

MISSISSIPPI SUPREME COURT DECISIONS – MAY 26, 2016

SUPREME COURT - CIVIL CASES

CITY OF VICKSBURG v. WILLIAMS

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - MOTION TO DISMISS - STANDARD - In examining a motion to dismiss, the Court must accept the allegations in the complaint as true and consider only whether any set of facts could support the plaintiff's action

CIVIL PROCEDURE - MOTION TO DISMISS - STANDARD - A Rule 12(b)(6) motion to dismiss should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of the claim

FACTS

Williams claims he discharged a firearm to prevent an attack by a neighbor's dog. He then called 911 to report the incident. Officers arrested him for discharging a firearm within the city limits. Williams sued the city. The city moved for dismissal under Miss. Rule of Civil Procedure 12(b)(6) and pled immunity under the Miss. Tort Claims Act (MTCA). The city's motion to dismiss was subsequently denied. The city appealed.

ISSUE

Whether the trial court erred in refusing to dismiss the complaint.

HOLDING

Because it cannot be determined beyond a reasonable doubt that Williams will be unable to prove any set of facts in support of his claim, the trial court did not err in refusing to dismiss the complaint. Therefore, the Supreme Court affirmed the judgment of the Warren County Circuit Court and remanded the case to the trial court for further proceedings.

Affirmed & Remanded 2015-IA-00860-SCT (May 26, 2016)

Opinion by Justice Randolph

Hon. Isadore W. Patrick, Jr. (Warren County Circuit Court)

John Michael Coleman for Appellant - Marshall E. Sanders for Appellee

Briefed by [Shayna Giles](#)

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IN RE MISSISSIPPI RULES OF EVIDENCE

CIVIL EVIDENCE

HOLDING

The Court amended Mississippi Rule of Evidence 103 as follows:

RULE 103. RULINGS ON EVIDENCE

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(3) *Effects of Definitive Rulings.* Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. Moreover, a party who objects to evidence of a prior conviction the court finds admissible in a definitive ruling does not waive or forfeit a claim of error by offering the evidence. But if under the court's ruling there is a condition precedent to admission or exclusion, such as the introduction of certain testimony or the pursuit of a certain claim or defense, no claim of error may be predicated upon the ruling unless the condition precedent is satisfied.

Continuing objections to evidence of the same or a similar nature or subject to the same or similar objections may in the discretion of the trial judge be allowed.

(b) **Record of Offer and Ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) **Hearing of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Plain Error.** Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Rule of Evidence 103 Amended 89-R-99002-SCT (May 26, 2016)

Briefed by [Jake Bradley](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – MAY 24, 2016

COURT OF APPEALS - CIVIL CASES

ADAMS V. STATE

CIVIL POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - PROBATION HEARINGS - RIGHT TO COUNSEL - While probationers do not necessarily have a right to representation by counsel at probation-revocation hearings, the trial court should appoint counsel when the issues relevant to the revocation hearing are complex or difficult to understand

CRIMINAL PROCEDURE - REVOCATION OF PROBATION - FAILURE TO PAY FINES - Before revoking a defendant's probation solely based on his or her failure to pay fines, the trial court should inquire as to the reasons the defendant failed to pay.

CRIMINAL PROCEDURE - REVOCATION OF PROBATION - DISCRETION - Pursuant to Miss. Code. Ann § 47-7-37(5)(b), the trial court, at the time a probationer's probation is revoked, has discretion to reinstate a defendant's entire suspended sentence

FACTS

In 2005, David Adams pleaded guilty to three counts of armed robbery. He was sentenced to fifteen years in the custody of the Mississippi Department of Corrections (MDOC) on each count to be served concurrently, with six years to serve, nine years suspended, and five years supervision probation. In 2013, MDOC filed a petition alleging that Adams violated his probation by failing to report to his probation officer and to pay court fines and fees. Adams, signed a waiver of his right to a preliminary probation-revocation hearing and after a formal revocation hearing, where Adams admitted to violating his probation, the trial court revoked Adam's probation and ordered him to serve his remaining nine years. Adams then filed a motion requesting a rehearing, which the trial court treated as a post-conviction relief (PCR) motion. The trial court denied the PCR motion. Adams appealed.

ISSUES

Whether (1) Adams did not understand his rights during the hearing, (2) the trial erred by not inquiring about Adams' failure to pay fees and court cost, (3) Adams was improperly denied a preliminary hearing, and (4) Adams' sentence was unconstitutional.

HOLDING

(1) Because Adams did not request representation, the issues discussed at his hearing were not complex, and Adams waived his right to an attorney during the revocation hearing, the issue was without merit. (2) Because the revocation of Adams' probation was not solely based on his failure to pay fines, but rather based on his failure to report, the trial court did not err by not inquiring about his inability to pay fines and fees. (3) Because Adams signed a waiver of his right to a preliminary probation-revocation hearing, and could not show any prejudice resulting from the failure to have a preliminary hearing, the issue was without merit. (4) Because, Adams admittedly violated his parole, the trial court did not abuse its discretion by imposing the remainder of his sentence. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

Affirmed 2014-CP-01508-COA (May 24, 2016)

Opinion by Chief Judge Lee

Hon. John Huey Emfinger (Madison County Circuit Court)

Pro se for Appellant Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Nash Gilmore](#)

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HARDAWAY V. HOWARD INDUS., INC.

CIVIL - INSURANCE

WORKERS COMP - BAD FAITH – ARGUABLE BASIS - A claimant may have an independent cause of action in tot for refusal to pay workers' comp in bad faith when an insurance carrier or self-insured employer denies benefits without a legitimate or arguable basis, commits a willful or malicious wrong or acts with gross and reckless disregard for the claimant's rights

WORKERS' COMP - BAD FAITH – EXHAUSTION OF ADMINISTRATIVE REMEDIES - A claimant must obtain a final judgment from the workers' comp commission that he is entitled to benefits prior to filing an action for bad faith denial of those benefits; however, the requirement to exhaust administrative remedies only means that the lawsuit cannot be filed and maintained until the claimant first obtains a final judgment that the benefits are compensable

WORKERS' COMP - BAD FAITH – EXHAUSTION OF ADMINISTRATIVE REMEDIES - Dismissal for failure to exhaust administrative remedies should be dismissed with prejudice

FACTS

Vince Hardaway and Tommie McCray filed separate lawsuits against their employer, Howard Industries, Inc. alleging bad faith refusal to investigate and pay their workers' comp claims for temporary partial disability. The bad faith claims were filed prior to a final judgment on the issue of benefits. Howard filed motions to dismiss for lack of jurisdiction and failure to state a claim for which relief can be granted. The circuit court granted Howard's motion. Hardaway and McCray appealed.

ISSUE

Whether the circuit court erred in dismissing Hardaway and McCray's cases for failure to state a claim upon which relief can be granted.

HOLDING

Because neither Hardaway nor McCray's claim for benefits was final at the time they both filed their bad faith lawsuits, the complaints were properly dismissed without prejudice for failure to exhaust administrative remedies. However, the claims will not be dismissed with prejudice for failure to state a claim upon which relief can be granted. Therefore, the Court of Appeals affirmed the judgment of the Jones County Circuit Court.

Affirmed in Part, Reversed in Part and Rendered in Part - 2014-CA-01826 (May 23, 2016)

Opinion by Judge Wilson

Hon. Billy Joe Landrum (Jones County Circuit Court)

Jonathan B. Fairbank for Appellant Richard Lewis Jr., Richard T. Lawrence, & Richard L. Yoder for Appellee

Briefed by [Katherine M. Portner](#)

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MOSHER V. MOSHER

CIVIL DOMESTIC RELATIONS

DIVORCE – PROPERTY SETTLEMENT AGREEMENT – INTERPRETATION – A property settlement agreement is a contract and the terms may be interpreted by a court when disputes arise

DIVORCE – PROPERTY SETTLEMENT – DIVISION OF MARITAL PROPERTY– To equitably divide property, the chancellor must: (1) classify the parties' assets as marital or separate, (2) value those assets, and (3) equitably divide the marital assets based upon the Ferguson factors

PERMANENT ALIMONY – PROPERTY SETTLEMENT – DIVISION OF MARITAL PROPERTY – Permanent alimony should only be considered where one spouse is left with a deficit. If the marital assets, after equitable division and in light of the parties' non-marital assets, will adequately provide for both parties, then no more need be done

