLANT**

v.

STATE OF MISSISSIPPI — **APPELLEE**

DATE OF JUDGMENT:	05/08/2012
TRIAL JUDGE:	HON. ANDREW K. HOWORTH
COURT FROM WHICH APPEALED:	TIPPAH COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	WILEY Z. CARROLL (PRO SE)
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LAURA HOGAN TEDDER
NATURE OF THE CASE:	CIVIL - POST-CONVICTION RELIEF
TRIAL COURT DISPOSITION:	MOTION FOR POST-CONVICTION RELIEF DISMISSED
DISPOSITION:	REVERSED AND REMANDED: 08/27/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE GRIFFIS, P.J., MAXWELL AND FAIR, JJ.

FAIR, J., FOR THE COURT:

¶1. Wiley Carroll was banished from the Third Circuit Court District as a condition of his post-release supervision. He appeals the dismissal of his post-conviction-relief (PCR) petition for removal of the banishment restriction as illegal. He also claims his counsel was ineffective in allowing him to agree to an illegal sentence. Because the record before us does not indicate whether the trial court addressed the requisite banishment considerations, as articulated in *Cobb v. State*, 437 So. 2d 1218, 1220-21 (Miss. 1983), we reverse and remand.

STANDARD OF REVIEW

¶2. The trial court may summarily dismiss a PCR motion without an evidentiary hearing "[i]f it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief." Miss. Code Ann. § 99-39-11(2) (Supp. 2012). To succeed on appeal, the petitioner must: (1) make a substantial showing of the denial of a state or federal right and (2) show that the claim is procedurally alive. *Young v. State*, 731 So. 2d 1120, 1122 (¶9) (Miss. 1999).

¶3. When reviewing the denial of a PCR motion, an appellate court "will not disturb the trial court's factual findings unless they are found to be clearly erroneous." *Callins v. State*, 975 So. 2d 219, 222 (¶8) (Miss. 2008). Our review of the summary dismissal of a PCR motion, a question of law, is de novo. *Young*, 731 So. 2d at 1122 (¶9).

FACTS

¶4. On February 11, 2004, Carroll pled guilty to attempted robbery and was sentenced to twenty years in the custody of the Mississippi Department of Corrections, with nine years to serve, eleven years suspended, and the first five years of suspended incarceration on post-release supervision. In exchange for his plea, the State agreed to drop other charges pending against both him and his wife. As a condition of the post-release supervision portion of his sentence, Carroll was banished from the Third Circuit Court District. He made no objection to the banishment at the plea hearing.

¶5. The transcript of the plea hearing shows that the prosecution requested banishment to assist Carroll in his rehabilitation, and Carroll joined in that request. Specifically, the goal was to help Carroll avoid persons and places of disrepute or criminal activity. When asked

whether he understood the implications of the banishment provision, Carroll stated that he did:

> Q. [A]nd, finally they're asking the Court to order that in order to assist you in your rehabilitation and avoid persons and places of disrepute or criminal activity that upon your release from the penitentiary you reside outside of the Third Circuit Court District. That means, Benton, Tippah, Marshall, Lafayette, Union, Calhoun and Chickasaw Counties.
>
> You understand the recommendation that's going to be made in this case by the District Attorney's office as to sentencing?
>
> A. Yes, sir.
>
> Q. All right.
>
> Q. The Court is going to accept the recommendation if I accept your plea of guilty, and that's the sentence I am going to impose. You need to understand the implications of the sentence because with eleven years suspended, when you get out of the penitentiary if you violate your probation, you could get those eleven years; do you understand that?
>
> A: Yes, sir.
>
> Q: Okay. *The part about remaining outside of the Third Judicial District, the Third Circuit Court District that I just talked about with you a minute ago, is that a condition of your release and probation that you are prepared to accept and live with?*
>
> A: Yes, sir.

(Emphasis added). After accepting Carroll's guilty plea, the judge stated the following to Carroll:

> Finally, based on your stated desire and agreement to leave the Third Judicial District, this Court is going to include in this order that you will, as an additional effort at rehabilitation upon your release from the penitentiary that you will refrain from residing in or traveling through the Third Circuit Court District and that you will, of course, avoid persons and places of disrepute both

in the Third Circuit Court District and elsewhere . . . .

DISCUSSION

¶6. Mississippi Code Annotated section 99-39-21(1) (Rev. 2007) states the following:

> Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred . . . .

Additionally, Carroll pled guilty, so pursuant to Mississippi Code Annotated section 99-39-5(2) (Supp. 2012), he had three years from the entry of the judgment of his conviction to file a PCR motion. We must therefore determine whether an exception to these procedural bars applies. *Bell v. State*, 95 So. 3d 760, 763 (¶10) (Miss. Ct. App. 2012).

¶7. "[E]rrors affecting fundamental constitutional rights are excepted from the procedural bars of the [Uniform Post-Conviction Collateral Relief Act]." *Id*. at (¶12) (citation omitted). Since Carroll's sentencing, the constitutional requirements of banishment have been clarified by our highest court, notably in a five-justice concurrence by Justice Graves in *Means v. State*, 43 So. 3d 438, 447 (¶33) (Miss. 2010). The concurrence outlined an affirmative obligation of the trial court to hold a hearing and make mandatory, on-the-record, findings.

1. Banishment

¶8. The history of banishment, its current status, and particularly the mandatory requirements imposed on Mississippi trial judges were the subject of a recent law-journal article by Judge Maxwell, entitled *And Stay Out! A Look at Judicial Banishment in Mississippi*, 82 Miss. L.J. 1 (2012). The most recent case cited in that article, *Means v. State*,

is authoritative. *Means* recognizes first that banishment fits within the constitutional exception to the procedural bar. *Means*, 43 So. 3d at 442 (¶11). Carroll's assigned error is, therefore, squarely before the Court.

¶9. Under *Means*, banishment remains an allowable condition of post-release supervision – provided the reason or reasons for its imposition are within acceptable parameters and made the subject of an on-the-record analysis. The Supreme Court of Mississippi "reaffirm[ed] the duty" announced in *Mackey v. State*, 37 So. 3d 1161, 1167 (¶23) (Miss. 2010), to apply the "*Cobb* factors"[1] and added that although earlier decisions "did not necessarily place an affirmative duty on the trial judge to articulate the *Cobb* factors on the record," such is now mandatory. *Means*, 43 So. 3d at 444 (¶20). It reversed and remanded for a hearing to give the trial judge the opportunity to "pass on the propriety of Means's banishment order." *Id.* at 447 (¶29).

¶10. In *Cobb*, our supreme court outlined four factors to be considered and applied for properly banishing a person convicted of a crime. As clarified in *Means* the trial court must find, on the record and with analysis of each factor, that: (1) the banishment provision bears a reasonable relationship to the purpose of probation; (2) the ends of justice and the best interest of the defendant and the public would be served by the banishment; (3) public policy is not violated and the rehabilitative purpose of probation is not defeated by the banishment;

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[1] *Cobb v. State*, 437 So. 2d 1218, 1220-21 (Miss. 1983); *see also McCreary v. State*, 582 So. 2d 425, 427 (Miss. 1991); *Hamm v. State*, 758 So. 2d 1042, 1046-47 (¶¶12-15) (Miss. Ct. App. 2000); *Weaver v. State*, 764 So. 2d 479, 480-81 (¶¶6-8) (Miss. Ct. App. 2000).

and (4) the defendant's rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution are not violated by the imposition of the banishment. *Means*, 43 So. 3d at 442 (¶13) (citation omitted).

¶11. This Court has actually required on-the-record findings since 2000, four years before Carroll's sentencing, when we unanimously said: "In order for banishment to be an appropriate form of punishment[,] an on the record analysis of the *Cobb* factors is required." *Hamm v. State*, 758 So. 2d 1042, 1047 (¶15) (Miss. Ct. App. 2000). This specific requirement was later enunciated with "read my lips" clarity by the supreme court in *Mackey* and *Means* when it not only adopted and mandated this on-the-record-finding approach, but went one step further and retroactively applied these requirements in both cases. *See Means*, 43 So. 3d at 444 (¶21) (noting the Court of Appeals' prior recognition of this affirmative duty and adopting and retroactively applying an on-the-record-finding approach to reverse a banishment condition).

¶12. So while the dissent is technically correct that the supreme court "only recently" mandated factual findings, the pertinent and dispositive fact it overlooks is that our high court applied the requirements retroactively in *Mackey*, then a few months later reaffirmed that approach in *Means* – reversing both cases, which were PCR challenges like Carroll's. Thus, we cannot jettison retroactive application of this approach in today's case, particularly since Carroll's challenge is to a post-*Hamm* and post-*Weaver* 2004 sentence, and his PCR motion was filed after both *Mackey* and *Means* had already been decided.

¶13. The record in Carroll's case is simply insufficient to determine whether the trial court

made the required findings. Carroll designated *all* pertinent transcripts in his "Designation of Record on Appeal." However, the record only includes two pages of the transcript from the plea hearing and does not include a transcript from the sentencing hearing. In those pages, the trial court only alluded to the *Cobb* factors without making an on-the-record analysis. In *Means*, under similar circumstances, the supreme court was "simply unable to determine from the record before [it] whether the sentencing judge examined, on the record, any specific facts or circumstances of Means's case relevant to the *Cobb* factors to support the banishment." *Means*, 43 So. 3d at 446 (¶28). The court also noted that while "Means is responsible for designating the record pursuant to Mississippi Rule of Appellate Procedure 10(b) in a manner sufficient to allow this Court to review his asserted issues[,] . . . it is the absence *itself* of record support for Means's banishment which requires additional review." *Means*, 43 So. 3d at 446 (¶¶28-29).

¶14. It has been suggested that the fact that the banishment was part of the plea agreement prevents this Court from reversing and remanding this case. On the contrary, our supreme court in *Means* reversed and remanded the trial court's decision despite the fact that Means's sentence was a result of a negotiated plea agreement. *Id.* at (¶29). *See also Mackey v. State*, 37 So. 3d 1193, 1195 (¶8) (Miss. Ct. App. 2009) (reversed and rendered by the supreme court in *Mackey*, 37 So. 3d at 1167 (¶24), notwithstanding the fact that Mackey "eagerly" accepted banishment as a condition of his suspended sentence). Carroll's sentence, like Means's sentence and Mackey's sentence, was the result of a negotiated plea agreement. In *Means*, the supreme court explained:

> This Court only recently imposed an affirmative duty on the trial judge to analyze the *Cobb* factors on the record before banishing the defendant. *See Mackey*, 37 So. 3d at 1166-67. So there may be, in fact, some reasons for and benefits of Means's banishment under *Cobb* and *McCreary*, but they do not appear in the scant PCR record before us. And since no hearing was held on Means's present PCR motion, the trial court has not had an opportunity, in this PCR proceeding, to pass on the propriety of Means's banishment under *Cobb* and *McCreary*. That court should be given the opportunity before this Court rules on it.

Means, 43 So. 3d at 447 (¶29).

¶15. Therefore, we must remand this case so that the trial court may determine, from the complete record of Carroll's plea and sentencing, whether the standard set by *Cobb* has been met.

2. Ineffective Assistance of Counsel

¶16. Carroll also argues his counsel was ineffective. "The Mississippi Supreme Court has consistently held that the time bar of Mississippi Code Annotated section 99-39-5(2) applies to . . . post-conviction relief claims based on ineffective assistance of counsel." *Chancy v. State*, 938 So. 2d 267, 270 (¶11) (Miss. Ct. App. 2005). This Court has held:

> [W]hile it is conceivable that under the facts of a particular case, this Court might find that a lawyer's performance was so deficient, and so prejudicial to the defendant that the defendant's fundamental constitutional rights were violated. However, [we have] never held that merely raising a claim of ineffective assistance of counsel is sufficient to surmount the procedural bar.

McBride v. State, 914 So. 2d 260, 264 (¶12) (Miss. Ct. App. 2005) (citation omitted).

¶17. In order to prevail on a claim of ineffective assistance of counsel, "a defendant must prove that his counsel's performance was deficient, and that the deficiency prejudiced his defense." *Thomas v. State*, 933 So. 2d 995, 997 (¶6) (Miss. Ct. App. 2006) (citing *Strickland*

v. Washington, 466 U.S. 668, 688 (1984)). "[I]n order to satisfy the second prong, [Carroll] was required to show that but for his counsel's error(s): he would not have pleaded guilty; he would have instead insisted on going to trial; and the ultimate outcome would have been different." *Henderson v. State*, 89 So. 3d 598, 602 (¶15) (Miss. Ct. App. 2011).

¶18. Carroll has provided nothing in support of his assertions on this issue. A defendant is obligated to provide "more than conclusory allegations on a claim of ineffective assistance of counsel." *Carpenter v. State*, 899 So. 2d 916, 921 (¶23) (Miss. Ct. App. 2005). Accordingly, this issue is without merit.

CONCLUSION

¶19. This Court concludes, as the Supreme Court of Mississippi did in *Means*, that:

> [Carroll]'s PCR motions should have been excepted from the procedural bars, and the trial court erred in its dismissal. Therefore, we must remand this case to the trial court to review the record as it existed at the time of [Carroll]'s sentencing to determine, on the record as required in *Means,* if it contains the requisite reasons for and benefits of [Carroll]'s banishment under *Cobb* and *McCreary* . . . .

See Means, 43 So. 3d at 447 (¶29). Further:

> If the record as previously made – which may include the transcript of [Carroll's] plea and/or sentencing proceedings – reveals that no such reasons exist, or that the sentencing judge did not address the *Cobb* considerations as they relate to [Carroll], then [Carroll's] banishment violated his due-process rights, and the revocation of the suspension of [Carroll's] sentence (for violating the banishment) was unlawful. If, upon review of the record, the trial court reaches this conclusion, the trial court shall vacate the revocation and reinstate the original, suspended sentence with all the conditions except the banishment.

Id. at 447 (¶30).

¶20. **THE JUDGMENT OF THE CIRCUIT COURT OF TIPPAH COUNTY DISMISSING THE MOTION FOR POST-CONVICTION RELIEF IS REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO TIPPAH COUNTY.**

LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, ROBERTS, MAXWELL AND JAMES, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

CARLTON, J., DISSENTING:

¶21. I respectfully dissent from the majority's opinion because I find the record reflects that the trial judge sufficiently articulated his reasoning for imposing banishment from the Third Circuit Court District, setting forth the factors as required by *Cobb v. State*, 437 So. 2d 1218, 1219-21 (Miss. 1983). I also dissent from the majority's finding that the record contains a sufficient factual basis for such banishment. *See Means v. State,* 43 So. 3d 438, 447 (¶33) (Miss. 2010) (Graves, P.J., specially concurring) (acknowledging that the supreme court only recently began requiring the trial courts to affirmatively articulate their reasoning for, as well as the benefits of, imposing banishment when applying the *Cobb* factors).

¶22. The record in this case shows that during the plea colloquy in 2004, the trial judge fully explained the condition of the sentence of banishment to Carroll. The trial judge explained that the sentence was imposed to assist him in his rehabilitation and in avoiding persons and places of disrepute or criminal activity. The trial court informed Carroll during the colloquy that he would be banished from the Third Circuit Court District, and identified the counties in that district for Carroll: Benton, Tippah, Marshall, Lafayette, Union, Calhoun, and Chickasaw Counties. The court also explained to Carroll that based upon the

offenses to which he was pleading guilty, he faced a maximum punishment of life without parole, but that the district attorney's office recommended the trial court sentence Carroll to serve twenty years in the custody of the Mississippi Department of Corrections (MDOC), with eleven of those years suspended, leaving nine years to serve. The district attorney also recommended placing Carroll on post-release supervision for five years upon his release from incarceration.[2] The trial court further explained that in the event the guilty plea was accepted, the district attorney also agreed to retire to the file a couple of other cases against Carroll; to not indict him or prosecute him on an armed-robbery charge; and to retire charges against his wife in the case in which he pled guilty. The trial court then explained the consequences of the sentence in the event the court accepted Carroll's guilty plea. The trial court also explained to Carroll the consequences of violating the banishment provision after his release from incarceration.

