

# ATTORNEY GENERAL OPINIONS

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The following are opinions from the Office of the Mississippi Attorney General on elections matters. The information is taken in its entirety from the Attorney General's Office Computer Generated Opinion Database, located at [www.agopin.state.ms.us](http://www.agopin.state.ms.us).

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### 3.1

**OPINION DATE: June 19, 1991**  
**SUBJECT: Elections – Miscellaneous**

Honorable Sally Berkley  
Chairman  
Franklin County Election Commission  
Post Office Box 267  
Meadville, Mississippi 39653

Dear Mrs. Berkley:

Attorney General Mike Moore has received your letter of request and has assigned it to me for research and reply. Your letter states:

"I request an opinion on the following procedure for curbside voting. This is the procedure we have used in our county for years but we have heard of different procedures used in some counties. We want to be sure we are complying with the intent of the Voting Accessibility and Handicapped Act.

- 1) Managers of a polling place determine when a voter is at the polls.
- 2) Person enters and declares to manager that an individual, who is handicapped and cannot come into the polls, wishes to vote.
- 3) Manager checks to see if potential voter's name is on book.
- 4) If found on pollbook, two managers take Voter Registration and a ballot out to voter. If there are people in the process of voting, managers must wait until they finish before going out to 'curbside' voter. No voting takes place while the two managers are outside.
- 5) Voter signs or makes mark in Voter Register. He is given any needed instructions by manager.
- 6) Voter marks his ballot and places it in plastic sleeve (scanner ballot) or envelope to protect the vote secrecy.
- 7) Managers take ballot back and place ballot in ballot box.
- 8) 'Voted' is written by voter's name.

Does this procedure adhere to the Voting Accessibility for Elderly and Handicapped?

It is our understanding that voting for handicapped should be handled as close as possible to procedures for non-handicapped and that there should not be any special notice on documentation that a person voted curbside."

The "Voting Accessibility For the Elderly and Handicapped Act" (the Act) is a federal law. While we do not issue official opinions interpreting federal law the stated purpose of the Act is "to promote the fundamental right to vote by improving access for the handicapped and elderly individuals to registration facilities and polling places for Federal [elections](#)". 42 U.S.C. 1973ee.

"Curbside Voting" in Mississippi has apparently been practiced at least since 1959. See the attached copy of an opinion addressed to Honorable James Breland, dated May 22, 1987 which cites and quotes an opinion dated July 1, 1959. The 1959 opinion appears to be the basis for the practice but it does not set forth any suggested procedure that should be followed. It says that while there is no authority for the "carrying of a ballot away from the voting place", if the managers of the election determine that the elderly or physically handicapped voter is "at the polling place" they (the managers) may give assistance.

It is our opinion that once the determination is made that the voter is "at the polling place" every effort should be made and assistance provided to permit disabled voters to vote in the same manner as other voters and insure that their ballots will be counted as regularly voted ballots. The procedure outlined in your letter, in our opinion, is in compliance with the intent of the 1959 opinion and would have the effect of furthering the stated purpose of the Act.

Sincerely,

MIKE MOORE, ATTORNEY GENERAL

BY:

Phil Carter

Special Assistant Attorney General

## 3.2

**OPINION DATE:** August 18, 2000  
**SUBJECT:** Disqualifying Crimes

Leslie Scott, Esquire  
Assistant Secretary of State  
for Elections  
Post Office Box 136  
Jackson, Mississippi 39205-0136

### **Re: Disqualifying Crimes**

Dear Ms. Scott:

Attorney General Mike Moore has received your letter of request and assigned it to me for research and reply.

Your letter states:

"This is a request for an official Attorney General's opinion regarding disenfranchising crimes.

I recently became aware of the Fifth Circuit U.S. Court of Appeals case *Cotton v. Fordice* 157 F.3d 388 (1998), in which the court held that the crime of armed robbery was a disenfranchising crime under Section 241 of the Mississippi Constitution of 1890.

I am aware that previous Attorney General opinions have held that the crime of armed robbery was not a disenfranchising crime. In light of this new Fifth Circuit case, I am requesting your official opinion as to whether the Secretary of State should begin advising circuit clerks and election commissioners to purge from the voter rolls those persons convicted in Mississippi courts of the crime of armed robbery.

