

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**CHARLES EDWARD WILSON**

**APPELLANT**

**VS.**

**NO. 2014-CP-01732**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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## **Statement of the Case and Facts**

On October 29, 1982, Charles Edward Wilson was indicted for acting in concert with three co-indictees to kidnap a woman and her three children. (CP 1). A jury found Wilson guilty of kidnaping, and later, Wilson pleaded guilty to raping the woman he had kidnaped. (CP 51). Wilson did not appeal his convictions. (CP 154). However, Wilson filed a PCR petition for his rape conviction on November 7, 1985. (CP 59). And he filed a PCR petition for his kidnaping conviction on June 20, 1986. (CP 71). The circuit court found that the claims Wilson raised in the petition related to his kidnaping conviction were without merit, and the court's Order denying the petition was filed on July 21, 1986. (CP 79). Wilson appealed, and the Supreme Court affirmed the circuit court's denial of his PCR petition on September 19, 1988. (CP 124). Thirty-two years after he committed the kidnaping, Wilson filed a second PCR motion. (CP 155). The circuit court entered an order on October 8, 2014 denying post-conviction relief. (CP 191). The court found that Wilson's petition was time barred and that his claims for relief were without merit. (CP 189-191). Wilson appeals the court's decision.

## **Summary of the Argument**

Wilson's PCR petition was barred because it was his second petition, and because he did not file it within the time required by statute. Furthermore, based on the issues he raised in his petition, he is not entitled to relief. Accordingly, the circuit court did not abuse its discretion when it denied Wilson's petition. This Court should affirm the circuit court's decision.

## **Argument**

### *Standard of Review*

Circuit courts may dismiss a PCR petition if "it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any

relief.” Miss. Code Ann. § 99-39-11(2)(Supp. 2014). Appellate courts review the dismissal or denial of a PCR motion for abuse of discretion. **Hughes v. State**, 106 So. 3d 836, 838 (Miss. Ct. App. 2012). And this Court will not disturb a circuit court's dismissal of a PCR motion unless the decision is clearly erroneous. **Small v. State**, 141 So. 3d 61, 65 (Miss. Ct. App. 2014)(citations omitted). This Court reviews questions of law *de novo*. **Id.** To be successful on appeal, Wilson has the burden to (1) make a substantial showing that one of his state or federal rights has been denied and (2) show that the claim is procedurally alive. **Id.** (citing **Buckley v. State**, 119 So. 3d 1171, 1173 (Miss. Ct. App. 2013)(further citation omitted).

**I. The circuit court correctly found that Wilson’s PCR petition was barred, and was also without merit.**

On appeal, Wilson complains that the circuit court erred in finding that his petition was procedurally barred, and argues that the court should have addressed the merits of his petition. (Appellant’s Brief p. 4). For the reasons discussed below, the circuit court did not abuse its discretion in finding that Wilson’s petition was barred. And, contrary to the claim in Wilson’s brief, the circuit court did address the merits of his petition; the circuit court found that they were without merit. The circuit court’s findings were not clearly erroneous and Wilson did not demonstrate that he was entitled to post-conviction relief. Accordingly, this issue is without merit.

**a) Wilson’s petition was barred as a Successive PCR Motion**

Under Mississippi Code Annotated Section 99-39-23(6)(Rev. 2007), all successive petitions are barred if the prisoner has filed a previous motion for post-conviction relief, unless the petitioner demonstrates that an exception applies. Wilson filed a PCR petition for his kidnaping conviction on June 20, 1986. (CP 71). The circuit court found that Wilson’s claims were without merit, and court’s Order denying the petition was filed on July 21, 1986. (CP 79). Wilson appealed, and the Supreme

Court affirmed the circuit court's denial of his PCR petition on September 19, 1988. (CP 124). Wilson filed a second motion for post-conviction relief on August 4, 2014. (CP 155). This petition was successive and Wilson has failed to show that an exception applies that would allow him to overcome the successive-writ bar. Furthermore, most of the claims that Wilson raised in his second PCR petition, and that he now raises on appeal, were raised in his first petition; those claims are *res judicata* barred. (CP 71-73, 79, and 124) and *See Riley v. State*, 150 So. 3d 138, 140 (Miss. Ct. App. 2014). Specifically, his claim that his indictment was defective, that he was denied effective assistance of counsel, and that his convictions are not supported by sufficient evidence are barred under *res judicata*.