DIVORCE – DIVISION OF MARITAL ASSETS – FINANCIAL DISPARITY – An equitable division of property does not always mean an equal division of property. Overall financial disparity between parties coupled with a party's lower earning proves substantial evidence for unequal distribution of marital assets

DIVORCE – DIVISION OF MARITAL ASSETS – FINANCIAL DISPARITY – No divorce shall be granted ... until all matters involving custody and maintenance of any child ... have been either adjudicated by the court or agreed upon by the parties and found to be adequate and sufficient by the court and included in the judgment of divorce

FACTS

Gary and Lori Mosher married in 1987, and separated in 2010. At the time of the divorce hearing in January 2014 the couple had been married for twenty-six years. Mr. Mosher was retired from the Navy, and working as a civilian contractor at the Stennis Space Center. Ms. Mosher was working as an assistant school teacher. Two children were born to the marriage. The older son was emancipated, and the younger daughter, eighteen years of age, was not. The

court granted a divorce based on irreconcilable differences. In the property settlement, not raised before the chancery court, the parties agreed that Lori would receive one half of Gary's military requirement, but did not specify a monthly amount, and pay \$727 per month in child support. The chancellor awarded Ms. Mosher one-half of Mr. Mosher's total monthly military retirement income, a share of the marital estate that exceeded Mr. Mosher's share by approximately \$10,555, permanent alimony, and increased his child support to \$775.85 per month. Mr. Mosher appealed.

ISSUE

Whether (1) the Chancellor lacked the authority to interpret the parties' agreement that Ms. Mosher would receive one-half of Mr. Mosher's military retirement to include both his disposable retired pay and disability compensation; (2) the chancellor erred in awarding Ms. Mosher marital assets that exceeded Mr. Mosher's share by \$10,500; (3) the chancellor erred in awarding Ms. Mosher permanent alimony; and (4) the chancellor erred in awarding Ms. Mosher child support in an amount that exceeded the amount in the property settlement.

HOLDING

(1) Because the property settlement did not specify the extent of the pension, the court may interpret the meaning of their terms where disputed. (2) Because there was a financial disparity between the parties, Lori had a greater share of the marital debt, and because Lori's lower earning capacity was due to sacrifices she had made for the marriage, the chancellor's decision of unequal distribution was not error; (3) Because the chancellor could not adequately resolve the overall financial disparity between the parties through property division alone, the chancellor did not err. (4) Because Gary failed to raise the issue of the increased child support payment before the chancery court, this issue was procedurally barred. Therefore, the judgment of the Harrison County Chancery Court was affirmed.

CONCURRENCE/DISSENT

Judge Carlton agreed with the first three issues but argued that the chancellor erred in awarding Lori a greater amount of child support than the parties agreed to. The couple submitted only certain issues to the chancellor to adjudicate and provided no consent to permit the chancellor to adjudicate child support. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Chancery Court.

Affirmed - 2015-CA-00142-COA (May 24, 2016)

En Banc Opinion by Judge Ishee – Judge Carlton (Concurring in Part and Dissenting in Part)

Hon. Jennifer T. Schloegel (Harrison County Chancery Court)

Kelly Michael Rayburn for Appellant - Lori Mosher (Pro se) for Appellee

Briefed by [Alexandra Bruce](#)

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MOSS V. MATHIS

CIVIL REAL PROPERTY

PROPERTY - PROPERTY DIVISIONS - PARTITION IN KIND - Partition in kind is the preferred method of partitioning property in Mississippi

PROPERTY - PROPERTY DIVISIONS - CHOICE IN TYPE OF PARTITION - The propriety of partitioning property by sale or in kind is determined on a case-by-case basis

PROPERTY - PROPERTY DIVISIONS - HEARINGS ON PARTITIONS - Regarding hearings on partition cases, a chancellor is not required to conduct a hearing on objections to the special commissioners' report when the landowners do not submit their objections in the form of a motion and do not notice or request a hearing

