

**MISSISSIPPI SUPREME COURT UPDATE**  
**2015 Fall Public Defenders Training Conference**  
**October 8, 2015 - April 14, 2016**

Leslie Lee  
Office of State Public Defender  
601-576-4290  
[lee@ospd.ms.gov](mailto:lee@ospd.ms.gov)  
[www.ospd.ms.gov](http://www.ospd.ms.gov)

<b><u>Death Penalty Cases</u></b> .....	1
<i><u>Batiste v. State</u></i> (PCR).....	1
<b><u>Non-Death Penalty Criminal Cases</u></b> .....	2
<i><u>Anderson (Michael) v. State</u></i> .....	17
<i><u>Boggs v. State</u></i> .....	42
<i><u>Bowser v. State</u></i> .....	9
<i><u>Brown (Michael) v. State</u></i> .....	11
<i><u>Burgess v. State</u></i> .....	14
<i><u>Burrell v. State</u></i> .....	8
<i><u>Collier v. State</u></i> .....	33
<i><u>Dartez v. State</u></i> .....	10
<i><u>Different v. State</u></i> .....	21
<i><u>Fleming v. State</u></i> .....	25
<i><u>Flynt v. State</u></i> .....	6
<i><u>Giles v. State</u></i> .....	38
<i><u>Graham (Dewayne) v. State</u></i> .....	36
<i><u>Graves v. State</u></i> .....	44
<i><u>Green v. State</u></i> .....	30
<i><u>Hale v. State</u></i> .....	31
<i><u>Hall (Eddie) v. State</u></i> .....	39
<i><u>Moore (Lester) v. State</u></i> .....	29
<i><u>Newell v. State</u></i> .....	2
<i><u>Nuckolls v. State</u></i> .....	23
<i><u>Parish v. State</u></i> .....	5
<i><u>Roby v. State</u></i> .....	27
<i><u>Rowsey v. State</u></i> .....	19
<i><u>Shinn v. State</u></i> .....	18
<i><u>Tubbs v. State</u></i> .....	34
<i><u>Warren v. State</u></i> .....	40
<i><u>Warwick v. State</u></i> .....	24
<b><u>SCT Post-Conviction Cases</u></b> .....	46
<i><u>Atwood v. State</u></i> .....	46

<a href="#"><u>Bester v. State.</u></a> .....	48
<a href="#"><u>SCT Miscellaneous.</u></a> .....	49
<a href="#"><u>Hall (Jason) v. State.</u></a> .....	51
<a href="#"><u>Hinds County, Mississippi, City of Jackson, Mississippi, Billy Jade (Jay) Albright in his Individual Capacity and Mississippi Bureau of Narcotics v. Ronnie Burton.</u></a> .....	53
<a href="#"><u>Isaac v. State.</u></a> .....	52
<a href="#"><u>Six Thousand Dollars (\$6,000) v. State of Mississippi Ex Rel. Mississippi Bureau of Narcotics.</u></a> .....	49
<a href="#"><u>U.S. Supreme Court Notes.</u></a> .....	53
<a href="#"><u>Caetano v. Massachusetts.</u></a> .....	57
<a href="#"><u>Hurst v. Florida.</u></a> .....	54
<a href="#"><u>Kansas v. Carr.</u></a> .....	54
<a href="#"><u>Lockhart v. United States.</u></a> .....	56
<a href="#"><u>Luis v. United States.</u></a> .....	57
<a href="#"><u>Montgomery v. Louisiana.</u></a> .....	55
<a href="#"><u>Mullenix v. Luna.</u></a> .....	53
<a href="#"><u>Musacchio v. United States.</u></a> .....	55
<a href="#"><u>Nichols v. United States.</u></a> .....	57
<a href="#"><u>Wearry v. Cain.</u></a> .....	56
<a href="#"><u>Welch v. United States.</u></a> .....	58
<a href="#"><u>White v. Wheeler.</u></a> .....	54
<a href="#"><u>Woods v. Etherton.</u></a> .....	58
 <b>Direct appeal decisions by date - non death penalty cases:</b>	
<a href="#"><u>October 8, 2015.</u></a> .....	2
<a href="#"><u>October 22, 2015.</u></a> .....	5
<a href="#"><u>October 29, 2015.</u></a> .....	9
<a href="#"><u>November 12, 2015.</u></a> .....	11
<a href="#"><u>November 19, 2015.</u></a> .....	14
<a href="#"><u>December 3, 2015.</u></a> .....	18
<a href="#"><u>December 10, 2015.</u></a> .....	21
<a href="#"><u>December 17, 2015.</u></a> .....	25
<a href="#"><u>January 28, 2016.</u></a> .....	27
<a href="#"><u>February 4, 2016.</u></a> .....	31
<a href="#"><u>February 18, 2016.</u></a> .....	34
<a href="#"><u>February 25, 2016.</u></a> .....	36
<a href="#"><u>March 17, 2016.</u></a> .....	38
<a href="#"><u>March 31, 2016.</u></a> .....	40
<a href="#"><u>April 7, 2016.</u></a> .....	42
<a href="#"><u>April 14, 2016.</u></a> .....	44

**MISSISSIPPI COURT OF APPEALS UPDATE**

**2015 Fall Training Conference  
October 6, 2015 – April 12, 2016**

**Direct Appeal Cases..... 60**

*Affleck v. State..... 114*

*Ames v. State..... 63*

*Anderson (Christopher) v. State..... 120*

*Anderson (Clarence) v. State..... 125*

*Austin v. State..... 61*

*Barnett v. State..... 72*

*Berry v. State..... 86*

*Bratcher v. State..... 69*

*Brewer v. State..... 68*

*Brown (Travon) v. State..... 80*

*Bufford v. State..... 76*

*Carr v. State..... 93*

*Carroll v. State..... 121*

*Case v. State..... 60*

*Casey v. State..... 78*

*Chester v. State..... 131*

*Course v. State..... 84*

*Ellis v. State..... 116*

*England v. State..... 124*

*Fancher v. State..... 129*

*Freeman v. State..... 150*

*Galloway v. State..... 100*

*Goldsmith v. State..... 119*

*Graham (Andrew) v. State..... 136*

*Grant v. State..... 142*

*Gray (Natyyo) v. State..... 73*

*Hampton v. State..... 152*

*Harris (Mario) v. State..... 146*

*Harvey v. State..... 65*

*Hobson v. State..... 111*

*Hoffman v. State..... 151*

*Holmes v. State..... 108*

*Hubbard v. State..... 68*

*Hunter (Calvin) v. State..... 94*

*Hunter (Derrick) v. State..... 139*

*John v. State..... 99*

*Johnson (Derrick) v. State..... 145*

*Johnson (Dexter) v. State..... 71*

*Johnson (James) v. State..... 110*

*Johnson (Mickey) v. State..... 130*

<u><i>Jordan v. State</i></u> .....	105
<u><i>Lafayette v. State</i></u> .....	95
<u><i>Land v. State</i></u> .....	128
<u><i>Lewis (David) v. State</i></u> .....	148
<u><i>Malone v. State</i></u> .....	92
<u><i>Mastin v. State</i></u> .....	87
<u><i>McCollum v. State</i></u> .....	133
<u><i>McCormick v. State</i></u> .....	118
<u><i>McCoy v. State</i></u> .....	98
<u><i>Moore (Adrian) v. State</i></u> .....	138
<u><i>Moore (David) v. State</i></u> .....	127
<u><i>Moss v. State</i></u> .....	103
<u><i>Nolan v. State</i></u> .....	123
<u><i>Parker v. State</i></u> .....	79
<u><i>Parks v. State</i></u> .....	107
<u><i>Parvin v. State</i></u> .....	134
<u><i>Phillips v. State</i></u> .....	77
<u><i>Prokasy v. State</i></u> .....	153
<u><i>Reed v. State</i></u> .....	86
<u><i>Robinette v. State</i></u> .....	89
<u><i>Ross v. State</i></u> .....	122
<u><i>Schlepphorst v. State</i></u> .....	140
<u><i>Smith (Brandon) v. State</i></u> .....	97
<u><i>Stone v. State</i></u> .....	62
<u><i>Taylor (Willie) v. State</i></u> .....	85
<u><i>Thomas (Antwain) v. State</i></u> .....	132
<u><i>Thomas (Christopher) v. State</i></u> .....	90
<u><i>Townsend v. State</i></u> .....	155
<u><i>Tutwiler v. State</i></u> .....	101
<u><i>Varnado v. State</i></u> .....	66
<u><i>Walker v. State</i></u> .....	82
<u><i>Whitehead v. State</i></u> .....	147
<u><i>Whittle v. State</i></u> .....	113
<u><i>Wilson (Timothy) v. State</i></u> .....	143
<u><i>Woods v. State</i></u> .....	104
<u>COA Post-Conviction Cases</u> .....	156
<u><i>Alford v. State</i></u> .....	196
<u><i>Bates v. State</i></u> .....	206
<u><i>Beal v. State</i></u> .....	193
<u><i>Blount v. State</i></u> .....	190
<u><i>Brasso v. State</i></u> .....	215
<u><i>Braziel v. State</i></u> .....	202
<u><i>Brown (Kevin) v. State</i></u> .....	205
<u><i>Brown (Paul) v. State</i></u> .....	192

<u><i>Brown (Vernon) , Jr. v. State.</i></u>	216
<u><i>Burgin v. State.</i></u>	159
<u><i>Burkhalter v. State.</i></u>	168
<u><i>Burns v. State.</i></u>	208
<u><i>Byrd v. State.</i></u>	172
<u><i>Chandler v. State.</i></u>	200
<u><i>Elkins v. State.</i></u>	219
<u><i>Evans v. State.</i></u>	218
<u><i>Felton v. State.</i></u>	177
<u><i>Fluker (I) v. State.</i></u>	157
<u><i>Fluker (II) v. State.</i></u>	204
<u><i>Gandy v. State.</i></u>	182
<u><i>Gray (Bobby) v. State.</i></u>	164
<u><i>Hicks v. State.</i></u>	195
<u><i>Holton v. State.</i></u>	213
<u><i>Hooghe v. State.</i></u>	212
<u><i>Hudspeth v. State.</i></u>	171
<u><i>Jackson (Gerry) v. State.</i></u>	175
<u><i>Johnson (Joseph) v. State.</i></u>	167
<u><i>Jones (Paul) v. State.</i></u>	169
<u><i>Kennedy (Elroy) v. State.</i></u>	170
<u><i>Kennedy (Thomas) v. State.</i></u>	186
<u><i>Kyles v. State.</i></u>	189
<u><i>Lewis (Robert) v. State.</i></u>	187
<u><i>Madden v. State.</i></u>	197
<u><i>Magee v. State.</i></u>	173
<u><i>Mason v. State.</i></u>	160
<u><i>McDonald v. State.</i></u>	178
<u><i>McLaurin (I) v. State.</i></u>	185
<u><i>McLaurin (II) v. State.</i></u>	220
<u><i>McMickle v. State.</i></u>	184
<u><i>Meisner v. State.</i></u>	210
<u><i>Minor v. State.</i></u>	201
<u><i>Neal v. State.</i></u>	198
<u><i>Pinkney v. State.</i></u>	176
<u><i>Presley v. State.</i></u>	158
<u><i>Randle v. State.</i></u>	165
<u><i>Rogers v. State.</i></u>	183
<u><i>Ruffin v. State.</i></u>	156
<u><i>Scott v. State.</i></u>	208
<u><i>Shies v. State.</i></u>	199
<u><i>Sinko v. State.</i></u>	214
<u><i>Smith (Antonio) v. State.</i></u>	166
<u><i>Smothers v. State.</i></u>	162
<u><i>Springer v. State.</i></u>	174
<u><i>Stricklin v. State.</i></u>	180

<u><i>Stokes v. State.</i></u> .....	217
<u><i>Taylor (Warren) v. State.</i></u> .....	179
<u><i>Tedder v. State.</i></u> .....	161
<u><i>Thomas (Bobby) v. State.</i></u> .....	188
<u><i>Timmons v. State.</i></u> .....	163
<u><i>Walden v. State.</i></u> .....	191
<u><i>Wallace (Reginald) v. State.</i></u> .....	193
<u><i>Wallace (Rosa) v. State.</i></u> .....	203
<u><i>Wallace (Roy) v. State.</i></u> .....	177
<u><i>Williams (Dillon) v. State.</i></u> .....	211
<u><i>Wilson (Charles) v. State.</i></u> .....	206
<u><i>Zales v. State.</i></u> .....	181
<u>Miscellaneous Cases</u> .....	221
<u><i>Brady v. Hollins, et.al and MDOC.</i></u> .....	221
<u><i>Moore (Jamar) v. State.</i></u> .....	222
<b>Direct appeals opinions by dates:</b>	
<u>October 6, 2015.</u> .....	60
<u>October 13, 2015.</u> .....	64
<u>October 20, 2015.</u> .....	68
<u>October 27, 2015.</u> .....	71
<u>November 3, 2015.</u> .....	72
<u>November 10, 2015.</u> .....	78
<u>November 17, 2015.</u> .....	85
<u>November 24, 2015.</u> .....	90
<u>December 1, 2015.</u> .....	99
<u>December 8, 2015.</u> .....	101
<u>December 15, 2015.</u> .....	108
<u>January 5, 2016.</u> .....	119
<u>January 12, 2016.</u> .....	120
<u>January 19, 2016.</u> .....	127
<u>January 26, 2016.</u> .....	128
<u>February 9, 2016.</u> .....	129
<u>February 16, 2016.</u> .....	130
<u>February 23, 2016.</u> .....	132
<u>March 1, 2016.</u> .....	134
<u>March 8, 2016.</u> .....	138
<u>March 15, 2016.</u> .....	142
<u>March 22, 2016.</u> .....	143
<u>March 29, 2016.</u> .....	145
<u>April 5, 2016.</u> .....	147
<u>April 12, 2016.</u> .....	151

INDEX OF ISSUES OF SIGNIFICANT CASES

Bond

Wallace (no authority to revoke bond based on appearance that def “trifling” with court or hesitating to plead guilty)..... 193

Death Penalty

Hurst (only jury can sentence someone to death - not judge on jury recommendation)..... 54

Carr (need not instruct jury that mitigation evidence does not need to be found beyond a reasonable doubt). .... 54

Disorderly Conduct

Mastin (def reluctantly accepted ticket while screaming and cursing at officer – insufficient to show officer was attempting to avoid breach of the peace by arresting def)..... 87

Embezzlement

Brown (Michael) (Atty def guilty of embezzlement when original embezzlement deprives the victim of the right to direct and control his own property as the owner, not the embezzler, sees fit, even if the embezzlement ultimately turned a profit for the victim)..... 11

Enhancements

Harvey (firearm enhancement under §97-37-37(2) can not imposed on top of habitual offender enhancement)..... 65

Expert Testimony/Witnesses

Fleming (cellular engineer’s testimony not lay opinion - must be designated as an expert). .... 25

Felon in possession of a firearm

Green (§97-37-5(1) allows multiple convictions when more than one weapon is possessed simultaneously by a prior convicted felon)..... 30

Flight Instruction

Anderson (no evidence support assertion that def’s flight caused by something other than consciousness of guilt – def never testified he left the scene

because he was worried about retaliation). . . . .	17
<b>Forfeiture</b>	
<u>Luis</u> (pretrial freeze of def’s legitimate, untainted assets violates 6 <sup>th</sup> Amendment right to counsel of choice). . . . .	57
<b>Guilty Pleas</b>	
<u>Wallace</u> (no obligation for a court to accept a “best interests” or <i>Alford</i> plea). . . .	193
<b>Indictments</b>	
<u>Warren</u> (indictment for possession of a controlled substance in a correctional facility need not identify the controlled substance). . . . .	40
<b>Mitigation Evidence</b>	
<u>Carr</u> (need not instruct jury that mitigation evidence does not need to be found beyond a reasonable doubt). . . . .	54
<b>Murder</b>	
<u>Roby</u> (deliberate design murder instruction improperly told jury if def intended an assault, she was automatically criminally liable for any resultant homicide regardless of intent). . . . .	27
<b>Parole</b>	
<u>Sinko</u> (offenders convicted of manufacturing are no longer parole ineligible based on amendments adopted by HB 585). . . . .	214
<b>Prior Bad Acts (MRE 404(b))</b>	
<u>Johnson</u> (reversible error to admit offense reports from four prior domestic violence incidents by def w/o conducting MRE 403 balancing test – reports contained other allegations against def). . . . .	110
<b>Right to Counsel</b>	
<u>McCollum</u> (in the absence of a prior warning, a defendant will not be found to have forfeited his right to counsel based on complaints about his appointed counsel). . . . .	133
<b>Self-Defense Instructions</b>	

Newell (Manslaughter instructions based on §97-3-29 and §97-3-31 proper). . . . . 2

**Sentencing Issues**

Montgomery (prohibition against automatic life w/o parole for juveniles in *Miller v. Alabama* is retroactive). . . . . 55

Atwood (circuit courts do not have inherent power to suspend a sentence or to impose PRS, nor the power to revoke PRS – Legislative function – HB 585 did not violate separation of powers). . . . . 46

Bester (judge has the authority to sentence a def to life for forcible rape under §97-3-65(4)(a) with or w/o a recommendation from the jury). . . . . 48

**Sexual Battery**

Burgess (force is not an element of sexual battery – marriage is an affirmative, but not an absolute defense – when raised, must show parties living apart or force used). . . . . 14

**Speedy Trial**

Rowsey (def does not waive right to speedy trial by failing to obtain ruling on motion for speedy trial). . . . . 19

Flynt (raise speedy trial issue at trial – make a record). . . . . 6

**Stun Guns**

Caetano (stun guns are protected under the 2<sup>nd</sup> Amendment). . . . . 57

**Venue**

Nuckolls (stipulation of facts failed to sufficiently allege venue). . . . . 23

**Wrongful Conviction**

Hall (an order passing indictment to the files sufficient under §11-44-7(1)(b) to establish innocence w/o a dismissal or nol pros). . . . . 51

Moore (petitioner established he was innocent of felony possession of Schedule II hydrocodone, but admitted guilt of misdemeanor possession of Schedule III – still entitled to proceed with wrongful conviction of felony compliant). . . . . 222

**MISSISSIPPI SUPREME COURT DECISIONS**  
**October 8, 2015 - April 14, 2016**

**DEATH PENALTY CASES:**

***Bobby Batiste v. State***, No. 2013-DR-01624-SCT (Miss. January 21, 2016)

**CASE:** PCR – Capital Murder

**SENTENCE:** Death

**COURT:** Oktibbeha County Circuit Court

**TRIAL JUDGE:** Hon. James T. Kitchens, Jr.

**APPELLANT ATTORNEY:** Dellwyn K. Smith, Louwlynn Vanzetta Williams, Scott A. Johnson

**APPELLEE ATTORNEY:** Jason L. Davis, Cameron L. Benton, Brad A. Smith

**DISPOSITION:** Leave to seek PCR Granted. Kitchens, Justice, for the Court. Waller, C.J., Dickinson, P.J., King and Coleman, JJ., Concur. Pierce, J., Dissents with Separate Written Opinion Joined by Randolph, P.J., and Lamar, J. Maxwell, J., Not Participating.

**ISSUE:** Whether certain statements, alleged to have been made by a bailiff to jurors concerning how African-Americans viewed the death penalty, violated Batiste's constitutional right to an impartial jury.

**FACTS:** Bobby Batiste and Andreas Galanis were students at Mississippi State and shared an apartment in Starkville. In March of 2008, Galanis discovered Batiste and/or Batiste's girlfriend had been using Galanis's debit card without his knowledge. Galanis made a complaint at the Oktibbeha County Sheriff's Department. The following day was the beginning of spring break. Galanis's mother contacted the sheriff's office when she did not hear from him as expected. A deputy went to his apartment to check on him. Batiste let the officer into the apartment and Galanis's body was subsequently discovered. Batiste was arrested and made two statements to the police admitting to the murder. He was indicted for capital murder during the commission of a robbery. He was subsequently convicted and sentenced to death. His conviction and sentence were both affirmed by the SCT. *Batiste v. State*, No. 2010-DP-00510-SCT (Miss. May 16, 2013). Batiste subsequently filed a request for leave to file a PCR, alleging a bailiff improperly influenced jurors during his trial. Batiste submitted affidavits from two jurors. One alleged that when the jury had questions, the bailiffs would explained the law to them. She was worried that the jury was all-white, but a bailiff told her that was because "black people will not consider the death penalty." A second juror was also concerned the jury was all-white. He claimed, "Someone...explained that you have to be comfortable with the death penalty, and blacks don't feel as comfortable with it."

**HELD:** The claim is not procedurally barred, as it was not capable of being addressed at trial or on appeal. If even barred, it involves a fundamental right to a fair trial by an impartial jury.

The affidavits support Batiste's claim that bailiffs made improper comments which affected his right to a fair trial. The SCT could not say that such remarks to jurors, if made, did not impact Batiste's

fundamental constitutional right to a fair trial by an impartial jury. If accurately reported, the remarks were presumptively prejudicial. Batiste has made a substantial showing of a denial of a state or federal right sufficient to entitle him to an evidentiary hearing. The circuit court is directed to “ascertain what communications were had between bailiffs and/or other persons and the jury and to determine, insofar as is possible, what impact, if any, those communications had on Batiste's conviction and sentence.”

**Pierce, Justice, Dissenting:**

Justice Pierce dissented, believing Batiste failed to overcome the presumption that the bailiff's comments, if made, did not improperly influenced the jury. The alleged comments did not express any personal opinion of the bailiff relating to Batiste's conviction or sentence. There was no indication that the comments influenced the jury's decision-making process. He believed the request to file a PCR should have been denied.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108585.pdf>

**NON-DEATH PENALTY CASES:**

**October 8, 2015**

*James C. Newell, Jr. v. State*, No. 2013-CT-00030-SCT (Miss. October 8, 2015)

**CASE:** Manslaughter

**SENTENCE:** 20 years with 15 to serve, 5 suspended, followed by 5 years PRS

**COURT:** Lowndes County Circuit Court

**TRIAL JUDGE:** Hon. Lee Sorrels Coleman

**TRIAL ATTORNEYS:** William Paul Starks, Ii, Rhonda Hayes Ellis

**APPELLANT ATTORNEY:** Hunter Nolan Aikens, George T. Holmes

**APPELLEE ATTORNEY:** Billy L. Gore

**DISTRICT ATTORNEY:** Forrest Allgood

**DISPOSITION:** COA Affirmed. Case Reversed and Remanded. Waller, Chief Justice, for the Court. Randolph, P.J., Chandler and Pierce, JJ., Concur. Lamar, J., Concurs in Part and in Result Without Separate Written Opinion. Dickinson, P.J., Dissents with Separate Written Opinion Joined by Kitchens and King, JJ.; Coleman, J., Joins in Part.

**ISSUES:** (1) Whether the State presented sufficient evidence; (2) whether Newell's constitutional right to a speedy trial was violated; (3) whether the trial court erred in granting several jury instructions; (4) whether the trial court erred in allowing Newell's voice messages on his wife's phone to be admitted; and (5) whether the trial court erred in admitting the transcript of a witness's testimony from Newell's first trial.

**FACTS:** James Newell was convicted of manslaughter stemming from his shooting of Adrian Boyette in the parking lot of the Slab House bar in Lowndes County. Newell was having problems with his wife of two weeks for allegedly seeing another man. On May 14, 2008, Newell called his wife Diane's cell phone and left two voice mails. In the first message, he threatened to shoot Diane and her boyfriend, but in the second message he recanted. Nevertheless, he drove to the Slab House to confirm the affair before getting a divorce. Newell saw Boyette, whom he did not know, standing near Diane's truck. Words were exchanged, and Newell turned and walked back toward his own truck. Boyette followed him, and began to shout and beat on Newell's truck. At some point, Boyette shut the truck door on Newell's leg. Boyette continued to threaten Newell. Newell testified he feared for his life. He then got out of the truck and Boyette said that he was going to cut him up. Newell stated that when Boyette grabbed for his pocket Newell reached back inside the truck and pulled a gun and shot Boyette. Newell was tried for murder, but was convicted of manslaughter. His first conviction was reversed on appeal. *Newell v. State*, 49 So. 3d 66 (Miss. December 2, 2010). Newell was retried and convicted again. At his retrial, Dr. Steven Hayne testified over objection that the bullet wound was consistent with Boyette being in a guarded position. The COA reversed, holding that the trial judge erred in allowing Dr. Hayne's testimony. *Newell v. State*, No. 2013-KA-00030-COA (Miss.Ct.App. September 23, 2014). Newell sought certiorari regarding his other appellate issues that were not addressed by the COA.

**HELD:** First, the Court noted it could take certiorari to address issues not resolved by the COA. If successful, Newell would not be subject to a new trial, or the issues could arise again on retrial.

(1) In his second trial, Newell relied on self-defense under the Castle Doctrine as his primary defense. The State presented sufficient evidence to overcome his theory of self-defense and support a conviction for manslaughter. The jury was presented with conflicting accounts of Newell's fatal altercation with Boyette and was given instructions on self-defense and the Castle Doctrine. It is clear from its verdict that the jury rejected the self-defense theory and found the State's account of the events to be more credible.

(2) Newell was retried 607 days after the Court's mandate on his first appeal. The delay was presumptively prejudicial, but the State's efforts to retry Newell were reasonable. Some delay occurred when Newell requested a continuance because he had not yet obtained a copy of the transcript from his first trial. The State also requested a continuance because the prosecutor had a scheduling conflict with another case in another county. Newell did not object. A second delay by the prosecutor for not being ready should be held against the State. However, Newell subsequently filed a motion for recusal of the trial judge, and the case was transferred to a new judge. Other delays were needed for motions and attempts to find missing witnesses.

Although Newell asserted his rights to a speedy trial, he waited almost 8 months to do so, and participated in later delays. Finally, Newell claimed prejudice because a key witness (Jason Hollis) could not be located. Hollis testified and was cross-examined at his first trial. His testimony was read to the jury during the retrial. Newell does not explain how his cross-examination of Hollis would have differed between the two trials. The Court weighed the *Barker* factors and found no violation of his right to a speedy trial.

(3) The trial judge did not err in granting Instruction S-5A, which instructed the jury to find Newell guilty of manslaughter if it found that Boyette withdrew as the initial aggressor and retreated, that Newell subsequently became the aggressor, and that Newell killed Boyette unnecessarily. There was an evidentiary basis for the instruction, as Hollis testified that he witnessed Boyette step away from Newell's vehicle with his hands in the air before the fatal shot was fired.

The trial court did not err in granting Instruction S-4, which told the jury they could convict if Newell unnecessarily killed Boyette while Boyette was engaged or attempting to engage in any crime or misdemeanor. At trial, Newell claimed the instruction was inconsistent with his self-defense theory. On appeal, he claimed it was an incorrect statement of the law. The claim is barred. Regardless, although S-4 used similar language to manslaughter under §97-3-29, the instruction required the jury to find that Newell killed Boyette unnecessarily while Boyette was committing an unlawful act, which follows the language of §97-3-31. Since the facts apply to both statutes, the jury was fairly instructed.

Finally, Newell argued that the jury's verdict following the elements instruction in S-1 must be set aside because the verdict may have been reached exclusively in reliance on Instruction S-4, an allegedly erroneous theory of guilt. However, because the Court found that S-4 was not an incorrect statement of law, this argument is without merit.

(4) Newell argued that the message he left on his wife's voicemail hours before the incident, was not relevant to his trial on a manslaughter charge. The voicemail was relevant, as it shed light on Newell's state of mind and tended to make it more probable that Newell acted against Boyette in a "state of violent and uncontrollable rage," which would support a conviction for heat-of-passion manslaughter. The probative value of this evidence was not substantially outweighed by any prejudicial effect.

Newell also argued that the voicemail represented inadmissible evidence of a prior bad act. Newell's voicemail was not admitted as evidence of his character for violence. It was presented to describe to the jury why Newell was at the Slab House on the night of the incident, and it explained the motive and intent behind his altercation with Boyette.

(5) The trial judge did not err in admitting Hollis's testimony from Newell's first trial. Hollis could not be located for the second trial. He was the only eyewitness to events leading up to the shooting. Newell argued that his motives for developing Hollis's testimony at the first and second trials were not similar. However, Newell argued fiercely in both trials that he had killed Boyette in self-defense, specifically asserting the protections of the Castle Doctrine. MRE 804 does not require an identical motive for developing prior testimony, but merely a "similar motive."

#### **DICKINSON, PRESIDING JUSTICE, DISSENTING:**

Justice Dickinson once again dissented on the speedy trial issue. "I believe it is no secret among the bench and bar that this Court has no interest in protecting the constitutional right to a speedy trial, or in enforcing speedy-trial law." He believed Newell showed sufficient prejudice with the unavailability of Hollis, a key eyewitness. Newell lost the opportunity to cross-examine Hollis in front of a second jury in order to pursue a different line of cross-examination because he was now

defending a manslaughter charge, not a murder charge as in his first trial. Because every *Barker* factor weighed in Newell's favor, he would find Newell's constitutional right to a speedy trial was violated.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107758.pdf>

**October 22, 2015**

*Daniel Parish v. State*, No. 2014-KM-01401-SCT (Miss. October 22, 2015)

**CASE:** Misdemeanor – DUI Marijuana and Possession of Drug Paraphernalia

**SENTENCE:** 48 hours for the DUI, and 6 months, with all but 5 days suspended, for the paraphernalia, consecutively

**COURT:** Rankin County Circuit Court

**TRIAL JUDGE:** Hon. John Huey Emfinger

**APPELLANT ATTORNEY:** Kevin D. Camp, Jared K. Tomlinson

**APPELLEE ATTORNEY:** Whitney M. Adams

**DISPOSITION:** Affirmed. Waller, Chief Justice, for the Court. Dickinson and Randolph, P.JJ., Lamar, Chandler, Pierce and Coleman, JJ., Concur. Kitchens, J., Dissents with Separate Written Opinion Joined by King, J.

**ISSUE:** Whether the evidence was sufficient to show Parish was driving under the influence of marijuana.

**FACTS:** On October 9, 2012, Daniel Parish encountered a driver's license checkpoint while driving on Luckney Road in Brandon, MS. Officer James King of the Brandon PD observed that Parish "slowed down tremendously and did kind of a crawl roll to the checkpoint." Upon shining his flashlight in the car, King noticed that Parish "had a green leafy substance all over his pants and some ash and he was really nervous." King also smelled burnt marijuana on Parish's breath and in the vehicle. Parish's speech was slurred, and his eyes were red. Parish denied drinking, but admitted that he had smoked marijuana about 20 minutes before. Parish consented to search his backpack, where he admitted to having a hookah pipe inside. The pipe smelled of burnt marijuana. King gave Parish some field sobriety tests, and Parish agreed to a blood test. His blood tested positive for marijuana. Parish pled no contest in municipal court and appealed to county court. He presented an expert who testified the evidence only showed consumption of marijuana. The evidence failed to show impairment. Nevertheless, Parish was convicted of driving under the influence of marijuana in violation of §63-11-30(1)(d), and of possession of drug paraphernalia. The convictions were affirmed in circuit court and Parish again appealed.

**HELD:** King testified that Parish approached the checkpoint at a "crawl." Parish had dilated pupils, reddened eyes, and slurred speech. Parish exhibited eyelid and leg tremors while performing the Romberg test. Parish's blood tests revealed the presence of active metabolites for marijuana,

meaning he was still experiencing the pharmacological effects of the drug even after he was arrested. Finally, Parish admitted to smoking marijuana 20 minutes prior to encountering the checkpoint. This evidence, viewed in the light most favorable to the verdict, was sufficient to prove not only that Parish had ingested marijuana before driving, but that he was driving "in a state of intoxication that lessens a person's normal ability for clarity and control."

**Kitchens, Justice, Dissenting:**

Justice Kitchens believed the State failed to produce sufficient evidence that Parish's ability to operate his motor vehicle was impaired in any way from his consumption of marijuana. The State's evidence showed he was driving after consuming marijuana, but failed to show the marijuana impaired his driving. "In every roadside test that the arresting officer administered to Parish to determine whether his ability to drive was impaired by marijuana consumption, Parish passed."

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO106874.pdf>

*Thomas Glynn Flynt v. State*, No. 2013-KA-01973-SCT (Miss. October 22, 2015)

**CASE:** Manslaughter

**SENTENCE:** 20 years, 15 to serve, and five (5) years post-release supervision

**COURT:** Forrest County Circuit Court

**TRIAL JUDGE:** Hon. Robert B. Helfrich

**APPELLANT ATTORNEY:** Phillip Broadhead

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISTRICT ATTORNEY:** Patricia Burchell

**DISPOSITION:** Affirmed. Coleman, Justice, for the Court. Waller, C.J., Randolph, P.J., Lamar, Chandler and Pierce, JJ., Concur. Kitchens, J., Dissents with Separate Written Opinion Joined by Dickinson, P.J., and King, J.

**ISSUES:** (1) Whether the trial court erred by denying the motion for JNOV, (2) whether the trial court erred by denying the motion for a new trial, due to (a) the weight of the evidence, (b) the defense theories of self-defense and the Castle Doctrine, and (c) lack of a speedy trial.

**FACTS:** On April 11, 2009, Tommy Flynt and his family went to a cousin's house for a large family Easter egg hunt. At some point, his adult daughter, Krystal and her girlfriend, Teresa Groover, also showed up. Krystal attempted to pick a fight, so Flynt and his family left and went to his auto repair shop. Some time later, Krystal and Teresa showed up at the shop, and Krystal again tried to provoke him. The testimony was a bit conflicting, but as Tommy was trying to remove Krystal, Teresa came in and separated the two. Teresa, a former Marine, pinned Tommy to the ground. Tommy testified she choked him. He claimed he tried to get up and Teresa took him to the ground again. (Tommy testified this happened three times). Finally, Krystal told her to let him go. He got up and headed to his office to call police, finding a beer to drink since his throat hurt from the choking. He also

keep a gun in the office. Again, the testimony was conflicting on how fast Teresa followed him, but she did go into his office. Tommy claimed he does not remember how the gun came into play, but Teresa tried to choke him again. He said they both had their hands on the gun when it went off. He claimed they were still struggling when police arrived. Officers also gave slightly different accounts of the scene when they arrived. One officer testified a female was on top of Tommy when he arrived, and another was on the couch wounded. Another heard Tommy claiming to want to "shoot the bitch again." Teresa was shot at close range. She died two days later. The State's theory was Tommy went into the office, had time to load the weapon before Teresa walked in. Indicted for deliberate design murder, he was convicted of manslaughter and appealed.

**HELD:** (1) The jury's verdict of manslaughter was supported by the evidence. Section 97-3-35 allows a manslaughter conviction in a "cruel or unusual manner" or "by use of a deadly weapon." Teresa's killing was not cruel or unusual, so the State had to prove Tommy: (1) killed Teresa; (2) with a dangerous weapon; (3) without authority of law; and (4) not in necessary self-defense. Although witnesses presented some contradictory testimony and no one actually saw Tommy shot Teresa, sufficient evidence pointed to Tommy as the shooter.

Tommy admits to fighting with Teresa; testimony indicated that Teresa pinned Tommy down at least twice; Tommy was able to escape from Teresa at least twice and walk to his office; Tommy kept a gun in his office; Teresa was shot in Tommy's office by Tommy's gun; Tommy had gunshot residue on both hands; Tommy had his hands on the gun when police arrived; and two police officers testified that they heard Tommy say something about shooting Teresa and/or wanting to shoot her again.

(2)(a) The verdict was not against the weight of the evidence. Forensic evidence tied Tommy to the shooting. There was no evidence Teresa fired the gun. While some witness testimony was inconsistent as to specific details, Tommy's testimony was the most different from all the others. The jury is charged with sorting through conflicting testimony.

(2)(b) Flynt also asserted that the jury could not have fully considered his theory of self-defense or the Castle Doctrine, however, the jury was instructed on both. He had no apparent injuries after the incident. Further Flynt failed to cite any authority pertaining to the Castle Doctrine or how it should be applied to the facts of his case. Therefore, the issue is procedurally barred. Notwithstanding the bar, Flynt was not entitled to a new trial on this issue.

Flynt was at his place of business and was not engaged in any unlawful activity. It did not appear that he was the aggressor, so he had no duty to retreat. However, there was no testimony that Teresa was not welcome when she arrived or that she had entered unlawfully or forcibly. A question arises however, as to whether Teresa unlawfully or forcibly entered Tommy's inner office, where the shooting occurred. No one testified that Tommy told Teresa to leave, or that Tommy fled the office to escape from Teresa, or that Tommy tried to keep Teresa out of the office. A properly instructed jury did not find the Castle Doctrine applied.

(2)(c) The dissent argued Flynt's right to a speedy trial was violated. However, Flynt did not raise the issue at trial or on appeal. The Court declined to address the issue under the plain error doctrine. "To place upon ourselves as justices and judges a duty to scour the record in order to discover

potential error where none was suggested at any point by any party would be to put the Court in a position too closely resembling that of a interested litigant, and that we shall not do.”

**Kitchens, Justice, Dissenting:**

Justice Kitchens believed the violation of Flynt’s speedy trial rights was plain error. After his indictment, 1,483 days passed before his trial. The bulk of the delay occurred when the State moved the case to its inactive file. The prosecution told the court that certain evidence had been lost. Three years later, the State, with a new DA, moved to reinstate the case on the active docket. Justice Kitchens argued that the fact Flynt never asked for a speedy trial should not be weighed against him as his case was inactive. Any such motion would have been void. Finally, Flynt clearly showed prejudice. Not only did the State lose some undisclosed evidence, the original defense counsel’s file was heavily damaged by water while in storage. Flynt’s state and federal speedy trial rights were violated.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO105932.pdf>

*Tyrone Burrell v. State*, No. 2014-KA-00670-SCT (Miss. October 22, 2015)

**CASE:** Kidnapping

**SENTENCE:** 30 years without parole as an habitual offender

**COURT:** Tunica County Circuit Court

**TRIAL JUDGE:** Hon. Charles E. Webster

**APPELLANT ATTORNEY:** Erin Elizabeth Pridgen

**APPELLEE ATTORNEY:** Scott Stuart

**DISTRICT ATTORNEY:** Brenda Fay Mitchell

**DISPOSITION:** Affirmed. Coleman, Justice, for the Court. Waller, C.J., Randolph, P.J., Lamar, Chandler and Pierce, JJ., Concur. Kitchens, J., Concur in Part and Dissents in Part with Separate Written Opinion Joined by Dickinson, P.J., and King, J.

**ISSUES:** (1) Whether the trial court's method of selecting alternate jurors amounted to an abuse of discretion, (2) whether the verdict is contrary to the law and evidence and whether the trial court erred in denying Burrell's motion for a new trial, (3) whether Burrell's sentence is contrary to the law and evidence.

**FACTS:** On November 5, 2012, Charles and Fredna Jeter went to Bally’s Casino in Tunica. Fredna drove, as Charlie had stopped driving several years earlier after a stroke and a heart attack. While playing the machines, Charlie was approached by Tyrone Burrell. Burrell saw that Charlie smoked Pall Mall cigarettes and told Charlie that he could sell him Pall Malls for \$1 per carton. Charlie testified Burrell said the cigarettes were in his car, so Charlie followed him to the parking lot. When they got to Charlie's car, Burrell pulled out a gun and demanded that Charlie drive him to Memphis. When they got to Burrell's neighborhood, Burrell demanded more money and Charlie gave him \$65

that he had in his pocket. Burrell then told Charlie to "take off." Charlie went straight back to the casino. Since he had been gone for about two hours, Fredna had notified the police. Burrell claimed he merely conned Charlie to get a ride to Memphis, and he did not intend to rob him or kidnap him. Surveillance video recorded Charlie and Burrell walking in the parking lot, but a gun could not be seen. Burrell was convicted of kidnapping and appealed.

**HELD:** (1) Burrell asserted that the trial judge abused his discretion by selecting alternate jurors by drawing their names out of a paper cup. Burrell waived his claim about the judge's method of selecting alternate jurors because he did not lodge a timely objection.

(2) Burrell's indictment alleged that he did "without authority of law, and with or without intent to secretly confine, forcibly seize and confine Charlie Jeter." The evidence was sufficient for the jury to find that Burrell forcibly seized and confined Charlie. Kidnaping is not a specific intent crime. It is sufficient that the surrounding circumstances resulted in a way to effectively become a kidnaping as opposed to the actual intent to kidnap. Burrell did not need to have intended to kidnap Charlie. The fact that a gun is not visible in the surveillance footage is not proof that there was no gun. If the jury believed Charlie, then the testimony and circumstantial evidence were sufficient to prove that Burrell "forcibly seized and confined" Charlie.

(3) The trial court sentenced Burrell to 30 years without parole. Burrell could have gotten life, so his sentence was within that allowed by law. That 30 year sentence could have been doubled under the elderly victim enhancement, and another 5 years could have been added under the firearms enhancement, resulting in a total of 65 years.

**Kitchens, Justice, Concurring in Part and Dissenting in Part:**

Justice Kitchens would affirm Burrell's conviction, but would vacate the sentence and remand this case to the trial court to conduct a sentencing hearing with a jury. Although the State did not seek a life sentence, §97-3-53 requires that the question of life imprisonment be presented to the jury in order for the jurors either to exercise or forego their right to fix a convicted kidnaper's sentence at imprisonment for life. The trial court did not submit the possibility of life imprisonment to the jury, therefore depriving the jury of its statutory obligation to consider it. That, in turn, deprived the trial court of its ability to sentence Burrell, because the jury did not fail to agree on fixing the penalty at life.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO106690.pdf>

**October 29, 2015**

*Ira Donell Bowser v. State*, No. 2014-KA-01283-SCT (Miss. October 29, 2015)

**CASE:** Murder

**SENTENCE:** Life as an habitual offender

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Roger T. Clark

**APPELLANT ATTORNEY:** Hunter Nolan Aikens

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISTRICT ATTORNEY:** Joel Smith

**DISPOSITION:** Affirmed. Coleman, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Lamar, Kitchens, Chandler, Pierce and King, JJ., Concur.

**ISSUE:** Whether the evidence was sufficient to support the verdict; or alternatively, whether the verdict was against the overwhelming weight of the evidence which established that Bowser was guilty only of manslaughter.

**FACTS:** Ira Bowser admitted to killing Shabree Page at their apartment on June 9, 2012. Page's body was found after a friend went to speak to her after finding out police were looking for Bowser because he abandoned his car on the highway. She had been stabbed 29 times. Bowser turned himself in and explained the two argued as soon as he got home. He claimed the fight became physical and Page grabbed a knife and swung it at him, but not to hurt him. When he grabbed the knifed, he cut her arm. She then started hitting him and he "flashed out." He did not remember actually stabbing her. He testified he did not think she was hurt that bad and left the apartment. The issue at trial was whether Page's death was the result of deliberate design murder, depraved heart murder, heat of passion manslaughter, or self defense.

**HELD:** The evidence was sufficient. There was some form of a fight, or tussle, and a brutal homicide. Page's numerous stab wounds were consistent with deliberate thrusts. Bowser had only superficial injuries. Bowser presented only his testimony depicting his account of the events, which the jury was free to disregard. Although Bowser did not remember actually stabbing Page, he repeatedly admitted that he was guilty, that no one else could have stabbed Page because he was the only other person there, and that it was not in self defense.

Bowser testified that he and Page had a volatile relationship. Upon Bowser's arrival at home, Page demanded to know where he had been and why he had not called her all day. He testified he was attempting to grab her to calm her down. Page kicked him, grabbed a knife from the table in their bedroom, and swung at him, "but she wasn't trying to hurt [him]." He "flashed out" and stabbed her 29 times. Bowser's own testimony belies a heat of passion claim. He really had no explanation for his "flash out."

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108130.pdf>

*Correy James Dartez v. State*, No. 2014-KA-00884-SCT (Miss. October 29, 2015)

**CASE:** Murder

**SENTENCE:** Life

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Lisa P. Dodson

**APPELLANT ATTORNEY:** Erin Elizabeth Pridgen

**APPELLEE ATTORNEY:** Abbie Eason Koonce

**TRIAL ATTORNEYS:** Mary Elizabeth McFadyen, Robert C. Stewart

**DISTRICT ATTORNEY:** JOEL SMITH

**DISPOSITION:** Affirmed. Pierce, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Lamar, Kitchens, Chandler, King and Coleman, JJ., Concur.

**ISSUE:** Whether trial counsel was constitutionally ineffective for failing to raise an insanity defense and for not challenging the introduction into evidence of Dartez's confession to the police.

**FACTS:** On January 30, 2013, Correy James Dartez killed his wife Victoria by smothering her with a pillow. Dartez and Victoria were both in their forties, and they both had a host of medical issues. Both were diagnosed with bipolar disorder. Victoria also had Down's Syndrome. After killing her, Dartez called 911 and told the dispatcher he had killed his wife. He met police with a pairing knife in his hand and asked them to shoot him. They tasered him instead and took him into custody. He waived his rights and told police he killed his wife because she had been suffering and that he could not afford medicine for her any longer. However, Victoria was given her medication free by the Catholic Diocese. The trial court held a competency hearing and he was found competent to stand trial. An insanity defense was not pursued at trial. Dartez was convicted and appealed.

**HELD:** Whether Dartez's trial counsel should have raised an insanity defense and whether trial counsel should have challenged Dartez's confession involves facts not fully apparent from the record. Dartez can raise the claim again on post-conviction.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108174.pdf>

**November 12, 2015**

*Michael James Brown v. State*, No. 2013-KA-02080-SCT (Miss. November 12, 2015)

**CASE:** Embezzlement x2 and Direct Criminal Contempt x3

**SENTENCE:** 20 years on Count I and 20 years, with 10 suspended on Count II, with the sentences running consecutively, and three 30 day consecutive sentences for contempt. Trial judge also ordered \$1.2 million in restitution

**COURT:** Rankin County Circuit Court

**TRIAL JUDGE:** Hon. John Huey Emfinger

**APPELLANT ATTORNEY:** George T. Holmes

**APPELLEE ATTORNEY:** Scott Stuart

**DISTRICT ATTORNEY:** Michael Guest

**DISPOSITION:** Convictions Affirmed, portion of sentence regarding restitution reversed and remanded. King, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Kitchens, Chandler and Coleman, JJ., Concur. Lamar, J., Concur in Part and in Result Without Separate Written Opinion. Pierce, J., Not Participating.

**ISSUES:** (1) Whether the evidence was sufficient and the whether the verdict was against the weight of the evidence, (2) whether the trial court improperly allowed other bad acts evidence, (3) jury instructions, and (4) whether the trial court erred in the amount of restitution ordered.

**FACTS:** When DeMon McClinton was 16, his mother, Rebecca Henry, died intestate shortly after her father, prominent civil rights activist Dr. Aaron E. Henry, died in 1997. DeMon and his adult brother Aaron divided a “substantial” inheritance with each receiving over \$3 million. Since DeMon was a minor, a guardianship was opened in Hinds County Chancery Court on June 16, 2000, with Thomas McClinton, DeMon’s father, as guardian. McClinton retained the services of attorney Michael James Brown to represent him as guardian. From DeMon’s inheritance, checks totaling \$1,290,493.08 were tendered to Brown as attorney for the guardian, including a \$1 million check dated February 20, 2001. (A copy of this check was never found or introduced into evidence). These checks were deposited into Brown’s attorney escrow account.

On February 22, 2001, Brown wrote a check for \$300,000 from his escrow account and tendered it to Linus Shackelford, a client of Brown’s who owned and operated a cemetery in Rankin County. The check indicates that it was a loan from “DBM, LLC.” There is a corresponding promissory note dated February 11, 2001, for this loan indicating that “the Guardianship of DeMon B. McClinton” was the lender. It was signed by Shackelford and McClinton stating that Shackelford’s cemetery property secured the loan. (Brown explained that “DBM, LLC” was noted as the lender because the funds came from Brown’s personal money which he was lending to McClinton to lend to Shackelford.) The check was written the day after he received and deposited the guardianship’s \$1 million check dated February 20, 2001. Shackelford testified that he did not know that the funds were coming from a guardianship. Brown testified that he obtained prior verbal authorization for the \$300,000 loan from then Chancellor Stuart Robinson. However, Judge Robinson testified that he did not authorize Brown verbally or in writing to loan the guardianship’s money.

On September 7, 2001, Brown delivered a second loan check to Shackelford for \$250,000. A corresponding unsigned promissory indicated that the lender was “Thomas McClinton.” Again, there was no chancery court order authorizing this second loan. Brown maintained that this \$250,000 also did not come from guardianship funds, but rather came from his money, namely the \$398,000 fee he had just received and deposited from chancery court for his work on the guardianship. Shackelford did not make any payments on either loan until subsequent legal action was taken against him.

The guardianship was closed in 2006. McClinton filed a petition to reopen the guardianship in 2009. Chancellor Dewayne Thomas ordered Brown for another final accounting, as the accounting in 2006 was inadequate. Judge Thomas ultimately found Brown in contempt of court, and found that Brown had committed a fraud upon the court by not properly accounting for guardianship funds. Brown claimed most of his records from that time were destroyed by water, and that the bank’s records were not keep after 7 years. Brown testified that any money which he took out of the guardianship funds was just to pay himself back for what he had lent to the guardianship. Attorney Paul Roger was appointed to investigate the guardianship funds. Roger’s conclusions were

that Brown failed to account for the money relative to the two loan checks to Shackelford. These two checks were the basis for the two count indictment for embezzlement against Brown under §97-11-25. He was convicted and appealed.

**HELD:** (1) Brown claimed the evidence failed to show he used guardianship money to extend the loans to Shackelford. Brown argued that he acted ineptly, and perhaps committed malpractice by failing to seek chancery court approval for the loans, but that he did not commit a crime. Ample evidence existed to show that the \$550,000 in loans came out of guardianship funds. There were chancery court accountings in which Brown himself represented that the loans came from guardianship funds. The \$300,000 promissory note stated explicitly that the loan was made from the guardianship, and the \$250,000 promissory note stated that the loan was made from McClinton. Testimony from McClinton, DeMon, and Shackelford established that the loans were from the guardianship. Brown told Shackelford in a recorded conversation that the loans came from guardianship money. Brown began spending large and extravagant amounts of money on behalf of the guardianship on the day after the \$1 million check was deposited. Finally, Brown claimed numerous times that he had oral permission from Judge Robinson to lend the guardianship money, yet failed to explain why he would obtain such permission if he was actually loaning his own money. The jury clearly found Brown's representations were not credible.

The trial court applied the law correctly with regard to the "own use" element of the statute. Brown argued that converting property to his "own use" must benefit Brown in order to constitute embezzlement. Brown argued that the loans, to be repaid to the guardianship at 10% interest and secured by Shackelford's real property, benefitted the guardianship, not Brown. Brown argued he intended that the use of the funds was for the benefit the guardianship. However, the "original embezzlement deprives the victim of the right to *direct and control* his own property as the *owner*, not the embezzler, sees fit, even if the embezzlement ultimately turned a profit for the victim." [emphasis supplied]. Brown deposited some guardianship funds into his escrow account, and that he never moved them from his escrow account to a guardianship account. Since Brown directed and controlled the disposition of the money, he applied it to his own use.

(2) Brown claimed the State inappropriately mentioned acts such as the purchase of automobiles from guardianship funds and the "stealing" of \$1.2 million dollars from the guardianship. Brown waived any objection to Rule 404(b) evidence being admitted at trial for failing to object. Additionally, Brown himself elicited testimony multiple times about the automobiles and the \$1.2 million. He even introduced evidence which contained indications of other bad acts, including car purchases and property purchases from McClinton's fiancé. The claim is waived.

(3) Brown waived any objection to the language in the jury instructions by failing to raise the issue in his post-trial motions. This claim is also without merit. Instruction S-4, regarding personal use, was not a misstatement of the law. As explained above, "own use" does not mandate a personal benefit. Also, in Instruction S1-A and S2-A, Brown argued a line regarding his deposit of guardianship funds into his escrow account was a misstatement of the law, as the mere deposit of funds into an escrow account by an attorney acting as a fiduciary does not constitute conversion. However, the instructions, read as a whole, clearly explained the jury had to find all the elements, not just the deposit into escrow, to find embezzlement. The claim is waived and is without merit.

(4) Finally, the trial court did exceed its sentencing authority in sentencing Brown to pay \$1.2 million in restitution. Although he did not object at trial, the court's order was plain error. Brown was convicted of embezzling a total of \$550,000. No proof was offered that any more than the \$550,000 in pecuniary damages resulted from the offenses of conviction. The sentence of restitution was vacated and remanded for resentencing as to any restitution.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108427.pdf>

**November 19, 2015**

***Casey Mark Burgess v. State***, No. 2013-KA-01516-SCT (Miss. November 19, 2015)

**CASE:** Sexual Battery x3

**SENTENCE:** 30 years on each count, concurrently

**COURT:** Rankin County Circuit Court

**TRIAL JUDGE:** Hon. John Huey Emfinger

**TRIAL ATTORNEYS:** Donald W. Boykin, Jacqueline L. Purnell, Michael Guest, Dewey K. Arthur, Marty Miller

**APPELLANT ATTORNEY:** Donald W. Boykin

**APPELLEE ATTORNEY:** Melanie Dotson Thomas

**DISTRICT ATTORNEY:** Michael Guest

**DISPOSITION:** Affirmed. Randolph, Presiding Justice, for the Court. Waller, C.J., Chandler, Pierce, King and Coleman, JJ., Concur. Dickinson, P.J., Concur in Part and in Result with Separate Written Opinion. Lamar, J., Concur in Part and in Result Without Separate Written Opinion. Kitchens, J., Dissents with Separate Written Opinion.

**ISSUES:** (1) Whether the trial judge erred by granting certain jury instructions because they constructively amended all counts of the indictment by adding the necessary element of "force"; (2) whether the trial judge erred by improperly limiting Burgess's voir dire regarding religious opinions on sex; (3) whether the trial judge erred by denying Burgess's challenges of certain jurors for cause; (4) whether the trial judge erred by excluding evidence of S.B.'s prior sexual acts with Burgess; (5) whether the evidence was sufficient and not against the weight of the evidence; (6) whether the trial judge erred by giving a flight instruction; (7) whether the trial judge erred by admitting letters into evidence at sentencing; and (8) whether the trial judge erred by admitting a redacted text message into evidence.

**FACTS:** Casey Mark Burgess was convicted of three counts of sexual battery against his wife, S.B. After celebrating their 12<sup>th</sup> Anniversary, Burgess left his wife and three young daughters for a week-long drug and alcohol induced binge. Early in the morning on August 28, 2011, S.B. was sleeping in her children's bedroom when Burgess entered the daughters' bedroom. Burgess was filthy, and told her he had not showered in a week and had been living in his truck. S.B. attempted to walk into the living room to talk to Burgess. He ordered her to the master bedroom where he

grabbed her by the neck. He told her to do what he said "or else there's going to be three motherless children on the other side of this house." He said she would never forgive him for what he did during the week, "so I'm going to have my way with you one last time." He then proceeded to vaginally and anally rape her. He also forced her to perform oral sex on him. According to S.B., "the whole time during all of this, he was either . . . holding me down or . . . gripping my neck and I couldn't breathe. . . . I thought he was about to snap my neck." The ordeal lasted about 3½ hours. S.B. then called Burgess's parents and her mother. When they arrived, she and the three children left with S.B.'s mother. S.B. did not contact police until the following day when she saw Burgess drive up to the school where she worked and two of her daughters attended. The next day she then obtained a restraining order and hired a divorce attorney. The following day she formally pressed charges against him. Burgess admitted to a process server that S.B.'s allegations were true. When Burgess was later returning to his house, he saw police cars in his driveway. He then turned around and tried to flee, but was arrested after wrecking his truck. He was convicted of all three counts and appealed.

**HELD:** (1) Burgess was indicted under §97-3-95(1)(a), which prohibits "sexual penetration with another person without his or her consent." His indictment tracked the language of the statute when it asserted that Burgess "engage[d] in sexual penetration . . . with S.B. . . . by inserting his penis in S.B.'s [vagina, anus, and mouth], without her consent[.]" Force is not a necessary element of the charge. However, Burgess alleged that since S.B. was his legal wife, force was necessary in order to be convicted of sexual battery. Section 97-3-99 states a legal spouse of an alleged victim may be found guilty of sexual battery "if the legal spouse engaged in forcible sexual penetration" without consent. Burgess argued that including force in the jury instructions improperly amended the indictment.

We hold that force is not an element of sexual battery...We further hold that marriage can be an affirmative defense to sexual battery, yet it is not an absolute defense. Once the defense of marriage is raised, it will apply, unless the State proves beyond a reasonable doubt that the two were separated or living apart at the time of the attack or that force was involved...Proof of force negates the affirmative defense.

(2) The trial court did not err in asking defense counsel to rephrase his questioning of jury members about sex from a Biblical perspective. The trial judge restricted counsel from specifically asking about their religious beliefs and sexual conduct. The court instructed defense counsel he could ask about morals and religious beliefs, but his questions had to be crafted for the purposes of determining whether jurors would be able to be fair and impartial. Counsel then followed up by questioning the jury about whether they had moral objections to consensual anal sex between spouses. The trial judge did not abuse his discretion.

(3) The trial judge did not err in denying a challenge for cause because several jurors knew two of the State's witnesses. Although the jurors stated they would tend to believe these witnesses over others, counsel never asked them followup questions to determine if they would be able to set aside those relationships and consider the witness's testimony just the same as the other witnesses. The trial court ruled defense counsel failed to lay the foundation for a strike for cause.

(4) Counsel sought to cross-examine S.B. about her prior sexual relationship with Burgess. This included evidence that they had engaged in prior anal and oral sex and that S.B. "had numerous high heels and lingerie, and that she would wear those while having sex." The State objected, arguing counsel failed to give notice of this evidence under MRE 412(c). The trial court did not err in refusing to allow the impeachment.

(5) The evidence was sufficient to support the verdicts. "No evidence was presented that could lead a fair-minded juror to find Burgess not guilty."

(6) The trial judge did not err in granting a flight instruction. Burgess clearly testified he fled for one reason only: to avoid being arrested for sexually battering S.B.

(7) The trial judge did not err in considering several letters written by S.B., her family, co-workers and friends. Victim-impact evidence is admissible at sentencing and does not violate a defendant's right to confrontation. Burgess failed to explain how the letters prejudiced the court into imposing a greater sentence, in light of the trial judge's on-the-record finding that he did not need the letters in order to impose the maximum sentence.

(8) During cross, counsel elicited testimony regarding the size of S.B.'s divorce judgment as motive for her filing the charges against Burgess. On redirect, the State sought to introduce a text message to rebut the defense's allegations. Burgess sent a text to S.B. stating, "Will you at least text me something? I'm guess [sic] I'm waiting on either charges and me picked up or nasty divorce papers. You took me off Facebook[.]" The message was sent the day S.B. filed formal charges and the day before Burgess was served with the divorce papers. The court found the text would tend to rebut the allegations of bias or motive, and held the probative value was not outweighed by its prejudicial effect. The trial court did not abuse its discretion in admitting the message.

#### **Dickinson, Presiding Justice, Concurring in Part and in Result:**

Justice Dickinson dissented, arguing flight instructions were unfair and should be abolished altogether. However, he did not believe it was reversible in this case given that the evidence, even without a flight instruction, was more than sufficient to prove beyond a reasonable doubt that Burgess forcibly sexually assaulted his wife.

#### **Kitchens, Justice, Dissenting:**

Justice Kitchens dissented, arguing the indictment should have alleged Burgess was married to S.B. and that the sexual battery was forcible. The majority's opinion saddles defendants with the obligation to raise the affirmative defense of marriage found in §97-3-99. The State is then obligated to rebut by proving the sex was forcible.

The indictment in the present case failed to allege force, an essential element of the crime of sexual battery under Sections 97-3-95 and 97-3-99 where, as here, the victim was the defendant's legal spouse "and at the time of the alleged offense such person and the alleged victim are not separated and living apart." The State had a duty to investigate the case fully, including the parties' status respecting each other,

before presenting the case to the grand jury, then to draft an indictment that reflected that status and the element of force.

He did not believe a defendant should be required to disclose the affirmative defense of marriage.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108187.pdf>

***Michael T. Anderson v. State***, No. 2012-CT-01066-SCT (Miss. November 19, 2015)

**CASE:** Deliberate-Design Murder, Aggravated Assault, and Felon in Possession of a Firearm

**SENTENCE:** 3 consecutive life sentences as an habitual offender

**COURT:** Hinds County Circuit Court

**TRIAL JUDGE:** Hon. Winston L. Kidd

**TRIAL ATTORNEYS:** Scott Rogillio, Brad Hutto, Kimalon Campbell, Darla Palmer

**APPELLANT ATTORNEY:** Mollie Marie McMillin

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISTRICT ATTORNEY:** Robert Shuler Smith

**DISPOSITION:** Affirmed. Randolph, Presiding Justice, for the Court. Chandler, Pierce and Coleman, JJ., Concur. Lamar, J., Concur in Part and in Result Without Separate Written Opinion. Dickinson, P.J., Dissents with Separate Written Opinion Joined by Kitchens and King, JJ. Kitchens, J., Dissents with Separate Written Opinion Joined by Waller, C.J., Dickinson, P.J., and King, J.

**ISSUE:** Whether the trial court erred in granting a flight instruction.

**FACTS:** On April 10, 2009, Michael Anderson shot and killed Drystle Sanders in front of the Triple-A store in Jackson. Although there were conflicting accounts of how much Sanders drank before arriving at the store and what he was there to purchase, Sanders and several others, including his mother, apparently drove to the store to purchase snacks, cigarettes, and beer. Anderson claimed he was outside the store when Sanders and Sylvester Coleman went into the store. There was a dispute as to whether the two talked to Anderson inside the store. Anderson claimed that after he left the store, he was hit in the back of the head and knocked to the ground. After he was hit a second time, a gun fell to the ground. Anderson testified that he grabbed the gun and shot Sanders in self-defense. Anderson testified that after shooting Sanders, he walked home to his mother's house. Other witnesses testified Sanders did not have a gun. Coleman testified he only saw the two fighting when he exited the store. He heard a gunshot and saw Sanders fall to the ground. Anderson then fired the gun at him as he ran. His mother and other friends drove away in the car and later picked Coleman up down the street. When they returned to the store to check on Sanders, they encountered Anderson who shot at the car. Sanders suffered several gunshot wounds and died at the scene. Ballistics indicated two separate guns were used during the shooting. An off-duty officer nearby witnessed part of the shooting, as well as Stephen Johnson, who testified he saw Anderson fire two shots standing over Sanders while he lay on the ground. The COA affirmed, finding no error in granting a flight instruction, as Anderson never provided a reasonable explanation for his

flight from the murder scene. *Anderson v. State*, No. 2012-KA-01066-COA Miss.Ct.App. October 21, 2014). The SCT granted certiorari.

**HELD:** Anderson claimed that because he claimed self-defense, a flight instruction was not proper. The SCT found the COA did not err in finding the instruction proper. No evidence was introduced to support the assertion that Anderson's flight was caused by something other than consciousness of guilt. Anderson never testified he left the scene because he was worried about retaliation. The trial court determined the evidence of Anderson's flight it was probative and did not err in allowing the jury to consider it.

**Dickinson, Presiding Justice, Dissenting:**

Justice Dickinson dissented, expressing his view that the Court should abolish flight instructions altogether. He argued that attorneys can always argue inferences, but to give an instruction on this one type of inference is improper. "I believe this practice is inappropriate, and should cease."

**Kitchens, Justice, Dissenting:**

Justice Kitchens dissented, arguing there was sufficient evidence to support Anderson's contention that he fled based on fear of retaliation from Sanders's companions. Since Anderson's flight can be explained by something other than guilty conscience, the instruction should not have been given.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109069.pdf>

**December 3, 2015**

*Daryl Shinn v. State*, No. 2013-KA-01156-SCT (Miss. December 3, 2015)

**CASE:** Armed Robbery

**SENTENCE:** 20 years

**COURT:** Lowndes County Circuit Court

**TRIAL JUDGE:** Hon. Lee Sorrels Coleman

**TRIAL ATTORNEY:** Carrie Jourdan

**APPELLANT ATTORNEY:** George T. Holmes

**APPELLEE ATTORNEY:** Lisa L. Blount, Melanie Dotson Thomas

**DISTRICT ATTORNEY:** Forrest Allgood

**DISPOSITION:** Affirmed. Coleman, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Lamar, Kitchens, Chandler, Pierce and King, JJ., Concur.

**ISSUES:** (1) Whether the verdict was against the weight of the evidence, and (2) whether he was denied effective assistance of counsel.

**FACTS:** On June 12, 2011, Tiya's Market in Columbus was robbed at gunpoint. After speaking with store employees and another eyewitness, the police developed Daryl Shinn as a suspect. They showed the store cashier a photo lineup, and she identified Shinn as the gunman. Shinn's mother gave permission to police to search her home (where Shinn resided), and the police recovered clothing from under Shinn's mattress that matched the description of that described by the eyewitnesses. At trial, a store employee and a bystander both testified unequivocally that Shinn was the robber. Shinn offered three alibi witnesses in his defense, but none of these witnesses seemed sure of the date of the robbery. Shinn's counsel on appeal claimed the verdict was against the weight of the evidence. The SCT affirmed. [\*Shinn v. State\*](#), No. 2013-KA-01156-SCT (Miss. September 4, 2014). On January 15, 2015, the SCT granted Shinn's motion for rehearing because he was not allowed to file a pro se brief. Shinn submitted a brief containing claims of ineffective assistance of counsel.

**HELD:** (1) Shinn's conviction was not so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. (2) "The trial record, standing alone, does not validate Shinn's claims of ineffective assistance of counsel, and so we decline to address them." Shinn can raise this issue again on PCR.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108771.pdf>

***James Robert Rowsey v. State***, No. 2014-KA-00501-SCT (Miss. December 3, 2015)

**CASE:** Aggravated Assault

**SENTENCE:** 10 years

**COURT:** Greene County Circuit Court

**TRIAL JUDGE:** Hon. Kathy King Jackson

**TRIAL ATTORNEYS:** David C. Futch, Joseph W. Griffin, Robert J. Knochel

**APPELLANT ATTORNEY:** Mollie Marie McMillin, James Robert Rowsey (Pro Se)

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISTRICT ATTORNEY:** Anthony N. Lawrence, III

**DISPOSITION:** Affirmed. Kitchens, Justice, for the Court. Dickinson, P.J., Lamar, Chandler and King, JJ., Concur. Coleman, J., Concur with Separate Written Opinion Joined by Dickinson, P.J., Lamar, Kitchens and Chandler, JJ. Pierce, J., Concur in Result Only with Separate Written Opinion Joined by Waller, C.J., and Randolph, P.J.

**ISSUES:** (1) Whether the trial court erred by failing to dismiss the indictment against Rowsey for violation of his constitutional right to a speedy trial, and (2) whether the trial court erred by failing to dismiss the indictment against Rowsey because his statutory right to a speedy trial was violated. Rowsey also filed a supplemental pro se brief raising (3) ineffective assistance, (4) attorney conflict of interest, (5) a violation of right not to testify, (6) whether the trial judge erred in sanctioning Rowsey, and (7) whether the record on appeal is incomplete or tainted.

**FACTS:** On January 28, 2010, James Rowsey was imprisoned at the South Mississippi Correctional Institution in Leakesville, serving a life sentence for murder. Rowsey became concerned that Fate Santee, a man who was assigned to a bed, or "rack," near Rowsey's and who was associated with the Crips, was going to beat him up. As Santee was resting on his assigned rack, Rowsey heated up two cups of water in a microwave. Rowsey then walked back to the racks and dumped the hot water on Santee's head. Santee was severely injured by the attack. He was moved from the prison's infirmary to the burn center at River Oaks Hospital in Flowood. Santee had burns on his trachea, face, and shoulders, which required treatments that included skin grafts, a tracheotomy, and the use of a feeding tube. Rowsey was indicted for aggravated assault on February 22, 2011. He was appointed a public defender and waived arraignment on May 16, 2011. On June 6, 2011, the public defender moved to withdraw after Rowsey filed a bar complaint against him. On July 26, 2011, he was appointed new counsel. After numerous continuances, his trial finally began on February 24, 2014. He was convicted and appealed.

**HELD:** (1) Rowsey was not denied a speedy trial despite a 3 year delay. Rowsey raised the issue in the trial court but the trial court did not rule on his claim. Prior case law held that the failure to obtain a ruling waived the issue for appeal. However, this conflicts with *Barker v. Wingo*. "Thus, insofar as *Wells [v. State]*, 160 So. 3d 1136 (Miss. 2015)] and *Kolberg [v. State]*, 829 So. 2d 29, 88 (Miss. 2002)] hold that a defendant can waive his or her right to a speedy trial by failing to obtain a ruling on his or her motion for a speedy trial in the trial court, we overrule those cases."

Most of the delay in this case was attributable to Rowsey's unwarranted harassment of his trial counsel and the substantial amount of time it took to schedule a mental evaluation to prepare Rowsey's defense. Rowsey was demanding a speedy trial at the same time he was requesting continuances. Rowsey also failed to demonstrate prejudice. He was already serving a life sentence when the assault occurred. Rowsey admitted to the assault, but claimed self-defense. The delay did not affect his defense.

(2) The delay in this case was due to good cause, namely, that Rowsey was awaiting a mental examination at the State Hospital. Rowsey's statutory right to a speedy trial was not violated.

Pro Se Issues: (3) Ineffective Assistance. Rowsey claimed that counsel infringed upon his right to a speedy trial by requesting continuances. This claim is not appropriate on direct appeal. He also claimed counsel was ineffective for advising him to testify. This is trial strategy. Initial counsel's waiver of arraignment had no impact on his conviction. Rowsey also argued that his counsel on appeal was ineffective because she raised only arguments related to Rowsey's right to a speedy trial. This was also strategy.

(4) Rowsey's counsel did not have an actual conflict of interest. Counsel did move to withdraw based a conflict with Rowsey, but this personality conflict had no obvious effect on the quality of his attorney's representation at trial. (5) There was no evidence in the record to support Rowsey's claim that he was forced against his will by his attorney to testify.

(6) The trial judge did not abuse her discretion in sanctioning Rowsey for filing a frivolous motion. The motion was frivolous, disrespectful, and verbally abusive to the trial court. (7) Rowsey claimed that certain filings were absent from the record and that the record contained filings from other cases.

Rowsey failed to establish that these missing documents or documents from another case would have affected the outcome of his trial or appeal.

**Coleman, Justice, Concurring:**

Justice Coleman concurred, writing a long opinion on the history of whether a claim of a violation of the right to a speedy trial may be waived by not obtaining a ruling by the trial court after a motion or demand is filed. He disagreed with Justice Pierce’s opinion that such a claim should be reviewed as plain error. He concluded that in the past, the Court “has too loosely used the word waiver in the speedy-trial context.”

Plain error is reserved for reviewing claims that have been waived and procedurally barred. Rowsey did not knowingly waive his rights on this issue simply because the trial judge did not rule on it. Plain error has been used in instances where the speedy trial issue was never raised at trial, but not when it was raised but a ruling was never obtained. Justice Coleman cited *Berry v. State*, 728 So. 2d 568 (Miss. 1999), in noting that a speedy-trial claim could not be waived based on the failure to obtain a ruling on it. The trial court was in error for not ruling on the motion to dismiss for lack of a speedy trial. The burden of obtaining a ruling should be on the trial court. Therefore, the claim cannot be procedurally barred and a plain error analysis cannot be used.

**Pierce, Justice, Concurring in Result Only:**

Justice Pierce wrote to concur in the judgment, but argued the speedy trial claim should be reviewed under the plain error doctrine. He agreed with the majority that this Court wrongly employed the use of the term "waiver" in *Wells* and *Kolberg*, but those cases need not be overruled. “What should have been said in those cases is that, by not obtaining a ruling in the trial court on a speedy-trial claim, the defendant failed to preserve the issue for appeal—thus relegating the claim to plain-error review.” Those cases simply used wrong terminology. The Court was correct when it declined to address the claim.

Under plain-error review, the appellant bears the burden of showing not only that an error occurred but also that it resulted in either a manifest miscarriage of justice or seriously affected the fairness or public reputation of the judicial proceedings. If the appellant is able to demonstrate the likelihood of such, as occurred in *Myers v. State*, 145 So. 3d 1143 (Miss. 2014), then it would be proper for the reviewing court to remand the case to the circuit court for the purpose of allowing the State to present evidence explaining the delay and allowing the trial court to conduct a *Barker* analysis. But if the appellant is unable to do so on appeal, as was the case in *Wells* and *Kolberg*, then the reviewing court may decline to entertain the matter on appeal.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109046.pdf>

**December 10, 2016**

*Chris Spencer Different v. State*, No. 2014-KA-00714-SCT (Miss. December 10, 2015)

**CASE:** Gratification of Lust and Sexual Battery

**SENTENCE:** 15 years with a concurrent 30 years with the last 15 suspended and 5 years probation

**COURT:** Rankin County Circuit Court

**TRIAL JUDGE:** Hon. John Huey Emfinger

**TRIAL ATTORNEYS:** Dewey Arthur, Jacqueline Purnell, Joey Mayes, Kevin Camp, Jared K. Thomlinson

**APPELLANT ATTORNEY:** Benjamin Allen Suber

**APPELLEE ATTORNEY:** Alicia Marie Ainsworth

**DISTRICT ATTORNEY:** Michael Guest

**DISPOSITION:** Affirmed. Pierce, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Lamar, Kitchens, King and Coleman, JJ., Concur.

**ISSUE:** Whether the evidence was sufficient to support that Different sexually assaulted B.B. in Mississippi.

**FACTS:** Chris Spencer Different married Dawn Jodoin in 2005. Jodoin had two children, B.B. and J.B. In May 2010, Jodoin and Different moved to Rankin County from South Carolina. B.B. was 14 years old and entering the 9<sup>th</sup> grade. Jodoin decided to end her marriage with Different in 2011. Jodoin, B.B., and J.B. all moved back to South Carolina. After the divorce was final, she married Brian Jodoin. In February 2012, while living in Ohio, B.B. told her younger brother that Different had sexually assaulted her. He told Brian, and Brian told Jodoin. Jodoin took B.B. to a counselor, and the counselor contacted the DHS about the abuse. In the 2012 forensic interview, B.B. stated that Different had sexually assaulted her when they lived in Mississippi at The Highlands while her mother worked overtime at a nursing home. She also indicated that the assault had happened two to three years prior to the interview. B.B.'s school records verified that she lived at The Highlands in Rankin County from June 1, 2010, to July 1, 2011. B.B. testified that Different sexually assaulted her four to five times a week when they lived at The Highlands. Different "lick[ed] and suck[ed]" her breasts, penetrated her vagina with his fingers, and touched her vagina with his penis. She testified that Different attempted vaginal and anal penetration but she prevented him. He also wanted B.B. to perform oral sex on him but she refused. B.B. testified that she never told anyone about the sexual assaults because Different threatened to hurt her. Different was convicted and appealed.

**HELD:** While Different purports to raise a sufficiency-of-the-evidence argument, his claim actually presents a weight-of-the-evidence issue. During her forensic interview, B.B. stated that the sexual offenses had occurred two to three years prior to the interview, dating the assaults between February 2009 and February 2010. This was prior to the family's move to Mississippi. B.B. also testified that the assaults occurred four to five times a week while her mother worked overtime from 11:00 p.m. until 7:00 a.m. Jodoin testified she rarely worked past 11pm after moving to Mississippi, but regularly did so in South Carolina. Regardless, B.B. clarified at trial that Different sexually assaulted her in Mississippi when she was attending Brandon High School.

“B.B.'s testimony was not discredited or contradicted by any evidence with the exception of Different's testimony. This is a weight-of-the evidence determination, which we must defer to the fact-finder.”

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108884.pdf>

*Samuel Allen Nuckolls v. State*, No. 2014-KA-00311-SCT (Miss. December 10, 2015)

**CASE:** Video Voyeurism x13

**SENTENCE:** 5 years on Count 11, concurrently with Count 3

**COURT:** Desoto County Circuit Court

**TRIAL JUDGE:** Hon. Gerald W. Chatham, Sr.

**TRIAL ATTORNEYS:** Ronald D. Michael, Seth Pounds, Alicia M. Ainsworth

**APPELLANT ATTORNEY:** Ronald D. Michael

**APPELLEE ATTORNEY:** Alicia M. Ainsworth

**DISTRICT ATTORNEY:** John W. Champion

**DISPOSITION:** Affirmed, in part, Reversed in part. Dickinson, Presiding Justice, for the Court. Waller, C.J., Lamar, Kitchens, King and Coleman, JJ., Concur. Randolph, P.J., Concur in Part and Dissents in Part with Separate Written Opinion Joined by Pierce, J.

**ISSUES:** (1) Whether the State sufficiently proved where the transfer took place, or who made the transfer, (2) whether the State failed to prove Count 11 occurred within the statute of limitations.

**FACTS:** Samuel Nuckolls was charged under §97-29-63, for secretly filming and videotaping women in his bathroom on thirteen occasions. When Nuckolls moved to dismiss most of the counts because they had occurred outside the two-year statute of limitations, the State obtained an amended indictment, adding language charging that Nuckolls "otherwise reproduced" the images within the statute of limitations by saving them on his computer. Nuckolls then waived his right to a trial by jury, and the parties submitted an agreed stipulation of facts to the circuit judge, asking the circuit judge to decide the case based on that stipulation. Based on the stipulation of facts, the circuit judge convicted Nuckolls on all thirteen counts. Nuckolls appealed all of his convictions except for counts three and four.

**HELD:** (1) The stipulation omitted any reference to where ten of the thirteen counts took place. Since the State failed to prove venue as to those ten counts, they are reversed. To imply, as the State suggested, that the transfers occurred in DeSoto County simply because Nuckolls resided there, is insufficient. Although the stipulation stated the filming occurred in Nuckolls's bathroom, there is no information on where the transferring to the laptop took place. The filming took place outside the statute of limitations, so the transfer to the computer must have taken place some time after the filming. Venue was adequately raised at trial when counsel argued the State failed to prove where the transfer took place.

(2) Nuckolls argues that the State failed to prove that count eleven occurred within the statute of limitations because the parties stipulated that the filming occurred within a range of dates, including dates both within and outside the two-year statute of limitations. However, the parties also stipulated, that the Count 11 video ended with Nuckolls entering with a silver laptop consistent with the Apple MacBook Pro. Nuckolls purchased the Apple MacBook Pro on January 5, 2011. Therefore, it can be reasonably inferred that the recording must have occurred after that date and within the statute of limitations.

**Randolph, Presiding Justice, Concurring in Part and Dissenting in Part:**

Justice Randolph disagreed that Nuckolls ever contested venue at trial and stipulated the facts were sufficient for his conviction. Since venue was never the issue for which Nuckolls sought relief, the majority should not have, sua sponte, decided the issue. He would affirm all counts.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO105778.pdf>

***Graham Warwick v. State***, No. 2014-KM-01801-SCT (Miss. December 10, 2015)

**CASE:** DUI Marijuana and Tinted Windows, second offense

**SENTENCE:** 48 hours suspended

**COURT:** Madison County Circuit Court

**TRIAL JUDGE:** Hon. John Huey Emfinger

**TRIAL ATTORNEYS:** Kevin Dale Camp, Jared Keith Tomlinson, John G. (Trae) Sims, III

**APPELLANT ATTORNEY:** Kevin D. Camp, Jared K. Tomlinson

**APPELLEE ATTORNEY:** John G. Sims, III

**PROSECUTOR:** John G. Sims, III

**DISPOSITION:** Affirmed. Waller, Chief Justice, for the Court. Dickinson and Randolph, P.JJ., Lamar, Pierce, King and Coleman, JJ., Concur. Kitchens, J., Dissents with Separate Written Opinion.

**ISSUE:** Whether the evidence was sufficient to support the DUI conviction.

**FACTS:** On July 16, 2012, at around 6:20 p.m., Officer Tyler Burnell of the Madison Police Department observed a car with dark-tinted windows driving by. Burnell began following the vehicle. He observed the car weave over the double yellow line in the center of the road. As the vehicle approached the entrance to the Annandale neighborhood, it weaved again within its lane of traffic. Burnell noticed that the driver had rolled the vehicle's front windows down after he had begun following it. When the vehicle made a right turn within the city limits, Burnell was able to conclude that the vehicle's side windows were illegally tinted. He then initiated a traffic stop. The driver, Graham Warwick, was issued a ticket for the tinted windows. Burnell had Warwick step out of the car so he could show him how to correct the violation. He then noticed that Warwick's eyes were bloodshot. Asked if he was on medication, Warwick said he was taking medication for

attention deficit disorder and anxiety, which were in his car. Warwick consented to a search and a field sobriety test. Based on the results of these tests, Burnell concluded that Warwick had been driving under the influence and placed him under arrest. At the police department, Warwick was given a Drug Recognition Expert (DRE) evaluation. Based on the results, Burnell believed Warwick was under the influence of marijuana. Warwick refused to submit a urine sample, so Burrell obtained a search warrant for blood testing. The crime lab later determined his blood contained the active metabolite of marijuana in the amount of 2.3 nanograms per milliliter. He was found guilty on March 7, 2013, in Madison Municipal Court. Warwick timely appealed his case to the Madison County Court, where he was again convicted at a bench trial. Emily Harper, the forensic toxicologist, testified the pharmacological effects effect of marijuana usually last between five and six hours. Harper opined that Warwick's blood-test results generally would be indicative of marijuana use three to five hours prior to the sample being taken. The defense called Tony Corrotto as an expert witness in the areas of field sobriety testing and DRE protocols. Corrotto opined that Warwick did not present any indicators of impaired driving when he was pulled over or during his initial contact with Burnell. The Madison County Circuit Court affirmed Warwick's convictions and he appealed.

**HELD:** Warwick argued that the mere presence of marijuana in his bloodstream, where there are no physical manifestations of influence, is insufficient evidence to support a conviction for DUI. The SCT found the evidence was sufficient. Burnell observed Warwick's vehicle weave twice before pulling him over. Warwick's eyes were bloodshot when he exited his vehicle, he failed the lack-of-convergence test, he exhibited eyelid tremors during the Romberg test, and he did not successfully complete the walk-and-turn test or finger-to-nose test.

Burnell, who was trained in various field sobriety testing techniques, and his supervisor, a certified DRE instructor, offered the opinion that he had been driving under the influence of marijuana. Warwick exhibited twelve indicators that he was under the influence of marijuana while undergoing the DRE evaluation. Finally, Harper testified that Warwick's blood tested positive for the active metabolite of marijuana, meaning that the drug would have had an impairing effect on Warwick when he was pulled over.

**Kitchens, Justice, Dissenting:**

Justice Kitchens did not believe the State sufficiently proved impairment due to marijuana use. The State was required to prove not only that Warwick had consumed the drug, but also that he was "driving in a state of intoxication" such that his "normal ability for clarity and control" was lessened. According to Burnell's testimony, it was not that Warwick's vehicle was weaving which gave rise to the stop, but that the windows on Warwick's vehicle were illegally tinted. The state's expert could not testify regarding what the level of marijuana found in Warwick's blood would have on a specific individual. Proof of use is not the same as proof of impairment. He would reverse and render.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108175.pdf>

**December 17, 2015**

***Markeith D. Fleming v. State***, No. 2013-CT-01858-SCT (Miss. December 17, 2015)

**CASE:** Murder and Aggravated Assault

**SENTENCE:** Consecutive sentences of life and 20 years, respectively

**COURT:** Attala County Circuit Court

**TRIAL JUDGE:** Hon. C. E. Morgan, III

**TRIAL ATTORNEYS:** Jay Howard, Jeffery Waldo

**APPELLANT ATTORNEY:** Hunter N. Aikens

**APPELLEE ATTORNEY:** Scott Stuart

**DISTRICT ATTORNEY:** Doug Evans

**DISPOSITION:** Reversed and Remanded. Dickinson, Presiding Justice, for the Court. Waller, C.J., Randolph, P.J., Lamar, Kitchens, Pierce, King and Coleman, JJ., Concur.

**ISSUE:** Whether the trial judge erred in allowing an AT&T engineer to testify regarding cellular phone records without being qualified as an expert.

**FACTS:** On September 1, 2012, Derrick Hannah and his cousin, Christopher Graham, were shot while driving home from Kosciusko. Graham was killed, but Hannah survived, although paralyzed from the chest down. Hannah, testified that as a white car approached them on the road, Graham, who was driving, said "they about to shoot us," and Hannah "looked right quick" and started ducking. Hannah testified that he possessed "no doubt" that Markeith Fleming was the shooter. Hannah testified that he observed no other person in the white car with Fleming. The record also reflects that Fleming's girlfriend drove a white Altima. Cell phone records presented at trial placed Fleming in the same area as the murder, shortly before the murder occurred. The State used an AT&T engineer to introduce the cell phone records, but did not tender him as an expert. The trial court denied a continuance for Fleming to consult his own expert about the cell phone records. The COA found the trial judge did not abuse his discretion in admitting the AT&T engineer's testimony as a lay witness and denying Fleming's request for a continuance. [\*Fleming v. State\*](#), No. 2013-KA-01858-COA (Miss.Ct.App. April 14, 2015). The SCT granted certiorari.

**HELD:** After the COA issued its opinion, the SCT decided [\*Collins v. State\*](#), 172 So.3d 724 (Miss. August 20, 2015). *Collins* held that "testimony that goes beyond the simple descriptions of cell phone basics, specifically testimony that purports to pinpoint the general area in which the cell phone user was located based on historical cellular data, requires scientific, technical, or other specialized knowledge that requires expert testimony." Accordingly, this case must be reversed.

The AT&T engineer's testimony crossed the line into expert testimony under *Collins*, and it exceeded the information contained in the phone records.

So the circuit judge and the Court of Appeals erred by concluding that [the AT&T engineer] provided no expert testimony, and that the State's disclosure of the phone records in March 2013 provided sufficient notice of the State's intent to use expert testimony to establish Fleming's whereabouts at the time of the murder. Because the

State ambushed Fleming with this expert testimony shortly before trial, his request for a continuance to consult with an expert of his own should have been granted.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109384.pdf>

**January 28, 2016**

***Shunbrica Andrea Roby v. State***, No. 2014-KA-00621-SCT (Miss. January 28, 2016)

**CASE:** Deliberate Design Murder

**SENTENCE:** Life

**COURT:** Clay County Circuit Court

**TRIAL JUDGE:** Hon. Lee J. Howard

**TRIAL ATTORNEYS:** Lindsay Clemons, Kristen Wood Williams, Clinton Martin

**APPELLANT ATTORNEY:** Hunter N. Aikens

**APPELLEE ATTORNEY:** Lisa L. Blount

**DISTRICT ATTORNEY:** Forrest Allgood

**DISPOSITION:** Reversed and Remanded. Lamar, Justice, for the Court. Waller, C.J., Dickinson, P.J., Kitchens, Pierce, King and Coleman, JJ., Concur. Randolph, P.J., and Maxwell, J., Not Participating.

**ISSUES:** (1) Whether Roby's conviction was supported by sufficient evidence, (2) whether Roby forfeited her right to argue a Confrontation Clause violation, and (3) whether the trial court erred in granting Instruction S-10.

**FACTS:** On October 28, 2012, Shunbrica Roby drove to West Point to "bust the windows" out of her boyfriend Marcus Payne's car, because he had been seeing other women. Her cousins Natisha and Latwanna Roby were with her. They saw Payne's car at a gas station and pulled in behind him. Shunbrica got out with a hammer and began to break the windows out of his car. Payne emerged from the store and a struggle ensued. Initially the struggle was between Payne and Shunbrica only, but her cousins joined in, and ultimately Payne was stabbed and later died. There were slightly conflicting witness accounts on whether Shunbrica or one of her cousins actually stabbed Payne. Alexis Robinson testified neither Payne or Shunbrica had anything in their hands during the first part of the fight. After the cousins joined the fray, they all were hitting him. She never saw a knife. Juanita Yates testified that she never saw a knife, but knew it must have been something besides punches when she saw all the blood. However, Yates stated Shunbrica was not with the other two women when she saw the blood. She also testified Shunbrica seemed to try and comfort Payne after the cousins drove off. Shunbrica then left and was able to flag down a relative for a ride away from the gas station. Shunbrica was convicted of deliberate design murder and appealed.

**HELD:** (1) The evidence was sufficient to find deliberate design murder. Robinson testified that Shunbrica broke out Payne's car windows and said "I told you about playing with me." Shunbrica

was "slinging" him against the car, and fighting. Shunbrica's cousins were "holding" Payne while she was fighting him, and that they were just "beating and jumping on him." Shunbrica made no effort to stop the fight, even when one of her cousins yelled, "cut his neck, girl, cut his neck." Shunbrica also admitted that she left home with a hammer because she was going to break Payne's windows. She admitted further that she brought a knife from her cousin's house and put it on the dashboard of the car, because she always carried her knife.

A reasonable jury could find that Shunbrica intended to kill Payne and that she had "appreciable time" to reflect upon her actions before committing (or assisting in) the act. The verdict was also not against the weight of the evidence.

(2) Although there was a Confrontation Clause violation, it was not reversible error. Officer Tara Sloane testified that Natisha told him that Shunbrica had stabbed her boyfriend Marcus. Also, when Shunbrica's unredacted statement was introduced into evidence, it included statements by Detective Albert Lee recounting statements that the cousins had made implicating Shunbrica. Counsel did not object to these statements. The SCT found no plain error.

Inadmissible testimony was admitted without objection. Defense counsel then emphasized that testimony on cross-examination in an effort to shift the focus away from Shunbrica. As such, she may not now claim error. The State presented sufficient evidence for the jury to find that Shunbrica committed deliberate-design murder even without the cousins' statements, especially since the State did not argue that Shunbrica was the one who actually stabbed Payne.

(3) The trial judge did, however, commit reversible error by granting Instruction S-10. S-10 was an aiding and abetting instruction which included the language:

.....Roby, together with Natisha Roby and/or Latwanna Roby, acted with a common design in committing an assault upon Marcus Payne and a homicide was committed by one of them while engaged in that assault, then all are criminally liable for that homicide....

While other instructions provided that the State had to prove all the elements of deliberate-design murder beyond a reasonable doubt, S-10 instructed the jury that the State had to prove only that Roby committed an assault beyond a reasonable doubt. If the jury found that Shunbrica intended to commit an assault, she automatically was criminally liable for any resultant homicide, regardless of her intent. This was an incorrect statement of the law. The error was compounded by the State in closing argument when the prosecutor emphasized that S-10 only required that the jury find that Shunbrica committed an assault to find her guilty of deliberate design murder.

Finally, the deliberate design instruction was sufficient. It was unnecessary to grant D-3 which would have "further defined" state of mind. The court's instructions on reasonable doubt were also sufficient and the additional defense proffers on reasonable doubt were repetitive.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108830.pdf>

*Lester Darrell Moore v. State*, No. 2015-KA-00207-SCT (Miss. January 28, 2016)

**CASE:** Felony Shoplifting

**SENTENCE:** 5 years

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Lisa P. Dodson

**TRIAL ATTORNEYS:** Scott Lusk, Ian Baker, Charlie Stewart, Wilton Mcnair

**APPELLANT ATTORNEY:** Hunter Nolan Aikens

**APPELLEE ATTORNEY:** Billy L. Gore

**DISTRICT ATTORNEY:** Joel Smith

**DISPOSITION:** Affirmed. Randolph, Presiding Justice, for the Court. Waller, C.J., Dickinson, P.J., Lamar, Kitchens, Pierce, King and Coleman, JJ., Concur. Maxwell, J., Not Participating.

**ISSUES:** (1) Whether the trial court erred by failing to apply the ameliorative punishment provisions of the amendments to §97-23-93, and (2) whether the trial court erred in allowing a police officer to testify as to the price of the wallets.

**FACTS:** On March 5, 2013, Lester Darrell Moore was acting suspicious in the Biloxi Dillard's. Andre Correa, the securities supervisor, located Moore on his security cameras and observed him take nine men's wallets and put them into his jacket. A security officer apprehended Moore immediately after he left the store. He was handcuffed after a scuffle and nine wallets were recovered. At the police station, five more wallets were recovered from Moore. At trial, Correa testified that the total value of the nine wallets that he recovered from Moore was \$926, and the total value of the five wallets recovered by the police was \$800. The values were determined by the price tags on the wallets. The total value of the 14 wallets was \$1,726. Moore testified that he took the nine initial wallets from Dillard's, but he claimed that he did not steal the other five. Moore was indicted for shoplifting more than \$500 in merchandise. After the incident, § 97-23-93 was amended to require the theft of more than \$1,000 for felony shoplifting. Over objection, the jury was instructed to convict Moore if the value of the items was over \$500. He was convicted and appealed.

**HELD:** (1) The trial judge did not err in instructing the jury that Moore was guilty if they found the value of the items to be over \$500. The amendments to the shoplifting statute were adopted after Moore was indicted. However, the amendments changed the elements of the offense. The penalty remained the same. The jury was properly instructed as to the elements of the offense at the time the crime occurred.

(2) At trial, a police officer was allowed to provide the value of all 14 wallets recovered. However, he had no personal knowledge of the value, but simply related what he was told by representatives of Dillard's. However, Correa had previously testified, as a representative of Dillard's, as to the value of the wallets.

But for Andre Correa previously testifying, without objection, that the total value of the fourteen wallets recovered was \$1,726, [the officer's] hearsay statement could

have resulted in reversible error. However, since the value had been established fully by the owner, we deem the repetitious valuation to be harmless.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110099.pdf>

*Verenzo Cartrell Green v. State*, No. 2013-CT-01228-SCT (Miss. January 28, 2016)

**CASE:** Possession of a Weapon by a Convicted Felon x3 and Trafficking in Stolen Firearms

**SENTENCE:** 10 years on each count of possession of a weapon by a felon, all consecutively, and a concurrent 15 years for the trafficking, all as an habitual offender

**COURT:** Adams County Circuit Court

**TRIAL JUDGE:** Hon. Forrest A. Johnson, Jr.

**APPELLANT ATTORNEY:** Erin Elizabeth Pridgen

**APPELLEE ATTORNEY:** Barbara Wakeland Byrd

**DISTRICT ATTORNEY:** Ronnie Lee Harper

**DISPOSITION:** Affirmed. Coleman, Justice, for the Court. Randolph, P.J., Lamar and Pierce, JJ., Concur. King, J., Dissents with Separate Written Opinion Joined by Dickinson, P.J., and Kitchens, J. Waller, C.J., and Maxwell, J., Not Participating.

**ISSUE:** Whether §97-37-5(1) allows for multiple convictions when more than one weapon is possessed simultaneously by a prior convicted felon.

**FACTS:** On February 28, 2012, Verenzo Green was spotted by agents of the sheriff's department outside of a grocery store. There was an outstanding warrant for Green's arrest for a burglary. When the agents first saw him, Green and several other men were standing by a vehicle with its trunk open. As soon as Green noticed the agents, he closed the trunk and walked towards the entrance to the store. But instead of walking into the store, he threw a set of car keys down and ran into some nearby woods. The agents were unable to catch him. They returned to the store a few minutes later and spoke with the store manager. After speaking with her, she requested that the car be towed. The police determined that Green was the owner of the car. They conducted an inventory search of the vehicle, and used the keys Green threw down to open the trunk. Police discovered three guns on top of two large speakers. The trial court denied Green's motion to suppress the guns, finding that Green abandoned his vehicle on private property, and that the police were reasonable in conducting an inventory search before impounding the vehicle. Green's conviction was affirmed by the COA. *Green v. State*, No. 2013-KA-01228-COA (Miss.Ct.App. January 20, 2015). Judge Barnes dissented, agreeing that the search was valid, but argued Green's double jeopardy issue was plain error. The SCT granted certiorari.

**HELD:** Green never raised any objection on the basis of double jeopardy at trial, nor did he raise the issue on appeal. Although the issue is indeed one of first impression and the correct result unsettled and unclear, it does not justify the application of the plain error doctrine. The SCT has

never held that convictions for multiple counts of being a felon in possession of firearms violate constitutional protections against double jeopardy. Therefore the claim cannot be plain error.

**King, Justice, Dissenting:**

Justice King believed the COA should have addressed the issue as plain error. The right to be free from double jeopardy is a fundamental right, and procedural bars do not apply. “The statute criminalizes the possession of any firearm by a convicted felon. I find merit in Judge Barnes's dissent and in the determination that ‘any firearm’ may be interpreted to mean either the singular or the plural.” He argued that use of the word "any" was ambiguous. He pointed out that the Fifth Circuit has similarly held a federal statute using “any” firearm to prohibit multiple prosecutions for more than one weapon possessed. Because Green possessed the three firearms simultaneously, with no evidence introduced otherwise, he could be convicted only once of possession of a weapon. This was plain error.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110569.pdf>

**February 4, 2016**

*John Ashley Hale v. State*, No. 2014-KA-01778-SCT (Miss. February 4, 2016)

**CASE:** Sale of Controlled Substance (Count I, II, and IV, oxycodone and Count III, morphine)

**SENTENCE:** 8 years without parole as a habitual offender for each count. The sentences in Counts I and II were ordered to run consecutively to each other, and the sentences in Counts III and VI were ordered to run concurrently with Counts I and II.

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Roger T. Clark

**TRIAL ATTORNEY:** Robert C. Stewart

**APPELLANT ATTORNEY:** Mollie M. McMillin, George T. Holmes, Hunter N. Aikens, John Ashley Hale (Pro Se)

**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss

**DISTRICT ATTORNEY:** Joel Smith

**DISPOSITION:** Affirmed. Waller, Chief Justice, for the Court. Dickinson and Randolph, P.JJ., Lamar, Kitchens, King, Coleman and Maxwell, JJ., Concur.

**ISSUES:** [MOIA Issues] (1) Whether the trial court erred in denying an instruction on involuntary intoxication, (2) whether the trial court erred in denying an entrapment instruction, [Pro Se Issues] (3) whether the State or the trial court failed to respond to Hale's pro se pretrial motions, (4) whether the trial court erred in failing to appoint an expert witness for Hale, (5) whether Hale's indictment was defective, (6) whether Hale received ineffective assistance of counsel, and (7) whether Hale's conviction was the product of vindictive prosecution.

**FACTS:** On June 20, 2013, Biloxi police executed a search warrant unrelated to this case. Lieutenant Aldon Helmert, who was in plain clothes, stepped out onto the apartment's balcony to get some fresh air. John Ashley Hale was walking by with another man and asked Helmert what he was doing. Helmert said he was "partying." Hale asked Helmert if they were drinking alcohol, and Helmert responded with "something more than that." Hale then asked if he wanted "anything else," and Helmert said he did. Helmert and Investigator David Elliot met with Hale outside the apartment. Hale told them that he had some oxycodone pills that he would be willing to sell. Helmert bought two of these pills from Hale. Hale then left, but he returned about 15 minutes later. Elliot purchased six more oxycodone pills, and Hale sold another investigator four morphine pills and seven alprazolam pills. Hale then returned to his apartment with the investigator and gave him two more morphine pills and another alprazolam pill. They returned to the original apartment and Hale was arrested. Sometime after he arrived at the police department, Hale fell ill and was transported to the hospital. Hale claimed he did not remember anything from that night. Hale testified that he is a military veteran and has numerous health problems, including PTSD and chronic back pain. He had prescriptions for numerous medications, including oxycodone, morphine, and alprazolam. He was staying with friends after his wife died. He testified that he started to feel strange after drinking some grapefruit juice, and he claimed to have no memory of anything from that point until he woke up in the hospital the next day. The officers testified Hale did appear to have been drinking, but was not intoxicated. Charged in a six-count indictment, Hale was convicted of 4 counts and appealed.

**HELD:** (1) The trial judge did not err in denying Hale's instruction on involuntary intoxication. The instruction lacked an evidentiary basis. Hale presented no evidence of the side effects of his medication or any possible negative interactions between grapefruit juice and his medication. Hale was not precluded from presenting his theory of the case, as other instructions informed the jury Hale's sales had to be "willful." The SCT seemed to imply automatism can be asserted as a defense to a criminal charge, but that when the jury is adequately instructed on "willfulness," it is not error to deny an instruction on automatism or involuntary intoxication.

(2) The trial judge did not err in denying an entrapment instruction. Again, the trial judge found no evidentiary basis. Because Hale claimed he did not remember what happened that night, the trial court had to rely on the testimony of the investigators, who all stated that Hale had initiated both the initial conversation and the subject of selling pills. Hale failed to present sufficient evidence of government inducement.

(3) Hale's claim that the State failed to respond to his pro se pretrial motions is without merit. The record did not support Hale's claim that the State withheld exculpatory discovery from him.

(4) Hale argued that he was denied a fair trial because he did not have the benefit of an expert witness to assist him in explaining his defense of involuntary intoxication. However, counsel gave notice to the state that an expert on gastroenterology would testify. The State objected based on the expert's qualifications and the trial judge reserved his ruling. The defense never called the expert. The claim is without merit.

(5) Hale's indictment was not defective. Hale did not present any arguments concerning his indictment until after he had been convicted. He argued that the indictment failed to specify whether he was charged with a "sale" or "transfer," which lowered the burden of proof. He also claimed error

in using a multicount indictment. The claim is barred for failing to cite authority and is without merit. Section 41-29-139 prohibits the sale or transfer of a controlled substance.

(6) The SCT found the record insufficient to review Hale's claims of ineffective assistance of counsel. He is free to raise the issue again on post-conviction.

(7) Hale raised various allegations of corruption within the Harrison County law enforcement system and the court system, and claimed that his convictions were a punishment for his opposition to such corruption. The record fails to support Hale's claims.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110285.pdf>

**Larry Collier v. State**, No. 2014-KA-00087-SCT (Miss. February 4, 2016)  
[opinion from 4/16/15 withdrawn – no significant changes]

**CASE:** Sale of Cocaine x3

**SENTENCE:** 40 years on the first two counts and one day on the third count, with sentences to run consecutively

**COURT:** Rankin County Circuit Court

**TRIAL JUDGE:** Hon. William E. Chapman, III

**TRIAL ATTORNEYS:** A. Randall Harris, Dewey K. Arthur, Joey W. Mayes

**APPELLANT ATTORNEY:** Grady Morgan Holder, John M. Colette, Robert L. Sirianni, Jr.

**APPELLEE ATTORNEY:** Scott Stuart

**DISTRICT ATTORNEY:** Michael Guest

**DISPOSITION:** Affirmed. Dickinson, Presiding Justice, for the Court. Waller, C.J., Randolph, P.J., Lamar, Kitchens, King, Coleman, and Maxwell, JJ., Concur.

**ISSUES:** (1) Whether the trial court erred in prohibiting Collier from cross-examining Melvin about her undisclosed criminal convictions and prohibiting admission of her prior guilty plea petition, and (2) whether the evidence was sufficient to support the verdicts.

**FACTS:** Larry Collier was convicted of three counts of selling cocaine to a confidential informant, Shirley Melvin. Melvin decided to go undercover for the Rankin County Sheriff's Department after she was arrested for selling cocaine. While working off her charges, Melvin set up several drug buys with Collier under Investigator Barry Vaughn's supervision. Vaughn searched Melvin before each transaction, but admitted that Melvin could have hidden cocaine in places on her body or in her car that were never searched. At trial, Melvin was asked by the State about her criminal record. Melvin said she had five forgery convictions dating back to 2001, which she characterized as being for "bad checks." And when asked if she had another felony conviction, Melvin said she had a felony conviction sometime around 2000 for selling crack cocaine. She also admitted to the 2010 arrest which caused her to work as a CI. The video of the three transactions with Collier were played for the jury. During cross-examination, the defense attempted to impeach Melvin for her failure to

disclose three other convictions from the 1970's, claiming she had opened the door by failing to disclose them after being asked by the State about his criminal history. The trial court denied the request, stating Collier did not provide notice under MRE 609.

**HELD:** (1) Collier argued that the trial court's refusal to let him cross-examine Melvin about her other three convictions violated the Confrontation Clause, and that the trial court should have allowed him to introduce Melvin's guilty-plea petitions in evidence. Rule 609—by its very terms—has no application when a witness lies on the witness stand. Impeachment of specific testimony simply is outside the purview of Rule 609, including its advanced-written-notice requirements. The trial judge erred by refusing to allow Collier's counsel to cross-examine Melvin on all of her convictions.

When Collier sought to introduce Melvin's guilty-plea petition, Melvin had not been cross-examined about her inconsistent criminal history. Until Melvin testified one way or the other, her guilty-plea petition could not be used for impeachment purposes. And even if it could be used for such purposes, the statement could not be introduced as substantive evidence.

"Had the State asked Melvin to disclose all of her criminal convictions during the last ten years, this issue would not be before us. But the State chose to ask Melvin about all her convictions, even those barred by Rule 609." However, the SCT found the error harmless. The jury was aware Melvin was a seasoned felon. Collier was also allowed to impeach her characterizations of the forgeries as "bad checks." Because Melvin's credibility had already been tarnished, and because of the substantial video evidence of the transactions, the disclosure of three more convictions would not have had made any difference.

(2) Collier argues that the jury's verdict was based on speculation and that the evidence was insufficient to prove that Collier sold cocaine to Melvin. Collier notes that Melvin's testimony made the State's case and that the video of the transactions alone was insufficient. Collier further argued that Melvin was so desperate to stay out of jail that she framed Collier. "Melvin's testimony along with the recordings—as unclear as they were—*could* have been sufficient for a reasonable juror to find Collier guilty of selling cocaine." [emphasis supplied].

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO102539.pdf>

**February 18, 2016**

***Thomas Tubbs v. State***, No. 2015-KA-00337-SCT (Miss. February 18, 2016)

**CASE:** Molestation

**SENTENCE:** 15 years

**COURT:** Warren County Circuit Court

**TRIAL JUDGE:** Hon. Isadore W. Patrick, Jr.

**TRIAL ATTORNEYS:** Richard Earl Smith, Jr., Angela Carpenter, Lane Campbell, Eugene Perrier

**APPELLANT ATTORNEY:** Hunter Nolan Aikens

**APPELLEE ATTORNEY:** Billy L. Gore

**DISTRICT ATTORNEY:** Richard Earl Smith, Jr.

**DISPOSITION:** Affirmed. Randolph, Presiding Justice, for the Court. Waller, C.J., Dickinson, P.J., Lamar, Kitchens, King, Coleman, Maxwell and Beam, JJ., Concur.

**ISSUES:** (1) Whether the trial court erred in admitting hearsay statements as tender-years testimony, (2) whether the trial court erred in ruling a 5-yr old competent to testify, and (3) whether the trial court erred in admitting certain exhibits into evidence due to a break in the chain of custody.

**FACTS:** On December 17, 2009, D.J. (3-yr old T.J.'s mother) was working late at the hospital, so her children stayed at the home of Thomas and Vernita Tubbs. D.J. picked up the children around 7:00 p.m. and took them straight home. When they got home, T.J. went to the bathroom. T.J. called for her mother's help. As D.J. was pulling up her underpants, T.J. said, "Thomas licked me." D.J. then called her mother into the room and asked T.J. to tell her grandmother what happened. T.J. then pointed to her vagina and told the grandmother that Tubbs had touched her. T.J.'s clothes were collected by Investigator Randy Naylor, who gave them to Raymond Elledge to secure in the evidence room. Lieutenant Linda Hearn collected buccal swabs from Thomas Tubbs. She gave them to another investigator who gave them to Naylor. The State's forensic expert, Kathryn Moyse Rogers, testified that she had received the evidence (the swabs and the clothes) from Elledge. Tubbs's DNA was found on T.J.'s panties. T.J. testified that Tubbs did "a bad something" in that "he touched me." When asked where, she pointed to her private parts. Using a drawing, T.J. then identified parts of her body where Tubbs touched her. Tubbs did not testify, but gave conflicting stories to police. He said T.J. was referring to a spanking he gave her when she said she was "licked." He later said T.J. was doing flips in the bed and "flipped right in [his] face." Finally, the trial judge allowed Tubbs's prior rape conviction of a 10-year old into evidence to show lack of mistake. Tubbs's first trial ended in hung jury. He was convicted at a second trial and appealed.

**HELD:** (1) There was no abuse of discretion in allowing the grandmother's testimony. While the trial court did not use the specific words "substantial indicia of reliability," the court's evidentiary hearing contains more than sufficient findings on the record to allow T.J.'s grandmother to testify as to T.J.'s statement to her pursuant to the tender-years hearsay exception of Rule 803(25).

(2) The trial judge also did not abuse his discretion in allowing 5-year old T.J. to testify. The trial court determined T.J. was able to remember events. She knew how old she was, that she went to school, and the names of her teachers. She knew she would get in trouble if she acted up at school and knew that it was bad to say someone did something that he or she really did not do. All of her answers at the hearing evidence her ability to understand and answer questions intelligently.

(3) The trial judge did not abuse his discretion in admitted T.J.'s panties. Tubbs argued there was a break in the chain of custody because Elledge did not testify. Naylor testified he gave the evidence to Elledge and Rogers testified she received the evidence from Elledge. However, Tubbs offered no evidence that anything irregular occurred. His "mere suggestion" that substitution could possibly have occurred does not meet the burden of showing probable substitution.

To read the full opinion, click here:  
<http://courts.ms.gov/Images/Opinions/CO110749.pdf>

**February 25, 2016**

***Dewayne Graham v. State***, No. 2013-KA-02165-SCT (Miss. February 25, 2016)

**CASE:** Kidnapping, Forcible Rape, and Sexual Battery

**SENTENCE:** Concurrent terms of 30 years for each conviction as an habitual offender

**COURT:** Lauderdale County Circuit Court

**TRIAL JUDGE:** Hon. Lester F. Williamson, Jr.

**APPELLANT ATTORNEY:** Justin Taylor Cook

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISTRICT ATTORNEY:** Bilbo Mitchell

**DISPOSITION:** Affirmed. Coleman, Justice, for the Court. Waller, C.J., Randolph, P.J., Lamar, King, Maxwell and Beam, JJ., Concur. Dickinson, P.J., Concur in Part and in Result Without Separate Written Opinion. Kitchens, J., Concur in Part and Dissents in Part with Separate Written Opinion.

**ISSUES:** (1) Whether the trial court erred when it denied Graham's motion for a directed verdict as to sexual battery in Count III, when the State presented no evidence that Graham had performed fellatio on the victim, (2) whether the State impermissibly amended Count III of the indictment when it issued jury instruction S-3, (3) whether the State presented sufficient evidence to convict Graham, and (4) whether Graham's speedy trial rights were violated when the court reset the date of trial five times over sixteen months.

**FACTS:** On December 22, 2011, the victim met Jamonious Inge, while visiting her mother and children. Inge later offered the victim cocaine and they went to his house. There was a conflict in the testimony why they left, but they met Dewayne Graham outside Inge's resident. The three started to walk to a nearby Cefco convenience store, and then down a wooded pathway behind the Cefco. Once within the trees, Inge abruptly turned around and punched her in the eye, and then told her to pull her clothes down. The impact knocked her hairpiece from her head and one of her earrings out of its piercing. The victim testified that she was scared and crying, and that she was in shock throughout the encounter. Inge and Graham were blocking her from moving. The victim testified that Inge and Graham both participated in the sexually assaulting her. Graham unzipped his pants and told her to perform oral sex on him. She complied but testified her actions were not voluntary. Inge attempted to penetrate the victim vaginally while standing behind her, but he was unable to achieve an erection. At that point, Graham and Inge switched positions, with Inge forcing the victim to perform oral sex while Graham forcibly raped her from behind. When Graham and Inge decided to take the victim somewhere else, she pulled her clothing into place and ran to the Cefco they had passed earlier. Inside the store, she asked the clerk to call the police and then ran behind the counter. Inge later testified against Graham. He was convicted on all three counts and appealed.

**HELD:** (1) Count III of the indictment alleged Graham committed sexually battery "...by performing fellatio on [the victim]." Graham argued that the evidence was insufficient on this charge, as fellatio could not be performed on a female. A review of the testimony offered at trial makes it clear that the State intended to prove that Graham forced the victim to perform fellatio upon him. The SCT found the State provided Graham with sufficient notice of the charges against him when the indictment charged him with sexual battery by engaging in sexual penetration involving the act of fellatio. Whether the State satisfied the elements of the offense was a jury question.

(2) Regarding Count III, the State was granted a jury instruction which told the jury Graham was guilty if they found Graham put his penis in the victim's mouth. Graham argued that was not what the indictment charged. The indictment charged that Graham committed fellatio on the victim. The SCT found the instruction did not constructively amend the indictment. The instruction did not alter the factual basis of the offense charged, or alter Graham's defense. He was placed on notice he was charged with sexual battery by fellatio. Graham's defense was basically consent, so he suffered no prejudice from the instruction.

(3) The evidence was sufficient to support all three convictions. Although the victim never actually said "no" to the assault, she testified it was not voluntary and tried talk them out of it. Her testimony was sufficient. The store clerk also testified the victim was scared, nervous and upset. As for the kidnapping, Graham argued that, other than the punch that Inge gave to the victim, neither party did anything that could be construed as a kidnapping. However, the statute does not require that a victim must attempt to flee or that she be told that she cannot leave for a kidnapping to arise. The evidence supported the victim's allegation of having been forcibly confined.

Graham cautions, however, that if the kidnapping statute were to be interpreted so broadly, every single rape or assault allegation could be accompanied by a kidnapping charge. Because of the evidence produced at trial, we are unconvinced by Graham's parade-of-horribles argument. The victim testified that the men were blocking her exit when she realized she was in danger....[T]he victim testified that as soon as Inge and Graham had backed away to fix their clothes, she had fled.

(4) Graham was not denied his constitutional right to a speedy trial despite a two year delay between his arrest and trial. (The SCT found the claim of a statutory violation was waived for failure to sufficiently argue the issue or cite authority). Three of the continuances granted weighed in favor of the State were to secure the attendance of material witnesses. Another delay was for the purpose of continued plea negotiations, while there was no clear reason was given for a fifth delay. Graham agreed to the first two continuances. Graham asserted his right and refused to sign one joint continuance. However, Graham suffered no prejudice from the delay. After granting one of the State's motions for a continuance on April 8, 2013, the trial court released Graham from custody on his own recognizance. Graham failed to establish that he suffered actual prejudice from the delay.

#### **Kitchens, Justice, Concurring in Part and Dissenting in Part:**

Justice Kitchens would reverse and render Graham's convictions of sexual battery and kidnapping, but would affirm Graham's conviction of forcible rape. Because the indictment states that the victim on whom Graham performed fellatio was "a female person," it cannot be said that the indictment

charged a crime. Even if it did, the State did not prove those facts at trial. “It is beyond question that the jury instruction materially altered the essential facts of sexual battery as charged in the indictment.” Additionally, he did not believe the State proved a kidnapping occurred. Graham’s confinement of the victim was merely incidental to his sexual assault of the victim.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109688.pdf>

**March 17, 2016**

***Patrick Bernard Giles v. State***, No. 2013-KA-01888-SCT (Miss. March 17, 2016)

**CASE:** Statutory Rape and Sexual Battery

**SENTENCE:** 10 years for the statutory rape and a consecutive 25 years for the sexual battery

**COURT:** Leake County Circuit Court

**TRIAL JUDGE:** Hon. Marcus D. Gordon

**TRIAL ATTORNEYS:** Curt Crowley, Steven Kilgore

**APPELLANT ATTORNEY:** Christopher A. Collins

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISTRICT ATTORNEY:** Mark Sheldon Duncan

**DISPOSITION:** Affirmed. Kitchens, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Lamar, King, Coleman, Maxwell and Beam, JJ., Concur.

**ISSUES:** (1) Whether Giles received ineffective assistance of counsel, and (2) whether the prosecutor made improper closing arguments.

**FACTS:** On June 3, 2012, Patrick Bernard Giles, 19, attended a party at the home of his friend, D.J., in Carthage, MS. Giles met D.J.'s 12-year-old niece, Dolores, who was staying with D.J. for the week. D.J.'s daughter later sent Giles a text message informing him that Dolores was "interested" in him. Giles requested Dolores's cell phone number. When Barbara gave Giles the number, she informed him that Dolores was 12 years old. Giles began sending texts to Dolores. After about a day and a half, Giles began texting Dolores about sex. On Wednesday, June 6, 2012, Giles sent Dolores a text stating that he wanted to meet her in person. After Dolores assured Giles that her uncle and aunt were not home, the pair agreed to meet behind her uncle's barn. Behind the barn, Giles engaged in vaginal and anal intercourse with Dolores. Over the next few months, rumors circulated about an illicit romance between Dolores and Giles. In February 2013, Dolores's parents confronted her about the rumors, and she told them about her encounter with Giles. Police were contacted and Giles was arrested. While he was in jail, he gave a written statement to police which read, “We was you Dixon it a hourse ride she ask for my phone number I didn't know old how she was I didn't ask Than she call and text in ask me to come over So I went to DJ house Only he was not there so went to the darn We was kiss in had sex”. Giles presented an alibi defense at trial, claiming he was in Flowood on June 6<sup>th</sup> after the birth of his son. Giles admitted that Dolores had called and texted him, but he maintained that he had not answered her calls or texts. (Records of the texts did not exist). Giles

testified that he never met Dolores at D.J.'s home, and that he never kissed Dolores or had sex with her. He claimed the written statement was untrue. He was convicted and appealed.

**HELD:** (1) Because several of Giles's ineffective assistance of counsel claims are not based on facts fully apparent from the record, the SCT dismissed those claims without prejudice. Giles's claims based on failure to investigate, failure to reciprocate discovery, and failure to identify and call additional alibi witnesses, and the question of whether Giles was prejudiced by the totality of counsel's performance can be raised again in PCR.

Giles's claims of ineffective assistance of counsel for counsel's failure timely to request discovery, failure to move to suppress his police statement on the basis of irrelevance, failure to object during closing arguments, and failure to make various motions are without merit.

(2) The prosecutor's closing arguments were not improper. Giles claimed that the prosecutor's description of the elements instruction was tantamount to a peremptory instruction to find him guilty. Giles argued that the prosecutor's statement that "Defendant did have sexual intercourse with [Dolores] . . ." instructed the jury that all the elements of statutory rape had been met. However, in context, it is clear the prosecutor was reciting to the jury the crime elements the State was obliged to prove. The prosecutor did not argue facts outside the evidence, but instead properly drew inferences from the evidence that had been presented.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111408.pdf>

*Eddie Hall v. State*, No. 2014-KA-00986-SCT (Miss. March 17, 2016)

**CASE:** Murder

**SENTENCE:** Life

**COURT:** Covington County Circuit Court

**TRIAL JUDGE:** Hon. Eddie H. Bowen

**TRIAL ATTORNEYS:** Daniel Jones, Wendell James, Frank C. Jones, William Franklin Jordan, Catouche Body

**APPELLANT ATTORNEY:** Donald W. Boykin

**APPELLEE ATTORNEY:** Abbie Eason Koonce

**DISTRICT ATTORNEY:** Daniel Christopher Jones

**DISPOSITION:** Affirmed. Randolph, Justice, for the Court. Waller, C.J., Dickinson, P.J., Lamar, Kitchens, King, Coleman, Maxwell and Beam, JJ., Concur.

**ISSUES:** (1) Whether the trial court committed reversible error during the jury selection process, by failing to ask certain questions, automatically disqualifying a juror who said he was convicted of a felony, and by appointing a foreperson, and (2) whether Hall received ineffective assistance of counsel.

**FACTS:** A horse show was held in the Black Cat community of Covington County on September 16, 2012. At twilight, a fight broke out among a group of 50-100 people after they returned from a trail ride. Eddie Terrell Hall retrieved a revolver from his trailer and fired it into the air, instructing people to leave immediately. Johnny "Tubby" Hubbard, who was attempting to help break up the fight, got into his truck and started to drive away. Hall evidently had taken offense at Tubby for some reason. After shouting something to the effect of "[t]hat sumbitch hit my old lady," Hall fired a shot into the windshield of Tubby's truck before walking around and firing a second shot at Tubby through the passenger side. The first shot grazed Tubby's cheek, and the second hit him in the upper arm. Tubby's cousin, Michael Hubbard, asked Hall what was going on. Hall replied "you want to get shot too?" Tubby fled the truck and ran into the woods. Hall then shouted something to the effect of "let's go get the sumbitch, he went in the woods." Hall led several others to chase after Tubby. Michael and another individual were able to reach Tubby first and take him to the hospital. Tubby died at the hospital due to blood loss from the gunshot wound in his arm. Hall disappeared for two days before turning himself in to the Sheriff. He was convicted of murder and appealed.

**HELD:** (1) Although the trial judge improperly selected the foreperson, Hall forfeited his right to argue this issue on appeal by failing to contemporaneously object. He also did not object when the court did not ask jurors about prior jury service within two years. This is a personal privilege exemption and must be asserted by the juror. Incomplete jury questions were corrected during voir dire. Finally, a juror who has committed an infamous crime is disqualified under § 13-5-1. None of these four issues can be shown to have affected the outcome of Hall's trial.

(2) Hall argue that he received ineffective assistance due to his counsel's failure to object to hearsay during the testimony of Investigator Wade-Smith. On direct, counsel showed Wade-Smith nontestifying witness statements. She then testified that others had reported seeing another person with a gun at the scene. On cross, the State then asked Wade-Smith, without objection, if during her investigation any witness had ever come forward stating that someone other than Hall was the shooter. She testified no one did. Even if hearsay, it was clearly harmless.

Hall also argued that his trial attorney was ineffective for requesting a manslaughter plea when the potential jurors were present in the courtroom and could have heard him. The record was insufficient to address the issue on direct appeal. He is free to raise this again on PCR.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110596.pdf>

**March 31, 2016**

***Shirley Warren v. State***, No. 2013-CT-00926-SCT (Miss. March 31, 2016)

**CASE:** Possession of a Controlled Substance in a Correctional Facility

**SENTENCE:** 7 years with 4 suspended and 5 years supervised probation

**COURT:** Winston County Circuit Court

**TRIAL JUDGE:** Hon. Joseph H. Loper, Jr.

**TRIAL ATTORNEYS:** Michael Gunther Howie, Jay Howard, Andy Davis

**APPELLANT ATTORNEY:** Andy Davis

**APPELLEE ATTORNEY:** Billy L. Gore

**DISTRICT ATTORNEY:** Doug Evans

**DISPOSITION:** COA Reversed and Conviction Reinstated and Affirmed. Coleman, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Lamar and Beam, JJ., Concur. Kitchens, J., Dissents with Separate Written Opinion Joined by King, J. Maxwell, J., Not Participating.

**ISSUES:** (1) Whether the indictment was sufficient to charge Warren with possession of a controlled substance in a correctional facility, (2) whether the trial court erred by denying Warren's motion to suppress the forensic chemist's testimony for discovery violations, and (3) whether the trial court abused its discretion by finding that the forensic chemist was qualified to render expert testimony, (4) whether the evidence was sufficient and whether the verdict was against the weight of the evidence, and (5) whether there was cumulative error.

**FACTS:** On June 9, 2012, Shirley Warren visited the Winston-Choctaw Regional Correctional Facility in Louisville. Upon checking in with the visitation officer, Warren was subjected to a search performed by Correctional Officer Theresa Carter. During the search, Carter discovered several medicine tablets concealed in the waistband of Warren's pants. It was later determined that the contraband consisted of four Lortab tablets and four Xanax tablets. Warren was later indicted from possessing "a controlled substance" in the correctional facility. Warren filed a motion to dismiss asserting that the indictment was defective and insufficient for failing to identify the controlled substances that Warren was alleged to have possessed. This motion was denied and Warren was convicted. The COA reversed, holding that the State's failure to include the identity of the controlled substance in her indictment prevented Warren from preparing a possible defense: namely, that her possession of the controlled substance was lawful. *Warren v. State*, No. 2013-KA-00926-COA (Miss.Ct.App. January 27, 2015). The SCT granted the State's petition for writ of certiorari.

**HELD:** Warren argued to the trial court that the identity of the controlled substance is an essential element of the crime, and that the defective indictment left her unable to prepare a defense. Warren's indictment undisputedly tracked the language of the statute. The statute, §47-5-198(1), prohibits the possession of "any controlled substance or narcotic drug" in a correctional facility.

Neither the crime nor the penalty depends upon the type of controlled substance possessed; rather, the statute criminalizes possession of "any controlled substance" in a correctional facility. Therefore, an indictment for possession of a controlled substance in a correctional facility need not identify the controlled substance allegedly possessed. The identity of the controlled substance under §41-5-198(1) is not an essential element of the crime. Warren admitted that the State had provided her with the crime lab's test results in discovery.

(2) Warren claims that the State violated the mandatory disclosure requirement of Rule 9.04 by failing to produce Smith's certification or the Columbus Forensic Laboratory's accreditation, policies, controls, protocols, and procedures. This claim is without merit. Smith's curriculum vitae and the crime lab's certification and protocols were not within the scope of Warren's discovery requests or required discovery under Rule 9.04(A). Warren's motion for discovery did not request any

background information on the experts or the crime lab. Warren fails to show that the State had the materials in its possession and withheld them to constitute a discovery violation.

(3) Warren argued that Smith was not qualified because he never testified that his methods were generally accepted in the scientific community or that his work was subject to peer review. Additionally, Smith was not certified by the American Board of Criminalistics, and Columbus Crime Laboratory was not accredited by the American Society of Crime Lab Directors (ASCLD). However, given Smith's education, experience, and training in drug analysis, the court did not abuse its discretion in finding that Smith was qualified to testify. Warren cited §13-1-114(1)(b), in arguing Columbus Crime Lab was not a “court-approved laboratory.” However, §13-1-114 was repealed in 1991.

(4) When Warren was visiting a correctional facility, a corrections officer searched her and discovered a plastic bag that contained eight pills concealed inside the waistband of her pants. Warren told the warden that the pills were Lortab and Xanax. The analyst who tested the pills testified that they contained Lortab and Xanax, both controlled substances. A reasonable jury could infer from Warren's concealment of the pills on her person and her statement to the warden that she knew the pills contained controlled substances that she knowingly brought them into a correctional facility.

(5) There was no cumulative error.

#### **Kitchens, Justice, Dissenting:**

Justice Kitchens dissented, arguing that an indictment under §47-5-198(1) for possession of a controlled substance in a correctional facility, must identify the controlled substance that the defendant allegedly possessed in order to give proper notice to an accused. “A defendant charged with possession of a controlled substance in a correctional facility cannot prepare a defense that the possession was authorized by law without knowing the identity of the controlled substance the State will attempt to prove the defendant possessed.” He would reverse and render the case.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110597.pdf>

**April 7, 2016**

*Steven Lee Boggs v. State*, No. 2014-KA-00194-SCT (Miss. April 7, 2016)

**CASE:** Gratification of Lust

**SENTENCE:** 15 years

**COURT:** Rankin County Circuit Court

**TRIAL JUDGE:** Hon. John Huey Emfinger

**TRIAL ATTORNEYS:** Jacqueline Pernell, Dewey Arthur, Marty Miller, Edward Rainer, Gary Williams

**APPELLANT ATTORNEY:** Gary Lee Williams, J. Edward Rainer

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISTRICT ATTORNEY:** Michael Guest

**DISPOSITION:** Affirmed. Waller, Chief Justice, for the Court. Randolph, P.J., Lamar, Kitchens, Coleman, Maxwell and Beam, JJ., Concur. Dickinson, P.J., Concur in Part and in Result with Separate Written Opinion Joined by King, J.

**ISSUES:** (1) Whether the trial court erred in allowing D.N. and S.S. to testify about other allegations of Boggs's sexual misconduct; (2) whether the trial court gave a proper limiting instruction concerning the testimony admitted under Rule 404(b); (3) whether the trial court erred in admitting testimony under the tender-years exception to hearsay in Rule 803(25); and (4) whether there was cumulative error.

**FACTS:** Steven Lee Boggs was convicted of one count of gratification of lust against his cousin K.E. which occurred between the summer of 2009 and the summer of 2010. Boggs's wife Becky worked at McLaurin Elementary School. Becky and Amanda Stocks would work at the school during the summers. They would take K.E. and Amanda's daughter S.S. with them. Boggs often would come to school with his wife to do various work projects and look after K.E. and S.S. Boggs also tutored K.E. after school during the time in question, and he took care of K.E. and D.N. (another relative) while other adults were around on at least one occasion during the time in question. On July 5, 2012, a Boggs was served with a no-contact order regarding K.E. Becky went to K.E.'s house to talk to K.E.'s parents about the order. K.E. told her mother that Boggs had sexually abused her on several occasions. K.E. stated that Boggs had exposed his penis in front of her and S.S. in the library of McLaurin Elementary School. When he tutored her, Boggs would touch K.E.'s vagina and expose his penis in front of her. Boggs was indicted for one count of gratification of lust against K.E. and one count of attempted gratification of lust against S.S. However the count involving S.S. was dismissed on statute-of-limitations grounds. D.N. alleged that Boggs had touched her vagina while they were at a family member's pool during the summer of 2010. Boggs was charged by a separate indictment for this offense, but the indictment was nol pros'd in 2011, before the indictment involving K.E. was issued. S.S. and D.N. were both allowed to testify for the State against Boggs. Boggs testified in his own defense and denied any wrongdoing. He was convicted and appealed.

**HELD:** (1) D.N. and S.S. were around the same age (between 8-11) when these incidents happened, and they both stated that Boggs warned them not to tell anyone about his conduct. The State argued that the testimony of D.N. and S.S. would be offered as proof of motive, common plan or scheme, and absence of mistake under Rule 404(b). The State argued that the testimony was admissible to show a common plan or scheme by Boggs.

“We find that K.E.'s and D.N.'s testimony fits within this purpose and also serves as proof of motive.” Both D.N. and K.E. are related to Boggs, and they were around the same age when Boggs abused them. K.E.'s and S.S.'s testimony concerning Boggs's conduct in the McLaurin Elementary School library are substantially similar. Boggs took measures to be alone with S.S., just as he did with D.N. and K.E. Finally, he told all three girls that they could not tell anyone about his misconduct. The court also did not err in finding the probative value of the evidence outweighed any unfair prejudice to Boggs.

(2) Prior to D.N. taking the stand, Boggs requested that the trial court give the jury a limiting instruction explaining the purposes for which the jury could consider D.N.'s testimony. Boggs objected to the State's proffered instruction, arguing that a proper limiting instruction must list only the specific purposes for which the evidence was being admitted, citing *Cole v. State*, 126 So. 3d 880, 886 (Miss. 2013). The SCT noted that *Cole* was on rehearing at the time of Boggs's trial, so it was not binding on the trial court. Additionally, *Cole* did not overrule any of the Court's other previous decisions approving the exact instruction given in this case.

The SCT found that while it may have been a better practice for the trial court in this case to limit the language of the instruction to the purposes for which the State had offered the evidence, it was not error since the instructions actually given "fairly, though not perfectly, announce the applicable rules of law."

(3) At trial, S.S.'s mother testified concerning S.S.'s disclosure of Boggs's sexual misconduct. A forensic interviewer with the Mississippi Community Education Center, testified concerning her interview with D.N. after she had disclosed Boggs's abuse. Boggs cites no authority to suggest the tender years exception did not apply to this testimony.

(4) There was no cumulative error.

**Dickinson, Presiding Justice, Concurring in Part and in Result:**

Justice Dickinson agreed that the court properly admitted the testimony of the other girls.

I do not agree, however, with the majority's continued insistence on allowing the admission of propensity evidence that has been mislabeled as "motive." I also believe that by failing to tailor the limiting instruction to the purposes for which he admitted this evidence, the circuit judge erred.

Although he believed the judge committed error by failing to provide a sufficiently tailored limiting instruction, he did not believe this affected a substantial right of Boggs.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111039.pdf>

**April 14, 2016**

*Marshall Graves v. State*, No. 2014-KA-00464-SCT (Miss. April 14, 2016)

[On rehearing, the opinion from October 29, 2015 was withdrawn, but case was still affirmed. The original opinion stated there were no defense objections during closing arguments. The revised opinion notes only that there were no proper objections to the specific claims Graves raised.]

**CASE:** Fondling x2 and Sexual Battery

**SENTENCE:** 15 years on each fondling and life on the sexual battery, all concurrent

**COURT:** Lamar County Circuit Court

**TRIAL JUDGE:** Hon. Prentiss Greene Harrell

**APPELLANT ATTORNEY:** W. Daniel Hinchcliff, Marshall P. Graves (Pro Se)

**APPELLEE ATTORNEY:** Ladonna C. Holland

**TRIAL ATTORNEYS:** Robert Whitacre, Shirlee Fager Baldwin, Kim Harlin, Lauren Harless

**DISTRICT ATTORNEY:** Haldon J. Kittrell

**DISPOSITION:** Affirmed. Randolph, Presiding Justice, for the Court. Waller, C.J., Dickinson, P.J., Lamar, Kitchens, Chandler, Pierce, King and Coleman, JJ., Concur.

**ISSUES:** *Lindsey* brief. Whether there were any arguable issues for appeal. Pro Se Brief. (1) Whether the indictment was defective, (2) whether Graves received effective assistance of counsel, (3) whether the trial court improperly admitted the video of G.W. being interviewed by a CAC counselor, (4) whether the State committed a discovery error by calling G.W.'s father, (5) whether the trial court erred in admitting hearsay statements under the tender-years exception, (6) whether the evidence was sufficient and not against the weight of the evidence, (7) whether there was prosecutorial misconduct, (8) whether the trial judge erred in failing to sever the indictment counts, and (9) whether there was cumulative error.

**FACTS:** Ten year old G.W. lived with her parents and younger brother in Hattiesburg. During the summer of 2010, Mr. W. invited his friend Marshall Graves to stay with them because Graves was "down on his luck." One evening Mr. and Mrs. W. went to dinner for their anniversary, and Graves agreed to watch G.W. and her younger brother. During the evening, Graves called G.W. into her parents' bedroom. He told G.W. that he loved her, and "he gave me a hug and started kissing me with his tongue in my mouth and started grabbing my butt and my boobs and then reached his hand down the front of my pants." He told her not to tell anyone or he would get her father into trouble. A week later, a similar event happened after he called G.W. into the bathroom. This time she alleged he also digitally penetrated her vagina. He offered her money and a cell phone to keep quiet. G.W. later told a friend what happened. The friend told G.W.'s mother, who contacted authorities.

**HELD:** "We have reviewed the record and find that there are no arguable issues for appeal. We further find that Graves's *pro se* brief raises no arguable issues and that no supplemental briefing is warranted."

(1) Graves alleged that his indictment was defective because the language was confusing and lacked specificity in the multiple counts. From the face of Graves's indictment, he was charged with two counts of fondling G.W., a child under the age of 17, and sexually battering G.W., a child under the age of 14, all occurring when he was 45 years old. As such, Graves's indictment complied with Rule 7.06, as each count tracks the language of the statutes.

(2) Graves's ineffective-assistance argument is based on his claim that his second chair, appointed counsel did not have sufficient time to prepare for his trial. (She was appointed a week before trial). However, Graves failed to show any deficient performance by counsel. Graves claims that she wanted to keep a medical appointment, which was scheduled for the second day of trial. However, counsel agreed to reschedule this appointment after Graves made it known that he wanted her to be present for trial. This issue is without merit.

(3) Defense counsel offered the video of G.W.'s interview into evidence to impeach G.W. with a prior inconsistent statement. During the interview, G.W. mentioned that Graves was on house arrest and had fought with his girlfriend. Graves cannot complain about an alleged error invited or induced by himself.

(4) The State called G.W.'s father to testify. Defense counsel objected because Mr. W. was not on the State's original witness list. However, the State had supplemented the list and it was in the case file. Additionally, Mr. W's statement was included in the original discovery. Regardless, the trial court allowed defense counsel additional time to prepare for cross-examination.

(5) Graves failed to object to G.W.'s friend's testimony as improper hearsay under the tender years exception. The claim is procedurally barred.

(6) The evidence was sufficient. G.W. testified in detail regarding the two times that Graves fondled and sexually assaulted her. Although Graves attempted to impeach G.W.'s testimony through her interview with the CAC, G.W.'s testimony was not substantially contradicted. Additionally, the State offered the testimony of four other witnesses, G.W.'s mother, brother, friend, and friend's mother, who all corroborated G.W.'s testimony.

(7) Graves argued that, during closing arguments, the district attorney made references to Graves being a "pedophile" and that he had the propensity to harm other children. There was no objection to these comments. The claim is waived.

(8) The trial judge did not abuse its discretion in failing to sever the indictment counts. Count one referenced a fondling that took place between July 23, 2010, and July 26, 2010, while counts three and four referenced a sexual battery and fondling that occurred between July 30, 2010, and August 1, 2010. The State presented a *prima facie* case satisfying its duty to provide Graves with specific acts and dates, and that the crimes were part of a common scheme or plan. The time span provided in the indictment was not so broad as to fail to put Graves on notice of the specific acts alleged.

(9) There was no cumulative error.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108182.pdf>

#### **SCT POST-CONVICTION CASES:**

*Jerry Wayne Atwood v. State*, No. 2015-CA-00190-SCT (Miss. January 14, 2016)

**CASE:** PCR – Grand Larceny

**SENTENCE:** 10 years, with 9 years, 11 months suspended, and 5 years PRS

**COURT:** Wayne County Circuit Court

**TRIAL JUDGE:** Hon. Robert Walter Bailey

**TRIAL ATTORNEYS:** Lisa Howell, Phillip Weinberg, Andy Davis

**APPELLANT ATTORNEY:** Jacob Wayne Howard, Robert B. McDuff, J. Clifton Johnson, II  
**APPELLEE ATTORNEY:** Lisa L. Blount

**DISPOSITION:** Denial of PCR Reversed and Remanded. Randolph, Presiding Justice, for the Court. Waller, C.J., Dickinson, P.J., Lamar, Kitchens, Pierce, King and Coleman, JJ., Concur. Maxwell, J., Not Participating.

**ISSUE:** (1) Whether the Legislature may amend the statutorily authorized penalties for certain violations of the conditions of post-release supervision, and (2) whether a circuit court may rely on §99-19-29 for the authority to revoke a term of post-release supervision and impose a period of imprisonment.

**FACTS:** Jerry Atwood pled guilty to grand larceny, and was required to pay of restitution through a restitution center as part of his sentence. While on post-release supervision, Atwood was expelled from the restitution center. The state petitioned the court to revoke Atwood's post-release supervision. The circuit court found that Atwood had violated a condition of his release and revoked Atwood's supervised release and imposed the remainder of his ten-year sentence. Prior to his revocation hearing, the Legislature amended the probation and post-release-supervision statute to provide for graduated penalties for certain violations. The circuit court found these amendments unconstitutional as the Legislature restricted the inherent power of a court to enforce its own orders by limiting the sentence available upon a finding of a violation of said orders. The court found this to be a violation of the separation-of-powers doctrine. Atwood challenged his sentence through a PCR, claiming reinstatement of his suspended sentence was unlawful in that it exceeded the maximum period of imprisonment allowed under the 2014 amendments to §47-7-37. The PCR was denied and Atwood appealed.

**HELD:** (1) Prior to HB 585, §47-7-37 authorized a circuit court to punish a violation of the conditions of post-release supervision by "impos[ing] any part of the sentence which might have been imposed a the time of conviction." The 2014 amendments to the statute provided for graduated penalties for "technical violations."

....[W]e find nothing in the amendments that impinge upon a trial court's ability to enforce its orders. The day the amendments took effect, Atwood remained sentenced to ten years, with nine years, eleven months suspended, and five years of post-release supervision. The circuit court retained its sole authority to determine whether Atwood had violated a condition of his supervised release, as well as the power to revoke his term of supervision and to impose a period of imprisonment. The Legislature simply altered the term and place of imprisonment for certain violations.

Circuit courts do not have inherent power to suspend a sentence or to impose a term of post-release supervision, nor do they have inherent power to revoke a term of post-release supervision and impose a period of imprisonment. This is a legislative function. The circuit court erred in finding the amendments unconstitutional.

(2) The circuit court also held that in the alternative, §99-19-29 gives the court authority to impose and subsequently vacate a suspended sentence, as well as the authority to vacate a conditional

pardon. However, this case involved post-conviction supervision, governed by §47-7-37. Thus, §99-19-29 cannot be relied upon as authority to revoke Atwood's post-release supervision.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109901.pdf>

**April 14, 2016**

*Charles Bester v. State*, No. 2013-CT-00058-SCT (Miss. April 14, 2016)

**CASE:** PCR – Forcible Rape and Robbery

**SENTENCE:** Life for the rape and a concurrent 7 years for the robbery

**COURT:** Jones County Circuit Court

**TRIAL JUDGE:** Hon. Billy Joe Landrum

**APPELLANT ATTORNEY:** Charles Bester (Pro Se)

**APPELLEE ATTORNEY:** Scott Stuart

**DISPOSITION:** COA Affirmed. Dismissal of PCR Affirmed. Lamar, Justice, for the Court. Dickinson and Randolph, P.JJ., Coleman and Beam, JJ., Concur. Kitchens, J., Dissents with Separate Written Opinion Joined by Waller, C.J., and King, J. King, J., Dissents with Separate Written Opinion Joined by Waller, C.J., and Kitchens, J. Maxwell, J., Not Participating.

**ISSUE:** Whether the trial court erred in imposing a time bar to Bester's claim he received an illegal sentence.

**FACTS:** On August 31, 1992, Charles Bester pled guilty to the rape and robbery of Clara Anderson. In 2006, Bester filed a motion to vacate and set aside his sentence, claiming he was not informed of several rights. The circuit court treated the motion as a PCR, and summarily dismissed it as being time-barred. This dismissal was affirmed. *Bester v. State*, 976 So. 2d 939 (Miss. Ct. App. 2007). On September 14, 2012, Bester filed a motion to correct his sentencing, alleging that a life sentence for the crime of forcible rape must only be imposed by a jury. Bester claimed that because his life sentence is illegal, his motion was excepted from the time-bar. Nevertheless, the circuit court treated the motion as a PCR, and summarily dismissed it as time-barred. The COA held that Bester's sentence was not illegal, as a life imprisonment is a sentence permitted as a lawful punishment for forcible rape when imposed by a jury. Since Bester entered a guilty plea, he freely, voluntarily, and intelligently waived a jury, and asked the circuit court to honor his plea agreement. His sentence did not violate a fundamental right and the circuit court properly found the petition procedurally barred. *Bester v. State*, No. 2013-CP-00058-COA (Miss.Ct.App. July 29, 2014). The SCT granted certiorari.

**HELD:** “The sole issue before us is whether the trial judge had the authority to sentence Bester to life imprisonment, absent a recommendation from the jury. We hold that he did.” The punishment for forcible rape is currently codified under §97-3-65(4)(a). The statute reads, in part, that the defendant “shall” be imprisoned for life if the jury so finds, but if the jury does not impose life,

“...the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.” The SCT held that “any term” includes life imprisonment.

The Court declined to apply the principle of *stare decisis* in this case. “We think it pernicious, i.e., harmful, for this Court to continue to exceed its constitutional authority by judicially amending Section 97-3-65(4)(a) and limiting a judge's sentencing authority as established by the Legislature.” Because Bester's sentence was not illegal, the Court agreed with the COA and the trial court that Bester’s PCR was time-barred and successive writ-barred.

**Kitchens, Justice, Dissenting:**

Justice Kitchens dissented, agreeing with Justice King’s dissent, but also arguing that a jury was never given the opportunity to impose a life sentence since Bester pled guilty. Therefore, the trial court could only impose a life sentence when the jury fails to do so. Further, a life sentence is not “a term” of imprisonment. In overruling “four decades” of the interpretation of the phrase "for any term," the majority attempts to circumvent the doctrine of *stare decisis*.

**King, Justice, Dissenting:**

Justice King pointed out that the State did not request the Court to overrule 40 years of precedent. “Such action on the part of this Court is surely to be an unpleasant shock to the criminal defense bar of this state.”

First, to interpret "any term" that the court may prescribe as including "life," as the majority does, renders the distinction carefully placed in the statute by the Legislature utterly meaningless. If the court may sentence a defendant to life imprisonment, why then, would it be necessary for the Legislature to specify that a jury must recommend life imprisonment in its verdict? Such a provision is not necessary if the court may also sentence the defendant to life.

Further, even if the language of the statute regarding “any term” was ambiguous, it must be construed in favor of the defendant. He believed the doctrine of *stare decisis* should apply in this case.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110923.pdf>

**MISCELLANEOUS CASES**

***Six Thousand Dollars (\$6,000) v. State of Mississippi Ex Rel. Mississippi Bureau of Narcotics***, No. 2013-CT-01034-SCT (Miss. December 10, 2015)  
[decision from August, 27, 2015 modified. No significant changes]

**CASE:** Civil Forfeiture

**COURT:** Jefferson Davis County Circuit Court

**TRIAL JUDGE:** Hon. Anthony Alan Mozingo

**APPELLANT ATTORNEY:** Thomas P. Welch, Jr.

**APPELLEE ATTORNEY:** Senica Manuel Tubwell

**DISPOSITION:** COA Affirmed. King, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Lamar, Kitchens, Chandler, Pierce and Coleman, JJ., Concur.

**ISSUES:** (1) Whether the COA erred in finding the verdict was not against the overwhelming weight of the evidence; and (2) whether the COA erred in affirming the trial court's decision to permit expert testimony.

**FACTS:** Anthony Brown filed a petition in circuit court contesting the forfeiture of \$6,000 seized by MBN. On January 22, 2012, John Norman Cole was arrested after he failed to stop at a driver's license checkpoint Jefferson Davis County. After a short police pursuit, Cole crashed his Toyota Camry into the rear of a trailer approximately 5 miles from the checkpoint. Cole fled the accident scene on foot, but was later apprehended about 200 yards from the crash site. A roll of money (\$6,000), secured by a rubber band, and a clear plastic bag containing what was later determined to be cocaine, was found on the ground in the immediate area of Cole's arrest. Another bag of marijuana was also found. The currency was seized and MBN sought forfeiture of the currency. Brown claimed that he was the innocent owner of the cash. He said Cole was going to Hattiesburg to give the money to his cousin to purchase a vehicle for him. Brown claimed his cousin then told him he should not buy the car and Cole was returning the money to him when he was arrested. MBN Agent Heather Sullivan and Keith McMahan, a forensic scientist with the Mississippi Crime Laboratory, were listed as state witnesses, but were not designated as experts until trial. Agent Sullivan testified that, based on her training and experience, the circumstances indicated the currency was "drug money." She also testified Cole denied having any knowledge about the money. At the conclusion of bench trial, the trial court found MBN proved, by a preponderance of the evidence, that the currency in question was used, or intended for use, in violation of the Uniform Controlled Substances Law and that Brown's assertion that he was an innocent owner of the currency lacked credibility. Brown appealed, but the COA affirmed. [\*Six Thousand Dollars \(\\$6,000\) v. State of Mississippi Ex Rel. Mississippi Bureau of Narcotics\*](#), No. 2013-CA-01034-COA (Miss.Ct.App. September 30, 2014). The SCT granted certorari.

**HELD:** (1) The COA did not err. The innocent-owner exception to the forfeiture statute does not require actual presence at the time of seizure, but it does require the claimant to satisfy standing. Brown's sole link to the currency found in Jefferson Davis County was his own testimony, which the trial court found lacked credibility. Without proof that Brown was the actual owner of, or even had an ownership interest in, the specific defendant currency, Brown's claim, by default, must fail.

(2) It was error to allow Agents McMahan and Sullivan to testify as experts, because the MBN did not timely disclose them as expert witnesses under Rule 4.04A, and because the MBN failed to show special circumstances existed for the untimely designations. Although it was error to allow Agents McMahan and Sullivan to testify as experts, because Brown failed to establish an ownership interest in the seized currency, the error was harmless error. Further, Brown was not required to request a

continuance under Rule 4.04A. Brown properly objected to the untimely disclosure of the agents as expert witnesses, and failure to request a continuance did not result in waiver of the issue.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/202807.pdf>

**Jason Hall v. State**, No. 2014-CA-01759-SCT (Miss. March 17, 2016)

**CASE:** Civil Compliant for Compensation under the Wrongful Conviction Act

**COURT:** Forrest County Circuit Court

**TRIAL JUDGE:** Hon. L. Breland Hilburn

**TRIAL ATTORNEYS:** Samuel S. Mchard, Marcus Mclelland, Lee D. Thames, Jr., Malissa Wilson

**APPELLANT ATTORNEY:** Cory Nathan Ferraez, Samuel Steven Mchard, Marcus Alan Mclelland

**APPELLEE ATTORNEY:** Lee Davis Thames, Jr.

**DISPOSITION:** Dismissal of compliant Reversed and Remanded. Beam, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Lamar, Kitchens, King, Coleman and Maxwell, JJ., Concur.

**ISSUE:** Whether the trial court erred in dismissing appellant's compliant for compensation under Mississippi's Wrongful Conviction Act.

**FACTS:** On April 8, 2011, Hall and two others were indicted for burglary of a building. A jury acquitted Hall of burglary but convicted him of accessory after the fact. The trial court sentenced Hall as a habitual offender to 5 years. The SCT reversed Hall's conviction and vacated his sentence, finding that Hall was convicted of a crime for which he was not indicted, and that Hall did not waive indictment. *Hall v. State*, 127 So. 3d 202 (Miss. 2013). On January 30, 2014, Hall filed a complaint against the State, seeking compensation under the Wrongful Conviction Act. The Attorney General's Office subsequently filed a motion to dismiss pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure, on the ground that Hall had failed to meet the prerequisites of § 11-44-3(c) (which requires the accusatory instrument to be dismissed or nol prossed). The Forrest County DA's Office entered a Pass Order on March 10, 2014, in the underlying criminal matter. After the court dismissed the complaint, Hall filed a motion to reconsider. The circuit court then entered an agreed order setting aside the Pass Order. The DA announced no further action would be taken on the charges against Hall. Hall filed an amended complaint, but the court dismissed it again. Hall appealed.

**HELD:** The State is correct that passing a case to the files is different from a nolle prosequi action. However, the DA passed Hall's burglary indictment to the files.

Based on double-jeopardy grounds, because Hall was acquitted of the burglary charge by a jury, Hall is entitled to a dismissal of the indictment with prejudice, as that was the only charge contained in the indictment. Contrary to the State's contention and

the circuit court's ruling, this particular case meets the statutory prerequisites of Section 11-44-3(1)(c).

Therefore, the circuit court's finding that Hall had failed to establish his innocence as required by §11-44-7(1)(b), on the basis that the Order Passing to Inactive Files was neither a dismissal nor a nolo prosequi pursuant to §11-44-3(1)(c), was error. The case is remanded to the circuit court for an evidentiary determination under §11-44-7, after the parties have had an opportunity to conduct discovery.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111448.pdf>

*Aundray Isaac v. State*, No. 2014-CA-01128-SCT (Miss. March 31, 2016)

**CASE:** Civil - Compliant for compensation for wrongful imprisonment:

**COURT:** Pike County Circuit Court

**TRIAL JUDGE:** Hon. David H. Strong, Jr.

**APPELLANT ATTORNEY:** David Neil McCarty, Graham Patrick Carner

**APPELLEE ATTORNEY:** Alison O'Neal McMinn, Malissa Winfield

**DISPOSITION:** Dismissal of complaint Affirmed. Coleman, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.J.J., Lamar, Kitchens, King, Maxwell and Beam, JJ., Concur.

**ISSUES:** (1) Whether the trial court erred when it failed to explicitly discuss the "malice" element of arson, and (2) whether that the trial court erred by finding that Isaac had failed to prove that he had set the fire unintentionally.

**FACTS:** Aundray Isaac was indicted in 1991 for first-degree arson of Shannon Jackson's apartment. Isaac set a towel on fire which was draped over Jackson's door. Isaac was living with Jackson, but they had an agreement that Isaac would come home before midnight or he would be locked out. At his criminal trial, Isaac testified that the fire was an accident. No one was hurt. The fire had charred the front door but otherwise left the door functional. Jackson also testified she believed the fire was an accident. Nevertheless, Isaac was convicted of first degree arson and sentenced to 12 years. The SCT later reversed and rendered his conviction, holding that the State had failed to prove the malice and willfulness elements of first-degree arson beyond a reasonable doubt and therefore had produced insufficient evidence to support Isaac's conviction. *Isaac v. State*, 645 So. 2d 903 (Miss. 1994). Based on the Mississippi Wrongful Conviction Act, Isaac filed suit in 2012 asking for compensation for the 995 days he wrongfully spent in prison. At the civil trial, Isaac gave a slightly different version of how the fire started. Jackson also gave a different account at the civil trial, testifying that she believed he intentionally set the fire and that he was abusive in their relationship. Regardless, the fire was set by Isaac either attempting to light a cigarette or with an already-lit cigarette that came into contact with the towel. The parties stipulated Isaac met six of the seven elements under the Act to receive compensation. After the testimony the trial judge found in favor of the State, ruling that Isaac failed to prove by a preponderance of the evidence that he did not commit the felony of arson.

Isaac appealed.

**HELD:** (1) Isaac claims that there was never any evidence at all that he acted maliciously. The burden was on Isaac to prove he did not act with malice. Malice can be inferred from evidence of willfulness. The trial court did not err in determining that Isaac intentionally set the fire, and that he failed to prove that he did not maliciously set the fire.

(2) Given our deferential review, we cannot say the trial judge erred by finding that Isaac's story was not believable, especially when Isaac's narrative varied between the civil and criminal trials, and Jackson testified to establish his intent. We also note that, while Isaac eventually extinguished the fire, that does not necessarily mean that he did not intentionally set it and then regretted his decision or changed his mind.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111822.pdf>

*Hinds County, Mississippi, City of Jackson, Mississippi, Billy Jade (Jay) Albright in his Individual Capacity and Mississippi Bureau of Narcotics v. Ronnie Burton*, No. 2014-CA-01004-SCT (Miss. March 31, 2016)

This was a civil case under the Mississippi Tort Claims Act. On Friday, September 12, 2008, police were approaching a house to serve a drug warrant when they were fired on by someone in front of the house. Ronnie Burton, who was standing near the shooter(s) fled. Officer Billy Jade Albright returned fire. At some point Burton was shot in his right shoulder. However, the bullet exited his shoulder and was not recovered. There was no evidence indicating if Albright or one of the men from the house fired the shot that hit Burton. Burton admitted he was armed but did not fire his weapon. Charges against him were later dropped. Burton sued the City of Jackson, Hinds County, MBN, and Albright. The trial judge later entered a judgment against the defendants, finding them liable for Burton's injuries. On appeal, the SCT reversed and rendered, finding that the defendants are all immune under either the police-protection exemption or the inmate exemption found in the MTCA.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110046.pdf>

#### **U.S. SUPREME COURT NOTES:**

*Mullenix v. Luna*, No. 14-1143 (November 9, 2015). The USSCT held, per curiam, that an officer was entitled to qualified immunity when he shot and killed a driver to end a high-speed chase. In 2010, a driver led police on an 18-minute chase at speeds over 85 miles per hour and threatened to shoot police if they did not abandon pursuit. In response to this chase and threats, as well as the belief that the driver was intoxicated, officers set up tire spike strips at 3 locations. In addition, Trooper Chadrin Mullenix fired 6 shots at the driver as he drove under an overpass. Mullenix had not been trained in use of deadly force. The driver was killed after being hit by four of the shots and after his car hit the median and rolled. Decedent's family brought an 1983 claim, alleging the excessive use of force by the police violated the 4<sup>th</sup> Amendment. The District Court denied the

officer's motion for summary judgment based on qualified immunity, stating there was a question as to whether the officer acted "recklessly" or as "a reasonable, trained peace officer would have acted in the same or similar circumstances." The 5<sup>th</sup> Circuit affirmed and concluded that the officer's actions were unreasonable because an officer cannot "use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." The Supreme Court determined the 5<sup>th</sup> Circuit erred in denying qualified immunity to the officer.

To read the full opinion, click here:

[http://www.supremecourt.gov/opinions/15pdf/14-1143\\_f20h.pdf](http://www.supremecourt.gov/opinions/15pdf/14-1143_f20h.pdf)

**White v. Wheeler**, No. 14-1372 (December 14, 2015). The USSCT held, per curiam, that the 6<sup>th</sup> Circuit erred in reversing the Kentucky Supreme Court on habeas review. During the jury selection process, the state trial court excused a juror after concluding he could not give sufficient assurance of neutrality or impartiality in considering whether the death penalty should be imposed. The Kentucky Supreme Court was not unreasonable in its application of federal law when it concluded that the trial court's exclusion of a juror did not violate the Sixth Amendment. The contrary determination of the 6<sup>th</sup> Circuit contravenes controlling precedents of the Supreme Court

To read the full opinion, click here:

[http://www.supremecourt.gov/opinions/15pdf/14-1372\\_1p23.pdf](http://www.supremecourt.gov/opinions/15pdf/14-1372_1p23.pdf)

**Hurst v. Florida**, No. 14-7505 (January 12, 2016). The USSCT held (Sotomayor, J., for the Court, joined by Roberts, C. J., and Scalia, Kennedy, Thomas, Ginsburg, and Kagan, JJ. Breyer, J., filed an opinion concurring and Alito, J., filed a dissenting opinion) that a capital sentencing proceeding that allows a judge, and not the jury, to make the final determination in imposing the death penalty violates the Sixth Amendment.

Timothy Lee Hurst challenged Florida's hybrid sentencing proceedings, arguing it violates the Sixth Amendment in light of *Ring v. Arizona*, which expanded *Apprendi v. New Jersey*. *Apprendi*, established that any facts that "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict is an element that must be submitted to the jury." Here, Hurst was convicted of murdering his coworker. The jury recommended that he be sentenced to death. Under Florida law, a judge is required to make a separate determination as to "whether sufficient aggravating circumstances existed to justify imposing the death penalty." The judge, found that aggravating circumstances existed, and sentenced him to death. The Court held that Florida's sentencing scheme is unconstitutional under the Sixth Amendment, and that the mere recommendation by a jury does not meet the *Apprendi* standard. Following the analysis in *Ring*, the Court noted that requiring the trial judge to make the critical fact finding, and allowing the trial judge to make the ultimate decision on imposing a death sentence, is unconstitutional. The Court overruled prior case law which allowed a sentencing judge to make the ultimate decision regarding aggravating circumstances, and participate in independent fact finding to impose the death penalty.

To read the full opinion, click here:

[http://www.supremecourt.gov/opinions/15pdf/14-7505\\_5ie6.pdf](http://www.supremecourt.gov/opinions/15pdf/14-7505_5ie6.pdf)

**Kansas v. Carr**, No. 14-449 (January 20, 2016). The USSCT held 8-1 (Scalia, J., for the Court,

joined by Roberts, C. J., and Kennedy, Thomas, Ginsburg, Breyer, Alito, and Kagan, JJ. Sotomayor, J., filed a dissenting opinion) that the Eighth Amendment does not (1) require a court to instruct a jury engaged in capital sentencing that mitigating factors need not be proven beyond a reasonable doubt, or (2) require separate hearings for multiple defendants in a capital sentencing case.

The Kansas Supreme Court had vacated the death sentences of three defendants after determining that the death sentences violated the 8th Amendment by neglecting to "affirmatively inform the jury that mitigating factors. . . [need not be proven] beyond a reasonable doubt." The Kansas Supreme Court also determined that the lower court's failure to sever sentencing proceedings where two defendant who were brothers, infringed on their right to individualized sentencing, in violation of the 8th Amendment. The U.S. Supreme Court reversed, finding that the Eighth Amendment does not require courts to inform juries that mitigating factors need not be proven beyond a reasonable doubt. The Court also held that the Constitution did not require separation of proceedings.

To read the full opinion, click here:

[http://www.supremecourt.gov/opinions/15pdf/14-449\\_9o7d.pdf](http://www.supremecourt.gov/opinions/15pdf/14-449_9o7d.pdf)

**Montgomery v. Louisiana**, No. 14-280 (January 25, 2016). The USSCT held 6-3 (Kennedy, J., for the Court, joined by Roberts, C. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ. Scalia, J., filed a dissenting opinion, joined by Thomas and Alito, JJ. Thomas, J., also filed a separate dissenting opinion) that juveniles who were sentenced to life without parole before the decision in *Miller* can petition for parole if they were not allowed to present mitigation evidence during sentencing.

Henry Montgomery was convicted of murder without capital punishment when he was a juvenile. Under the Louisiana statute, a sentence of life without parole was automatic. The Court decided in *Miller v. Alabama* that courts cannot sentence a juvenile to life without parole without first applying principles of juvenile sentencing, which includes mitigating factors. Montgomery argued that the decision in *Miller* should be retroactive and apply to his case and his sentence is a violation of the Eighth Amendment. The Supreme Court of Louisiana denied relief on the grounds that the decision in *Miller* was procedural and the states did not have to follow the ruling in cases which were final at the time of *Miller*. The Supreme Court determined that the decision in *Miller* affected a substantive area of constitutional law and should be applied retroactively. The Court determined this was not a burden on states because rather than retry each case, the states could simply allow those convicted to petition for parole.

To read the full opinion, click here:

[http://www.supremecourt.gov/opinions/15pdf/14-280\\_3204.pdf](http://www.supremecourt.gov/opinions/15pdf/14-280_3204.pdf)

**Musacchio v. United States**, No. 14-1095 (January 25, 2016). The USSCT court unanimously held (THOMAS, J., for the Court) that a sufficiency challenge should be assessed by the elements of the alleged crime, not by an erroneous jury instruction, and a defendant cannot raise a §3282(a) statute of limitations bar for the first time on appeal.

Petitioner was found guilty by a jury of two separate counts of conspiracy. Petitioner appealed and challenged the sufficiency of the evidence on the first count and argued for the first time, that his prosecution for the second count was barred by a five year statute of limitations. The Supreme Court

agreed with the Fifth Circuit's decision to reject the sufficiency challenge on the grounds that a reviewing court's determination of sufficiency is based on the legal question of whether there is enough evidence to prove the essential elements of the crime and does not rest on the jury instructions given. The Supreme Court also agreed with the Fifth Circuit's decision regarding the issue of when a statute of limitations bar can be raised. The Supreme Court held that under §3282 (a), a statute of limitations bar must be raised in the district court prior to the issue being raised on appeal.

To read the full opinion, click here:

[http://www.supremecourt.gov/opinions/15pdf/14-1095\\_2d8f.pdf](http://www.supremecourt.gov/opinions/15pdf/14-1095_2d8f.pdf)

***Lockhart v. United States***, No. 14-8358 (March 1, 2016) The USSCT held 6-2 (Sotomayor, J., for the Court, joined by Roberts, C. J., and Kennedy, Thomas, Ginsburg, and Alito, JJ., Joined. Kagan, J., dissented, joined by Breyer, J.) that when interpreting a statute, a court should interpret a limiting clause or phrase at the end of the sentence to only modify the noun or phrase immediately preceding it.

Avondale Lockhart pled guilty to possession of child pornography in violation of 18 U.S.C. §2252(a)(4). Because of Lockhart's prior state conviction for sexual abuse of his adult girlfriend in 2000, the District Court applied an increased maximum sentence of 10 to 20 years per 18 U.S.C. §2252(b)(2), and the Second Circuit affirmed. Under §2252(b)(2), a prior state conviction "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" requires an enhanced maximum sentence. Lockhart argued that the modifying language "involving a minor or a ward" should apply to all three statutory provisions, thus eliminating his prior conviction from the sentencing decision. The Supreme Court affirmed and held that the increased maximum sentence should stand because the Court has typically applied "the rule of the last antecedent," which interprets a modifying clause to only apply to the phrase it immediately follows. The Court reasoned that §2252(b)(2) does not contain language that would lead readers to apply the modification naturally to all three provisions. Additionally, the Court found that the distinction of the last provision parallels the Federal Criminal Code §109A, as the headings include the modification for the third provision only. Finally, the Court found that the rule of lenity should not apply for simple grammatical principles and that stretching the modification across all three provisions would make them nearly synonymous.

To read the full opinion, click here:

[http://www.supremecourt.gov/opinions/15pdf/14-8358\\_o7jp.pdf](http://www.supremecourt.gov/opinions/15pdf/14-8358_o7jp.pdf)

***Wearry v. Cain***, No. 14-10008 (March 7, 2016). The USSCT held per curiam with Alito, J., filing a dissenting opinion joined by Thomas, J.) that the Louisiana Court failed to recognize and grant Appellant relief for a *Brady v. Maryland* violation committed by state prosecutors after they failed to turn over material evidence that prejudiced the appellant.

Michael Wearry was convicted of capital murder and sentenced to death. Wearry later discovered that the prosecution withheld information. The prosecution did not disclose police records that cast doubt on the credibility of a key witness. The prosecution also failed to turn over medical records that would contradict the testimony of that witness. Additionally, the prosecution misrepresented the motive of

a different witness. Weary claimed that the prosecution committed a *Brady* violation and that his trial attorney failed to provide adequate assistance of counsel. The Louisiana Trial court and Supreme Court denied relief to both claims. To prevail on his *Brady* claim, Appellant only had to show that the new evidence is sufficient to undermine confidence in the verdict. Applying this standard, the U.S. Supreme Court reversed and remanded the case, holding that the new evidence was sufficient to undermine the confidence of the verdict. The Court found that the information would have undermined the prosecution's case and materially aided Weary at trial in violation of his Sixth Amendment and Due Process rights. In light of the Constitutional violation, the Court did not address the claim of ineffective assistance of counsel.

To read the full opinion, click here:

[http://www.supremecourt.gov/opinions/15pdf/14-10008\\_k537.pdf](http://www.supremecourt.gov/opinions/15pdf/14-10008_k537.pdf)

***Caetano v. Massachusetts***, No. 14-10078 (March 21, 2016). The USSCT held, per curiam (with Alito, J., dissenting, joined by Thomas, J.) that blanket prohibitions on the possession of stun guns and other arms not in existence at the time of the founding violate the Second and Fourteenth Amendments.

Jamie Caetano owned a stun gun for self-defense purposes because she was afraid of her abusive ex-boyfriend. Petitioner was subsequently arrested for violating Mass. Gen. Laws, Ch. 140 §131J, which prohibited possession of an electrical weapon. Caetano moved to dismiss the charge on Second Amendment grounds. The trial court denied her motion, and she was convicted. She appealed to the Massachusetts Supreme Judicial Court. The Court rejected her Second Amendment defense and held that the Second Amendment does not protect possession of a stun gun because: (1) stun guns were not available when the Second Amendment was adopted; (2) stun guns are dangerous and unusual; and (3) stun guns are not readily adaptable for military use. Emphasizing the reasoning of *District of Columbia v. Heller*, the U.S. Supreme Court rejected this view and reversed. The Court reiterated that “the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” The Court held that *Heller* rejected all three reasons relied upon by the Massachusetts Supreme Judicial Court.

To read the full opinion, click here:

[http://www.supremecourt.gov/opinions/15pdf/14-10078\\_aplc.pdf](http://www.supremecourt.gov/opinions/15pdf/14-10078_aplc.pdf)

***Luis v. United States***, No. 14-419 (March 30, 2016). The USSCT held 5-3 (Breyer, J. for the Court, joined by Roberts, C.J., Ginsburg and Sotomayor, JJ, with Thomas, J. filed a concurring opinion. Kennedy filed a dissenting opinion, joined by Alito, and Kagan, J., also filed a dissenting opinion) that the pretrial freeze of a criminal defendant's legitimate, untainted assets violates the Sixth Amendment right to counsel of choice.

To read the full opinion, click here:

[http://www.supremecourt.gov/opinions/15pdf/14-419\\_nmip.pdf](http://www.supremecourt.gov/opinions/15pdf/14-419_nmip.pdf)

***Nichols v. United States***, No. 15-5238 (April 4, 2016). The USSCT unanimously held (Alito, J., for the Court) that the Sex Offender Registration and Notification Act (SORNA) only requires an offender to appear in a current jurisdiction to report updates of his or her information.

Lester Ray Nichols pled guilty to one count of Knowingly Fail to Register or Update a Registration, under SORNA, for his actions of moving from Kansas to the Philippines without notifying anyone of his status. Under SORNA, Nichols was required to appear in person within three business days, in at least one involved jurisdiction, to update all information required for the registry. The Tenth Circuit upheld his conviction, holding that the state in which an individual is moving from is considered an involved jurisdiction. Foreign countries are not considered jurisdictions under SORNA, and 42 U.S.C. §16913(a) requires an offender to appear in person in at least one jurisdiction where the offender resides, works, or studies, which led the Supreme Court to reverse the Tenth Circuit and conclude that SORNA required appearance in the new jurisdiction and not Kansas. This led the Supreme Court to hold that the language in SORNA does not create any additional “loopholes or deficiencies” for sex offenders and that Kansas was not an involved jurisdiction in this case. Nichols was not required to update his registration in Kansas once he left the state and moved to the Philippines.

To read the full opinion, click here:

[http://www.supremecourt.gov/opinions/15pdf/15-5238\\_khlo.pdf](http://www.supremecourt.gov/opinions/15pdf/15-5238_khlo.pdf)

***Woods v. Etherton***, No. 15-723, (April 4, 2016). The USSCT held, per curiam, that it is inappropriate to use the "fairminded jurist" standard when evaluating an appellant's claims for relief on appeal.

After police received an anonymous tip, Timothy Etherton was arrested and ultimately convicted of Possession of Cocaine with the Intent to Deliver. At trial, the main controversy centered around whether Etherton was the owner of the cocaine or if it belonged to his co-defendant, Ryan Pollie. After the anonymous tip was recounted twice during trial, Etherton’s counsel objected to its admission. The jury was instructed that the tip was not evidence and should only be used for the purposes of determining police actions. Etherton later sought post conviction relief on three grounds: 1) that the admission of the tip violated his Sixth Amendment Confrontation Clause Rights; 2) ineffective assistance of counsel; and 3) an additional ineffective assistance of counsel claim towards his appellate counsel for failing to raise the Confrontation Clause issues. The state courts denied relief and Etherton pursued habeas relief. The Sixth Circuit held that Etherton’s counsel was ineffective and found that his Confrontation Clause Rights had been violated, but the court held that it was appropriate to admit the content of the anonymous tip. The U.S. Supreme Court reversed and held that the Sixth Circuit applied an inappropriate standard of review under the Anti-Terrorism and Effective Death Penalty Act of 1996. The court found that the Sixth Circuit improperly used the “fairminded jurist” standard, because this standard does not give enough deference to lower courts and a fairminded jurist could objectively decide otherwise.

To read the full opinion, click here:

[http://www.supremecourt.gov/opinions/15pdf/15-723\\_h3dj.pdf](http://www.supremecourt.gov/opinions/15pdf/15-723_h3dj.pdf)

***Welch v. United States***, No. 15-6418 (April 18, 2016). The USSCT held 7-1 (Kennedy, J., for the Court, with Thomas, J., dissenting) that ***Johnson v. United States***, 135 S.Ct. 2551 (2015), is retroactive.

Last year, in *Johnson*, the Court held that the residual clause of the Armed Criminal Career Act (ACCA)—that defines a "violent felony" as one involving "conduct that presents a serious potential risk of physical injury to another"—is unconstitutionally vague. In *Welch*, the Court held the *Johnson* case should apply retroactively, even to cases that were final before *Johnson* was decided. The case ensured that even federal prisoners who have already filed and lost a prior habeas corpus claim can still seek relief under *Johnson* if they file a successive habeas petition within the one-year statutory habeas deadline (presumably June 25, 2016, a year after the Court issued its *Johnson* decision).

To read the full opinion, click here:

[http://www.supremecourt.gov/opinions/15pdf/15-6418\\_2q24.pdf](http://www.supremecourt.gov/opinions/15pdf/15-6418_2q24.pdf)

**MISSISSIPPI COURT OF APPEALS CRIMINAL DECISIONS**  
**October 6, 2015 – April 12, 2016**

**COA DIRECT APPEAL CASES**

**October 6, 2015**

*Jason R. Case v. State*, No. 2013-KA-01587-COA (Miss.Ct.App. October 6, 2015)

**CASE:** Touching a Child for Lustful Purposes x2

**SENTENCE:** 15 years on Count I, with a consecutive 15 years on Count II, with 5 years to serve and 10 years suspended, followed by 5 years of PRS

**COURT:** Lincoln County Circuit Court

**TRIAL JUDGE:** Hon. David H. Strong, Jr.

**APPELLANT ATTORNEY:** George Holmes

**APPELLEE ATTORNEY:** Alicia Marie Ainsworth

**DISTRICT ATTORNEY:** Dee Bates

**DISPOSITION:** Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the tender-years hearsay exception was improperly applied; (2) whether Case was irreparably prejudiced by irrelevant character evidence; (3) whether trial counsel was constitutionally ineffective; and (4) whether the trial court erred in allowing the State to refer to him as a "pedophile" during closing arguments.

**FACTS:** Jason Case was the principal at Hazlehurst Middle School and lived alone. In September 2010, DHS certified Case as a foster parent. In January 2011, Keyla O'Quinn, a DHS family protection specialist, received a report that a mother was using drugs at home in front of her two children – Brian, 13, and Daniel, 9. DHS immediately took the children into custody, and placed Brian and Daniel in foster care with Case. Later, both children told O'Quinn that Case let them play with gasoline and fire. Case also posted pictures of the children sitting on his lap on Facebook. Case was told that DHS policy prohibits posting pictures of children on the internet, but he never removed the pictures. In June 2011, Brian and Daniel were placed with one of Daniel's relatives. O'Quinn testified that when she picked up the children, Brian said that he hoped she was not going to put any girls in Case's home. Based on a separate investigation, O'Quinn requested an interview with Brian in January of 2012. O'Quinn then asked Brian if Case ever touched him in way that made him uncomfortable. At first, Brian made a funny expression and said he was ready to go. Brian eventually told O'Quinn that Case touched his penis twice. A forensic interview was conducted by the Children's Advocacy Center (CAC). The CAC interview was consistent with the statement he gave to O'Quinn. At trial, Brian testified that Case would give him and Daniel melatonin and Benadryl at night to put them to sleep. He then testified about two incidents where Case touch his penis while he tried to sleep. Case did not testify. He was convicted and appealed.

**HELD:** (1) Because of Brian’s age, the trial judge had to first make an on-the-record determination that Brian's mental and emotional age was of tender years. Brian was 13 at the time he made the statements. The court found that Brian was taken from his mother's home at age 13 and that he had since lived in at least four different foster homes. The judge elaborated that Brian was probably behind other children both mentally and emotionally. The court also determined that Brian's statements bore substantial indicia of reliability. Even if it was error to admit O'Quinn's testimony based on lack of reliability, the error would be harmless. There was still sufficient evidence to convict Case without O’Quinn’s testimony. Brian testified at trial.

(2) Case argued that the court admitted improper character evidence that he placed photographs of the children on Facebook, and that he allowed the children to play with gasoline. However, Case failed to object on the grounds of irrelevant character evidence, so his claim is waived.

(3) Case also claims his counsel was ineffective for failing to object to the improper character evidence. The record does not affirmatively indicate that Case suffered denial of effective assistance of counsel. He can raise the issue again on post-conviction.

(4) During closing, the State referred to Case as a pedophile on several occasions, noting that the State apparently thought it was better “to take these children away from their mother's drug use and then they put them with a pedophile.” However, Case only objected at the end of argument. He did not ask for a curative instruction. Regardless, the Court found no error. “Here, the prosecutor's comments, taken in context, show that the prosecutor was commenting on the facts presented in the evidence.”

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107191.pdf>

***Paxton Austin v. State***, No. 2013-KM-02085-COA (Miss.Ct.App. October 6, 2015)

**CASE:** Boating Under the Influence

**SENTENCE:** 24 hours, suspended

**COURT:** Clay County Circuit Court

**TRIAL JUDGE:** Hon. Lee J. Howard

**APPELLANT ATTORNEY:** Rodney A. Ray

**APPELLEE ATTORNEY:** Michelle D. Easterling

**COUNTY PROSECUTOR:** Michelle D. Easterling

**DISPOSITION:** Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Whether the verdict was against the overwhelming weight of the evidence

**FACTS:** On August 26, 2012, Paxton Austin and Suzanne Brown were boating on the Tennessee-Tombigbee River with friends. Austin and his friends docked on a sandbar that was also

occupied by Luke Robinson, an acquaintance of Austin, and Greg Bell, an off-duty MHP trooper. Robinson gave Austin some Jell-O shots made with vodka. One of Bell's friends also saw Austin drinking beer. While later boating, Bell saw Austin's boat fail to yield in time for a large barge. Austin's boat collided with the front left side of the barge and became wedged upside down underneath the barge. Austin was thrown into the water, and Brown was trapped underneath the boat and barge. Brown was rescued but suffered severe lacerations to her back. Austin resisted attempts to rescue him as he tried to get back to his mangled boat. Eventually, he was dragged into Bell's boat, but had to be restrained to prevent him from jumping back into the water toward his boat. Austin suffered two broken ribs and a collapsed lung as a result of the collision. When they reached the nearest port, law enforcement officers noticed Austin smelled of alcohol and had slurred speech. He tested 0.110 on a breath test. He was convicted of boating under the influence and appealed.

**HELD:** Austin's breath-alcohol was 0.110 – above the 0.08 limit. Witness testimony reflects that Austin was drinking beer and taking Jell-O shots prior to the accident. Law-enforcement officers at the scene observed Austin slurring his speech and noted a strong smell of an intoxicating beverage on Austin's breath. “The evidence is more than adequate to support the verdict at hand.”

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO104812.pdf>

*Fredrico Stone v. State*, No. 2014-KA-00480-COA (Miss.Ct.App. October 6, 2015)

**CASE:** Possession of Cocaine

**SENTENCE:** 16 years as an habitual offender

**COURT:** Coahoma County Circuit Court

**TRIAL JUDGE:** Hon. Charles E. Webster

**APPELLANT ATTORNEY:** Azki Shah

**APPELLEE ATTORNEY:** Scott Stuart

**DISTRICT ATTORNEY:** Brenda Fay Mitchell

**DISPOSITION:** Affirmed. Griffis, P.J., for the Court. Lee, C.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur. Irving, P.J., Concur in Part and in the Result.

**ISSUES:** (1) Whether the trial court erred by selecting the alternate jurors; (2) whether the trial court erred by refusing to give his circumstantial-evidence jury instruction; (3) whether the verdict is against the overwhelming weight of the evidence; and (4) whether the trial court erred by denying his motion for a directed verdict.

**FACTS:** On September 16, 2012, Officer Romeisha Moore observed a Saturn traveling at a high rate of speed in Clarksdale. She initiated a traffic stop and determined that the license tag on the Saturn was actually registered to a Nissan, and was expired. The driver, Frederico Stone, admitted that he was driving without a license. There were two other men in the car with Stone – one man in the front passenger seat, and the other in the back seat. Stone was having difficulty speaking, and Moore noticed something plastic in his mouth. Moore attempted to remove the item from Stone's mouth,

but he resisted and the two "tussled." Stone turned away from her toward the passenger seat and, fearing for her safety, she then tasered him. She handcuffed Stone and removed him from the car. On the passenger side of the car, Moore saw several small plastic bags that were wet and appeared to look like what she saw in Stone's mouth. Twenty-nine small bags were recovered and tested positive for cocaine. Stone was convicted and appealed.

**HELD:** (1) Stone claimed the trial court erred in its manner of selecting the two alternate jurors. After the jurors were qualified, 14 jurors were selected. Prior to the submission of the case to the jury, the trial court selected two names out of a cup and designated those two names as the alternate jurors. These two alternate jurors were then excused while the remaining twelve jurors retired to deliberate. The claim is barred and is without merit. Stone failed to object at trial. Regardless, judges enjoy a substantial degree of deference in the procedures used to empanel a jury.

(2) The trial judge did not err in denying a circumstantial evidence instruction. Officer Moore's testimony constituted direct evidence such that a circumstantial-evidence instruction was properly refused. Moore testified that she saw something plastic in Stone's mouth. After subduing Stone, noticed several bags on the ground. The bags were wet and resembled the plastic item she attempted to retrieve from Stone's mouth.

(3) and (4) The verdict was not against the weight of the evidence. Stone had a plastic bag in his mouth and refused to show Moore the bag. Moore testified Stone turned away from her, toward the passenger – indicating Stone passed the plastic bags to his passenger, who then threw them out of the car. The plastic bags were found on the ground by the car and were wet. The substance in the bag tested positive for cocaine. The evidence was sufficient.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO106525.pdf>

*Tommy Ames v. State*, No. 2013-KA-01286-COA (Miss.Ct.App. October 6, 2015)

**CASE:** Aggravated Assault x2

**SENTENCE:** Two terms of 20 years, with 5 years suspended, 15 to serve, and 5 years PRS, consecutive

**COURT:** Warren County Circuit Court

**TRIAL JUDGE:** Hon. M. James Chaney, Jr.

**APPELLANT ATTORNEY:** Hunter Nolan Aikens

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISTRICT ATTORNEY:** Richard Earl Smith, Jr.

**DISPOSITION:** Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair and Wilson, JJ., Concur. James, J., Not Participating.

**ISSUES:** (1) Whether the trial court erred in admitting a witness's prior testimony under MRE 804(b)(1), and (2) whether Ames was denied a speedy trial.

**FACTS:** On November 2, 2007, Kenya Johnson and Christopher Blackmore traveled to Vicksburg. Johnson was driving and was flagged down by an acquaintance of his, Tommy Ames. (Blackmore did not know him). Johnson and Ames conversed momentarily. At the end of the discussion, Ames opened one of the back doors of the car and entered the car. Ames then shot Johnson in the back of his head and in his neck, and shot Blackmore in the back of his head. At some point, Johnson elbowed Ames, causing him to be ejected from the car. Immediately after the shooting, Johnson and Blackmore drove a short distance to a law office, where Attorney Paul Winfield provided first-aid to them. Johnson and Blackmore both survived the shooting. At the time of the incident, Ames was on federal post-release supervision. He was arrested in Arkansas several weeks later. During a federal revocation hearing, Johnson testified against Ames, and Ames's counsel cross-examined Johnson. Ames was revoked and sentenced to 50 months. Ames was subsequently indicted in Mississippi, but did not go to trial for five years. Johnson could not be located, but the court allowed his testimony from the revocation hearing to be used. Ames was convicted and appealed.

**HELD:** (1) Ames argued that the trial court erred in deeming Johnson unavailable under Rule 804(b)(1), because the State failed to use reasonable, diligent efforts to secure his presence at trial. However, an investigator testified to the efforts he made in trying to locate Johnson. Johnson was last seen in 2008. The investigator spoke with known associates of Johnson's, and enlisted the help of law enforcement in other jurisdictions. The trial judge did not abuse his discretion in allowing Johnson's prior testimony.

(2) Ames was not denied his constitutional rights to a speedy trial despite a 1,995-day delay. The State issued a detainer warrant for Ames on April 2, 2008, and indicted him on August 20, 2008. On April 13, 2009, Ames asserted his right to a speedy trial. On August 20, 2009, the trial court granted the State's request for a writ of habeas corpus ad prosequendum and an order to transport Ames from federal custody. This was evidence of a diligent, good-faith effort to bring Ames to trial. Ames was released from federal custody and arrested on October 7, 2011. Ames was arraigned on October 14, 2011, and released on bond. Over the next 20½ months, trial was continued four times, and Ames's counsel was substituted five times.

While the delay was presumptively prejudicial, and Ames asserted his speedy-trial right, we find that his constitutional right to a speedy trial was not violated. The State made a good-faith effort to bring him to trial while he was serving time in the custody of the federal prison, and the withdrawal of each of Ames's counsel, while not his fault, weighs only slightly against the State. The reason for one delay is due in large part to Ames's absence on the day of trial and withdrawal of counsel that same day. Ames also agreed to one of the four continuances. Furthermore, Ames has failed to show how he was prejudiced by the delay. This issue is without merit.

Ames's statutory right to a speedy trial was also not violated by the 654-day delay between his arraignment and trial. All of the delays were either attributable to Ames or were for good cause.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107761.pdf>

**October 13, 2016**

***Dillard Harvey a/k/a Mitchell Beard a/k/a Michael Towns v. State***, No. 2013-KA-01758-COA (Miss.Ct.App. October 13, 2015)

**CASE:** Manslaughter and Felon in Possession of a Firearm

**SENTENCE:** 20 years as an habitual offender, plus a 10 year firearms enhancement, and a consecutive 10 years for the felon in possession charge

**COURT:** Hinds County Circuit Court

**TRIAL JUDGE:** Hon. Jeff Weill Sr.

**APPELLANT ATTORNEY:** Mollie Marie McMillin

**APPELLEE ATTORNEY:** Scott Stuart

**DISTRICT ATTORNEY:** Robert Shuler Smith

**DISPOSITION:** Manslaughter and Felon in Possession convictions Affirmed. Firearms Sentence Enhancement Reversed and Rendered. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, James and Wilson, JJ., Concur.

**ISSUE:** (1) Whether the trial judge erred in imposing a firearm enhancement in addition to sentencing him as an habitual offender, (2) whether the trial judge erred in allowing the pathologist to testify about the body position of the victim when shot, (3) whether the trial judge abused his discretion in denying re-cross examination, (4) whether the trial judge erred in instructing the jury that self-defense was not a defense to a charge of felon in possession of a firearm, and (5) whether the trial erred in requiring defense counsel to repeat his participation in a direct examination demonstration during the State's cross-examination.

**FACTS:** Dillard Harvey was out with Felita Brown when he broke up an attempted auto burglary, apprehending one of the suspects. After finishing up at the police station, Harvey took Brown back to her home. Since it was late, he went to sleep on Brown's couch. Early that morning, he awoke to the sounds of Aaron Yates, a former boyfriend of Brown's, beating on her door and breaking into her car. Harvey told Brown to call the police. He then armed himself with a revolver he had been carrying. He and Yates began fighting over the gun on the porch, with Harvey eventually getting the upper hand. Brown saw Harvey "stomping" on Yates while Yates was kicking up at him. She did not see what happened next, but the last thing she heard Yates say was, "Man, I promise to God if you let me go I'll never come back around here again." The pleas were followed by a gunshot. Harvey came back inside and said he had shot Yates accidentally. A neighbor testified that she heard Yates screaming that he was going to leave and begging Harvey to stop. She saw Harvey – who was much larger and stronger – beating Yates about the head with a gun and dragging him around on the porch. Yates had numerous contusions, abrasions, and lacerations, including a significant laceration to the head consistent with being struck by a gun barrel. He died from a gunshot wound to the back, fired from more than two and one-half feet away. Harvey testified that the gun belonged to Yates and that Yates was threatening him with it. The gun went off accidentally while he wrestled with Yates in self-defense.

**HELD:** (1) Harvey was sentenced as habitual offender. The additional firearm enhancement under §97-37-37(2) is not applicable where "a greater minimum sentence is otherwise provided by any other

provision of law." The mandatory maximum penalty provided by the habitual offender statute is "a greater minimum sentence . . . otherwise provided by any other provision of law." The COA reversed and rendered Harvey's ten-year sentence for the firearm enhancement.

(2) Dr. Adel Shaker, a forensic pathologist, testified about the trajectory of the bullet traveling through Yates's body. Over defense objections alleging that the testimony was speculative, Shaker was also asked as to the body position of the victim when he was shot. Trial counsel's objection went to the question, not the nonresponsive answer. Therefore, the claim is barred. It is also without merit. In *Edmonds v. State*, 955 So. 2d 787 (Miss. 2007), the MSSCT did not hold that a pathologist can never testify to the relative positions of the victim and shooter.

(3) The trial judge did not err in denying the defense request to re-cross Dr. Shaker the issue of the victim's position. Harvey argued that the question about the victim's body position was beyond the scope of the cross-examination and that the trial court therefore abused its discretion in denying the recross. However, if the question or answer were beyond the scope of cross-examination, Harvey had a duty to contemporaneously object on that basis.

(4) On appeal, Harvey conceded self-defense was not a defense, but necessity is a defense to a charge of felon in possession of a firearm. He claimed that the trial court's instruction on self-defense was misleading. However, Harvey never requested a necessity instruction at trial.

(5) Finally, Harvey claimed that the trial court abused its discretion in requiring defense counsel to repeat a demonstration with Harvey (where the defense counsel played the part of Yates), during the State's cross-examination of Harvey. A mistrial on this issue was also later denied. "As the State points out, Harvey's defense counsel chose to participate in the demonstration, and Harvey presents no real authority supporting his arguments on this point."

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107374.pdf>

*Earnest Varnado, Jr. v. State*, No. 2014-KA-00699-COA (Miss.Ct.App. October 13, 2015)

**CASE:** Possession of More than 40 dosage units of Benzylpiperazine (BZP) and Resisting Arrest

**SENTENCE:** 30 years as an habitual offender with a concurrent 6 months for resisting arrest

**COURT:** Pike County Circuit Court

**TRIAL JUDGE:** Hon. David H. Strong Jr.

**APPELLANT ATTORNEY:** Benjamin Allen Suber

**APPELLEE ATTORNEY:** Barbara Wakeland Byrd

**DISTRICT ATTORNEY:** Dee Bates

**DISPOSITION:** Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the State failed to establish a predicate chain of custody for the admission of

the controlled substance into evidence; (2) whether his sentence amounts to cruel and unusual punishment; (3) whether the circuit court erred in denying his motion for a mistrial; (4) whether the circuit court erred in denying his motion for a new trial; and (5) whether there was cumulative error.

**FACTS:** On June 7, 2013, police attempted to serve an arrest warrant on Earnest Varnado. He fled from officers, but was eventually captured. During a pat-down by Deputy Terry Beadles, a plastic bag of pills was found in Varnado's front-left pocket. At trial, Deputy John Speed testified that Beadles gave him the pills, which he took to the sheriff's department and logged the bag into evidence. However, Speed's report, written the day of the arrest, stated that he found the pills, which he thought were ecstasy. On cross-examination, Speed clarified that Beadles had performed the pat-down, but he still considered the bag his "find." Beadles testified and confirmed that he handed the bag of pills to Speed. Agent Jason Duncan testified that he either retrieved the pills from the Unit locker or received them from Speed himself, and transported them to the crime lab. Adrian Hall, a forensic scientist at the crime lab, testified that he performed a chemical analysis of the pills, and determined them to be BZP. Varnado was convicted of possession of BZP and resisting arrest, but acquitted him of a charge of possessing a firearm by a convicted felon. Varnado appealed.

**HELD:** (1) Varnado claimed the State failed to establish a sufficient chain of custody for the pills found in his pocket after his arrest. Varnado argued that there were discrepancies about who handled the evidence and that there was an ambiguity as to the description and number of pills confiscated. "Varnado's characterization of Deputy Speed's and Agent Duncan's testimonies is misleading and disingenuous."

Beadles and Speed testified that the pills that were sent to the crime lab were the same pills found on Varnado on the day of the arrest. They described an unbroken chain of custody showing that the pills were removed from Varnado's pocket by Beadles, given to Speed and then to Duncan who gave them to the lab. At the lab, Hall examined them and testified some pills were destroyed in the process. The destruction of pills during the testing process does not equate to tampering or substituting evidence. There is no need to prove a presumption of regularity when there is a valid chain of custody.

(2) Varnado's sentence was not cruel or unusual. The claim is barred for failing to raise it at trial. Sentences arising under the habitual-offender statute do not constitute cruel and unusual punishment. Varnado's sentence is within the statutory limits.

(3) Duncan testified that after he came into contact with Varnado at the jail, Varnado refused to speak with him. The trial judge did not err in denying a mistrial. Reversal is not always required in cases where the prosecutor has asked questions about the defendant's post-*Miranda* silence, especially where the evidence weighs overwhelmingly against the defendant. The State did not mention Varnado's post-*Miranda* silence anymore after the brief exchange between Duncan and the prosecutor.

(4) The verdict was not against the weight of the evidence. The evidence showed that Varnado possessed 41 or 43 dosage units, which are both greater than the 40 dosage units specified in the indictment.

(5) There was no cumulative error.

To read the full opinion, click here:  
<http://courts.ms.gov/Images/Opinions/CO107576.pdf>

***Herbert Leon Brewer, III v. State***, No. 2013-KM-01472-COA (Miss.Ct.App. October 13, 2015)

**CASE:** Misdemeanor Speeding  
**SENTENCE:** \$75 plus costs

**COURT:** Tate County Circuit Court  
**TRIAL JUDGE:** Hon. Smith Murphey

**APPELLANT ATTORNEY:** Herbert Leon Brewer III (Pro Se)  
**APPELLEE ATTORNEY:** Alicia Marie Ainsworth  
**PROSECUTOR:** C. Gaines Baker

**DISPOSITION:** Appeal Dismissed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, James and Wilson, JJ., Concur.

**ISSUE:** Whether the circuit court erred in denying Brewer's appeal from justice court.

**FACTS:** Herbert Brewer was charged with speeding, and was convicted in justice court. He appealed his conviction to the Tate County Circuit Court. The circuit court found Brewer guilty, assessed him a \$75 fine, and ordered him to pay court costs on June 18, 2013. Brewer failed to file his motion for a JNOV or new trial within 10 days. He file a "Motion Post Judgment to Reconsider Order" a month later on July 19, 2013. The circuit court treated it as a JNOV motion and denied it as untimely and without merit on July 31, 2013. Brewer then filed an appeal on August 29, 2013.

**HELD:** Since Brewer's motion from July 19<sup>th</sup> was untimely, Brewer had thirty days from the date of the original June 18<sup>th</sup> order to appeal to the supreme court. Because Brewer's appeal was not filed within thirty days of the final judgment, the COA lacked jurisdiction. His appeal was dismissed.

To read the full opinion, click here:  
<http://courts.ms.gov/Images/Opinions/CO107394.pdf>

**October 20, 2015**

***Bernard Hubbard v. State***, No. 2013-KA-00814-COA (Miss.Ct.App. October 20, 2015)

**CASE:** Gratification of Lust and Sexual Battery  
**SENTENCE:** 15 years on both counts to run consecutively as an habitual offender

**COURT:** Hinds County Circuit Court  
**TRIAL JUDGE:** Hon. Tomie T. Green

**APPELLANT ATTORNEY:** Kevin Dale Camp, Jared Keith Tomlinson

**APPELLEE ATTORNEY:** Billy L. Gore  
**DISTRICT ATTORNEY:** Robert Shuler Smith

**DISPOSITION:** Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the trial judge erred in allowing the testimony of two women who had been molested by Hubbard when they were children, (2) whether the evidence was sufficient, and (3) whether the verdict was against the weight of the evidence.

**FACTS:** Bernard Hubbard was convicted of gratification of lust and sexual battery of his step-daughter “Abby.” Abby testified that when she was 8 years old, Hubbard began kissing her and touching and licking her genitals. After this continued for some period of time, he vaginally raped her, and she reported the abuse to a gym teacher. Abby was removed from her mother's custody, but she was returned after a no-contact order was issued to prevent Hubbard from seeing her. However, the mother – who did not believe Abby – disregarded the court order and allowed Hubbard to visit and stay with them. Eventually, Hubbard resumed molesting Abby. The abuse apparently ended only after Abby's aunt reported that Hubbard was continuing to have contact with Abby. The State was also allowed to call Hubbard's daughter, and the child of a woman whose sister Hubbard was dating. Both alleged Hubbard had also molested them. Hubbard was initially charged in both cases with capital rape, but ultimately pled guilty to gratification of lust. He was subsequently convicted of molesting Abby and appealed.

**HELD:** (1) The trial judge did not err in allowing the prior bad acts by Hubbard into evidence. Both prior victims described how Hubbard progressed from groping them and touching or licking their genitals to raping them. Both described how Hubbard had bribed them or used threats and extorted promises to prevent them from disclosing the abuse. One testified that Hubbard had invoked God in these efforts in a way similar to that described by Abby in this case. Hubbard’s claim that the trial judge did not balance the prejudicial effect of this testimony with its probative value is belied by the record. Cautionary instructions were given to the jury.

(2) and (3) Hubbard argued that Abby was not a credible witness because of inconsistencies in her testimony. However, a review of the record showed the inconsistencies were minor. She was generally consistent in her allegations and never wavered on the gravamen of the offenses, other than an initial reluctance to come forward and a subsequent reluctance to reveal the full extent of the abuse. For that she offered detailed explanations of how Hubbard and her mother bullied and manipulated her into silence.

To read the full opinion, click here:  
<http://courts.ms.gov/Images/Opinions/CO107530.pdf>

***Kimberlee Michelle Bratcher v. State***, No. 2014-KM-01060-COA (Miss.Ct.App. October 20, 2015)

**CASE:** DUI  
**SENTENCE:** 48 hours

**COURT:** Madison County Circuit Court  
**TRIAL JUDGE:** Hon. John Huey Emfinger

**APPELLANT ATTORNEY:** William P. Featherston Jr.  
**APPELLEE ATTORNEY:** John G. Sims III  
**DISTRICT ATTORNEY:** Michael Guest

**DISPOSITION:** Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell and James, JJ., Concur. Fair and Wilson, JJ., Concur in Part and in the Result Without Separate Written Opinion.

**ISSUE:** Whether the evidence was sufficient.

**FACTS:** On February 2, 2012, Madison police officer Jim Mack, Jr., stopped Kimberlee Bratcher for speeding. During the stop, he learned that she had a warrant out for her arrest. When Bratcher exited the vehicle, Mack observed her stagger. He called a DUI officer to the scene. Officer Drew Hall administered several field sobriety tests and two portable breath tests Bratcher. Based on the results, Bratcher was arrested and taken to the police station. After obtaining Bratcher's consent, Hall administered the Intoxilyzer 8000 breath test to her. She registered a .08 percent BAC. The county found Bratcher guilty of §63-11-30(1)(c). The circuit court affirmed the conviction and she appealed.

**HELD:** Bratcher argued that there was insufficient evidence to support her conviction because the county court failed to factor in the any margin of error for the intoxilyzer. The county court did not err in failing to consider a .02 margin of error. The reference of .02 in the Mississippi Crime Laboratory Implied Consent Policies and Procedures, refers to “a tolerance value,” not a margin of error. “By definition, it is an internal safeguard that causes the intoxilyzer to void breath-test results when it produces results that differ by more than .02.”

Bratcher also argued the county court failed to factor in the "inherent" .005 margin of error of the dry-gas-ethanol-standard solution (dry gas) used to calibrate the intoxilyzer. The claim is without merit because there is nothing to indicate the court did not take this into consideration. The fact that the county court did not weigh the evidence in Bratcher's favor does not necessarily establish that the court failed to consider it.

The county court did not err in admitting the test results. Hall testified that he waited at least twenty minutes before administering the breath test to Bratcher. During his testimony, the court admitted a two-year permit issued by the Department of Public Safety to Hall in June 2011, authorizing him to conduct analyses of breath specimens to determine alcohol content. The court also admitted certificates of calibration showing that the intoxilyzer was calibrated as of February 1, 2012, and March 1, 2012. The certificates of calibration stated that the "instrument was certified to meet acceptable standards of accuracy." The State is not required by law to prove that the dry gas used in the Intoxilyzer 8000 was properly calibrated.

To read the full opinion, click here:  
<http://courts.ms.gov/Images/Opinions/CO107762.pdf>

**October 27, 2015**

***Dexter Johnson v. State***, No. 2012-KA-00363-COA (Miss.Ct.App. October 27, 2015)

**CASE:** Kidnapping and Murder

**SENTENCE:** 30 years with a concurrent life without parole

**COURT:** Bolivar County Circuit Court

**TRIAL JUDGE:** Hon. Kenneth L. Thomas

**APPELLANT ATTORNEY:** John M. Colette, Sherwood Alexander Colette

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISTRICT ATTORNEY:** Brenda Fay Mitchell

**DISPOSITION:** Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Maxwell, Fair and Wilson, JJ., Concur. James, J., Concur in Part Without Separate Written Opinion.

**ISSUES:** (1) Whether he received ineffective assistance of counsel, and (2) whether the trial court abused its discretion in dismissing two jurors during the trial.

**FACTS:** August 1, 2005, Robert Hill Smith and Jim Buck Frazier were riding in Frazier's car, when they passed Johnson's home. Johnson followed the men because Smith owed him approximately \$65. Johnson stopped Frazier and Smith and approached the car with a gun. Johnson got into the car and ordered Smith to give him the money he owed, pointing the gun at Smith's leg. Johnson then forced Smith to get into Johnson's car, and they drove away. Frazier did not see Smith and Johnson again. When Smith's body was found the next day, Frazier contacted police. Johnson was interviewed and confessed to shooting Smith. Johnson admitted that he abducted Smith at gunpoint, but claimed that he only intended to "scare" Smith into giving him the money. Smith started fighting with him, and during the struggle, Johnson felt Smith "poke" him with an object. He responded by shooting Smith and dragging his body into a corn field. Smith was shot six times. Johnson later led police to the gun he used.

**HELD:** (1) Johnson claimed his counsel was ineffective for not challenging the admission of his taped confession, and his failure to move for a mistrial after the dismissal of two jurors. The COA determined the record was sufficient to review the issue. Although counsel filed a motion to suppress, he told the court he made a strategic decision allow the tape, as he believed it had been tampered with. Since counsel stated this was done for strategic reasons, it was not ineffective. Johnson failed to show the tape would have been suppressed had counsel challenged it.

As the following issue will show, Johnson has failed to show he suffered any prejudice from the court's dismissal of the jurors. Therefore, had counsel moved for a mistrial after the dismissal of the two jurors, the result of the proceedings would not have been different.

(2) The trial court did not abuse its discretion in dismissing two jurors during the trial. After Juror 10 failed to show up for trial on the second day, informing the court that she had to take her daughter to a doctor in Jackson, the judge replaced the juror with an alternate. Johnson did not object.

The second juror, Juror 3, was observed by the State acknowledging a member of the defendant's family on his way out of the courtroom. After the trial judge questioned him, he was dismissed and replaced with an alternate. The defense did object to his dismissal. The juror stated he “bumped” the man and told him he could not talk to him. However the State alleged the juror touched the man and then smiled and laughed while leaving the courtroom. Johnson failed to show how he was prejudiced by the dismissal of either juror.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107509.pdf>

**November 3, 2015**

*Theotus Barnett v. State*, No. 2013-KA-01946-COA (Miss.Ct.App. November 3, 2015)

**CASE:** Deliberate Design Murder

**SENTENCE:** Life

**COURT:** Attala County Circuit Court

**TRIAL JUDGE:** Hon. C.E. Morgan, III

**APPELLANT ATTORNEY:** Justin Taylor Cook

**APPELLEE ATTORNEY:** Alicia Marie Ainsworth

**DISTRICT ATTORNEY:** Doug Evans

**DISPOSITION:** Affirmed. Wilson, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur.

**ISSUE:** Whether the trial court erred by denying funds to hire an independent forensic pathologist to rebut the testimony of the State's witness, Dr. Steven Hayne.

**FACTS:** On Friday, May 25, 2007, Danny Tavares, was late coming home from work at his family's used car lot, Tavares Motors in Kosciusko. His wife and daughter went to check on him. They discovered the lobby of the business in disarray and blood stains on the carpet and walls. They found Tavares in the bathroom kneeling with his head over the toilet, his hands clutching the rim. Once it was clear he was dead, she called police. Nearly all of the blood at the scene belonged to Tavares. However, one sample taken from the bathroom floor was later found to match Theotus Barnett's DNA profile. Almost four years later, Barnett turned up in Tennessee, where he had been arrested and was awaiting trial on charges of aggravated kidnapping and aggravated robbery. Law enforcement officers from Mississippi traveled to Tennessee to interview Barnett. At first he denied ever being at Tavares Motors, but when confronted with the DNA evidence, Barnett admitted he had been there to look at a truck. Then he said he was there to confront Tavares for selling his son a lemon. His story changed a couple of times, but he essentially claimed he got into a fight with Tavares after Tavares accused

Barnett’s son of lying. He allegedly used a racial slur and then “all hell broke loose.” Tavares hit him with something and Barnett took it from him and started “whooping him up with it.” Prior to trial, counsel requested an independent expert to review Dr. Steven Hayne’s autopsy report, which determined the cause of death as strangulation. The judge agreed to do so, but counsel had to name the proposed expert and give details of the analysis that the expert would conduct. Counsel later gave a name, but provided no detail on the need for the expert’s services. Despite the judge's repeated suggestions that Barnett request a *Daubert* hearing prior to trial, Barnett never requested such a hearing.

**HELD:** The trial judge did not abuse his discretion by denying Barnett's motion for public funds to retain an independent forensic pathologist. Barnett offered no concrete reason why such assistance was necessary to an adequate defense. Further, Dr. Hayne's testimony was not the sole evidence against Barnett. The State presented ample additional evidence of deliberate design, and Barnett was able to present his theory of manslaughter through cross-examination. Barnett was also offered meaningful pretrial access to Dr. Hayne, as well as the new state medical examiner.

Once the defendant has not only admitted that he killed the victim but also changed his story several times about how the crime occurred, expert testimony concerning the precise cause of death is no longer so essential to the State's case that the defendant is entitled to funds for an expert. Barnett simply asserted—without explanation—that an expert might identify some other possible cause of death which might be helpful to him. Such assertions are insufficient to establish a substantial need for an expert.

To read the full opinion, click here:  
<http://courts.ms.gov/Images/Opinions/CO107711.pdf>

*Natyoo Gray v. State*, No. 2013-KA-01151-COA (Miss.Ct.App. November 3, 2015)

**CASE:** Capital Murder

**SENTENCE:** Life w/o parole

**COURT:** Hinds County Circuit Court

**TRIAL JUDGE:** Hon. Jeff Weill, Sr.

**APPELLANT ATTORNEY:** W. Daniel Hinchcliff, Natyoo Gray (Pro Se)

**APPELLEE ATTORNEY:** Scott Stuart

**DISTRICT ATTORNEY:** Robert Shuler Smith

**DISPOSITION:** Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, PJJ., Barnes, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether Gray received effective assistance of counsel, (2) whether the circuit court erred when it granted the prosecution's motion to quash a subpoena duces tecum Gray served on the victim’s mother, (3) whether the prosecution withheld exculpatory material by not disclosing evidence of the life-insurance policies during discovery, (4) whether the trial court erred in admitting unauthenticated prior statements allegedly made by Gray during a paternity and child-support case

against him, (5) whether the circuit court erred when it allowed the prosecution to introduce pictures of child that were taken after she died, (6) whether the trial court erred in failing to exclude testimony from prosecution experts regarding the time that the child's fatal injuries occurred, (7) whether the trial court erred in failing to allowed the defense to obtain Brown's mental-health records and introduce them into evidence, (8) whether the trial court erred in finding the testimony of several defense character witnesses irrelevant, (9) whether the trial court erred in failing to grant a circumstantial evidence instruction, (10) whether the evidence was sufficient, (11) whether the verdict was against the weight of the evidence, (12) whether there was prosecutorial misconduct, (13) whether comments made by the trial judge were reversible error, (14) whether Gray's sentence was proper, and (15) whether there was cumulative error.

**FACTS:** On Sunday, November 20, 2011, Phyllis Brown went to church, leaving her 13-month-old daughter, Aubrey Zoe Brown, in the care of her father, Natyyo Gray. Gray was a detective with the Jackson Police Department. They were both asleep when she left. Gray called 911 at 1:45pm. When firefighters arrived, Zoe was in cardiac arrest and Gray was pressing Zoe's stomach. Gray later told an EMT, as well other fellow police officers that he had pressed on Zoe's abdomen to relieve constipation, and later in an attempt to perform CPR. Zoe died at 4:29 p.m. A subsequent autopsy concluded that Zoe died due to internal bleeding caused by significant blunt-force trauma. At trial, numerous witnesses testified that the blunt-force trauma to Zoe's abdomen lacerated her liver and essentially tore her pancreas in half. A number of witnesses also testified that Zoe's injuries were the product of child abuse, and they were not caused by massaging her stomach or improperly performing CPR by pressing on her abdomen. Expert witnesses testified that without medical intervention, Zoe would have died less than an hour after sustaining her fatal injuries. Gray claimed Zoe's injuries were caused by Brown. He also claimed her severe bruising was caused during her medical treatment. Gray also alleged that witnesses who testified that he had said that he killed Zoe were all either lying or testifying based on rumors that they had heard from others. Gray also called Dr. Steven Hayne, who testified Zoe could have lived up to 5 hours after her injuries, placing her in Brown's care while injured. Gray was convicted of capital murder during felonious child abuse.

**HELD:** (1) Gray argued that he received ineffective assistance of counsel because his trial attorneys were not able to interview all of the prosecution's witnesses. However, the COA found the record insufficient to review this claim. Gray can raise the issue again on PCR.

(2) The circuit court did not err when it granted the prosecution's motion to quash the subpoena duces tecum that he had served on Brown. The subpoena duces tecum at issue commanded Brown to appear at Gray's trial attorney's office and produce the material at issue. The circuit court had not entered an order authorizing the subpoena duces tecum. Therefore, the subpoena violated UCCCP Rule 2.01.

(3) The trial judge did not err in finding no discovery violations regarding Brown's life insurance policies on Zoe. Brown was asked about them at trial. The existence of the polices was not exculpatory. Therefore, the failure to produce them prior to trial was not error.

(4) The trial judge did not err in failing to suppress pretrial statements Gray allegedly made during an earlier paternity and child support case involving Zoe 9 months before her death. Gray purportedly referred to Zoe as an "ugly bastard" and denied he was her biological father. At trial, Gray claimed

the statements were too remote. On appeal, Gray claimed the prior statements were not properly authenticated. The claim is procedurally barred. Gray did not cite this ground in the trial court.

(5) The circuit court did not err when it allowed the prosecution to introduce pictures of Zoe that were taken after she died. Contrary to Gray's claims, there was no evidence that bruising can occur after death. The pictures were helpful to the jury because they were able to see Zoe's injuries. Without the pictures, the jury would have been left to imagine the frequency and severity of bruising on Zoe's abdomen, face, head, and inside her upper lip, as well as her internal injuries.

(6) The trial judge did not err in allowing the prosecution's experts to testify in rebuttal on the time Zoe could have lived after her injuries. Although this was not in their initial reports, the issue only became relevant after Gray had his expert opine that Zoe could have lived over 5 hours with the injuries. The State's supplemental discovery was proper. Gray never requested a continuance. The trial judge was not required to hold a *Daubert* hearing. The absence of peer-review articles to support the prosecution's experts does not render their expert opinions inadmissible. Finally, the trial judge did not abuse his discretion when he found that Dr. Scott Benton was qualified to testify as an expert in pediatric forensic medicine.

(7) The trial judge did not err in excluding evidence of Brown's mental health. Gray claimed that Brown "has a history of mental and emotional problems," and had communicated with a mental-health counselor on the day that Zoe died. Gray provided no evidence that Brown was mentally unstable, violent, or that she had ever been hospitalized or medicated for a mental-health issue.

(8) The trial court did not err in limiting some of Gray's character witnesses. The court prohibited testimony from the mother of another of Gray's children about his treatment of his other child. The court found the testimony irrelevant. The court also excluded the deputy police chief who was Gray's supervisor. The proffer indicated she resigned from the police department after she got into a heated discussion with other officers who would not tell her what was happening in Gray's investigation. Gray cited no authority that supported his specific claims that the witnesses should have been allowed to testify regarding his personal and professional character. This claim was procedurally barred.

(9) There was no error in failing to give a circumstantial evidence instruction, as Gray did not request one.

(10) and (11) The evidence was sufficient to support the verdict. Numerous physicians, including Dr. Hayne, testified that Zoe's death was the result of child abuse. The testimonies of prosecution's experts also supported the conclusion that Zoe's fatal injuries occurred while she was in Gray's exclusive care. The jury chose to believe the state's experts over Dr. Hayne. The verdict was also not against the weight of the evidence.

(12) Gray claimed the prosecution knowingly presented false testimony, but there is no support for his claim. Additionally, Gray claimed the prosecution made inappropriate comments during its closing argument. However, Gray did not object at any time during the prosecution's closing argument. The claim is barred.

(13) Gray claimed the circuit court committed reversible error by admonishing his trial attorneys to "move along," and rushed his attorneys during their examinations. However, this was a long trial. The transcript was over 2000 pages. Not once does Gray cite to any portion of it to support his claim in this issue. Gray also failed to cite any authority with his claim.

(14) The circuit court did not err when it sentenced him to life without eligibility for parole. Gray could only be sentenced to death or life without parole.

(15) There was no cumulative error.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO106899.pdf>

**Robert Bufford v. State**, No. 2013-KA-01629-COA (Miss.Ct.App. November 3, 2015)

**CASE:** Murder and Possession of a Firearm by a Convicted Felon,

**SENTENCE:** Life with a consecutive 10 years as an habitual offender

**COURT:** Hinds County Circuit Court

**TRIAL JUDGE:** Hon. Jeff Weill, Sr.

**APPELLANT ATTORNEY:** W. Daniel Hinchcliff

**APPELLEE ATTORNEY:** Scott Stuart

**DISTRICT ATTORNEY:** Robert Shuler Smith

**DISPOSITION:** Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur. Maxwell, J., Concur in Part and in the Result.

**ISSUES:** (1) Whether the trial court erred in admitting testimonial statements in violation of the Confrontation Clause, (2) whether the trial court erred in excluding res gestae evidence in support of his theory of the case, and (3) whether the trial court erred in admitting evidence of the autopsy report in violation of the Confrontation Clause.

**FACTS:** On July 5, 2011, at about 4:40 a.m., Robert Bufford, also known as "Little Rob" and "Rod," and Davie Miller were seen leaving Northside Legends, a club in Jackson. Miller was driving, and Bufford was in the passenger seat. A JPD officer was conducting traffic stop when she heard shots. Office Ahvegail White responded to the scene and found Miller lying on the ground, covered in blood. White began asking Miller questions. Miller stated that he and his friend were coming from Northside Legends, and they were engaged in an argument inside the car when his friend started shooting. Miller identified the friend as "Rod." Miller also told a responding paramedic that he was "assaulted by a friend" while "coming from a nightclub." Before undergoing surgery, a JPD detective asked Miller if he wanted to press charges against the person who shot him. He said he did, and then gave a description of the shooter, identified him as "Rod," and gave a detailed account of what happened. After regaining consciousness several days later, Miller's wife asked him if he knew what happened to him. He responded, "Rod." Miller died a few weeks later.

**HELD:** (1) The trial court did not err in allowing Miller's statements to Officer White. The court ruled the statements were admissible as exceptions to the hearsay rule under MRE 803(1) and (2), but failed to address Bufford's Confrontation Clause claim. The COA reviewed the claim under the plain error doctrine, but found the statements admissible under *Crawford*. The questions White asked were the type necessary to enable her to meet an ongoing emergency.

Further, Miller's statements to the paramedic were also admissible. Miller's statements were made for the purpose of diagnosis or treatment. Bufford did not raise this claim at trial, but it also fails under the plain error doctrine.

The trial judge did err in finding the statements made to the JPD detective admissible. This was plain error. Since the detective asked him if he wanted to press charges, Miller's primary purpose was likely to establish or prove past events potentially relevant to later criminal prosecution. However, in this case, the error was harmless. The evidence of Bufford's guilt was abundant.

Finally, there is was no error in admitting Miller's statement to his wife. Again, although the trial judge did not address the Confrontation Clause claim, it was not plain error. Miller's wife was not working in connection with the police, and his statement to her was not made with the thought of future prosecution.

(2) The trial court did not err in excluding as irrelevant evidence of marijuana found at the scene of the shooting. Bufford claimed the marijuana was *res gestae* evidence in support of his defense theory suggesting that the shooting had possibly been related to a bad drug deal. Because the substance that Bufford claims was marijuana had not been tested and was found in someone else's car, the evidence did not have a tendency to make the existence of any fact more or less probable. The only evidence to support Bufford's theory suggesting that the shooting had possibly been related to a bad drug deal was not credible.

(3) Bufford also claimed it was a violation of his right to confrontation when evidence of Dr. Erin Barnhart's autopsy report was admitted, since Dr. Barnhart was not the medical examiner who performed Miller's autopsy. The doctor who performed Miller's autopsy resigned from the medical examiner's office before trial. Dr. Barnhart reviewed his case notes and photographs. From this, Dr. Barnhart compiled an autopsy report from which she testified at trial. The COA agreed with the trial court's determination that Dr. Barnhart was sufficiently involved with the analysis and overall process so as to avoid violating Bufford's right to confrontation.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107813.pdf>

***Tony Phillips v. State***, No. 2014-KA-00018-COA (Miss.Ct.App. November 3, 2015)

**CASE:** Simple Assault on a Correctional Officer

**SENTENCE:** 5 years

**COURT:** Washington County Circuit Court

**TRIAL JUDGE:** Hon. Betty W. Sanders

**APPELLANT ATTORNEY:** Hunter Nolan Aikens

**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss

**DISTRICT ATTORNEY:** Willie Dewayne Richardson

**DISPOSITION:** Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the instructions sufficiently informed the jury on the law of self-defense, and (2) whether the State violated *Batson*.

**FACTS:** Tony Phillips, an inmate at the Washington County Regional Correctional Facility, was indicted for simple assault on a correctional officer after he attacked Officer Mose Harmon. Phillips testified in his own behalf and sought to establish that the assault on Harmon had been an act of self-defense.

**HELD:** (1) Phillips argued that S-1, the elements instruction, and D-8, his own self-defense instruction, failed to properly instruct the jury that the State bore the burden of proving that he did not act in self-defense. The claim is procedurally barred because, during trial, Phillips failed to object to S-1 and D-8, and he failed to raise this issue in his post-trial motion. Notwithstanding the bar, there was no plain error.

S-1 properly set forth the elements of the crime of simple assault on a correctional officer, and it accurately informed the jury that if the State failed to prove those elements beyond a reasonable doubt, the jury had to find Phillips not guilty. Also, as seen in §97-3-7, the State was not required to prove that Phillips's assault of Officer Harmon was not an act of self-defense. D-8 defined the law of self-defense and informed the jury that if it found that Phillips acted in self-defense in attacking Harmon, then it was duly bound to return a verdict for Phillips.

(2) There was no violation of *Batson*. The court found the State's reason for striking a black female race-neutral based on the prosecutor's assertion she had a prior "bad interaction" with the DA's office. Phillips did not refute that explanation and did not name non-African-American veniremembers who had "bad interactions" with the district attorney's office but who were not challenged by the State. Phillips failed to show that information from the DA's investigator was unreliable.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108400.pdf>

**November 10, 2015**

*John Andrew Casey v. State*, No. 2014-KA-00537-COA (Miss.Ct.App. November 10, 2015)

**CASE:** Aggravated Assault

**SENTENCE:** 15 years with 5 suspended and 5 years PRS

**COURT:** Coahoma County Circuit Court  
**TRIAL JUDGE:** Hon. Albert B. Smith, III

**APPELLANT ATTORNEY:** Hunter Nolan Aikens

**APPELLEE ATTORNEY:** Scott Stuart

**DISTRICT ATTORNEY:** Brenda Fay Mitchell

**DISPOSITION:** Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the trial judge erred in allowing the State to admit evidence used to prove kidnapping in Casey's first trial where he was acquitted of that charge, and (2) whether the evidence was sufficient.

**FACTS:** John Andrew Casey was initially tried for sexual battery, kidnapping and aggravated assault against his girlfriend, Lauren Brocato. Apparently Casey and Lauren got into an argument concerning her earlier relationship with another man. She still had his phone number in her phone under a female friend's name. She left his house and Casey followed her, trying to stop her car before she went to a male friend's house. At some point Casey called her and said he had been in a wreck. Lauren wound up going back to his house. Lauren claimed Casey then assault her, hitting her and eventually putting her in a dog crate and later wrapping her in a chain. She was able to leave when Casey fell asleep. Lauren showed up at her parents' doorstep bruised, battered, and struggling to breathe. Her mom rushed her to the hospital, where she spent five days recovering from a collapsed lung, broken ribs, and a fractured eye socket. Casey denied he was the source of Casey's injuries. However, police found some evidence in Casey's house which corroborated her story. The jury acquitted him of the sexual battery and kidnapping charge, but could not unanimously agree on the aggravated assault charge and a mistrial was declared. In his second trial for aggravated assault only, the state was allowed to present evidence regarding the dog crate and chains, evidence used to try to prove kidnapping in his first trial. Casey was convicted and appealed.

**HELD:** (1) The trial judge found any evidence of sexual penetration was "out" because it was more prejudicial than probative. But the court found the evidence that Casey restrained Lauren—first in a dog crate, then with a chain—was much more relevant to the assault charge and could come in so long as the State did not mention the kidnapping charge. This was not an abuse of discretion. Casey asserts his prior acquittal made this evidence so prejudicial it required exclusion. However, the evidence was admitted as substantive evidence to prove aggravated assault, not for another purpose such as impeachment.

(2) The evidence was sufficient to support the verdict. Casey did not contest Lauren was seriously injured, but only that he did not do it. This was a classic jury question. Lauren unequivocally identified Casey as her assailant, both initially to law enforcement and at trial.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108115.pdf>

*Henry J. Parker, Jr. v. State*, No. 2014-KA-01292-COA (Miss.Ct.App. November 10, 2015)

**CASE:** Possession of Marijuana with Intent to Distribute  
**SENTENCE:** 20 years with 10 suspended and 10 years PRS (3 reporting)

**COURT:** Harrison County Circuit Court  
**TRIAL JUDGE:** Hon. Lawrence Paul Bourgeois, Jr.

**APPELLANT ATTORNEY:** Mollie Marie McMillin  
**APPELLEE ATTORNEY:** Billy L. Gore  
**DISTRICT ATTORNEY:** Joel Smith

**DISPOSITION:** Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Whether Parker’s Confrontation Clause rights were violated when the trial judge allowed a crime lab supervisor to testify the substance was marijuana when he did not personally conduct the testing.

**FACTS:** On September 18, 2010, Officer Pablo de la Cruz of the Harrison County Sheriff’s Department stopped Henry Parker on I-10 for driving carelessly. Parker informed the officer that he had diabetes and had not eaten recently. Parker also stated that he left his insulin and blood meter in Texas. Parker refused medical assistance. The officer noticed Parker acting nervously and fidgeting. He also noticed that there were empty food containers in the car, indicating that Parker had eaten recently. Parker said that he was traveling from Houston to Moss Point for a church opening, but no luggage was seen in the back of the car. Parker then consented to a search. In the trunk of the rental car were 9 cattle-feed bags filled with what appeared to be marijuana. At trial, Parker testified that the people he did business with in Moss Point rented the car for him. Timothy Gross, a forensic analyst, and also the associate director and regional manager of the Gulf Coast Regional Crime Lab testified he supervised the analysis of the substance found in the trunk and determined it was 91.7 kilograms of marijuana. Tasha Carnes, the analysis “in training” who actually tested the substance did not testify. Parker was convicted and appealed.

**HELD:** First, the COA found the issue procedurally barred for failing to contemporaneous object. Regardless, there was no plain error by allowing Gross to testify. Citing *Jenkins v. State*, 102 So. 3d 1063 (Miss. 2012), the COA found that a supervisor, reviewer, or other analyst involved may testify in place of the primary analyst where that person was “actively involved in the production of the report and had intimate knowledge of the analyses even though [he] did not perform the tests firsthand.” Gross testified that Carnes was in training and assisted in Parker’s case. Gross testified that he did not personally collect all the data, but did personally supervise the analysis and made the identification.

To read the full opinion, click here:  
<http://courts.ms.gov/Images/Opinions/CO108080.pdf>

***Travon Brown v. State***, No. 2014-KA-00020-COA (Miss.Ct.App. November 10, 2015)

**CASE:** Deliberate Design Murder x2

**SENTENCE:** Two consecutive life sentences

**COURT:** Lee County Circuit Court

**TRIAL JUDGE:** Hon. Thomas J. Gardner, III

**APPELLANT ATTORNEY:** Hunter Nolan Aikens

**APPELLEE ATTORNEY:** Barbara Wakeland Byrd

**DISTRICT ATTORNEY:** J. Trent Kelly

**DISPOSITION:** Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Carlton, Maxwell, Fair and Wilson, JJ., Concur. James, J., Concur in Part and Dissents in Part Without Separate Written Opinion.

**ISSUES:** (1) Whether the circuit court erred in refusing several jury instructions; (2) whether the circuit court erred in excluding evidence of the victims' toxicology results; (3) whether the evidence was insufficient to support the jury's verdict, or in the alternative, whether the verdict was against the overwhelming weight of the evidence; and (4) whether Brown received ineffective assistance of counsel.

**FACTS:** On September 28, 2011, Travon Brown shot and killed Cornelius Harris and Felicia Ruffin at their home. Harris's cousin, Dexter Babbitt, was sitting in his car at his house across the street. Hearing the shots, Babbitt called 911. He claimed that he saw Harris open the front door, but that Harris was jerked back inside by Brown, and Brown shot Harris in the head. Police arrived and found Ruffin deceased, sitting on the couch holding a book. One officer testified that it looked as though Ruffin had been shot while turning a page of her book. They also saw Harris lying on the floor in a large pool of blood. Brown was in the bathtub with a gunshot wound to his left hand, a beer, a bottle of shampoo, and a .40-caliber Glock pistol. Brown admitted the gun belonged to him. Firearms expert Mark Boackle testified that the projectiles recovered from Ruffin and Harris had been fired from Brown's pistol. Brown claimed he was playing a football game with Harris on an Xbox. Brown stated that Harris became angry and threw his controller at Brown. (Although controllers were found, the Xbox was unplugged in another room). Brown had his gun in his waistband when the two began "scuffling." He said the gun fell out as he headed for the door. Harris rushed him and the gun went off several times during the struggle. He claimed the killings were "a complete accident." Telvis Ragin testified he saw Brown earlier that night, and Brown said he was going to kill someone. Ragin later recanted his statement, but at trial claimed Brown forced him to recant by threatening him. Brown was convicted and appealed.

**HELD:** The trial judge did not err in refusing a "no duty to retreat" instruction (D-8). The court found no evidentiary support for it. Additionally, Brown's theory of defense was covered in other instructions.

There was also no error in denying D-10, an instruction telling the jury not to judge Brown in the "cool, calm light of after-developed facts." The court's instructions adequately covered the reasonableness of Brown's actions.

The trial court also did not err in denying D-12, an accident and misfortune instruction, and D-13, and sudden provocation instruction. The court's instructions adequately covered Brown theory of defense.

There was no error denying D-14, a *Weathersby* instruction. The evidence presented at trial did not support Brown's account of the killings.

(2) Brown argued that Harris had used cocaine within a few hours of his death, which showed that Harris was aggressive, unpredictable, and had impaired judgement. Also, he claimed Ruffin's use of cocaine, marijuana, and alcohol just prior to her death slowed her reaction time. The trial judge did not err in sustaining the State's objection to the toxicology evidence. The court found that it would be "rank speculation" to imply that the drug use by the victims had any relevance to what occurred.

(3) The evidence sufficiently proved deliberate design murder. Brown went over to Harris's house with a gun, which according to Boackle's testimony could not have accidentally discharged nine bullets. In order for nine rounds to have been shot from Brown's semiautomatic Glock, the trigger must have been pulled nine times. In addition, a couple of hours before the shooting took place, Brown told Ragin he was going to kill someone. The verdict was also not against the weight of the evidence.

(4) Brown claimed his trial counsel was ineffective for failing to offer a manslaughter instruction, for failing to object to the State's improper comments during closing argument; and for failing to object to alleged instances of prosecutorial misconduct. Brown's allegations are not adequately supported by evidence, and do not prove that his counsel's representation was deficient in any way.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107080.pdf>

**Larry Walker v. State**, No. 2013-KA-01592-COA (Miss.Ct.App. November 10, 2015)

**CASE:** Carjacking and Kidnapping

**SENTENCE:** Two concurrent life sentences as an habitual offender

**COURT:** Lawrence County Circuit Court

**TRIAL JUDGE:** Hon. Prentiss Greene Harrell

**APPELLANT ATTORNEY:** Justin Taylor Cook

**APPELLEE ATTORNEY:** Billy L. Gore

**DISTRICT ATTORNEY:** Haldon J. Kittrell

**DISPOSITION:** Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the indictment for attempted forcible sexual intercourse was defective and prejudiced Walker, (2) whether there was sufficient evidence to prove Walker's habitual-offender status, and (3) whether Walker's statutory and constitutional rights to a speedy trial were violated.

**FACTS:** Larry Walker was convicted of carjacking and kidnapping. On August 25, 2001, 16-year-old BD was driving her father's car to visit her mother when she stopped at a convenience store. Walker approached and told her he had a pistol and had her slide over to the passenger seat. He drove to a wooded area and attempted to rape her but was unsuccessful. He then ordered her to perform oral sex on him. BD pretended to by using her hands instead of her mouth. At Walker's first trial, he was acquitted of a sexual battery and a robbery count, but the jury hung on the other charges. He was convicted in his second trial with the exception of a not guilty verdict on a second sexual battery count. His conviction was overturned on appeal due to a *Batson* violation. [\*Walker v. State\*, 937 So. 2d 955 \(Miss. Ct. App. 2006\)](#). In his third trial, the jury found him guilty of carjacking and kidnapping, but found him not guilty of attempted rape.

**HELD:** (1) Although the indictment did not properly allege an overt act, Walker was acquitted of this charge. Walker argued the defective indictment allowed for the admission of prejudicial evidence that would have otherwise been excluded. Specifically, Walker claimed the use of the word "minor" in the jury instructions when the age of the victim was irrelevant to the other two counts caused prejudice. The COA found Walker failed to show how the introduction of this evidence caused actual prejudice or affected the outcome of the trial. Walker did not raise a sufficiency claim on the carjacking and kidnapping charges. Walker cannot say the alleged prejudicial evidence from the attempted rape charge alone resulted in the guilty verdicts.

(2) Walker argued the pen-packs introduced by the State did not include a sworn affidavit, and the court failed to make a finding on Walker's status. Walker failed to object to the State's evidence of his habitual-offender status at trial, so the issue is barred. Regardless, the State met its burden. The State submitted certified pen-packs attesting to Walker's prior convictions, along with Walker's verified signature and social security number on the documents.

(3) Walker asserts the delays prior to his first trial and from his second trial until his third trial violated his statutory and constitutional rights to a speedy trial. Although Walker asserted his speedy trial rights before his first trial. He did not raise the issue on appeal from his convictions after his second trial. Thus, Walker waived this claim. Regardless, the delay did not exceed the 270-day rule for his first trial due to a continuance Walker sought, as well as a delay from the crime lab. After a mistrial, the time of retrial is within the discretion of the trial court, and is not subject to the 270-day rule. The court then looks at the *Barker* factors to determine whether the discretionary length of time between trials violated the defendant's constitutional right to a speedy trial.

Walker's constitutional right to a speedy trial was not violated. The mandate on the reversal of Walker's conviction was issued on October 5, 2006. He was retried on April 9, 2010. This was presumptively prejudicial. The circuit court appointed new counsel on December 27, 2006, but counsel failed to withdraw until December 17, 2008. On January 10, 2010, Walker filed motions for a continuance and discovery after retaining a third attorney. Walker filed a motion to dismiss for failure to grant a speedy trial, but did not demand a speedy after his first trial. Finally, Walker failed to demonstrate actual prejudice. The only prejudice Walker cited was the length of his incarceration, which is generally insufficient for reversal.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107794.pdf>

*Derrick Course v. State*, No. 2014-KA-00109-COA (Miss.Ct.App. November 10, 2015)

**CASE:** Armed Robbery

**SENTENCE:** 30 years

**COURT:** Hinds County Circuit Court

**TRIAL JUDGE:** Hon. Jeff Weill, Sr.

**APPELLANT ATTORNEY:** Erin Elizabeth Pridgen

**APPELLEE ATTORNEY:** Lisa L. Blount

**DISTRICT ATTORNEY:** Robert Shuler Smith

**DISPOSITION:** Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Whether the trial court erred in failing to suppress the victim's pre-trial identification of Course.

**FACTS:** On December 8, 2011, Clell McCurdy was in his dorm room on the campus of Jackson State University. Two men entered his room. One began to search through McCurdy's belongings while the other man stood by the door. The man at the door stated he would shoot McCurdy if he called for help. The man kept his hand in his pocket the entire time as if holding a gun. McCurdy called police after they left. He described the men as both having dread locks. One was tall with a dark complexion while the other was short with a lighter complexion. The following day, police called McCurdy. Derrick Course and Reginald Jackson had been arrested as suspects in another robbery. McCurdy was shown one picture and each identified them as the robbers. Days later, reviewing surveillance footage, an officer realized that the video showed a suspect other than Jackson. McCurdy viewed the tape and identified the man on the tape, Frederick Smith, as the second robber rather than Reginald Jackson. His identification of Course remained the same. McCurdy testified he watched the man he thought had a gun for about 5 minutes during the robbery. McCurdy described this assailant as light complected with dread locks. The description accurately described Course. McCurdy was positive of his identification when looking at the photograph, when reviewing the surveillance video, and at the suppression hearing. The trial court allowed the identification and Course was convicted. He appealed.

**HELD:** Course argued that the out-of-court identification process was unnecessarily suggestive and conducive to an irreparable mistaken identification. Course's photograph was one of two photographs shown to McCurdy the day after he was robbed. Officers made no effort to set up a proper photo lineup to prevent false identifications. This procedure did in fact result in the false identification of Reginald Jackson as one of the men who robbed McCurdy. The identification of Course was unnecessarily suggestive. However, even though the identification methods used by officers were suggestive, the pretrial identification was reliable.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO106523.pdf>

**November 17, 2015**

**Willie B. Taylor v. State**, No. 2014-KA-00424-COA (Miss.Ct.App. November 17, 2015)

**CASE:** Receiving Stolen Property

**SENTENCE:** 10 years as an habitual offender

**COURT:** Madison County Circuit Court

**TRIAL JUDGE:** Hon. John Huey Emfinger

**APPELLANT ATTORNEY:** Darla Y. Mannery-Palmer

**APPELLEE ATTORNEY:** Lisa L. Blount

**DISTRICT ATTORNEY:** Michael Guest

**DISPOSITION:** Affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Maxwell, Fair and Wilson, JJ., Concur. Barnes, J., Concur in Part and in the Result Without Separate Written Opinion.

**ISSUES:** (1) Whether the trial court committed reversible error in allowing the State to admit Ex. 5, and (2) whether the trial court erred in failing to grant Taylor's motion for a new trial or JNOV.

**FACTS:** On October 19, 2012, Jimmy Mann reported his 2006 Ford F-250 pickup stolen from Kosciusko. A little over three months later, Willie B. Taylor was stopped in Madison County while driving the truck. Taylor did not stop immediately when the deputy activated his blue lights and siren. Taylor drove for about a mile before pulling over. Investigator Mike McGowan with the Mississippi Agricultural Theft Bureau processed the F-250 and took photos of the vehicle. The VIN on all four side windows of the F-250 reflected the true VIN, but the VIN on the doors and windshield had been altered. McGowan also found several items belonging to Taylor in the truck after the F-250 was inventoried. There was an application for title that listed Tommy Rice Motors as the seller of the F-250. The title also listed Bill White as the authorized agent, or seller, but no one by that name was an employee at Tommy Rice Motors. Taylor guilty of receiving stolen property and not guilty of altering vehicle identification

**HELD:** (1) Taylor claimed it was reversible error to admit Exhibit 5 (a picture of damage to the truck to show forced entry), after sustaining Taylor's objection to the admission of the photograph as exceeding the scope of the cross-examination of Mann. The judge admitted the photo anyway, stating the jury had already seen it. This was error, but harmless. The record did not show that the photo was ever showed to the jury before the court sustained Taylor's objection. Nevertheless, since the jury heard testimony from Mann and McGowan regarding to the damage depicted in the photo, the photo itself did not affect the final result of the case.

(2) Taylor claimed the State failed to prove he knew the truck was stolen. The jury (even without Ex. 5) heard testimony about the damage to the truck. The jury also heard about the altered VIN, the fake title, and Taylor's flight when Deputy Brock attempted to stop Taylor. There is sufficient evidence of guilty knowledge. Further, the verdict was not against the weight of the evidence.

To read the full opinion, click here:  
<http://courts.ms.gov/Images/Opinions/CO108330.pdf>

*Ashendrias E. Reed v. State*, No. 2014-KA-01486-COA (Miss.Ct.App. November 17, 2015)

**CASE:** Grand Larceny  
**SENTENCE:** 5 years as an habitual offender

**COURT:** Forrest County Circuit Court  
**TRIAL JUDGE:** Hon. Robert B. Helfrich

**APPELLANT ATTORNEY:** George T. Holmes  
**APPELLEE ATTORNEY:** LaDonna C. Holland  
**DISTRICT ATTORNEY:** Patricia A. Thomas Burchell

**DISPOSITION:** Affirmed. Fair, J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, James and Wilson, JJ., Concur. Irving, P.J., Concur in Part and in the Result Without Separate Written Opinion.

**ISSUE:** Whether Reed was properly sentenced as an habitual offender.

**FACTS:** Ashendrias Reed was convicted of grand larceny after stealing an automobile that turned out to have a GPS tracking device onboard. Reed claimed the State failed to prove he was previously sentenced to over a year on a prior grand larceny since he was non-adjudicated and then sent to RID.

**HELD:** First, Reed did not contest his sentencing at trial, so the issue is waived. Notwithstanding the bar, the claim is without merit. The trial court's revocation order clearly referred back to the original nonadjudication order when it stated that Reed would "return" to "post-release supervision." The nonadjudication order specified a supervision period of one year. Regardless, for the purposes of §99-19-81, it is the length of the sentence that controls, not how much of it is actually served.

To read the full opinion, click here:  
<http://courts.ms.gov/Images/Opinions/CO108287.pdf>

*Dequan Berry v. State*, No. 2014-KA-00377-COA (Miss.Ct.App.November 17, 2015)

**CASE:** Armed Robbery x2  
**SENTENCE:** Two concurrent terms of 30 years, with 12 suspended, consecutive to an additional 5 years for a firearm enhancement

**COURT:** Hinds County Circuit Court  
**TRIAL JUDGE:** Hon. Jeff Weill, Sr.

**APPELLANT ATTORNEY:** Benjamin Allen Suber  
**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss  
**DISTRICT ATTORNEY:** Robert Shuler Smith

**DISPOSITION:** Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the trial court erred in denying his motion for a mistrial, (2) whether the trial court erred in failing to sustain his objections during the cross-examination of a witness, and (3) whether there was cumulative error.

**FACTS:** On April 15, 2012, at around 10:30 p.m., Skyler Watts and Kisha Catchings returned from Walmart to their apartment. A young man approached them with a gun. Although the man was wearing a bandana over his face, Skyler and Kisha recognized the man as Dequan Berry, who had once lived at the same apartments. Berry demanded money. They eventually gave Berry money they had hidden in their apartment and Berry left. At trial, Berry provided an alibi defense. Carolyn Washington testified that on the night of the robbery, Berry was playing cards with her and Berry's grandmother, Mamie Aaron. Mamie corroborated Carolyn's testimony but added that later in the evening, she and Berry had watched television. Berry testified and denied that he committed the robbery. However, he did admit that he used to live at the victims' apartment complex and knew Skyler. He was convicted and appealed.

**HELD:** (1) The trial judge did not err in failing to grant a mistrial when the prosecution commented on closing argument that Berry only stated he was playing cards after he was arrested. This was not a comment on his right to remain silent. Berry's right to remain silent was not at issue because he had waived that right and had voluntarily given a statement, which had been admitted into evidence without objection. Berry took the stand and testified in his own defense.

(2) During Mamie's testimony, the State asked several questions about how the witness had helped her daughter (presumably referring to Berry's mother). The defense objected on the basis of relevancy. After a second objection, the State moved on with its cross without asking further questions of Mamie regarding her family. "After reviewing the record, we find that allowing this line of questioning did not adversely affect any of Berry's substantial rights." The State was attempting to show that Mamie could not remember many details about her family, but vividly recalled the facts on the night of the robbery.

(3) Berry failed to show cumulative error. In addition to the two errors discussed above, Berry complains of the circuit court's treatment of jurors and the "unclean" copy of jury instructions given to the jury. The record fails to support his argument that the trial court improperly questioned the jury after one juror disclosed an improper communication. Also, it was not error to give the jury instructions marked "Given" and designated with "D," "C," or "S."

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108615.pdf>

**Gregory L. Mastin v. State**, No. 2014-KM-00431-COA (Miss.Ct.App.November 17, 2015)

**CASE:** Disorderly Conduct and Resisting Arrest

**SENTENCE:** 6 months probation

**COURT:** Lowndes County Circuit Court  
**TRIAL JUDGE:** Hon. Lee J. Howard

**APPELLANT ATTORNEY:** Charles Richard Mullins  
**APPELLEE ATTORNEY:** Lisa L. Blount  
**DISTRICT ATTORNEY:** Forrest Allgood

**DISPOSITION:** Reversed and Rendered. Irving, P.J. for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Maxwell, Fair, James and Wilson, JJ., Concur. Carlton, J., Dissents Without Separate Written Opinion.

**ISSUES:** (1) Whether the State failed to prove that Mastin's spoken words constituted disorderly conduct; (2) whether §97-35-7(1)(i), as applied in this case, violates Mastin's First Amendment right to free speech and is thus overly broad; and (5) whether the evidence is insufficient to support the judgment or whether the judgment is against the overwhelming weight of the evidence.

**FACTS:** While conducting a driver's license checkpoint, Deputy Paul Greggs discovered that Gregory Mastin's Alabama-issued driver's license, was expired. (However, the license was still valid under Alabama law, as Mastin had a 60 day grace period to renew it). Greggs asked Mastin to move his vehicle to the side of the road. Greggs asked Mastin to step out of the vehicle, and Mastin handed his license to Greggs. At some point, Mastin got back inside his vehicle, where he waited while Greggs checked his license. In his patrol car, Greggs prepared an expired-license ticket to give to Mastin. After walking back to Mastin's vehicle, Greggs again asked Mastin to step out of the vehicle, and Mastin complied. According to Greggs, Mastin yelled, screamed, and refused to accept the ticket. Greggs then arrested Mastin for disorderly conduct. Mastin was charged by affidavit with committing disorderly conduct "[b]y yelling and cursing, stating [that] he wasn't paying the f----- ticket he was being issued[,] . . . [and] yelling this is f----- b-----." Greggs testified Mastin "crossed his arms and again refused to take the ticket and continued to act disorderly [by] [y]elling [and] screaming." However, on cross, Greggs admitted that Mastin did take the ticket. Mastin pled guilty to the expired-license charge, and following a bench trial, the justice court convicted him of disorderly conduct and resisting arrest. His convictions were affirmed on appeal in county court and circuit court. He again appealed.

**HELD:** The Court first found that Issue 1 was subsumed by Issue 5. The Court also found Issue 2 was procedurally barred as it was not raised at trial. Finally, since Issue 5 was dispositive, none of Mastin's other claims were discussed.

(5) During trial, Greggs initially testified that Mastin had refused the expired-license ticket while yelling, screaming, and cursing. But, on cross-examination, he admitted that in his police report, he had stated that Mastin had taken the ticket. Greggs admitted that he did not feel threatened during the stop of Mastin. Greggs further admitted that Mastin never attempted to provoke a physical altercation with him.

It was not clear from the evidence that Greggs ever gave Mastin a command to follow. Regardless, assuming a command was given, it was a command to Mastin to take the ticket for driving with an

expired license. According to Greggs's own testimony, Mastin took the ticket, albeit not without doing some cursing in the process. The command to take the ticket was not issued for the purpose of avoiding a breach of the peace, for at that point nothing had transpired that could be even remotely viewed as a brewing breach of the peace. The record did not support a finding that in ordering Mastin to accept the ticket, Greggs was attempting to avoid a breach of the peace.

“So when Deputy Greggs arrested Mastin for disorderly conduct, Mastin had not refused an order or command by a law-enforcement officer to act or do, or refrain from acting or doing, something in order to prevent a breach of the peace.” Because the evidence was insufficient to establish the legality of Mastin's arrest, it was also insufficient to establish that he resisted a lawful arrest.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108614.pdf>

***Lynda Dianne Robinette v. State***, No. 2014-KM-01649-COA (Miss.Ct.App. November 17, 2015)

**CASE:** First Offense DUI, Running a Stop Sign, and Following too Closely

**SENTENCE:** 48 hours, suspended for 2 years

**COURT:** Madison County Circuit Court

**TRIAL JUDGE:** Hon. William E. Chapman, III

**APPELLANT ATTORNEY:** Kevin Dale Camp, Jared Keith Tomlinson

**APPELLEE ATTORNEY:** Boty McDonald

**CITY PROSECUTOR:** Boty McDonald

**DISPOSITION:** Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Carlton, Maxwell, Fair and James, JJ., Concur. Wilson, J., Concur in Part and in the Result Without Separate Written Opinion. Ishee, J., Dissents with Separate Written Opinion.

**ISSUE:** Whether the trial court erred in denying her motion for a directed verdict and in rendering a verdict of guilty because the evidence was insufficient.

**FACTS:** On March 24, 2012, Officer David Mattox observed a vehicle that appeared to be speeding. He followed the vehicle, driven by Lynda Robinette. She was going 50 mph and following about one car length behind another car. She appeared to be frequently tapping her brakes behind the other car. When they reached a stop sign, Robinette did not completely stop, so Mattox turned on his blue lights. Mattox testified that he smelled alcohol and noticed that Robinette's eyes were bloodshot and glass. He asked her how much she had to drink that night, to which she replied, "three sips of vodka and a glass of wine with dinner." Mattox testified that "her speech was slurred and thick-tongued." She said no alcohol was in the car, but Mattox found a wine bottle that had been opened with one-fourth of the wine remaining. Because of medical conditions, she said she could not perform some field sobriety tests. She tested positive on a preliminary breath test. DUI Officer Stephen Webb administered a horizontal-gaze-nystagmus test, where he observed all six indicators of impairment. She was arrested and subsequently registered a 0.12% on the Intoxilyzer 8000. At trial, a friend testified they had one cup of wine after the Zippity Doo Dah parade and then went to a concert and

then had dinner. Robinette testified she had a tiny bit of vodka during the parade and a cup of wine after. She then talked about her medical conditions, which included gastroparesis, a medical condition that causes belching and regurgitation. She also has Meniere's disease, which is an inner-ear disorder that causes loss of equilibrium, vomiting, and nystagmus. She also takes medication for seizures. She did concede that alcohol makes her conditions worse. Dr. Steven Hayne testified for the defense. He concluded she would have had a 0.03% BAC at the time of the stop. Her gastroparesis would have made the Intoxilyzer results unreliable. Nevertheless, Robinette was convicted and appealed.

**HELD:** Robinette's sufficiency claim is procedurally barred. After her motion for a directed verdict was denied, she put on a defense case, but failed to renew her motion after she rested. Notwithstanding the bar, her claim is still without merit. Further, even though the City of Ridgeland failed to file a brief, the Court can confidently conclude that her convictions should be affirmed.

Robinette was charged with common-law DUI. Mattox testified that Robinette was speeding, that she was tapping her brakes because she was too close to the vehicle in front of her, and that she failed to stop completely at a stop sign. He testified that he smelled alcohol coming from inside the vehicle. There was testimony that Robinette's eyes were bloodshot and glassy and that her speech was slurred and thick-tongued. Robinette admitted that she had consumed alcohol that evening. Webb also testified Robinette that breath and person smelled like alcohol.

While Robinette's medical conditions might explain the horizontal-gaze-nystagmus test and why she was swaying in the video footage, Robinette admitted that the consumption of alcohol aggravates her symptoms, including the loss of equilibrium. The trial court could find that Robinette operated her vehicle under circumstances indicating that her ability to operate her vehicle was impaired by the consumption of alcohol. This issue is without merit. The evidence was sufficient to sustain Robinette's conviction for tailgating.

**Ishee, J., Dissenting:**

Judge Ishee dissented, noting that the appellee failed to file a brief, thus confessing error. He did not notice any slurred speech in the videos he watched. Also, based on the medical evidence provided, since the City did not file a brief, he could not "say with full confidence that Robinette's conviction should be affirmed."

To read the full opinion, click here:  
<http://courts.ms.gov/Images/Opinions/CO104712.pdf>

**November 24, 2015**

*Christopher Edward Thomas v. State*, No. 2014-KA-00243-COA (Miss.Ct.App. November 24, 2015)

**CASE:** Capital Murder and Conspiracy to Commit Armed Robbery  
**SENTENCE:** Life without parole and a consecutive 5 years.

**COURT:** Panola County Circuit Court  
**TRIAL JUDGE:** Hon. Smith Murphey

**APPELLANT ATTORNEY:** George T. Holmes  
**APPELLEE ATTORNEY:** Laura Hogan Tedder  
**DISTRICT ATTORNEY:** John W. Champion

**DISPOSITION:** Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur.

**ISSUE:** (1) Whether the evidence was sufficient for the conspiracy conviction, (2) whether the conspiracy verdict was against the weight of the evidence, (3) whether the evidence was sufficient for the capital murder conviction, (4) whether the trial court erred in excluding a co-conspirator's statement based on hearsay, (5) Pro se claim on whether there was newly discovered evidence, and (6) Pro se claim on whether Thomas received a fair trial.

**FACTS:** On the afternoon of May 3, 2013, several friends got together to drink and smoke marijuana. Among those present were DeShaun "Shaun" Alexander, John "Little John" Market, LaDaron "Little Bit" Taylor, Quendravious "Bug Eye" Taylor, and Christopher "Lucky" Thomas (Chris). Chris, LaDaron, and Quendravious eventually went to a dice game. Tovell "Taco" Henderson was one of several men shooting dice. Tovell won about \$1,250, and Chris lost all of his money. Christ told LaDaron he was mad and wanted to rob the whole dice game, but decided to only rob Tovell. There was a gun in the Jeep they were driving. Chris went to his mother's house and got another gun. Shaun and John remained in the jeep while the others went back to the dice game. Chris came out later with Tovell and got into his truck. LaDaron and Quendravious got in the Jeep with Shaun and John, and followed behind. LaDaron and Quendravious later joined Chris and Tovell in his truck. Quendravious testified that Tovell pulled out a wad of cash, and LaDaron jumped out of the truck and demanded it. Tovell rushed him and LaDaron shot him, grabbed the cash and he and Quendravious started running. They heard additional shots as they saw the Jeep and got in with Shaun and John. Two neighbors heard the shots. One saw a single shooter standing over a man on the ground, and another saw two men running, and then several gunshots. Chris later spoke to Quendravious on the phone, and told him he was hiding in a school bus and needed someone to pick him up. Chris hid the gun on the bus, but it was later found by a student. Four of five shell casings found at the scene came from this gun. According to Quendravious, he, John, LaDaron, and Chris later divvied up the stolen money. Tovell suffered seven different gunshot wounds. Chris was convicted of capital murder and conspiracy. He appealed.

**HELD:** (1) & (2) The circumstances, statements, and actions of the conspirators were sufficient to support the conviction. After Chris lost all his money to Tovell, Chris was mad and wanted to "get something back from Tovell." LaDaron testified that it was Chris's idea to rob Tovell, and that both guns used in the robbery belonged to Chris. Chris returned to the dice game armed with both guns. Chris later got in the truck with Tovell, while his co-conspirators followed close behind. LaDaron and Quendravious got into Tovell's truck with Chris. When Tovell pulled out a wad of cash, LaDaron jumped out and demanded all of Tovell's money. Tovell then wrestled LaDaron to the ground and at least one shot was fired immediately. LaDaron grabbed some cash and took off. The men later split the stolen money. The verdict was also not against the weight of the evidence.

(3) LaDaron admitted he demanded cash from Tovell, but when Tovell tackled him, LaDaron shot him once and ran. Quendravenous corroborated this. Both LaDaron and Quendravenous said they heard several more gunshots as they were fleeing. Chris was the only person left back at the truck when the last four or five shots were fired. A witness testified that she looked out the window, saw two men running, and then heard five to six gunshots. Chris's hands and palms contained gunshot residue. When LaDaron got into the jeep with Shaun and John, he immediately said Chris had killed someone. Finally, Chris hid on a school bus with one of the two murder weapons until early the next morning. Four of five shell casings recovered from the scene were fired from the gun that Chris admitted hiding on the bus.

(4) Chris argued that the circuit court erred in limiting his attorney's cross-examination of Shaun. Chris attempted to ask Shaun about statements made by Quendravenous. Before the statement of an alleged co-conspirator can be admitted as evidence, the trial court must determine that there is preliminary evidence of a conspiracy. Counsel declined to lay the predicate to establish the conspiracy and withdrew the question. The claim is waived.

(5) In his pro se supplemental brief, Chris insisted that newly discovered evidence shows he did not commit capital murder. He claimed the State withheld exculpatory evidence that LaDaron killed Tovell. Chris really presented no new evidence. He just asserts that had LaDaron told the truth, he would not have been convicted. LaDaron later pled guilty to manslaughter, but Chris has shown no evidence that LaDaron had a plea agreement in hand or was promised leniency for his testimony during or before Chris's trial. He additionally only speculates the State sponsored perjured testimony.

(6) Chris's last pro se argument mentions a shocking device he says he was required to wear at trial. However, the record indicates the trial judge allowed him to remove it.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108294.pdf>

***Synecca Malone v. State***, No. 2014-KA-00725-COA (Miss.Ct.App. November 24, 2015)

**CASE:** Sale of Alprazolam and Sale of less than 30 grams of Marijuana

**SENTENCE:** 20 years for the Alprazolam, and a concurrent 3 years for the marijuana, both as a habitual offender.

**COURT:** Desoto County Circuit Court

**TRIAL JUDGE:** Hon. Robert P. Chamberlin

**APPELLANT ATTORNEY:** George T. Holmes

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISTRICT ATTORNEY:** John W. Champion

**DISPOSITION:** Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the evidence was sufficient, and (2) whether the verdict was against the weight

of the evidence.

**FACTS:** On November 17, 2011, a CI named Rodanté Waldrup contacted Investigator Benjamin Swan of the Horn Lake PD, and told him a man named "QP" was selling marijuana and Xanax "bars." Investigators told Waldrup to make a controlled buy from QP. Waldrup contacted QP—later confirmed to be Synecca Malone—and Malone agreed to sell Waldrup an ounce of marijuana and four Xanax bars for \$120. The next day, Waldrup met with Swan and Detective Nicki Pullen. The officers searched Waldrup and his car for money and drugs and gave him \$120 in cash. They also wired him with electronic-surveillance equipment. Officers followed Waldrup to the buy location, but parked across the street to watch the transaction. The officers saw Waldrup park, get out of his vehicle, and get into Malone's car with Malone. Malone sold Waldrup an ounce of marijuana and four Xanax tablets for \$120. Waldrup then returned to his own car and met officers at a post-buy location. Waldrup handed over the drugs and gave a statement about the drug sale. Officer Charles Strauser then initiated a traffic stop of Malone. His driver's license was expired and he was arrested. Strauser then patted down Malone and felt something in his pants pocket. Malone gave the officer permission to search his pockets. Inside he found two bundles of cash—one containing \$120 and the other \$123. The \$120 was the pre-recorded buy money. Malone was convicted of selling Xanax and marijuana. He appealed.

**HELD:** (1) and (2) The evidence was sufficient. In addition to Waldrup's testimony and his statement, the video of the transaction was admitted. The video showed Waldrup enter Malone's car. Swan also testified he saw the two men meet inside Malone's car. Immediately after the buy, Waldrup handed over the drugs, later determined to be 22.9 grams of marijuana and four dosage units of alprazolam (Xanax). The cash found on Malone matched the recorded money given to Waldrup to make the buy. Waldrup's credibility was for the jury to determine.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108289.pdf>

***Jerry Deuntay Carr v. State***, No. 2014-KA-01481-COA (Miss.Ct.App. November 24, 2015)

**CASE:** Capital Murder

**SENTENCE:** Life w/o Parole

**COURT:** Coahoma County Circuit Court

**TRIAL JUDGE:** Hon. Charles E. Webster

**APPELLANT ATTORNEY:** George T. Holmes, Erin Elizabeth Pridgen

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISTRICT ATTORNEY:** Brenda Fay Mitchell

**DISPOSITION:** Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Fair, James and Wilson, JJ., Concur. Barnes, J., Concur in Part and in the Result.

**ISSUES:** (1) Whether the testimony of a technical reviewer in place of the actual analyst who conducted the DNA test, violate the Confrontation Clause, (2) whether the trial court erred in

randomly selecting the alternate jurors from the whole panel.

**FACTS:** On the afternoon of July 29, 2010, the Simmons Package Store in Friars Point was robbed. Police found Gerald Simmons lying on the floor behind the cash register, badly injured. (He died 8 days later). That same afternoon, Tyonda Tinner watched her roommate, Brymon Hamp, and Hamp's friend, Jerry Carr, walk toward Friars Point. They returned 30 minutes later with a case of gin, which they loaded in the back of Hamp's black Chevrolet Caprice. Hamp started spending money around town—getting his cell phone turned back on, replacing his spare tire, and paying a gas bill he owed Tinner. Hamp told Tinner he had robbed Simmons, knocking him on the head to get the money out of Simmons's pocket. Carr said he was the one who stole the money from the cash register. Police were on the lookout for a Caprice and stopped Hamp. Deputies noticed the case of gin, along with a bottle of vodka. They also saw blood on Hamp's shoe. They arrested both Hamp and Carr and collected their clothes and shoes. These items were sent to the Crime Lab. Hamp's clothes tested positive for blood, which later was matched to Simmons's DNA. At the time of arrest, Hamp had \$304 in cash, and Carr had \$282. The DNA analyst, Alexandria Bradley, who concluded the blood taken from Hamp's clothes, and who matched the known DNA sample from Simmons, did not testify. Instead, Section Chief William Jones, who served as the technical reviewer of the test, testified for the State. Carr was convicted and appealed.

**HELD:** (1) Carr first argues the circuit judge erred by permitting Williams Jones to testify about the DNA report linking the blood on Hamp's clothing to the victim. Jones observed the analyst conduct a DNA test and testified about the results, which he verified before he signed the report. Jones's testimony did not violate the Confrontation Clause. Based on Jones's personal knowledge about the testing process and the resulting DNA report, any questions Carr may have had about the accuracy of the testing or report could have been put to Jones on cross-examination. Further, Jones was accepted as a DNA expert. He testified, based on the DNA profiles generated by Bradley, the samples from Hamp's shoe and the victim matched. “Thus, the incriminating testimonial statement—that the two profiles matched—came from Jones.”

(2) Carr also claimed that the circuit judge abused his discretion by utilizing a "paper cup" to select alternates. Since Carr did not object to this at trial, the claim was reviewed under the plain error doctrine. Both statute and rule (§ 13-5-67; URCCC 4.05, 10.01) do not provide for waiting until the end of trial to randomly select alternate jurors. However, even if selected in "an irregular manner," the jury here was a legal jury with the authority to render a verdict against Carr.

Even if error, Carr failed to show how the irregularities affected his fundamental, substantive rights or otherwise led to a manifest miscarriage of justice for plain error. Carr made no assertion his Sixth Amendment right to an impartial jury was violated due to the jury-selection process. As long as the jury that sat was impartial, the fact that Carr had to pool his regular and alternate peremptory challenges to achieve that result does not mean his Sixth Amendment rights were violated.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108290.pdf>

*Calvin Hunter v. State*, No. 2014-KA-00508-COA (Miss.Ct.App. November 24, 2015)

**CASE:** Attempted Aggravated Assault on a Law Enforcement Officer x2

**SENTENCE:** Count I, 20 Years, and Count II, a consecutive 15 years

**COURT:** Newton County Circuit Court

**TRIAL JUDGE:** Hon. Marcus D. Gordon

**APPELLANT ATTORNEY:** P. Shawn Harris

**APPELLEE ATTORNEY:** Scott Stuart

**DISTRICT ATTORNEY:** Mark Sheldon Duncan

**DISPOSITION:** Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Maxwell, Fair and Wilson, JJ., Concur. Barnes, J., Concur in Part and in the Result Without Separate Written Opinion. James, J., Concur in Part Without Separate Written Opinion.

**ISSUE:** Whether the verdict was against the weight of the evidence.

**FACTS:** On August 27, 2013, Calvin Hunter got into an argument with Thelma Hunt, with whom he was living at the time. Hunter returned home after drinking, and the two began to argue. Hunt asked Hunter to leave her home, and Hunter refused. She threatened to call the police. Hunter replied that he would kill her and the police if she made the call. Despite Hunter's threats, Hunt called police. Officers David Boatner and Jacob Moore arrived and were let into the house by Hunt. The officers encountered Hunter standing in the hallway. Hunter cursed at the officers, and told them he was not going anywhere and that he was going to kill them. Hunter was told he was under arrest. He then lunged into the bedroom, landed on his back on the bed, and slid his right hand underneath a pillow. Thinking that Hunter was reaching for a weapon, Moore tased Hunter. After a struggle, the officers succeeded in securing Hunter's hands with handcuffs. When Boatner looked under the right-hand pillow where Hunter had slid his hand, he found nothing. However, when Boatner searched under the pillow on the left side of the bed, he found an open knife with its blade exposed. Hunt said the knife belonged to her. She said she usually kept the knife closed and in a bowl that sat on a shelf at the head of her bed. Hunter claimed he never cursed at the officers or threatened them. Hunter said that he was merely reaching for his cigarettes when Moore tased him. He denied trying to reach for the knife Hunt kept near the bed. He was convicted and appealed.

**HELD:** Based on the evidence, the jury could have reasonably found that Hunter intended, and was attempting, to cause serious bodily injury or death to Boatner and Moore by resisting arrest, threatening to kill them, lunging on the bed, and reaching for Hunt's knife. In addition, the jury could have found that Moore's action of tasing Hunter constituted an extraneous event that intervened and prevented Hunter from carrying out his intended aggravated assault upon the officers.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107751.pdf>

*Anthony Lafayette v. State*, No. 2014-KA-00944-COA (Miss.Ct.App. November 24, 2015)

**CASE:** Manslaughter

**SENTENCE:** 20 years

**COURT:** Bolivar County Circuit Court  
**TRIAL JUDGE:** Hon. Albert B. Smith, III

**APPELLANT ATTORNEY:** W. Daniel Hincheliff  
**APPELLEE ATTORNEY:** LaDonna C. Holland  
**DISTRICT ATTORNEY:** Brenda Fay Mitchell

**DISPOSITION:** Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the evidence was sufficient to prove manslaughter, (2) whether the verdict was against the weight of the evidence, and (3) Pro se claim of whether the jury was properly instructed on self-defense.

**FACTS:** On October 20, 2007, Anthony Lafayette and his brother, Alan, were at a nightclub called Club Checkers. An altercation erupted between Lafayette and Zerensky Webb, and after that, Earnest Booth pulled up his shirt and showed Lafayette a gun that was tucked in Booth's waistband. No one saw Booth remove the gun from his waistband. Lafayette drew his gun and shot twice in the air before it jammed. Several witnesses confirmed that Lafayette had only fired two shots into the ceiling. Timothy Mays, the club's security guard, testified that he saw Lafayette and Booth standing on the dance floor and Lafayette holding a handgun. Mays stated that Lafayette's gun looked like it had jammed. Mays attempted to calm Lafayette and to get him to leave the club peacefully. Mays testified that after Alan shoved him out of the way, he saw Lafayette shoot Booth in the face. Lafayette then dropped his gun and left the club. Lafayette later turned himself in, admitting that he had shot Booth in the face after Booth had revealed his gun.

**HELD:** (1) Lafayette claimed that the State failed to prove that he killed Booth in the heat of passion. There was evidence that an altercation between Lafayette and Webb (and possibly Booth) occurred at the club, that a beer bottle was thrown, and that Lafayette responded by shooting his gun into the air at least twice. Booth showed Lafayette the weapon that was concealed in his waistband. Mays testified that he attempted, for several minutes, to calm Lafayette and to get him to leave the building. However, instead of leaving the club, Lafayette shot and killed Booth. The evidence was sufficient.

(2) Lafayette's chief argument is that because Booth had a gun, the jury should have found that he had acted in self-defense. However, there was no testimony that Booth made any overt act toward Lafayette other than raising his shirt to reveal the gun that was tucked into his waistband, and there was no testimony that Booth attempted to remove the gun from his waistband.

(3) Lafayette argued that the jury was not properly instructed regarding self-defense. However, he failed to object to the self-defense instructions given. The claim is waived. The jury was told that the State was required to prove that the shooting of Booth was "not in necessary self-defense." Additionally, D-14 instructed the jury to acquit Lafayette if the State had failed to prove beyond a reasonable doubt that he had not acted in self-defense when he shot Booth. Because it is clear that the jury was properly instructed, there is no plain error.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108804.pdf>

**Brandon P. Smith v. State**, No. 2013-KA-01517-COA (Miss.Ct.App. November 24, 2015)

**CASE:** Possession of a Firearm by a Convicted Felon

**SENTENCE:** 10 years as a habitual offender

**COURT:** Leake County Circuit Court

**TRIAL JUDGE:** Hon. Marcus D. Gordon

**APPELLANT ATTORNEY:** Edmund J. Phillips Jr., Christopher A. Collins

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISTRICT ATTORNEY:** Mark Sheldon Duncan

**DISPOSITION:** Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the trial judge erred in denying his motion for a directed verdict, (2) whether the trial judge erred in refusing his request for a peremptory instruction, and (3) whether the trial judge erred in denying his motion for a new trial.

**FACTS:** On February 21, 2012, Joe Handy Helton's business was burglarized. One of his trucks on the property also had a shotgun stolen from it. Brandon Smith became a suspect due to his involvement in the sale of the stolen shotgun. Shawn Bell, a friend of Smith's, testified that Smith had contacted him and asked him to see if anyone wanted to purchase a shotgun. According to Bell, LaWilliam Holmes told him that he was interested. Smith and Bell went to Gary McCraney's house, where Smith lived, to pick up the gun. Bell saw Smith with the gun when Smith returned to the car. They then headed to Holmes's house. Smith handed Holmes the gun in return for \$60. At trial, Holmes did not recall Bell calling him about purchasing a gun. He confirmed that he bought the gun, but he testified that he gave the money to Bell. However, he did see Smith hand the gun to Bell. Finally, McCraney testified that he saw the gun at his house and assumed it was Smith's gun. Smith told him that he had taken the gun from Helton's building. Smith also told him about the damage that Smith had done to the building. McCraney confirmed seeing Smith leave his house with the gun. Smith testified and admitted that he had been convicted of burglarizing Helton's building in 2009, but he denied burglarizing it in 2012. He also testified that he did not break into the truck, steal the gun, or sell a shotgun to Holmes. Smith further testified that he did not know Holmes and that he did not recall telling McCraney details of the burglary incident. Smith was acquitted of business burglary and motor-vehicle burglary, but convicted of possession of a firearm by a convicted felon. He appealed.

**HELD:** (1) and (2) Smith argued that the State failed to meet its burden to prove that he had "dominion and control" over the shotgun. McCraney and Bell testified that they saw Smith in actual possession of the shotgun. Admittedly, Holmes and Bell differed in some aspects of their testimonies, but both testified that at some point they saw Smith in possession of the shotgun. A reasonable juror

could find beyond a reasonable doubt that Smith was guilty of possession of a firearm by a convicted felon.

(2) Smith also argued that the circuit court erred in denying his motion for a new trial. “However, Smith has done no more than assign the error because he did not discuss the facts, nor has he attempted to show how the verdict was against the weight of the evidence. Additionally, he has not cited any authority in support of this argument.” The claim is procedurally barred and is also without merit.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108803.pdf>

*Marlene Zerne McCoy v. State*, No. 2014-KA-01253-COA (Miss.Ct.App. November 24, 2015)

**CASE:** Felony DUI

**SENTENCE:** 5 years

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Lawrence Paul Bourgeois, Jr.

**APPELLANT ATTORNEY:** Justin Taylor Cook

**APPELLEE ATTORNEY:** Billy L. Gore

**DISTRICT ATTORNEY:** Joel Smith

**DISPOSITION:** Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Fair and James, JJ., Concur. Maxwell and Wilson, JJ., Concur in Part and in the Result Without Separate Written Opinion.

**ISSUES:** (1) Whether the trial judge erred in refusing defense theory of defense instructions, (2) whether McCoy was properly indicted for Felony DUI.

**FACTS:** On October 2, 2012, Marlene McCoy was stopped by police on suspicion of drunk driving. Instead of conducting any field sobriety tests, the officer took McCoy to a hospital and offered her a blood test. She refused and was charged with DUI Refusal, careless driving, and driving without a license. The officer obtained a search warrant for a sample of McCoy's blood, which revealed that she had a BAC of .04% and many controlled substances in her blood, including marijuana, Soma, Meprobamate, Carisoprodol, Tramadol, Diazepam, Hydrocodone, and Nordiazepam. McCoy later pled guilty in municipal court to careless driving. She was subsequently indicted for Felony DUI. She was convicted and appealed.

**HELD:** (1) McCoy requested instructions of reckless driving, arguing that if the jury did not find she was under the influence, it could find her guilty of reckless driving. She admitted driving recklessly, but claimed she was not doing so based on the influence of drugs. Apparently, the trial found that since McCoy had pled guilty to careless driving, a lesser-included offense to reckless driving, allowing the jury to consider a reckless driving verdict would violate double jeopardy. The COA, however, simply found no evidentiary basis for the reckless driving instructions.

McCoy admitted that she had alcohol and several other drugs in her blood and that she was swerving and driving recklessly when she was stopped by the officer. However, her claim that she was not under the influence was based on her testimony alone. McCoy was not an expert toxicologist. The State refuted McCoy's claim through the expert testimony of Duriel McKinsey, a forensic toxicologist. He testified on not only to how long some of the drugs found in McCoy's blood remain effective in the human body but also to the addictive effect of the drugs when taken together. McCoy's incompetent testimony was insufficient to provide an evidentiary basis for the instructions.

Even if there was a factual basis, reckless driving is not a lesser-included offense to Felony DUI. Lesser offense instructions, as opposed to lesser-included offenses, are no longer a unilateral right of a defendant.

(2) The State did not improperly indict McCoy for Felony DUI because one of her priors was an aggravated DUI conviction under §63-11-30(5). A violation of §63-11-30(5) encompasses a violation of §63-11-30(1). The record establishes that McCoy committed three separate DUI offenses within a five-year time frame.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108820.pdf>

**December 1, 2015**

*Duane John v. State*, No. 2013-KA-02001-COA (Miss.Ct.App. December 1, 2015)

**CASE:** DUI Manslaughter x6

**SENTENCE:** 15 years on each count, consecutively, and with 15 years suspended, for a total of 75 years to serve

**COURT:** Lafayette County Circuit Court

**TRIAL JUDGE:** Hon. Marcus D. Gordon

**APPELLANT ATTORNEY:** P. Shawn Harris

**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss

**DISTRICT ATTORNEY:** Benjamin F. Creekmore

**DISPOSITION:** Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Maxwell, Fair and Wilson, JJ., Concur. James, J., Concur in Part and Dissents in Part Without Separate Written Opinion.

**ISSUES:** (1) Whether the trial court erred in finding John voluntarily consented to his blood being tested, and (2) whether the verdicts were against the weight of the evidence.

**FACTS:** On the evening of December 28, 2012, Duane John left his sister's house in Philadelphia, Mississippi, and got into his vehicle along with his girlfriend, two other adults, and John's five children. While trying to pass another vehicle on the road, John lost control of his vehicle, causing it to flip over and sink into a creek. John, his girlfriend, and another adult, were able to climb out

of the vehicle. One adult, Diane Chickaway, along with John's five children, died as a result of the accident. Jonathan Spears, a DUI officer for the Neshoba County Sheriff's Department, responded to the scene of the accident. Spears testified that after the wrecker pulled John's vehicle from the creek, he observed several alcoholic-beverage boxes, cans, and bottles inside of the vehicle. Investigator Kevin Baysinger went to the hospital and informed John that law enforcement suspected that he was under the influence of alcohol at the time of the accident. John signed a consent form allowing for a blood sample to be drawn. (At the suppression hearing, John denied giving consent). Baysinger admitted that he did not read John his *Miranda* rights before John consented to have his blood drawn. Baysinger knew John from his previous DUI arrest. John's BAC was .18%. On December 31, 2012, after John had been discharged from the hospital, Spears interviewed John at the Neshoba County Jail. John provided a statement wherein he admitted to purchasing and drinking beer on the night of the accident.

**HELD:** (1) The trial judge did not err in finding John voluntarily consented to the blood draw. John claimed he was never told he had a right to refuse. Baysinger testified that he told John that since fatalities occurred in the accident, law enforcement needed to draw blood from all of the drivers involved. He then asked John if he would consent to having his blood drawn. John agreed and signed the form. John was not under arrest or in custody at the time he consented to the drawing and testing of his blood; rather, John provided his consent in writing while at the hospital in a noncustodial environment. John also makes no argument or assertion that he revoked consent at any time or attempted to revoke consent. The trial judge did not abuse his discretion in finding that, under the totality of the circumstances, John's consent was valid.

(2) The verdicts were not against the weight of the evidence. Spears testified that he observed several alcoholic-beverage boxes, cans, and bottles inside of John's vehicle. Baysinger testified that he met with John at the hospital, and informed him that police suspected that he was under the influence of alcohol at the time of the accident. John then verbally agreed and signed a consent form for a blood draw. John later provided a statement admitting that he purchased and consumed alcohol on the night of, and prior to, the accident. His BAC was 0.18%. The cause of death for all six passengers was drowning.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108446.pdf>

**Ronald Joseph Galloway v. State**, No. 2014-KA-00328-COA (Miss.Ct.App. December 1, 2015)

**CASE:** Possession of less than 30 grams of Marijuana with intent to distribute within 1,500 feet of a public park

**SENTENCE:** 20 years as an habitual offender

**COURT:** Hancock County Circuit Court

**TRIAL JUDGE:** Hon. Lawrence Paul Bourgeois, Jr.

**APPELLANT ATTORNEY:** Benjamin A. Suber

**APPELLEE ATTORNEY:** Laura H. Tedder

**DISTRICT ATTORNEY:** Joel Smith

**DISPOSITION:** Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the evidence was sufficient to support the verdict, and (2) whether the circuit court erred by admitting his confession into evidence.

**FACTS:** On August 26, 2011, Bay St. Louis Police were working with a confidential informant who was performing "buy-walk operations." While the informant was biking through Martin Luther King Jr. public park, he was flagged down by a man later identified as Ronald Joseph Galloway. Although the CI said he was looking for cocaine, Galloway offered to sell him marijuana. The CI said he would come back later with money. The CI then gave police a description of the man. Officers Randall Darty and Don Gray went to the park and found a man matching the CI's description. The man refused to identify himself and finally fled. As he ran, he dropped a brown paper bag containing smaller bags of marijuana. While searching for the man, detectives saw Galloway, who matched the description of the suspect. Galloway was breathing heavily and sweating. Darty identified Galloway as the man who fled from him in the park. Galloway was arrested, read his rights, and taken to the police station. He informed the detectives that he had a fifth-grade education and could not read or write. Detective Robert O'Neal read the right's form to him. Galloway signed the waiver-of-rights form. He was then videotaped and audiotaped while he admitted to possessing the marijuana in question with an intent to sell it. Galloway's motion to suppress the confession was denied. He was convicted and appealed.

**HELD:** (1) Both the informant and Officer Darty witnessed Galloway with the brown paper bag in his hand. The informant observed Galloway retrieve the brown paper bag from a nearby garbage can in the park as Galloway was offering to sell marijuana. Darty witnessed Galloway drop the bag in the park while being chased. Further, Galloway admitted to having possessed the marijuana in question and also admitted that his intent was to sell the marijuana in the park.

(2) Galloway's inability to read and write did not prohibit him per se from understanding his rights. He was read his *Miranda* rights on at least two separate occasions and was also read the form outlining both his rights and the consequences of waiving those rights should he confess. The circuit judge saw the videotaped confession and heard the testimony of Detective O'Neal, who had personally explained to Galloway his rights. The trial judge's decision to admit the confession is supported by the record.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107259.pdf>

**December 8, 2015**

*Adrel Ryan Tutwiler v. State*, No. 2014-KA-00645-COA (Miss.Ct.App. December 8, 2015)

**CASE:** Aggravated Assault

**SENTENCE:** 20 years with 2 suspended and 2 years on PRS

**COURT:** Forrest County Circuit Court  
**TRIAL JUDGE:** Hon. Robert B. Helfrich

**APPELLANT ATTORNEY:** Grady Morgan Holder, Robert L. Sirianni, Jr.

**APPELLEE ATTORNEY:** Barbara Wakeland Byrd

**DISTRICT ATTORNEY:** Patricia A. Thomas Burchell

**DISPOSITION:** Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Maxwell, Fair and Wilson, JJ., Concur. James, J., Concur in Part Without Separate Written Opinion.

**ISSUES:** (1) Whether the trial court erroneously refused Tutwiler's peremptory instruction and denied his motion for a JNOV or, in the alternative, a new trial, (2) whether the trial court erred in giving an instruction on voluntary intoxication when the issue was not raised at trial, and (3) whether the trial court erred in denying Tutwiler's oral motion for a continuance.

**FACTS:** Adrel Ryan Tutwiler was convicted of aggravated assault for the shooting of Tranongras Hallmon. Tutwiler and Hallmon were USM students who shared an apartment. Apparently their relationship deteriorated in the spring of 2012. Hallmon went home for the summer while Tutwiler stayed in the apartment. On August 20, 2012, Tutwiler hosted a small gathering with three friends when Hallmon returned to the apartment. Hallmon asked the partiers to stop smoking inside, then began bringing his belongings into the apartment. While he was putting his groceries in the refrigerator, Tutwiler confronted him about removing some of his food. During this argument, Tutwiler pulled a gun, and the two men wrestled for control of the gun. At least three shots were fired in the kitchen area before Hallmon ran from the apartment. Tutwiler chased Hallmon and fired at least one shot outside. The eyewitness accounts vary on the number of shots fired, where the shots occurred, and whether Tutwiler purposely aimed at Hallmon. After the incident, Hallmon went to the hospital with several gunshot wounds. Tutwiler was convicted of aggravated assault and appealed.

**HELD:** (1) Tutwiler claimed the State did not prove that he did not act in necessary self-defense. All of the witnesses testified that Tutwiler possessed the gun, and Hallmon did not have a weapon of any kind. Further, all of the witnesses heard at least one gunshot inside the kitchen and at least one gunshot outside, although the exact number of shots in each location varied. Three bullet casings were found in the kitchen and one outside. Tutwiler admitted he shot Hallmon. The State presented sufficient evidence for the jury to find Tutwiler guilty.

Tutwiler also claimed the State failed to prove Hallmon suffered four gunshot wounds. However, Hallmon testified he received four gunshot wounds, and several witnesses stated Hallmon was wounded at the scene. Even one of Tutwiler's witness testified he saw Hallmon with at least three wounds at the hospital the evening of the incident. This was sufficient.

The verdict was not against the weight of the evidence. The State presented evidence that Tutwiler possessed the gun, Hallmon was unarmed, gunshots occurred in the kitchen and outside, Tutwiler pursued Hallmon, and Hallmon received four gunshot wounds.

The State sufficiently proved Tutwiler did not act in necessary self-defense. Hallmon did not have a weapon. Tutwiler could not explain why he feared for his life, ran after Hallmon, or fired a shot outside after the fight essentially ended. Though he had allegedly fought with Hallmon in the past, Tutwiler provided no reason for his belief that Hallmon would harm him.

(2) The trial court did not err in giving an instruction on voluntary intoxication. The court found ample evidence of possible intoxication as all of the witnesses at the scene testified to the presence of alcohol, and Tutwiler admitted he consumed alcohol before the altercation.

(3) After the State's first three witnesses, Tutwiler sought a continuance because he felt uncomfortable with his attorney and believed his attorney did not prepare. Counsel responded that he had time to prepare for the case. (He was appointed seven months before trial). Counsel had requested and had been given one prior continuance. Tutwiler primarily argues prejudice due to his attorney's failure to meet with him prior to the morning of trial. However, Tutwiler did not show how this delayed meeting resulted in prejudice.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108280.pdf>

***Joseph Moss v. State***, No. 2014-KA-00919-COA (Miss.Ct.App. December 8, 2015)

**CASE:** Manslaughter x2

**SENTENCE:** Two 20 year term to be served consecutively

**COURT:** Wayne County Circuit Court

**TRIAL JUDGE:** Hon. Robert Walter Bailey

**APPELLANT ATTORNEY:** George T. Holmes, Phil Broadhead, and the Ole Miss Appeals Clinic

**APPELLEE ATTORNEY:** Billy L. Gore

**DISTRICT ATTORNEY:** Bilbo Mitchell

**DISPOSITION:** Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the trial judge erred in denying his motion for a directed verdict and JNOV or, in the alternative, a new trial; (2) whether the trial judge erred in overruling his objection pursuant to Mississippi Rule of Evidence 404(b); (3) whether the trial judge erred in overruling his objection pursuant to Mississippi Rules of Evidence 106 and 1002; and (4) whether the trial judge erred in admitting evidence of his involuntary confession.

**FACTS:** On January 18, 2013, Joseph Moss and Donald True was asked by Moss's sister to leave her apartment. With no transportation, Moss contacted his mother to pick him up. True contacted Tyrone Clemons and Fredrick Hammock to pick him up. While waiting for his mother, Moss, True, Clemons, and Hammock went to the store in Hammock's car for alcohol and cigarettes. During the trip, Moss noticed a gun in the armrest of the car. Throughout the day, Clemons and Hammock were

verbally aggressive towards Moss. That evening, Moss returned to the car and obtained the gun he noticed earlier. After concealing the gun under his jacket, Moss walked toward the back of the car. At this point, either Clemons or Hammock moved towards Moss and, with his hands in his pockets, yelled: "Man, f\*\*\* this s\*\*\*. Man, come here!" Moss shot Clemons six times and shot Hammock seven times before fleeing. No weapons were found on either Clemons or Hammock. Moss later called his ex-girlfriend's mother, Dawn Young, and stated that he had "nothing to lose" and was coming to "teach her [daughter] a lesson" for breaking up with him. According to Young, Moss indicated he had nothing to live for. Moss later called his ex-girlfriend and told her "he had shot two people and . . . was coming for [her]." Moss finally turned himself in two days later.

**HELD:** (1) The evidence was sufficient and the verdict was not against the weight of the evidence. Moss argued the evidence showed that he killed Clemons and Hammock in self-defense. However, Moss shot Clemons six times (five of which were in the back) and shot Hammock seven times (four of which were in the back) at a distance of greater than three feet; Moss fled the scene after the shooting; no weapons were found on either Clemons or Hammock; Moss said to Young that he had "nothing to lose" and was going to "teach her [daughter] a lesson"; and finally, Moss stated to his ex-girlfriend "he had shot two people, and . . . was coming for [her]."

(2) Moss claimed Young's testimony was inadmissible under Rule 404(b). However, Moss failed to object to her testimony, so the claim is waived. Regardless, Young's testimony was not about a past crime, but was essentially about different parts of the same crime. Because Young's testimony was so interrelated to the charged crime and because it was necessary to prove state of mind, it was both relevant and admissible.

(3) Moss next claimed the State should have been required to play the video of his interview in its entirety pursuant to Rule 106. Moss possessed the ability to play any portion of the video during the defense's case-in-chief; however, Moss rested without presenting any evidence. The jury had access to the entire video during deliberations. Further, Moss claimed that an officer should not have been able to testify as to the substance of the video pursuant to the best-evidence rule. MRE 1002 does not exclude the officer's testimony because he participated in the interview and had firsthand knowledge of the facts. The existence of a video does not exclude the direct testimony of a witness.

(4) Moss did not move to suppress his confession or challenge its admissibility at trial based on its involuntary nature. Therefore, Moss is procedurally barred from raising this issue on appeal.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108035.pdf>

**Gregory Woods v. State**, No. 2014-KA-01167-COA (Miss.Ct.App. December 8, 2015)

**CASE:** Burglary of a Dwelling

**SENTENCE:** 25 years as a habitual offender

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Roger T. Clark

**APPELLANT ATTORNEY:** George T. Holmes  
**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss  
**DISTRICT ATTORNEY:** Joel Smith

**DISPOSITION:** Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** Whether the evidence was sufficient and whether the verdict was against the weight of the evidence.

**FACTS:** On March 2, 2014, Sherri Ann McNulty was awakened around 4 a.m. by a loud noise outside her house in Biloxi. She believed the noises were coming from her neighbor's house and called police. Police arrived and also heard loud banging inside the house. The lights were off inside the house. Woods opened the door and explained that he had just moved into the house and was moving furniture around. About the same time, another officer was walking around outside of the house and noticed a broken window. The window pane had been removed and a trash can was underneath the window. A concrete rock was on the ground by the trash can with shattered glass around it. Woods stated that the house had been left to him by his grandmother. Other than a prescription bottle with his name on it, Woods was unable to provide identification or proof to confirm his claim. The owner of the property, Tony Eckwood, was located. After viewing the house, Eckwood noticed furniture and smaller items had been moved, including weapons and other valuables. Woods was convicted and appealed.

**HELD:** Woods argued the State did not prove that he intended to commit a crime, only that he was present at the house. Woods was found in the victim's home without permission. There was evidence of a breaking and entering. Viewing the evidence in the light most favorable to the State, we find that there was sufficient evidence for the jury to convict Woods of burglary of a dwelling.

To read the full opinion, click here:  
<http://courts.ms.gov/Images/Opinions/CO108186.pdf>

*William Michael Jordan v. State*, No. 2014-KA-00615-COA (Miss.Ct.App. December 8, 2015)

**CASE:** Depraved Heart Murder and Felon in Possession of a Firearm

**SENTENCE:** For Murder, 35 years, with 5 suspended and 5 years PRS, and a concurrent 10 years for felon in possession

**COURT:** Lauderdale County Circuit Court  
**TRIAL JUDGE:** Hon. Robert Walter Bailey

**APPELLANT ATTORNEY:** Charles W. Wright, Jr., Rebecca Taff Wright  
**APPELLEE ATTORNEY:** LaDonna C. Holland  
**DISTRICT ATTORNEY:** Bilbo Mitchell

**DISPOSITION:** Affirmed. Maxwell, J., for the Court. Irving and Griffis, P.JJ., Barnes, Carlton and James, JJ., Concur. Fair, J., Dissents with Separate Written Opinion, Joined by Lee, C.J., and Ishee,

J.; Wilson, J., Joins in Part.

**ISSUES:** (1) Whether the trial court erred in admitting a rap music video as evidence defendant intended to intimidate witnesses, (2) whether the trial judge erred in allowing an investigator to testify about the video and his investigation, (3) whether the trial judge erred in denying an alibi instruction and a cautionary instruction on accomplices, and (4) whether the evidence was sufficient and whether the verdict was against the weight of the evidence.

**FACTS:** Late in February 2012, Aaron Coleman's mother reported him missing. Coleman's car was soon found outside of Meridian. Several days later, Coleman's body was discovered in the woods near I-20. Coleman was last seen alive on February 27 at William Jordan's house. When questioned, Jordan confirmed Coleman had stopped by that day, had only stayed a few minutes. After that, Jordan supposedly never saw him again. Charlie Henderson and Bobby Baker—longtime friends of both Coleman and Jordan—had also been at Jordan's house that evening. And they gave similar stories to the police. The police were told they should also question JaMichael Smith, because he had been at Jordan's house that night too. But Smith quickly left Meridian late that night on a Greyhound bus headed for Michigan. A year later, Smith was extradited from Michigan to Mississippi. He then told police that he was at Jordan's house with Coleman, Henderson, and Baker on February 27<sup>th</sup>. He saw Jordan waiving a shotgun around and left the room. He then heard a gunshot, saw Coleman bent over, and fled. Once Smith was in custody, Baker came forward too. He saw Jordan shoot Coleman in the stomach. Coleman was alive for some time while Jordan and Henderson debated on what to do. Ultimately, he helped Jordan dump Coleman's body. They later burned their clothes and Coleman's wallet and cell phone at Henderson's house. Jordan and Henderson were indicted for murder, but Henderson requested a severance. Smith and Baker were charged as accessories after the fact and testified against Jordan. The trial judge later allowed a YouTube music video into evidence with showed Henderson rapping (with a brief appearance of Jordan), about retribution against snitches as evidence that Jordan tried to keep Smith and Baker from testifying. Jordan was convicted of second degree murder and being a felon in possession of a weapon. He appealed.

**HELD:** (1) The trial court did not err in admitting evidence that Jordan and Henderson threatened the two eyewitnesses to Jordan's murder of Coleman by participating in a rap video about killing snitches, after the two witnesses had implicated Jordan and Henderson, but before Jordan's trial commenced. The COA only addressed the claims regarding the video that counsel raised at trial.

The YouTube video was relevant. The video was posted after Smith and Baker had given statements incriminating Jordan and Henderson. Smith and Baker both testified that they felt threatened by the video. Because Jordan willingly participated in the video, it was probative of witness intimidation and was evidence showing a consciousness of guilt. The State did not merely introduce the video as bad-character evidence, but as evidence that Jordan tried to prevent Smith and Baker from testifying.

The video was also properly authenticated. Before admitting the video, the State questioned MBI investigator Danny Knight. Knight testified that Baker's counsel alerted him to a threatening video on YouTube. He downloaded a copy of it on CD. “Based on his testimony, we find Knight had sufficient knowledge to authenticate that the video was what the State claimed it to be—a video published on YouTube featuring Jordan and Henderson.” Not knowing when the video was made,

who produced it, or when it was published on the internet, did not go to admissibility, but to the weight of the evidence.

(2) Additionally, it appears Knight misspoke when he first testified that the video contained a "reenactment . . . of the killing of Aaron Coleman." Knight later testified, "in [his] opinion," that the final scene depicts getting a witness, "which is Mr. Baker," into the woods and killing him for turning. This was strictly Knight's opinion, as he had no firsthand knowledge. The COA found Knight's narration to be harmless error.

Further, Knight's testimony about the investigation was not improper. Knight was not improperly giving lay opinion about the truthfulness of Smith, Baker, or Jordan. Instead, he was testifying about matters within his personal observation—namely, why the investigation of Coleman's death heated up and pivoted toward Jordan, after almost a year later.

(3) The trial judge did not err in denying an alibi instruction. Jordan's alibi consisted of his girlfriend testifying Jordan did not shoot Coleman and dispose of his body. According to the State's case, the scene of the shooting was Jordan's home. Jordan's defense did not place him in a location other than the scene of the crime. Therefore, Jordan's claim that Coleman was not shot in his house was a denial, not an alibi.

The trial judge did not err in denying a cautionary instruction on accomplices. Smith and Baker were not accomplices, but accessories after the fact.

(4) The testimony of both Smith and Baker were sufficient to convict Jordan. Baker further testified Jordan turned the gun on him to prevent Baker from calling for an ambulance, exhibiting an indifference to Coleman's life. Smith and Baker corroborated each other. Additionally there was evidence Jordan tried to intimidate these witnesses once they started cooperating. Moreover, Baker's testimony was corroborated by the fact Coleman's phone stopped emitting a signal at the time Baker said it was burned, and police found a metal barrel used for fires outside Henderson's home.

**Fair, J., Dissenting:**

In a lengthy dissent, Judge Fair believed it was improper to allow the State to bolster its case with the YouTube video. He believed counsel sufficiently preserved all claims regarding the video. The video was allowed into evidence based on false or misleading testimony, and the prosecution failed to ever establish the proper predicate to introduce it under Rule 404(b). Jordan was tried and convicted solely on the word of two witnesses who did not implicate him until more than a year after Coleman's death, and only after being arrested themselves. He believed the prosecution's improper bolstering of its case with the rap video denied Jordan a fair trial.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109290.pdf>

*Cornelius Parks v. State*, No. 2014-KM-01675-COA (Miss.Ct.App. December 8, 2015)

**CASE:** Misdemeanor Domestic Violence

**SENTENCE:** Fine and court costs only

**COURT:** Kemper County Circuit Court

**TRIAL JUDGE:** Hon. Robert Walter Bailey

**APPELLANT ATTORNEY:** David H. Linder

**APPELLEE ATTORNEY:** Marvin E. Wiggins, Jr.

**COUNTY PROSECUTOR:** Marvin E. Wiggins, Jr.

**DISPOSITION:** Reversed and Remanded. Wilson, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur.

**ISSUE:** Whether the circuit court erred in dismissing his appeal for lack of jurisdiction.

**FACTS:** On August 9, 2011, Cornelius Parks was convicted of misdemeanor domestic violence in justice court. On September 6, Parks filed a notice of appeal in the circuit court, along with a "Cost and Appearance Bond" and a check for \$449. His cost and appearance bonds were contained in one document and he tendered one check to the circuit court. The Kemper County prosecutor subsequently filed a motion to dismiss Parks's appeal for want of jurisdiction, arguing that the appeal did not comply with UCCCR Rule 12.02. The circuit judge dismissed the appeal for lack of jurisdiction, finding that Parks failed to perfect his appeal because he failed to obtain both of the bonds required by Rule 12.02—a cost bond and an appearance bond. Parks appealed.

**HELD:** Parks's "cost and appearance bond" plausibly purports to serve as both a cost bond and an appearance bond. Parks's bond made clear that it was intended to cover both the appeal costs and to secure his appearance before the circuit court. He also noted that the full amount of his bond (\$449) covered both the fine and appeal costs. "For these reasons, we conclude that Parks's 'cost and appearance bond' met the bare minimum requirements of Rule 12.02 that are necessary to confer jurisdiction on the circuit court."

Therefore, although we remand the case to the circuit court, we do so only because the circuit judge made clear that he was dismissing Parks's appeal for lack of jurisdiction and not as an exercise of his discretion. On remand, the circuit court may decide whether Parks should be granted leave to amend his "cost and appearance bond" to correct these and any other deficiencies. Whether to grant Parks leave to correct such errors is a matter committed to the discretion of the circuit judge.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108579.pdf>

**December 15, 2015**

***Justin Dominique Holmes v. State***, No. 2013-KA-00113-COA (Miss.Ct.App. December 15, 2015)

**CASE:** Manslaughter and Attempted Aggravated Assault

**SENTENCE:** 20 years on each count to run concurrently

**COURT:** Harrison County Circuit Court  
**TRIAL JUDGE:** Hon. John C. Gargiulo

**APPELLANT ATTORNEY:** Christopher Brian Fisher, Michael W. Crosby  
**APPELLEE ATTORNEY:** Scott Stuart  
**DISTRICT ATTORNEY:** Joel Smith

**DISPOSITION:** Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the evidence was sufficient to support the verdict, (2) whether the verdict was against the weight of the evidence, (3) whether the trial judge erred in allowing the State to amend the indictment to include “attempted” aggravated assault, and (4) whether he received ineffective assistance of counsel.

**FACTS:** On January 29, 2011, half-brothers Lorenzo Pettis and Kyle Oatis drove to Lenard Dennis's home to try and buy drugs. Lenard was not happy about their arrival and told them to "get the hell away" from his house. An argument ensued. Several members of Lenard's family came outside. Lenard's son punched Lorenzo. The brothers got back to their car. As the two began to leave, they taunted Lenard's family to come down the street to fight. And Lenard's family obliged, taking off on foot in pursuit of Kyle's car. At some point, Justin Holmes, who was Lenard's neighbor and close family friend joined the group. Holmes fired two shots at Kyle's moving vehicle. Kyle called Holmes a profane name and started teasing him for shooting what he thought were blanks. This apparently further upset Holmes, so he opened fire again on Kyle's car. This time, bullets hit Kyle in the chest, lower back, and arm, causing him to crash his car into a bridge. Kyle died while en route by ambulance to a hospital. Holmes was charged with the murder of Kyle and the aggravated assault of Lorenzo. The State was later allowed to amend the indictment to allege an attempted aggravated assault of Lorenzo. Holmes was convicted of the lesser offense of manslaughter and attempted aggravated assault. He appealed.

**HELD:** (1) and (2) Holmes claimed the evidence was insufficient to support a heat of passion manslaughter conviction. However, Holmes requested this instruction at trial. “After review, we find Holmes got just what he asked for and cannot now complain of it.” The angry scene and chase, along with Kyle's insult and heckling, may have justified the jury in believing Holmes, without malice and fueled by passion, opened fire on Kyle.

Holmes also claims there was insufficient evidence to show he attempted to shoot at Lorenzo. Kyle drove the vehicle, and Lorenzo was the passenger. Several witnesses testified that Holmes shot at the car and no one else had a gun. Lorenzo testified he thought he was being shot at. Also, a detective testified there appeared to be a bullet hole in the passenger side door of the vehicle. This was sufficient. Witness credibility is decided by the jury.

(3) Holmes was charged with the aggravated assault of Lorenzo. The trial judge did not err in amending the indictment to allege the “attempted” aggravated assault of Lorenzo. The statute allows a conviction of aggravated assault if one attempts to cause or knowingly causes. Therefore, Holmes was on notice that he could be convicted of the attempt to commit aggravated assault. It is the same

crime. Any defense Holmes may have had was equally available to him after this immaterial amendment was made.

(4) Holmes claimed his counsel was ineffective because he offered the only evidence that a jury could have relied upon to render a guilty verdict for heat-of-passion manslaughter. However, the record does not indicate what counsel's strategy was. Therefore, the claim is dismissed without prejudice to raise again on PCR.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109294.pdf>

**James L. Johnson, Jr. v. State**, No. 2014-KA-00664-COA (Miss.Ct.App. December 15, 2015)

**CASE:** Aggravated Domestic Violence

**SENTENCE:** 20 years, with 10 suspended, and 5 years of PRS

**COURT:** Alcorn County Circuit Court

**TRIAL JUDGE:** Hon. James Seth Andrew Pounds

**APPELLANT ATTORNEY:** John R. White

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISTRICT ATTORNEY:** J. Trent Kelly

**DISPOSITION:** Reversed and Remanded. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Fair, James and Wilson, JJ., Concur. Maxwell, J., Concur in Result Only Without Separate Written Opinion.

**ISSUE:** Whether the circuit court erred by admitting evidence of Johnson's prior bad acts of domestic violence.

**FACTS:** James Johnson was convicted of committing aggravated domestic violence by strangulation against his ex-wife, Volante Jones, on December 3, 2012. A couple of months after their divorce, Jones was packing up items to move into her new home. Johnson called Jones and inquired about her activities the previous weekend. Jones told him unless he was calling about the children, she had nothing to discuss. About 30 minutes later, she heard Johnson ring the doorbell and let himself into the house. Jones testified that Johnson grabbed her throat. Johnson eventually flipped her on her back, used his weight to pin her down, and then placed his right arm around her throat. Apparently Johnson eventually grew weary from the constant struggling and let her go. He left shortly after his son arrived at the house. As soon as all her children were home, she called police. Johnson claimed Jones initiated the fight and he was only defending himself. While investigating the incident, police discovered that, over the past 13 years, Johnson had been involved in four prior violent acts against Jones and three other women. At trial, the State sought to admit evidence of these incidents under MRE 404(b). The prosecution proffered details about incidents. The first occurred in 1999, involved Johnson's first wife, and resulted in a simple-assault conviction. The second incident, which occurred in 2000, involved Johnson's ex-girlfriend, and also resulted in a simple-assault conviction. The third incident, which occurred in 2002, involved Jones. Although this third incident was never prosecuted,

Jones testified at trial as to the facts surrounding the incident. The fourth incident, which occurred in 2012, involved Johnson and Jones's daughter. This fourth incident also failed to result in a conviction and was instead dismissed after Johnson completed an anger-management course. Based on the proffer, the circuit court granted the State's motion, finding the evidence more probative than prejudicial. However, at trial, to prove these acts, the State admitted the police offense reports which contained other details of allegations not mentioned in the State's proffer. Johnson was convicted and appealed.

**HELD:** The four offense reports admitted during Johnson's trial contained accusations that Johnson had committed various other serious crimes not included in the State's pretrial proffer. After the State offered the four offense reports at trial for admission into evidence, the circuit court conducted no evaluation of whether the State offered the contents of the reports for a proper and relevant purpose under Rule 404(b). The circuit court also failed to determine whether the prejudice arising from the additional allegations in the reports outweighed the probative value. Without redacting any of the additional serious criminal allegations contained in the offense reports, the circuit court admitted the entire contents of the reports into evidence over the defense objection.

This was reversible error. The State proffered to the circuit court its intent to offer four past acts or convictions of domestic violence. The State did not provide the circuit court with the four related offense reports, nor did the State mention in the proffer its intent to offer the entire offense reports into evidence, including the additional criminal allegations contained within the reports. The circuit court abused its discretion by admitting the reports without conducting additional balancing tests regarding the new allegations.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109014.pdf>

*Christopher Orlando Hobson v. State*, No. 2014-KA-01116-COA (Miss.Ct.App. December 15, 2015)

**CASE:** Felony Evasion, Misdemeanor Resisting Arrest, Possession of a Firearm by a Convicted Felon, and Possession of a stolen firearm

**SENTENCE:** Life as an habitual offender on each count but the resisting arrest. For resisting arrest, a six month concurrent sentence.

**COURT:** Rankin County Circuit Court

**TRIAL JUDGE:** Hon. John Huey Emfinger

**APPELLANT ATTORNEY:** George T. Holmes

**APPELLEE ATTORNEY:** Barbara Wakeland Byrd

**DISTRICT ATTORNEY:** Michael Guest

**DISPOSITION:** Affirmed. Barnes, J., for the Court. Lee, C.J., Griffis, P.J., Ishee, Carlton, Maxwell, Fair and Wilson, JJ., Concur. James, J., Concur in Part Without Separate Written Opinion. Irving, P.J., Concur in Part and Dissents in Part Without Separate Written Opinion.

**ISSUES:** (1) Whether the evidence of felony flight was sufficient to support the verdict, (2) whether the jury instruction regarding flight compromised Hobson's right to due process, (3) whether the evidence was sufficient evidence that Hobson possessed a stolen firearm and was aware the firearm was stolen, and (4) whether the trial court's denial of Hobson's motion for a mistrial was an abuse of discretion.

**FACTS:** On February 5, 2013, Pearl Police Officer William Lindley observed a Honda Accord driven by Christopher Hobson cross the center line. Lindley testified that Hobson "was slumped towards the middle in between the driver and passenger's side" and "was not wearing a seatbelt." When Lindley activated his blue lights and dashboard camera, Hobson slowed down, as if to stop. However, he then sped off. The chase lasted about four minutes and covered about two miles through a residential area. Hobson sped through three stop signs during the chase, and Lindley stated that Hobson's speed was "no higher than 70 miles per hour" in a 20 mph zone. Hobson drove off the road into a sparsely wooded area and exited the car. When the officer ran towards Hobson, he turned away to run but was quickly tackled by Lindley. Hobson escaped the officer's grasp by elbowing the officer in the chest and ran towards some nearby apartments. Lindley continued his pursuit of Hobson and gave numerous verbal commands for him to stop, but Hobson failed to comply. Lindley observed Hobson throw down a black handgun between some cars. The officer discharged a taser into Hobson's back, and he eventually surrendered. Another officer retrieved the dropped handgun. The pistol had been reported stolen in January 2013. Hobson was tried on four counts: Count I, felony fleeing; Count II, simple assault of a police officer; Count III, possession of a firearm by a convicted felon; and Count IV, possession of a stolen firearm. He was convicted of all charges, but in Count II, he was convicted of the lesser offense of resisting arrest. He appealed.

**HELD:** (1) Hobson argued that the evidence did not support his conviction for felony evasion, but merely supports a conviction for misdemeanor evasion. He claimed Lindley's testimony was "an exaggeration," and that his behavior was only negligent, not reckless. The evidence was sufficient. Hobson failed to stop when Lindley activated his blue lights, ran three stop signs, and exceeded the posted speed limit in a residential area. This was corroborated by the officer's dashboard video, which additionally showed Hobson drove on the wrong side of the road throughout much of the chase. The mere fact that no one was injured by his reckless driving is irrelevant to the conviction.

(2) The trial judge did not err in granting a flight instruction. Hobson ran from the officer, and no explanation for the flight was provided. The evidence supported the trial court's conclusion that the evidence of Hobson's unexplained flight was relevant to the two charges involving the firearm and was probative of guilt.

(3) Hobson argued that the State did not prove that he knew the gun was stolen. The pistol had been discovered stolen less than a month prior to Hobson's arrest. The trial judge concluded that Hobson possessed the gun, which was the only item stolen; he discarded the gun while running from the officer, evincing guilty knowledge; and no explanation was given as to how he possessed the weapon. The circumstances surrounding the incident and Hobson's actions were sufficient for the jury to infer that he knowingly and intentionally possessed a stolen firearm.

(4) Hobson's wife was called to testify regarding a phone conversation she had with Hobson 3 days prior to trial. Hobson asked her if anyone had seen the officer punch him. When the State asked her

about the conversation, she replied: "We're going through two different cases, so, I mean, both of them [involved] an incident with the police punching him," referring to a second upcoming case involving Hobson. Hobson's request for a mistrial was denied. The trial court did not abuse its discretion when it found that the witness's vague remarks regarding the other case did not result in prejudice to Hobson. Defense counsel specifically requested that the trial judge not admonish the jury to disregard the remark.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109376.pdf>

***Tremayne Whittle v. State***, No. 2014-KA-01222-COA (Miss.Ct.App. December 15, 2015)

**CASE:** Sexual Battery

**SENTENCE:** 30 years

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Lawrence Paul Bourgeois Jr.

**APPELLANT ATTORNEY:** Justin Taylor Cook

**APPELLEE ATTORNEY:** Barbara Wakeland Byrd

**DISTRICT ATTORNEY:** Joel Smith

**DISPOSITION:** Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the trial court erred by admitting hearsay statements under the "tender-years exception" of MRE 803(25), and (2) whether the verdict contradicts the overwhelming weight of the evidence.

**FACTS:** In January 2013, eleven year old Amy began having behavior problems in school. Her mother, Tami, found a letter in Amy's bedroom from her school indicating these problems. Tami went to confront Amy the home of Amy's grandmother, Carla. When Carla asked Amy why she was having problems, Amy started crying and eventually disclosed that Tremayne Whittle, her mother's former boyfriend, had "forced [himself] on her." Amy was taken to a local hospital, where she was treated by a sexual-assault nurse examiner, Kathryn Culver. Amy's family was asked to leave so Culver could speak with Amy alone. Amy was upset and crying. Culver testified that Amy told her Whittle had sexually abused her at some point between August and October 2012 in her bedroom at her mother's house. Amy related that late one night, Whittle entered her bedroom and told Amy to pull down her pants. Then he jumped on top of her, put his hand over her mouth, and put "his P" in her "butt." Amy told Culver that it hurt. Later, when Amy went to the bathroom, there was "white stuff there." Amy told a similar story to criminal investigator Carolyn Prendergast. Whittle denied abusing Amy, claiming she made up the allegations because her grandmother threatened to spank her due to her poor grades and bad behavior in school. He also presented character witnesses in his defense. He was convicted of sexual battery and appealed.

**HELD:** (1) The trial judge did not err in allowing Amy's mother, her grandmother, and Investigator Prendergast to testify about what Amy had told them regarding the assault under the tender years hearsay exception. The court held a hearing outside of the presence of the jury and found the 11-year-old victim was of tender years. Although not spontaneous, the court determined that the statements were reliable. Amy had no motive to lie, knew what an oath was, and knew the difference between the truth and a lie.

(2) Whittle claimed he is entitled to a new trial because Amy did not immediately report the sexual assault until several months after it occurred, and her story was uncorroborated and suspect. However, Amy testified that she did not immediately report the assault because Whittle threatened that if she told anyone, he would "do it again." Amy's behavior and emotional state were entirely consistent with her claim that she had been sexually assaulted.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108759.pdf>

**George Affleck v. State**, No. 2013-KA-00763-COA (Miss.Ct.App. December 15, 2015)

**CASE:** Capital Murder and Possession of a Firearm by a Convicted Felon

**SENTENCE:** Two consecutive life without parole sentences as an habitual offender

**COURT:** Hinds County Circuit Court

**TRIAL JUDGE:** Hon. Jeff Weill, Sr.

**APPELLANT ATTORNEY:** Justin Taylor Cook

**APPELLEE ATTORNEY:** Alicia Marie Ainsworth

**DISTRICT ATTORNEY:** Robert Shuler Smith

**DISPOSITION:** Affirmed. Irving, P.J., for the Court. Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur. Griffis, P.J., and Maxwell, J., Concur in Part and in the Result Without Separate Written Opinion. Lee, C.J., Not Participating.

**ISSUES:** (1) Whether the trial court improperly admitted statements to police under the excited-utterance exception to the hearsay rule; (2) whether the trial court erroneously allowed testimonial statements to police into evidence in violation of the Confrontation Clause; (3) whether the trial court erroneously allowed the State to present irrelevant and unauthenticated evidence; (4) whether the trial court erroneously allowed the State to introduce prior-bad-acts testimony; (5) whether the evidence was insufficient to support the felon-in-possession-of-a-firearm conviction; (6) whether a new trial is warranted under the doctrine of retroactive misjoinder; (7) whether none of the errors raised are harmless; and (8) whether the cumulative effect of the errors necessitates reversal.

**FACTS:** On May 22, 2011, Sunny Day Bayham heard her neighbor, Diane Hearn, fighting with George Affleck. She went outside to see if Hearn needed help. Affleck was throwing Hearn around trying to force her into his truck. Affleck yelled at Bayham to go back inside her house or she "could have some of the same." Bayham did not call police. Another neighbor, Ylandra Chambers, also heard the argument. She had to call police twice in 2009 because of Affleck-Hearn fights. A

neighbor of Affleck also saw him that night fighting with a female, "really beating her." Affleck threatened to kill the woman as she ran into his house. Another neighbor heard Affleck say, "B---, I'm going to kill you," as he was trying to keep the female from escaping his truck. She heard the female screaming and yelling for help. Neither neighbor mentioned the threats in their later statements to police. Affleck's two roommates also saw Affleck fighting with Hearn. After two or three hours of hearing them yelling at each other, they left to stay in a hotel in Clinton. Before they left, Pedro Lugo saw Hearn lying on the floor in Affleck's room. Her face was bloody, but she was breathing. On his way back the next morning, he called police out of concern for Hearn. When Reyes Cruz returned to the house the next morning, Affleck was mopping up what appeared to be blood, and Affleck's clothes from the night before were hanging up wet in the bathroom.

That morning, around 5 a.m., Affleck's brother, called police and reported that Affleck had called him and said he had hit his girlfriend, and that Hearn was bleeding, and that it was "bad." Unable to locate Affleck at his Texas residence, police called Jackson police and asked them to check on Hearn at Affleck's Mississippi house. Affleck refused to let them in without a warrant. Seeing blood on his car, as well as a burning mattress and more blood in his backyard, Affleck was detained as police got a warrant. Hearn's blood was later found all over Affleck's house. A 20-gauge Mossburg shotgun was found in the shed behind the house. Blood was also found on the bed liner of his truck. Several bloody items were found in a dumpster less than a mile from Affleck's home. The items had both Affleck's and Hearn's DNA. Hearn's body was found 4 days later off of I-20 near Bolton. A pathologist determined that her death was a homicide caused by severe blunt-force trauma. Bones in her neck were fractured, consistent with either strangulation or blunt-force trauma. Cell phone records placed both Affleck's and Hearn's cell phones in Bolton on the morning of May 23, 2011. These records also showed Affleck's call to his brother at 5 a.m. on May 23 was made near Bolton. Affleck was convicted and appealed.

**HELD:** (1) The trial judge did not err in allowing a detective to testify to what Affleck's brother told police. (His brother was unavailable as a witness). Affleck claimed this was hearsay within hearsay. A summary of the detective's testimony had to be supplemented into the record because the court reporter was injured during trial and some testimony tapes were lost. The brother later gave a statement which was read to the jury. The trial court found the conversation between Affleck's brother and the detective was admissible as an excited-utterance. The record does specify exactly how much time passed between Affleck's call to his brother and the brother's conversation with the detective. However, based on cellphone records, it was no more than about 3 hours. Under the facts of this case, finding the statement an excited utterance was not an abuse of discretion.

The statement was also more probative than prejudicial. The brother's call to police was essential for the jury to understand why Affleck was ultimately arrested. The testimony was probative to present the jury with a complete account of the facts of the case. Even if the trial court erred in admitting the testimony, the admission was harmless error, considering the overwhelming evidence against Affleck.

(2) The use of the brother's statement also did not violate the Confrontation Clause. The brother's call to police was not testimonial. He contacted police out of ongoing concern for Hearn's safety. He was unaware of Affleck's or Hearn's location, and he was unaware that Hearn had been killed. He was concerned she may be hurt and in need of assistance. The call was made so police could resolve an ongoing emergency, rather than simply to learn what had happened in the past. The

brother's statement was written before Hearn's body was found. While it was not admitted into evidence, the detective read it to the jury. The COA found this nontestimonial. Regardless, even if error, it was harmless.

(3) The trial judge did not err admitting several pieces of evidence. Affleck argued the evidence was irrelevant, untested for DNA, unauthenticated, and unduly prejudicial. The items included a golf club, a knife on a pole, hair fibers, a rubber strap, a mop, and brass knuckles. The trial judge found some probative value in the items. All of these items were found either in Affleck's home or truck, both crime scenes and near the place of Affleck's arrest. The pathologist testified that Hearn had suffered blunt-force trauma and multiple cuts or stab wounds. These items, as well as the hair fibers, rubber strap, and mop, constituted a part of the surrounding scene of the crime and were probative.

(4) Chambers, testified, over objection, that she called the police twice in 2009 because she heard "a lot of screaming and yelling" while Affleck was at Hearn's house. Affleck argued this was inadmissible prior-bad-acts evidence, solely used to attack his character. Chambers testified that after the second incident, police and paramedics responded to Hearn's house, but she did not testify as to any charges brought against Affleck after either incident. She only testified she became concerned when she heard Affleck at Hearn's house on May 22, 2011, "[b]ecause he [was]n't supposed to be[] over there." Affleck conceded the testimony was admissible and drafted a limiting instruction which was granted. The claim is procedurally barred. Chambers's testimony was probative as to Affleck's state of mind, intent, and motive for the murder.

(5) The evidence was sufficient to prove Affleck was in constructive possession of the shotgun found in the shed in his backyard. Affleck was the owner of the house. At the time of Affleck's arrest on May 23, 2011, he was standing within close proximity of the shed, which had blood on it. Although Affleck points out that he lived at the home with multiple roommates, no evidence was presented that the shotgun belonged to anyone other than Affleck. Affleck failed to present any evidence to rebut the presumption that he constructively possessed the shotgun.

(6) Affleck argued that because the felon-in-possession-of-a-firearm count should have been vacated due to lack of evidence, the evidence introduced in support of this charge prejudiced his defense to murder. Since the COA found the evidence for the charge sufficient, this claim is without merit.

(7) and (8) The State presented substantial evidence against Affleck. With regard to the issues raised, any error at trial, if any is found, was harmless given the overwhelming evidence against Affleck. Further, the Court found no individual errors, and therefore no cumulative errors requiring reversal.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109347.pdf>

***Bryn Ellis v. State***, No. 2013-KA-02000-COA (Miss.Ct.App. December 15, 2015)

**CASE:** Murder

**SENTENCE:** Life

**COURT:** Hinds County Circuit Court

**TRIAL JUDGE:** Hon. William A. Gowan Jr.

**APPELLANT ATTORNEY:** W. Ellis Pittman, Wilbert L. Johnson

**APPELLEE ATTORNEY:** Barbara Wakeland Byrd

**DISTRICT ATTORNEY:** Robert Shuler Smith

**DISPOSITION:** Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Ishee, Carlton, Maxwell, Fair and James, JJ., Concur. Barnes and Wilson, JJ., Concur in Part and in the Result Without Separate Written Opinion.

**ISSUES:** (1) Whether the circuit court erred when it allowed the prosecution to introduce an unavailable witness's prior deposition testimony, (2) whether the circuit court improperly allowed the prosecution to introduce hearsay statements into evidence, and (3) whether the prosecutor made an improper comment during closing arguments.

**FACTS:** On March 8, 2010, Barry Odom was shot and killed in the parking lot outside of his apartment in Jackson. Barry's cell phone indicated that he had been talking to Cheryl McGee shortly before his death. Cheryl told authorities that Bryn Ellis killed Barry. Cheryl had been involved with Ellis, but had broken up with him and was seeing Barry instead. She testified that Ellis had threatened her and Barry numerous times if they kept seeing each other. Cheryl did not believe that Ellis was serious about his threats, but she and Barry took precautions to avoid Ellis. Barry's friend, Jeffrey Miller, testified that Barry had been followed by an ex-boyfriend of a woman that he had been seeing. Another friend, Thomas Knight, testified similarly. Barry's sister, Stacey Jones, testified that Barry had told her that he was being harassed by an ex-boyfriend of a woman that he had been seeing. According to Stacey, Barry had borrowed a pistol from her because he was concerned that the ex-boyfriend "was going to harm him." Katie Roberts, who lived with Ellis, testified that he was gone for several hours on the night that Barry was killed. Jennifer Childs testified that on the night of March 8, 2010, Ellis told her that "he [had] shot someone [in the chest] because they had a confrontation going on." Forensic pathologist Dr. Feng Li performed Barry's autopsy, but was going to be out of the country on Ellis's trial date. Over objection, the trial court allowed the State to take a video deposition of Dr. Li which was used at trial. Ellis was convicted and appealed.

**HELD:** (1) The circuit court did not abuse its discretion when it held that Dr. Li was unavailable to testify, allowing a pre-trial video deposition of Dr. Li to be used at trial. Ellis's trial attorney cross-examined Dr. Li during the deposition. It was within the court's discretion to find the witness unavailable and that Ellis was not prejudiced by the fact that Dr. Li testified by way of a video deposition.

(2) The trial judge did not err in allowing Cheryl to testify that Barry said that Ellis had been following her car; that Ellis threatened to kill Barry if Cheryl did not stop seeing him; and that she believed that Ellis was responsible when she learned that Barry had been killed. Cheryl's testimony indicated that Barry identified Ellis while he was looking at him and was a present sense impression. Counsel did not claim that Cheryl's testimony that Ellis threatened to kill Barry was hearsay, but only objected to leading. That claim was waived. Finally, Cheryl's comments that she immediately thought Ellis had killed Barry were not irrelevant speculation. On appeal, he claims her comments were an improper lay opinion. Cheryl's testimony was limited to her initial reaction. Cheryl's

testimony helped explain why authorities suspected that Ellis may have been responsible for Barry's death.

(3) Ellis claimed the prosecutor's statement in closing that the evidence demonstrated that he had a "history of threats" that the defense did not dispute, was an improper comment on Ellis's failure to testify. Viewed in its context, the prosecution was arguing that four witnesses had testified that they heard Ellis make threats toward Barry, and there had been no dispute regarding their testimony. Ellis could have called witnesses to testify that they had never heard him threaten anyone. This was a comment on the lack of a defense, not on a failure to testify.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109349.pdf>

***Timothy Antonio McCormick v. State***, No. 2014-KA-01404-COA (Miss.Ct.App. December 15, 2015)

**CASE:** Robbery

**SENTENCE:** 15 years as a habitual offender

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Michael H. Ward

**APPELLANT ATTORNEY:** Erin Elizabeth Pridgen

**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss

**DISTRICT ATTORNEY:** Joel Smith

**DISPOSITION:** Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** Whether McCormick's statutory and constitutional rights to a speedy trial were violated.

**FACTS:** On January 16, 2006, Timothy McCormick was arrested for robbery. He was indicted on October 9, 2006. On January 22, 2007, McCormick waived arraignment and entered a not-guilty plea. His trial was set for May 7, 2007. On January 25, 2007, McCormick filed a motion demanding a speedy trial and one seeking a dismissal of the indictment because of an alleged violation of his constitutional right to a speedy trial. However, on May 7<sup>th</sup>, McCormick failed to show up for his trial. A judgment nisi was entered and McCormick was ordered arrested. At some point McCormick was arrested and incarcerated in Georgia. He had a projected release date in 2013. In January of 2012, the sheriff's office filed a detainer request with the Georgia Department of Corrections to obtain custody of McCormick. He waived extradition and arrived in Mississippi on July 12, 2013. Although he again requested a speedy trial, he also asked for two continuances. His trial began on September 9, 2014, and the jury found McCormick guilty of robbery. He appealed.

**HELD:** (1) McCormick was not denied his statutory right to a speedy trial. Regardless of any waiver by McCormick, the court found no statutory speedy-trial violation. The majority of the time between arraignment and trial was attributable to McCormick, and any other delays resulted from

McCormick's requests for continuances or the State's attempt to negotiate a plea deal. "McCormick should not benefit from skipping trial and then complaining after the fact that he was denied a speedy trial."

(2) There was also no violation of his constitutional rights to a speedy trial. McCormick was arrested on January 16, 2006, and his trial finally began on September 9, 2014. Although presumptively prejudicial, the other *Barker* factors do not weigh in McCormick's favor. The majority of the delay is attributable to McCormick since he fled the state prior to trial. After extradition back to Mississippi, McCormick further delayed trial by filing two requests for continuances. Although McCormick did assert his right to a speedy trial, he failed to show the delay impaired his defense. To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109017.pdf>

**January 5, 2016**

***Kenneth R. Goldsmith v. State***, No. 2014-KA-01321-COA (Miss.Ct.App. January 5, 2016)

**CASE:** Grand Larceny

**SENTENCE:** Life without parole as an habitual offender

**COURT:** Rankin County Circuit Court

**TRIAL JUDGE:** Hon. Samac S. Richardson

**APPELLANT ATTORNEY:** Benjamin Allen Suber

**APPELLEE ATTORNEY:** Lisa L. Blount

**DISTRICT ATTORNEY:** Michael Guest

**DISPOSITION:** Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur

**ISSUES:** (1) Whether the evidence was insufficient to support the verdict, and (2) whether his sentence as a habitual offender of life without parole is disproportionate to the crime and constitutes cruel and unusual punishment.

**FACTS:** Kenneth R. Goldsmith was convicted of grand larceny for the theft of a bicycle, and was sentenced to life without parole as a violent habitual offender. On October 15, 2012, an employee at Ergon Trucking in Flowood noticed a suspicious truck in the company parking lot. He reported the Chevrolet Trailblazer and its license to police. On October 19, 2012, at around 8:37a.m., the same truck was seen at Ergon. That same morning an employee named Barton Lampton, had his Giant TCR Advanced SL1 bicycle stolen out of the back of his truck. According to Lampton, the bicycle retailed for \$6,000 to \$6,500, but he was able to purchase it as a demo for \$3,200. Goldsmith later pawned the bike at USA Pawn at 9:20a.m. that same morning. The Trailblazer belonged to Goldsmith's fiancée. Goldsmith claimed he never went to Ergon, but picked up his stepson and his friend that morning on Lakeland Drive. The stepson's friend (Goldsmith did not remember his name) sold Goldsmith the bike for \$45. The friend then told Goldsmith to wait 15-20 minutes. If he did not bring Goldsmith his money back, the friend stated Goldsmith could sell the bicycle. He then

went to USA Pawn and sold them the bike for \$100. Ian Gallman, an employee at USA Pawn, estimated the retail value of the bicycle at \$7,000. However, Gallman paid Goldsmith \$100 because that is the amount Goldsmith requested. Gallman later listed the bicycle on Craigslist for \$4,000. On cross, Goldsmith changed his story and added he went and serviced an air conditioner at a hotel for 15 or 20 minutes before driving to the pawn shop. He was convicted and appealed.

**HELD:** (1) Goldsmith's claim on the sufficiency of the evidence is procedurally barred. Although he requested a directed verdict, he failed to renew the motion after putting on evidence during the defense case. Regardless, the claim is without merit. First, the value of the bike was sufficiently established to be over \$500. Second, there was sufficient evidence that he committed the crime. Goldsmith was in possession of the bicycle the same morning it was stolen. Goldsmith's explanation as to how he gained possession is demonstrably false. Time-stamped photographs place the Trailblazer in the parking lot at Ergon at 8:40 a.m. It was estimated that Goldsmith arrived in the Trailblazer at the pawn shop between 9:00 a.m. and 9:10 a.m. According to the pawn receipt, the transaction was completed at 9:20 a.m. This contradicted his claim of buying the bike between 8:40-9:10, then maybe waiting 15 or 20 minutes, then servicing an air conditioner, and then driving to the pawn shop.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108185.pdf>

**January 12, 2016**

*Christopher Anderson v. State*, No. 2014-KA-00588-COA (Miss.Ct.App. January 12, 2016)

**CASE:** Attempted Auto Burglary

**SENTENCE:** 7 years as a habitual offender

**COURT:** Forrest County Circuit Court

**TRIAL JUDGE:** Hon. Robert B. Helfrich

**APPELLANT ATTORNEY:** Benjamin Allen Suber

**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss

**DISTRICT ATTORNEY:** Patricia A. Thomas Burchell

**DISPOSITION:** Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, James and Wilson, JJ., Concur.

**ISSUE:** Whether the evidence was sufficient to support the verdict.

**FACTS:** On September 2, 2013, the owner of Club Memories in Hattiesburg, Allen Tatum, was inside the club waiting for deliveries. The club was not open, and he had parked his 2001 Ford F-150 just outside the entrance to the club. He heard someone banging on the club door and looked outside. He saw a man trying to get into his truck by punching keyless-entry on the truck. Tatum called police. Christopher Anderson, who matched Tatum's description, was walking away from the truck when police arrived. Anderson claimed he was trying to get into the truck because he thought it was for

sale. Anderson said that he found a letter in his hotel room stating that there was a vehicle waiting for him at Club Memories with some keys and money inside. The letter also told him to contact the owner of the vehicle and make arrangements for the purchase. So he went to the club and tried to open the truck with the keyless-entry feature. At trial, Anderson put on no evidence in his defense. Tatum said he had a Bible, some loose change, and his title and insurance in the truck. He denied his truck was for sale.

**HELD:** Anderson's sole contention on appeal is that there was insufficient evidence to show he intended to steal. The evidence presented by the State was legally sufficient to allow the jury to conclude, beyond a reasonable doubt, that Anderson was guilty of attempted auto burglary.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109114.pdf>

*Deldrick Lamont Carroll v. State*, No. 2014-KA-01676-COA (Miss.Ct.App. January 12, 2016)

**CASE:** Armed Robbery

**SENTENCE:** 27 years

**COURT:** Benton County Circuit Court

**TRIAL JUDGE:** Hon. Robert William Elliott

**APPELLANT ATTORNEY:** Justin Taylor Cook

**APPELLEE ATTORNEY:** Abbie Eason Koonce

**DISTRICT ATTORNEY:** Benjamin F. Creekmore

**DISPOSITION:** Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the trial court erred in trying him in absentia; (2) whether the trial court erred in allowing the State to amend the indictment and charge him as a habitual offender; and (3) whether his constitutional right to counsel was violated.

**FACTS:** On April 6, 2012, a large group of people gathered at a house in Benton County for a birthday party. A group of twelve to fifteen men gathered in a side room of the house to play dice, including Deldrick Carroll and Gary Patterson. As the game began to wind down, only six or seven men were left playing. Patterson testified that as he was about to leave the game, Carroll pulled a gun out and pointed it at Patterson. Patterson dropped his money, which he testified was \$2,260. Carroll picked up the money and quickly left the house. As he left, Carroll shot his gun in the air twice. Patterson reported the robbery to the sheriff's office. Patterson informed deputies several days later that Carroll, Carroll's brother, and another man from the party were trying to call him. Deputies arranged for Patterson to call them back and record the calls. During the phone call, Carroll admitted to robbing Patterson, but denied pulling a gun on him. Carroll also assured Patterson that he would try to return the money to him. Carroll did not appear for trial and was convicted in absentia. He appealed.

**HELD:** (1) The trial judge did not err in allowing Carroll to be tried in absentia. On the morning of the trial, after voir dire, Carroll's defense attorney moved for a continuance due to Carroll's absence. His attorney told the court he could not reach Carroll. Counsel acknowledged that he and Carroll discussed the matter in the DA's office the prior Monday. Carroll failed to allege how he was prejudiced by not being present. The record reflects a sufficient factual basis to support the trial court's finding that Carroll waived his right to be present at his trial.

(2) The trial judge did not err in allowing the state to amend Carroll's indictment to allege habitual offender status. Carroll claimed that since he was not present at the pretrial hearing on the motion to amend, he failed to receive notice as to what charges and sentence he was facing if he exercised his right to a trial. The motion was filed 5 days before trial. Counsel admitted he discussed this with Carroll and could not dispute the allegation. Counsel did not object at trial. Notwithstanding the bar, Carroll cannot claim that he was unfairly surprised.

(3) The sheriff's investigators did not violate Carroll's right to counsel by recording his conversations with Patterson after a warrant had been drawn up for his arrest. This was not a 5<sup>th</sup> Amendment violation. Further, Carroll's ineffective of counsel claims should be raised on PCR.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108847.pdf>

**Loren Wendell Ross v. State**, No. 2014-KA-01267-COA (Miss.Ct.App. January 12, 2016)

**CASE:** Felony DUI

**SENTENCE:** 5 years, with 3 years to serve, 2 suspended, and 5 years of supervised probation

**COURT:** Madison County Circuit Court

**TRIAL JUDGE:** Hon. Edwin Y. Hannan

**APPELLANT ATTORNEY:** Erin Elizabeth Pridgen

**APPELLEE ATTORNEY:** Lisa L. Blount

**DISTRICT ATTORNEY:** Michael Guest

**DISPOSITION:** Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Whether the testimony by a forensic scientist with the Crime Lab, who did not personally conduct the toxicology test on a blood sample, was a violation of Ross's constitutional right to confront witnesses.

**FACTS:** On August 2, 2013, at approximately 2 a.m., Loren Ross was pulled over by a Madison police officer for not having lights illuminating his license plate. Ross told the officer he had not been drinking; however, the officer observed an empty bottle of liquor in the backseat floorboard of the car. The officer ran a background check and, seeing Ross had prior DUIs, asked Ross to get out of the car. He noted that Ross's breath smelled of alcohol and that he had "glassy eyes." Ross gave two breath samples on the officer's portable breath-test machine; both were positive. Ross was

subsequently arrested. Police were not able to get Intoxilyzer results, so Ross consented to a blood test. His BAC came back at 0.16%. At trial, the State called David Lockley, a forensic scientist from the Mississippi Crime Lab who did not conduct the actual testing of Ross's blood sample. Dariel McKenzie, the forensic scientist who personally conducted the tests, did not testify. Lockley declared that he was the "technical reviewer and administrator reviewer on [the] case" and was involved in the production of the report. Ross was convicted and appealed.

**HELD:** Recent Mississippi case law is clear that as long as the testifying analyst had intimate knowledge of the testing and had reviewed the results of the original analyst, there is no violation of the defendant's right of confrontation under the Sixth Amendment.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109473.pdf>

***Stephen Nolan v. State***, No. 2014-KM-01647-COA (Miss.Ct.App. January 12, 2016)

**CASE:** First Offense DUI and Following too Closely

**SENTENCE:** 48 hours, suspended, with 2 years unsupervised probation

**COURT:** Madison County Circuit Court

**TRIAL JUDGE:** Hon. William E. Chapman, III

**APPELLANT ATTORNEY:** Kevin Dale Camp, Jared Keith Tomlinson

**APPELLEE ATTORNEY:** Boty McDonald

**CITY ATTORNEY:** Boty McDonald

**DISPOSITION:** Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Fair and Wilson, JJ., Concur. James, J., Concur in Part Without Separate Written Opinion.

**ISSUES:** (1) Whether the verdicts were against the weight and sufficiency of the evidence; (2) whether the trial court improperly considered his refusal to submit to the Intoxilyzer 8000 test as evidence of guilt; (3) whether there was reasonable suspicion and probable cause for the stop; (4) whether the verdicts were against the weight of the evidence; and (5) whether the tailgating statute, §63-3-619, is unconstitutionally vague.

**FACTS:** On January 20, 2013, at approximately 1:56 a.m., Officer Ryan Ainsworth observed Stephen Nolan's vehicle traveling at an unsafe distance behind another vehicle on Rice Road in Ridgeland. Nolan's vehicle then swerved, and his passenger-side tires struck the fog line on the right side of the road. Nolan was pulled over, and Ainsworth smelled an "overwhelming" odor of alcohol coming from Nolan's vehicle, and he noticed Nolan appeared lethargic and had bloodshot, glassy eyes. After testing positive on a preliminary breath test and failing several field sobriety tests, he was arrested and later refused the Intoxilyer 8000.

**HELD:** Again, the City of Ridgeland failed to file an appellee brief, but the COA found that the case "can be confidently affirmed."

(1) Viewing the evidence in the light most favorable to the State, the evidence was sufficient to support the DUI conviction. Although Nolan's speech was not slurred, he admitted to drinking, smelled of alcohol, had glassy, bloodshot eyes, and failed to perform the field sobriety tests adequately. Nolan refused the Intoxilyzer 8000. Ainsworth's dashcam video was also viewed by the court.

(2) Nolan argued that because the State failed to prove intoxication, his refusal to submit to the Intoxilyzer was irrelevant. However, the State did present sufficient evidence of intoxication. Nolan's refusal to submit to the breath test was properly admitted into evidence.

(3) Ainsworth testified that he conducted the traffic stop because Nolan was tailgating (a violation of §63-3-619) the vehicle in front of him. Ainsworth testified Nolan was within a car length of the vehicle in front of him. This testimony was sufficient to support the tailgating charge and sufficient to establish probable cause for the traffic stop. Nolan admitted during trial he was following closely to the car in front of him in order to follow a colleague who was leading him back to his hotel.

(4) Nolan admitted to following the vehicle closely, as he did not want to get separated from the vehicle. Nolan inadequately performed the field sobriety tests, smelled of alcohol, admitted he had drinks earlier that night, and had glassy, bloodshot eyes. The fact that he was calm and cooperative and did not exhibit balance issues other than during the field sobriety tests does not negate a finding of intoxication.

(5) The tailgating statute is not impermissibly vague. Several other states have found similar statutes constitutional. Ainsworth testified that Nolan was following the vehicle in front of him more closely than was reasonable and prudent because Nolan would not have been able to stop had the vehicle in front of him slammed on brakes. "The statute, coupled with the rules of the road, is sufficiently definite such that an ordinary person can understand the prohibited conduct and that law enforcement can avoid arbitrary enforcement."

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110195.pdf>

***Jeycob England v. State***, No. 2014-KA-00048-COA (Miss.Ct.App. January 12, 2016)

**CASE:** Manslaughter

**SENTENCE:** 20 years

**COURT:** Hinds County Circuit Court

**TRIAL JUDGE:** Hon. Tomie T. Green

**APPELLANT ATTORNEY:** Erin Elizabeth Pridgen

**APPELLEE ATTORNEY:** Barbara Wakeland Byrd

**DISTRICT ATTORNEY:** Robert Shuler Smith

**DISPOSITION:** Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the State's medical expert's testimony violated England's Confrontation Clause right; and (2) whether England received an illegal sentence above the statutory maximum.

**FACTS:** On July 22, 2011, Jeycob England went to the Electric Cowboy, a bar in Jackson, with his girlfriend, Bridget Gagliardi, and another friend. Also at the club were Scot Ford and several of his friends. When the club closed for the night, Ford allegedly waved to Gagliardi, whom he met a couple of months earlier. England disliked Ford's interaction with Gagliardi, and a verbal altercation between Ford and England ensued. After the men separated, each got into a different car and left the club. Coincidentally, the two cars went to the same gas station down the street from the club. After another verbal altercation, they decided to take the fight elsewhere and the two groups drove to the Target parking lot. Everyone eventually got into a physical fight. At some point, England broke away from the group and reached his car. Witnesses testified that the fight essentially ended with everyone returning to their respective cars. Other witnesses testified the fight was still ongoing when they heard England's car coming towards the group. Everyone got out of the way of the car, except Ford, who was hit with the right-front of the car. The car ran over Ford before speeding off through the parking-lot exit and onto the interstate. Charged with deliberate-design murder, the jury found England guilty of manslaughter.

**HELD:** (1) England asserted the trial court erred in letting Dr. Mark LeVaughn testify about his final autopsy report when he did not conduct the autopsy himself. Dr. Adel Shaker actually conducted the autopsy. However, Dr. LeVaughn testified he reviewed Dr. Shaker's preliminary report, along with other records and photographs, in creating his own final report. His final autopsy report contained his own findings and opinions. This did not violate England's Confrontation Clause right.

England also claimed error in Dr. LeVaughn relying on and testifying about Ford's toxicology report, which he did not conduct or prepare himself. Dr. LeVaughn testified that he had no knowledge of the preparation or analysis of the toxicology report, and could only testify as an expert in the field of pathology, not as an expert in toxicology. The COA did find a Confrontation Clause violation regarding the toxicology report. However, the Court found the error harmless. England only disputed his intent to kill Ford, not whether he hit and killed Ford with his car. Dr. LeVaughn's testimony about Ford's toxicology report did not attest to England's intent to kill Ford. Ford's blood-alcohol level was not at issue.

(2) England's sentence was not plain error. He claimed the maximum penalty for a death caused by an intoxicated person negligently operating a motor vehicle under §63-11-30(5) was 10 years. However, England was convicted of manslaughter under §97-3-47. The sentence was legal.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108764.pdf>

***Clarence DeJuan Anderson v. State***, No. 2014-KA-00239-COA (Miss.Ct.App. January 12, 2016)

**CASE:** Possession of a Controlled Substance with Intent to Distribute and Possession of a Weapon by a Convicted Felon

**SENTENCE:** 35 years with a concurrent 10 years, both as a habitual offender

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Lawrence Paul Bourgeois, Jr.

**APPELLANT ATTORNEY:** George T. Holmes

**APPELLEE ATTORNEY:** Abbie Eason Koonce

**DISTRICT ATTORNEY:** Joel Smith

**DISPOSITION:** Affirmed. James, J., for the Court. Lee, C.J., Griffis, P.j., Barnes, Ishee, Carlton, Fair and Wilson, JJ., Concur. Irving, P.J., Concur in Part and in the Result Without Separate Written Opinion.

**ISSUES:** (1) Whether the trial court erred by admitting the two firearms discovered at the home, which were not identified in the indictment; (2) whether Anderson received ineffective assistance of counsel; and (3) whether the trial court erred by refusing a requested instruction for the lesser-included offense of simple possession.

**FACTS:** On March 9, 2012, narcotics agent Brian Sullivan, received a call from a CI who saw cocaine at a house located at 828 26th ½ Street in Gulfport. Sullivan obtained a search warrant and found Clarence Anderson, a woman, and a young child inside. Agents also discovered three firearms, cocaine, and a large quantity of cash stacked on the kitchen counter. Sullivan also found 6.1 grams of cocaine base on a shelf in the bedroom closet. Anderson told the agents that he had received approximately a quarter kilogram of cocaine earlier in the day and was able to sell all of it except for the amount that was discovered in the closet. Anderson also told the agents that he was awaiting a delivery of \$9,500 worth of cocaine that he had ordered from his source, Demarcus Clark a/k/a Tutu. At trial, however, Anderson denied ever living at that house, and was only there that day babysitting. He testified that he was unaware of any firearms or any type of criminal activity occurring in the house. Anderson claimed the cash was from a tax-refund check that he had cashed. Anderson testified that he lied to agents about Tutu, but then contradicted himself on cross. Anderson then testified that he was not "distributing" drugs; rather, he was "just a middleman." Anderson was convicted and appealed.

**HELD:** (1) The indictment charged Anderson, a convicted felon, with illegal possession of a Smith & Wesson 9mm handgun. During the search of the house, two other firearms were discovered. Anderson argued that he was "irreparably prejudiced" by the admission of the two other firearms that were not identified in the indictment. However, the prosecution introduced the two other firearms not to prove illegal possession, but to show Anderson's intent to distribute cocaine.

The admission did not violate MRE 404(b). The two other firearms were found in the same master bedroom, and at the same time, as the Smith & Wesson during the execution of the search. The possession and discovery of the other two firearms were so interrelated to the charged crime of possession with intent to distribute that these events constituted a single transaction or occurrence.

(2) Anderson received effective assistance of counsel. Anderson first claimed counsel should have stipulated to his status as a convicted felon. However, a stipulation that Anderson was a felon would have been futile because the prosecution also offered that prior conviction for the purpose of proving intent in relation to the possession with intent to distribute charge.

Further, counsel was not ineffective for failing to object to the use of that prior to show intent. Evidence of prior involvement in the drug trade is admissible to prove intent to distribute. The trial court then properly conducted a Rule 403 balancing test, and found that the probative value was not substantially outweighed by the danger of unfair prejudice. The court also gave a limiting instruction.

(3) The trial court did not err by refusing his request for an instruction on the lesser-included offense of simple possession of cocaine. Anderson's own testimony also eliminates the possibility that he was guilty of simple possession. Anderson testified he was not a dealer, but "just a middleman." There was no evidence presented that the cocaine was for Anderson's own personal use.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109769.pdf>

**January 19, 2016**

***David Lee Moore v. State***, No. 2014-KA-00533-COA (Miss.Ct.App. January 19, 2016)

**CASE:** Drive-by Shooting and Aggravated Assault with a Firearm Enhancement

**SENTENCE:** 5 years for the drive-by shooting and a consecutive 20 years for the aggravated assault

**COURT:** Coahoma County Circuit Court

**TRIAL JUDGE:** Hon. Albert B. Smith, III

**APPELLANT ATTORNEY:** Mollie Marie McMillin

**APPELLEE ATTORNEY:** Alicia Marie Ainsworth

**DISTRICT ATTORNEY:** Brenda Fay Mitchell

**DISPOSITION:** Affirmed. Barnes, J., for the Court. Lee, C.J., Griffis, P.J., Ishee, Carlton, Fair and James, JJ., Concur. Irving, P.J., and Wilson, J., Concur in Part and in the Result.

**ISSUE:** Whether the trial judge erred in allowing a technical reviewer to testify to the gunshot residue results when he did not actually conduct the test.

**FACTS:** On May 23, 2012, Kelcey Horton was stopped at an intersection Clarksdale when he was shot by David "Dae Dae" Moore. Horton only knew him as "Dae Dae." Horton later picked Moore out of a photographic lineup. Police recovered six projectiles from Horton's car, noting bullet holes in the car door. They also collected shell casings from the intersection where the shooting occurred. Moore was detained the following morning, and consented to a search of his car. Officers collected two spent projectiles from the windshield area of Moore's car. Testing on the projectiles recovered from Horton's car and Moore's car subsequently revealed they all came from a .40-caliber gun. Jacob Burchfield, a trace-evidence analyst with the Mississippi Crime Lab, testified there was gunshot residue found on the driver's door handle of Moore's car. Moore attempted to enter a best interests plea on February 2, 2013. Moore explained that he had no recollection of the incident, as he was under the influence at the time, and that he did not know the victim. The trial judge refused to allow the plea. He was convicted at trial and appealed.

**HELD:** Moore did not specifically raise a Confrontation Clause violation at trial, but the COA reviewed the issue based on references to the issue during trial. The analyst who actually tested for gunshot residue, Alicia Smith, no longer worked at the crime lab, so Burchfield testified in her place. Burchfield signed Smith's report as the technical reviewer. He testified he peer-reviewed the case to make sure that it was accurate. Based on recent Mississippi Supreme Court rulings in similar cases, the COA found no error.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110187.pdf>

**January 26, 2016**

***Sean Land v. State***, No. 2014-KA-00805-COA (Miss.Ct.App. January 26, 2016)

**CASE:** Attempted Armed Robbery, Aggravated Assault, and Possession of a Firearm by a Felon

**SENTENCE:** 25 years for the robbery, 10 years for the assault, and 7 years for the weapons charge, all consecutively

**COURT:** Jones County Circuit Court, Second Judicial District

**TRIAL JUDGE:** Hon. Billy Joe Landrum

**APPELLANT ATTORNEY:** Daniel Hinchcliff

**APPELLEE ATTORNEY:** Alicia Marie Ainsworth

**DISTRICT ATTORNEY:** Anthony J. Buckley

**DISPOSITION:** Affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUES:** (1) Whether the trial court erred in allowing the police investigator to provide a narration of the surveillance videos shown to the jury; and (2) whether the trial court erred in allowing the admission of physical evidence that was not produced during discovery.

**FACTS:** On May 6, 2013, Sedrick Miles and Sean Land stopped at a Walmart in Laurel so that Miles could use the restroom. When Miles returned to the car, Land said he was going to do something. He had seen Fernando Noriega leaving Walmart and counting his money. Miles testified he was looking through some CDs when Land exited the car and then he heard a gunshot. He looked up and saw Noriega on the ground in the parking lot. He then saw Land shoot him again. Land returned to the vehicle, and Miles drove away from the scene. However, his tag number was captured on Walmart surveillance video. Miles was arrested two days later. Miles made a statement to police implicating Land as the actual shooter. Land was then arrested and confessed in a videoed interview with police. During trial, the prosecution played the Walmart surveillance video. Lt. Jerome Jackson described what was occurring in the surveillance video as it was played for the jury. Also, on one occasion, he pointed out where the jury should focus its attention as it was played. The prosecution also asked Miles about the shoes he wore during the robbery. Miles stated he was actually wearing those same shoes. The defense objected, claiming a discovery violation. The objection was overruled and Miles's shoes were admitted into evidence. Land was convicted and appealed.

**HELD:** (1) Jackson's narration mostly described what was occurring in the video. Land's counsel only objected during specific parts of the video. Counsel objected when the prosecutor asked which side of the car should the jury be watching for activity after Miles had returned to the vehicle. The objection was overruled, and Jackson directed the jury to focus their attention to the front passenger side of the vehicle. There was also an objection prior to Jackson's testimony that, on a smaller screen, he was able to tell a difference in Miles's footwear.

Jackson testified as a lay-witness, not an expert. Jackson did not identify Land or even mention the robbery while the video was played. His testimony had little bearing in Land's case and was a mere exposition of the crime. However, Jackson did not possess firsthand knowledge of the events recorded on the video. As a result, Jackson should not have been allowed under MRE 701 to offer opinion testimony regarding the actions in the video. Regardless, there was sufficient evidence to convict Land even without the narration. Any error was harmless.

(2) The prosecutor stated he first noticed Miles's shoes on the day of trial. Land's counsel refused to examine the shoes, and never requested a continuance or a mistrial. Even though Land claimed unfair surprise, he waived any discovery violation claim when he failed to request a continuance or a mistrial.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109535.pdf>

**February 9, 2016**

***Randolph Parkes Fancher v. State***, No. 2014-KM-01225-COA (Miss.Ct.App. February 9, 2016)

**CASE:** Misdemeanor DUI and Careless Driving

**SENTENCE:** 48 hours suspended

**COURT:** Madison County Circuit Court

**TRIAL JUDGE:** Hon. William E. Chapman, III

**APPELLANT ATTORNEY:** Kevin Dale Camp, Jared Keith Tomlinson

**APPELLEE ATTORNEY:** John G. (Trae) Sims, III

**CITY ATTORNEY:** John G. (Trae) Sims, III

**DISPOSITION:** Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Carlton, Fair, James and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUE:** Whether the evidence was sufficient.

**FACTS:** On December 28, 2012, Randolph Parkes Fancher was pulled over by Officer Tyler Burnell for driving about 15 mph over the 50 mph speed limit, and for weaving over the fog line. Burnell testified he smelled an intoxicating beverage inside the vehicle and on Fancher's breath. Burnell stated Fancher denied drinking, but later admitted to taking several doses of NyQuil. Fancher

declined to submit to a portable breath test. However, Fancher agreed to submit to a field sobriety test. Fancher advised Burnell that he had ankle problems that affected his balance. Therefore, Burnell only conducted a horizontal-gaze-nystagmus (HGN) test, which Fancher failed. He was subsequently arrested and refused an Intoxilyzer test. Fancher pled no contest in municipal court to DUI and careless driving. He appealed his case to the county court, which found him guilty of both charges after a trial de novo. The circuit court affirmed and Fancher appealed.

**HELD:** Burnell testified Fancher was speeding and weaving in the road, and smelled alcohol in Fancher's vehicle and on his breath. Fancher admitted that he had taken NyQuil that evening but had not consumed alcohol. Finally, Fancher's refused to submit to the Intoxilyzer test. Although Burnell testified about Fancher's failure of the HGN test, the county court did not mention the HGN test when discussing its reasoning for finding Fancher guilty of DUI. It was not improper to use Fancher's Intoxilyzer refusal as evidence of guilt. This was not the only evidence the court considered.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109651.pdf>

**February 16, 2016**

***Mickey Lee Johnson v. State***, No. 2014-KA-00719-COA (Miss.Ct.App. February 16, 2016)

**CASE:** Sexual Battery

**SENTENCE:** 20 years with 5 years supervised probation

**COURT:** Washington County Circuit Court

**TRIAL JUDGE:** Hon. Margaret Carey-McCray

**APPELLANT ATTORNEY:** W. Daniel Hinchcliff

**APPELLEE ATTORNEY:** Lisa L. Blount

**DISTRICT ATTORNEY:** Willie Dewayne Richardson

**DISPOSITION:** Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUE:** *Lindsey* brief. Whether there were any arguable issues for appeal.

**FACTS:** On March 11, 2012, Mickey Lee Johnson's wife, Diane, found Johnson with their daughter, A.J., in a back room of the family's residence. Johnson was on his knees with his pants down, directly behind A.J., who was lying on her side holding her underwear. Diane testified that Johnson jumped up and ran into the closet, stating that the situation was not what it appeared. Diane notified the police. A.J. testified that Johnson approached her that night and ordered her to have sex with him. She refused, but Johnson became violent. A.J. stated that Johnson ordered her to remove her underwear, after which he inserted his penis into her vagina. A.J. further testified that Johnson had been raping her since she was 13-years old. A.J. stated she never told anyone because Johnson had threatened her with violence. DNA testing indicated that Johnson was the father of A.J.'s two children. A.J. was 24 at the time of trial. Johnson admitted his intention to have sex with A.J. on

March 11, 2012, but denied any penetration had occurred. On cross-examination, Johnson invoked his right against self-incrimination. Johnson was convicted. On appeal, his appellate counsel filed a *Lindsey* brief asserting there were no arguable issues for appeal. Johnson did not file a pro se brief.

**HELD:** The COA affirmed there were no arguable issues for appeal.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110006.pdf>

*Darex Antonio Chester v. State*, No. 2014-KA-00964-COA (Miss.Ct.App. February 16, 2016)

**CASE:** Sale of Cocaine x2 and Sale Diazepam (Valium),and Triazolam (Halcion)

**SENTENCE:** Concurrent terms of 60 years on Counts I and II, and 40 years on Count III and IV, all as a subsequent drug offender and habitual offender

**COURT:** Pike County Circuit Court

**TRIAL JUDGE:** Hon. Michael M. Taylor

**APPELLANT ATTORNEY:** W. Daniel Hinchcliff

**APPELLEE ATTORNEY:** Alicia Marie Ainsworth

**DISTRICT ATTORNEY:** Dee Bates

**DISPOSITION:** Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUES:** *Lindsey* brief. Pro Se issues: (1) Whether the trial judge erred in failing to clarify his sentence, (2) whether his sentences were excessive, disproportionate, and constituted cruel and unusual punishment, and (3) whether the trial judge erred in granting a jury instruction defining “dosage unit.”

**FACTS:** Darex Antonio Chester was convicted of 4 counts of selling a controlled substance. He was also indicted as a subsequent drug offender and a habitual offender. After his convictions, the trial judge ordered his sentences to run concurrently, for a total of 60 years to serve without parole. Appellate counsel filed a *Lindsey* brief alleging no arguable issues for appeal. Chester filed a pro se brief.

**HELD:** (1) Chester requested the Court to direct the trial judge to answer his petition to clarify his sentence. However, Chester filed a writ of mandamus with the Court, which was denied on June 24, 2015. The appropriate procedure under MRAP 27(h)(5) for review of a petition for a writ of mandamus is to file a motion for reconsideration within 14 days. This claim is barred.

(2) Chester’s sentence was proper. Chester's sentences clearly fall within statutory limits.

(3) The trial judge did not err in instructing the jury that “that a ‘dosage unit’ equals a tablet or capsule of [a] controlled substance.” This was not an improper peremptory instruction, but the statutory definition.

To read the full opinion, click here:  
<http://courts.ms.gov/Images/Opinions/CO110009.pdf>

**February 23, 2016**

*Antwain D. Thomas v. State*, No. 2014-KA-01078-COA (Miss.Ct.App. February 23, 2016)

**CASE:** Sale of Cocaine

**SENTENCE:** 60 years as a subsequent drug offender and habitual offender

**COURT:** Clarke County Circuit Court

**TRIAL JUDGE:** Hon. Robert Walter Bailey

**APPELLANT ATTORNEY:** George T. Holmes, Phillip Broadhead

**APPELLEE ATTORNEY:** Scott Stuart

**DISTRICT ATTORNEY:** Bilbo Mitchell

**DISPOSITION:** Affirmed. Wilson, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton and Fair, JJ., Concur. James, J., Concur in Part Without Separate Written Opinion. Greenlee, J., Not Participating.

**ISSUES:** (1) Whether the trial court erred by permitting Officer Moulds to testify that the CI told him that she had talked to Thomas and arranged to buy cocaine from him; (2) whether the trial court erred by allowing Agent Lewis to describe what the video depicted; (3) whether he was entitled to a cautionary jury instruction regarding the CI's testimony; and (4) whether there is sufficient evidence to sustain the conviction, or whether the verdict was against the overwhelming weight of the evidence.

**FACTS:** On November 8, 2010, a confidential informant (CI) told Lieutenant Commander Joseph Moulds of the South Mississippi Narcotics Task Force that she had arranged to buy cocaine from Antwain Thomas the next day. Moulds and Task Force Agent Billy Lewis met with the CI the next morning, and she called Thomas in the agents' presence, although the call was not recorded. The CI told Moulds and Lewis that the original plan was for Thomas to meet her at her house, but during the phone call, Thomas told the CI to come to his girlfriend's house instead. The agents gave the CI \$50 to make the buy, searched her car for drugs, and also made her empty her pockets and shake her clothes to make sure she did not have any concealed drugs. The agents also gave her a small handheld video camera to use to record the buy. The CI returned to the agents' location 15 minutes later with the camera and 1.5 grams of crack cocaine. Moulds testified that he later viewed the video and, after comparing it to pictures of Thomas, confirmed that Thomas was the man on the video. Lewis testified that he had known Thomas for ten years and had no doubt that the man on the video was Thomas. Agent Lewis also testified that an exchange of money could be seen in the video. Finally, the CI positively identified Thomas as the man who sold her the cocaine. Thomas was convicted and appealed.

**HELD:** (1) The trial court did not abuse its discretion by allowing Moulds to testify about his prior conversation with the CI. Moulds's testimony was admissible to explain why he and Agent Lewis met with the CI, searched her vehicle, and gave her cash and a video camera. It was not hearsay. Regardless, the CI testified and was the key witness at trial. She was subject to cross-examination. Any error was harmless.

(2) The trial judge did not err by allowing Lewis to describe to the jury his interpretation of the events depicted on the video. Thomas did not object to the testimony. Thomas finally objected only when the prosecutor asked Lewis to reiterate the same testimony. By then, both Moulds and Lewis had testified, without objection, that the man on the video was Thomas and that an exchange of cash could be seen. Lewis's final confirmation of this testimony was merely redundant and harmless, even if it was error.

(3) The trial judge did not abuse his discretion by refusing to instruct the jury that the CI's testimony should be "received with caution." Moulds and the CI acknowledged that the CI had been arrested for selling a small amount of cocaine and offered an opportunity to "work off" the charge in exchange for buying cocaine and helping to arrest more significant dealers. Both admitted that the CI had never been indicted and had avoided prosecution for her crime.

(4) Thomas argued that the CI was untrustworthy because her arrest and potential prosecution for selling cocaine gave her a motive to lie. The jury was entitled to consider the CI's motives, but it was also entitled to find her credible. The video of the exchange in this case, although poor quality, corroborates the CI's testimony. The evidence was sufficient and the verdict was not against the weight of the evidence.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110345.pdf>

**Charles Ray McCollum, Jr. v. State**, No. 2014-KA-01522-COA (Miss.Ct.App. February 23, 2016)

**CASE:** Burglary of a Dwelling and Kidnapping

**SENTENCE:** 25 years and a consecutive 35 years, respectively, as an habitual offender

**COURT:** Simpson County Circuit Court

**TRIAL JUDGE:** Hon. Eddie H. Bowen

**APPELLANT ATTORNEY:** Justin Taylor Cook

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISTRICT ATTORNEY:** Daniel Christopher Jones

**DISPOSITION:** Reversed and Remanded. Wilson, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair and James, JJ., Concur. Greenlee, J., Not Participating.

**ISSUE:** Whether McCollum was denied his state and federal constitutional right to counsel.

**FACTS:** On September 5, 2012, Bill Russell, then 89-years old, was assaulted in his home in Magee. The attacker beat Russell brutally, bound Russell's feet and hands behind his back, ransacked the house, stole over \$2,000 in cash, and left in Russell's Chevrolet Lumina. Russell later identified Charles McCollum as his assailant. McCollum was indicted and appointed counsel. A year later, McCollum's attorney filed a motion to withdraw. McCollum did not believe that his attorney was capable of handling the case properly because counsel had two other trials and a mediation scheduled around the same time. After conferring with the State and McCollum, the judge agreed to continue the case until September 2014. Five days before McCollum's trial date, defense counsel again moved to withdraw. McCollum had filed a bar complaint against counsel and had written letters to two key defense witnesses in which he warned that counsel was a liar who could not be trusted. Although counsel stated McCollum wanted to fire him, McCollum told the court he did not want to fire counsel and did not want counsel to withdraw. He regretted his counsel saw the letters he wrote and he was not sure the bar complaint was the right thing to do. The State filed a motion to proceed to trial based on the victim's age. The circuit judge granted counsel's motion to withdraw and the State's motion to proceed with trial. The judge found that McCollum's conduct made it impossible for his court appointed counsel to continue to represent him. He appointed another attorney to act as "arm chair counsel" for McCollum if he had any questions. McCollum was required to represent himself. He was convicted and appealed.

**HELD:** The State confessed error and the COA agreed and reversed. The record before us does not support a finding that McCollum impliedly waived or forfeited his right to counsel by his conduct. Although the trial judge touched on some of the warnings and advisories set out in Rule 8.05, it is clear that McCollum did not knowingly and voluntarily waive his right to counsel. In fact, McCollum repeatedly told the circuit court that he did not want to represent himself, and that he desired court-appointed counsel. Thus, the issue is whether his conduct establishes a forfeiture of the right to counsel or what some courts have terms an "implied waiver" of the right.

"On the record before us, we are unable to say that McCollum received a sufficient warning that his conduct might result in a loss of his right to counsel. Accordingly, we cannot conclude that McCollum impliedly waived his right to counsel." Looking at other states, the Court found that, "*in the absence of a prior warning*, a defendant will not be found to have forfeited his right to counsel based on conduct of the type involved in this case." [emphasis supplied].

From the record before us, all that can be said is that McCollum was an uncooperative client who disparaged his court-appointed attorney and filed a bar complaint against him. We sympathize with the attorney involved, and we agree with the trial judge that a defendant should not be able to use his right to counsel as a means to delay criminal proceedings against him. However, unless the defendant has been warned that his conduct may result in loss of the right to counsel or engages in egregious misconduct such as physical violence, there is no basis for finding an implied waiver or forfeiture of that right.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110334.pdf>

*David W. Parvin v. State*, No. 2014-KA-00466-COA (Miss.Ct.App. February 23, 2016)

**CASE:** Murder  
**SENTENCE:** Life

**COURT:** Monroe County Circuit Court  
**TRIAL JUDGE:** Hon. Paul S. Funderburk

**APPELLANT ATTORNEY:** James Lawton Robertson, Jim Waide, Rachel Pierce Waide, William James Dukes, Edwin Poteat Lutken, Jr.

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISTRICT ATTORNEY:** J. Trent Kelly

**DISPOSITION:** Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Fair and James, JJ., Concur. Wilson, J., Concur in Part and in the Result Without Separate Written Opinion. Greenlee, J., Not Participating.

**ISSUES:** (1) Whether the evidence was sufficient to prove that Parvin acted with "deliberate design" when he accidentally shot and killed his wife, (2) whether Parvin is entitled to a judgment of acquittal under the *Weathersby* rule, (3) whether Parvin was denied due process, (4) whether the trial court erred in denying Parvin's request to introduce telephone records into evidence, (5) whether the trial court erred in admitting Parvin's prior testimony, (6) whether the trial court erroneously instructed the jury, and (7) whether Parvin is entitled to a new trial and whether an accumulation of errors denied Parvin due process of law.

**FACTS:** On the morning of October 15, 2007, Dr. David Parvin called 911 to report that he had accidentally shot Joyce Parvin, his wife of 49 years, at their home near Aberdeen. When law enforcement officials arrived, Joyce was found dead in a desk chair with a shotgun wound on the right side of her torso. Parvin reported to the investigating officers that he had been rushing out of the house to shoot a beaver and was carrying a loaded shotgun. According to Parvin, in his haste, he tripped, and during his fall, the gun discharged, shooting his wife. Parvin was convicted in his first trial, but the Supreme Court reversed based on expert testimony from Dr. Steven Hayne, and the admission of a computer-generated depiction of the shooting by a crime-scene analyst. The Court found the testimony speculative, depicting a "possible" account of the shooting. [\*Parvin v. State\*](#), No. 2011-KA-01471-SCT (Miss. April 11, 2013). Parvin was tried a second time and was again convicted. He appealed.

**HELD:** (1) Parvin maintained the shooting was an accident and that the State failed to prove he acted with deliberate design. Although there was no direct evidence of deliberate design, the jury had sufficient evidence to prove Parvin's intent to kill. Parvin gave inconsistent accounts of the events surrounding Joyce's death. First he said he tripped over a rug, then said it was the dog, and then claimed he wasn't sure. He also changed his story on whether he pulled the trigger or not before his second trial. The State's firearms expert contradicted Parvin's claim of an accidental discharge of the shotgun. Parvin also had an affair and began seeing another woman shortly after his wife's death.

(2) Parvin was not entitled to a directed verdict based on the *Weathersby* Rule. In his first appeal, the SCT found he was not entitled to a directed verdict without the improper expert testimony. The Court cited the testimony of his mistress, who stated Parvin initially told her that his wife had committed

suicide. However, on retrial, the mistress testified she did not remember exactly what Parvin told her. While looking solely at the testimony from the second trial, despite her confusion at times, she still testified to the same facts she testified to at the first trial, namely that Parvin initially told her that Joyce killed herself and later changed his story. The jury determined her credibility. The mistress's testimony, along with the inconsistencies in Parvin's version of events, was sufficient for the COA to decline to apply the *Weathersby* rule.

(3) Parvin was not denied due process. He again claimed that there was insufficient evidence to prove deliberate design, and challenged the credibility of the evidence presented. The claim is without merit.

(4) The trial court did not err in denying the admission of Parvin's phone records into the evidence. The sheriff's department had subpoenaed the records, and Parvin sought to admit them during the cross-examination of a sheriff's deputy. The records were hearsay. The deputy could not authenticate them. They were not certified to be self-authenticating.

(5) Parvin next argued that the trial court erred when it allowed the State to introduce Parvin's testimony from the first trial. Parvin claims that the only reason he testified in the first trial was to rebut the improper expert evidence. However, this only matters if the improper evidence was unconstitutionally obtained, such as an involuntary confession. Regardless, it does not appear that Parvin's testimony at the first trial was provoked by improper expert testimony, but rather his strong desire to testify. Finally, Parvin's testimony was not an "admission," but a statement against interest under MRE 801(d)(2).

(6) The trial judge did not abuse his discretion in failing to grant an instruction telling the jury that it must disregard the fact that Parvin had been convicted in a prior trial. During trial, Parvin's prior trial was mentioned several times, but the defense never objected. Counsel should have objected at the first mention of the trial instead of submitting an instruction.

The trial judge also did not err in failing to grant a circumstantial evidence instruction. The evidence presented at Parvin's trial was not entirely circumstantial. Parvin admitted that he shot his wife. This was an element of the offense. The fact that the evidence of deliberate design was circumstantial does not entitle him to a circumstantial evidence instruction.

(7) There was no cumulative error.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110348.pdf>

**March 1, 2016**

*Andrew Graham v. State*, No. 2014-KA-01783-COA (Miss.Ct.App. March 1, 2016)

**CASE:** Conspiracy to possess a controlled substance inside a correctional facility

**SENTENCE:** 5 years as an habitual offender

**COURT:** Lincoln County Circuit Court  
**TRIAL JUDGE:** Hon. Michael M. Taylor

**APPELLANT ATTORNEY:** George T. Holmes, Justin Taylor Cook

**APPELLEE ATTORNEY:** Barbara Wakeland Byrd

**DISTRICT ATTORNEY:** Dee Bates

**DISPOSITION:** Affirmed. Carlton, J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, James and Wilson, JJ., Concur. Irving, P.J., and Fair, J., Concur in Part and in the Result Without Separate Written Opinion. Greenlee, J., Not Participating.

**ISSUES:** (1) Whether his indictment was defective; (2) whether the evidence was legally sufficient to support his conviction; and (3) whether he was illegally sentenced as a habitual offender.

**FACTS:** On February 24, 2012, Officer Teresa Lawrence was monitoring inmates in the yard at the Lincoln County jail. She noticed Andrew Graham and another inmate standing by the yard's exterior door. She saw Graham and the other inmate bend down by the exterior door and "get stuff out from under the door." She alerted other officers who searched the inmates when they re-entered the jail. Officers found three envelopes concealed on inmate Terrance Hudson. Before going into the yard, Graham said he was cold and was allowed to bring a blanket outside with him. When officers began their search of Graham, he tried to hand his blanket to Hudson. Officers found envelopes containing tobacco and marijuana in Hudson's blanket. A small crack was later found in the exterior jail-yard door large enough to slide something through the opening. Graham was later indicted on two counts: Count I, bringing marijuana, a controlled substance, into a correctional facility; and Count II, conspiracy to possess a controlled substance inside a correctional facility. He was only convicted of Count II. He appealed.

**HELD:** (1) Graham asserts his indictment was fatally defective for failure to specify the contraband that he conspired to possess in the correctional facility. Graham failed to raise this argument before the circuit court. Regardless, the indictment included the essential statutory elements of the charges and tracked the language of the statute. Count I of Graham's indictment provided notice that marijuana constituted the controlled substance that Graham was charged with unlawfully possessing.

(2) Graham next claimed that the conspiracy charge was based completely on circumstantial evidence and speculation, and that he failed to show a "union of the minds" between himself and Hudson. Graham was allowed to take a blanket with him to the jail yard because he complained that he felt cold. An officer observed Graham and another inmate stand by the yard's exterior door, bend down, and retrieve items from underneath the door. Before being searched, Graham attempted to pass his blanket to Hudson. The blanket contained envelopes with tobacco and marijuana. The State presented sufficient evidence for a jury to determine that Graham entered into a common plan to possess a controlled substance inside a correctional facility.

(3) Graham raised no objection during the pretrial hearing to the State's motion to amend his indictment to reflect his habitual-offender status. During his sentencing hearing, Graham failed to object to his sentence as a habitual offender, and did not raise the issue on his JNOV.

Notwithstanding the bar, it was not plain error. The court admitted Graham's prior sentencing orders into evidence. His sentence was not illegal.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110558.pdf>

**March 8, 2016**

*Adrian Moore v. State*, No. 2014-KA-01461-COA (Miss.Ct.App. March 8, 2016)

**CASE:** Murder and Aggravated Assault

**SENTENCE:** Life with a consecutive 20 years

**COURT:** Jackson County Circuit Court

**TRIAL JUDGE:** Hon. Robert P. Krebs

**APPELLANT ATTORNEY:** George T. Holmes, Mollie Marie McMillin

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISTRICT ATTORNEY:** Anthony N. Lawrence, III

**DISPOSITION:** Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Fair, James and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUES:** (1) Whether the trial court abused its discretion in denying the defense's motion for a mistrial after the jury indicated it was deadlocked, and (2) whether the trial court erred in refusing to allow the defense to make a record regarding testimony the trial court ruled as inadmissible.

**FACTS:** On January 20, 2013, Alfred Durden and his brother, Hardy Parker, were leaving a night club. Crossing a vacant parking lot, Durden recognized Adrian Moore standing in a wooded area nearby. Moore immediately started shooting at the two men. The first shot narrowly missed Durden, hitting Parker, who fell to the ground. Durden, pretending to be shot, lay down on the ground. Moore walked over and shot Parker in the head. Moore then stood over Durden, and shot him in the back of the head. Fortunately, the bullet exited through Durden's neck, and he survived the shooting. Parker, however, died from his injuries. Durden went to a nearby apartment where a friend of his, Nathan Holmes, lived. Holmes called police and Durden later told him Moore was the shooter. When police arrived, Durden said "Adrian" shot him. Moore was arrested, and a search of his residence revealed several types of bullets and a tan skull cap. Moore's clothing was collected for DNA testing, and blood found on his jeans was a positive DNA match with a known sample of Parker's blood. Moore was convicted and appealed.

**HELD:** (1) After about 3 hours of deliberations, jurors said they were deadlocked. The judge asked only for the numerical split, but the foreman told him it was 10-2 for guilty. The judge read the *Sharplin* instruction and sent the jury back to deliberate some more. A couple of hours later, a little after 6 pm, the jury reported they were still deadlocked 10-2. The judge asked if going home for the

night would help. All jurors said it might. The following morning, jurors resumed deliberations and came back with an unanimous verdict after a couple of hours.

The trial judge did not err in refusing to grant a defense request for a mistrial. Nothing in the record indicates that the trial court pressured or coerced the jurors. In fact, when asking the jurors if they thought going home would help, the judge reassured the jurors, "Nobody is trying to put you on the spot."

(2) The trial judge did not deny defense counsel the opportunity to make a record on evidence of a possible motive for police officers to implicate Moore. Moore had been involved in another shooting where he claimed self-defense after shooting Jackie Davis. When Druden identified Moore, he told police it was the same man who had shot Davis. The trial judge did not allow counsel to go into the details of the Davis shooting. Moore also claimed it was reversible error not to allow him to cross-examination Officer Kim Stevens about a recording of Durden's statement to police. The court allowed counsel to admit the CD of the statement, but not to cross-examine the officer about it.

Counsel stated that his purpose was to show motive on the part of law enforcement to implicate Moore in the present crime. However, the absolute right to make a proffer does not include the right to develop testimony from a witness. The trial court permitted counsel to state what he thought his questioning of the investigating officer regarding the Davis case might demonstrate. In the second instance, counsel stated what the recording would show, and he was also allowed to enter the CD into evidence for identification purposes.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110887.pdf>

*Derrick Hunter v. State*, No. 2014-KA-01372-COA (Miss.Ct.App. March 8, 2016)

**CASE:** Second-Degree Murder

**SENTENCE:** Life

**COURT:** Humphreys County Circuit Court

**TRIAL JUDGE:** Hon. Jannie M. Lewis

**APPELLANT ATTORNEY:** George T. Holmes, Benjamin Allen Suber

**APPELLEE ATTORNEY:** Billy L. Gore

**DISTRICT ATTORNEY:** Akillie Malone Oliver

**DISPOSITION:** Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUES:** (1) Whether the evidence was sufficient, (2) whether the verdict was against the overwhelming weight of the evidence, and (3) whether the trial court erred in allowing two State witnesses to testify.

**FACTS:** On the night of August 23, 2013, Temeria Ingram and her two children arrived home after watching a football game at a friend's house. Shameika Brown later came to Ingram's home and spent a few hours there. Either during Brown's time at the house or as she was leaving, Ingram's longtime boyfriend, Derrick Hunter arrived at the home intoxicated. After Brown left, the two got into a physical fight which resulted in Ingram's death. After realizing that Ingram was unconscious, Hunter woke his daughter, Brendarrius Ingram, and told her to remain calm and come help him lift Ingram onto the bed. When Hunter realized that they could not move Ingram, he instructed Brendarrius to go to the neighbor's house and call 911. Hunter told paramedics that he kicked Ingram in the neck. Hunter was arrested and charged with murder. Dr. Mark LeVaughn testified that Ingram died of strangulation and noted that she had multiple abrasions, scrapes, and bruises on her body, as well as a bite mark on her back. Hunter testified that he did kill Ingram but did so in the heat of passion, as he suspected that Brown and Ingram had an intimate relationship. He was convicted of second-degree (depraved heart) murder and appealed.

**HELD:** (1) Hunter claims that he is guilty of culpable-negligence manslaughter rather than second-degree murder. However, Hunter did not ask that the jury be instructed on culpable-negligence. The State presented evidence that Ingram was beaten and strangled. Dr. LeVaughn testified that the scratches on Temeria's neck were consistent with death by strangulation. Brendarrius testified that her mother, days before the killing, told her to call 911 if she heard any screaming. The jury resolved the question of Hunter's mental culpability. The evidence was sufficient for depraved heart murder.

(2) Because Hunter never made a motion for a new trial and the issue the weight of the evidence was never heard in the trial court, he is procedurally barred from raising it now on appeal.

(3) Hunter claims the trial court erred in allowing two witnesses testify in violation of the discovery rule. The Friday before trial, the State notified the defense that Brendarrius would testify to more than anticipated, and a new witness, Mary Ingram would also testify. At trial, Hunter objected to Brendarrius and was given time over lunch to speak with her. When she later testified, he did not object further.

Hunter objected again to Mary's testimony and asked that it be excluded after speaking with her. The trial judge erred in allowing her to testify. However, the error was harmless. The only new information provided through Mary's testimony was that during a conversation with Hunter days after Ingram's death, Hunter told her that he was high on the night he killed Ingram. Later in trial, Hunter testified that he was not high, but he was intoxicated. Mary's testimony was not necessary to Hunter's conviction.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109683.pdf>

**Mark Schlepphorst v. State**, No. 2014-KM-01594-COA (Miss.Ct.App. March 8, 2016)

**CASE:** First Offense DUI

**SENTENCE:** 48 hours, suspended for two years with unsupervised probation

**COURT:** Madison County Circuit Court  
**TRIAL JUDGE:** Hon. William E. Chapman, III

**APPELLANT ATTORNEY:** V.W. Carmody Jr., Aaron Paul Hommell  
**APPELLEE ATTORNEY** LaDonna C. Holland

**DISPOSITION:** Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUE:** (1) Whether the evidence was sufficient for common law DUI, and (2) whether the evidence was sufficient to prove venue.

**FACTS:** Around 11 p.m. on November 8, 2012, Mark Schlepphorst drove through a Madison County Sheriff's Department checkpoint without stopping and ignored the direction of the officers. When he was pulled over, deputies noticed the smell of an intoxicating beverage was coming from Schlepphorst's car and that Schlepphorst's speech was slurred. Schlepphorst then admitted that he had "a couple of glasses of wine" that evening. Schlepphorst failed three field sobriety tests and tested positive on a portable breath test. He admitted to deputies that he was feeling some effects for the wine. He was arrested and taken to the sheriff's department. The Intoxylizer was out of order, and Schlepphorst was offered a urine test. He refused and was charged with DUI and reckless driving. Schlepphorst pled no contest in justice court and then appealed to the county court. After a bench trial, the county court found Schlepphorst guilty of both charges. The circuit court affirmed the county court's judgment. Schlepphorst appealed again.

**HELD:** Schlepphorst argued that the State did not provide sufficient evidence to prove that he was impaired at the time of his arrest. Deputies testified that Schlepphorst drove recklessly through the checkpoint, despite being instructed to stop. The smell an intoxicating beverage was coming from inside his car. Schlepphorst's speech was slurred and he admitted to drinking wine that evening. The portable breath test was positive, and Schlepphorst later admitted to a deputy that he was feeling the effects of the alcohol. Schlepphorst also refused the urine test offered to him at the sheriff's department. The evidence was sufficient to prove common-law DUI.

Schlepphorst also challenged the accuracy of the field sobriety test. He argued that his knee problems and glaucoma prevented him from performing well on the tests and caused him to sway as he stood outside of his car. Schlepphorst called Dr. Jimmy Valentine, who testified that Schlepphorst was not a suitable candidate for the field sobriety tests due to his eye and knee conditions. Because of this testimony, the county court judge declined to consider the field sobriety tests, but found him guilty anyway. It was also proper for the court to consider Schlepphorst's refusal to take a urine test. A urine test constitutes a chemical test under the statute. His refusal of the urine test is admissible under the statute.

(2) A deputy's testimony that the events occurred in Madison County was sufficient to establish venue.

To read the full opinion, click here:  
<http://courts.ms.gov/Images/Opinions/CO109628.pdf>

**March 15, 2016**

*Charlie Ricardo Grant v. State*, No. 2013-KA-00614-COA (Miss.Ct.App. March 15, 2016)

**CASE:** Sexual Battery x2

**SENTENCE:** Two concurrent terms of 30 years, with 15 suspended, and 15 years PRS

**COURT:** Rankin County Circuit Court

**TRIAL JUDGE:** Hon. John Huey Emfinger

**APPELLANT ATTORNEY:** S. Malcolm O. Harrison

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISTRICT ATTORNEY:** Michael Guest

**DISPOSITION:** Affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, Wilson and Greenlee, JJ., Concur.

**ISSUES:** (1) Whether the circuit court abused its discretion when it allowed a nurse's hearsay testimony regarding statements the minor victim made during a medical examination, (2) whether the trial judge erred in allowing the prosecution to cross-examine Grant about his previous girlfriends to discredit his alibi witness, and (3) whether the evidence was sufficient and whether the verdict was against the weight of the evidence.

**FACTS:** In May of 2011, Charlie Grant was 31-years old. Grant was a frequent presence in N.M.'s house, where she lived with her mother, Grant's brother, and three siblings. Grant's brother and N.M.'s mother had two daughters together. Grant frequently took N.M. and/or her siblings on outings. N.M. developed crush on Grant. When N.M. was in the eighth grade, Grant began complimenting her hips. His touch lingered when they embraced. One weekend night, Grant took N.M. and her brother to see a late movie. After dropping them off at home, Grant later texted N.M., and with her mother's consent, N.M. and Grant went to Waffle House. On the way there, N.M. grabbed Grant's thigh. Grant exposed his penis so she could touch it. After getting food to go, N.M. performed oral sex on Grant while riding in his truck. Grant eventually parked and performed oral sex on her. He later told her not to tell anyone. N.M. later told a friend, who told N.M.'s mother. N.M. initially denied anything inappropriate happened, but eventually admitted what she and Grant did. N.M.'s mother contacted police. Grant was charged with three counts of sexual battery. The jury convicted him of two counts and acquitted him a third. He appealed.

**HELD:** (1) The trial judge did not err in allowing the testimony of a nurse practitioner, Stacey Carter, that N.M. told her that N.M. performed oral sex on Grant and he reciprocated. Carter recommended "protective placement" of N.M. Although Grant did not live in N.M.'s home, there was evidence that he was a frequent presence. Grant's nieces were N.M.'s half-siblings. Grant's identity was pertinent to Carter's treatment of N.M., based on Carter's concern regarding the potential for further inappropriate contact with Grant. The testimony was admissible under M.R.E. 801(c).

(2) In rebuttal, Grant called British Manning, who he claimed was his girlfriend at the time, to give him an alibi. On cross, the prosecution asked Grant about all the girlfriends he told police about

during his interrogation. (“10 different women over the course of 58 minutes”). The prosecution asked him why he never mentioned Manning. Grant claimed the questions about his prior girlfriends were irrelevant and prejudicial. Although it is possible that some degree of prejudice could have existed in the jurors' minds regarding interracial dating or having children out of wedlock, Grant's omission of Manning's name tended to make it more probable that Manning's testimony was not credible. The trial judge did not abuse his discretion.

(3) The evidence was sufficient. N.M. testified that she was 14-years old when she performed oral sex on Grant (who was 31-years old) twice and he performed oral sex on her once. It is irrelevant that N.M. consented. Grant disputed N.M.'s version of events, but the jury believed N.M. The fact that the jury found Grant not guilty of one charge has no impact on his two convictions. After the trial, N.M. signed an affidavit recanting her testimony. However, at the motion for a new trial, N.M. testified that she did not lie when she testified during Grant's trial. She said she signed the affidavit because she felt guilty because she consented to the acts that led to Grant's convictions.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111693.pdf>

**March 22, 2016**

*Timothy Allen Wilson v. State*, No. 2014-KA-01478-COA (Miss.Ct.App. March 22, 2016)

**CASE:** Receiving Stolen Property

**SENTENCE:** 10 years as a habitual offender

**COURT:** Warren County Circuit Court

**TRIAL JUDGE:** Hon. Isadore W. Patrick, Jr.

**APPELLANT ATTORNEY:** George T. Holmes

**APPELLEE ATTORNEY:** Alicia Marie Ainsworth

**DISTRICT ATTORNEY:** Richard Earl Smith, Jr.

**DISPOSITION:** Affirmed. Wilson, J., for the Court. Griffis, P.J., Carlton, Fair and Greenlee, JJ., Concur. James, J., Concur in Part Without Separate Written Opinion. Irving, P.J., Concur in Part and Dissents in Part with Separate Written Opinion, Joined by Lee, C.J., Barnes, Ishee and James, JJ.

**ISSUES:** (1) Whether the circuit court properly instructed the jury, (2) whether his trial counsel was ineffective, and (3) whether his sentence is illegal because he was sentenced under the law in effect at the time of his offense, rather than the law as amended by House Bill 585.

**FACTS:** On April 2, 2012, Paul Powers witnessed two males, later identified as Timothy Allen Wilson and Wilson's brother, use a truck to remove a utility trailer from Powers's neighbors' yard. After learning that the owners of the trailer had not given the men permission to remove it. Powers followed them in his vehicle, while contacting law enforcement. Powers provided police with the tag number on the truck that Wilson was driving. The truck was registered to Wilson. Lieutenant Randy

Lewis located the truck and arrested Wilson and his brother. Lewis located the trailer in a nearby yard. Wilson and his brother were jointly tried for receiving stolen property. During trial, Wilson presented an alibi defense, but his trial counsel failed to submit an alibi jury instruction. The State submitted its own alibi instruction. After the jury convicted Wilson, the circuit court imposed a ten-year sentence under the version §97-17-70 that was in effect at the time of Wilson's offense, rather than the amended version which passed in 2014 before his trial. Wilson appealed.

**HELD:** (1) Wilson argued that S-3 was improper because it required him to prove the truth of his alibi defense. Wilson never objected to the instruction, so the COA reviewed the claim under the plain error doctrine. The prosecution submitted S-3, which told the jury the State is not required to prove that an alibi defense is not true. S-3 did not shift the burden of proof to Wilson, as several other instructions informed the jury that the State bore the burden of proof beyond a reasonable doubt. Neither S-3, nor the absence of a different alibi instruction, prevented the jury from considering and determining whether Wilson had an alibi.

The court also gave, without objection, S-4, which instructed the jury that "proof that a defendant stole the property that is the subject of the charge against him, or her, shall be prima facie evidence that the defendant had knowledge that the property was stolen." This was not plain error. The instruction tracked the language of §97-17-70(3)(b). Even if S-4 should not have been given, the elements instruction properly fully instructed the jury on the elements that the State had to prove in this case.

(2) Wilson argues that his counsel was ineffective because he failed to object to S-3 and S-4 and because he failed to submit an alibi instruction. The COA found the record was sufficient to address this claim, but found it was without merit. Counsel may well have abandoned the alibi defense. But even without an alibi instruction, the jury was still able to consider the alibi testimonies and to find that there was reasonable doubt as to whether Wilson was guilty. Wilson failed to show that his counsel was ineffective or that he suffered any prejudice as a result. Even if counsel objected to S-3 and S-4, Wilson cannot show that there is a reasonable probability that these instructions would have altered the result of the proceeding.

(3) Wilson's indictment charged him with receiving stolen property that had "a value in excess of \$500.00." Prior to Wilson's trial, the Legislature amended §97-17-70(4) to change the \$500 threshold to a range of more than \$1,000 but less than \$5,000 and to reduce the maximum punishment. The trial judge did not err in sentencing Wilson under the statute in effect at the time of the offense, rather than the one in effect at the time of trial. The COA held that the legislative changes related not just to the sentencing of receiving stolen property, but to the elements of the offense. In this case, the Legislature amended both the elements of the crime and the applicable penalties.

**Irving, P.J., Concurring in Part and Dissenting in Part:**

Judge Irving dissented, believing that Wilson should have been sentenced under the amended penalty statute that was in effect at the time that Wilson was sentenced. Contrary to the majority opinion, he asserted that the definition of the crime of receiving stolen property did not change, only the penalties did depending on the value of the property. In this case, the State offered proof that the trailer was valued at \$1,500. The penalty portion of the amended statute requires that a person

committing the crime of receiving stolen property valued at \$1,500 should be sentenced to no more than 5 years. He would modify the judgment of the circuit court to reflect that Wilson is sentenced as a habitual offender to 5 years.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO112249.pdf>

**March 29, 2016**

*Derrick Johnson v. State*, No. 2013-KA-01829-COA (Miss.Ct.App. March 29, 2016)

**CASE:** Capital Murder

**SENTENCE:** Life without Parole

**COURT:** Hinds County Circuit Court

**TRIAL JUDGE:** Hon. Winston L. Kidd

**APPELLANT ATTORNEY:** W. Daniel Hinchcliff

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISTRICT ATTORNEY:** Robert Shuler Smith

**DISPOSITION:** Affirmed. Wilson, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Greenlee, JJ., Concur.

**ISSUE:** Whether the trial judge abused his discretion by precluding cross-examination of a detective who interviewed defendant regarding bribery allegations.

**FACTS:** On July 26, 2011, around 2:30 a.m., two masked men entered a gas station in Jackson and demanded money from the clerk. The store's security guard, Tyrone McKinney, entered the store and attempted to retrieve a revolver near the cash register. McKinney and one of the robbers exchanged fire. McKinney was shot twice in the chest and died at the scene. The clerk was shot once in the leg. Three days later, police questioned Derrick Johnson as a suspect in the murder. Detective Eric Smith and Detective William Waples conducted the interview. Johnson eventually confessed to being the shooter. Johnson later claimed he was intoxicated during the interview. Smith died before Johnson's trial, but Waples testified Johnson did not appear to be intoxicated. The trial judge granted the State's request to preclude defense counsel from inquiring into Waples's departure from the Jackson Police Department. At the time of trial he was employed as the captain of campus police at Hinds Community College. Waples testified during the suppression hearing that prior to his resignation, JPD informed him that he had been accused of taking bribes and that he was being reassigned. Waples testified that he resigned from JPD because he did not want to be reassigned. Waples had not been arrested, charged with any crime, or received any kind of document setting out any allegations against him. Johnson was convicted and appealed.

**HELD:** The trial judge did not abuse his discretion in finding that the allegations against the detective were "irrelevant to his character and truthfulness on the matter before the court." Waples had never been arrested or the subject of any formal charge. The possible investigation of Waples for bribery

was irrelevant to his testimony at trial. Waples's testimony served primarily to authenticate the audiotape of Johnson's interview and other exhibits.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111053.pdf>

***Mario Harris v. State***, No. 2014-KA-01398-COA (Miss.Ct.App. March 29, 2016)

**CASE:** Murder and Drive-by Shooting

**SENTENCE:** Life and a concurrent 30 years as an habitual offender

**COURT:** LeFlore County Circuit Court

**TRIAL JUDGE:** Hon. Margaret Carey-McCray

**APPELLANT ATTORNEY:** Benjamin Allen Suber

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISTRICT ATTORNEY:** Willie Dewayne Richardson

**DISPOSITION:** Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Fair, James, Wilson and Greenlee, JJ., Concur.

**ISSUES:** (1) Whether the photo of the murder victim at the scene was unnecessarily gruesome, (2) whether the verdict was against the weight of the evidence, and (3) whether there was cumulative error.

**FACTS:** Mario Harris, a/k/a "Pierre," was convicted of the murder of Cornelius Banks, a/k/a "Bobblehead," and the injuring of Jared Moore in the commission of a drive-by shooting. Maurice Tims testified that on November 8, 2011, Harris and Michael Johnson flagged him down and asked for a ride. Alfred Lacy also joined them. Before they left, Harris ran back inside an abandoned house "to get something." Harris returned with a black SKS assault rifle and sat in the front-passenger seat. Johnson and Lacy sat in the backseat. Tims claimed he was upset that Harris had a rifle, but Johnson put a gun to his head and told him to drive. Tims drove toward Reno's Restaurant on the corner of McLaurin and Roosevelt Streets. They stopped as a crowd of people exited Reno's. Harris stated, "there he goes right there," and Harris and Lacy began shooting into the crowd outside of Reno's. Lacy used a handgun, and Harris used the SKS assault rifle. Johnson also testified that Harris fired the SKS rifle out of the window of Tims's vehicle the night of the shooting. Johnson admitted he had a gun but denied shooting it. Someone in the crowd returned fire as they sped off. Law enforcement began chasing them. When they reached a dead-end, the four men ran in different directions. The car was traced back to Tims, who turned himself in. He first denied involvement claiming someone had borrowed his car, but later admitted his involvement. Harris was convicted and appealed.

**HELD:** (1) During testimony describing the appearance of the crime scene, the victims' condition, and the bullet damage, the State offered into evidence several photographs, including one of Banks's body. The photograph depicts Banks's body and the scene around his body. His eyes and mouth are partially open, and his ear is bloody. His head is lying in a pool of blood, and his body is lying next to several trash cans.

The photograph aids in describing the circumstances in which Banks was killed, and corroborates police testimony about where Banks's body was found. It is also relevant as to who made the fatal shot due to the trajectory of the bullet in relation to where the accomplices testified that Harris was sitting in the vehicle. Since the photograph is from a distance, and not a close-up of the victim's head, it is not overly gruesome. The probative value outweighed any prejudicial effect.

(2) The verdict was not against the weight of the evidence. Both Tims and Johnson placed Harris in the vehicle with an SKS assault rifle, shooting into a crowd of people outside of Reno's. Their testimony also corroborated other testimony, including accounts of the police chase, and the discovery of Lacy after the chase, hiding in a nearby apartment. Tims's testimony that Harris was shooting out of the vehicle's window was confirmed by the ballistic expert's testimony that shell casings were found in the front of Tims's vehicle and had been discharged from the assault rifle. Finally, Harris's fingerprints were found on the front-passenger door of Tims's vehicle.

(3) There was no individual error, therefore there was no cumulative error.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111875.pdf>

**April 5, 2016**

***Kimberly Ann Whitehead v. State***, No. 2014-KA-00697-COA (Miss.Ct.App. April 5, 2016)

**CASE:** Possession of Precursors with the intent to manufacture, and Possession of .1 gram or more, but less than two grams, of Methamphetamine.

**SENTENCE:** 20 years, with 10 suspended, followed by 5 years PRS, with a consecutive 8 years, with 3 suspended, followed by 3 years PRS

**COURT:** Warren County Circuit Court

**TRIAL JUDGE:** Hon. M. James Chaney, Jr.

**APPELLANT ATTORNEY:** Kevin Dale Camp, Jared Keith Tomlinson

**APPELLEE ATTORNEY:** John R. Henry, Jr.

**DISTRICT ATTORNEY:** Richard Earl Smith, Jr.

**DISPOSITION:** Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Carlton, Fair and Wilson, JJ., Concur. James and Greenlee, JJ., Not Participating.

**ISSUES:** (1) Whether there was sufficient evidence; (2) whether the jury's verdicts were contrary to the overwhelming weight of the evidence; (3) whether the evidence that led to her convictions was seized without a valid consent to search; and (4) whether two of the jury instructions were inadequate because they failed to list the precursors that she was charged with possessing.

**FACTS:** On October 4, 2012, investigators responded to a tip that Kimberly Whitehead was manufacturing methamphetamine at the address where she lived with her 82-year-old grandmother, Ruby Mills. Investigator Mike Traxler knocked on the front door while Investigator Stacey Rollison

watched the back of the mobile home. Rollison saw Whitehead exit the back door carrying a black, square box in her hands. Whitehead opened the door to a shed and gave the black box to her boyfriend, Shane Hulett. Whitehead went back inside the mobile home. Mills answered the front door, and there was a strong odor of ammonia in the home. Whitehead denied that anyone was manufacturing drugs at the house. She later led Traxler to her and Hulett's bedroom, where he found a coffee filter in a box by a night stand and a glass pipe. Whitehead denied owning the shed. Mills signed a consent form and gave the investigators permission to search the shed. The black box that Rollison saw Whitehead carrying was hidden behind a section of pegboard mounted inside the shed. The black box contained scales disguised as a cell phone, "a coffee filter containing a white powder[y] substance," and a "small, white package" of a substance later determined to be methamphetamine. Another plastic bag containing a white powdered substance was on a table in the shed. The shed also contained lithium batteries and a bucket of opened blister packs of pseudoephedrine tablets. Traxler also found a can of Drano and two cans of Coleman fuel. Whitehead was convicted of possession of Pseudoephedrine and Ammonium Nitrate with the intent to manufacture, and possession of meth. She appealed.

**HELD:** (1) and (2) The evidence was sufficient to show constructive possession. Whitehead and Hulett lived in Mills's mobile home. There was a strong chemical odor coming from the home. Pseudoephedrine was discovered outside the shed and the ammonium nitrate was inside the shed behind the home. The shed also contained a number of other precursor chemicals. Immediately after police knocked on the door, Whitehead was seen handing a black box to Hulett, who was inside the shed. The black box contained slightly more than 1.1 gram of meth. Although Hulett took sole responsibility for all of the meth, precursors, and paraphernalia that was discovered, the jury chose not to believe him.

(3) The circuit court did not err in denying Whitehead's motion to suppress the evidence recovered from the shed based on lack of standing. Mills testified she thought she was only consenting to a search of the house, not the shed. However, the consent form that she signed clearly states that she was consenting to a search of the shed. Regardless, Whitehead and Hulett both said the shed did not belong to them. Therefore, she had no standing to object to the search of the shed based on her claim that Mills lacked authority to consent to the search. Further, it would be reasonable to consider the shed as part of the curtilage of the home.

(4) Whitehead alleged the jury was not properly instructed, since S-4 and S-5 improperly referred to "two or more" precursors without specifically listing the precursors that she allegedly possessed. However, S-1A, the elements instruction, did list the precursors. S-3A also instructed the jury that pseudoephedrine and ammonium nitrate were precursors. When read together as a whole, the jury instructions were adequate regarding the elements of the offense charged in the indictment, and Whitehead suffered no prejudice from the omission of the name of the precursors in S-4 and S-5.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110713.pdf>

*David Lee Lewis v. State*, No. 2014-KA-01244-COA (Miss.Ct.App. April 5, 2016)

**CASE:** Aggravated Assault and Possession of a Firearm by a Felon

**SENTENCE:** 10 years for aggravated assault, and a consecutive 5 years for possessing the firearm

**COURT:** Hinds County Circuit Court

**TRIAL JUDGE:** Hon. Jeff Weill, Sr.

**APPELLANT ATTORNEY:** Erin S. Pridgen

**APPELLEE ATTORNEY:** Billy L. Gore

**DISTRICT ATTORNEY:** Robert S. Smith

**DISPOSITION:** Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Carlton, Fair, James and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUE:** Whether the trial court erred in excluding Lewis's testimony that the victim was high on drugs at the time of the assault.

**FACTS:** On May 11, 2013, David Lewis got involved in an altercation with Patrick McQuirter. Lewis's domestic companion, Kimberly Gaines, was using drugs. Lewis refused to allow Gaines to leave so that she would be free to use drugs outside of Lewis's presence. She called her cousin, McQuirter. According to Lewis, McQuirter showed up, high on drugs himself. McQuirter attacked Lewis and the two men fell to the ground, causing Lewis to hit his chin on the concrete steps after McQuirter fell on him. McQuirter then got up and walked home. While walking home Lewis and Lewis's son drove around the corner onto McQuirter's street. According to McQuirter, Lewis motioned for McQuirter to come to the driver-side window. He asked McQuirter why he was "always getting in [their] business." McQuirter responded that Gaines was his cousin and that he had no business putting his hands on a female. McQuirter stated that Lewis then sat for a few seconds before pulling out a gun and shooting McQuirter in the leg. Lewis then drove off and left McQuirter in the street. Lewis claimed he was driving to another woman's house and noticed his head was bleeding. Getting a napkin, he saw a gun in his glove compartment. He did not know it was there and put it on the seat. As he drove off, he saw McQuirter standing in the middle of the street, refusing to move. As McQuirter approached the driver-side window, Lewis grabbed the gun and shot McQuirter in the leg. Lewis testified that if he had not shot McQuirter, he believed McQuirter would have "gotten him." Lewis was convicted and appealed.

**HELD:** Lewis argued that because he was not allowed to testify to his belief of McQuirter's state of intoxication, he was not able to adequately express his state of mind and, thus, he could not adequately argue self-defense. M.R.E. 404(a)(2) allows testimony regarding a victim's character only after the defendant offers evidence that the victim was the initial aggressor. Lewis attempted to introduce evidence of McQuirter's cocaine use well before any overt act of aggression was established. Further, Lewis did not offer any specific testimony explaining how cocaine affects McQuirter's propensity for violence, nor did he offer any testimony explaining cocaine's effects on propensity for violence in general.

The testimony was also inadmissible under M.R.E. 404(b). Lewis did little to explain the relevance of this evidence to his state of mind at the time of the assault. Lewis simply stated that he believed McQuirter was high on drugs, and that this belief increased his apprehension of harm, offering no

explanation for why McQuirter's intoxication made Lewis more fearful. It was not proper lay opinion evidence, as Lewis did not articulate any details, just that he "knew when the man was high."

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110085.pdf>

**Jessie Freeman v. State**, No. 2014-KA-01652-COA (Miss.Ct.App. April 5, 2016)

**CASE:** Manslaughter and Murder

**SENTENCE:** 20 years for the manslaughter and a consecutive 40 years for murder

**COURT:** Hinds County Circuit Court

**TRIAL JUDGE:** Hon. Jeff Weill, Sr.

**APPELLANT ATTORNEY:** William Scott Mullennix, Percy Stanfield

**APPELLEE ATTORNEY:** Billy L. Gore

**DISPOSITION:** Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, James, Wilson and Greenlee, JJ., Concur. Fair, J., Concur in Part and in the Result Without Separate Written Opinion. Carlton, J., Dissents with Separate Written Opinion.

**ISSUE:** Whether the trial court erred by refusing to allow a defense expert to testify that methamphetamine use causes violent behavior.

**FACTS:** On the morning of June 11, 2012, Jessie Freeman drove with his 7-year-old daughter from Brandon to Jackson looking for his wife, Lenora. Freeman testified that he was able to locate Lenora using the GPS technology on Lenora's cell phone. Lynn Outlaw, Lenora's employer, testified that Lenora told him she had argued with Freeman on June 8, and Freeman had threatened to kill her. Lenora told Outlaw she was leaving Freeman. Freeman also called Outlaw twice the morning of June 11 looking for Lenora. Freeman testified that he located Lenora's cell phone at a Studio 6 Motel. He saw Lenora's truck, and saw Alan Ramsey sitting in the driver's seat. Freeman claimed Ramsey looked "wild-eyed" and agitated and suddenly pointed a gun at Freeman. Freeman then stepped back into his car to grab his gun, and fired three shots at Ramsey. One of these shots hit Lenora, who was also in the truck. Freeman stated he did not see Lenora in the truck – that she was crouched down in the passenger seat. Freeman left the scene but was followed by Ramsey, who was driving Lenora's truck. Ramsey rear-ended Freeman but lost control of the truck and crashed into the retaining wall outside of the motel. Both Ramsey and Lenora died from gunshot wounds, not the car accident. Freeman later turned himself into police. A gun was found in Lenora's truck, but it was unloaded and in its holster beneath a seat. A witness living at the hotel saw Freeman's car speed into the parking lot, then saw Freeman exit the car holding a gun and start shooting at the truck. A jury convicted Freeman of one count of manslaughter and one count of murder.

**HELD:** Freeman's theory of the case was that he shot Ramsey in self-defense. Freeman argued that Ramsey was under the influence of methamphetamine, which caused Ramsey to act aggressively by exhibiting a gun; thus, Freeman had to defend himself and his daughter. Freeman testified that he had

observed Ramsey shoot crystal meth over 100 times in the 10 years Freeman had known him. The meth would cause him to appear "wild-eyed and crazy looking" and have a short temper.

Ramsey's blood screen was positive for methamphetamine. He called Dr. Steven Hayne to testify about the effects of meth on a person's behavior. The trial judge did not err in excluding Hayne's testimony. Dr. Hayne's proffered testimony was speculative at best. There was no testimony concerning the amount of meth in Ramsey's system.

**Carlton, J., Dissenting:**

Judge Carlton dissented, arguing it was an abuse of discretion to exclude Dr. Hayne's testimony. The evidence was relevant to support Freeman's claim of self-defense.

The record reflects that Freeman established that the victim had used methamphetamine when the incident occurred, and the record also reflects evidence that Ramsey had previously been short-tempered when using methamphetamine. The expert testimony proffered showed that methamphetamine use increases propensity for violence, regardless of the dosage. The record reflects that Freeman established the relevancy link of Ramsey's toxicology results with his theory of self-defense in an effort to show Ramsey as the initial aggressor.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110005.pdf>

**April 12, 2016**

***Jennifer Lee Hoffman v. State***, No. 2014-KA-00456-COA (Miss.Ct.App. April 12, 2016)

**CASE:** Armed Robbery

**SENTENCE:** 3 years

**COURT:** Attala County Circuit Court

**TRIAL JUDGE:** Hon. Joseph H. Loper, Jr.

**APPELLANT ATTORNEY:** George T. Holmes, Phillip Broadhead

**APPELLEE ATTORNEY:** Barbara Wakeland Byrd

**DISTRICT ATTORNEY:** Doug Evans

**DISPOSITION:** Affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Fair, Wilson and Greenlee, JJ., Concur. Barnes, J., Concur in Part and in the Result Without Separate Written Opinion.

**ISSUES:** (1) Whether the trial court erred when it allowed the State to present evidence of Hoffman's prior inconsistent statement; (2) whether the trial court erred in denying Hoffman's motion for a JNOV, or, alternatively, her motion for a new trial; and (3) whether the trial court abused its discretion when it denied Hoffman's request to instruct the jury on the lesser-nonincluded offense of

prostitution.

**FACTS:** On August 16, 2013, Henry Hood and Jennifer Hoffman met in Kosciusko to have sexual intercourse. Hood and Hoffman had met on Facebook through Kayla McDaniel, a mutual associate. Hood agreed to pay Hoffman \$100 to have sex with him, as she needed money to return to Louisiana. Hoffman followed Hood to his brother's old house in a suburban owned by McDaniel's boyfriend, Shawn Despres. However, they could not get into the house, so they decided to have sex in the suburban. However, McDaniel, Despres, and Clarence Windom were hiding in the back of the suburban. When Hoffman got on top of Hood, he was grabbed from behind and a knife was placed at his neck. Although the testimony varied, Hoffman and the others then stole Hood's money and his cell phone was taken from his car. After they left, Hood was able to get to a friend's house where he called the sheriff's office. The suburban was later pulled over. Hoffman, Despres, Windom, McDaniel, and Quenton Hall were in the suburban and were all arrested. Hoffman gave a statement to police where she denied knowing anything about a robbery and claimed that she was not involved in a robbery. McDaniel, Despres, and Windom testified against Hoffman. At trial, Hoffman admitted that she arranged to have sex with Hood in exchange for \$100, but she testified that she had no idea about the plan to rob Hood. She claimed that the only reason that Despres and Windom were with her was to protect her in case something went wrong. She claimed she declined any money from the robbery. She was convicted and appealed.

**HELD:** (1) Hoffman testified that she lied in her pretrial statement because she was embarrassed, but she refused to sign the statement because she knew it was not true. The trial judge did not err in admitting her pretrial statement as impeachment. Hoffman claimed the impeachment was complete when she admitted she lied. She also claimed the State failed to lay a proper foundation for the admission of the statement. However, Hoffman only sought to have the statement excluded prior to trial as involuntary. She did not object to the admission during trial. Her claim is barred.

(2) The evidence was sufficient. Hood testified that when Hoffman got into his lap, a man sitting in the back seat jumped up, wrapped his arm around his neck, and pulled a knife. Despres, Windom, and McDaniel all testified that a knife was used. Her codefendants testified that it was Hoffman's idea to rob Hood, and Hood identified Hoffman as the person who stole his cell phone. The jury was entitled to disbelieve Hoffman's testimony.

(3) Hoffman claimed the trial court erred in failing to allow a lesser offense instruction on prostitution. However, based on the recent case of *Hye v. State*, 162 So. 3d 750 (Miss. 2015), a defendant is no longer entitled to lesser offense instructions.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO112648.pdf>

***Nathaniel Hampton v. State***, No. 2013-KA-02110-COA (Miss.Ct.App. April 12, 2016)

**CASE:** Capital Murder

**SENTENCE:** Life w/o Parole

**COURT:** Sunflower County Circuit Court

**TRIAL JUDGE:** Hon. Betty W. Sanders

**APPELLANT ATTORNEY:** Ben Suber

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISTRICT ATTORNEY:** Willie Dewayne Richardson

**DISPOSITION:** Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Fair, James, Wilson and Greenlee, JJ., Concur.

**ISSUES:** (1) Whether the trial court erred by failing to grant a mistrial after members of the jury were allowed to see him shackled and behind bars, and (2) whether the evidence was insufficient to support the guilty verdict.

**FACTS:** On June 30, 2011, Richard O'Neal was walking with Nathaniel Hampton and Marcus Haney on Hannah Street in Indianola. The men then saw Gerod Nellum and David Melton. O'Neal testified that Nellum informed them that he was "fixing to whoop Dude, Dude owed him \$120," referring to Melton. He observed Hampton start running towards Melton, and then watched as Hampton took the padlock that he was wearing around his neck on a shoestring and hand it to Nellum. Nellum then hit Melton with the padlock. Nellum continued to hit Melton until Hampton said "that's enough." Hampton then took Melton's wallet out of his pocket and looked inside and threw it back. The men started walking in the park when it was pointed out Hampton had blood on his shirt. He took off the shirt and left it in the park. (Police later recovered the shirt). Haney also gave similar testimony. Hampton claimed O'Neal and the rest of the men encouraged Nellum to beat Melton. He did give Nellum the padlock, but denied having any knowledge that Nellum would use it to beat Melton to death. Hampton admitted to removing Melton's wallet from his pants pocket, but he denied removing any money. Hampton was convicted of capital murder and appealed.

**HELD:** (1) Hampton argued that the trial court erred in failing to grant a mistrial after members of the jury allegedly viewed Hampton while he was in shackles and behind bars in the courthouse holding cell. However, the transportation officer told the court that the jurors could not see Hampton because a closed curtain blocked the jurors' view of the holding cell. The defense raised no motion for a mistrial. Hampton failed to demonstrate any prejudice resulting from the possibility that jurors could have seen him in handcuffs and in the holding cell.

(2) Hampton claimed that the State failed to present sufficient evidence to establish Hampton's intent to rob Melton. Haney and O'Neal both testified that Nellum informed them that he was going to "whoop" Melton because Melton owed him \$120. Hampton, O'Neal, and Haney all consistently testified that Hampton then gave Nellum the padlock, which Nellum used to beat Melton to death. It was undisputed that Hampton removed Melton's wallet from his pocket after Nellum fatally beat Melton. A reasonable jury could find that Melton's murder and the removal of his wallet were part of a continuous chain of events.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111583.pdf>

*Joshua Wayne Prokasy v. State*, No. 2014-KA-01793-COA (Miss.Ct.App. April 12, 2016)

**CASE:** Armed Robbery and Conspiracy to commit Armed Robbery

**SENTENCE:** 25 years with 20 to serve and 5 years PRS and a concurrent 5 years for the conspiracy

**COURT:** Pearl River County Circuit Court

**TRIAL JUDGE:** Hon. Prentiss Greene Harrell

**APPELLANT ATTORNEY:** Hunter Nolan Aikens

**APPELLEE ATTORNEY:** Scott Stuart, John R. Henry, Jr.

**DISTRICT ATTORNEY:** Haldon J. Kittrell

**DISPOSITION:** Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Fair, Wilson and Greenlee, JJ., Concur. James, J., Concur in Part Without Separate Written Opinion.

**ISSUES:** (1) Whether the trial court erred in denying his request for a mental examination, (2) whether the trial court failed to instruct the jury fully on venue for the conspiracy charge, and (3) whether the trial court erred in responding to the jury's question during deliberations.

**FACTS:** On Easter Sunday, March 31, 2013, Samantha Jo Brumfield robbed a Kangaroo convenience store in Poplarville. Brumfield's husband, Joshua Prokasy, parked behind the building in their car. The cashier, Kristin Burge, testified that Prokasy walked in the store minutes before Brumfield. Prokasy went to the restroom and then exited the store. Brumfield then entered the store and pointed a gun at Burge's head and demanded money. Burge complied, and Prokasy and Brumfield fled in their vehicle. Prokasy and Brumfield were later arrested in Louisiana for an incident unrelated to the robbery. Prokasy gave a written statement and confessed to the robbery.

**HELD:** (1) Prokasy requested a mental evaluation to determine his competency. The trial court held a hearing, and ruled that Prokasy was competent to stand trial. He did not order a psychiatric examination. Prokasy claimed he suffered from post-traumatic stress disorder (PTSD), depression, anxiety, and substance abuse. He was injured in an accident while serving in the Army in Iraq. The court conducted an extensive examination of Prokasy and asked about his background, military service, medication, disability, and general knowledge as to the proceedings before the court. The court was within its discretion to conclude that there were no reasonable grounds to believe that Prokasy was incompetent to stand trial.

(2) Prokasy argued that Instruction 10, on the conspiracy charge, should have had a statement as to venue. However, when reviewed as a whole, the instructions did address the element of venue.

(3) During deliberations, the jury presented two questions: (1) "If the defendant is found guilty of conspiracy, is he therefore guilty of armed robbery?" and (2) "Can we find him guilty of aiding/planning in the robbery and not guilty of armed robbery?" The trial court answered both questions, "No." Prokasy argues that the second question and the subsequent answer implied that the jury should convict Prokasy of armed robbery if he aided or planned the robbery without consideration of intent. However, the jury instructions, when considered as a whole, cure any error that may have occurred from a misleading instruction.

Further, it appears Prokasy did not challenge the court's response to the jury question at the time it was given, as the exchange between counsel and the judge in answering the jury's question is not in the record.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110883.pdf>

***Maurice Townsend v. State***, No. 2014-KA-01327-COA (Miss.Ct.App. April 12, 2016)

**CASE:** Simple Assault on a Law Enforcement Officer

**SENTENCE:** 5 years with 1 year to serve, 4 years suspended, and 4 years of PRS

**COURT:** Lafayette County Circuit Court

**TRIAL JUDGE:** Hon. Andrew K. Howorth

**APPELLANT ATTORNEY:** Ralph Stewart Guernsey, Carnelia Pettis Fondren

**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss

**DISTRICT ATTORNEY:** Benjamin F. Creekmore

**DISPOSITION:** Affirmed. Carlton, J., for the Court. Irving and Griffis, P.JJ., Ishee and Greenlee, JJ., Concur. James, J., Dissents with Separate Written Opinion, Joined by Lee, C.J., Barnes, Fair and Wilson, JJ.

**ISSUES:** (1) Whether his indictment was fatally defective; (2) whether Mississippi should extend the holding of *Batson v. Kentucky*, to ensure the inclusion of minorities on juries; and (3) whether the circuit court erred by dismissing for cause certain potential jurors.

**FACTS:** On November 27, 2011, Maurice Townsend visited The Locker Room Bar in Oxford with his wife and aunt. Around midnight, The Locker Room stopped serving alcohol, and the bouncers began collecting patrons' drinks. Townsend became upset when his drink was taken away and had to be escorted out of the bar. Meanwhile, Oxford PD Officer David Sabin arrived in uniform as Townsend was being led out the bar. Townsend was kicking, screaming, cursing, and trying to spit on the bouncers. As he instructed Townsend not to reenter the premises, Sabin testified that Townsend's aunt grabbed his right arm. As he removed her hand, Townsend pushed Sabin backward, and began screaming that he could not touch his aunt or speak to her. Sabin attempted to arrest Townsend and a fight ensued. At one point Townsend had his hands around Sabin's throat trying to choke him. Sabin's testimony was substantially corroborated by one of the bouncers. Sabin sprayed Townsend with mace and had to chase him and mace him again before finally subduing him. Townsend was indicted for aggravated assault of a law enforcement officer, but the jury convicted him of simple assault of a LEO. He appealed.

**HELD:** (1) Townsend claimed that his indictment was fatally defective because it omitted an essential element of the offense, in that Sabin was acting within the scope of his duty at the time of the offense. Townsend's indictment only alleged that he attempted "to cause serious bodily injury to Officer David Sabin, a law enforcement officer."

Upon review, we find the indictment clearly notified Townsend of the crime and the statutory section being charged. Both the heading and the body of the indictment provided that Townsend was being charged with aggravated assault on a law enforcement officer under section 97-3-7(2) and that the maximum prison term for the crime was thirty years. In addition, the language of the indictment tracked the statutory language of section 97-3-7(2). A reading of the indictment as a whole gave Townsend fair notice of the charge against him so he could prepare an adequate defense and avoid unfair surprise or the threat of double jeopardy.

(2) and (3) Townsend concedes that the circuit court followed the procedure established in *Batson*. The COA declined to extend *Batson* to ensure the inclusion of minorities on juries. Further, the court did not abuse its discretion in dismissing two potential jurors for cause. The jurors stated they either would not or could not pay attention to the evidence presented at trial.

**James, J., Dissenting:**

Judge James dissented, arguing that Townsend's indictment omitted an essential element of the crime of aggravated assault of a law-enforcement. Townsend's indictment under §97-3-7(2) was insufficient because it omitted the element of "acting within the scope of his duty, office[,] or employment." Because the indictment lacked a material essential element, it was legally insufficient to charge Townsend with aggravated assault of a law-enforcement officer. She would reverse Townsend's conviction for simple assault of a law-enforcement officer, and remand this case to the circuit court with instructions to sentence Townsend for basic simple assault.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111263.pdf>

**COA POST-CONVICTION CASES**

**October 5, 2016**

*Anthony Ruffin v. State*, No. 2014-CP-01672-COA (Miss.Ct.App. October 6, 2015)

**CASE:** PCR – Forcible Rape

**SENTENCE:** 30 years, with 15 years suspended and 5 years of PRS

**COURT:** Lauderdale County Circuit Court

**TRIAL JUDGE:** Hon. Robert Walter Bailey

**APPELLANT ATTORNEY:** Anthony Ruffin (Pro Se)

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISPOSITION:** Dismissal of PCR Affirmed. Wilson, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur.

**ISSUES:** (1) Whether his plea was invalid because he had entered a plea of nolo contendere or "no

contest," which is not a valid plea to a felony, and (2) that his plea to the charge of forcible rape under §97-3-65(4)(a) was void.

**FACTS:** On July 24, 2006, sixteen-year-old A.P. was watching television at a friend's home when Anthony Ruffin—who was 38 at the time—entered the room, sat down next to her, and started kissing her. Ruffin then forced A.P. into a bedroom. A.P. resisted, but Ruffin pinned her to the bed, and vaginally raped her. When Ruffin was arrested, admitted he had sex with A.P., but claimed it was consensual. Ruffin later entered a best interests guilty plea to forcible rape. That same day, he signed an agreed order to amend his indictment to delete the word "statutory" and to substitute "97-3-65(4)(a)" for "97-3-65(3)(a)." On May 17, 2010, Ruffin filed a PCR asserting that his indictment was flawed because it charged him with statutory rape, not forcible rape, and ineffective assistance of counsel. The circuit judge denied relief, finding that the original indictment was sufficient to put Ruffin on notice that he was being charged with forcible rape and that the amendments on the day he pled guilty—which Ruffin expressly approved—were matters of form, not substance. Ruffin did not appeal. On August 25, 2014, Ruffin filed a second PCR. The trial judge found the petition time barred and successive writ barred. He appealed.

**HELD:** Ruffin’s second PCR was time barred and successive writ barred. Ruffin claimed his claims were excepted from the time bar since they implicate fundamental constitutional rights. “In this case, it is easier to explain why Ruffin's claims lack merit than it is to try to sort out whether in theory they implicate any fundamental right.”

(1) Ruffin did not enter a plea of *nolo contendere*, but a best interests *Alford* plea. (2) Ruffin’s claim that his indictment was illegally amended is without merit. This claim was essentially addressed on his first PCR. Although the subsection cited to statutory rape, the charging portion of his indictment clearly charged forcible rape and thus provided the defendant with adequate notice of the charges against him. “[T]he record makes abundantly clear that he deliberately, knowingly, and voluntarily pled guilty to that crime.”

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107026.pdf>

***Patrick Fluker v. State***, No. 2013-CP-01635-COA (Miss.Ct.App. October 6, 2015)

**CASE:** PCR – Armed Robbery

**SENTENCE:** 15 years

**COURT:** Forrest County Circuit Court

**TRIAL JUDGE:** Hon. Robert B. Helfrich

**APPELLANT ATTORNEY:** Patrick Fluker (Pro Se)

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISPOSITION:** Dismissal of PCR Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether his indictment was defective since it was not stamped "filed," signed, or dated by the circuit clerk resulting in an illegal sentence, and (2) whether he received ineffective assistance of counsel because his counsel did not object to the indictment.

**FACTS:** Patrick Fluker pled guilty to armed robbery. He subsequently filed a PCR alleging his indictment was defective since it was not stamped "filed," signed, or dated by the Forrest County Circuit Clerk. He claimed this alleged defect resulted in an illegal sentence. Fluker also argued that he received ineffective assistance of counsel because his counsel did not object to the indictment for the alleged deficiency. The trial court dismissed the petition as a successive writ and he appealed.

**HELD:** (1) A valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial. Failing to stamp an indictment "filed" is a nonjurisdictional defect. Fluker waived his claim on appeal and failed to meet any exception to the successive-writ bar. (The dismissal of Fluker's prior PCR was affirmed earlier this year. *Fluker v. State*, No. 2013-CT-00608-SCT (Miss. June 11, 2015)).

(2) Fluker only makes bare assertions in support of his ineffective-assistance-of-counsel claim. He has failed to show that his counsel's performance was deficient, or that but for the allegedly deficient performance, he would not have pled guilty.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107205.pdf>

**Rochester Eugene Presley v. State**, No. 2014-CP-00675-COA (Miss.Ct.App. October 6, 2015)

**CASE:** PCR – Commercial Burglary and Grand Larceny

**SENTENCE:** 7 and 10 years consecutively as an habitual offender

**COURT:** Forrest County Circuit Court

**TRIAL JUDGE:** Hon. Robert B. Helfrich

**APPELLANT ATTORNEY:** Rochester Eugene Presley (Pro Se)

**APPELLEE ATTORNEY:** Scott Stuart

**DISPOSITION:** Dismissal of PCR Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Whether the trial judge erred in treating his petition as a post-conviction petition.

**FACTS:** On November 12, 2004, Rochester Presley pled guilty to grand larceny, and was given a suspended sentence. Shortly after being released on probation, Presley broke into Grayco Systems in Hattiesburg, and stole the keys to a pickup truck and the truck itself, along with other items. On June 2, 2005, the trial court revoked Presley's probation. Presley was later convicted of the burglary of Grayco Systems and grand larceny of one of Grayco's trucks. Those convictions were affirmed on appeal. *Presley v. State*, 994 So. 2d 191 (Miss. Ct. App. 2008). Presley next filed a PCR appealing the revocation of his suspended sentence for his November 12, 2004 conviction of grand

larceny. The Mississippi Supreme Court affirmed the trial court's order denying Presley's PCR. *Presley v. State*, 48 So. 3d 526 (Miss. 2010). On August 5, 2011, Presley filed a Petition for Order to Show Cause or, in the Alternative, Petition for Writ of Habeas Corpus regarding his April 4, 2006 convictions. The circuit court returned the pleadings, informing Presley he must receive permission from the Supreme Court before filing a challenge to these convictions. He then filed a writ of mandamus since the circuit court would not rule on his motion. The trial court then treated the petition as a PCR and dismissed it because it was not filed with the permission of the Supreme Court. Presley appealed.

**HELD:** Although styled a petition to show cause/writ of habeas corpus, he was requesting post-conviction relief. The COA previously heard Presley's direct appeal of his convictions and sentences for burglary and grand larceny. Therefore, Presley was required to seek and obtain the supreme court's permission to file a PCR. The COA lacked jurisdiction to consider the appeal.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107262.pdf>

*Antonio Burgin v. State*, No. 2014-CP-01342-COA (Miss.Ct.App. October 6, 2015)

**CASE:** PCR – Armed Robbery

**SENTENCE:** 23 years, with 5 years PRS

**COURT:** Lowndes County Circuit Court

**TRIAL JUDGE:** Hon. James T. Kitchens, Jr.

**APPELLANT ATTORNEY:** Antonio Burgin (Pro Se)

**APPELLEE ATTORNEY:** Scott Stuart

**DISPOSITION:** Denial of PCR Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether his sentence is illegal; (2) whether his plea was involuntary; (3) whether there was sufficient evidence to support his conviction; and (4) whether he received ineffective assistance of counsel.

**FACTS:** In April 2011, Antonio Burgin was indicted for armed robbery and aggravated assault. Although the indictment correctly identified §97-3-7 as the charging statute for Count II, the indictment incorrectly identified §97-3-73 as the charging statute for the armed robbery. This is the statute for simple robbery. It should have identified §97-3-79. Despite identifying the incorrect charging statute, the heading of Burgin's indictment correctly stated that armed robbery was the offense charged in Count I. In addition, the body of Burgin's indictment charged the statutory elements of armed robbery. On November 26, 2012, Burgin signed and filed a plea petition acknowledging his intention to plead guilty to the crime of armed robbery. The aggravated assault count was retired to the files. The State also agreed not to seek sentencing as an habitual offender. At his plea, he agreed with the State's proposed facts and acknowledged he was pleading guilty to

armed robbery. Less than two years after his sentencing, Burgin filed a PCR. The circuit court denied relief and Burgin appealed.

**HELD:** (1) Burgin argued that he was indicted for and pled guilty to simple robbery, so his sentence was illegal. Although his indictment erroneously identified §97-3-73 as the relevant statutory section for his robbery charge, he clearly pled to armed robbery. The substance of Burgin's indictment provided him with sufficient notice of the pending charge against him for armed robbery.

(2) Despite Burgin's assertions on appeal, the record demonstrates that the circuit court thoroughly questioned Burgin before accepting his guilty plea to ensure that Burgin understood the charge against him and the consequences of his guilty plea. At two different times during Burgin's plea hearing, the circuit court asked whether Burgin understood that he was pleading guilty to armed robbery. The plea was voluntary.

(3) After the circuit court explained the charge against him for armed robbery, Burgin answered the charge by pleading guilty. Burgin's guilty plea was entered voluntarily, knowingly, and intelligently. Therefore, Burgin waived his right to have the State prove each element of armed robbery beyond a reasonable doubt.

(4) Burgin failed to present any evidence to support his assertions, and the record clearly contradicts his claims. Burgin stated under oath during his plea colloquy that he was satisfied with the legal representation his attorney provided. Burgin's unsupported assertions fail to satisfy his burden to demonstrate that his attorney's performance was deficient and caused him prejudice.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107083.pdf>

**Reginald Mason v. State**, No. 2013-CP-01971-COA (Miss.Ct.App. October 6, 2015)

**CASE:** PCR – Armed Robbery and Aggravated Assault

**SENTENCE:** 20 years on each count to run concurrently

**COURT:** Adams County Circuit Court

**TRIAL JUDGE:** Hon. Forrest A. Johnson Jr.

**APPELLANT ATTORNEY:** Reginald Mason (Pro Se)

**APPELLEE ATTORNEY:** Melanie Dotson Thomas

**DISPOSITION:** Dismissal of PCR Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Whether he was deprived of his right to counsel during plea negotiations, and whether the circuit court erred in denying his PCR without an evidentiary hearing.

**FACTS:** On May 12, 1995, Reginald Mason shot Ronald Merritt with a pistol while attempting to rob him. On July 8, 1996, Mason filed a petition to enter a plea of guilty, but he later withdrew the

plea. A trial began on July 24, 1996, and, after three witnesses testified on behalf of the State, Mason decided to enter a guilty plea. In 2013, Mason filed a PCR. The circuit court dismissed the petition as time barred. Mason appealed.

**HELD:** Mason argued that he was abandoned by his attorney during his guilty plea. He asserts that this error affected his fundamental constitutional rights and that he is entitled to an evidentiary hearing. However, upon review of the record, there is no indication that Mason was abandoned by his attorney. Mason testified that he had spoken with his attorney prior to entering his guilty plea, and Mason agreed on the record that entering a guilty plea was the right thing to do. Mason admitted that he was guilty of the charges. Mason's claim of ineffective assistance of counsel is not sufficient to invoke the time-bar's fundamental-rights exception.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO104816.pdf>

**William Tedder v. State**, No. 2014-CP-00858-COA (Miss.Ct.App. October 6, 2015)

**CASE:** PCR – Aggravated Assault on a Law-enforcement Officer x4

**SENTENCE:** 30 years on each count, with 27 years to serve, and with all counts to run concurrently to each other but consecutively to a related federal conviction

**COURT:** Madison County Circuit Court

**TRIAL JUDGE:** Hon. William E. Chapman, III

**APPELLANT ATTORNEY:** William Tedder (Pro Se)

**APPELLEE ATTORNEY:** Alicia Ainsworth

**DISPOSITION:** Dismissal of PCR Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Carlton, Fair and James, JJ., Concur. Maxwell, J., Concur in Part and in the Result Without Separate Written Opinion. Wilson, J., Not Participating.

**ISSUES:** (1) Whether the trial judge erred in not allowing an equitable tolling the the statute of limitations on his PCR, and (2) whether his guilty plea was voluntary.

**FACTS:** William Tedder was involved in a 2006 armed robbery of a Trustmark Bank in Hinds County, and a subsequent car chase into Madison County, where he was apprehended. Specifically, during the car chase Tedder sideswiped multiple police cars and pointed a gun at multiple police officers. Tedder was charged with four counts of aggravated assault on a law-enforcement officer and one count of felony evasion. He also faced a bank-robbery charge in federal court, for which he was later convicted. As part of his plea, the State dropped the felony evasion charge and agreed not to seek a sentence as a violent habitual offender. At the plea, Tedder agreed with the State's factual basis for the plea. At a latter sentencing hearing, Tedder attempted to withdraw his guilty plea, claiming that he had received ineffective assistance of counsel. Tedder asserted that he was under duress when he pleaded guilty. After reviewing the evidence and questioning Tedder, the judge found he did not present a sufficient basis to set aside the guilty plea. Seven years later, Tedder filed a PCR

challenging the circuit judge's refusal to allow him to withdraw his guilty plea. The PCR was dismissed as time-barred, and also found to be without merit. Tedder appealed.

**HELD:** (1) Tedder has failed to raise or establish any exception to the statute of limitations. The doctrine of equitable tolling does not apply to non-death-penalty cases. Additionally, Tedder failed to show extraordinary circumstances of any sort that would explain why his PCR motion was four years past the statute of limitations. An unanswered letter asking his attorney to appeal his convictions was insufficient. The PCR is barred and is without merit.

(2) The record is clear that the circuit court judge thoroughly reviewed with Tedder his rights, the charges against him, and the consequences of both pleading guilty to the charges and going to trial. Tedder has failed to present us with proof that his plea was not voluntarily and intelligently given. Rather, he makes unsubstantiated assertions that he received ineffective assistance of counsel. He claimed his counsel failed to bring forth more evidence in his case.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO104815.pdf>

***William Smothers v. State***, No. 2014-CP-01539-COA (Miss.Ct.App. October 6, 2015)

**CASE:** PCR – Statutory Rape

**SENTENCE:** 20 years with 10 suspended

**COURT:** Madison County Circuit Court

**TRIAL JUDGE:** Hon. John Huey Emfinger

**APPELLANT ATTORNEY:** William Smothers (Pro Se)

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISPOSITION:** Dismissal of PCR Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether his indictment was defective and (2) whether that he had effective assistance of counsel.

**FACTS:** In July of 2007, William Smothers had sexual intercourse with his niece, A.R. The indictment charging Smothers with this offense originally alleged that the crime occurred "between the dates of July 27, 2007, through July 28, 2007...." These dates were later amended in writing to "July 13, 2007, through July 20, 2007...." It appears from the record that this change of dates occurred at the hearing in the circuit court, minutes before Smothers pled guilty to statutory rape in October of 2009. As part of this plea agreement, the State agreed not pursue another case against Smothers, where it was alleged that he sexually assaulted another victim. Smothers made no objections to the alteration of the dates when he pled. In September of 2014, Smothers filed a PCR, which the trial judge dismissed as time barred. Smothers appealed.

**HELD:** Smothers petition was time barred. His claims regarding the indictment and the effectiveness of counsel do not involve fundamental constitutional rights, so the procedural bars are not waived. Regardless, the claims are without merit.

(1) The issues regarding Smothers's indictment arise from the change of the dates of the crime. The original dates in the indictment establish A.R.'s age at 14, meaning that Smothers could not be convicted under §97-3-65(1)(b). Once the dates were changed, A.R.'s age at the time of the incident was under 14. This change in the victim's age is the difference between being convicted under §97-3-65(1)(a) or §97-3-65(1)(b). However, this change would be significant in the sentencing phase if Smothers was 18 or older. Because Smothers was 17 at the time of the offense, the circuit court had complete discretion in sentencing regardless of which statutory-rape section applied. Therefore, any error was harmless. Regardless, Smothers waived any defect by pleading guilty.

(2) Smothers argued that his counsel should have objected to the change of date in the indictment, because it led to a change in the age of the victim. While the change in the indictment did alter the age of the victim, counsel's inaction did not prejudice Smothers's defense. The result of the proceeding would have been the same.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO106527.pdf>

**October 13, 2015**

***Demarcus Ventrell Timmons v. State***, No. 2014-CA-01089-COA (Miss.Ct.App. October 13, 2015)

**CASE:** PCR – Armed Robbery, Kidnapping, and Conspiracy to Commit Armed Robbery

**SENTENCE:** Concurrent sentences of 32 years, 30 years, and 5 years, respectively

**COURT:** Madison County Circuit Court

**TRIAL JUDGE:** Hon. William E. Chapman, III

**APPELLANT ATTORNEY:** Kevin Dale Camp, Jared Keith Tomlinson

**APPELLEE ATTORNEY:** Lisa L. Blount

**DISPOSITION:** Dismissal of PCR Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether he pleas were voluntary and had a sufficient factual basis, (2) whether he received effective assistance of counsel, and (3) whether he was entitled to an evidentiary hearing.

**FACTS:** On September 17, 2012, Demarcus Timmons pled guilty to armed robbery, kidnapping, and conspiracy to commit armed robbery. The charges stemmed from an armed robbery of Kimberly Lewis, who worked at Sand Dollar Lifestyles, a clothing store in the Renaissance shopping center in Ridgeland, MS. After closing the store, Lewis was walking to her car carrying the store proceeds for the day to deposit. Timmons jumped into the car with her and pulled a gun. He forced her to drive to a nearby hotel. Once there, Timmons stole the store's deposits and Lewis's phone. He also took

her I.D. and car keys. Police investigation determined the robbery was set up by a co-manager, who told Timmons that Lewis would be carrying the store deposits. After Timmons had admitted guilt, he attempted to assert he did not have a gun during the robbery. Lewis testified and stated that Timmons clearly had a gun. Timmons was sentenced and later filed a PCR. The trial court dismissed the petition without a hearing.

**HELD:** (1) Timmons's plea was voluntary. The judge thoroughly questioned Timmons during his plea hearing. Timmons said he understood the indictment, the elements of each offense, and possible defenses to charges.

There was also a sufficient factual basis for the plea. Timmons agreed with the prosecutor's proffer of facts, including his use of a gun. The fact that Timmons later denied this after his plea does not negate the factual basis. Since Timmons was going to testify against a co-indictee, the prosecutor asked him some questions to confirm what his testimony would be. This is when he denied he used a gun. The prosecutor then called the victim, who confirmed Timmons used a gun. Timmons never attempted to withdraw his plea.

(2) Timmons claimed his lawyer was ineffective for not pursuing a speedy trial claim and for not investigating witnesses to support his claim he did not have a gun. His speedy trial claim was waived by his guilty plea. Further, Timmons has not identified the witnesses his lawyer should have talked to, nor has he particularly pled what they would have said. Timmons also told the court he was satisfied with his attorney. The claim is without merit.

(3) The judge reviewed the PCR motion, guilty-plea transcript, sentencing-hearing transcript, and criminal file before denying Timmons's PCR motion. The trial judge did not err in failing to find a viable claim to merit an evidentiary hearing.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107384.pdf>

***Bobby Leonard Gray v. State***, No. 2014-CP-01562-COA (Miss.Ct.App. October 13, 2015)

**CASE:** PCR – Sale of Cocaine

**SENTENCE:** 60 years as a subsequent drug offender and habitual offender

**COURT:** Wayne County Circuit Court

**TRIAL JUDGE:** Hon. Lester F. Williamson, Jr.

**APPELLANT ATTORNEY:** Bobby Leonard Gray (Pro Se)

**APPELLEE ATTORNEY:** Billy L. Gore

**DISPOSITION:** Denial of PCR Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether he received an illegal sentence; and (2) whether the allegedly illegal sentence excepts his PCR motion from the three-year statute of limitations.

**FACTS:** On January 6, 1998, Bobby Leonard Gray was indicted for selling cocaine. Three weeks later, the State filed a motion to amend is indictment to include habitual offender and subsequent drug offender status. The trial court granted the motion. Five months later, on July 9, 1998, Gray was convicted by a jury. Sixteen years later, Gray filed a PCR claiming his sentence was illegal, as he did not receive adequate notice of the State's intent to enhance his sentence.

**HELD:** The State filed the motion only 17 days after the original indictment was filed and more than five months before trial. The motion contained sufficient language to provide Gray with notice of the State's intent to enhance his sentence, and there is no evidence that the amendment to the indictment prejudiced his defense. This issue is without merit. Gray did not receive an illegal sentence, so his PCR is not excepted from the time bar.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107759.pdf>

**November 3, 2015**

***Monroe Randle v. State***, No. 2014-CP-00153-COA (Miss.Ct.App. November 3, 2015)  
[opinion from 5/12 withdrawn and revised slightly]

**CASE:** PCR – Murder

**SENTENCE:** Life

**COURT:** Clay County Circuit Court

**TRIAL JUDGE:** Hon. James T. Kitchens, Jr.

**APPELLANT ATTORNEY:** Monroe Randle (Pro Se)

**APPELLEE ATTORNEY:** Barbara Byrd

**DISPOSITION:** Dismissal of PCR Reversed and Remanded. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Whether the trial judge erred in summarily dismissing Randle's PCR.

**FACTS:** Monroe Randle was convicted of murder in 1980. He was ordered to serve a life sentence. On February 24, 2010, Randle was granted parole. However, his parole was revoked in July 2012 after he was arrested for simple assault by threat and possession of a firearm. Randle filed a PCR in the circuit court contesting the revocation of his parole. The circuit court summarily dismissed the PCR motion on the ground that Parole Board is the sole authority on granting or revoking parole. Randle appealed, arguing that his parole was unlawfully revoked because he was never convicted of the crimes upon which the revocation of his parole was based.

**HELD:** "...[T]he circuit court judge summarily dismissed Randle's PCR motion without an evidentiary hearing, and there is no record before this Court providing the information the parole board relied upon in revoking Randle's parole, nor did the circuit judge make any finding as to

whether Randle received the appropriate due process at the revocation hearing.” The case was remanded for an evidentiary hearing.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO102169.pdf>

**November 10, 2015**

*Antonio Vashon Smith v. State*, No. 2014-CA-00446-COA (Miss.Ct.App. November 10, 2015)

**CASE:** PCR – Fondling

**SENTENCE:** Revocation of 10 year suspended sentence

**COURT:** Clarke County Circuit Court

**TRIAL JUDGE:** Hon. Lester F. Williamson, Jr.

**APPELLANT ATTORNEY:** James A. Williams

**APPELLEE ATTORNEY:** Billy L. Gore

**DISPOSITION:** Denial of PCR Affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Maxwell, Fair and Wilson, JJ., Concur. Barnes, J., Concur in Part and in the Result Without Separate Written Opinion.

**ISSUES:** (1) Whether the second revocation hearing subjected him to double jeopardy; (2) whether he was entitled to an evidentiary hearing; (3) whether he was denied effective assistance of counsel, (4) whether the trial judge erred in not appointing counsel at his second revocation hearing, and (5) whether the plea was voluntary.

**FACTS:** On July 19, 2006, Antonio Vashon Smith entered a best interests plea to fondling. As part of the plea, a sexual-battery count was dismissed. He was sentenced to 10 years, with all 10 years suspended and 5 years of supervised probation. On March 29, 2007, Smith's probation officer filed an affidavit stating that Smith violated his probation for failing to register as a sex offender. Smith testified that he failed to register because it "slipped my mind." The circuit court revoked Smith's probation and ordered him to serve one year. The order also provided that Smith's probation would end in July 2011. On August 6, 2009, Smith's probation officer filed a petition to revoke Smith's probation because Smith failed to register as a sex offender on two occasions. Smith, without counsel, informed the court that he violated the terms of probation because he "went through a lot." Specifically, he claimed he was depressed, did not have transportation, had a suspended license, and could not find employment. On September 1, 2009, the circuit court revoked Smith's probation, and ordered him to serve the remaining balance of his suspended sentence in the custody. On December 18, 2012, Smith filed a PCR which the court dismissed as barred and without merit. He appealed.

**HELD:** (1) Smith failed to abide by a condition of his probation by failing to register. Upon revocation, a portion of his suspended sentence was reinstated. Following his release from incarceration, while Smith was on probation, Smith again failed to abide by the conditions of his

probation. For that reason, the circuit court again revoked Smith's probation. This was not a double jeopardy violation.

(2) The trial judge did not abuse his discretion by failing to hold an evidentiary hearing on Smith's PCR. Smith claimed he did not know he would have to serve day for day. However, Smith was aware that any violation, no matter how slight, could potentially result in revocation of his entire suspended sentence. Smith argues that his probation officer informed him he did not need an attorney and that he would "speak up for him" at the hearing. Smith offered no affidavit, other than his own, in support of his claims.

(3) Smith argued he was denied effective assistance of counsel at sentencing and during his first revocation hearing. "Smith does not assert in his brief that but for his attorney's alleged misrepresentation, he would have insisted on proceeding to trial rather than enter his guilty plea, which alone is fatal to his claim." Smith's counsel did challenge the sexual battery charge, which resulted in its dismissal and probationary sentence for fondling.

Counsel was not ineffective for failing to argue a due process claim that a first violation of the duty to register as a sex offender does not have to result in an arrest. Counsel did argue that some tolerance is built into §45-33-33(4). He presented mitigation evidence resulting in only a one year revocation with no, new separate charge for failing to register.

Counsel was not ineffective at sentencing and during the first revocation hearing because he failed to advise Smith that if his probation was revoked, his sentence would be served day-for-day. This argument is in direct conflict with the record. Smith also stated he was satisfied with counsel.

(4) Smith was not denied due process and the right to counsel at his second revocation hearing. Smith, who had attended two years of college, was afforded a hearing before the circuit court where he was allowed to cross-examine his probation officer. The trial judge did not err in failing to appoint counsel.

(5) Smith's claim that his plea was involuntary is time-barred, as it was filed outside of the three-year statute of limitations. Regardless, Smith unequivocally acknowledged his understanding of the *Alford* plea and its consequences during the plea colloquy. Based on Smith's statements made under oath, the COA found that Smith's plea was entered freely and voluntarily.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107559.pdf>

***Joseph L. Johnson v. State***, No. 2014-CP-01156-COA (Miss.Ct.App. November 10, 2015)

**CASE:** PCR – Gratification of Lust

**SENTENCE:** 15 years with 7 suspended and 5 years PRS

**COURT:** Madison County Circuit Court

**TRIAL JUDGE:** Hon. John Huey Emfinger

**APPELLANT ATTORNEY:** Madison County Circuit Court  
**APPELLEE ATTORNEY:** Joseph L. Johnson (Pro Se)

**DISPOSITION:** PCR Dismissed. Fair, J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, James and Wilson, JJ., Concur. Irving, P.J., Concur in Part and in the Result Without Separate Written Opinion.

**ISSUE:** Whether the trial judge erred in denying his motion for house arrest pending the appeal of the denial of his PCR.

**FACTS:** Joseph Johnson pled guilty to gratification of lust in 2009. He attempted to appeal his guilty plea, but his appeal was dismissed as untimely. He then filed a motion for post-conviction relief, which was denied in 2010. In 2012, the trial court denied a late appeal, and the COA affirmed. *Johnson v. State*, 137 So. 3d 336 (Miss. Ct. App. 2014). In March 2014, while Johnson's appeal from the denial of his motion to file a late appeal of his PCR was pending, Johnson filed in the circuit court a "Motion for House Arrest" during the pendency of that appeal. The trial judge denied this after his unsuccessful appeal as it was moot. Nevertheless, Johnson appealed the denial of his motion for house arrest. In his brief on appeal, Johnson does not argue that the circuit court should have granted his motion for house arrest. Instead, he argues the merits of his case.

**HELD:** Johnson is apparently attempting to transform his motion to be released on house arrest into a motion for post-conviction relief, following the denial of an out-of-time appeal from his actual PCR. Because none of these issues were raised in the motion in the circuit court from which Johnson appeals, they are procedurally barred on appeal.

To read the full opinion, click here:  
<http://courts.ms.gov/Images/Opinions/CO108112.pdf>

*James Donald Burkhalter v. State*, No. 2014-CP-00373-COA (Miss.Ct.App. November 10, 2015)

**CASE:** PCR – Possession of a Weapon by a Convicted Felon  
**SENTENCE:** 2 years without parole as a habitual offender

**COURT:** Stone County Circuit Court  
**TRIAL JUDGE:** Hon. Lawrence Paul Bourgeois, Jr.

**APPELLANT ATTORNEY:** James Donald Burkhalter (Pro Se)  
**APPELLEE ATTORNEY:** Alicia Marie Ainsworth

**DISPOSITION:** Denial of PCR Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Whether he was illegally sentenced as an habitual offender.

**FACTS:** In September of 2013, James Donald Burkhalter pled guilty to being a felon in possession of a weapon as an habitual offender. In 1989, Burkhalter got into a fight with his wife and was

arrested for aggravated assault. After bonding out, he returned home and got into another fight with his wife. He was arrested and charged with battery with a deadly weapon. The incidents were 18-19 hours apart and were prosecuted separately. These two convictions were the basis for his habitual offender status. Although Burkhalter was required to serve 10 years w/o parole, the trial judge sentenced him to 2 years with credit for time served. The plea also dropped two counts of simple assault on a police officer. On October 11, 2013, Burkhalter filed a PCR, which the court treated as a motion to reconsider sentencing and denied. He filed a PCR with the SCT, which dismissed it, noting he had to file a PCR in the circuit court. On May 22, 2014, with only a few months left on his sentence, Burkhalter filed a PCR with the circuit court to challenge the legality of his sentence as a habitual offender. The PCR was denied and Burkhalter appealed.

**HELD:** Burkhalter concedes that the circuit court sentenced him, as a habitual offender, to an illegally lenient sentence. Burkhalter contends the circuit court erroneously sentenced him as a habitual offender because his prior convictions failed to arise out of separate incidents at different times. Burkhalter argued the 18-19 hours that elapsed between his two arrests failed to provide a sufficient "cooling-off" period.

The trial judge did not abuse his discretion in finding that Burkhalter's prior convictions arose out of separate incidents at different times. Sufficient time elapsed, and sufficient intervention occurred, to allow Burkhalter's passions to cool so he could reflect before forming and actualizing a new criminal design. Furthermore, when a defendant receives an illegally lenient sentence, it is considered harmless error as the defendant suffered no prejudice from the imposition of the sentence.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108030.pdf>

***Paul F. Jones v. State***, No. 2014-CP-00552-COA (Miss.Ct.App. November 10, 2015)

**CASE:** PCR – Possession of Cocaine

**SENTENCE:** 12 years as a habitual offender and a subsequent drug offender

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Roger T. Clark

**APPELLANT ATTORNEY:** Paul F. Jones (Pro Se)

**APPELLEE ATTORNEY:** Lisa L. Blount

**DISPOSITION:** Denial of PCR Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Carlton, Maxwell, Fair, James and Wilson, JJ., Concur. Barnes, J., Concur in Part and in the Result Without Separate Written Opinion.

**ISSUES:** (1) Whether Jones was properly sentenced as a habitual offender, (2) whether Jones was subjected to multiple punishments for the same offense, (3) whether Jones waived any unlawful search and seizure claim by pleading guilty, and (4) whether Jones received effective assistance of counsel

**FACTS:** On February 25, 2013, Paul Frederick Jones pled guilty to one count of possession of a controlled substance under the enhancement statute and the habitual-offender statute. A CI purchased drugs from Jones and police obtained a search warrant for his residence. They discovered a large quantity of drugs. Specifically as to Jones, they recovered: 0.3 grams of cocaine, 167 grams of spice, 41 dosage units of ten-milligram hydrocodone, 5 dosage units of five-milligram hydrocodone, a glass crack pipe, some Brillo pads, miscellaneous paraphernalia, sandwich bags, a marijuana pipe and grinder, and house-arrest paperwork. Although charged in a multi-count indictment, he pled to one count of possession of cocaine. On April 3, 2013, Jones filed a PCR, alleging he was illegally sentenced as an habitual offender, that he was subjected to double jeopardy, that the search of his home was illegal, and that he had ineffective assistance of counsel. The trial judge denied relief and Jones appealed.

**HELD:** (1) During the hearing on the state's motion to amend the indictment to allege habitual offender status, the state submitted a certified copy of Jones's pen-pack. Jones's only objection was to the timeliness of the State's motion. He admitted his prior convictions during his plea. This was sufficient.

(2) Jones next argued that he was illegally sentenced under two separate sentence enhancements, resulting in cumulative punishment. Being sentenced both as a subsequent drug offender and a habitual offender does not violate double jeopardy.

(3) Jones's guilty plea waived any claim concerning the search of his residence.

(4) Jones claimed his counsel was ineffective at his suppression hearing. Jones fails to show that the motion to suppress was denied because his counsel's performance was deficient. He also claims his counsel was ineffective at the sentencing hearing by allowing his sentence to be improperly enhanced. At his plea, Jones stated he was satisfied with his attorney. The record indicates Jones knew exactly what he faced at sentencing.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO106979.pdf>

*Elroy Kennedy v. State*, No. 2014-CP-01029-COA (Miss.Ct.App. November 10, 2015)

**CASE:** PCR – Statutory Rape of a child under 14

**SENTENCE:** 25 years

**COURT:** Choctaw County Circuit Court

**TRIAL JUDGE:** Hon. Joseph H. Loper, Jr.

**APPELLANT ATTORNEY:** Elroy Kennedy (Pro Se)

**APPELLEE ATTORNEY:** Billy L. Gore

**DISPOSITION:** Denial of PCR Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** Whether Kennedy’s claims of a defective indictment and ineffective assistance of counsel are procedurally barred.

**FACTS:** In July 2009, Elroy Kennedy pled guilty to statutory rape of a child under 14, and was sentenced to 25 years. In April 2012, Kennedy filed a PCR motion claiming his indictment had been falsified and his counsel was ineffective. The PCR was denied by the trial court, and the COA affirmed on appeal. [\*Kennedy v. State\*](#), 118 So. 3d 684 (Miss. Ct. App. 2013). In April 2014, Kennedy filed another PCR, alleging similar claims. The trial court found the petition time barred and barred as a successive writ. He appealed.

**HELD:** “We agree with the trial court that Kennedy's PCR motion is time-barred, successive, and without merit.” None of Kennedy's claims are included in the fundamental rights that survive procedural bars. It is true that Kennedy's arrest-warrant affidavit charged him with sexual battery, but the grand jury indicted him for statutory rape. This does not mean his indictment was defective.

To read the full opinion, click here:  
<http://courts.ms.gov/Images/Opinions/CO107943.pdf>

*Lois Hudspeth v. State*, No. 2014-CA-00990-COA (Miss.Ct.App. November 10, 2015)

**CASE:** PCR – Murder  
**SENTENCE:** Life w/o Parole

**COURT:** Panola County Circuit Court  
**TRIAL JUDGE:** Hon. Smith Murphey

**APPELLANT ATTORNEY:** Tommy Wayne Defer  
**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss  
**DISTRICT ATTORNEY:** John W. Champion

**DISPOSITION:** Resentencing Affirmed. Griffis, P.J., for the Court. Lee, C.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur. Irving, P.J., Dissents Without Separate Written Opinion.

**ISSUE:** Whether the trial court erred in finding the evidence was sufficient to support a life sentence without parole.

**FACTS:** On June 17, 2004, Lois Lee Hudspeth pled guilty to the murder of Jennifer Younger. Young's body was found on or about November 4, 2003, in Askew Refuge in Tunica County. The cause of death was blunt-force trauma to the head. She had approximately five injuries to her head. Hudspeth later admitted to striking Younger in the face with a tire iron, taking off her clothes, and dumping her body in the wildlife refuge. Hudspeth's car, where the murder occurred, was later found burned in a neighboring county. Hudspeth was 16 at the time of the crime. He was 17 at the time of his guilty plea. He was sentenced to life without parole. Hudspeth filed a motion to vacate his sentence based on [\*Miller v. Alabama\*](#), 132 S.Ct. 2455 (2012). The trial court granted the motion to vacate Hudspeth's sentence and held a hearing using the factors enunciated in *Miller* to determine

whether the mandatory life sentence was to be served with or without parole. The trial court resentenced Hudspeth to life without the possibility of parole. He appealed.

**HELD:** The trial court did not abuse its discretion in sentencing Hudspeth to life without parole. Hudspeth was almost 17 at the time of the crime. Hudspeth's sister, Kimberly, testified that Hudspeth received no formal education after the sixth grade. Panola County Investigator Mark Whitten testified that Hudspeth was street smart and familiar with criminal procedure. Hudspeth did not come from a stable and caring family. There was testimony that both his parents were alcoholics and fought constantly with each other. Kimberly testified that their father was physically abusive, and both of them were removed from their parents' custody at one point.

Hudspeth admitted to abusing alcohol and drugs, and had been involved in criminal activity at a young age. Further, the crime was heinous. Hudspeth admitted to beating the victim in the face with a tire iron. Hudspeth then removed her clothes and dumped her body in the woods. Kimberly stated he had been drinking and smoking marijuana the day of Young's murder. Kimberly also stated Hudspeth had pulled her by her hair and tried to attack her with a tire iron that same day. Finally, Whitten opined that Hudspeth had no potential for rehabilitation. The State noted that Hudspeth had been committing criminal activity while in prison, indicated by a recent felony conviction.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107792.pdf>

**Bradford Scott Byrd v. State**, No. 2014-CP-01163-COA (Miss.Ct.App. November 10, 2015)

**CASE:** PCR – Attempted Sexual Battery

**SENTENCE:** 20 years, with 10 to serve, 5 suspended and 5 years PRS.

**COURT:** Perry County Circuit Court

**TRIAL JUDGE:** Hon. Robert B. Helfrich

**APPELLANT ATTORNEY:** Bradford Scott Byrd (Pro Se)

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISPOSITION:** Denial of Motion for Modification of Sentence Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Whether the trial judge erred by failing to modify the conditions of his PRS based on lack of jurisdiction.

**FACTS:** Bradford Scott Byrd pled guilty to attempted sexual battery on September 4, 2007. As part of his sentence, Byrd was ordered to remain at least 200 yards away from his victim, R.B., as well as cease all contact with R.B., upon his release from incarceration. On July 24, 2014, prior to his release from prison, Byrd filed a motion for modification of his sentence. Byrd requested that the circuit court remove the 200-yard restriction because his residence upon his release would be within 200 yards of R.B. The circuit court denied Byrd's motion, citing a lack of jurisdiction by the circuit court to alter Byrd's sentence. Byrd now appealed.

**HELD:** First, Byrd argued that his PRS condition constituted an illegal sentence, which excepts his motion from the procedural time-bar. However, Byrd's PRS condition falls within the statutory guidelines for PRS. Second, Byrd fails to cite any legal authority to support his argument for removing the 200-yard limitation.

The circuit court, relying on §47-7-33(1), found that once Byrd began to serve his sentence in 2007, it was without jurisdiction to alter, amend, or suspend Byrd's sentence. Though the circuit court found it lacked jurisdiction to alter his sentence, Byrd primarily requested a modification of his PRS requirements. Under §47-7-35(1), a court can modify the terms and conditions of probation or post-release supervision once supervision begins. The court was correct that while incarcerated, the circuit court has no jurisdiction. Jurisdictional bar aside, Byrd's argument that the 200-yard-prohibition provision is surplusage lacks merit.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107558.pdf>

*Deriera Magee v. State*, No. 2014-CP-01182-COA (Miss.Ct.App. November 10, 2015)

**CASE:** PCR – Possession of Cocaine

**SENTENCE:** 16 years as an habitual offender

**COURT:** Pearl River County Circuit Court

**TRIAL JUDGE:** Hon. Anthony Alan Mozingo

**APPELLANT ATTORNEY:** Deriera Magee (Pro Se)

**APPELLEE ATTORNEY:** LaDonna C. Holland, John R. Henry, Jr.

**DISPOSITION:** Denial of PCR Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether his conviction should be reversed because he was never arraigned on a new indictment, (2) whether that his double-jeopardy rights were violated by his conviction under the new indictment, and (3) whether he received ineffective assistance of counsel.

**FACTS:** On February 20, 2009, Derie'ra Magee was indicted on felony drug charges. In May 2009, the prosecutor made a motion to amend the indictment to charge Magee as a habitual offender. This motion was never granted. The State obtained a new indictment on June 12, 2009, charging Magee with two counts of possession of a controlled substance as a habitual offender. On January 19, 2010, Magee pled guilty to a reduced charge of possession of cocaine in Count I. Magee subsequently filed a PCR which the trial court denied. He appealed.

**HELD:** (1) Magee claimed he was never arraigned on the new indictment. However, Magee's guilty plea waived this issue. He raised this issue for the first time on appeal.

(2) Magee claimed he pled guilty to misdemeanor marijuana charges in city court based on the same arrest. The record is silent regarding any city court conviction. Assuming Magee did plead guilty to both crimes, his double-jeopardy rights were not violated because these crimes were not the same offense. The circuit court conviction pertained to his possession of cocaine, while the alleged city court conviction resulted from his possession of marijuana.

(3) Because of Magee's alleged double-jeopardy violation, he argues that he had ineffective assistance of counsel. Since Magee's double-jeopardy rights were not violated, he has no basis to claim ineffective assistance of counsel.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO107558.pdf>

**November 17, 2015**

***Justin Springer v. State***, No. 2014-CA-00850-COA (Miss.Ct.App.November 17, 2015)

**CASE:** PCR – Capital Murder

**SENTENCE:** Life without Parole

**COURT:** Lee County Circuit Court

**TRIAL JUDGE:** Hon. James Lamar Roberts, Jr.

**APPELLANT ATTORNEY:** William C. Bristow

**APPELLEE ATTORNEY:** Barbara Wakeland Byrd

**DISPOSITION:** Denial of PCR Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, James and Wilson, JJ., Concur.

**ISSUE:** Whether Springer's right to a speedy trial was violated.

**FACTS:** Justin Springer was convicted of the June 9, 2008, capital murder of Kamby Ivy, a reputed small-time drug dealer, during a home invasion of Camanda Jamison's (Ivy's girlfriend's) trailer. His co-defendant, Greg Kelly, took a plea offer from the state for manslaughter and burglary and testified against Springer. Kelly testified that he did not know Springer was armed until they had entered Jamison's trailer. He said Springer shot Ivy who was unarmed. Jamison died prior to trial, but her statement to police was used without objection. His conviction was affirmed on appeal. [\*Springer v. State\*](#), No. 2011-KA-00718-SCT (Miss. June 7, 2012). Following his direct appeal, Springer was granted leave to file a PCR based on his speedy trial claim. He was granted an evidentiary hearing to determine if counsel was ineffective for failing to file a speedy trial motion and on whether his appellate counsel was ineffective for not raising the claim on appeal. After applying the *Barker* factors, the trial court found that Springer's statutory and constitutional rights to a speedy trial were not violated and that he was not denied effective assistance of counsel. Springer appealed.

**HELD:** Springer could not demonstrate that, but for his counsel's errors, his speedy trial claim would have succeeded. There was a 1,057 day delay between his arrest and trial, but only 322 days were

attributable to the state. Springer did not raise this claim until his PCR motion. Springer claimed that his defense was impaired, since an eyewitness to the crime passed away of natural causes before his trial. Before she died, Jamison gave a statement to the police, which was recorded and played at Springer's trial. Springer has failed to show any actual prejudice from the eyewitness's unavailability. It is clear from the record that Springer's counsel zealously represented him, filing at least forty separate motions on his behalf (which contributed to the delay and helped remove the death-penalty charge).

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108297.pdf>

**Gerry D. Jackson v. State**, No. 2014-CP-01550-COA (Miss.Ct.App.November 17, 2015)

**CASE:** PCR – Possession of Cocaine

**SENTENCE:** 8 years as an habitual offender

**COURT:** Amite County Circuit Court

**TRIAL JUDGE:** Hon. Forrest A. Johnson, Jr.

**APPELLANT ATTORNEY:** Gerry D. Jackson (Pro Se)

**APPELLEE ATTORNEY:** Billy L. Gore

**DISPOSITION:** Denial of PCR Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether his sentence was illegal; (2) whether his defective was defective; and (3) whether he received effective assistance of counsel.

**FACTS:** After being indicted on two sale counts, Gerry D. Jackson pled guilty on September 19, 2013, to one count of possession of cocaine. Jackson was sentenced as a habitual offender to 8 years. He subsequently filed a PCR which was denied. He appealed.

**HELD:** (1) and (2) Jackson's first two issues concern whether he was properly sentenced as a habitual offender. Jackson did not challenge his status at his sentencing, so the claim is procedurally barred. Regardless, Jackson entered a plea of guilty, which operates to waive all nonjurisdictional rights or defects, including proving each element of the offense beyond a reasonable doubt. During his plea colloquy, Jackson admitted to having two prior convictions.

(3) Jackson also contends his trial counsel was ineffective by allowing him to be sentenced as a habitual offender. Other than bare assertions, Jackson has failed to prove his trial counsel was ineffective.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108036.pdf>

**November 24, 2015**

***Bobby Joe Pinkney v. State***, No. 2014-CP-00583-COA, consolidated with No. 2014-CP-00594-COA, and No. 2014-CP-00605-COA (Miss.Ct.App. November 24, 2015)

**CASE:** PCR – Murder and Burglary of a Dwelling

**SENTENCE:** Life plus a consecutive 15 years.

**COURT:** Hinds County Circuit Court

**TRIAL JUDGE:** Hon. William A. Gowan Jr.

**APPELLANT ATTORNEY:** Bobby Joe Pinkney (Pro Se)

**APPELLEE ATTORNEY:** Lisa L. Blount

**DISPOSITION:** Dismissal of PCR Affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Maxwell, Fair and Wilson, JJ., Concur. Barnes, J., Concur in Part and in the Result Without Separate Written Opinion.

**ISSUE:** Whether the trial judge erred in dismissing Pinkney’s three PCRs.

**FACTS:** In 1984, Bobby Joe Pinkney murdered Tracey Thompkins Hickman during a burglary. He was found guilty of capital murder and sentenced to death. After several appeals and remands, Pinkney eventually pled guilty in 1995 to murder and burglary of an occupied dwelling. He was sentenced to life for the murder and a consecutive 15 years for the burglary. He filed a PCR in 1998 which was denied. In April 2014, Pinkney simultaneously filed three PCRs. In the first PCR, Pinkney claimed that accepting his guilty plea to the lesser charge of murder amounted to double jeopardy, because he had previously been convicted of capital murder of the same victim. Pinkney also alleged that the murder charge in the indictment was insufficient because it did not include all of the essential elements of murder. Pinkney also claimed that he received ineffective assistance of counsel because his attorney allowed him to plead guilty to murder when the indictment was allegedly insufficient. In the second PCR, Pinkney again alleged double jeopardy and ineffective assistance, but also claimed that the burglary criminal information was insufficient. Finally, his third PCR claimed that the capital-murder indictment was insufficient, and that he received ineffective assistance of counsel when he was convicted of capital murder and sentenced to death. All three motions were dismissed based on res judicata. Pinkney appealed.

**HELD:** First, Pinkney was not entitled to an evidentiary hearing, as he failed to show any claim that was procedurally alive. Second, Pinkney’s PCRs are both time-barred and successive writ barred. He failed to argue any exception to the bar. Notwithstanding the procedural bars, his claims are without merit. Neither the indictment, nor the criminal information was defective. In addition to his sworn plea, Pinkney acknowledged having been informed of the essential elements of the crimes by his attorney at the plea hearing.

Pinkney claimed a double jeopardy violation in his 1998 PCR. This claim was addressed by the SCT on the merits and denied. Finally, Pinkney's ineffective-assistance claims are barred and are also without merit. He alleged that he was subjected to double jeopardy, and that his indictment and criminal information were defective. Pinkney claims that he has a fundamental constitutional right to effective counsel. The SCT has yet to find effective counsel a fundamental right to overcome

procedural bars. His trial counsel was not ineffective for allowing him to plead guilty. With the assistance of his attorney, he was able to avoid the death penalty.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108327.pdf>

***Arnold Lee Felton v. State***, No. 2014-CP-00648-COA (Miss.Ct.App. November 24, 2015)

**CASE:** PCR – Burglary of a Dwelling

**SENTENCE:** 25 years

**COURT:** Marion County Circuit Court

**TRIAL JUDGE:** Hon. Anthony Alan Mozingo

**APPELLANT ATTORNEY:** Arnold Lee Felton (Pro Se)

**APPELLEE ATTORNEY:** Laura Tedder

**DISPOSITION:** Denial of PCR Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Whether the trial judge erred in denying post-conviction relief.

**FACTS:** On March 7, 2011, Arnold Lee Felton pled guilty to burglary of a dwelling. In exchange for his guilty plea, the State agreed not to charge him as a habitual offender. On February 18, 2014, Felton filed a PCR, alleging that his guilty plea was involuntary and that he received ineffective assistance of counsel. The trial judge denied relief and Felton appealed.

**HELD:** Felton alleges he would not have pled guilty but for his attorney's advice. Felton contends his attorney informed him he would only receive a 12-year sentence and also failed to advise him of the maximum sentence for burglary of a dwelling, which was 25 years. The trial court quoted directly from the plea colloquy in its order, where Felton admitted that he understood that the maximum sentence for burglary, and where Felton admitted that his attorney had not promised him that the court would impose any specific sentence. Felton has offered no evidence, by affidavit or otherwise, to prove his claim, nor has he shown that his counsel's performance was deficient. The trial court did not err in denying relief.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108810.pdf>

***Roy Dale Wallace v. State***, No. 2014-CP-00755-COA (Miss.Ct.App. November 24, 2015)

**CASE:** PCR – Robbery

**SENTENCE:** 12 years as a habitual offender

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. John C. Gargiulo

**APPELLANT ATTORNEY:** Roy Dale Wallace (Pro Se)

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISPOSITION:** Denial of PCR Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Whether the trial court erred in denying post-conviction relief as procedurally barred.

**FACTS:** On December 10, 2007, Roy Dale Wallace pled guilty to robbery and was sentenced as a habitual offender to 12 years. Wallace's first PCR alleged he was improperly sentenced as a habitual offender. The trial court denied relief and the ruling was affirmed on appeal by the COA. [\*Wallace v. State\*](#), 88 So. 3d 789 (Miss. Ct. App. 2012). On April 21, 2014, Wallace filed a second PCR. The trial court found the motion without merit and barred as a successive writ. Wallace appealed.

**HELD:** Wallace's first PCR motion was denied by the trial court in April 2011. Pursuant to §99-39-23(6), that denial barred the PCR at issue in this appeal. It was also time-barred. Wallace also raised the same claim regarding his habitual offender status. The PCR is also barred as res judicata. There is no statutory exception to the bars, and Wallace has failed to show a violation of his fundamental rights.

Notwithstanding the bar, his claims are without merit. Wallace argued that his sentence as a habitual offender is illegal because the order granting the State's motion to amend the indictment to charge him as a habitual offender was not entered until the day after he entered his guilty plea. The motion to amend the indictment was filed a week prior to the plea hearing. Wallace admits that he is not arguing a lack of notice. Therefore, he was not denied an "opportunity to present a defense" and was not "unfairly surprised."

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108779.pdf>

**December 1, 2015**

***Ronald McDonald v. State***, No. 2014-CP-00163-COA (Miss.Ct.App. December 1, 2015)

**CASE:** PCR – Kidnaping, Armed Robbery x4, Rape, and Sexual Assault

**SENTENCE:** 35 years

**COURT:** Hinds County Circuit Court

**TRIAL JUDGE:** Hon. Winston L. Kidd

**APPELLANT ATTORNEY:** Ronald McDonald (Pro Se)

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISPOSITION:** Denial of PCR Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the allegedly illegal sentences except his PCR motion from the three-year statute of limitations, (2) whether his indictments were fatally defective and resulted in illegal sentences; (3) whether one of his indictments violated Double Jeopardy and resulted in an illegal sentence; and (4) whether the warrants for his arrest were invalid and resulted in illegal sentences.

**FACTS:** On July 13, 1992, Ronald McDonald pled guilty to several counts in three different indictments, and was sentenced to 35 years. On August 1, 2013, McDonald filed a PCR in the circuit court, attacking each of his convictions, and the circuit court summarily denied and dismissed the motion, finding it untimely and without merit. He appealed.

**HELD:** (1) McDonald argued that his PCR is excepted from the time-bar found in §99-39-5(2) because his fundamental right to be free from an illegal sentence was violated. The PCR is time-barred and also improper as it attacks multiple convictions in the same petition.

(2) Notwithstanding the bar, his PCR is without merit. McDonald's indictment complied with Rule 7.06. It provided McDonald with sufficient notice of the crimes against him.

(3) McDonald was charged with two counts of armed robbery when he robbed two separate victims at the same time. That is not a violation of double jeopardy. McDonald failed to raise this issue in the circuit court, so the claim is barred and is without merit.

(4) McDonald argues that in each case, the State failed to issue and serve him with an arrest warrant that was signed by the Hinds County Sheriff, thereby depriving the circuit court of jurisdiction. However, by pleading guilty to the charges, McDonald waived any argument regarding the defective arrest warrants.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109021.pdf>

***Warren Taylor v. State***, No. 2014-CA-01494-COA (Miss.Ct.App. December 1, 2015)

**CASE:** PCR – Sale of Cocaine and Tampering with Physical Evidence

**SENTENCE:** 30 years

**COURT:** Madison County Circuit Court

**TRIAL JUDGE:** Hon. John Huey Emfinger

**APPELLANT ATTORNEY:** Thomas Jon-William Bellinder

**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss

**DISPOSITION:** Denial of PCR Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether Taylor received ineffective assistance of counsel, and (2) whether his guilty pleas were freely and voluntarily entered.

**FACTS:** Warren Taylor was indicted for conspiracy to sell cocaine, sale of cocaine, and tampering with physical evidence. While in the custody of the Madison County Detention Center, he was attacked by another inmate. During the attack, Taylor sustained injuries to two of his fingers, and he was prescribed Lortab to treat the pain. Days after the attack, Taylor signed a petition in which he disclosed his intent to enter guilty pleas to the sale of cocaine and tampering with physical evidence. The circuit court accepted his plea and he was sentenced. After the imposition of his sentence and after he retained new counsel, Taylor filed a PCR. Taylor alleged that before the plea hearing, he ingested a Lortab pill that rendered him incoherent. He also alleges that although he informed his trial counsel that he had taken the pill, his trial counsel ignored his complaints and executed his plea petition against his will. The circuit court denied relief and Taylor appealed.

**HELD:** (1)The record clearly belies Taylor's unsupported claims that he received ineffective assistance of counsel. During the plea hearing, Taylor stated that he was satisfied with his trial counsel's representation and that his trial counsel had adequately advised him of all aspects of his case, including his possible defenses. Taylor cannot now, without any proof as to what the suggested investigation by his trial counsel would have revealed, argue that his trial counsel's representation was unreasonable largely because counsel failed to conduct an investigation.

(2) During the plea hearing, Taylor informed the circuit judge that he had taken Lortab. The judge inquired as to whether the drug was then affecting Taylor's ability to comprehend and understand the plea proceedings. Taylor indicated that it was not. The record reveals that before accepting Taylor's pleas, the circuit judge adequately informed him of the nature of the charges against him and the consequences of his pleas, and, even after that, Taylor stated that he still wished to plead guilty. The pleas were voluntary.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109022.pdf>

**December 8, 2015**

***Kendra Stricklin v. State***, No. 2014-CP-01679-COA (Miss.Ct.App. December 8, 2015)

**CASE:** PCR – Uttering a Forgery

**SENTENCE:** 10 years suspended and 5 years probation

**COURT:** Oktibbeha County Circuit Court

**TRIAL JUDGE:** Hon. James T. Kitchens, Jr.

**APPELLANT ATTORNEY:** Kendra Stricklin (Pro Se)

**APPELLEE ATTORNEY:** Laura Hogan Tedder, John R. Henry, Jr.

**DISPOSITION:** Denial of motions to reconsider sentences Affirmed. Wilson, J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur. Irving, P.J., Concurs in Part and in the Result Without Separate Written Opinion.

**ISSUE:** Whether the trial judge erred in dismissing Petitioner's three PCRs requesting

reconsideration on sentencing based on lack of jurisdiction.

**FACTS:** In October 2012, Kendra Stricklin pled guilty to uttering a forgery in Winston County. She was given a 10 year suspended sentence and probation. At the time of Stricklin's sentencing in Winston County, she was already under indictment for false pretenses in Oktibbeha County. In January 2013, Stricklin pled guilty to this charge. Stricklin swore under oath in her petition and affidavit that she was not on probation and had never been convicted of a felony or misdemeanor. She was again given a suspended sentence. When the DA discovered that Stricklin had committed perjury in her plea petition, in her affidavit, and in open court, he filed a petition to revoke her probation in the Oktibbeha County false pretenses case. The judge found that Stricklin had violated the terms of her probation and sentenced her to three years in MDOC custody. Stricklin subsequently pled guilty to perjury, and on August 1, 2013, the court sentenced her to ten years in MDOC custody, consecutive to her three years for false pretenses. In January 2014, Stricklin was indicted for felony shoplifting which occurred in August of 2012 in the Oktibbeha County. The offense occurred prior to her previous guilty pleas. She pled guilty on April 28, 2014, and was sentenced to 5 years, with three years suspended and 3 years PRS. On June 4, 2014, Stricklin filed a pro se "Petition for Reconsideration," seeking reconsideration of her sentences in the three Oktibbeha County cases. The court treated the petition as a PCR and dismissed it without prejudice as it challenged three separate judgments. Stricklin then filed separate petitions concerning her three convictions, apologizing to the court and asking for a second chance. The court denied all three, finding it had no jurisdiction to alter her sentences. She appealed.

**HELD:** As with her circuit court filings, Stricklin's appellate filings do not set forth any claim for post-conviction relief. When the court reviewed Stricklin's subsequent petitions, it appears to have concluded that Stricklin's pro se filings were actually motions to reconsider her sentences rather than PCR motions. The petitions should not have received new case numbers, but regardless, the court did not have authority to change her sentences. Even if construed as a PCR, she set forth no claim for relief and admits that "[t]he trial court did not commit any errors at all."

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108593.pdf>

***Daniel Richard Zales v. State***, No. 2014-CP-01341-COA (Miss.Ct.App. December 8, 2015)

**CASE:** PCR – Uttering a Counterfeit Instrument

**SENTENCE:** 10 years as an habitual offender

**COURT:** Kemper County Circuit Court

**TRIAL JUDGE:** Hon. Lester F. Williamson Jr.

**APPELLANT ATTORNEY:** Daniel Richard Zales (Prose)

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISPOSITION:** Denial of PCR Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether his pro se, best interests plea was valid, (2) whether there was a sufficient factual basis for the plea, (3) whether he receive effective assistance of counsel, and (4) whether his plea waived his right to a preliminary hearing and a bifurcated sentencing hearing.

**FACTS:** In 2013, Daniel Richard Zales was indicted as a habitual offender for kidnaping, rape, and uttering a counterfeit instrument. As to the third count, the indictment charged Zales with publishing to the circuit clerk a forged certificate of marriage, falsely claiming the marriage was performed by an ordained minister, when in fact Zales knew the minister's name on the certificate was forged. Two weeks before trial, Zales told the circuit judge he wished to dismiss his appointed counsel and represent himself. After a lengthy inquiry, the judge allowed Zales to proceed pro se, with his attorney remaining as stand-by counsel only. On the morning of trial, Zales decided to accept the State's plea offer. The State agreed to nol pros the kidnaping and rape charges in exchange for Zales's *Alford* plea to uttering a counterfeit instrument. After his plea and sentence, Zales subsequently filed a PCR. The trial judge denied relief and Zales appealed.

**HELD:** (1) Although Zales claimed it was never explained to him what an *Alford* plea was, the record shows otherwise. The court asked Zales if he was pleading even though he did not think he was guilty. His plea petition stated the plea was offered under *Alford v. North Carolina*. Reviewing the plea colloquy, the COA found “it was crystal clear that Zales desired to enter a best-interest plea.” The plea was voluntary.

(2) There was also a sufficient factual basis. The prosecutor stated Zales had knowingly presented a forged marriage certificate to the circuit clerk. While it was unclear who actually signed the name of the minister—Zales or someone else—Zales presented the document knowing it was counterfeit. State also represented that Stephanie Hughes, the would-be bride, would testify that she watched Zales sign the minister’s name.

(3) The judge informed Zales of his constitutional right to represent himself and the dangers and responsibilities of self-representation. Because Zales voluntarily waived his right to counsel and elected to proceed pro se, he cannot now claim ineffective assistance.

(4) Zales’s right to a preliminary hearing and a bifurcated sentencing hearing were waived once Zales entered a valid guilty plea.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108817.pdf>

***James Gandy Jr. v. State***, No. 2013-CP-01803-COA (Miss.Ct.App. December 8, 2015)

**CASE:** PCR – Kidnapping

**SENTENCE:** Life as a habitual offender

**COURT:** Jones County Circuit Court

**TRIAL JUDGE:** Hon. Billy Joe Landrum

**APPELLANT ATTORNEY:** James Gandy Jr. (Pro Se)

**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss

**DISPOSITION:** Denial of PCR Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Whether the trial court erred in finding the PCR time-barred.

**FACTS:** James Gandy, Jr. was convicted of kidnaping in 1985 and sentenced as a habitual offender to life in prison. In July 2013, Gandy filed a PCR, arguing that to be sentenced as a habitual offender the State had to prove that he served at least one year in prison and that one of the prior convictions was for a violent crime. He argued that he only served nine months in prison and that neither of his prior convictions, burglary or receiving stolen property, was a violent crime. The trial judge found the PCR time-barred and denied relief. Gandy appealed, arguing his illegal sentence was an exception to the time bar.

**HELD:** While an illegal sentence is an exception to the time-bar, Gandy's sentence was not illegal. Gandy claimed that the State failed to prove beyond a reasonable doubt that he had served one year or that one of his prior convictions was a violent crime. "This is irrelevant." The State was not required to prove this. The State only had to prove that Gandy had been previously convicted of two felonies and that he had been sentenced to separate terms of at least one year. He was sentenced to the maximum sentence for kidnaping—life—under §99-19-81, not as a violent habitual offender under §99-19-83.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108612.pdf>

*Jermaine Rogers v. State*, No. 2014-CA-01146-COA (Miss.Ct.App. December 8, 2015)

**CASE:** PCR – Capital Murder

**SENTENCE:** Life w/o Parole

**COURT:** Rankin County Circuit Court

**TRIAL JUDGE:** Hon. William E. Chapman, III

**APPELLANT ATTORNEY:** Charles E. Miller

**APPELLEE ATTORNEY:** Abbie Eason Koonce

**DISPOSITION:** Dismissal of PCR Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Maxwell, Fair and Wilson, JJ., Concur. James, J., Concur in Part and Dissents in Part Without Separate Written Opinion.

**ISSUES:** (1) Whether Rogers received ineffective assistance of counsel, (2) whether Rogers received an illegal sentence, (3) whether plain or cumulative errors warrant the reversal of Rogers's conviction, and (4) whether the circuit court erred in failing to conduct a full evidentiary hearing to determine Rogers's competency.

**FACTS:** On October 7, 2005, Jermaine Rogers pled guilty to capital murder. In exchange for his plea, the State dropped a second charge of conspiracy to commit murder charge. Rogers filed his first PCR on August 29, 2006, an amended PCR on July 7, 2007, and a second amended PCR on February 29, 2008. Rogers primarily contended that, due to his mental health and intellectual disabilities, he lacked the competency to enter a voluntary guilty plea. The circuit court granted Rogers's request for a psychological evaluation, and Dr. Linda Wilbourn conducted an evaluation and produced a report on January 5, 2014. Rogers's parents also testified about Rogers's mental problems at a hearing on June 7, 2014. However, the trial judge ultimately dismissed he petition. Rogers appealed.

**HELD:** (1) Rogers failed to attach any affidavits in support of his ineffective assistance claims. Rogers merely asserted he received ineffective assistance without alleging specific acts, except in his appellate brief. Rogers argued his counsel knew about his mental issues and should have requested a psychological evaluation to determine whether he was competent to voluntarily plead guilty. However, he failed to show how this omission by trial counsel constituted an error or caused prejudice. Rogers did not claim he would not have pled guilty or that he was incompetent to voluntarily plead guilty.

(2) Rogers was indicted and pled guilty to capital murder. Life without parole is not an excessive sentence for capital murder.

(3) “This Court found no error in any of Rogers's contentions on appeal; thus, we find no cumulative error.” As to plain error, the Court found no error that affects Rogers's fundamental rights.

(4) Based on the plea colloquy, the circuit court lacked any reasonable ground to order a competency hearing. During Rogers's post-conviction proceedings, the circuit court held a hearing and received evidence of Rogers's competency in the form of Dr. Wilbourn's evaluation and testimony from Rogers's parents concerning his mental state and intellectual abilities. After hearing the evidence, the circuit court agreed with the State's position that Rogers failed to present sufficient evidence to prove incompetency. Dr. Wilbourn did not opine on Rogers's mental retardation.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108279.pdf>

***William Robert McMickle v. State***, No. 2014-CP-01581-COA (Miss.Ct.App. December 8, 2015)

**CASE:** PCR – Possession of two grams or more but less than ten grams of Cocaine

**SENTENCE:** 12 years

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Roger T. Clark

**APPELLANT ATTORNEY:** William Robert McMickle (Pro Se)

**APPELLEE ATTORNEY:** Billy L. Gore

**DISPOSITION:** Denial of PCR Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether there was a factual basis to support McMickle's guilty plea, (2) whether the guilty plea was knowingly and voluntarily made, (3) whether McMickle received ineffective assistance of counsel, and (4) whether McMickle was subjected to double jeopardy,

**FACTS:** William McMickle was pulled over for a traffic violation and police found cocaine in his car. While in police custody, McMickle confessed to possessing cocaine, but agreed to work with police as a CI. McMickle was later indicted on the possession charge and he pled guilty. The circuit court withheld adjudication of guilt and placed him on probation in the drug court program. However, McMickle was later charged with possession and sale of cocaine. His probation was revoked and he was sentenced to 12 years with credit for time served. McMickle subsequently filed a PCR which was denied. He appealed.

**HELD:** McMickle raised several issues dealing with various stages of his case. However, all these claims were waived after he voluntarily pled guilty.

(1) In his plea petition, McMickle admitted that he had possessed 2.3 grams of cocaine. Although the plea transcript was not part of the record, the plea petition was sufficient.

(2) McMickle argued that his plea was involuntary because his trial counsel coerced him into pleading by informing him that if he decided to withdraw his guilty plea, then the circuit court would impose the maximum sentence. He also claimed counsel misled him by telling him that if the court revoked his probation, he would face a maximum of 3 years. McMickle offered no affidavits other than his own in support of this allegation. Further, McMickle's sworn plea petition belies this claim.

(3) McMickle listed several allegations of ineffective assistance. However, there is insufficient evidence of counsel's alleged misrepresentations and coercion. Even if counsel's representation was deficient, McMickle cannot show that the deficient representation prejudiced his case. He was initially sentenced to probation for a crime that carried a maximum sentence of twenty years. "Surely this cannot be considered prejudicial."

(4) McMickle claimed that he was subjected to double jeopardy because he was prosecuted several times for the same offense. He asserted that his first prosecution followed his confession, and he "served his time" by working as a CI. McMickle claimed his indictment constituted double jeopardy, and his subsequent guilty plea constituted yet another prosecution. Finally, McMickle also submitted that the revocation of his probation and the imposition of the twelve-year sentence constituted yet another prosecution for the same offense. The claim is without merit.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109100.pdf>

**December 15, 2015**

*Charles McLaurin, Jr. v. State*, No. 2015-CP-00597-COA (Miss.Ct.App. December 15, 2015)

**CASE:** PCR – Felony Shoplifting x2

**SENTENCE:** Two 4 year concurrent terms

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Roger T. Clark

**APPELLANT ATTORNEY:** Charles McLaurin Jr. (Pro Se)

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISPOSITION:** Appeal Dismissed for Lack of Jurisdiction. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Did the circuit court err in dismissing McLaurin’s judicial challenges to MDOC's sentencing policy.

**FACTS:** On July 15, 2013, Charles McLaurin, Jr. pled guilty to two counts of felony shoplifting. On September 27, 2013, McLaurin filed what he called a motion for reconsideration of his sentence. He asked the circuit judge to let him serve his sentence in Louisiana. The circuit judge denied the motion, ruling he had no authority to order this. McLaurin eventually sought relief through MDOC's Administrative Remedy Program. On April 2, 2014, MDOC issued its final decision denying McLaurin’s request. McLaurin waited nearly eight months before filing the first of two additional motions—a motion to clarify his sentence and an objection to the judge's dismissal of that motion. The were filed in Harrison County, where McLaurin was convicted and sentenced, not Sunflower County, where he was incarcerated. The Harrison County circuit court dismissed his motions and he appealed.

**HELD:** McLaurin did not file his challenge in the 30 day period allowed for judicial review of MDOC’s administrative review. The circuit court did not have jurisdiction. Additionally, the venue was wrong, as he should have filed in Sunflower County. The appeal was dismissed.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109293.pdf>

***Thomas Jack Kennedy v. State***, No. 2014-CP-01495-COA (Miss.Ct.App. December 15, 2015)

**CASE:** PCR – Armed Robbery

**SENTENCE:** 10 years to serve and 10 years PRS

**COURT:** DeSoto County Circuit Court

**TRIAL JUDGE:** Hon. Gerald W. Chatham, Sr.

**APPELLANT ATTORNEY:** Thomas Jack Kennedy (Pro Se)

**APPELLEE ATTORNEY:** Lisa L. Blount

**DISPOSITION:** Dismissal of PCR Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether his indictment for armed robbery was defective due to ambiguity; and (2) whether there was a sufficient factual basis for the plea.

**FACTS:** On August 15, 2013, Thomas Jack Kennedy pled guilty to an armed robbery of a BankPlus location in Southaven. Kennedy entered the bank and handed an employee a note stating, "This is a robbery, I have a gun, so no dye packets and no one dies, no funny money, put it all in the bag." The employee placed all of the money in her bank drawer into the bag, and she also placed a GPS tracking system into the bag. Police officers eventually pulled over Kennedy on I-69. Officers conducted a search of Kennedy's vehicle and found a camouflage jacket, a backpack, a BB gun, a ball cap, and cash. Kennedy was arrested and both verbally confessed and wrote a statement confessing that he did commit the robbery. On June 26, 2014, Kennedy filed a PCR. The circuit court dismissed his petition and he appealed.

**HELD:** (1) Kennedy argued that none of the witnesses to the alleged armed robbery saw him with a weapon; as a result, he should have been charged under §97-3-81 (attempting to rob by extortion). Kennedy claimed that he only possessed a threatening letter, and "a threatening letter is not a deadly weapon." However, Kennedy's indictment clearly alleged he placed the teller in fear by giving her a note which said he had a gun. This was sufficient for armed robbery.

(2) The trial judge did not err in failing to address his sufficiency of the evidence claims. Kennedy admitted he committed the crime based on the State's proffer. Further, Kennedy waived any argument regarding the sufficiency of the evidence to prove the indicted charge of armed robbery by knowingly and voluntarily pleading guilty.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108642.pdf>

**Robert E. Lewis (Robert), Jr. v. State**, No. 2015-CP-00094-COA (Miss.Ct.App. December 15, 2015)

**CASE:** PCR – Capital Murder

**SENTENCE:** Life w/o parole

**COURT:** Lowndes County Circuit Court

**TRIAL JUDGE:** Hon. James T. Kitchens, Jr.

**APPELLANT ATTORNEY:** Robert E. Lewis Jr. (Pro Se)

**APPELLEE ATTORNEY:** Billy L. Gore

**DISPOSITION:** Dismissal of PCR Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Whether Lewis was required to obtain permission from the supreme court to file a PCR in the circuit court.

**FACTS:** On August 28, 2008, Robert Lewis pled guilty to capital murder and was sentenced to life without parole as a habitual offender. Between 2009 and 2014, Lewis filed four PCRs challenging

his conviction and sentence. His first PCR was denied and affirmed by the COA on appeal. In his second PCR, the circuit court originally found the petition barred as a successive writ, but later concluded that it lacked jurisdiction because Lewis needed to obtain permission from the supreme court before he could file the PCR, since the COA was the court that last exercised jurisdiction on his case. At some point, Lewis filed an application in the supreme court, seeking permission to file a PCR in the circuit court. However, the supreme court, finding that since there had been no appeal of Lewis's conviction or sentence, it was without jurisdiction to consider Lewis's application, and dismissed it without prejudice. On December 9, 2011, Lewis filed his third PCR motion, which the circuit court also dismissed as a successive motion. On August 13, 2014, Lewis filed his fourth PCR which the circuit court again dismissed. On appeal, the State argued the circuit court had no jurisdiction since Lewis failed to obtain permission from the supreme court to file the PCR, as the COA was the last court to exercise jurisdiction in his case.

**HELD:** The COA agreed with Lewis that he was not required to obtain permission from the supreme court before he could file a PCR challenging the validity of his guilty plea to capital murder in 2008. In the opinion, Judge Irving detailed the history of the requirement to obtain the supreme court's permission before filing a PCR as set forth in §99-39-7. Notwithstanding the circuit court's earlier error finding that Lewis needed permission to file, it correctly found that Lewis's petition was successive-writ barred. Before filing the subject PCR, Lewis filed three other PCRs in the circuit court, one of which was denied and two of which were dismissed. This PCR was barred as a successive writ.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109345.pdf>

***Bobby Thomas v. State***, No. 2014-CP-01229-COA (Miss.Ct.App. December 15, 2015)

**CASE:** PCR – 2<sup>nd</sup> Degree Murder

**SENTENCE:** 25 years

**COURT:** Claiborne County Circuit Court

**TRIAL JUDGE:** Hon. Lamar Pickard

**APPELLANT ATTORNEY:** Bobby Thomas (Pro Se)

**APPELLEE ATTORNEY:** Scott Stuart

**DISPOSITION:** Denial of PCR Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

**ISSUES:** (1) Whether the guilty plea was voluntary, and (2) whether he received ineffective assistance of counsel.

**FACTS:** Bobby Thomas was indicted for the capital murder of James Curry. He later pled guilty to depraved heart murder. Before Thomas entered his plea, his attorney moved ore tenus for a competency hearing, alleging that Thomas had been a special-education student and that he had once

been evaluated at a mental-health facility. The circuit judge denied the motion from the bench. Thomas subsequently filed a PCR, which the circuit court summarily denied. Thomas appealed.

**HELD:** (1) Thomas argued that his plea was involuntary because his trial counsel convinced him that the plea was in his best interest because a trial would result in a death sentence, and that counsel told him that he would get parole if he pled guilty. This claim is without merit, as the record establishes that Thomas was aware of the nature of the charges against him, the rights he was forfeiting, and the consequences of his plea.

(2) Thomas also argued that his trial counsel was ineffective because counsel failed to inform him that he was entitled to a competency hearing, and failed to procure medical records that could have proven that he lacked the mental capacity to fully appreciate the consequences of his guilty plea. However, the COA found Thomas's counsel did request a competency hearing. Although counsel failed to procure his medical records before the plea hearing, the record does not shed any light as to the cause of counsel's failure or what the medical records would have proven. Therefore, the COA found no ineffective assistance. Thomas admitted his guilt at the plea. There was a factual basis to support the plea, so counsel was not ineffective for failing to object to the insufficiency of the evidence presented against him.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109348.pdf>

**January 12, 2016**

*Marvin Kyles v. State*, No. 2013-CA-02007-COA (Miss.Ct.App. January 12, 2016)

**CASE:** PCR – Aggravated Assault on a LEO

**SENTENCE:** 10 years followed by 5 years probation

**COURT:** Lowndes County Circuit Court

**TRIAL JUDGE:** Hon. Lee Sorrels Coleman

**APPELLANT ATTORNEY:** Jonathan W. Martin

**APPELLEE ATTORNEY:** Scott Stuart

**DISPOSITION:** Dismissal of PCR Affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair and Wilson, JJ., Concur.

**ISSUE:** Whether counsel was ineffective because she failed to inform Kyles of a possibly meritorious claim based upon a speedy-trial violation.

**FACTS:** On November 30, 2012, Marvin Kyles pled guilty to aggravated assault on a law enforcement officer. As part of the plea, the State dismissed a possession of marijuana charge. On May 3, 2013, Kyles filed a petition to vacate his conviction, which the trial court treated as a PCR. Kyles argued that his counsel was ineffective because his attorney failed to advise him of the violation of his constitutional right to a speedy trial before he entered a guilty plea to the charge. The

trial court dismissed Kyles's petition on the merits, without an evidentiary hearing and he appealed.

**HELD:** Kyles's voluntary guilty plea waived his speedy trial claim. Without the plea agreement, Kyles faced 30 years and a fine of \$5,000. The court accepted the State's recommendation of 10 years with 5 years probation and even reduced the fine to \$2,500. Kyles acknowledged during his plea that he gave up his right to a speedy trial and that he was satisfied with his attorney.

Looking at the balancing test of *Barker v. Wingo*, it does not appear Kyles's speedy trial claim would have been successful had it been raised. Kyles pled guilty 295 days after his arrest. He failed to argue the *Barker* factors or how he was prejudiced by the delay. Kyles has not made the required showing that his attorney's conduct rendered his guilty plea involuntary.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109799.pdf>

### **January 19, 2016**

**Charlie Blount v. State**, No. 2013-CP-01710-COA (Miss.Ct.App. January 19, 2016)

**CASE:** PCR – Motor Vehicle Theft

**SENTENCE:** Life as an habitual offender

**COURT:** Hinds County Circuit Court

**TRIAL JUDGE:** Hon. Winston L. Kidd

**APPELLANT ATTORNEY:** Charlie Blount (Pro Se)

**APPELLEE ATTORNEY:** Billy L. Gore

**DISPOSITION:** Denial of PCR Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Carlton, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Whether the trial court erred in finding his PCR time-barred.

**FACTS:** Charlie Blount was convicted of numerous felonies and is currently serving a life sentence as an habitual offender. Blount was first convicted in 1993 after pleading guilty to for simple assault of a law enforcement officer, accessory after the fact to grand larceny, and receiving stolen goods. He was sentenced to 5 years on each count to be served concurrently. In 1996, he was convicted by a jury of possession of cocaine. He was sentenced to 3 years as an habitual offender. In 2011, Blount was found guilty of motor-vehicle theft and sentenced to life as an habitual offender. On appeal, the COA found the sentence was proper, as simple assault on a law enforcement officer was a violent felony. *Blount v. State*, 111 So. 3d 1216 (Miss. Ct. App. 2012). In 2012, Blount challenged his 1996 cocaine-possession charge. The COA found his petition time-barred. *Blount v. State*, 126 So. 3d 927 (Miss. Ct. App. 2013). Aggrieved, he filed a subsequent PCR motion, not only challenging the 1996 sentence, but also his life sentence from the 2011 motor-vehicle theft. The circuit court found the petition procedurally barred.

**HELD:** Blount was not illegally sentenced to overcome the time bar. Blount's assertion that he was illegally sentenced as a habitual offender due to the concurrent sentencing from his 1993 convictions lacks merit. Furthermore, Blount has failed to provide the Court with sufficient evidence that his fundamental rights were violated.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108609.pdf>

*Nathaniel Walden v. State*, No. 2014-CP-00165-COA (Miss.Ct.App. January 19, 2016)

**CASE:** PCR – Murder and Shooting into an Occupied Dwelling

**SENTENCE:** Life with a consecutive 10 years with 5 suspended and 5 years PRS

**COURT:** Holmes County Circuit Court

**TRIAL JUDGE:** Hon. Jannie M. Lewis

**APPELLANT ATTORNEY:** Nathaniel Walden (Pro Se)

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISPOSITION:** Dismissal of PCR Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Carlton, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Whether the trial judge erred in finding Walden's PCR procedurally barred and time barred.

**FACTS:** On October 11, 2006, Nathaniel "Dude" Walden was convicted in the Holmes County Circuit Court of the crimes of murder and shooting into an occupied dwelling. His conviction was affirmed on appeal. *Walden v. State*, 29 So. 3d 17 (Miss. Ct. App. 2008). Walden was convicted of shooting and killing his sister-in-law, Mary Walden. Walden had gotten into a dispute with his brother, James, and fired a gun at him into James's trailer. Mary was killed by the one of the bullets. In 2011, the Supreme Court denied Walden's request to file a PCR. A second request for leave to file a PCR was filed on January 14, 2013, and was granted on June 20, 2013. On July 12, 2013, Walden filed a PCR in the trial court alleging a claim of ineffective assistance of counsel. The trial judge dismissed the petition as procedurally barred, time barred and without merit. Walden appealed.

**HELD:** The circuit court erred in finding that it lacked jurisdiction to review the PCR. The Supreme Court granted Walden's application to proceed, so his PCR was not procedurally barred. The COA also found the court erred in finding the claim time barred. Walden filed his motion seeking leave before the three-year statute of limitations expired, but the Supreme Court did not grant it until after the three-year deadline had passed. The COA presumed that the supreme court intended to allow Walden to file his motion without subjecting it to the three-year statute of limitations.

Regardless, Walden's claims are without merit. Walden complains that his counsel was defective in advising him to reject a plea deal to manslaughter. Walden alleges that his attorney told him that the State would not have the ability to prove that Walden intentionally murdered the victim at trial. However, Walden failed to present any evidence that he was offered a plea deal for manslaughter. The trial judge did not err in finding the claim without merit.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108793.pdf>

***Paul Brown v. State***, No. 2014-CP-01235-COA (Miss.Ct.App. January 19, 2016)

**CASE:** PCR – Sexual Battery and Fondling

**SENTENCE:** A total of 25 years to serve and 5 years PRS

**COURT:** Washington County Circuit Court

**TRIAL JUDGE:** Hon. Richard A. Smith

**APPELLANT ATTORNEY:** Paul S. Brown (Pro Se)

**APPELLEE ATTORNEY:** Scott Stuart

**DISPOSITION:** Dismissal of PCR Affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair and Wilson, JJ., Concur.

**ISSUE:** Whether the trial court erred in dismissing Brown’s PCR as procedurally barred.

**FACTS:** Paul S. Brown was arrested on a charge of fondling. Brown subsequently made bond and was to have no contact with the victim. On April 14, 2011, officers arrested Brown at his fiancée's home, which is where the victim resided. Brown subsequently picked up an additional charge for sexual battery on the same minor. On May 20, 2013, in Cause No. 2011-0173-CR, Brown pled guilty to two counts of sexual battery. He was given concurrent sentences of 25 years on each count. He also pled guilty to two counts of fondling and was sentenced to five years of PRS on both counts, with the sentences to run concurrently with each other but consecutively to the two counts of sexual battery. In Cause No. 2011-0174-CR, Brown pled guilty to one count of sexual battery and was sentenced to 25 years to run concurrently with the sentence in Cause No. 2011-0173-CR. He subsequently filed a PCR alleging his pleas were not voluntarily given and that he received ineffective assistance of counsel. His claims were denied. On May 8, 2014, Brown filed a second PCR. The trial judge dismissed Brown's second petition, based on the same facts, as procedurally barred. He appealed.

**HELD:** The trial judge did not err in dismissing Brown’s PCR as a successive writ. Brown claimed, but did not show any newly discovered evidence. He also failed to show that his fundamental constitutional rights were violated. Brown has presented no evidence, beyond his mere assertions, to support his ineffective-assistance-of-counsel and involuntary-plea claims. He only submitted a letter from his attorney urging that he accept a plea deal. This was not ineffective. Additionally, Brown collaterally attacked two judgments and a total of five counts in a single petition. It would have been proper for the circuit court to dismiss Brown's petition on that basis alone.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110461.pdf>

**February 9, 2016**

**Jessie T. Beal v. State**, No. 2015-CP-00498-COA (Miss.Ct.App. February 9, 2016)

**CASE:** PCR – Statutory Rape

**SENTENCE:** 23 years

**COURT:** Madison County Circuit Court

**TRIAL JUDGE:** Hon. William E. Chapman, III

**APPELLANT ATTORNEY:** Jessie T. Beal (Pro Se)

**APPELLEE ATTORNEY:** Abbie Eason Koonce

**DISPOSITION:** Dismissal of PCR Affirmed. Fair, J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, James and Wilson, JJ., Concur. Irving, P.J., Concur in Part and in the Result. Greenlee, J., Not Participating.

**ISSUES:** (1) Whether his indictment subjected him to double jeopardy, and (2) whether he received ineffective assistance of counsel.

**FACTS:** On May 27, 2009, Jessie Beal pled guilty to statutory rape. He filed a PCR 7 months later, which was denied and affirmed on appeal. *Beal v. State*, 58 So. 3d 709 (Miss. Ct. App. 2011). He later filed a second PCR which was again denied and affirmed on appeal. *Beal v. State*, 118 So. 3d 162 (Miss. Ct. App. 2012). Beal filed a third PCR which alleged his indictment violated his rights against double jeopardy and that his counsel was ineffective. The trial court dismissed the petition and Beal again appealed.

**HELD:** (1) The circuit court dismissed Beal's petition, finding it was time-barred and successive-writ barred. However, Beal's claim of a double jeopardy violation exempted the claim for procedural bar. Beal argues that he was subjected to double jeopardy because he was indicted a second time for the same crime found in a prior indictment that had been nolle pros'd. However, the State can re-indict an accused for the same offense after an order of nolle prosequi has been entered. The indictment did not subject him to double jeopardy.

(2) Effective assistance of counsel is not a fundamental right. This claim is barred. Regardless, Beal argued that his counsel was ineffective because he failed to raise the double-jeopardy claim. Because Beal's double-jeopardy claim fails, so does his ineffective-assistance-of-counsel claim.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110004.pdf>

**Reginald Desmond Wallace v. State**, No. 2014-CP-01131-COA (Miss.Ct.App. February 9, 2016)

**CASE:** PCR – Armed Robbery, Kidnapping, and Conspiracy to Commit Armed Robbery

**SENTENCE:** 30 years for both armed robbery and kidnapping, and 5 years for conspiracy

**COURT:** Madison County Circuit Court

**TRIAL JUDGE:** Hon. William E. Chapman, III

**APPELLANT ATTORNEY:** Jane E. Tucker

**APPELLEE ATTORNEY:** Billy L. Gore

**DISPOSITION:** Dismissal of PCR Reversed and Remanded. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Fair, James and Wilson, JJ., Concur. Carlton, J., Dissents Without Separate Written Opinion. Greenlee, J., Not Participating.

**ISSUES:** (1) Whether the plea was voluntary, (2) whether the trial judge abused his discretion for refusing to accept a best interest's plea, and (3) whether counsel was ineffective for failing to inform petitioner of a favorable plea offer from the State.

**FACTS:** In late November 2011, Kimberly Lewis, the co-manager of Sand Dollar Lifestyles in Ridgeland, was robbed as she left work to make the store's deposit. Shortly after Lewis got in her car, a man later identified as Demarcus Timmons got into Lewis's car. Armed with a pistol, Timmons ordered Lewis to drive to a hotel approximately one mile away. After Lewis parked at the hotel, Timmons took the store deposit from her, along with some of her personal property, including her cell phone. A silver Cobalt truck picked up Timmons and sped away. The subsequent investigation led authorities to interview Kenisha Rush, another co-manager of Sand Dollar Lifestyles. Rush admitted that her boyfriend, Antonio Wallace, was involved in the robbery. Antonio and Reginald are brothers. The silver Cobalt belonged to Timmons's girlfriend, Kimberly Gates. Gates and Rush eventually revealed that there was a plan to rob Lewis and take the store deposit. Reginald was implicated as the driver of the silver Cobalt, while Gates rode in the backseat.

All five were indicted and charged with armed robbery, kidnapping, and conspiracy to commit armed robbery. Rush and Gates both took plea deals and pled guilty to simple robbery. Timmons and Reginald also petitioned to plea guilty. Reginald was pleading "open" to avoid a possible life sentence for armed robbery and kidnapping. There were some difficulties establishing the factual basis for his plea and his bond was revoked by the court. Reginald's sentencing hearing was postponed until after Antonio's trial. Reginald retained a new attorney for his sentencing. Against his attorney's advice, he testified at Antonio's trial. During Reginald's sentencing hearing, the circuit judge opined that Reginald's testimony at Antonio's trial was untruthful "in that it was not consistent . . . with reason[.]" Noting that Reginald had a remaining life expectancy of 39 years, the circuit court sentenced him to 30 years for both armed robbery and kidnapping, and 5 years for conspiracy. On April 14, 2014, Reginald filed a pro se PCR. In the State's response, Reginald's first attorney mentioned a plea offer to simple robbery. Reginald claimed he never heard of a plea offer to robbery. The circuit court dismissed the PCR without an evidentiary hearing. Reginald appealed.

**HELD:** Reginald claimed that his guilty pleas were involuntary. He asserted that the circuit judge revoked his bond during the guilty-plea hearing. The revocation of his bond coerced him to enter guilty pleas. Reginald initially tried to enter a best interests plea and wanted to clarify some of the prosecutor's factual basis. The circuit judge expressed his concern that he could not accept best-interest pleas when the prosecution was not recommending a sentence. The judge refused to take his plea unless he admitted guilt. Reginald later admitted guilt after the prosecutor gave a factual basis that did not tend to implicate Antonio.

We are unaware of any authority that allows a circuit judge to revoke a defendant's bond based on the appearance that "he was trifling with the court" or hesitating to

plead guilty after filing a petition to do so. Even so, we do not find that the circuit court's revocation of the bond coerced Reginald's guilty pleas.

To find that the circuit judge's revocation of Reginald's bond coerced his guilty pleas, the court would have to ignore the fact that Reginald had already expressed his desire to plead guilty to all three charges. "Although this opinion should not be construed as implicit support for the concept that a circuit judge may revoke a criminal defendant's bond out of frustration, under the precise circumstances of this case, we do not find that the circuit judge coerced Reginald's guilty pleas."

(2) The circuit judge acted within his discretion when he declined to accept the best-interest pleas. Although allowed, there is no obligation for the court to accept a best interest plea under *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). Considering Reginald was pleading open to multiple charges including armed robbery and kidnapping, the stated desire to avoid a life sentence was improbable since the court could sentence him to something very close to life anyway.

(3) Finally, Reginald claims he received ineffective assistance of counsel because his first attorney did not communicate the prosecution's offer to allow Reginald to plead guilty to the lesser offense of simple robbery. Although the claim was not included in his PCR, Reginald claimed he only found out about the offer when the State responded to his PCR. The record in this case contains a sworn statement from former defense counsel that there was a plea offer that was arguably favorable to Reginald, and two unsworn statements that Reginald was unaware of the plea offer.

Although the circuit court did not err in its resolution of the issues that Reginald originally raised in his PCR motion, we reverse the circuit court's judgment and remand the case for an evidentiary hearing on the issue as to whether [counsel] failed to communicate an offer to plead guilty to the lesser offense of robbery. We find that rather than awaiting a permissible successive PCR motion, this course of action better promotes the judicial economy and operates as a more efficient means to expedite a final decision.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110721.pdf>

***Albert Charles Hicks v. State***, No. 2013-KA-01747-COA (Miss.Ct.App. February 9, 2016)

**CASE:** PCR – Sale of Cocaine

**SENTENCE:** 20 years, with 12 suspended, 8 to serve, and 8 years PRS

**COURT:** Lauderdale County Circuit Court

**TRIAL JUDGE:** Hon. Robert Walter Bailey

**APPELLANT ATTORNEY:** Albert Charles Hicks (Pro Se)

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISPOSITION:** Dismissal of PCR Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Fair and Wilson, JJ., Concur. James, J., Concur in Part Without Separate

Written Opinion. Greenlee, J., Not Participating.

**ISSUE:** Whether his sentence was legal.

**FACTS:** On November 23, 1998, Albert Hicks pled guilty to the sale of cocaine. Hicks served his term and was released from prison. On March 29, 2010, he violated the terms and conditions of his release by selling cocaine. The circuit court revoked his suspended sentence, and ordered Hicks to serve the time remaining on his original sentence. On May 27, 2014, Hicks filed a motion for correction of an illegal sentence. Hicks contended the circuit erred in sentencing him to 8 years of PRS when the statutory maximum is 5 years. The circuit court treated the motion as a PCR and found his claims procedurally barred. Hicks appealed.

**HELD:** Hicks failed to show any exceptions to the time bar. Regardless, his claim is without merit. Under §47-7-34(3), the maximum number of years to be supervised under PRS is five. The statute does not limit unsupervised probation. Hicks's sentence did not exceed the maximum 20 years allowed under the statute. Time spent on probation is not included in the calculation of the maximum allowable sentence.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109569.pdf>

***Jerry Maurice Alford v. State***, No. 2014-CP-01016-COA (Miss.Ct.App. February 9, 2016)

**CASE:** PCR – Sale of Cocaine

**SENTENCE:** 30 years

**COURT:** Lauderdale County Circuit Court

**TRIAL JUDGE:** Hon. Lester F. Williamson, Jr.

**APPELLANT ATTORNEY:** Jerry Maurice Alford (Pro Se)

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISPOSITION:** Denial of PCR Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Fair and Wilson, JJ., Concur. James, J., Concur in Part Without Separate Written Opinion. Greenlee, J., Not Participating.

**ISSUES:** (1) Whether he was convicted under a defective indictment; and (2) whether he received ineffective assistance of counsel.

**FACTS:** Jerry Maurice Alford pled guilty on November 14, 2011, to the sale of approximately 0.6 grams of cocaine. Alford filed a PCR on September 12, 2013, which the circuit court denied. Alford alleged the indictment failed to allege the specific amount of cocaine, the manner in which he sold the cocaine, and to whom he sold the cocaine.

**HELD:** (1) Alford pled guilty, which waived any defect in the indictment unless the indictment failed to charge an essential element of the crime or it lacked subject matter jurisdiction. Alford primarily

claimed the failure to state a specific amount of cocaine rendered the indictment defective. However, at the time of the crime §41-29-139 did not specify the amount of cocaine required for a sentence of thirty years. Further, the exact method through which he sold the drugs is not essential. Failure to identify the confidential informant in the indictment is not a defect. The plain-error and the actual-innocence doctrines do not apply to this case. Alford only asserted his defective indictment caused a constitutional violation that rises to actual innocence.

(2) Alford contends his trial counsel failed to oppose the defective indictment, did not conduct discovery or interview witnesses, and told Alford he had to plead guilty. Alford's guilty plea waives these claims unless they resulted in an involuntary guilty plea. Alford offers no evidence indicating an involuntary guilty plea other than his own affidavit claiming counsel told him he had to plead guilty. During the plea hearing, Alford stated he freely and voluntarily entered the plea. This claim is without merit.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109629.pdf>

***Willie Lee Madden, Jr. v. State***, No. 2014-CP-01107-COA (Miss.Ct.App. February 9, 2016)

**CASE:** PCR – Transfer of a Controlled Substance

**SENTENCE:** 15 years as a habitual offender

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Michael H. Ward

**APPELLANT ATTORNEY:** Willie Lee Madden Jr. (Pro Se)

**APPELLEE ATTORNEY:** Lisa L. Blount

**DISPOSITION:** Denial of PCR Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUE:** Whether Madden's sentence should be reduced based on amendments to §41-29-139.

**FACTS:** In 2004, Willie Lee Madden, Jr. pled guilty to the charge of transfer of a controlled substance. Madden subsequently filed multiple PCRs, each being denied or dismissed. In his 5<sup>th</sup> PCR, Madden requests a reduction of his sentence based on recent amendments to the sentencing requirements in §41-29-139.

**HELD:** Madden's PCR is time barred and successive writ barred. Notwithstanding the bar, it is also without merit. House Bill 585 amended the penalty for the transfer of a controlled substance to "not more than eight years." Madden is currently serving fifteen years under the former version of the statute. If the Legislature chooses to apply an amendment to the sentencing requirements retroactively, it may provide such an instruction in the language of the amendment. The 2014 amendments provide no such instruction. Thus, Madden is not entitled to a reduction in his sentence.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109630.pdf>

**February 16, 2016**

*Alton Neal (Alton) v. State*, No. 2015-CP-00166-COA (Miss.Ct.App. February 16, 2016)

**CASE:** PCR – Aggravated Domestic Violence

**SENTENCE:** 20 years with 10 years suspended and 5 years of supervised probation

**COURT:** Lauderdale County Circuit Court

**TRIAL JUDGE:** Hon. Robert Walter Bailey

**APPELLANT ATTORNEY:** Alton Neal (Pro Se)

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISPOSITION:** Denial of PCR Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUES:** (1) Whether his guilty plea was involuntarily obtained, (2) whether the trial court failed to sua sponte conduct an evidentiary hearing as to his mental state at the time of the crime, and (3) whether he received ineffective assistance of counsel.

**FACTS:** On November 22, 2011, Alton Neal pled guilty and was sentenced for aggravated domestic violence. On December 23, 2013, Neal filed a motion for PCR, which the trial judge was denied. He appealed.

**HELD:** (1) Neal claimed his plea was involuntary because he was not properly advised as to the nature of the charge against him because he was not advised of the possible minimum and maximum sentences that might have been imposed. However, the record indicates he was advised of this at his plea hearing.

Neal also claimed the court did not inquire into whether he was intoxicated at the time of the offense and at his plea. Again, however, the plea transcript indicates the court discussed the medication Neal was taking at the time.

(2) The COA believed Neal intended to assert a claim that the trial court erred when it failed to conduct a competency hearing as to his mental capacity at the time of the guilty plea. Regardless, based on Neal's own sworn statements in court, and absent any evidence to the contrary, there was no indication that the trial court should have ordered a mental examination and competency hearing.

(3) Neal claimed that his trial counsel was ineffective when he failed to independently investigate the facts and circumstances of Neal's case. However, Neal's posttraumatic stress disorder, panic attacks, and bipolar disorder were all disclosed to the trial court during Neal's guilty plea hearing. Neal also stated at the plea that he was satisfied with counsel. Neal presented no evidence or affidavits to support his allegation of ineffective assistance of counsel. This issue is without merit.

Neal also presented several issues for the first time on appeal. The COA found all of these claims procedurally barred.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110008.pdf>

***Ricky Lee Shies v. State***, No. 2014-CP-01351-COA (Miss.Ct.App. February 16, 2016)

**CASE:** PCR – Credit-Card Fraud x2 and Possession of Cocaine

**SENTENCE:** Two consecutive five-year terms for the credit card fraud, and a consecutive 10 years for the cocaine charge

**COURT:** Lowndes County Circuit Court

**TRIAL JUDGE:** Hon. Lee J. Howard

**APPELLANT ATTORNEY:** Ricky Lee Shies (Pro Se)

**APPELLEE ATTORNEY:** Scott Stuart

**DISPOSITION:** Denial of PCR Affirmed. Irving, P.J., for the Court. Griffis, P.J., Ishee, Carlton, Fair and James, JJ., Concur. Wilson, J., Concur in Result Only Without Separate Written Opinion. Barnes, J., Concur in Part and Dissents in Part with Separate Written Opinion, Joined by Lee, C.J. Greenlee, J., Not Participating.

**ISSUES:** (1) Whether his illegal sentence is exempt from the time bar, and whether time should be reduced from another conviction as relief, and (2) whether he received ineffective assistance of counsel.

**FACTS:** On February 18, 2004, Ricky Lee Shies entered guilty pleas to two counts of credit-card fraud in case number 2003-0368-CRI and to possession of cocaine in case number 2003-0494-CRI. The trial judge sentenced him as a §99-19-81 habitual offender in case number 2003-0368 to two consecutive five-year terms. In case number 2003-0494, he was sentenced to 10 years, consecutive to the 10 years for the two credit card fraud convictions for a total of 20 years, ten of which were as an habitual offender. As part of the plea, two other counts of credit card fraud were retired to the file. On July 22, 2014, Shies filed a PCR, alleging that his sentence in case number 2003-0368, which he completed around February 2014, was illegal. The circuit court dismissed the PCR as time-barred and without merit. Shies appealed.

**HELD:** Shies argued that his sentences in case number 2003-0368 were illegal because they exceeded the statutory maximum. For relief, he asked that both of his sentences in case number 2003-0368 be retroactively reduced by two years and to have these years credited to his sentence in case number 2003-0494.

Although the indictment in case number 2003-0368 indicates that Shies was being indicted as a habitual offender, it failed to specify which habitual-offender code section. The sentencing order indicated it was §99-19-81. The maximum sentence for credit card fraud under § 97-19-21 is three

years. Since the circuit court sentenced Shies under §99-19-81, his two five-year sentences were illegal as they exceeded the maximum penalty prescribed by statute.

Despite the imposition of an illegal sentence, the COA could not grant relief. First, Shies has already served the two consecutive five-year sentences handed to him. Second, Shies was not prejudiced by the illegal sentences that he was given as a part of a plea bargain. As part of the plea, the State did not seek to have Shies indicted as a habitual offender in his cocaine indictment. Further, both indictments supported habitual status under §99-19-83.

(2) Shies claimed that his trial counsel's failure to raise certain objections, file certain motions, and conduct a proper investigation into his case prejudiced his defense. Shies also argued that he was prejudiced by trial counsel's failure to object to his illegal sentence. The record does not conclusively establish that counsel's failure to object to Shies's illegal sentence was prejudicial. Without the plea bargain, which included the illegal sentences, Shies was facing a total of twelve years on the four counts of credit-card fraud. Additionally, he could have been charged as a violent habitual. Counsel was not ineffective.

#### **Barnes, J., Concurring in Part and Dissenting in Part:**

Judge Barnes dissented in part, arguing the Court did have authority to amend his sentence to grant relief. While Shies has already served the illegally imposed ten years for the two credit-card-fraud convictions, he is still in custody serving a ten-year sentence for possession of cocaine, which was ordered to run consecutively to the sentences challenged in his PCR. Under the 2009 amendments to §99-39-5(1), Shies can still attack his convictions even if he is no longer incarcerated for those crimes, but is still in custody or supervision by the State. Shies received an illegally harsh sentence, not an illegally lenient one.

Shies is still suffering the effect of his two illegally imposed sentences; had he been sentenced according to the statutory maximum amount of three years, he would be eligible for release from custody in 2018, rather than 2022. Accordingly, I would reverse and remand for resentencing on the two convictions for credit-card fraud under section 97-19-21.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109203.pdf>

**February 23, 2016**

***Marshall Brian Chandler v. State***, No. 2014-CP-00114-COA (Miss.Ct.App. February 23, 2016)

**CASE:** PCR – Kidnapping, Aggravated Assault, and Conspiracy to commit Aggravated Assault  
**SENTENCE:** 45 years with 5 years PRS

**COURT:** Madison County Circuit Court

**TRIAL JUDGE:** Hon. John Huey Emfinger

**APPELLANT ATTORNEY:** Marshall Brian Chandler (Pro Se)

**APPELLEE ATTORNEY:** Lisa L. Blount

**DISPOSITION:** Summary Dismissal of PCR Vacated, but PCR Dismissed by COA. Wilson, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair and James, JJ., Concur. Greenlee, J., Not Participating.

**ISSUE:** Whether the trial court erred in summarily dismissing the PCR.

**FACTS:** In June 2012, a jury convicted Marshall Chandler of kidnapping, aggravated assault, and conspiracy to commit aggravated assault. Prior to his sentencing hearing, he reached an agreement with the State to waive his right to appeal, and agreed to testify against one of his co-conspirators. The State agreed not to seek sentencing as a habitual offender. The trial court questioned Chandler about the terms of the agreement to assure that Chandler was voluntarily waiving his right to appeal, and that he had discussed the agreement with his attorney. In December 2012, Chandler filed a pro se "Motion for New Trial or, in the Alternative, for Judgment Notwithstanding the Verdict" in which he alleged 15 distinct grounds for acquittal or a new trial. The circuit judge denied the motion as untimely. Chandler then filed a notice of appeal and requested an out of time appeal. The Court denied the request as untimely. Chandler's motion to reinstate the appeal was also denied. In September 2013, Chandler filed a PCR in circuit court. The circuit judge entered an order addressing Chandler's claims and summarily dismissing his PCR motion as without merit. Chandler appealed.

**HELD:** "Because Chandler's direct appeal from his conviction was dismissed as untimely, he was required by law to request and obtain leave from the Mississippi Supreme Court before filing a PCR motion in the circuit court. Because he failed to do so, the circuit court was correct to dismiss his PCR motion but should have dismissed for lack of jurisdiction rather than on the merits. Accordingly, we vacate the judgment of the circuit court and render a judgment dismissing Chandler's PCR motion for lack of jurisdiction."

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110336.pdf>

**Andy Edward Minor v. State**, No. 2014-CP-01650-COA (Miss.Ct.App. February 23, 2016)

**CASE:** PCR – Shooting into an Occupied Dwelling, Aggravated Assault, and Possession of a Firearm by a Convicted Felon

**SENTENCE:** Consecutive sentences totaling 40 years as an habitual offender

**COURT:** Jefferson County Circuit Court

**TRIAL JUDGE:** Hon. Lamar Pickard

**APPELLANT ATTORNEY:** Andy Edward Minor (Pro Se)

**APPELLEE ATTORNEY:** Billy L. Gore

**DISPOSITION:** Appeal from Denial of Motion for the Issuance of a Subpoena Duces Tecum Dismissed. Wilson, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair

and James, JJ., Concur. Greenlee, J., Not Participating.

**ISSUE:** Did the circuit court err in dismissing Minor's request for a subpoena to the Crime Lab for analysis of evidence found at the crime scene but never disclosed to him.

**FACTS:** In 2010, Andy Minor was convicted of shooting into an occupied dwelling, aggravated assault, and possession of a firearm by a convicted felon. His convictions were affirmed on direct appeal. *Minor v. State*, 89 So. 3d 710 (Miss. Ct. App. 2012). Minor has since filed multiple motions in the Supreme Court requesting leave to file a PCR. On November 3, 2014, Minor filed a "Motion for the Issuance of a Subpoena Duces Tecum" in the circuit court. The motion sought to compel the Mississippi Crime Laboratory to produce a spent cartridge found at the scene of the crimes of which Minor was convicted. Minor alleges that the results of any analysis of the cartridge were never disclosed to him. The circuit court found that Minor's filing was in the nature of a PCR and dismissed for lack of jurisdiction because the Supreme Court had not granted Minor leave to file the motion

**HELD:** The COA also dismissed Minor's motion, but for a different reason than the trial court. Minor did not file his motion for crime lab test results as part of a pending PCR. He could not have done so because the Supreme Court denied him leave to file such a motion. Outside of a PCR, a prisoner has no right to institute an independent, original action for documents related to his conviction. Minor's appeal is dismissed for lack of jurisdiction.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110335.pdf>

*Billie Salvador Braziel v. State*, No. 2015-CP-00026-COA (Miss.Ct.App. February 23, 2016)

**CASE:** PCR – Possession of Cocaine

**SENTENCE:** 16 years, with 13 suspended with 5 years PRS

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Michael H. Ward

**APPELLANT ATTORNEY:** Billie Salvador Braziel (Pro Se)

**APPELLEE ATTORNEY:** Abbie Eason Koonce

**DISPOSITION:** Denial of PCR Affirmed. Wilson, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair and James, JJ., Concur. Greenlee, J., Not Participating.

**ISSUE:** Whether the trial court erred in revoking Braziel's PRS.

**FACTS:** Billie Salvador Braziel pled guilty in 2009 to possession of cocaine. Braziel was placed on PRS in January 2012. On March 21, 2013, he was arrested for possession of a controlled substance with the intent to distribute. He was arrested with a neighbor, Thomas Buckley, who was also a convicted felon on PRS. The day after his arrest, Braziel tested positive for cocaine, opiates, and marijuana. On April 22, 2013, the State petitioned to revoke Braziel's PRS. Braziel denied the new crime, but admitted that he had failed to pay his probation fees and court fines. He also admitted that

the marijuana found in his jacket pocket was his. The court revoked his PRS and ordered Braziel to serve the rest of his 16 years. He was not indicted on the new charge. In October 2014, Braziel filed a PCR, claiming he should not have been revoked since the grand jury no billed his new charge. The circuit court denied the PCR and Braziel appealed.

**HELD:** Braziel's revocation hearing consisted of not just the fact of his arrest, but also testimony of one of the arresting officers, Braziel's admission that he possessed marijuana, his failed drug test, and his admitted failure to pay court costs, a fine, restitution, and monitoring fees. The circuit court correctly rejected Braziel's argument that there was insufficient evidence to revoke his probation. Revocation based on the inability to pay was, at most, harmless error. His continued drug use and association with Buckley were independent and adequate grounds to revoke. Finally, Braziel cites no authority for the notion that PRS should not be revoked simply because the probationer professes a desire to enter substance abuse treatment.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110341.pdf>

**Rosa Wallace v. State**, No. 2014-CP-00806-COA (Miss.Ct.App. February 23, 2016)

**CASE:** PCR – Possession of more than 30 grams of Cocaine

**SENTENCE:** 20 years without parole, followed by 10 years PRS

**COURT:** DeSoto County Circuit Court

**TRIAL JUDGE:** Hon. Robert P. Chamberlin

**APPELLANT ATTORNEY:** Rosa Wallace (Pro Se)

**APPELLEE ATTORNEY:** Barbara Wakeland Byrd

**DISPOSITION:** Denial of PCR Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Fair, James and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUES:** (1) Whether Wallace's constitutional right to confront witnesses was violated by the introduction of certified copies of her prior convictions, (2) whether Wallace's amended indictment was defective, and (3) whether the trial court's imposition of ten years of post-release supervision subjected Wallace to an illegal sentence and double jeopardy.

**FACTS:** On September 8, 2008, Rosa Wallace pled guilty to possessing more than 30 grams of cocaine as an habitual offender and a subsequent drug offender. On May 2, 2014, Wallace filed a PCR alleging, among other claims, that her sentence was illegal. While the trial court noted that her motion was time-barred, he addressed the claims on the merit and denied relief. Wallace appealed.

**HELD:** (1) Self-authenticating records of a defendant's prior convictions are not testimonial evidence, and do not trigger a defendant's constitutional right to confront witnesses.

(2) Wallace's indictment was amended to add habitual offender and subsequent drug offender status. Wallace contends that because the amended habitual-offender language to the indictment failed to

include dates of the previous judgments, she was not properly charged under UCCCR Rule 11.03(1). The indictment was not defective. The amendment set forth the dates of the prior convictions, the cause numbers, and the terms of the sentences imposed. Copies of the certified sentencing orders were submitted into evidence without objection.

(3) Wallace was sentenced as a habitual offender in accordance with §41-29-147 and §99-19-81. She faced 60 years. The trial judge sentenced Wallace to only 30 years, 20 to serve without parole, and 10 years PRS, with 5 years reporting. Wallace's 30-year sentence did not exceed the maximum allowed by law.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110381.pdf>

**March 8, 2016**

*Patrick Fluker v. State*, No. 2014-CP-00029-COA (Miss.Ct.App. March 8, 2016)

**CASE:** PCR – Armed Robbery

**SENTENCE:** 20 years with 15 to serve and 5 years PRS

**COURT:** Forrest County Circuit Court

**TRIAL JUDGE:** Hon. Robert B. Helfrich

**APPELLANT ATTORNEY:** Patrick Fluker (Pro Se)

**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss

**DISPOSITION:** Dismissal of PCR Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Fair, James and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUE:** Whether the trial judge erred in dismissing Fluker's habeas petition.

**FACTS:** On February 13, 2007, Patrick Fluker pled guilty to armed robbery. In March 2013, Fluker filed a petition for writ of habeas corpus, which trial court treated as a PCR. Fluker claimed his indictment was defective and "manufactured" by the district attorney in violation of the Constitution, and his capias was not timely executed. The trial court summarily dismissed the PCR as a successive writ, and found no statutory exceptions applied. Fluker appealed.

**HELD:** Fluker contended that these issues were not brought up in his first PCR, so his motion is not barred. The COA agreed with the trial court that Fluker's PCR was barred as a successive writ. It was also time-barred. Fluker argued that he has a fundamental right to be free from an unlawful sentence, yet he presented no evidence that his sentence was unlawful. He has merely fashioned a different argument – that of an illegal sentence – in an attempt to overcome the procedural bar. This argument is without merit.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111359.pdf>

**Kevin Brown v. State**, No. 2014-CA-01326-COA (Miss.Ct.App. March 8, 2016)

**CASE:** PCR – Fondling

**SENTENCE:** 10 years

**COURT:** Pontotoc County Circuit Court

**TRIAL JUDGE:** Hon. Paul S. Funderburk

**APPELLANT ATTORNEY:** Kenneth Harold Coghlan, Stuart Sheffield Davis

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISPOSITION:** Dismissal of PCR Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Fair, James and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUES:** (1) Whether Brown's counsel rendered ineffective assistance, (2) whether Brown's plea was voluntarily or knowingly given, and (3) whether Brown was advised of the charges against him and whether there was a factual basis for his plea.

**FACTS:** On July 22, 2008, Kevin Brown pleaded guilty to fondling. (He also entered pleas to two drug charges). On March 6, 2014, Brown filed a PCR, solely challenging his fondling conviction and sentence. Brown alleged ineffective assistance of counsel, that his plea was not given knowingly or voluntarily, and that there was no factual basis for the plea. The circuit court dismissed Brown's PCR, finding that all but one issue was time-barred, and that all three were without merit. Brown appealed.

**HELD:** (1) First Brown asserts that his attorney rendered ineffective assistance by inducing him to enter a guilty plea based on counsel's advice he would be parole-eligible for his two unrelated drug cases after serving his ten-year fondling sentence. He also alleged erroneous advice concerning eligibility for trusty time, good time credits, earned release time, and other good time credits on his two drug sentences while serving his ten-year sentence; failing to advise him that his ten-year sentence would be served "day for day" without parole; and that he failed to conduct discovery, investigate the fondling charge, and object to the defective indictment.

The circuit court examined the record and found Brown failed to establish a basis for his claims of ineffective assistance of counsel, and concluded that Brown's claims were time-barred. The COA agreed. Brown failed to prove that, but for the incorrect advice, he would not have pled guilty. Brown's plea was part of a negotiated agreement, which afforded him reduced sentencing. He faced 75 years on all of his charges. Further, Brown has not alleged with any specificity how his counsel's alleged failure to investigate would have resulted in a different outcome.

(2) Brown argued that counsel failed to inform him that his fondling sentence would be served "day for day," and therefore his plea was not voluntary. Brown's affidavit indicated that he expected to serve his full ten-year sentence. Furthermore, Brown's plea colloquy shows the circuit judge thoroughly advised him of the various constitutional rights he was waiving by pleading guilty, and that his plea was knowingly and intelligently entered.

(3) His claim that the indictment was insufficient and defective is procedurally barred. Brown's indictment was read at his plea and he acknowledged he understood the charge and was guilty. An indictment is a sufficient factual basis.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111296.pdf>

*Earl Bates v. State*, No. 2014-CP-01492-COA (Miss.Ct.App. March 8, 2016)

**CASE:** PCR – Murder and Aggravated Assault x2

**SENTENCE:** Life for the murder and 20 years on each aggravated assault

**COURT:** Pike County Circuit Court

**TRIAL JUDGE:** Hon. Michael M. Taylor

**APPELLANT ATTORNEY:** Earl Bates (Pro Se)

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISPOSITION:** Dismissal of PCR Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUE:** Whether the trial judge erred in dismissing Bates's motion.

**FACTS:** On November 28, 1995, Earl Bates pled guilty to murder and two counts of aggravated assault. The state had amended his indictment to allege habitual offender status and no pros'd a possession of a firearm by a felon count. Bates filed a prior PCR which was dismissed in 2012 by the Supreme Court. On July 14, 2014, Bates filed a motion to show cause asking that the State demonstrate the validity of his indictment from his 1995 conviction. Bates argued the habitual-offender amendment and the deletion of count four rendered the indictment invalid. The trial court treated the motion as a petition for post-conviction relief, and dismissed the petition due to the trial court's lack of jurisdiction over the case. Bates appealed

**HELD:** First, Bates's petition is barred as a successive writ. Second, the supreme court affirmed Bates's conviction on October 8, 1997, but Bates failed to seek permission from the supreme court before filing this PCR. The circuit court correctly found it lacked jurisdiction to hear the petition. His petition is also time-barred. He fails to prove any of the exceptions in the PCR statute to the procedural bars apply.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO109854.pdf>

*Charles Edward Wilson v. State*, No. 2014-CP-01732-COA (Miss.Ct.App. March 8, 2016)

**CASE:** PCR – Kidnapping

**SENTENCE:** Life

**COURT:** Amite County Circuit Court

**TRIAL JUDGE:** Hon. Forrest A. Johnson, Jr.

**APPELLANT ATTORNEY:** Charles Edward Wilson (Pro Se)

**APPELLEE ATTORNEY:** Barbara Wakeland Byrd

**DISPOSITION:** Denial of PCR Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Fair, James, Wilson and Greenlee, JJ., Concur.

**ISSUES:** (1) Whether the trial court erred in ruling that his PCR was time-barred; (2) whether counsel was ineffective; (3) whether he was prejudiced by the State's destruction of exculpatory evidence; (4) whether the State withheld information regarding a confidential informant; and (5) whether he was subjected to double jeopardy.

**FACTS:** On March 10, 1983, following a jury trial, Charles Wilson was convicted of kidnapping, and was sentenced to life. After that conviction and sentencing, Wilson took a plea deal on a separate, but related, rape charge. The plea agreement provided that Wilson would waive his right to an appeal of the kidnapping conviction and plead guilty to the rape charge. He was sentenced to 40 years to run concurrently with his life sentence. On June 20, 1986, Wilson filed a PCR, seeking relief from his kidnapping conviction. The circuit court denied relief and the Supreme Court affirmed in an unpublished opinion in 1988. On August 4, 2014, after a host of other motions had been filed by Wilson and ruled on by both the supreme court and the circuit court, Wilson filed his second PCR. The circuit court found the petition both time-barred and without merit. Wilson appealed.

**HELD:** (1) Wilson's PCR was also procedurally barred as a successive writ. The circuit court was correct in finding the petition time-barred. Wilson raised the claim in his first PCR that his indictment was defective for failing to include all essential elements of the offense. So this issue is res judicata and cannot serve to remove the procedural bars.

(2) Wilson's claim that his counsel was ineffective, we find this issue was raised and rejected in his first PCR motion. Therefore, this claim is barred by the doctrine of res judicata.

(3) Wilson's claim that biological and physical exculpatory evidence was destroyed by the State in bad faith refers to evidence introduced during Wilson's trial but later destroyed by the Mississippi Crime Laboratory after Wilson had been convicted and agreed not to appeal. This did not violate his due process.

(4) Wilson's claim that the State failed to disclose that an informant that was instrumental in securing his arrest was not raised in the circuit court. But even if it had been, it would have been procedurally barred as are all of the issues that he did raise.

(5) Wilson's claim that he has been subjected to double jeopardy is premised on his notion that the rape charge, to which he pled guilty, is a lesser-included offense of his kidnapping conviction. This is clearly without merit.

To read the full opinion, click [here](#):

<http://courts.ms.gov/Images/Opinions/CO111853.pdf>

**Antonio Scott v. State**, No. 2014-CP-01366-COA (Miss.Ct.App. March 8, 2016)

**CASE:** PCR – Aggravated Assault and Carjacking

**SENTENCE:** 20 years with a consecutive 10 years

**COURT:** Leake County Circuit Court

**TRIAL JUDGE:** Hon. Marcus D. Gordon

**APPELLANT ATTORNEY:** Antonio Scott (Pro Se)

**APPELLEE ATTORNEY:** Billy L. Gore

**DISPOSITION:** Dismissal of PCR Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUE:** Whether the trial judge erred in dismissing his PCR as time barred when he alleged an illegal sentence.

**FACTS:** On January 14, 2010, Antonio Scott entered guilty pleas to aggravated assault and carjacking. The judge sentenced Scott to consecutive sentences of twenty years and ten years. On July 25, 2014, Scott filed a PCR, attacking the legality of his sentences. His motion was untimely since it was not filed within three years.

**HELD:** Scott claimed his PCR should not be barred because his sentence was illegal. The illegality he asserts is that his sentences should be served concurrently, not consecutively, because the charges grew out of the same set of operative facts in a multi-count indictment. However, that is permissible. Because multicount indictments are allowed and sentencing judges are given discretion to fashion their sentences to run concurrently or consecutively, Scott's sentences were not illegal. His claim is both untimely and without merit.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111389.pdf>

**March 15, 2016**

**Timothy Burns v. State**, No. 2015-CP-00265-COA (Miss.Ct.App. March 15, 2016)

**CASE:** PCR – Capital Murder

**SENTENCE:** Life w/o Parole

**COURT:** Copiah County Circuit Court

**TRIAL JUDGE:** Hon. Lamar Pickard

**APPELLANT ATTORNEY:** Timothy Burns (Pro se)

**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss

**DISPOSITION:** Denial of PCR Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Fair, James and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUES:** (1) Whether a factual basis existed for his guilty plea; (2) whether his indictment was defective; (3) whether the trial court failed to require him to submit to a competency hearing; (4) whether the trial court failed to advise him of the minimum and maximum penalties for the charges against him; and (5) whether he was denied effective assistance of counsel.

**FACTS:** On October 3, 2014, Timothy Burns pled guilty to the two counts of capital murder. Burns was originally indicted for two counts of capital murder, one count of rape, and one count of arson, as a habitual offender, stemming from the kidnapping, rape, and murder of Atira Hill-Smith and the kidnapping and murder of Jaidon Hill. On January 7, 2015, Burns filed a PCR. The trial judge subsequently denied relief without an evidentiary hearing, and Burns appealed.

**HELD:** (1) Burns admits that he confirmed to the trial court that he was guilty of two counts of capital murder, but he argues this was insufficient to establish a factual basis for his plea because he did not admit in detail how the crime was committed. At the guilty plea, the prosecution stated that it was prepared to prove that Burns kidnapped Hill-Smith and Hill by taking them against their will from Hinds County and transporting them to Copiah County. He then murdered both of them by shooting them with a shotgun. Burns agreed this was correct. This was an adequate factual basis.

(2) Burns next asserts that his indictment for capital murder was defective because it omits the phrase "malice aforethought." However, capital murder does not require the language "malice aforethought." Burns was charged with capital murder with the underlying felony of kidnapping. The indictment tracked the language of the statute and provided Burns with proper notice of the charges against him.

(3) Burns claims that his counsel, the prosecution, and the trial judge all possessed awareness of Burns's "serious mental problems," which cause him to attempt suicide. He claims he should have been granted a competency hearing. Counsel requested a mental examination, but the record reflects no order granting or denying this motion. Burns failed to meet his burden to show by substantial evidence that his competency to stand trial was in question. During his plea, he denied he had any mental issues.

(4) The record reflects that in both the plea petition and plea hearing, Burns was made aware, repeatedly, of the maximum and minimum penalties to which he may have been subjected upon a plea of guilty. His claim is without merit.

(5) Burns's claim for ineffective assistance of counsel rests entirely on his own bare assertions. Burns provided no additional proof or affidavit to support his claim that his trial counsel's performance was deficient. Burns informed the trial court that he was satisfied with the advice provided by his attorneys. Burns also asserts that his counsel failed to investigate, failed to object to the defective indictment and to investigate whether Burns possessed competency to enter his guilty plea. As set forth above, Burns never disputed the factual basis of the plea. Since the Court found his other issues were without merit, the ineffective assistance claims are moot.

To read the full opinion, click here:  
<http://courts.ms.gov/Images/Opinions/CO110911.pdf>

**March 22, 2016**

***Tommy Meisner v. State***, No. 2014-CP-00619-COA (Miss.Ct.App. March 22, 2016)

**CASE:** PCR – Possession of Precursor Chemicals

**SENTENCE:** 10 years as a habitual offender

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Lisa P. Dodson

**APPELLANT ATTORNEY:** Tommy Meisner (Pro Se)

**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss

**DISPOSITION:** Denial of PCR Affirmed. Ishee, J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Carlton, Fair, James, Wilson and Greenlee, JJ., Concur. Irving, P.J., Concur in Result Only Without Separate Written Opinion.

**ISSUES:** (1) Whether his sentence was illegal because the court did not conduct a proportionality analysis, and (2) whether the trial court erred in failing to conduct an evidentiary hearing.

**FACTS:** On September 19, 2011, Tommy Meisner pled guilty to possession of precursor chemicals or drugs as a habitual offender. Meisner was originally facing four felony charges. The State agreed to nol pros two of the charges and recommend concurrent ten-year sentences to be served day-for-day for the other two charges. As a habitual offender, Meisner should have been sentenced to 30 years. The circuit judge mentioned the question of proportionality in passing on the record in determining that a reduced sentence was in order. In 2014, Meisner filed a PCR challenging the habitual offender enhancement and claiming that a proper proportionality analysis was not completed, rendering his sentence illegal. The trial court denied relief and Meisner appealed.

**HELD:** (1) Meisner was a habitual offender and should have been sentenced to the maximum term for possession of precursor chemicals – 30 years. However, the circuit judge took into consideration Meisner's testimony and mitigating evidence. Meisner admitted to having had severe drug addictions in the past, including the time during which he committed the instant crime. The circuit judge heard substantial testimony and saw documentation regarding Meisner's attempts to better himself. Since the circuit judge was vested with the authority to issue a reduced sentence, the State did not recommend an illegal sentence during plea bargaining.

(2) An evidentiary hearing was not necessary prior to denying Meisner's PCR. Meisner's allegations lacked any disputed information that would necessitate a hearing. All pertinent information was contained in the record before the circuit judge and in the motions and supporting documentation surrounding Meisner's PCR request.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110916.pdf>

***Dillon Williams v. State***, No. 2014-CA-01170-COA (Miss.Ct.App. March 1, 2016)

**CASE:** PCR – Burglary and Aggravated Assault

**SENTENCE:** 65 years (enhanced based on the victim’s age)

**COURT:** Marshall County Circuit Court

**TRIAL JUDGE:** Hon. Robert William Elliott

**APPELLANT ATTORNEY:** David G. Hill, Tiffany Leigh Kilpatrick

**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss

**DISPOSITION:** Denial of PCR Affirmed. Wilson, J., for the Court. