

No. _____

**In the
Supreme Court of the United States**

DESMOND HARRIS,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

**Appendix to Application to Justice Kavanaugh for Additional Time to File
a Petition for a Writ of Certiorari to the Missouri Supreme Court**

Missouri Supreme Court Opinion (June 23, 2026).....App. 1 to App. 16

FILED

JUN 23 2026

CLERK, SUPREME COURT



SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,

Respondent,

v.

DESMOND HARRIS,

Appellant.

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No. SC101233

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

The Honorable Michael W. Noble, Judge

In his sole point on appeal, Harris contends the circuit court plainly erred during sentencing by referring to unrelated charges of which Harris had been acquitted in that the state failed to prove by a preponderance of the evidence he had committed the conduct underlying those charges. This Court has jurisdiction pursuant to article V, section 10 of the Missouri Constitution. The circuit court's judgment of conviction is affirmed.

Background

On June 3, 2022, Harris and two other individuals confronted Victim outside of his home. At gunpoint, they robbed Victim of his wallet, car keys, and a bag containing a handgun. Harris and one of his accomplices then shot Victim more than a dozen times.

Harris fled, and Victim called for help. He was transported to the hospital, where he survived his wounds after five surgeries.

After Victim identified him in a line-up, Harris was charged with first-degree robbery, first-degree assault, two counts of armed criminal action, second-degree burglary, and stealing. Victim testified at trial he first recognized Harris when he saw him pictured in a television news report concerning a separate incident. Defense counsel objected to Victim's testimony as evidence of other crimes, asking the statement be stricken from the record and the jury instructed to disregard it. The circuit court granted both requests. Defense also moved for a mistrial, which was overruled.¹ At the close of the state's case, the circuit court sustained Harris's motion for judgment of acquittal as to the second-degree burglary and stealing charges. The jury found Harris guilty of the four remaining charges.

At Harris's sentencing, the circuit court asked defense counsel and the prosecutor whether they had any changes or additions to the sentencing assessment report (SAR).² Both declined, and neither offered any other evidence. The prosecutor recommended the circuit court sentence Harris to consecutive concurrent 15- and 10-year sentences for the

¹ On appeal, Harris initially challenged the circuit court overruling his motion for mistrial but abandoned this point in his substitute brief in this Court.

² Section 557.026.1, RSMo 2016, provides a probation officer "shall, unless waived by the defendant, conduct a presentence investigation in all felony cases and make a sentencing assessment report to the court before any authorized disposition is made[.]" Rule 29.07 provides: The "report of the pre-sentence investigation shall contain any prior criminal record of the defendant and such information about his or her characteristics, his or her financial condition, his or her social history, and the circumstances affecting his or her behavior as may be helpful in imposing sentence[.]"

robbery and associated armed criminal action charges, and concurrent 15- and 10-year sentences for the assault and associated armed criminal action charges.

As mitigating factors, defense counsel argued Harris was raised by his mother because his father had been incarcerated for Harris's entire life. Nevertheless, defense counsel argued Harris intended to rehabilitate himself. As a result, "given the contents of the SAR [and] the facts of this case," defense counsel suggested Harris be sentenced to a total of 13 years in prison (i.e., 10 years for the robbery charge, a consecutive three years for the associated armed criminal action charge, and a concurrent 10 years plus three years for the assault and related armed criminal action charges). After hearing these recommendations, the circuit court engaged in the following colloquy:

THE COURT: All right. So, number one, one of the things I agree with you is looking at sentencing is twofold. But the Court is not in the business of rehabilitation. That is what – the department of corrections and Probation and parole's job.

The Court is in the business of trying to figure out if there are any mitigating or aggravating factors when determining sentencing.

And, so, while you shared with the Court some mitigating factors, to just cast a fatherless individual is destined to become violent, the Court does not believe that.

The Court believes that there are plenty of people who have been raised without a father to go on and do amazing things, whether it be raised by the mother or grandmother. So, the Court doesn't look at fatherless as an automatic anchor, and that should preclude or remove responsibility from the individual.

In addition, what was – has not been talked about regarding Mr. Harris – because the court is allowed to look at all of his behavior, including his priors. And if I remember correctly, [Prosecutor 1], Mr. Harris had another trial in this jurisdiction?