¶23. In addition to an excerpt of the guilty-plea colloquy, the record also contains the trial court's written sentencing order. The sentencing order reflects Carroll's sentence to serve twenty years in the custody of MDOC, with eleven of those years suspended and nine to serve. The sentencing order also clearly sets forth the condition of basnishment from a

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[2] *See Watts v. Brewer*, No. 2:09cv122-KS-MTP, 2012 WL 1301261, *6-8 (S.D. Miss. Mar. 16, 2012) (Mississippi courts recognize that a suspended sentence with conditions implies a period of probation for a maximum period allowed by law); *see also Hamm v. State*, 758 So. 2d 1042, 1046-47 (¶¶12-15) (Miss. Ct. App. 2000) (sentence of ten years with nine suspended; suspended sentence was revoked within five years even though sentence listed no specific probationary period); *see also Shumpert v. State*, 764 So. 2d 1250, 1252-53 (¶9) (Miss. Ct. App. 2000).

defined geographical area, the Third Circuit Court District. I submit that the record reflects that the banishment imposed is not arbitrary, unreasonable, or ambiguous, and is enforceable as set forth in the sentencing order.

¶24. Additionally, the plea colloquy shows that after confirming with Carroll on the record that he qualified for habitual-offender status for sentencing, as well as explaining the district attorney's agreement to retire charges and refrain from prosecuting him in an armed-robbery charge, the trial judge explained that he imposed the banishment condition to assist Carroll in his rehabilitation and to help him avoid persons and places of disrepute or criminal activity upon his release from the penitentiary. The reasoning and factual basis articulated by the trial judge in the record sufficiently addresses the *Cobb* and *McCreary*[3] factors, and sufficiently provided the due process required by *Cobb, McCreary,* and *Mackey*.[4] Until the supreme court's 2010 opinion in *Mackey v. State*, 37 So. 3d 1161, 1167 (¶23) (Miss. 2010), the supreme court placed no affirmative duty on trial courts to articulate their reasoning on the record as to the *Cobb* factors. *See also Means,* 43 So. 3d at 447 (¶33). The court in *Mackey* cited Mississippi Code Annotated section 47-7-35 in providing that banishment was not prohibited and stating that a trial court may impose banishment to a defined geographic region of the state as a condition of the sentence as long as the trial judge addressed the *Cobb* and *McCreary* factors in doing so. *Mackey,* 37 So. 3d at 1167 (¶23). The opinion in *Mackey*

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[3] *McCreary v. State*, 582 So. 2d 425, 427 (Miss. 1991).

[4] *Mackey v. State*, 37 So. 3d 1161, 1167 (¶23) (Miss. 2010).

explained that a trial judge may not simply cite *Cobb* and state that the court considered the *Cobb* factors when sentencing a defendant, but that the reasoning articulated by the trial court must indeed address the required factors. *Id*. at 1165 (¶14).

¶25. In the case before us, the trial judge, in my view, sufficiently addressed the *Cobb* and *McCreary* factors, and I recognize that the trial court sentenced Carroll before the *Mackey* court required the trial court's reasoning to be affirmatively stated on the record. The trial court sentenced Carroll in 2004, but as acknowledged in *Means*, the supreme court only recently began requiring the trial court's reasoning for imposing banishment as a condition of a sentence to be affirmatively articulated, as well as the banishment to be factually supported by the record. Here, the trial court's banishment condition was limited to banishment from the Third Circuit Court District, and the trial judge identified by name the counties in that district for Carroll.