**b) Wilson's petition was time barred**

Wilson was convicted of kidnaping on March 10, 1983, and was sentenced to a term of life in the custody of the Mississippi Department of Corrections. (CP 52). Wilson filed his PCR petition on August 4, 2014. (CP 155). The circuit court found that his petition was time barred because the petition was not made within three years after the entry of the judgment of his conviction. (CP 189)(citing Miss. Code Ann. §99-39-5[(2)]). The court noted that there are exceptions to the time bar; however, it found that Wilson failed to show that any of those exceptions to the procedural time bar applied in his case. (CP 189). The circuit court's finding that Wilson's petition was time-barred was not erroneous.

The Supreme Court has held that "errors affecting *fundamental* constitutional rights are excepted from the procedural bars of the UPCCRA." *Rowland v. State*, 42 So. 3d 503, 506 (Miss. 2010)(emphasis added). But "merely asserting a constitutional-right violation is insufficient to overcome the procedural bars." *Means v. State*, 43 So. 3d 438, 442 (Miss. 2010).

In his PCR petition, Wilson claimed that his indictment was defective, that his counsel was

ineffective, and that biological and physical exculpatory evidence was destroyed in bad faith after he was convicted. (CP 161-177). However, Wilson did not demonstrate that any of his claims were sufficient to surmount the procedural bars. In *Barnes v. State*, this Court held that neither a claim alleging a defective indictment, nor a claim raising ineffective assistance of counsel is sufficient to overcome the three-year time limit to file a motion for post-conviction relief. *Barnes v. State*, 949 So. 2d 879, 881 (Miss. Ct. App. 2007). And Wilson’s bare allegation that, after he was convicted, the State destroyed exculpatory evidence in bad faith is insufficient to overcome the time bar. *See Jones v. State*, 761 So. 2d 907, 910 (Miss. Ct. App. 2000)(citing *California v. Trombetta*, 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984) and *Taylor v. State*, 672 So. 2d 1246, 1271 (Miss. 1996)(finding that “in order to raise constitutional concerns, the unavailable evidence must have had some demonstrable exculpatory value that was evident prior to destruction and also had to be evidence of such a nature that it was not obtainable by some other reasonable means,” and “merely holding out the possibility that further testing [will] call the earlier test results into doubt is not enough” to raise constitutional concerns)). Therefore, the circuit court did not err in finding that Wilson’s claims did not relate to his fundamental constitutional rights, and were time barred.

**c) Wilson’s claims are without merit**

Although the circuit court found that Wilson’s PCR petition was not timely filed, it went on to consider the claims raised by Wilson and found them to be without merit. (CP 189-191). The circuit court’s determination that the issues raised by Wilson were without merit was not clearly erroneous.

**(1) Wilson’s indictment was not defective.**

Wilson argued that he was entitled to post-conviction relief because his indictment was fatally defective. (CP 161). Wilson claimed that his indictment was defective because it charged that

he committed a kidnaping that began in Tangipahoa Parish, Louisiana, and ended in Amite County, MS. (CP 161-162). He argued that, because all of the elements of the crime of kidnaping did not occur in Amite County, the trial court lacked jurisdiction over the case. (CP 162). Wilson cited no relevant authority in support of this argument. And Mississippi law shows that his argument is without merit. Pursuant to Mississippi Code Annotated 99-11-19,

[w]hen an offense is committed partly in one county and partly in another, or where the acts, effects, means, or agency occur in whole or in part in different counties, the jurisdiction shall be in either county in which said offense was commenced, prosecuted, or consummated, where prosecution shall be first begun.

Essential portions of the crime were committed in Amite County; therefore, the trial court did have jurisdiction over the matter. *See Aldridge v. State*, 99 So. 2d 456, 460 (Miss. 1958). Accordingly, his indictment was not defective, and the circuit court did not abuse its discretion when it found that Wilson was not entitled to post-conviction relief.

**(2) Wilson was not entitled to post-conviction relief due to the fact that DNA evidence was destroyed after he was convicted.**

After Wilson pleaded guilty to rape, the Amite County Sheriff wrote a letter to the Mississippi Crime Lab, informing them that they could dispose of the evidence from the rape investigation. (CP 150). The evidence was disposed on January 15, 1985, although it is not clear what evidence was destroyed. (CP 149). In his most recent PCR petition, Wilson alleged that the evidence was exculpatory, and that it was destroyed in bad faith. (CP 169). He claimed that the evidence was of great value to his rape charge, and also his kidnaping charge. (CP 169).

A PCR motion may only challenge a single judgment. Miss. Code Ann. § 99-39-9(2)(Rev. 2007). In his PCR petition, Wilson challenged his kidnaping conviction; however, he argued that the State had a duty to preserve evidence obtained from the rape victim's rape kit because, he argued, the evidence would have shown that he is actually innocent (of both rape and kidnaping). (CP 171).



Prosecutors have a duty to turn over exculpatory evidence that is material to the defendant's guilt. *Manning v. State*, 884 So. 2d 717, 725 (Miss. 2004). But "the State's duty to preserve evidence is limited to evidence that is expected to play a significant role in the defense." *Banks v. State*, 725 So. 2d 711, 714-715 (Miss. 1997). Generally, "intentional spoliation or destruction of evidence relevant to a case raises a presumption, or, more properly, an inference, that this evidence would have been unfavorable to the case of the spoliator" and that it was destroyed in bad faith. *Washington v. State*, 478 So. 2d 1028, 1032 (Miss. 1985). However, the inference only arises "where the spoliation or destruction was intentional and indicates fraud and a desire to suppress the truth, and *it does not arise where the destruction was a matter of routine with no fraudulent intent.*" *Id.* (emphasis in original). In *Tolbert v. State*, 511 So. 2d 1368 (Miss 1987), the Supreme Court adopted the standard announced in the watershed U.S. Supreme Court case regarding spoliation of evidence, *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984). In *Trombetta*, the appellant argued that California authorities failed to preserve a breath sample taken after testing him on an intoxilyzer, even though they had the capabilities to preserve the sample. The Supreme Court found that this was not a matter amounting to a violation of the appellant's constitutional rights. Instead, the Supreme Court held that, "in order to raise constitutional concerns, the unavailable evidence must have had some demonstrable exculpatory value that was evident prior to destruction and also had to be evidence of such nature that it was not obtainable by some other means." *Jones v. State*, 761 So. 2d 907, 910 (Miss. Ct. App. 2000)(citing *Trombetta*, 467 U.S. at 489, 104 S. Ct. 2528). And the mere possibility that additional testing would call earlier test results into doubt is not enough to meet the *Trombetta* standard. *Id.*

Although not typically applied in cases where a conviction has already been obtained, this Court has previously applied the *Trombetta* standard to facts in a PCR case. See *Chapman v. State*,

47 So. 3d 203, 209 (Miss. Ct. App. 2010).<sup>1</sup> In *Chapman*, the PCR petitioner claimed that the State had failed to preserve exculpatory evidence related to his rape conviction. *Id.* at 205. However, this Court found that Chapman failed to offer more than a bare allegation that the State acted in bad faith when it destroyed the evidence. *Id.* at 209. Accordingly, this Court found that the petitioner was not entitled to post-conviction relief. *Id.*

Like the petitioner in *Chapman*, Wilson has also failed to satisfy the requirements announced in *Trombetta*. The circuit court did not abuse its discretion in finding that Wilson was not entitled to post-conviction relief. The record shows that the evidence was destroyed as a matter of routine, and Wilson has not demonstrated that the State disposed of the evidence with fraudulent intent. Also, the evidence was not obviously exculpatory. It is not apparent how the evidence from the rape kit would have shown that he did not kidnap the victims. It also appears that Wilson was convicted as an accessory to the kidnaping and rape; therefore, the fact that his DNA was not found when the rape kit was tested does not mean that he was not guilty. (Indictment: CP 1, and Wilson's statement to law enforcement: Court's Exhibit A/State's Exhibit 1), and *See* Miss. Code Ann. §97-1-3 (an accessory before the fact is deemed a principal to the crime).

