

MISSISSIPPI PUBLIC DEFENDERS  
CONFERENCE  
FALL 2016

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**APPELLATE COURT UPDATE**

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UNITED STATES SUPREME  
COURT CASES

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*Betterman v. Montana* (May 19, 2016)

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- After pleading guilty to bail-jumping, Betterman was jailed for over 14 months awaiting sentencing.
- Betterman argued that the delay in his sentencing violate his right to a speedy trial.
- The Court resolved a split in lower courts.

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*Betterman*



- “[T]he guarantee protects the accused from arrest or indictment through trial, but does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges. For inordinate delay in sentencing, although the Speedy Trial Clause does not govern, a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments.”

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*Betterman*



- The Court reserved on the question of whether the speedy trial clause “applies to bifurcated proceedings in which, at the sentencing stage, facts that could increase the prescribed sentencing range are determined (e.g., capital cases in which eligibility for the death penalty hinges on aggravating factor findings).”
- Nor did it decide whether the speedy trial right “reattaches upon renewed prosecution following a defendant’s successful appeal, when he again enjoys the presumption of innocence.”

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*Foster v. Chatman, (May 23, 2016)*



- Foster was convicted of capital murder and sentenced to death.
- Jury selection proceeded in two phases: removals for cause and peremptory strikes. The first phase whittled the list of potential jurors down to 42 “qualified” prospective jurors. Five were black.
- Before the second phase began, one of the black jurors—Powell—informed the court that she had just learned that one of her close friends was related to the defendant; she was removed, leaving four black prospective jurors: Eddie Hood, Evelyn Hardge, Mary Turner, and Marilyn Garrett.
- The State exercised nine of its ten allotted peremptory strikes, removing all four of the remaining black prospective jurors.

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*Foster*



- Both parties agreed that the defendant demonstrated a prima facie case and that the prosecutor had offered race-neutral reasons for the strikes. The Court therefore addressed only Batson’s third step, whether purposeful discrimination was shown.
- Foster focused his claim on the strikes of two black prospective jurors, Marilyn Garrett and Eddie Hood.

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*Foster*



- With respect Garrett, the prosecutor had told the trial court that Garrett was “listed” by the prosecution as “questionable” and its strike of her was a last-minute race-neutral decision.
- However, evidence uncovered after the trial showed this statement to be false; the evidence showed that the State had specifically identified Garret in advance as a juror to strike. In fact, she was on a “definite NO’s” list in the prosecution’s file.
- The Court rejected attempts by the State “to explain away the contradiction between the ‘definite NO’s’ list and [the prosecutor’s] statements to the trial court as an example of a prosecutor merely ‘misspeak[ing].’”

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*Foster*



- Regarding Hood, the Court noted that “[a]s an initial matter the prosecution’s principal reasons for the strike shifted over time, suggesting that those reasons may be pretextual.” It further found that the State’s asserted justifications for striking Hood “cannot be credited.”
- The Court found that “the focus on race in the prosecution’s file plainly demonstrates a concerted effort to keep black prospective jurors off the jury.”

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*Williams v. Pennsylvania (June 9, 2016)*

- Due process required that a Pennsylvania Supreme Court Justice recuse himself from the capital defendant's post-conviction challenge where the justice had been the district attorney who gave his official approval to seek the death penalty in the case.
- "[U]nder the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."

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*Williams*

- It went on to hold that the justice's authorization to seek the death penalty against the defendant constituted significant, personal involvement in a critical trial decision.
- Finally, it determined that an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote; as such the error was not subject to harmless error review

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*Utah v. Strieff (June 20, 2016)*

- An anonymous tip to the police department reported "narcotics activity" at a particular residence.
- An officer investigated and saw visitors who left a few minutes after arriving at the house. These visits were sufficiently frequent to raise his suspicion that the occupants were dealing drugs.
- One visitor was Strieff.
- After observing Strieff leave the house and walk toward a nearby store, the officer detained the defendant and asked for his identification. Strieff complied and the officer relayed information to a police dispatcher, who reported that Strieff had an outstanding arrest warrant for a traffic violation. The officer then arrested the defendant pursuant to the warrant. A search incident to arrest revealed methamphetamine and drug paraphernalia.

