

MISSISSIPPI SUPREME COURT DECISIONS – DECEMBER 14, 2017**SUPREME COURT - CIVIL CASES****HIGH V. KUHN****CIVIL - EMINENT DOMAIN**

EMINENT DOMAIN - UNSUCCESSFUL CLAIMS - ATTORNEY'S FEES - Under Miss. Code Ann. § 11-27-37, a defendant may be entitled to attorney's fees at the trial court's discretion if the judgment be that the plaintiff is not entitled to a judgment condemning the property

EMINENT DOMAIN - PRIVATE CLAIMS - LOCATION OF PROPERTY - Miss. Const. Art. 4, § 110 prohibits condemning for a statutory private road any property located within an incorporated town or city

CIVIL PROCEDURE - SANCTIONS - FRIVOLOUS FILINGS - The Mississippi Litigation Accountability Act authorizes the award of attorney's fees as a sanction for a frivolous filing, which is defined as having no hope of success

FACTS

In a 2016 case, the Mississippi Supreme Court ruled that Todd and Angela Kuhn were not entitled to condemn Cheryl High's property for a private road. Following the Court's mandate, High moved the Harrison County Special Court of Eminent Domain for an award of attorney's fees and expenses under Miss. Code Ann. § 11-27-37. The special court subsequently held that § 11-27-37 did not apply and denied High's request. High appealed.

ISSUE

Whether the trial court erred in holding Miss. Code Ann. § 11-27-37 awarding attorney's fees did not apply to the present case.

HOLDING

Because the Kuhns were not entitled to a judgment condemning the property, High may be awarded attorney's fees at the trial court's discretion. Therefore, the Supreme Court reversed and remanded the judgment of the Harrison County Special Court of Eminent Domain.

Reversed & Remanded - 2017-CA-00092-SCT (Dec. 14, 2017)

Opinion by Justice Maxwell

Hon. Michael H. Ward (Harrison County Special Court of Eminent Domain)

Steven Nicholas Newton for Appellant - Virgil G. Gillespie for Appellees

Briefed by [Jacob Swatley](#)

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IN RE ESTATE OF JOHNSON**CIVIL - OTHER**

PROPERTY - INTER VIVOS GIFT - ELEMENTS - It is well-settled that to show that an inter vivos gift was given, a party must prove the following elements by clear and convincing evidence: (1) the donor was competent to

make a gift, (2) the donation was a voluntary act and the donor had donative intent, (3) the gift must be complete and not conditional, (4) delivery was made, and (5) the gift was irrevocable

PROPERTY - INTER VIVOS GIFT - DELIVERY REQUIREMENT - Delivery and relinquishment of control are requisites of an inter vivos gift; delivery—either actual or constructive—must be unconditional and in such a manner that the donor retains no control or dominion over it

ESTATE PLANNING - POWER OF ATTORNEY - DUTY & AUTHORITY - As with other principal-agent relationships, the party trusted with the responsibility in the power of attorney owes certain duties to the principal; it is fundamental law that an agent owes his principal absolute good faith and fidelity, and he cannot in the exercise of his authority as agent acquire property or interest therein rightfully belonging to his principal without full disclosure and free consent of his principal

PROPERTY - CERTIFICATE OF DEPOSIT - PRESUMPTIVE TITLE - Pursuant to Miss. Code Ann. § 81-5-63, the creation of a certificate of deposit creates an automatic presumption of intent to give ownership to the persons named on the CD, whether living or as survivors; such presumptive title may be defeated upon proof of forgery, fraud, duress, or the un rebutted presumption of undue influence

FACTS

In 2005, Dorothy Johnson inherited a large sum of money following her sister's death. Dorothy purchased a number of certificates of deposit (CDs). Dorothy became bedridden in 2010, and her daughter, Sheila West, assumed most of the responsibilities of taking care of Dorothy. Acting through a durable power of attorney granted by Dorothy, Sheila West removed her brother's, niece's, and nephew's names from the CDs originally created by Dorothy and replaced them with her own name and the names of her two daughters. After Dorothy died, Sheila's brother, Ron Johnson, challenged the validity of Dorothy's will. Recognizing that the CDs were not assets of the estate, Ron abandon the will contest and instead petitioned the chancery court to set aside the CD amendments as an improper transfer of an inter vivos gift. Following a trial on the matter, the chancellor found that Sheila did not overcome a presumption of undue influence in making what amounted to inter vivos gifts and thereby reverted ownership of the CDs to their original form. After a trial, the chancellor set aside the changes to the CDs as improper amendments to an inter vivos gift and ordered them to be returned to original form and distributed. Sheila appealed. Sheila then failed to post the supersedeas bond as required by the chancellor. The chancellor rejected Sheila's request that her half of the CDs be used as collateral for the bond, and the CDs were disbursed as directed in their 2005 form.

ISSUES

Whether (1) the transfers in 2005 and 2010 can be considered inter vivos gifts; (2) Sheila abused her authority under the power of attorney by removing the original names and replacing them with her name and her daughters' names; and (3) the chancellor abused his discretion by failing to approve a supersedeas bond as requested by Sheila and thereafter disbursing the CDs.

HOLDING

(1) Because Dorothy maintained her status as a CD owner, Sheila's transfer did not create an inter vivos gift. The record clearly showed that Dorothy retained control and dominion over the CDs to the extent that she could remove them from the safe-deposit box and cash them out at any time, so the Supreme Court could not conclude that either Dorothy or Sheila effected a valid inter vivos gift through the creation of the CDs or the 2010 transfers of ownership. (2) Because Ron established that a confidential relationship existed and that Sheila potentially abused the relationship, a presumption of undue influence arose. Sheila failed to rebut the presumption of undue influence, as her actions to amend the CDs were not in good faith and did not reflect Dorothy's intent. Accordingly, Sheila abused her authority under the power of attorney. (3) Because the issue was moot and there was no public-interest need to address the issue, the Supreme Court declined to address it. Therefore, the Supreme Court affirmed the judgment of the Tippah County Chancery Court.

PARTIAL CONCURRENCE/DISSENT

Justice Coleman agreed with the majority's determination that there was no inter vivos gift. He dissented, however, from the majority's conclusion that Sheila abused her power of attorney. The chancellor did not approach the undue influence issue "head-on," and Justice Coleman would remand for the chancery court to conduct an appropriate analysis of the power of attorney issue.

Affirmed - 2016-CA-00338-SCT (Dec. 14, 2017)

En Banc Opinion by Justice Beam - Partial Concurrence/Dissent by Justice Coleman
Hon. Glenn Alderson (Tippah County Chancery Court)
B. Sean Akins for Appellant - Joe M. Davis for Appellee
Briefed by [Allison A. Bruff](#)

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LEFOLDT V. RENTFRO

CIVIL - FEDERALLY CERTIFIED QUESTION

MISSISSIPPI TORT CLAIMS ACT - DEFINITIONS - PLAIN LANGUAGE - Based on the plain language of the MTCA, the Act defines a claim as any demand to recover damages from a governmental entity as compensation for injuries and a claimant as any person seeking compensation under the Act, whether by administrative remedy or through the courts

MISSISSIPPI TORT CLAIMS ACT - STATUTE OF LIMITATIONS - There is a one-year statute of limitations for all claims brought under the Act

FACTS

Natchez Regional Medical Center (NRMC) filed for Chapter 9 bankruptcy, and H. Kenneth Lefoldt was appointed trustee for the liquidation trust. Lefoldt sued NRMC's former directors and officers in the United States District Court for the Southern District of Mississippi, alleging breach of fiduciary duties of care, good faith, and loyalty. The directors and officers sought dismissal under Federal Rule of Civil Procedure 12(b)(6) and argued that they were immune under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1, *et seq.* The District Court agreed and granted dismissal to the directors and officers. Lefoldt appealed, and the Fifth Circuit certified the federal question.

CERTIFIED QUESTION

(1) Does the MTCA furnish the exclusive remedy for a bankruptcy trustee standing in the shoes of a public hospital corporation against the employees of directors of that public corporation? (2) If the answer to the foregoing question is in the affirmative, does the MTCA permit the trustee to pursue any of the claims identified in his complaint against the officers and directors of NRMC in their personal capacity?

ANSWER

Because the purpose of the MTCA is to protect public entities from being sued for the acts of their servants, the Act does not refer to claims by the sovereign. Therefore, the MTCA does not bind the hands of the sovereign from pursuing any civil claim and the certified question is answered in the negative.

DISSENT

Presiding Justice Kitchens argued that the MTCA applies to any cause of action against any community hospital or its employees, so the MTCA provides the exclusive remedy for a public hospital's bankruptcy trustee who, on behalf of the public hospital, sued former officers and directors of that public hospital. Therefore, the first question should have been answered in the affirmative. Additionally, he argued that the MTCA does not permit the trustee to pursue claims of breach of fiduciary duty or gross negligence against the former directors and officers of NRMC in their personal capacities, so the second question should have been answered in the negative.

Certified Question Answered - 2017-FC-00486-SCT (Dec. 14, 2017)

En Banc Opinion by Presiding Justice Randolph - Dissent by Presiding Justice Kitchens
Brent B. Barriere, Alysson Leigh Mills, D. Skylar Rosenbloom, Rebecca Sha, Douglas Draper, Leslie Collins, Greta Brouphy, John Thomas Lamar Jr., Taylor Allison Heck, & John Thomas Lamar III for Appellant - Roy A Smith Jr., Steven James Griffin, & Michael F. Myers for Appellee
Briefed by [Mary-Katherine Black](#)

TUNICA CTY. BD. OF SUPERVISORS V. HWCC-TUNICA, LLC

CIVIL - OTHER

MUNICIPALITIES - BOARD OF SUPERVISORS - PROCEDURE FOR APPEAL - Miss. Code Ann. § 11-51-77 lays out the procedure for challenging a decision of boards of supervisors as to the assessment of taxes, and a Bill of Exceptions is not a prerequisite for appeal under this section where only the decision (not the actions) of the board of supervisors is in review

MUNICIPALITIES - BOARD OF SUPERVISORS - PROCEDURE FOR APPEAL - Miss. Code Ann. § 11-51-75 lays out the procedure for challenging a judgment or decision of a board of supervisors through a Bill of Exceptions, the purpose of which is to bring the Board's proceedings before the court where the actions of the Board are at issue

TAX - TAX LEVIES - NOTICE OF PUBLIC HEARING - Miss. Code Ann. § 27-39-203 governs the procedures by which taxing entities must provide notice of public hearing; statutory notice requirements are mandatory, not directory, actual notice is not sufficient, and noncompliant tax levies are void

FACTS

On August 22, 2014, The Tunica County Board of Supervisors (the "Board") published in the *Tunica Times* a notice of a public hearing to take place on August 28 on proposed *ad valorem* tax levies and increased millage rates for the 2014-15 fiscal year. On September 15, with no hearing having taken place, the Board met and approved the 2015 budget, including the tax levies and increased millage rates. On September 19, 2014, another public hearing was advertised in the *Tunica Times*, and this hearing did in fact take place on September 30. On October 10, HWCC-Tunica, who owns and operates Hollywood Casino-Tunica, filed a Bill of Exceptions/Notice of Appeal with the circuit court, arguing the tax levies were void because the Board had failed to satisfy statutory notice requirements for *ad valorem* tax levies. After the tax had been assessed and paid by HWCC, it supplemented the Bill of Exceptions with an additional request to be refunded the taxes it had paid under protest. A hearing on the Bill of Exceptions took place in June 2015, and the Board argued that the circuit court lacked jurisdiction to hear the appeal, because the Bill of Exceptions had not been timely filed and had not been signed by the president of the Board. In October 2015, the circuit court entered an order in favor of HWCC, holding that because the Board failed to comply with statutory advertising requirements, which it found to be mandatory, HWCC was overcharged for those *ad valorem* taxes it paid for the 2014-2015 fiscal year. The Board appealed.

ISSUES

Whether the circuit court (1) lacked jurisdiction over the tax levy appeal, and (2) erred in holding the Board failed to comply with the mandatory advertising requirements of Miss. Code Ann. § 27-39-203(2).

HOLDING

(1) Because the filing of a bill of exceptions was not required to grant the circuit court jurisdiction, payment of the bond was not required because HWCC had paid the taxes under protest, and HWCC's failure to obtain the president of the Board's signature was insufficient to defeat jurisdiction, thus the circuit court did not lack jurisdiction over the tax levy appeal. (2) Because the Board failed to comply with the mandatory advertising requirements before the September 15 tax levy and millage increase, and because simply requiring the Board to give proper notice before funds are spent would be inadequate to preserve the statutory strict compliance requirement, the circuit court did not err in ordering the tax void. Therefore, the Supreme Court affirmed the judgment of the Tunica County Circuit Court.