FACTS

A. Donald Mathis and Larry Mathis had a dispute with the heirs of the Moss family over the partition of approximately sixty acres of real property. Claiming a one-fifth undivided interest in the property (twelve acres), as tenants in common, the Mathises asserted that the property was not susceptible to division in kind but should be sold and the proceeds divided. The Mosses answered the complaint, claiming that the subject property was susceptible to

partition in kind. The chancellor entered an agreed order for the appointment of a special master under Miss. Code Ann. Section 11-21-15. The special master generally agreed with the recommendations in the Mathises' motion to divide the property. He found the Mathises owned an undivided one-fifth interest in the property, which should be allocated to them in kind by twelve acres on the eastern side of the tract adjoining other Mathis-owned property. He also found the majority of the Mosses wanted to keep their four-fifths undivided interest in common on the remaining forty-eight-acre tract. Subsequently the chancery court entered a "Judgment of Partition and Directions" adopting the special master's amended report for dividing the property in kind. Counsel for the Mosses did not appear at the hearing. The Mosses appealed.

ISSUE

Whether the chancellor committed manifest error in accepting the special master's amended report without a hearing.

HOLDING

Because the Mosses had opportunities to be heard or object to both the initial and amended reports and never filed an objection to either of the special master's reports, there was no error in the chancellor's decision. Therefore, the Court of Appeals affirmed the judgment of the Clarke County Chancery Court.

Affirmed - 2015-CA-00030-COA (May 24, 2016)

Opinion by Judge Barnes

Hon. Lawrence Primeaux (Clarke County Chancery Court)

Brandon I. Dorsey for Appellants - Don O. Rogers for Appellees

Briefed by [Robert T. Noland](#)

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NEWTON V. BROWN

CIVIL - OTHER

CIVIL PROCEDURE - TRIAL COURTS - JURISDICTION - Generally circuit courts are courts of law and chancery courts are courts of equity, and chancery courts are courts of limited jurisdiction, while circuit courts are courts of general jurisdiction

TRIAL COURTS - JURISDICTION - CHANCERY COURT - If there is one issue of exclusive equity cognizance, that issue can bring the entire case within subject matter jurisdiction of the chancery court and that court may proceed to adjudicate all legal issues as well

PROPERTY - CONVERSION - ELEMENTS - Conversion requires an intent to exercise dominion or control over goods which is inconsistent with the true owner's right

PARTNERSHIPS - PROPERTY - PROPERTY INTEREST - Property acquired by a partnership is property of the partnership and not of the partners individually

FACTS

Dr. Brown, Dr. Arthur Matthews, and Dr. Gerald Wessler entered into a partnership agreement to purchase an office building, the partnership owned two parcels of land including a building and parking lot. Dr. Brown and Dr. Matthew also entered into a second partnership to conduct their medical practice. In 2004 Dr. Matthews plead guilty to two counts of failure to file tax documents. Dr. Matthews received a prison sentence and a judgement against him in the amount of \$284,543 which resulted in a property lien. Dr. Brown and Dr. Matthews agreed to dissolve both partnerships. Dr. Brown bought Dr. Matthews' property interest and attempted to pay off the tax lien but Maggio, Brown's attorney, failed to send the check and improperly executed the quitclaim deed. When purchasing the property Dr. Brown was not informed of the judgement lien on the property. At a meeting with Blakeslee, the partnership accountant, and Newton, Dr. Matthews accountant, two checks from the Clinic Partnership accounts were exchanged. On that same day, Dr. Brown filed a complaint and the chancellor issued an ex parte temporary order preventing Newton and Dr. Matthews from disposing of the funds. After years of litigation, the chancellor found that Dr. Matthews violated his partnership duties to Dr. Brown, that Maggio committed simple negligence regarding the

Mississippi State Tax Commission check and the quitclaim deed, and that the checks belonged to Dr. Brown. Newton filed several motions to reconsider and was denied. Newton appealed.

ISSUE

Whether the chancellor erred in (1) refusing to transfer the case to circuit court, (2) finding Newton converted Dr. Brown's property and (3) awarding attorney's fees to Dr. Brown.

HOLDING

(1) Because Dr. Brown asserted claims that vested jurisdiction in the chancery court, the chancellor did not err in retaining jurisdiction. (2) Because Newton did not commit an egregious act by removing checks without authorization and the evidence failed to establish the checks belonged to Dr. Brown individually, the chancellor erred. (3) Because the Court finds that the court erred in determining that the checks were the personal property of Dr. Brown the judgment of attorney's fees was also in error. Therefore, the Court of Appeals affirmed in part, reversed and remanded in part, and reversed and rendered in part the judgment of the Harrison County Chancery Court.