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Strieff

- At a suppression hearing, prosecutors conceded that officers lacked reasonable suspicion to conduct the investigatory detention, but argued that the evidence seized during the detention should not be excluded because "the existence of a valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband."
- The trial court ruled that the evidence was admissible, but the Supreme Court of Utah reversed the trial court's ruling and held that the evidence was inadmissible.

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Strieff

- The Court reversed.
- It began by noting that it has recognized several exceptions to the exclusionary rule, three of which involve the causal relationship between the unconstitutional act and the discovery of evidence: the independent source doctrine; the inevitable discovery doctrine; and—at issue here—the attenuation doctrine.
- Under the attenuation doctrine, "Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."

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Strieff

- Turning to the application of the attenuation doctrine, the Court first held that the doctrine applies where—as here—the intervening circumstance that the State relies on is the discovery of a valid, pre-existing, and untainted arrest warrant.
- It then concluded that the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on the defendant's person.
- The Court applied the three factors articulated in *Brown v. Illinois*, 422 U. S. 590 (1975): the temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search; the presence of intervening circumstances; and the purpose and flagrancy of the official misconduct.

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*Strieff*



- “Applying these factors, we hold that the evidence discovered ... was admissible because the unlawful stop was sufficiently attenuated by the preexisting arrest warrant. Although the illegal stop was close in time to [the] arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for ... arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling [the] Officer ... to arrest [the defendant]. And, it is especially significant that there is no evidence that [the] Officer[s] ... illegal stop reflected flagrantly unlawful police misconduct.”

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*Strieff*



- Justice Sotomayor wrote a dissenting opinion in which she argued the evidence should be inadmissible and that the majority's opinion will "corrode all our civil liberties."
- Her dissent is worth reading.

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*Birchfield v. North Dakota*,(June 23, 2016).



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### Birchfield

- In three consolidated cases the Court held that while a warrantless breath test of a motorist lawfully arrested for drunk driving is permissible as a search incident to arrest, a warrantless blood draw is not.
- “Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation.” Having found that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample, the Court turned to the argument that blood tests are justified based on the driver’s legally implied consent to submit to them. In this respect it concluded: “motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.”

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### Misc. SCOTUS Cases

- *Lynch v. Arizona* (May 31, 2016) - Where the State put the defendant’s future dangerousness at issue and acknowledged that his only alternative sentence to death was life imprisonment without parole, the Arizona court erred by concluding that the defendant had no right to inform the jury of his parole ineligibility
- *Puerto Rico v. Sanchez Valle* (June 9, 2016). The Double Jeopardy Clause bars Puerto Rico and the United States from successively prosecuting a single person for the same conduct under equivalent criminal laws.

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### MISSISSIPPI SUPREME COURT CASES



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In the Interest of: J.T., a Minor, D.T. and M.T. v.  
Hinds County Youth Court,(April 21, 2016)

- On October 30, 2014, a daycare teacher contacted DHS, and reported that three-year-old J.T. "told her teacher . . . that dad put his fingers in her," and that J.T. "pointed at her vagina."
- DHS initiated an investigation. Cirby Scott, a DHS family-protection specialist, spoke with J.T.'s mother—M.T.—who stated that she knew of no abuse. Scott also spoke to J.T.'s father—D.T.—who denied the allegations. Scott permitted J.T. to remain in her mother's custody but required D.T. to leave the home and have no contact with J.T. A medical examination discovered no physical evidence of abuse.
- On November 3, 2014, a petition was filed in the Hinds County Youth Court, seeking to adjudicate J.T. a sexually abused child. During a shelter hearing, the youth court determined that probable cause existed that J.T. had been sexually abused.
- On November 10, 2014, the youth court held a second shelter hearing. Scott testified that, during the forensic interview, J.T. had made a statement similar to the one reported by the school. So the youth court left its prior orders in force.

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Hinds County Youth Court

- On December 30, 2014, the case proceeded to adjudication. Scott, who testified that she had observed J.T. stated that D.T. "touched her in her booty" during the forensic interview. Scott explained that J.T. "pointed to the pictures showing that her booty was her vaginal area."
- Scott reported that J.T. also disclosed that she had been touched by a friend at school. The CAC forensic-interview report was entered over objections to hearsay and violations of the Confrontation Clause.
- D.T. denied any abuse, but admitted he may have poked her while he was helping her get dressed. Friends and family members interviewed all denied the allegations. The family had no history with DHS. J.T.'s counselor reported that J.T. never mentioned sexual contact and showed no sexually inappropriate play during her sessions.