CONCURRENCE

Justice Coleman argued that the Miss. Code Ann. § 11-51-75 signature requirement is not a jurisdictional prerequisite that must be met before the circuit court can hear such an appeal because the statute in question neither mandated nor

forbid that the courts do anything whatsoever. Additionally, although the bill of exceptions itself is a jurisdictional requirement for the circuit court to hear an appeal via § 11-51-75, imperfections in it go to the adequacy of the record rather than the authority of the court to hear the appeal. Because HWCC did not follow the statutory mechanism by filing the bill of exceptions and a notice of appeal directly in the circuit court rather than filing its bill of exceptions with the Tunica County Board of Supervisors, the bill of exceptions may have been untimely. However, Justice Coleman found the trial court committed no error in light of confusing precedent on the matter and the Board's failure to attack the completeness of the record.

Affirmed - 2015-CA-01645-SCT (Dec. 14, 2017)

En Banc Opinion by Presiding Justice Kitchens - Concurrence by Justice Coleman

Hon. Charles E. Webster (Tunica County Circuit Court)

Julian Dennard Miller & Melvin David Miller II for Appellant - Alfred Thomas Tucker III for Appellee

Briefed by [Daniel Tankersley](#) & [Marilyn Higdon](#)

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SUPREME COURT - POST-CONVICTION RELIEF

STATE V. RUSSELL

CIVIL - POST-CONVICTION RELIEF

CRIMINAL - DEATH PENALTY - INTELLECTUAL DISABILITY - Imposing the death penalty on intellectually disabled persons violates the Eighth Amendment prohibition on cruel and unusual punishments

CRIMINAL - INTELLECTUAL DISABILITY - DETERMINATIONS - Determinations of intellectual disability for the purposes of the Eighth Amendment must be based on medical expertise

FACTS

Willie C. Russell stabbed and killed a corrections officer while an inmate at the State Penitentiary in 1989. Russell was convicted and sentenced to death. Russell filed for post-conviction relief and while his petition was still pending, the United States Supreme Court held that imposing a death penalty on an intellectually disabled person violates the Eighth Amendment. Russell amended his petition to include the claim that he was intellectually disabled. Awaiting a hearing on this issue, Russell was evaluated in a separate assault charge for intellectual disabilities, but not specifically on whether or not his disability would prevent the State from executing him. The State's expert witness concluded that the evaluation performed was not sufficient to determine Russell's disability for the purposes of the death penalty. The trial court, aware that Russell had acknowledged the evaluation was not a complete *Atkins* assessment, ruled that the state had not shown good cause to perform any further test. After an *Atkins* hearing to determine Russell's intellectual disability, the trial court entered an order vacating Russell's death sentence. The State of Mississippi appealed.

ISSUE

Whether the trial court abused its discretion by denying the State's motion to evaluate Russell on his *Atkins* claim.

HOLDING

Because the evaluation in Russell's assault case was not sufficient for the State's expert to form an opinion to a degree of reasonable physiological certainty, the trial court should have granted the State's motion for further evaluation. Therefore, the Supreme Court reversed and remanded the judgment of the Sunflower County Circuit Court.

DISSENT

Chief Justice Waller disagreed with the majority that the record was inadequate and insufficient for Russell's *Atkins* evaluation. He argued that the trial court did not abuse its discretion in denying the State's motion for further evaluation.

Reversed & Remanded - 2015-KA-00245-SCT (Dec. 14, 2017)

Opinion by Justice Maxwell - Dissent by Chief Justice Waller

Hon. Betty W. Sanders (Sunflower County Circuit Court)

LaDonna C. Holland (Att’y Gen. Office) for Appellant - Richard J. Bourke & David P. Voisin for Appellee

Briefed by [Jay Michael Patterson](#)

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SUPREME COURT - ORDERS

CHAMBLISS V. STATE

COURT ORDER

FACTS

Rothell Chambliss was indicted for burglary of a dwelling in Jefferson County. During voir dire, the trial judge inquired whether any of the venire members knew Chambliss. One prospective juror, William Marks, stated that he previously came to court to testify against Chambliss for a similar crime in the year or two preceding this trial. The prosecutor then interrupted, and the trial judge questioned Marks—in front of the entire panel—about whether he could be impartial. The judge then proceeded with voir dire. Chambliss’s attorney approached the bench and, outside the hearing of the venire, moved for a mistrial on the grounds of Marks’s statements in front of the jury. The prosecutor did not oppose the motion for a mistrial, but the trial judge decided Marks’s statements created no prejudice against Chambliss. Defense counsel later challenged Marks for cause, which was granted. After all challenges were made and ruled upon, Chambliss’s attorney again moved for a mistrial based on Marks’s earlier statements. The motion was denied. The jury found Chambliss guilty, and the trial judge overruled Chambliss’s motion for a new trial or, in the alternative, a JNOV. Chambliss petitioned for writ of certiorari.

ORDER

The Supreme Court considered the petition and found it should be denied.

OBJECTION

Presiding Justice Kitchens objected to the Order, arguing that Marks’s statement about Chambliss “breaking in” to another house in the recent past was an improper comment that potentially prejudiced the jury. Presiding Justice Kitchens emphasized that breaking in is a specific element of the crime of burglary, which Chambliss was on trial for. He cited the trial judge’s failure to quickly interrupt the prospective juror’s statement and failure to instruct the jury to disregard that statement as key reasons this case differs from previous cases affirming the denial of a mistrial based on improper venireperson comments. Presiding Justice Kitchens would grant certiorari.

Writ Denied - 2016-CT-00316-SCT (Dec. 12, 2017)

Order by Presiding Justice Randolph - Objection by Presiding Justice Kitchens

Briefed by [Allison A. Bruff](#)

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IN RE: CODE OF JUDICIAL CONDUCT

COURT ORDER

ORDER

This en banc Order amends Canon 5F of the Code of Judicial Conduct by specifying when a Special Committee on Judicial Election Campaign Intervention (“Special Committee”) shall be created and by delineating its duties and responsibilities in reviewing allegations of ethical misconduct in campaigns for judicial office. Additionally, this Order mandates that the Clerk of the Court spread it upon the minutes of the Court and forward a true copy to West Publishing Company for publication in the next edition of the *Mississippi Rules of Court* and in the *Southern Reporter, Third Edition, (Mississippi Edition)*.

[Exhibit A](#), referenced in and attached to the Order, shows that the Special Committee shall consist of five members. The Chief Justice of the Supreme Court; the senior justices of the Supreme Court Districts 1, 2, and 3, excluding the Chief Justice; and the Chief Judge of the Court of Appeals shall each nominate one member. All members of the Special Committee must be attorneys who are licensed to practice in the state of Mississippi. Any action taken by the Special Committee must be made by a majority vote, but should any nominating party fail to make an appointment, three members suffice to conduct the Special Committee’s business. In the year of its service, a Special Committee shall be appointed no later than February 1, and it exists until ninety days following judicial elections or for a period as long as is necessary to consider matters submitted to it within that time. However, if any nominating party runs as a candidate during the year for which a Special Committee shall be appointed, that party may not nominate a member for the Special Committee. The Canon describes where the appointing authority shifts in such an instance. If the Chief Justice of the Supreme Court runs as a candidate for judicial office, the appointing authority shifts to the next senior justice of the Supreme Court who is not charged with appointing authority under Canon 5F and who is not a candidate for judicial office that year. If a senior justice of the Supreme Court Districts 1, 2, or 3, excluding the Chief Justice, runs as a candidate for judicial office, the appointing authority shifts to the next senior justice of the same Supreme Court District who is not charged with appointing authority and who is not a candidate for judicial office that year. If the Chief Judge of the Court of Appeals runs as a candidate for judicial office, the appointing authority shifts to the next senior judge of the Court of Appeals who is not seeking judicial office.

Ordered 89-R-99013-SCT (Dec. 13, 2017)

En Banc Order by Justice King

Briefed by [Katherine Farese](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – DECEMBER 12, 2017

COURT OF APPEALS - CIVIL CASES

ALLEN V. JACKSON SQUARE APT. HOMES, LLC.

CIVIL - WRONGFUL DEATH

CIVIL PROCEDURE - DISCOVERY - REQUESTS FOR ADMISSIONS - A court has wide discretion to grant withdrawal or amendment of any admissions when (1) the presentation of the merits of the action will be subverted and (2) the party who obtained the admission fails to show that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits

CIVIL PROCEDURE - SUMMARY JUDGMENT - BURDEN - When a motion for summary judgment is made and supported by evidence that there is no material fact, the non-movant party may not rest upon the allegations in its pleadings, but rather set forth specific facts showing there is a genuine issue for trial

CIVIL PROCEDURE - SUMMARY JUDGMENT - GENUINE ISSUE - A non-movant party may not escape summary judgment by alleging that fact issues might arise if additional discovery were permitted; a court will only deny summary judgment for insufficient facts on the basis of the non-movant’s affidavits that sufficiently demonstrate he cannot present facts essential to justify his opposition

FACTS

One night, a fire occurred in the apartment resulting in the death of Catina Staffney, who was the only occupant unable to vacate the unit. The unit was in Melrose Place Apartments, owned and managed by Jackson Square. Persephany Allen, daughter of Catina, brought suit against Jackson Square for her mother's wrongful death. Jackson Square served Allen with written discovery, including requests for admissions, on February 26 and again February 29 at Allen's request. Allen failed to respond to Jackson's written discovery within the required thirty days, which deemed the admissions were conceded by operate of law. Jackson Square sent a good-faith request on April 12 to Allen for responses to discovery within ten days, which Allen acknowledged and confirmed would be provided. The following day, Jackson Square moved for summary judgment based, in part, on Allen's failure to respond to the requests for admission. On April 28, Allen moved to withdraw the admissions and acknowledge her failure to timely respond to the requests for admissions. Allen, however, did not respond to Jackson Square's request for admissions until less than 24 hours before the hearing on the motion for summary judgment. During the hearing, Jackson Square argued that the ten-day extension could not have included the request for admissions, since it did not have the authority to extend the period for timely responses to requests for admissions. The circuit court allowed Allen to withdraw most of the admissions, finding that she reasonably believed that a ten-day extension included an extension for responses to the request for admission, but nevertheless granted Jackson Square's motion for summary judgment on the grounds that Allen failed to set forth particularized facts showing there was a genuine issue for trial. Both parties appealed.

ISSUES

Whether the trial court erred (1) in allowing the withdrawal of the admissions or (2) in granting summary judgment in favor of Jackson Square.

HOLDING

(1) Because Allen reasonably understood Jackson Square's ten-day extension to include responses to the request for admissions, the trial court did not err in allowing the withdrawal of the admissions. (2) Because a non-movant party carries the burden of demonstrating that there is a genuine issue of fact for trial, and because Allen neither propounded any written discovery, nor filed affidavits supporting an argument that additional discovery would yield evidence essential to opposition to summary judgment, the trial court did not err in granting summary judgment to Jackson Square. Therefore, the Court of Appeals affirmed the summary judgment of the Hinds County Circuit Court.

Affirmed - 2016-CA-00876-COA (Dec. 12, 2017)

Opinion by Presiding Judge Griffis

Hon. William A. Gowan Jr. (Hinds County Circuit Court)

Jeffrey Matthew Graves & Dennis C. Sweet III for Appellant - Doris Theresa Bobadilla & Matthew Miles Williams for Appellees

Briefed by [D. Kirkwood Palmer](#)

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CRATIN V. FISHER

CIVIL - STATE BOARDS AND AGENCIES

CIVIL PROCEDURE - SERVICE OF PROCESS - SERVICE UPON THE STATE - Pursuant to Miss. R. Civ. Pro. 4(d)(5), service of process upon the State of Mississippi or any one of its departments, officers, or institutions is made by delivering a copy of the summons and complaint to the Attorney General of the State of Mississippi

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - APPEAL OF AGENCY DECISION - Miss. Code Ann. § 47-5-807 provides that any offender who is aggrieved by an adverse decision rendered pursuant to any administrative-review procedure may, within thirty days after receipt of the agency's final decision, seek judicial review of the decision

FACTS

In July 2008, Christopher Cratin was convicted of two counts of fondling and one count of sexual battery and sentenced to concurrent fifteen-year terms for his convictions. Cratin filed a grievance through the MDOC's Administrative Remedy Program (ARP) in April 2016, asserting that he was entitled to receive earned time, and that MDOC's policy regarding the exclusion of sex crime offenders from meritorious earned time (MET) violated state law. In June 2016, Cratin received the MDOC's decision denying his ARP grievance and appealed to the Hinds County Circuit Court. In September 2016, the circuit court entered an order of dismissal. The circuit court acknowledged that it was unsure whether it could exercise jurisdiction over Cratin's complaint. Further, the circuit court stated if it could exercise jurisdiction over Cratin's appeal, the MDOC's decision and policy prohibiting MET credit to sex offenders was not violative of state law. Cratin appealed.

ISSUE

Whether the Hinds County Circuit Court had jurisdiction to hear Cratin's appeal.

HOLDING

Because Cratin did not properly serve the State, the Hinds County Circuit Court lacked jurisdiction to hear his appeal. Therefore, the Court of Appeals vacated and remanded the judgment of the Hinds County Circuit Court for dismissal for lack of jurisdiction.

PARTIAL CONCURRENCE/DISSENT

Judge Carlton agreed that the circuit court lacked jurisdiction to hear Cratin's appeal. However, she argued that the Court of Appeals had the power to affirm the circuit court's order of dismissal instead of remanding it.

Vacated & Remanded - 2016-CP-00259-COA (Dec. 12, 2017)

Opinion by Judge Westbrook - Partial Concurrence/Dissent by Judge Carlton

Hon. William A. Gowan Jr. (Hinds County Circuit Court, First Judicial Dist.)

Pro se for Appellant - Darrell Clayton Baughn & Anthony Louis Schmidt Jr. (Att'y Gen. Office) for Appellee

Briefed by [Luke Kelly](#)

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CRONIER V. ALR PARTNERS

CIVIL - REAL PROPERTY

CIVIL - REAL PROPERTY - ADVERSE POSSESSION - Adverse possession of real property for ten years perfects title in the possessor

CIVIL - REAL PROPERTY - ADVERSE POSSESSION - Mere possession of the property is not sufficient; the possession must be open, notorious, and visible

CIVIL - ADVERSE POSSESSION - ATTORNEY FEES - Absent some statutory authority or contractual provision, attorneys' fees cannot be awarded unless punitive damages are also proper

FACTS

Allen and Janice Cronier purchased 80 acres of land in 2012 from Herbert and Earlene Bang. The Croniers paid cash for the property and did not use an attorney for the warranty deed or for the closing. The sellers did not survey the property or obtain a title opinion. After the purchase, Allen contacted Gerald Moody Jr. and had the property surveyed. Initial findings suggested the property was only 70 acres, not 80. The disputed acres were owned by the Rainwaters family, principals/owners of ALR Partners. The two families met and tried to resolve the property dispute but were unsuccessful. In October 2013, the Rainwaters noted several property markers moved or destroyed. The following December, the Rainwaters filed suit to quiet and confirm title against the Croniers and asserted claim to the disputed ten acres by adverse possession. The Rainwaters visited the property again in 2014 and claimed the Croniers erected new gates and a barbed wire fence around the 80 acres. At trial, Austin Rainwaters testified his family hired "Mr. Dennis"

in 1987 to mark the boundaries of the property. Marshall Rainwaters testified his family had continuously utilized the property since at least 1947. Allen denied removing any boundary markings on the property. The chancellor ruled in favor of the Rainwaterses on their claim of adverse possession of the property on the west and north boundary, but against the Rainwaterses on the adverse possession claim to a sliver of property along the southern boundary of the Croniers' parcel. The Croniers were ordered to remove all fencing and gates they installed along the disputed parcel, and to pay attorney fees for the Rainwaterses and court costs. Cronier appealed.

ISSUES

Whether the chancellor erred in (1) finding the Rainwaterses proved adverse possession by continuous use and activities on the property and (2) the award of attorney fees.

HOLDING

(1) Because several claims of ownership were visible for more than ten years and title ripened when the Rainwaterses completed ten years of adverse possession, the decision of the chancellor was proper. (2) Because the chancellor did not specify in her order whether she awarded attorney fees in lieu of punitive damages for removing boundary markers, the case was remanded for clarification. Therefore, the Court of Appeals affirmed in part, and reversed and remanded in part, the judgment of the Jackson County Chancery Court.

DISSENT

Judge Tindell argued the record lacked the proof necessary for the Rainwaterses to prevail on the adverse possession claim as such agreement would erode the extraordinarily high clear and convincing standard of proof.

Affirmed in Part; Reversed & Remanded in Part - 2016-CA-00521-COA (Dec. 12, 2017)

Opinion by Judge Barnes Dissent by Judge Tindell

Hon. Jaye A. Bradley (Jackson County Chancery Court)

Scott Corlew for Appellants - E. Foley Ranson for Appellees

Briefed by [Sarah Raben](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

GREEN V. STATE

CIVIL POST-CONVICTION RELIEF

POST-CONVICTION RELIEF STATUTE OF LIMITATIONS - EXCEPTIONS - There are expressly four types of rights that survive post-conviction relief procedural bars: (1) the right against double jeopardy; (2) the right to be free from an illegal sentence; (3) the right to due process at sentencing; and (4) the right not to be subject to ex post facto laws

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - COMMON LAW EXCEPTION - Claims for post-conviction relief made outside of the three-year statute of limitations may still proceed, despite no express exception, if the claim involves an error that affected the petitioner's fundamental constitutional rights

POST-CONVICTION RELIEF - FUNDAMENTAL RIGHTS EXCEPTION - APPLICABILITY - The applicability of the fundamental rights exception depends on each particular claim

CRIMINAL - INDICTMENT - IDENTITY OF VICTIM - The identity of the victim of the underlying crime is not an element of capital murder

FACTS

In 2008, Anthony Green pled guilty to two counts of murder and one count of grand larceny. As part of the plea agreement, the State agreed not to pursue capital murder charges and to recommend concurrent life sentences on the

murder charges, as well as a sentence on the grand larceny charge was below the maximum amount of incarceration for that offense. Eight years later, in 2016, Green filed a motion for post-conviction relief. The motion alleged that his indictment was defective because it failed to identify the victim of the underlying felonies. Further, the motion alleged that his guilty plea was involuntary. The circuit court dismissed the motion as time-barred. Green appealed.

ISSUE

Whether the trial court erred by dismissing the motion for post-conviction relief as time barred.

HOLDING

Because the identify of the victim of the underlying crime is not an element of capital murder, Green's indictment was sufficient and the issue did not involve a fundamental right. Because Green's claim that his plea was involuntary is actually a claim that the trial court failed to establish a factual basis for the convictions in record, it is not an issue of fundamental rights that survives post-conviction relief procedural bars. Accordingly, Green's post-conviction relief motion did not meet any recognized exceptions to the three-year time bar. Therefore, the Court of Appeals affirmed the decision of the Marshall County Circuit Court.

Affirmed 2017-CP-00157-COA (Dec. 12, 2017)

Opinion by Judge Fair

Hon. Andrew K. Howorth (Marshall County Circuit Court)

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

Briefed by [Michael Farese](#)

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WARD V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PROCEDURAL BAR - SUCCESSIVE MOTIONS- Under Uniform Post-Conviction Collateral Relief Act any order denying or dismissing a PCR motion is a bar to a second or successive PCR motion

CRIMINAL PROCEDURE - INDICTMENT - VALIDITY - It is the responsibility of any person challenging the validity of an official, or an official act, to show invalidity by clear proof; any evidence must be balanced by the strong presumption that the official acts of public officers are valid

INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - Under *Strickland v. Washington*, a claimant of ineffective assistance of counsel bears the burden of proof to show that: (1) counsel's performance was deficient and (2) the deficiency prejudiced his defense; allegations of ineffective assistance of counsel must be made with specificity and detail, and are assessed by the totality of the circumstances

FACTS

In December 2014, David Ward was indicted for possession of a firearm by a convicted felon. Seeking to avoid the additional habitual offender enhancement, Ward agreed to a plea deal wherein Ward pled guilty to felony possession and was sentenced to ten years in prison. In March 2016, Ward presented his first post-conviction relief (PCR) motion alleging an illegally convened grand jury and ineffective assistance of counsel. After its denial, Ward again brought a second wholly identical PCR motion in June 2016. From that denial, Ward appealed.

ISSUES

Whether (1) Ward's PCR motion is successively writ-barred; (2) Ward's 2014 indictment was sufficient; and (3) Ward received ineffective assistance of counsel.

HOLDING

(1) Because Ward brought two previously denied PCR motions before the court alleging an involuntary guilty plea and ineffective assistance of council, the Uniform Post-Conviction Collateral Relief Act states that all similar PCR motions are successively writ-barred. (2) Because nothing in the record indicated that the court had discharged the grand jury before Ward's indictment was signed, and because Ward's indictment met all the requirements under Rule 7.06 of the Uniform Rules of Circuit and County Court, Ward's indictment was deemed valid, and this issue without merit. (3) Because Ward did not show that but for the errors his council made that he would not have pled guilty, would have proceeded to trial, and the outcome would have been different, Ward's ineffective assistance of council argument is without merit. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2016-CP-01284-COA (Dec. 12, 2017)

Opinion by Judge Fair

Hon. John Huey Emfinger (Rankin County Circuit Court)

Pro se for Appellant - Laura Hogan Tedder (Att'y Gen. Office) for Appellee

Briefed by [Nikki Breeland](#)

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COURT OF APPEALS - CRIMINAL CASES

CLEMENTS V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - CHILD FONDLING - ELEMENTS - Pursuant to Miss. Code Ann. § 97-5-23, the elements of child fondling are: (1) a handling, touching, or rubbing, (2) of a child under the age of sixteen years, (3) by a person above the age of eighteen years, (4) for the purpose of gratifying lust or indulging depraved, licentious sexual desires

CRIMINAL PROCEDURE - WEIGHT OF EVIDENCE - UNCONSCIONABLE INJUSTICE - When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, the appellate court will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

FACTS

Ronald Clements was indicted on one count of child fondling. The victim, six-year old Sara, was the daughter of Linda Pickering who was Clements' girlfriend at the time. Pickering testified that on Christmas Eve 2012 she overheard her nephew, Charlie, say to Sara "last night after we had sex." Pickering called her sister and the two had a conversation with the children. Charlie advised that he learned sex from Sara and she responded that she could not tell because her daddy would get mad. Sara confirmed that when she said "daddy" she was referring to Clements and also that "daddy made her kiss his wee-wee." After the conversation with the children, Pickering reported the allegations to the sheriff's department and per its instruction, she waited until after the holidays to speak to the Department of Human Services. The day after Christmas, Pickering took Sara to DHS where she was interviewed. Candace Scott, Pickering's sister, also testified at trial that her son Charlie repeatedly told her the same story about what happened the night between him and Sara. He said that she "showed him how to have sex." Detective Derrick Hester, a criminal investigator for the Prentiss County Sheriff's Department, and Joanna Wilbanks, a family protection specialist with the Prentiss County DHS, also testified at trial, further corroborating Pickering and Sara's story. Marie Frison, the director of the Child Advocacy Center in Tupelo, also testified as an expert witness. She opined that the results of Sara's interview were consistent with that of a child who had been sexually abused and that Sara only disclosed sexual abuse by Clements and no one else. Finally, Sara testified as the State's last witness. She explained that while her mother was at work, Clements took her into her mother's bedroom, told her to get into the bed, and to pull down her pants. Sara then described, in detail, the

sexual encounter that occurred. She also explained other occasions when sexual encounters between her and Clements took place. The Prentiss County Circuit Court convicted Clements. Clements appealed.

ISSUES

Whether (1) the evidence was insufficient to support Clements' conviction, and (2) the verdict was against the overwhelming weight of the evidence.

HOLDING

(1) Because there was forensic evidence and corroborated testimony in support of the allegations, and because Clements testified to his age, there was sufficient evidence to support Clements' conviction. (2) Because the jury heard from both Sara and Clements and was therefore, presented with both sides of the story, its decision as fact finder and the determiner of credibility was not so contrary to the overwhelming weight of the evidence. Therefore, the Court of Appeals affirmed the judgment of the Prentiss County Circuit Court.

Affirmed - 2016-KA-01586-COA (Dec. 12, 2017)

Opinion by Presiding Judge Griffis

Hon. James Lamar Roberts Jr. (Prentiss County Circuit Court)

Robert Sneed Laher for Appellant - Abbie E. Koonce (Att'y Gen. Office) for Appellee

Briefed by [Maggie Vinzant](#)

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JACKSON V. STATE

CRIMINAL - FELONY

TRIAL - CONTINUANCE - MANIFEST INJUSTICE - A circuit court's decision to grant or deny a motion for continuance will not be reversed unless manifest injustice results

CRIMINAL RESPONSIBILITY - DISABILITY - TEST - The test of criminal responsibility is the defendant's ability, at the time of the act, to realize and appreciate the nature and quality thereof his ability to distinguish right from wrong

FACTS

Latrice Jackson was employed as a behavioral-health assistant at Millcreek Behavioral Health Facility in Magee, Mississippi. Her duties involved caring for mentally disabled females between the ages of thirteen and seventeen years old. In June 2013, Jackson was accused of abusing a vulnerable patient. Specifically, two other behavioral-health assistants testified that Jackson pulled a resident's hair, drug her to the bathroom, and directed expletives at the patient. After one agreed motion for continuance, Jackson changed counsel and was granted a second motion for continuance. A third agreed continuance was granted after documents were produced a few days before the trial date. Jackson then motioned for a fourth continuance, stating the counsel did not have enough time to review the documents and needed additional time to locate witnesses that were critical to Jackson's defense. The circuit court denied the motion and a jury found Jackson guilty. Jackson appealed.

ISSUES

Whether the circuit court erroneously denied Jackson's motion for a trial continuance based on (1) unprepared counsel, (2) concern for speedy trial rights, and (3) an alleged disability.