Affirmed In Part, Reversed and Remanded In Part, and Reversed and Rendered in Part 2014-CA-01597-COA (May 24, 2016)

Opinion by Presiding Judge Griffis

Hon. Hollis McGehee (Harrison County Chancery Court)

Paul M. Newton Jr. for Appellant Peter C. Abide for Appellee

Briefed by [Rod Hickman](#)

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RUSHING V. STATE

CIVIL – POST-CONVICTION RELIEF

STATUTE - AMENDMENT - RETROACTIVE APPLICATION - A court cannot retroactively apply amendments to sentences without also retroactively applying the amendments to the elements of the offenses

STATUTE - AMENDMENT - SENTENCING - When a statute is amended to provide for a lesser penalty, and the amendment takes effect before sentencing, the trial court must sentence according to the statute as amended, unless the legislature has amended both the elements of the crime and the punishments for the redefined offenses

FACTS

On August 29, 2013, Tracey Rushing sold approximately one tenth of a gram of crack cocaine to a confidential informant. On June 23, 2014, Rushing filed a petition to plead guilty. In his petition, Rushing acknowledged that his plea was an open plea and that the maximum sentence was thirty (30) years' imprisonment. In the petition, Rushing's attorney took the position that he should be sentenced pursuant to § 41-29-139, as amended effective July 1, 2014. However, the State's position was that he should be sentenced under the statute as it read at the time of his offense. At the time of Rushing's offense, a person convicted of selling cocaine could be imprisoned for not more than thirty (30) years and would be fined no less than five thousand dollars (\$5,000) nor more than one million dollars (\$1,000,000). However, as amended by House Bill 585, the statute provided that a person convicted of selling cocaine should be punished based upon the amount of cocaine sold. The circuit judge advised Rushing that he agreed with the State and would sentence Rushing under the statute as it read at the time of Rushing's offense. Rushing confirmed that he understood the court's position and still desired to plead guilty. Rushing filed a motion for post-conviction relief in which he argued that his sentence exceeded the maximum authorized by law because he should have been sentenced under § 41-29-139 as amended. The circuit court denied Rushing's motion. Rushing appealed.

ISSUE

Whether Rushing should have been sentenced under the version of the statute in effect at the time of the offense or under the amended version in effect at the time of sentencing.

HOLDING

Since Rushing pled guilty and agreed that he sold a specific quantity of drugs, there was no principled basis to apply the amendments retroactively while applying them only prospectively where the case proceeded to trial or the plea was less specific. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

DISSENT

Under the amendments, the state would have to prove the weight of the substance sold in order to convict, which was known to the trial court through the factual basis of the plea, making Rushing entitled to the benefit of the lesser penalties.

Denied - 2015-CP-00036-COA (May 24, 2016)

En Banc Opinion by Judge Wilson - Dissent by Judge Lee

Hon. John Huey Emfinger (Madison County Circuit Court)

Pro se for Appellant - Abbie Eason Koonce (Att'y Gen. Office) for Appellee

Briefed by [Peter H. Liddell](#)

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SMITH V. STATE

CIVIL – POST-CONVICTION RELIEF

CIVIL PROCEDURE - POST-CONVICTION RELIEF - EVIDENTIARY HEARING - A trial court is not required to grant an evidentiary hearing on every motion it entertains, especially when the allegations in the motion are specific and conclusory

CIVIL PROCEDURE - POST-CONVICTION RELIEF - EVIDENTIARY HEARING - When a movant purports to have been given erroneous advice by his attorney as to his eligibility for earned time, that erroneous advice goes uncorrected, and he provides evidence other than his own statement, he is entitled to an evidentiary hearing

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - To prevail on an ineffective-assistance-of-counsel claim, a movant must show by a preponderance of the evidence (1) that counsel's performance was deficient, and (2) but for the deficiencies, the trial court outcome would have been different

EVIDENCE - WITNESSES CREDIBILITY – CONTRADICTORY STATEMENTS - A movant who argues that the prior version of his testimony under oath was untrue but the version on appeal is true will be considered completely without credibility