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HCYC

- An investigative guardian ad litem report was also admitted over hearsay objections. Based on this evidence, the youth court adjudicated J.T. a sexually abused child. The judge left her in her mother's custody, and ordered that she receive counseling as needed. The no-contact order was left in place. J.T.'s parents appealed.

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**HCYC**

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- The State failed to produce sufficient evidence to prove that J.T. had been sexually abused.
- The Mississippi Youth Court Act requires the State to prove by a preponderance of the evidence that a child has been sexually abused.
- The State's case relied entirely on the child's statement. J.T. told her teacher and the CAC forensic interviewer that her father had stuck his finger inside her one time to get a "tiny cat" out of her "booty." The child also indicated that "inside her" referred to her vagina. Beyond the child's statement, neither DHS nor the investigative guardian ad litem discovered any evidence of abuse during their respective investigations. Family and friends strongly denied the allegations.

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**HCYC**

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- "But this child's statement could describe either sexual abuse or innocent contact between a father and daughter, and no additional evidence was provided to show abuse. The parents denied the allegation and provided an innocent explanation. And every witness interviewed by DHS indicated that no abuse had occurred. Under these unique circumstances, the child's statement did not provide sufficient evidence to support the abuse adjudication."

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**HCYC**

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- The SCT found it necessary to clarify "that the Rules of Evidence do apply in youth-court adjudications with full force and effect." Rule 1101(b) does not except youth-court adjudication hearings, only probable cause hearings.
- "To the extent that this Court or the Court of Appeals has held that the Mississippi Rules of Evidence have some diminished force in youth-court adjudications, we overrule the cases. When the youth court adjudicates the ultimate issue of abuse, the Rules must be given full effect. [emphasis supplied]."
- To suggest that the Rules should be "relaxed" in youth court is to suggest that a child's best interests are served when youth-court judges base their decisions on unreliable evidence. Except where specifically superseded by a youth-court-specific rule, the Mississippi Rules of Evidence apply with full force and effect to youth-court adjudications

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*Jones v. State (August 11, 2016)*

- Jones and a co-defendant were charged with murder as accomplices.
- Jones offered an accomplice instruction which was denied in favor of the State's which charged the jury to view evidence with great caution and suspicion "*if you find such uncorroborated testimony to be unreasonable, self-contradictory, or substantially impeached.*"

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*Jones*

- The Court held that the State's instruction conflated the standard trial courts are to apply when determining whether a defendant is entitled to a cautionary accomplice jury instruction and the standard trial courts are to apply when considering evidentiary sufficiency.

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*Jones*

- The Court, instead, adopted a new cautionary accomplice instruction:
- "During the course of his testimony in this trial, the witness John Doe claimed to have participated with the defendant in [the crime for which the defendant is on trial]. Doe is an admitted accomplice, and, as such, the jury should consider his testimony with great caution and suspicion. The jury is the sole judge of the credibility and the believability of all the witnesses, and it is for the jury to decide how much weight and worth, if any, to give the testimony of the witnesses, including Doe. As you consider Doe's testimony, you may accept such portions, if any, that you deem credible, and reject such portions, if any, that you do not deem worthy of belief."

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### Misc. MSSC Cases

- *Hurst v. State* (June 9, 2016): Interesting concurring opinion from Justice Dickinson regarding the statutory right to speedy trial. While good cause may excuse the delay, Mississippi's speedy trial statute does not require the accused to demonstrate prejudice. Justice Dickinson lamented the supreme court's use of prejudice in statutory speedy trial analysis.