In addition, there is language in the *Cotton v. Fordice* decision which suggests that other crimes that involve unlawful taking would now be disenfranchising that previously had been regarded as not disenfranchising. Accordingly, I am also requesting an official opinion as to whether the convictions in Mississippi courts for the crimes of robbery, burglary, shoplifting, receiving stolen property and any other related crimes should be considered disenfranchising in Mississippi."

In *Cotton v. Fordice* the Fifth Circuit Court of Appeals cited and quoted Section 241, Mississippi Constitution of 1890 which denies the ballot to any person convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy and then said:

"Neither the Mississippi caselaw or statutes resolve whether theft,' as used in Section 241,

includes the crime of armed robbery.' The federal courts' task is to determine as best we can how [the Mississippi Supreme Court] would rule if the issue were before it.' Federal Deposit Ins. Corp. V. Abraham, 137 F.3d 264, 268 (5th Cir. 1998) (citation omitted). In law, theft' is a general label for statutorily created crimes involving an unlawful taking. At common law, theft was defined as the felonious taking and carrying away of the personal property of another with intent to convert it to the use of the taker without the consent of the owner.' McLaughlin v. City of Canton, 947 F. Supp. 954, 970 n. 18 (S.D. Miss. 1995) (quoting 52A C.J.S. Larceny Section 1(2), at 398 (1968)). Similarly, Mississippi defines larceny' as taking and carrying away, feloniously, the personal property of another.' MISS. CODE ANN. Section 97-17-41 (Supp. 1998). The Mississippi Code labels various theft crimes as larceny, (Miss. Code Ann. Section 97-17-41) receiving stolen property, (Section 97-17-70) robbery, (Section 97-3-73) extortion (Section 97-3-82) and so forth. At least one other court has broadly interpreted Section 241 to conclude that theft' is an umbrella term' to describe those crimes that involve a wrongful taking.' McLaughlin, 947 F. Supp. 954, 970 n.18 (S.D. Miss. 1995) (citation omitted). As there is no crime labeled theft' in Mississippi, the term in Section 241 is only meaningful if it includes the larceny crimes, and thus includes armed robbery.

We also find it persuasive that in Mississippi, larceny (common law theft) is a lesser included offense of robbery. See *Holly v. State*, 671 So.2d 32, 45 (Miss.) cert. denied 518 U.S. 1025, 116 S. Ct. 2565, 135 L.Ed.2d 1082 (1996) ( [O]nce the State proved the elements of robbery, it was not required to offer any additional proof to establish the charge of grand larceny.) Thus, for double jeopardy purposes, the relatedness of the crimes is clear. See *id.* At 44. Because the term theft' in Section 241 must generically include a conviction for armed robbery,' Brown is disenfranchised under Mississippi law."

Based on the above, it is our opinion that one convicted of the crime of armed robbery is disenfranchised.

One of the elements of the crimes of receiving stolen property, robbery, extortion and shoplifting is the wrongful taking of property. Therefore, in our opinion, a felony conviction of any of these crimes is also disenfranchising

With respect to the crime of burglary, Black's Law Dictionary (Revised Fourth Edition) definition is "the breaking and entering the house of another in the nighttime, with intent to commit a felony therein, whether the felony be actually committed or not." Since the wrongful taking of property is not an element of the crime of burglary, we are constrained to say that burglary is not a disenfranchising crime.

In our opinion to Honorable Sandra N. Willis, dated March 21, 1997 we said that the following crimes are disqualifying: arson, bribery, bigamy, embezzlement, obtaining money or goods under false pretense (including felony bad check), forgery, murder, perjury, rape, and theft which includes larceny and taking unlawful possession of a motor vehicle under Section 97-17-42. We now modify that opinion by adding the crimes of armed robbery, robbery, receiving stolen property, extortion, and felony shoplifting. We

also note that in our opinion to Ms. Willis dated April 30, 1999 we specifically said that the crime of timber larceny is disqualifying.