¶26. Upon review of the banishment condition imposed, I rely upon the supreme court precedent of *Means v. State*,[5] which I quote in length:

> We held in *McCreary* that banishments from the entire state violate public policy. Specifically, we explained that "banishment from a large geographical area, especially outside of the State, struggles to serve any rehabilitative purpose, and implicates serious public policy questions against the dumping of convicts on another jurisdiction." *McCreary*, 582 So. 2d at 427-28 (citing [*United States*] *v. Abushaar*, 761 F.2d 954, 959-60 (3d Cir. 1985); *Rutherford v. Blankenship*, 468 F. Supp. 1357, 1360-61 (W.D. Va. 1979)). *See also, Simoneaux v. State*, 29 So. 3d 26, 39 (Miss. Ct. App. 2009) ("While banishing

[5] Carroll pled guilty in 2004. In *Means v. State*, a 2010 case, the supreme court acknowledged that the requirement to affirmatively articulate the *Cobb* and *McCreary* factors was recent. *Means*, 43 So. 3d at 444 (¶21).

Simoneaux from Mississippi would perhaps provide a degree of protection to the citizens of our state, we certainly do not want our sister states repaying us for the favor.").

Cobb represents this Court's seminal decision on banishment. The criminal charge in *Cobb* stemmed from an incident in which Cobb's nephew had thrown rocks at Cobb's vehicle as he passed by. *Cobb*, 437 So. 2d at 1220. Instead of notifying his brother (the boy's father) of the incident so that he could properly discipline the child, Cobb, who had a notoriously bad temper, shot the boy. *Id*. Thankfully, the boy recovered. Cobb pleaded guilty to aggravated assault and was sentenced to twelve years' imprisonment. Yet the circuit judge suspended the sentence and put Cobb on probation for five years, provided he leave Stone County and stay 125 miles away from the county. *Id*. at 1219. On direct appeal, Cobb raised several arguments regarding the impropriety of the banishment.

In addressing Cobb's contentions, this Court first held that the banishment provision bore a reasonable relationship to the purpose of probation. We specifically pointed out that "Mississippi Code Annotated [section] 47-7-35 (Supp. 1982) provides that courts shall determine the terms and conditions of probation and may order the probationer to '. . . [r]emain within a specified area[.]'" *Cobb*, 437 So. 2d at 1219 (quoting Miss. Code Ann. § 47-7-35(g) (Supp. 1982)). And we explained that, "instead of being a matter of right, it is by grace that probation is granted a defendant, and within his sound judicial discretion the trial judge may fix reasonable conditions of probation." *Id*. at 1221 (citing *Owens v. Kelley*, 681 F.2d 1362 (11th Cir. 1982)).

We also found that the banishment did not violate public policy nor defeat the rehabilitative purpose of probation. *Cobb*, 437 So. 2d at 1220-21. We noted that the judge "recognized that Cobb had an uncontrollable temper, and related this to the community," explaining that until Cobb learned to control his temper, it was not likely that he could live in harmony with his brother's family. *Id*. at 1220. The judge cautioned that, had the boy died, Cobb likely would have received a life sentence. *Id*. But the judge did not want to punish "a man of Cobb's character" so severely. Since Cobb's house was only three-eighths of a mile from his brother's house, the circuit judge thought the best interests of everyone required getting Cobb "away from his brother and family." *Id*. at 1220-21. The circuit judge noted that "compared to what I could have done, I think I have been relatively kind." *Id*. at 1221. We also recognized that "some amount of punitive aspects of probation serve the public interest as well as the probationer's interest." *Id*. at 1221. So we agreed with

the circuit judge that "the ends of justice and the best interests of the public as well as the defendant would be served by the banishment." *Id*. at 1220.

Finally, we found that the trial court had not violated Cobb's constitutional rights by imposing the banishment condition. We noted that:

> Here the record shows that the trial judge carefully and meticulously explained to Cobb his rights which shows that Cobb understood that he could be sentenced to 20 years in the penitentiary upon the indictment to which he pled guilty. As found by the trial judge, Cobb voluntarily and knowingly pled guilty and specifically acknowledged his guilt. Then the court deferred sentence, so that the Mississippi Department of Corrections could "conduct an investigation of this defendant" and present a presentence report to the trial court, all of which presumably was done. The judgment of the court fixing the sentence and conditions here complained of shows that Cobb (while represented by counsel) signed the judgment underneath the following language: "I accept the above probation in accordance with the terms thereof."