[PROSECUTOR 1]: Yes, he did, Your Honor.

THE COURT: Can you share with me what that trial was?

[PROSECUTOR 1]: That trial was tried by [PROSECUTOR 2], who's with me today, and – If you want to provide the Court with the facts of that case.

[PROSECUTOR 2]: Yeah, to start with, that was a not guilty verdict.

THE COURT: The Court is aware. But the Supreme Court has said the Court can take into consideration any of those cases.

[PROSECUTOR 2]: Yeah. The facts as alleged in that case were that the defendant, with two others, attempted to steal a vehicle, and, in the course thereof, a child was shot in the head.

THE COURT: And, so, it's my understanding that a jury of his peers found him not guilty; is that correct?

[PROSECUTOR 2]: That is correct. Before that was given to the jury, the attempted vehicle carjacking and the robbery were nolle by the State.

THE COURT: All right. So, in terms of this isn't Mr. Harris' one and only dance with the criminal justice system, while he may have prevailed in the other system, it is – the fact that he has had two serious incidents with the criminal justice system takes in the fact that this was not just a one-off.

So this isn't just a had a bad day, made some bad decisions. This shows the Court that this is a series of bad decisions; one in which he prevailed on, and second which he did not prevail on.

That being said, the Court – and seeing how there's no legal cause or reason why sentence and judgment should not be pronounced, in keeping with the verdict of the jury finding the defendant guilty of rob first, armed criminal action, assault first, and armed criminal action, beyond a reasonable doubt, the defendant will be committed to the custody of the Missouri Department of Corrections for a term of fifteen years for Count I, ten years for Count II, fifteen years for Count III, and ten years for Count IV, all of them to be run consecutive with each other.

Analysis

Harris argues the circuit court abused its discretion by basing the combined 50-year sentence, at least in part, on the unproven assumption he was guilty of three unrelated charges for the carjacking (two of which the state dismissed and third of which Harris was acquitted by a jury), because the state failed to offer any proof – let alone proof by a preponderance of the evidence – that Harris committed the conduct underlying

those charges. Harris claims the circuit court's actions in considering these unrelated charges *sua sponte*, and in relying on the unsupported belief Harris had committed these crimes, violated section 557.036, RSMo 2016,³ as well as Harris's state and federal constitutional rights to due process, a fair trial, and to be tried only for the offenses charged.

Defense counsel did not object to the circuit court's remarks concerning Harris's prior acquittal of unrelated charges, nor that acquittal's influence (if any) on the sentence. As a result, Harris's claim is not preserved, and he requests this Court exercise its discretion and grant plain error review of that claim. Rule 30.20 provides: "Allegations of error that are not briefed or are not properly briefed on appeal shall not be considered by the appellate court except errors respecting the sufficiency of the information or indictment, verdict, judgment, or sentence."

Because Harris's claim does not fall within the stated exceptions, he must rely on the second sentence of Rule 30.20, which provides: "Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice resulted therefrom." This Court recently reviewed Rule 30.20 in *State v. Jones*, 725 S.W.3d 577, 585 (Mo. 2025), and held:

³ Section 557.036.1, RSMo 2016 provides, after a defendant is found guilty, "the court shall decide the extent or duration of sentence or other disposition to be imposed under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant and render judgment accordingly."

[A]n appellate court confronted with a request to grant relief applying plain error review may resolve the claim in one of five ways under the Rule 30.20 framework:

1. Declining plain error review when an appellant *fails to facially establish ... plain error*, i.e., evident, obvious, and clear error;
2. Declining plain error review when an appellant *fails to facially establish ... an error affecting substantial rights*;
3. Declining plain error review when an appellant *fails to facially establish ... manifest injustice ...*;
4. Declining to *exercise its discretionary authority* to review for plain error; or
5. Determining ... to review and *grant relief*.

Id. at 585 (emphasis added). Any of the first four alternatives is a sufficient basis on which to reject an unpreserved claim of error, and the alternatives may be considered in any order. *Id.* Harris’s claim fails at least three of these four alternatives.

I. Plain Error

A circuit court’s sentencing decision is reviewed only for abuse of discretion.