To the extent that Wilson may have meant that the evidence would exonerate him of his rape conviction, the issue is barred for the same reasons that the PCR petition related to his kidnaping conviction is barred. And Wilson has failed to demonstrate that he is entitled to any relief. Although the present record does not indicate what the results of the DNA testing were, Wilson pleaded guilty

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<sup>1</sup>Please note that, through an Order signed December 9, 2014, the Supreme Court granted Chapman's *pro se* petition for Writ of Certiorari. *Chapman v. State*, 2012-CT-01574-SCT (January 8, 2015). A Supreme Court opinion addressing the issues has not handed down, as of June 2, 2015.

to raping one of the kidnaped victims. Wilson has failed to show that the evidence was exculpatory, he merely holds out hope that further testing would have called the earlier test results into doubt; this is insufficient to warrant post-conviction relief. *See Jones*, 761 So. 2d at 910 (*citing Taylor v. State*, 672 So. 2d 1246, 1271 (Miss. 1996)). The circuit court judge did not abuse his discretion when he found that Wilson's claim was without merit and denied his PCR petition.

**(3) Wilson has not shown that he received ineffective assistance of counsel.**

In order to be entitled to post-conviction relief based on ineffective assistance of counsel, the petitioner must meet the two-pronged test set forth in *Strickland v. Washington*. *Dickey v. State*, 662 So. 2d 1106, 1109 (Miss. 1995) (*citing Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed. 2d 674, 693 (1984)). Pursuant to *Strickland*, Wilson has the burden to show 1) that his attorney's performance was deficient, and 2) that his defense was prejudiced by that performance. *Strickland*, 466 U.S. at 687. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* There is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. *Id.* In order to overcome this presumption, the petitioner is required to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding[s] would have been different." *Id.* at 694.

Wilson claims that his attorney was ineffective because he failed to investigate his case prior to trial, he did not call any witnesses, and he was not present during his interrogation and his attorney did not attempt to suppress his confession. (CP 173 and 176). He also alleges that his attorney slept through his trial, and was ineffective because he did not perfect a direct appeal of his sentence. (CP 173).

**(i) Failure to seek to suppress his confession, failure to investigate prior to trial, and failure to call any witnesses:**

There is no indication in the record, aside from Wilson's own assertions, that his counsel was ineffective for failing to seek to suppress his confession. On February 22, 1983, Wilson was represented by Reginald Jones. (CP 14). Jones filed a Motion for a Hearing to Suppress Statements, through which he informed the court that Wilson was interviewed at a time that he was not represented by counsel. (CP 14). Jones explained that a hearing was necessary because, although Wilson's statements were recorded, defense counsel was unaware of the contents of the statements, and counsel was not sure whether Wilson's rights against self-incrimination and access to counsel had been violated. (CP 14 and 15). Counsel requested that, after discovery was complete, the trial court hold a hearing to determine whether Wilson's statements should be admitted into evidence. (CP 14). Jones filed a Motion for Authority to Withdraw on February 23, 1983, and on the same day, Leonard Rosenthal was appointed to represent Wilson. (CP 16-17). On March 3, 1983, the trial court granted Wilson's motion for a pre-trial suppression hearing. (CP 28). Although the transcript of the proceeding is not part of the record, the record shows that Wilson's attorney raised an issue regarding the admissibility of his statements, and a hearing was held regarding their admissibility. (CP 28). The trial court found that there was no reason to exclude the statements. (CP 30). Accordingly, Wilson's claim that his attorney did not attempt to suppress his statements is contrary to the record and is without merit.