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### MISSISSIPPI COURT OF APPEALS CASES



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### *Reed v. State* (May 10, 2016)

- Jimmy Lewis was shot during an incident at his house on November 3, 2012. Luke Reed lived in a tent in a wooded area in Jackson near Lewis's house. The two men sat on the porch and drank liquor together. Accordingly to Reed, he left to go buy more whiskey. Lewis's girlfriend, Cassandra James, was at Lewis's house when Reed returned.
- At some point later, Reed claimed some men came by trying to buy crack from Lewis. Lewis asked Reed if he could borrow his gun. (Reed said he carried a gun for protection because he is homeless). However, after the men left, Lewis keep Reed's gun and went inside.
- Reed later wanted to leave and got into an argument with Lewis and the two struggled with the gun. It went off and Lewis was shot.
- He claimed Lewis shot himself. On the other hand, Lewis testified and denied that he ever asked for or took possession of Reed's gun. Lewis asked Reed to leave so that he and James could spend some time alone. Reed did not want to go.
- Reed put the pistol in Lewis's side and quickly shot him once.

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*Reed*



- James testified that she was afraid because Reed had a gun, so she asked Lewis to ask Reed to leave. She stated she witnessed Lewis tell Reed to leave. Reed pulled a gun in response. She stated he fired the gun into the ground and then shot Lewis in the stomach.
- At trial, Reed sought to cross-examine Lewis on his prior criminal convictions for grand larceny and possession of cocaine. The court refused to allow the impeachment because the convictions were not "particularly probative of honesty" and that their probative value was substantially outweighed by the danger of unfair prejudice to the State. Reed was convicted and appealed.

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*Reed*



- The trial erred in failing to allow Reed to cross-examine Lewis about his prior convictions. The error cannot be dismissed as harmless because Lewis's testimony and credibility were critical to the State's case.
- Given a defendant's rights under the Confrontation Clause, Mississippi Rule of Evidence 609(a)(1) allows full impeachment of prosecution witnesses without the requirement of a balancing test, except in extreme situations.
- This case turned on the credibility of the defendant, the victim, and the victim's girlfriend. The jury heard the defendant was a felon. Lewis had a motive to lie since he was on probation and could possess a gun.

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*Jordan v. State (May 24, 2016)*



- Carl Jordan shot David Carter during an argument. Carter had his three children for visitation, and took them to his girlfriend's house. His ex-wife, Tanya, disapproved of this and came to Carter's girlfriend's house and demanded the children back. Carter refused. At one point she reached for a pistol inside her purse. She eventually left.
- Later that night, Carter claimed he went out to his truck to get some things for the children, and he saw Tanya and Jordan, who was Tanya's boyfriend (or fiancé, depending on the testimony), coming down the sidewalk. He claimed they were intoxicated. Again, they demanded the children. Carter tried to talk to Tanya, but Jordan aggressively tried to intercede. Tanya started laughing and handed her pistol to Jordan. Jordan then fired on Carter, as Tanya yelled "no!" Carter turned to run when Jordan pointed the gun at him, but he was hit twice in the buttocks. He made it to a neighbor's house, who was watching the altercation.

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*Jordan*

- The neighbor testified at trial and largely confirmed Carter's account. Jordan and Tanya claimed Carter had a gun in his waistband. They were in the neighborhood to help a relative and Carter starting yelling at them.
- When Carter reached for his gun, Jordan took Tanya's pistol from her purse, and fired several warning shots at Carter. When Carter started to point his gun at Jordan, Jordan shot at Carter.
- The trial judge did not allow Tanya to testify about Carter's threats, physical abuse, and intimidation she suffered at Carter's hands during their marriage, separation, and divorce. It was excluded as inadmissible character evidence, and was too remote to be relevant.

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*Jordan*

- Jordan proffered Tanya's testimony about Carter's prior threats and actions. Carter had held knives and screwdrivers to her neck and choked her. He boasted he was not afraid of going to prison because he had already been there. Carter had been violent with his coworkers, leading to him being required to attend therapy – where, with Tanya present, he admitted he had tried to kill her. He also admitted he had access to weapons. Tanya testified that Jordan was aware of these incidents. She also claimed Carter and his brother were members of a gang.
- The State's brief did not address the remoteness issue. MRE 404(a)(2) allows victim character evidence in support of self-defense. Further, MRE 405 allows proof of specific instances of conduct in cases where character is an essential element of a charge, claim, or defense. "A finding that some of the incidents were too remote for non-character purposes under Rule 404(b) does not equate to a finding that the incidents were too remote to evidence Carter's character under Rule 405.