HOLDING

(1) Because Jackson failed to explain how her counsel was unprepared, the trial court's denial of her motion for continuance based on unprepared counsel was not erroneously denied. (2) Because the trial court granted Jackson's multiple previous continuances, a significant amount of time had passed since Jackson had been indicted, and Jackson's expressed entitlement to a speedy trial, the trial court did not err in placing her speedy trial rights over effective

representation and a fair trial. (3) Because Jackson understood her employment duties and obligations at Millcreek, despite graduating high-school with a special-education diploma, there is no merit in Jackson’s claim that she was suffering from a disability. Consequently, the Court of Appeals was not satisfied that manifest injustice resulted from the circuit court’s denial of Jackson’s motion for continuance. Therefore, the Court of Appeals affirmed the judgment of the Simpson County Circuit Court.

Affirmed - 2016-KA-00924-COA (Dec. 12, 2017)

Opinion by Presiding Judge Griffis

Hon. Eddie H. Bowen (Simpson County Circuit Court)

Erin E. Briggs (Pub. Def. Office) for Appellant –Abbie Eason Koonce (Att’y Gen. Office) for Appellee

Briefed by [Caroline Loveless](#)

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JONES V. STATE

CRIMINAL - FELONY

EIGHTH AMENDMENT - LIFE WITHOUT PAROLE - JUVENILE OFFENDERS - In *Miller v. Alabama*, the Supreme Court of the United States held that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders; the sentence must have discretion to consider mitigating circumstances before a life-without-parole sentence may be imposed on a juvenile

EIGHTH AMENDMENT - LIFE WITHOUT PAROLE - JUVENILE OFFENDERS - In *Parker v. State*, the Mississippi Supreme Court held that *Miller* applies to the sentencing and parole statutes applicable to deliberate-design murder; a juvenile offender previously convicted of murder and sentencing to life imprisonment is entitled to a hearing to determine whether he should be deemed eligible for parole based on mitigating factors outlined in *Miller* and *Parker*

EIGHTH AMENDMENT - LIFE WITHOUT PAROLE - JUVENILE OFFENDERS - The *Miller* case does not require trial courts to make a specific finding of fact that a child is irretrievably depraved, irreparably corrupt, or permanently incorrigible

FACTS

Brett Jones previously was convicted for the murder of his grandfather and sentenced to life imprisonment. By statute, Jones’s conviction rendered him ineligible for parole. The Court of Appeals later affirmed the conviction and sentence on appeal. In 2011, the Court of Appeals affirmed the denial of Jones’s motion for post-conviction relief. Following the United States Supreme Court’s decision in *Miller v. Alabama*, the circuit court held a hearing to determine whether Jones, who was fifteen years old when he killed his grandfather, was entitled to parole eligibility under *Miller*. The circuit judge appointed counsel for Jones and authorized him to retain an investigator and expert. Jones testified at the new sentencing hearing and called five additional witnesses. The testimony presented focused largely on Jones’s abusive stepfather and his mother’s mental health issues. Following that hearing, the circuit court found that Jones was not entitled to relief under *Miller*. Jones appealed.

ISSUES

Whether (1) the circuit court judge failed to comply with the legal standard and procedure mandated by *Miller* and *Parker* by failing to consider each of the factors required by *Miller* and *Parker*; and (2) Jones has a constitutional right to parole eligibility because he is not irretrievably depraved.

HOLDING

(1) Because the circuit court judge expressly stated that he considered each of the *Miller* factors, even if not discussed on the record, and found Jones was not entitled to be sentenced in such a manner to make him eligible for parole, the judge complied with the required standards and procedures. The circuit court judge’s decision was not arbitrary, and his findings of fact were supported by substantial evidence. (2) Because the sentencing judge is not required to make a

specific finding of incorrigibility to impose life without parole, the issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Lee County Circuit Court.

PARTIAL CONCURRENCE/DISSENT

Judge Westbrook agreed with the majority's finding that Jones was not entitled to be resentenced by a jury. Judge Westbrook asserted, however, that the trial court did not conduct a thorough on-the-record analysis of Jones's incorrigibility. Judge Westbrook would find that before a juvenile homicide offender may be sentenced to life imprisonment without the possibility of parole, a sentencing authority must make specific on-the-record findings of fact that illustrate that he is among the very rarest of juvenile offenders who are irreparably corrupt, irretrievably broken, and incapable of rehabilitation.

Affirmed - 2015-KA-00899-COA (Dec. 14, 2017)

En Banc Opinion by Judge Wilson - Partial Concurrence/Dissent by Judge Westbrook

Hon. Thomas J. Gardner III (Lee County Circuit Court)

Robert B. McDuff & Jacob Wayne Howard for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [Allison A. Bruff](#)

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MAGEE V. STATE

CRIMINAL - FELONY

EVIDENCE - HEARSAY - TENDER YEARS EXCEPTION - Pursuant to Miss. R. Evid. 803(25), a statement by a child of tender years describing any act of sexual contact with or by another is admissible if: (A) the court—after a hearing outside the jury's presence—determines that the statement's time, content, and circumstances provide substantial indicia of reliability; and (B) the child either (i) testifies or (ii) is unavailable as a witness, and other evidence corroborates the act

CONSTITUTIONAL LAW - INEFFECTIVE ASSISTANCE - TRIAL STRATEGY - A presumption exists that trial counsel's decision not to request a limiting instruction falls within the ambit of trial strategy and does not render ineffective assistance of counsel

FACTS

Joshua Magee was charged with two counts of sexual battery against his then seven-year-old cousin, Abby. At the time of the offense, Magee was thirty-three years of age and living in the same household as the victim. The victim disclosed repeated acts of sexual abuse after she and Magee were caught together late at night without explanation. The circuit court convicted Magee for two counts of sexual battery. Magee appealed.

ISSUES

Whether (1) the trial court erred in permitting the State to impeach Magee with his prior felony conviction; (2) Magee's trial attorney rendered ineffective assistance of counsel by failing to request a limiting instruction; (3) the trial court erred in admitting hearsay statements of the victim under the tender years exception; and (4) the verdict was against the overwhelming weight of evidence and unsupported by sufficient evidence.

HOLDING

(1) Because Magee did not object to the State's use of his prior felony conviction for impeachment purposes, the issue was waived on appeal. (2) Because Magee's attorney's failure to request a limiting instruction was within the ambit of trial strategy, the Court of Appeals denied relief on this issue without prejudice to a potential motion for post-conviction relief. (3) Because the trial court adequately addressed every relevant *Wright* factor in its tender-years-exception analysis, there was no abuse of discretion. (4) Because there was unambiguous testimony to prove the penetration requirement for sexual battery and because the jury is the arbiter of witness credibility, there was sufficient evidence to support

Magee's conviction, which was not against the overwhelming weight of evidence. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2016-KA-01257-COA (Dec. 12, 2017)

Opinion by Judge Fair

Hon. John Huey Emfinger (Rankin County Circuit Court)

Matthew Allen Baldrige for Appellant - Joseph Scott Hemleben (Att'y Gen. Office) for Appellee

Briefed by [Allison A. Bruff](#) & [Andrew P. Cicero III](#)

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QASOON V. STATE

CRIMINAL - FELONY

APPELLATE PROCEDURE - STATUTORY INTERPRETATION - VAGUENESS - A claim of statutory vagueness may be raised for the first time on appeal and is exempt from procedural bar

STATUTORY INTERPRETATION - WEIGHT OF AUTHORITY - WAIVER OF CLAIM - Where an assertion of error is not supported by authority, the assertion is deemed abandoned and procedurally barred from appeal

CRIMINAL PROCEDURE - INDICTMENT - SUFFICIENCY OF EVIDENCE - If an indictment gives adequate notice of the crimes that the state will be bringing against a defendant, immaterial variance between the indictment and evidence presented is not adequate to find that the indictment is insufficient

FACTS

Maged Qasoon was arrested after being videotaped selling eight grams of synthetic marijuana to a confidential informant. At trial, Quasoon asserted, as a defense, that he was unaware that the substance he was selling was illegal, but did not allege that his indictment was insufficient to place him on notice of the state's allegations against him. This defense was ultimately unsuccessful and Quasoon was convicted under Miss. Code Ann. §§ 41-29-139 and 41-29-113(c)(5)(L). Qasoon appealed.

ISSUES

Whether the trial court erred in finding (1) Mississippi's schedule of controlled substances was adequately descriptive and proper for use at trial; (2) Qasoon's indictment was sufficient to proceed to trial given the lack of chemical description included within the indictment; and (3) the conviction was sufficiently supported by the evidence presented at trial.

HOLDING

(1) Because the failure to cite and employ relevant authority waives the assertion of vagueness on appeal, the trial court did not err in employing Mississippi's schedule of controlled substances at trial. (2) Because the sufficiency of the indictment was not challenged at trial or preserved on the record in any way, the issue is procedurally barred from consideration on appeal. (3) Because the indictment gave Qasoon adequate notice of the crimes alleged by the state against him and because the sufficiency of evidence was not challenged at trial, any variance between the indictment and evidence presented at trial was immaterial and so the issue is both without merit, as well as procedurally barred. Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Circuit Court

Affirmed - 2016-KA-01330-COA (Dec. 12, 2017)

Opinion by Judge Fair

Hon. Justin Miller Cobb (Lauderdale County Circuit Court)

P. Shawn Harris for Appellant - Abbie Eason Koonce (Att'y Gen. Office) for Appellee

Briefed by [Kelsey Dismukes](#)

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SARRETT V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - EVIDENCE - MOTION IN LIMINE - According to Rule 404(b)(1), evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character, however, when the charged crime and prior crime or bad act are so interwoven as to form a series of occurrences, such evidence may be offered to tell the complete story so as not to confuse the jury

CRIMINAL PROCEDURE - EVIDENCE - JNOV - When determining the sufficiency of evidence, the court decides whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - DIRECT APPEAL - A claim of ineffective assistance of counsel on direct appeal should be addressed only when (1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge

FACTS

On June 18, 2014, the Pearl Police Department arranged a controlled buy between Katy Young, a confidential informant, and Hunter Sarrett. Young's car and person were searched, and she was equipped with a key fob camera and body wire. The buy took place at Young's house, where she lived with Sarrett's sister. Upon Sarrett's request, Young met Sarrett underneath the carport. Young's key fob camera recorded and provided audio of the transaction, but her body wire did not record for reasons unknown. At the beginning of the recording Sarrett can be heard telling Young he had "been to ten people's houses" and had to go to "like eight more—business is picking up." After the drug transaction, Young met with law enforcement officers and gave them the drugs she purchased from Sarrett. Police then removed the recording devices, and confirmed with a photograph identification that Sarrett was the man she purchased from. Sarrett was then charged and convicted of Count I, sale of cathinone within 1,500 feet of a school; Count II, conspiracy to sell cathinone; Count III, sale of alprazolam within 1,500 feet of a school; and Count IV, conspiracy to sell alprazolam. On August 4, 2016, Sarrett filed a motion for a judgment notwithstanding the verdict, or in the alternative a new trial. The circuit court denied the motion as untimely. Sarrett appealed.

ISSUES

Whether (1) the circuit court erroneously denied Sarrett's motion in limine regarding other acts, crimes, or wrongs; (2) the prosecutor made inappropriate statements during the State's opening statement and closing argument; (3) counsel's failure to object to the authenticity of certain exhibits constituted ineffective assistance of counsel; (4) there was insufficient evidence to support his conviction on Counts I and II; and (5) the circuit court erred in denying Sarrett's post-trial motion as untimely.

HOLDING

(1) Because the conversation between Sarrett and Young were part of a series of occurrences which culminated in Sarrett's arrest, the admission did not violate Rule 404(b) and the trial court did not abuse its discretion. (2) Because the court cannot conclude based upon review of the record that the natural and probable effect of the statements were to create unjust prejudice against Sarrett, the prosecutor's statements were not inappropriate. (3) Because not all of the facts involving the admission or potential objection to the exhibits are apparent via the record, and the parties have not stipulated that the record is adequate, the court is unable to address the particular ineffective-assistance-of-counsel claim on direct appeal. (4) Because Sarrett did not object in court, nor did he raise the issue regarding sufficiency of evidence in his motion for directed verdict or his post-trial motion for a JNOV or a new trial, the issue is waived. Notwithstanding the waiver, sufficient evidence was presented to support Sarrett's conviction on Count I and II. (5) Because Sarrett's judgment of conviction was entered June 14, 2016, and he did not file his motion until August 4, 2016, he did not timely file his motion. Therefore, the Court of Appeals affirmed the decision of the Rankin County Circuit Court.

Affirmed - 2016-KA-01267-COA (Dec. 12, 2017)

Opinion by Presiding Judge Griffis

Hon. John Huey Emfinger (Rankin County Circuit Court)

Donald W. Boykin for Appellant - Abbie E. Koonce (Att'y Gen. Office) for Appellee

Briefed by [D. Hunter V. Robertson](#)

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