Wilson's claim that his attorney did not investigate his case before trial is also belied by the record. After he was appointed to represent Wilson, Rosenthal filed a number of motions related to discovery, exclusion of evidence, and even a demurrer to the indictment. (CP 18, 21, 22, and 23). This clearly shows that he actively investigated on Wilson's behalf.

Wilson argues that his attorney was ineffective because he failed to call any witnesses in his favor. (CP 173). Although it is not clear from the record whether Wilson’s attorney called witnesses at trial or not, Wilson has not shown how the outcome of his trial would have been different if witnesses had been called in his defense. An attorney’s decision to “file certain motions, call certain witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy.” *Scott v. State*, 742 So. 2d 1190, 1196 (Miss. Ct. App. 1999)(citations omitted). And this Court has held that “the mere failure to call a witness for the defense, standing alone, does nothing to demonstrate ineffective assistance of counsel.” *Sharp v. State*, 979 So. 2d 713, 716 (Miss. Ct. App. 2007)(citations omitted). Furthermore, the Court noted that in criminal trials, it is common for defense counsel to refrain from putting on any evidence as a strategy to emphasize the weakness of the prosecution’s evidence. *Id.* Wilson has not shown that his counsel did not call witnesses or that the decision not to call witnesses was not a part of reasonable trial strategy. Accordingly, this issue is without merit.

**(ii) Failure to file an appeal on Wilson’s behalf:**

Wilson erroneously argued that his attorney should have objected when the trial court, without authority, sentenced him to a life sentence. (CP 177). However, upon finding that Wilson was guilty of kidnaping, the jury– and not the trial judge– found that he should be sentenced to life in prison. (CP 51). His sentence was not illegal. *See* Miss. Code Ann. §97-3-53.

In furtherance of his erroneous claim that his sentence was illegal, Wilson argued that his attorney’s failure to file an appeal of his illegal sentence was a *per se* violation of his 6<sup>th</sup> Amendment right to counsel, and that he was entitled to an out-of-time appeal. (CP 174). Although out-of-time appeals may be granted under some circumstances, the person convicted of a crime must show that, through no fault of his own, he has been denied his right to perfect an appeal by acts of his attorney

or the trial court. *Johnson v. State*, 137 So. 3d 336, 339 (Miss. Ct. App. 2014)(citation omitted). However Wilson's claim that his attorney did not file an appeal, without more, is not sufficient to show that counsel's performance was deficient. See *Dickey v. State*, 662 So. 2d 1106, 1109 (Miss. 1995) and *Joshua v. State*, 913 So. 2d 1062, 1064 (Miss. Ct. App. 2005). Based on the record, it is unclear why an appeal was not perfected, although the record does indicate that Wilson filed a *pro se* Notice of Appeal. (CP 186). Wilson did not claim that he ever asked his attorney to file an appeal on his behalf, and he has failed to show that any agreement was reached regarding an appeal. Wilson fails to argue or show that he possessed no fault for his out-of-time appeal and that the acts of his attorney or the circuit court effectively denied his right to perfect his appeal; therefore, his attorney's performance cannot be found deficient. See *Johnson*, 137 So. 3d at 339, and *Dickey*, 662 So. 2d at 1109. Wilson has also failed to show that the circuit court should have suspended the rules and allowed him to file an out-of-time appeal, and Wilson failed to present sufficient evidence to warrant an evidentiary hearing on his motion. The circuit court did not abuse its discretion when it found that Wilson was not entitled to relief.

Wilson has only offered his own bare assertions in support of his arguments that his attorney(s) rendered ineffective assistance of counsel. This Court has held that, in PCR cases, where the petitioner only offers his own assertions that his attorney was ineffective, then his ineffective-assistance-of-counsel claim is without merit. *Mooney v. State*, 130 So. 3d 145, 147 (Miss. Ct. App. 2013)(citation omitted). Wilson failed to show that his attorney rendered ineffective assistance; accordingly, this issue is without merit.