State v. Russell, 598 S.W.3d 133, 136 (Mo. 2020). Given this standard of review, Harris fails to show the circuit court committed error, let alone error that was “evident, obvious, and clear.” *State v. Mills*, 687 S.W.3d 668, 675 (Mo. 2024). An “evident, obvious, and clear” error is one the circuit court should have recognized and prevented (or, at least, corrected) despite the lack of objection. *Jones*, 725 S.W.3d at 583. When the defendant is a prior offender and the circuit court (not the jury) determines the appropriate sentence within the bounds the legislature set, the circuit court has broad discretion what factors to consider, the weight to be given those factors and, ultimately, what sentence to impose. § 557.036.1, RSMo 2016; *Willbanks v. Dep’t of Corr.*, 522 S.W.3d 238, 243 (Mo. 2017).

The circuit court's reference to Harris's unrelated charges, among other factors, prior to announcing Harris's sentences did not amount to an abuse of discretion, let alone an abuse so evident, obvious, and clear the circuit court should have recognized the reference was error and corrected it.⁴

Harris's argument proceeds from two premises. First, he insists the circuit court did not merely refer to the unrelated charges but, instead, relied on its belief Harris had committed the conduct underlying those charges. Second, Harris argues, because the state offered no proof he had committed that conduct, the circuit court committed plain error under *United States v. Watts*, 519 U.S. 148 (1997), *State v. Clark*, 197 S.W.3d 598 (Mo. 2006), and *State v. Fassero*, 256 S.W.3d 109 (Mo. 2008), each of which Harris contends holds prior charges of which the defendant was acquitted may be considered by the circuit court in sentencing only if a preponderance of the evidence shows the defendant committed those crimes. Both premises are incorrect.

At the outset, the Court rejects the application of the cases on which Harris relies to the circumstances now before the Court. In *Watts*, the United States Supreme Court

⁴ In *State v. Burton*, 198 S.W.2d 19, 22 (Mo. Div. 1 1946), this Court held:

Our consideration is limited to the narrow question whether the judge has the right in fixing the punishment to consider the previous record and reputation of the accused when these matters were not an issue in the trial of the case nor disclosed by the record. When the purpose of the punishment is studied there can be no doubt but that the judge has this right.

See also *State v. Cline*, 452 S.W.2d 190, 195 (Mo. Div. 1 1970) (holding "a court should take into account the ... character and propensities of the offender, as well as his past as it may indicate present purposes and tendencies and suggest the period of restraint ... that should be imposed").

held “a jury’s verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.” *Watts*, 519 U.S. at 157. This holding, however, concerned only whether the sentencing court could consider such conduct in calculating the “base offense level under United States Sentencing Commission, Guidelines Manual § 2D1.1(b)(1) (Nov. 1995) (USSG).” *Id.* at 150. The Supreme Court’s holding in *Watts* was limited to the proper construction of the federal sentencing guidelines and related federal statutes and did not purport to resolve any constitutional claims. Moreover, the requirement that acquitted conduct must be proved by a preponderance of the evidence came from the federal sentencing guidelines.⁵ *Id.* at 156 (“The Guidelines state that it is ‘appropriate’ that facts relevant to sentencing be proved by a preponderance of the evidence, USSG § 6A1.3, comment., and we have held that application of the preponderance standard at sentencing generally satisfies due process.”). Because *Watts* concerned the federal sentencing guidelines and the standard for using conduct underlying an acquittal to alter the applicable range of punishment under those guidelines, the Court rejects its application to the present circumstance.

Harris’s reliance on *Clark* and *Fassero* also is misplaced. In *Clark*, unlike the present case, the jury determined the maximum sentence. *Clark*, 197 S.W.3d at 599.

⁵ This holding has been abrogated. “Effective November 1, 2024, Amendment 826 modified Section 1B1.3 to prohibit the consideration of acquitted conduct in determining a defendant’s guideline range, adding subsection (c), which provides that ‘[r]elevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court’). U.S.S.G. § 1B1.3(c).” *United States v. Scott*, 779 F. Supp. 3d 937, 941 (N.D. Ohio 2025).