INEFFECTIVE ASSISTANCE OF COUNSEL - DUTIES OF COUNSEL – INFORM CLIENT OF LIKELY OUTCOME - Counsel has a duty to fairly, even if that means pessimistically, inform the client of the likely outcome of a trial based upon the facts of the case

FACTS

After being indicted on four counts of statutory rape, Sheral Smith submitted to a psychological evaluation ordered by the circuit court to determine if she was fit to stand trial. At the competency hearing, Dr. Reb McMichael testified that Smith was faking mental illness, diminished capacity, and memory loss. Several other psychologists testified that Smith was mentally ill and unfit for trial. Smith's husband testified that Smith hit her head prior to her stay in Whitfield, she had to be hospitalized for three weeks, and after her fall Smith did not understand what was happening. The circuit court found Smith competent to stand trial. Smith's attorney, John Collette, brokered a plea bargain with the State. In exchange for pleading guilty, the State recommended that Smith be sentenced to twenty years, with thirteen years suspended and seven years to serve, as opposed to the potential maximum of 120 years. The trial court went over the terms of the sentence with Smith at the plea hearing. Smith continuously acknowledged that she understood the terms. She noted that she did not have any complaints with Collette's representation and stated that her plea was voluntary and that she was fully aware of her decision. Smith signed a plea petition stating what the State would recommend and the circuit judge accepted Smith's plea and sentenced her to the State's recommendation. Smith filed a post-conviction relief motion claiming that her plea was not voluntary and knowingly made due to ineffective assistance of counsel. Several of Smith's family members submitted affidavits stating that Collette told them that Smith would serve five years

or less. The affidavits noted that Collette stated that the plea bargain was Smith's best option and that he would not represent Smith if she did not take it. Upon review, the circuit determined that an evidentiary hearing was not necessary. The court also denied her post-conviction relief motion. Smith appealed.

ISSUES

Whether the trial court erred (1) in failing to grant an evidentiary hearing on her post-conviction relief motion before denying her motion and (2) in denying her post-conviction relief motion due to ineffective assistance of counsel.

HOLDING

(1) Because the trial court analyzed the post-conviction relief motion – which included numerous affidavits and the State's response, the transcripts of the plea and sentencing hearing and the competency hearing, the evidence entered at the competency hearing, and Smith's criminal file – the court was sufficiently able to determine whether Smith's claim had merit without an evidentiary hearing. Further, a hearing was not warranted as the misinformation that Smith allegedly received from Collette about the terms of her plea did not go uncorrected since the terms of her plea were listed in her signed plea petition, the circuit judge reviewed the terms with her, and she stated at the hearing that she understood and accepted them. (2) Because the transcript of the plea hearing showed that Smith was advised by the trial court of the exact terms of her sentence, the petition outlined the terms, at no time in the hearing or petition did anyone note that Smith would be eligible for early release or earned time, and Smith was explicitly told the length of her sentence and indicated clearly that she understood them and accepted them and that she had no complaints or problems with Collette's representation of her, Smith's argument that she was lying to the trial court and telling the truth now was without merit. Additionally, Collette's statement that Smith may never see her home again if she did not take the plea deal did not constitute ineffective assistance of counsel since it was true: Smith was facing up to 120 years in prison and Smith would not have been able to go home for at least thirty years if she received a maximum punishment on any of the four counts. Therefore, the Court of Appeals affirmed the Rankin County Circuit Court.

Affirmed - 2014-CA-01285-COA (May 24, 2016)

Opinion by Judge Ishee

Hon. William E. Chapman III (Rankin County Circuit Court)

William B. Kirksey, Nathan H. Elmore, & Bruce L. Barker for Appellant - Barbara Byrd (Att'y Gen. Office) for Appellee

Briefed by [Abby Abide](#)

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COURT OF APPEALS - CRIMINAL CASES

BRIGGS V. STATE

CRIMINAL – FELONY

CRIMINAL PROCEDURE - APPEAL - MOTIONS - It is elemental that errors cannot be raised in the Court of Appeals for the first time on appeal. A trial judge cannot be put in error on a matter which was not presented to him for decision