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*Brown v. State (June 28, 2016)*




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*Brown*



- Brown was involved in an altercation with Al Coleman (Westside Al) at the Birdland Nightclub. Brown fired several shots during the altercation, hitting four patrons of the club and killing another. Brown's defense was that Westside Al was the actual shooter. Brown was charged with four counts of aggravated assault and one count of depraved-heart murder.

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*Brown*



- The Court held that omission of "serious" bodily injury in aggravated assault jury instructions substantially altered the proof necessary for a conviction and broadened the grounds upon which Brown was convicted. Omission was a constructive amendment to the indictment requiring reversal of the aggravated assault convictions.

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*Brown*



- At the time of the crime, Mississippi's aggravated assault statute provided:
- "A person is guilty of aggravated assault if he (a) attempts to cause *serious* bodily injury to another, or causes such injury purposely, knowingly or recklessly under the circumstances manifesting extreme indifference to the value of human life"

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*Brown*

- The jury, however, was instructed on “bodily injury” as an element, not “serious bodily injury.”
- The omission of “serious” bodily injury in aggravated assault jury instructions substantially altered the proof necessary for a conviction and broadened the grounds upon which Brown was convicted. Omission was a constructive amendment to the indictment requiring reversal of the aggravated assault convictions.

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*Husband v. State (July 26, 2016)*

- Husband and his 12-year-old stepson visited Husband's aunt and uncle, the McGowans at their duplex in Columbia. The McGowans' neighbors, Phylicia Stokes and Forester Crenshaw were sitting on the shared porch of the duplex having drinks and cooking. The stepson went back to the car.
- Husband and Crenshaw became confrontational and got in each other's faces. Husband went to his car, which was parked in the driveway. Crenshaw also left the porch. He went to Stokes's car and got her .380 caliber handgun from the glove box. Husband got in his car. Stokes said Husband appeared to be reaching for something in his car. Husband testified that it was his car keys he was reaching for.

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*Husband*

- Crenshaw walked to Husband's car, holding the gun at his side, and stood in the open door of Husband's car. He was preventing Husband and his stepson from leaving. The stepson testified that Crenshaw threatened to kill them. When Husband turned to look at someone on the porch, Husband grabbed his gun from the car and pointed it at Crenshaw. Crenshaw ran behind a car. Husband fired his gun into the air, but when Crenshaw returned fire, he began pointing the gun at Crenshaw. One shot hit Crenshaw in his lower back. Husband and his stepson drove away and were not injured. Crenshaw died at a hospital.
- Husband was arrested and charged with heat-of-passion manslaughter.

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### Husband

- At trial, the State asked for, and the trial court instructed on the Castle Doctrine, as it applied to the victim.
- The Court of Appeals found that to be plain error.
- The plain language of the statute clearly indicates that the statutory presumption applies to the defendant, not to the victim.

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### Misc. Court of Appeals Cases

- *Towles v. State* (June 14, 2016): Trial court committed reversible error in denying Towles's proposed self-defense jury instruction. Self-defense theory did not conflict with Towles's assertion that the shooting was accidental, and defendants have a right to assert alternative theories of defense, even if they are inconsistent.

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### Rules "change"

- On July 1, 2016, the Mississippi Supreme Court adopted the Mississippi Supreme Court Advisory Committee for the Rules' restyle of the Mississippi Rules of Evidence.
- The language of these rules have been changed considerably.

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### Rules

- The restyle makes no substantive changes to the rules. Instead, the purpose was to increase readability and make them more easily understood.
- The vast majority of the restyle merely incorporated analogous rules in the Federal Rules of Evidence. Some of the ones that have changed significantly are the 400 and 600 series. I feel you will all find them much more clear.
- Some of the numbering, however, has changed. It would be a good practice for everyone to go over any motions they plan to file and make sure that any cut and paste appropriately references the desired section of the Mississippi Rule.

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### An example: Miss. R. Evid. 804(b)(5)

- **(5) Other Exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.
- **(5) Other Exceptions.** A statement not specifically covered by this Rule if:
  - **(A)** the statement has equivalent circumstantial guarantees of trustworthiness;
  - **(B)** it is offered as evidence of a material fact;
  - **(C)** it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;
  - **(D)** admitting it will best serve the purposes of these rules and the interests of justice; and
  - **(E)** before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

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