Sincerely,

MIKE MOORE, ATTORNEY GENERAL

By:  
Phil Carter  
Special Assistant Attorney General

### 3.3

**OPINION DATE:** May 11, 2001  
**SUBJECT:** Disenfranchising Crimes

Leslie Scott, Esquire  
Assistant Secretary of State for Elections  
Post Office Box 136  
Jackson, Mississippi 39205

#### **Re: Disenfranchising Crimes**

Dear Ms. Scott:

Attorney General Mike Moore has received your letter of request and assigned it to me for research and reply. Your letter states:

We have received several inquiries from election commissioners and circuit clerks asking whether the following crimes are disenfranchising under Section 241 of the Mississippi Constitution of 1890:

1. Sexual battery (Miss. Code Ann. Section 97-3-95)
2. Statutory rape (Miss. Code Ann. Section 97-3-65)
3. Carjacking (Miss. Code Ann. Section 97-3-117)

Since these crimes appear to share some or all of the same elements as other disenfranchising crimes, we are asking your assistance in determining whether persons convicted of the crimes listed above should be purged from the voter rolls.

Disenfranchising crimes listed in Section 241, Mississippi Constitution of 1890 are murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement and bigamy.

Mississippi Code Annotated Section 97-3-95 (Revised 2000) is the sexual battery statute. It provides:

(1) A person is guilty of sexual battery if he or she engages in sexual penetration with:

(a) Another person without his or her consent;

(b) A mentally defective, mentally incapacitated or physically helpless person;

(c) A child at least fourteen (14) but under sixteen (16) years of age, if the person is thirty-six (36) or more months older than the child; or

(d) A child under the age of fourteen (14) years of age, if the person is twenty-four (24) or more months older than the child.

(2) A person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of eighteen (18) years if the person is in a position of trust or authority over the child including without limitation the child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

Section 97-3-65 is the statutory rape and forcible rape statute. It provides in part:

(1) The crime of statutory rape is committed when:

(a) Any person seventeen (17) years of age or older has sexual intercourse with a child who:

(I) Is at least fourteen (14) but under sixteen (16) years of age;

(ii) Is thirty-six (36) or more months younger than the person; and

(iii) Is not the person's spouse; or

(b) A person of any age has sexual intercourse with a child who:

(i) Is under the age of fourteen (14) years;

(ii) Is twenty-four (24) or more months younger than the person; and

(iii) Is not the person's spouse.

(c) Neither the victim's consent nor the victim's lack of chastity is a defense to a charge of statutory rape.

...

(3)(a) Every person who shall have forcible sexual intercourse with any person or who shall have sexual intercourse not constituting forcible sexual intercourse or statutory rape with any person without that person's consent by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment, the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.

Section 97-3-117 is the carjacking statute. It provides in part:

(1) Whoever shall knowingly or recklessly by force or violence, whether against

resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempting to do so, or by any other means shall take a motor vehicle from another person's immediate actual possession shall be guilty of carjacking.

In comparing the elements of the crimes of rape and sexual battery, it appears that sexual battery is a separate and distinct crime from that of rape. Therefore, we are of the opinion that a conviction of sexual battery under Mississippi Code Annotated, Section 97-3-95 (Revised 2000) does not deprive one of his suffrage.

Turning to the crime of statutory rape, we note that the 1890 Constitution does not specify a particular type of rape, but uses the general term rape in its list of disqualifying crimes. It does not specifically list statutory rape as a disqualifying crime, neither does it specify forcible rape.

Section 2672, Article XXVII, Revised Code of 1871 provides:

Every person who shall be convicted of rape, either by carnally and unlawfully knowing a female child, under the age of ten years; or by forcibly ravishing any female of the age of ten years and upwards, shall be punished by imprisonment in the penitentiary for life.

Therefore, at the time of the adoption of the 1890 Constitution the crime of statutory rape had already been established by the Mississippi Legislature. Since Section 241 of the 1890 Constitution did not distinguish between forcible rape and statutory rape, we are of the opinion that both crimes are disqualifying.

Insofar as the crime of carjacking is concerned, in our opinion to you dated August 18, 2000 relying on *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998) in which the Court said that theft, which is listed as a disqualifying crime, is a general label for statutorily created crimes involving an unlawful taking of property, we said that a felony conviction of armed robbery, receiving stolen property, robbery, extortion or shoplifting is disqualifying. Since carjacking also involves an unlawful taking of property, we are of the opinion that it too is disqualifying.

Sincerely,

MIKE MOORE, ATTORNEY GENERAL

By:  
Phil Carter  
Special Assistant Attorney General