CRIMINAL PROCEDURE - APPEAL - JURY INSTRUCTIONS - It is incumbent upon the defendant to request jury instructions, a trial court is not required to sua sponte give such instructions

CRIMINAL PROCEDURE - APPEAL - INEFFECTIVE ASSISTANCE OF COUNSEL - Where the record cannot support an ineffective assistance of counsel claim of direct appeal, the appropriate conclusion is to deny relief, preserving the defendant's right to argue the same issue through a post-conviction relief motion

CRIMINAL PROCEDURE - WITNESS TAMPERING - §97-9-115 - A person commits the crime of tampering with a witness if he intentionally or knowingly attempts to induce a witness or a person he believes will be called as a witness in any official proceeding to: (a) Testify falsely or unlawfully withhold testimony; or (b) Absent himself from any official proceeding to which he has been legally summoned

FACTS

In Dec. 2013 a woman was walking through a mall parking lot with her son and several shopping bags. When she reached her car, she put the bags down and a man hit her on the head and stole her shopping bags. When authorities arrived, this woman described her attacker as a black male wearing a reddish shirt. Shortly after, a store in the mall alerted the police and mall security that a man was attempting to return several of the stolen items. The police arrested Trevioun Briggs and a search of his car revealed other stolen items and an orange colored sweater. Mall security tapes showed Briggs attempting to return the stolen items at other stores as well. While incarcerated for the robbery, Briggs made several phone calls, which were recorded. The recordings showed Briggs asking for an individual to provide an alibi for him for the times he is not shown on mall security and as a result was further charged with witness tampering. At trial, Briggs represented himself with the help of appointed counsel. The jury convicted Briggs on both counts. Briggs appealed.

ISSUES

Whether (1) the circuit court erred by not properly instructing the jury regarding the case being circumstantial, (2) his counsel was constitutionally ineffective for failing to request a proper circumstantial-evidence jury instruction, (3) the indictment for witness tampering was flawed, (4) the evidence was insufficient to convict him of witness tampering and (5) the two charges are subject to reversal for retroactive joinder.

HOLDING

(1) Because the defendant did not object to the judge's opinion that the case was non-circumstantial nor did he request a circumstantial evidence instruction, the circuit court judge did not err in not presenting the jury with a circumstantial evidence instruction. (2) Because there was nothing brought before the court to support an ineffective assistance of counsel claim, the court declined to review it on direct appeal. (3) Because Briggs contacted the person to fabricate an alibi, he was essentially making the person a witness. The use of the word may over will is a moot point and the indictment was not flawed. (4) Because the transcript shows that Briggs was asking for someone to provide him with varying alibis, the evidence was sufficient to convict him of witness tampering. (5) Because Briggs was properly charged with and convicted of witness tampering the two charges were properly joined and adjudicated. Therefore, the Mississippi Court of Appeals affirmed the judgment of the Madison County Circuit Court.

Affirmed 2014-KA-00016-COA (May 24, 2016)

Opinion by Judge Ishee

Hon. John Huey Emfinger (Madison County Circuit Court)

Justin T. Cook (Public Def. Office) for Appellant Jeffery A. Klingfuss (Att'y Gen. Office) for Appellee

Briefed by [Darlan Etienne](#)

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JORDAN V. STATE

CRIMINAL - FELONY

EVIDENCE – ADMISSIBILITY - VICTIM'S CHARACTER - Evidence of prior violent acts of the victim, when known to the defendant, are relevant and admissible under Miss. Rule of Evidence 404(b) to show the defendant's state of mind at the time of the incident and the reasonableness of his use of force

EVIDENCE - ADMISSIBILITY - VICTIM'S CHARACTER - If the refusal of evidence of the character of the victim affects the defendant's right to a fair trial; reversal is required unless "on the whole record, the error was harmless beyond a reasonable doubt"

FACTS

Carl Jordan shot David Carter multiple times in the buttocks during an argument on December 10, 2011. According to Jordan, he shot Carter because he believed that Carter was about to shoot him and his fiancée Tanya. Tanya and Carter had recently divorced. At trial, Jordan proffered Tanya's testimony regarding a long history of abuse and threats

by Carter, which Jordan was aware of at the time of the shooting. The trial court found that the evidence was too remote in time because it had largely occurred prior to the separation, about two years before the shooting. Jordan was tried and convicted of aggravated assault. He was sentenced to fifteen years' imprisonment for the underlying offense and an additional five years as an enhancement for the use of a firearm. Jordan appealed.