Cobb, 437 So. 2d at 1221. We thus found that Cobb's rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution had not been violated by imposition of the conditions of his probation, including the banishment. *Id*.

Based on the trial court's on-the-record adjudication of all those factors, this Court held on appeal, in pertinent part, that:

> *Upon the record as made and presented*, we find that the conditions imposed by the sentencing judge were reasonably related to Cobb's circumstances and his intended rehabilitation. *Upon these facts*, we are unable to say that removing him from the area was unreasonable or arbitrary or in any sense violated public policy or his authority under the pertinent statutes.

Cobb, 437 So. 2d at 1220, 1221 (emphasis added). Further, in *McCreary*, we explained why Cobb's banishment had been affirmed. We stated that:

> In *Cobb*, the Court satisfied itself from the record that the banishment provision bore a reasonable relationship to the

> purpose of probation; that the ends of justice and the best interest of the defendant and the public would be served; that public policy was not violated and the rehabilitative purpose of probation was not defeated; and that Cobb's rights under the First, Fifth and Fourteenth Amendments to the United States Constitution were not violated.

McCreary, 582 So. 2d at 427 (citing *Cobb*, 437 So. 2d at 1219-21) (emphasis added). So this Court affirmed Cobb's banishment because we were satisfied from the record as made and presented—which included specific facts regarding Cobb's situation, character, and offense—that Cobb's banishment would achieve a rehabilitative purpose, serve the ends of justice, and protect the rights and interests of Cobb and the public. *Cobb*, 437 So. 2d at 1219-21; *McCreary*, 582 So. 2d at 427.

Our decisions in Cobb *and* McCreary *do not necessarily place an affirmative duty on the trial judge to articulate the* Cobb *factors on the record.* Cobb *and* McCreary *simply indicate that we will affirm a banishment only if we are satisfied from the record as made and presented that the banishment is appropriate, taking the* Cobb *factors into consideration. Cobb*, 437 So. 2d at 1219-21; *McCreary*, 582 So. 2d at 427. But we cannot be satisfied from the record that the banishment is proper if no record is made or presented that the banishment would achieve the goals outlined by *Cobb* and *McCreary*. So a trial judge who imposes banishment as a condition of probation or a suspended sentence, and wishes to have the banishment affirmed on appeal, *will be best served by articulating, on the record, the reasons for and benefits of the banishment under the* Cobb *factors as they relate to the defendant.*

To that end, this Court recently held that "a trial judge's reasons for ordering banishment must be articulated and supported in the record by a factual basis, as required by Cobb *and* McCreary*." Mackey v. State,* 37 So. 3d 1161, 1167 (Miss. 2010). Mackey *thus imposes an affirmative duty on the trial court to articulate, on the record, the* Cobb *factors as they relate to the defendant to support the banishment.* The Court of Appeals has recognized this affirmative duty for some time now. Put simply, "in order for banishment to be an appropriate form of punishment, an on the record analysis of the *Cobb* factors is required." *Hamm v. State*, 758 So. 2d 1042, 1047 (Miss. Ct. App. 2000) (deriding this "outmoded form of punishment").

Today, we reaffirm the duty we announced in *Mackey*, and we provide more significant reasons for our imposition of it. It is evident from a reading of the

> *Cobb* decision that banishment is a unique and extraordinary form of punishment and should be seldom and cautiously imposed. Both *Cobb* and *McCreary* make clear that unreasonable, arbitrary, or unjustified banishment orders will not be upheld. *See Mackey*, 37 So. 3d at 1166-67 ("compelling reasons must be offered to justify allowing a defendant convicted of a serious criminal offense to leave the jurisdiction unsupervised, as opposed to incarceration or keeping the defendant in the jurisdiction of the court, with supervision"). *See also K.N.L. v. State*, 803 So. 2d 1245, 1249 (Miss. Ct. App. 2002) (affirming banishment from shopping mall of teenager convicted of shoplifting from store in mall).

Means v. State, 43 So. 3d 438, 442-45 (¶¶14-22) (Miss. 2010) (emphasis added).

¶27. I would accordingly affirm the trial court's judgment.