This Court held, when the jury performs this function, evidence of uncharged or even acquitted conduct may be introduced in the penalty phase provided a preponderance of the evidence shows defendant committed that conduct. *Id.* at 602 (relying, in part, on *Watts*). *Fassero*, like *Clark*, involved only jury sentencing. Relying on *Watts* and *Clark*, this Court stated: “Although the state may present evidence of criminal conduct for which the defendant was never convicted, the *penalty phase jury* may only consider such evidence if proven by a preponderance of the evidence.” *Fassero*, 256 S.W.3d at 119 (emphasis added).⁶ Because *Clark* and *Fassero* pertained only to jury sentencing, they – like *Watts* – do not apply to this case.⁷

The SAR, which Harris’s counsel reviewed and to which he offered no changes or objections, noted Harris was given a suspended imposition of sentence and a four-year probation term for his first felony (first-degree tampering with a motor vehicle). The SAR further notes Harris, within two months of the start of this probation, was arrested

⁶ In *Fassero*, the state offered an indictment showing the defendant was charged with “criminal sexual abuse against a child under age 13” but did not offer any evidence the defendant actually committed the conduct underlying that charge. 256 S.W.3d at 118. This Court held, “while the indictment is relevant to prove [the defendant] was *indicted* in 2003 ..., it is not relevant to prove [the defendant] *engaged* in the conduct alleged[.]” *Id.* at 119 (emphasis in the original). With no proof the defendant committed the underlying conduct, this Court held allowing the jury to consider the indictment served no legitimate purpose and imposed a high risk of unfair prejudice to the defendant. *Id.*

⁷ Without confirming the propriety of the holdings in *Clark* and *Fassero* due to their reliance on *Watts*, the Court notes judge sentencing and jury sentencing are fundamentally different. The latter requires protections the former does not. To the extent Missouri appellate decisions have read *Clark* and *Fassero* (and their reliance on *Watts*) to apply to judge sentencing, such an expansion is unwarranted, and those cases should no longer be followed.

twice and charged with the four felonies in the current case and six additional felonies in the unrelated carjacking case.⁸ The SAR did not provide any disposition of the latter charges. In its the sentencing colloquy, the circuit court explained that Harris's record showed the present case was not a one-time occurrence but instead was one of several serious interactions with the criminal justice system. Specifically, the circuit court stated:

[T]he fact that [Harris] has had two serious incidents with the criminal justice system [after the initial felony and probation] takes in the fact that this [present case] was not just a one-off. So this isn't just a had a bad day, made some bad decisions. This shows the Court that this is a series of bad decisions.

In context, this can be read as the circuit judge simply rejecting defense counsel's argument Harris was committed to rehabilitating himself because his first and best opportunity for rehabilitation (i.e., probation for his first felony) was followed almost immediately by multiple arrests and more than a dozen new charges. The SAR provides a sufficient basis for the circuit court to make this observation, and reliance on the SAR for this purpose was not error, let alone an evident, obvious, and clear error.

Harris argues, however, the circuit court's remarks were not directed at the fact he was twice arrested in the early months of his four-year probation term and charged with more than a dozen new felonies. Instead, Harris contends the circuit court sentenced him, in part, based on a belief Harris had committed the conduct underlying the charges in the

⁸ The criminal history section of Harris's SAR states: "He was arrested on 6/17/2022 for Vehicle Hijacking Injury with a Weapon (F), Armed Criminal Action (F), 3cts, UUW Shooting at MV per Building (F), and Attempted Robbery 1st Degree (F)[.]"

carjacking case, all of which either the state dismissed or resulted in a jury verdict of acquittal. The Court is not persuaded.

In evaluating the circuit court's brief remarks, context is critical. Defense counsel had just made two arguments in mitigation. First, Harris was raised by a single mother after his father was incarcerated. Second, despite these disadvantages, Harris was committed to rehabilitating himself. These arguments were followed immediately by the circuit court's comments Harris now challenges. In this context, they are not the sudden, random interjection of the circuit court's belief Harris committed other crimes, as Harris contends. Instead, it appears the circuit court was addressing defense counsel's mitigation arguments in the order counsel made them. First, the circuit court stated it did not believe Harris's being raised by single mother was inevitably to blame for the crimes of which the jury had just found him guilty. Second, the circuit court seems to reject the assertion Harris was committed to rehabilitation because Harris was arrested and charged twice in the first months after receiving probation for his first offense.

Nothing in the circuit court's remarks references a belief Harris was responsible for a child being shot in the head while he was attempting to steal a car. The circuit court's comments make no reference to *any* of Harris's conduct, whether in the present case or the unrelated carjacking. The circuit court did refer to Harris making a "series of bad decisions," but nothing in this comment equates "bad decisions" with serious felony conduct. The circuit court may have been referring to Harris's choice of associates, to his litigation strategy, or to any number of things other than criminal conduct. It simply is not possible to know for certain from this short colloquy exactly to what the circuit court

referred. Even if the circuit court considered the offenses for which Harris was acquitted when fashioning an appropriate sentence, and it was improper to do so, the short colloquy on which Harris relies is too slender a reed on which to build a plain error claim.

II. Manifest Injustice

Even if the Court were convinced the circuit court's colloquy concerning the unrelated charges from the carjacking episode focused on whether Harris committed those crimes (despite the jury acquitting Harris of all the charges the state did not dismiss), Harris fails to show this prejudiced him, let alone that it resulted in manifest injustice. *See Martin v. State*, 291 S.W.3d 846, 851 (Mo. App. 2009) ("Prejudice in the sentencing phase requires a reasonable probability that 'but for' the [error], a lesser sentence would have been imposed."). The bare recitation of the allegations the state offered in response to the circuit court's query did not purport to be evidence (even hearsay evidence) of Harris's conduct.⁹ Nor is it conceivable that a learned and experienced judge would take it as such.

A judge, unlike a jury, is presumed to know what evidence is sufficient to establish facts relevant to the sentencing decision and what evidence is not. *State v. Collins*, 290 S.W.3d 736, 746 (Mo. App. 2009) ("We assume the trial court's experience and expertise enables the trial court to consider appropriate sentencing factors and to

⁹ In cases of judge sentencing, hearsay evidence – including hearsay within an SAR – is routinely permitted. *Martin v. State*, 291 S.W.3d 846, 850 (Mo. App. 2009). Here, however, the second prosecutor did not offer evidence as to what Harris did or did not do in connection with the carjacking. Instead, the prosecutor told the judge what the "facts *as alleged* in that case were[.]" (Emphasis added).

disregard improper matters.”). As a result, the circuit court is presumed to know there was sufficient evidence of subsequent arrests and charges for purposes of rebutting defense counsel’s claim Harris was committed to rehabilitation, but nowhere near sufficient evidence to consider Harris actually committed the violent conduct underlying the carjacking charges. Moreover, this Court is bound to presume the circuit court was making the former point, not the latter. *Cf. State v. McMillin*, 783 S.W.2d 82, 96 (Mo. 1990) (noting when “a judge, rather than a jury, is the trier of fact, the reviewing court presumes that inadmissible evidence is not prejudicial”), *abrogated on other grounds by Morgan v. Illinois*, 504 U.S. 719 (1992).¹⁰ Accordingly, even if the circuit court’s reference to acquitted charges was improper, this Court must presume the circuit court did not use the state’s limited response for a manifestly unjust purpose, and Harris has not overcome that presumption. *See Mason v. State*, 368 S.W.3d 182, 188 (Mo. App. 2012) (holding “the presence of [the defendant]’s California juvenile offense in his [SAR], had we deemed it error, would not compel us to rebut the presumption that whe[n] the proceeding is before a judge, inadmissible evidence is not prejudicial”).

In an effort to demonstrate manifest injustice, Harris focuses on the fact the circuit court’s sentence exceeded the state’s recommendation, and he asks this Court to infer from that single fact the circuit court enlarged Harris’s sentences to punish him for

¹⁰ In *McMillin*, this Court held reference to the appellant’s two prior arrests in a presentence investigation report, just as with a SAR, was not prejudicial because – even if inadmissible in a guilt phase – it is both highly relevant and permissible at the punishment phase, and claims the report contained highly prejudicial and inflammatory personal conclusions of the probation and parole officer are “without merit *when the trial judge serves as sentencer*.” *McMillin*, 783 S.W.2d at 96-97 (emphasis added).

unrelated conduct the state did not prove. Again, the Court is not persuaded. The circuit court is not bound by either party's recommendation and, instead, is obligated only to impose a sentence that is fair and just under all the circumstances. § 557.036.1, RSMo 2016; *State v. Lindsey*, 996 S.W.2d 577, 579 (Mo. App. 1999) ("The trial court has a duty to undertake a case by case, defendant by defendant, evaluation in determining an appropriate punishment fashioned to both the crime and the criminal.").

Ignoring entirely the question of whether Harris committed the carjacking, the crime for which Harris was being sentenced fully merited the sentences the circuit court imposed. This armed robbery was calculated, ruthless, and represented a sharp increase in danger to the community from Harris's previous offense of tampering with a vehicle. This, coupled with the fact it occurred so quickly after – and was such a complete repudiation of – the opportunity given Harris through probation, justifies the circuit court's sentences. More importantly, these facts explain the circuit court's sentences without having to engage in the speculation Harris seeks, i.e., that the circuit court committed a manifest injustice or miscarriage of justice by increasing Harris's sentences to punish him for the unrelated and unproven crime.

III. Discretionary Review

The steepest hurdle faced by any defendant seeking plain error review is that such review is entirely discretionary. Two of the most significant factors informing this discretion are the circumstances surrounding the claimed error and the impact granting plain error review in the present case may have on future cases. Harris's claim is ill-suited for review on both counts. As a result, even if the Court believed the circuit

court likely (i) committed plain error (ii) that impacted substantial rights and (iii) resulted in manifest injustice, it still would decline to exercise its discretion to review Harris's claim.

Harris's claim is based entirely on brief remarks the circuit court made prior to pronouncing sentence. The exchange with the state took less than a minute in real time. Because the circuit court was under no obligation to explain the sentence it would soon impose, its comments cannot have been error. Instead, for any defendant to make a claim based on such comments, the defendant must prove – unmistakably – the sentence itself was an abuse of discretion, i.e., it resulted from improper motives or considerations. *See Burton*, 198 S.W.2d at 22 (noting review for abuse of discretion in sentencing is shown by a motive “of partiality, prejudice or oppression or induced by corruption”); *see also Russell*, 598 S.W.3d at 136 (noting abuse of discretion occurs when the circuit court’s “action is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful consideration” (internal quotations omitted)). As explained, Harris's claim fails because it depends entirely on an inference so strained it amounts to speculation.

But the record need not have been so bare. Harris's plain error claim could have been avoided, and all doubt about the circuit court's intentions dispelled, if defense counsel simply had asked the circuit court to elaborate whether its comments:

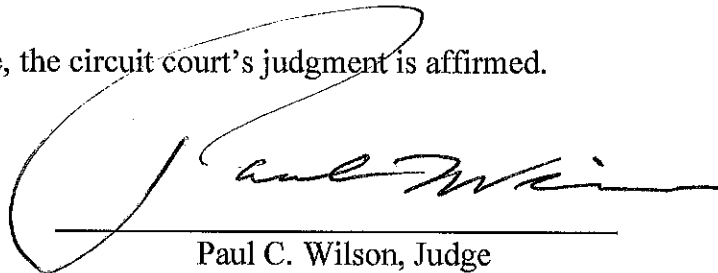
(1) signaled an intent to increase Harris's sentences to punish him for crimes of which he had been acquitted, or (2) as this Court presumes, were meant for the proper (if unnecessary) purpose of rebutting defense counsel's argument concerning Harris's

commitment to rehabilitation. Had the circuit court confessed to the former, Harris could have objected, and his claim would have been preserved. Had it confirmed the latter (and far more likely) explanation, the circuit court could have clarified it was referring only to Harris's multiple arrests and charges and not the conduct underlying them.

Accordingly, the Court faces a choice. The Court either must proceed with discretionary review in this case in hopes of divining the circuit court's motives and intentions from the very few words available or deny discretionary review now in hopes any similar concerns in the future will be raised in the circuit court where clarification can be had immediately. The choice is an easy one. Discretionary review is denied.

Conclusion

For the reasons set forth above, the circuit court's judgment is affirmed.



Paul C. Wilson, Judge

All concur.