ISSUE

Whether the trial court abused his discretion by excluding evidence regarding the victim's prior bad acts.

HOLDING

Because the prior incidents of violence were linked with more contemporaneous ones and formed a pattern of a continuing course of conduct, proffered evidence that was initially thought to be too remote to be admissible actually was found to not be harmless beyond a reasonable doubt, thus requiring its reversal. Therefore, the Court of Appeals reversed and remanded the Harrison County Circuit Court's decision.

Reversed and Remanded - 2014-KA-00489-COA (May 24, 2016)

Opinion by Judge Fair

Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court)

Michael W. Crosby for Appellant Laura Hogan Tedder (Att'y Gen. Office) for Appellee

Briefed by [Autumn T. Breeden](#)

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STRICKLAND V. STATE

CRIMINAL FELONY

CRIMINAL - HOMICIDE - DEFENDANT'S TESTIMONY AS SOLE EYEWITNESS - Where the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness, or by the physical facts or by facts of common knowledge

CRIMINAL - HOMICIDE - ACQUITTAL BASED UPON DEFENDANT'S EYEWITNESS TESTIMONY - In a homicide case, the defendant's version of the events must be reasonable and credible before he is entitled to an acquittal

CRIMINAL - HOMICIDE - HEAT-OF-PASSION MANSLAUGHTER - To return a verdict of guilty for heat-of-passion manslaughter, a jury must find that the defendant killed the victim in a state of violent and uncontrollable rage suddenly aroused by immediate and reasonable provocation

FACTS

George Strickland and his wife, Patricia, had been separated for a number of years. However, Patricia and her boyfriend, Christopher George, would stay at Strickland's house for a few days every month to allow George to check in with his parole officer. On Jan. 31, 2011, a confrontation between Strickland and George ended with George being killed. Lloyd Lash of the Lowndes County Sheriff's Department responded to the scene and arrested Strickland. Lash testified at trial that Strickland told him that Strickland caught Patricia and George having sexual intercourse. After Strickland was read his Miranda rights, however, Strickland claimed that Patricia and George were trying to kill him. At trial, conflicting testimony emerged as to the nature of the events that lead to George's death. Tommy Brown, the owner of the body shop next door to Strickland's house, testified that Strickland said that Patricia and George were trying to kill him. However, Brown did not mention these claims in his statement to police the day of the shooting. A customer at Brown's body shop testified that Strickland told Brown that Strickland shot George because he caught George and Patricia having sexual intercourse. An employee at Brown's body shop denied hearing what the customer heard Strickland say. A jury found Strickland guilty of manslaughter but not guilty of aggravated assault. Strickland filed for a judgement notwithstanding the verdict or, in the alternative, a new trial, which the trial court denied. Strickland appealed.

ISSUE

Whether Strickland was entitled to (1) an acquittal under *Weathersby* because Strickland was the only eyewitness to the homicide and his version of the events must be accepted as true, or (2) a new trial because the verdict was against the overwhelming weight of the evidence.

HOLDING

Because Strickland failed to specifically argue the *Weathersby* rule before the trial court as a ground for a directed verdict, the Court determined that it could not review the issue. Notwithstanding the procedural bar, the Court noted that Strickland's version of the events was not credible because Strickland had repeatedly contradicted himself and changed his story multiple times. Taking the evidence in the light most favorable to the verdict, the Court could not find that allowing the verdict to stand would sanction an unconscionable justice. The facts available in the record indicated that Strickland was sufficiently provoked to allow a jury to find Strickland guilty of heat-of-passion manslaughter. Therefore, the Court affirmed the judgment of the Lowndes County Circuit Court.

Affirmed 2014-KA-01815-COA (May 24, 2016)

Opinion by Chief Judge L. Joseph Lee

Hon. James T. Kitchens Jr. (Lowndes County Circuit Court)

Benjamin Allen Suber (Office of Pub. Def.) for Appellant Abbie Eason Koonce (Att'y Gen. Office) for Appellee

Briefed by [William H. Holley](#)

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