## **II. Wilson did not present any evidence or argument to show that he is actually innocent**

Wilson argues that the circuit court erred in failing to consider his claim that he is actually innocent. (Appellant's Brief p. 6). He does not assert that he did not commit the crime, he merely

argues that he is serving an illegal sentence and claims that this means he is actually innocent. (Appellant's Brief p. 6). However, he does not support his claim with any evidence, but only with his own uncorroborated allegations. Accordingly, this issue is without merit.

**III. Portions of Wilson's issues Four and Five of his appellate brief are barred from review because the issues were not presented to the circuit court.**

In Issues Four and Five of his Appellant's Brief, Wilson claims that the State withheld the fact that it relied on information from a confidential informant to arrest him, and he was denied the chance to cross-examine the confidential informant. (Appellant's Brief p. 13 and 18). Wilson also argues that the State presented insufficient evidence to support his kidnaping conviction and his rape conviction. (Appellant's Brief p. 14). These issues were not presented in his PCR petition, and should not be considered by this Court. *See Marshall v. State*, 136 So. 3d 443, 445 (Miss. Ct. App. 2013)(citation omitted)(finding that "a defendant who fails to raise an issue in his motion for post-conviction relief before the trial court may not raise that issue for the first time on appeal").

Wilson's claim that insufficient evidence was presented to support his convictions is also barred because he did not preserve the issue. Wilson was convicted of kidnaping on March 10, 1983, but there is no evidence in the record that he filed a motion for directed verdict or a motion for JNOV. (CP 51). Accordingly, Wilson failed to preserve this issue, and he has waived the opportunity to challenge the sufficiency of the evidence on appeal. *See Moore v. State*, 131 So. 3d 1228, 1231 (Miss. Ct. App. 2013)(citations omitted) with *Peden v. State*, 425 So. 2d 1356, 1357 (Miss. 1983)(finding that failure to preserve a challenge to the sufficiency of the evidence—through a motion for directed verdict, motion for JNOV, or seeking a peremptory instruction—"constitutes a waiver of any challenge on appeal to the sufficiency of the evidence." Furthermore, Wilson pleaded guilty to raping the victim; therefore, he waived the right to a jury trial, the right that the State prove each

element of the offense beyond a reasonable doubt, and the right to challenge the sufficiency of the evidence. *Steele v. State*, 845 So. 2d 758, 759 (Miss. Ct. App. 2003). Accordingly, this issue is without merit.

#### **IV. Wilson was not subjected to double jeopardy.**

In Issue Five of his Appellant's Brief, Wilson asserts that his attorney was ineffective for failing to argue that Wilson had been subjected to double jeopardy. (Appellant's Brief p. 16-18). He claims that rape is a lesser included offense of kidnaping. (Appellant's Brief p. 17)(arguing that "the Appellant's plea was the underlying felony in a capital indictment"). Although Wilson did not raise this issue in his PCR petition, the prohibition against double jeopardy is a fundamental right that is not subjected to procedural bars. *Bell v. State*, 117 So. 3d 661, 665 (Miss. Ct. App. 2013)(citation omitted). Wilson was not subjected to double jeopardy; therefore, his attorney was not ineffective. The Supreme Court has addressed this issue and found that rape and kidnaping are two, separate offenses. See *Hughes v. State*, 401 So. 2d 1100, 1104 (Miss. 1981). Each statute requires proof of an additional fact which the other does not; therefore, Wilson was not subjected to double jeopardy when he pleaded guilty to rape, following his conviction-by-jury for kidnaping. Accordingly, this issue is without merit.



### **Conclusion**

The issues raised by Wilson were either waived, are barred, or are without merit. Accordingly, the State of Mississippi respectfully requests that this Honorable Court affirm the circuit court's denial of Wilson's PCR petition.

Respectfully submitted,

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### **Certificate of Service**

I hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

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This the 9th day of June, 2015.

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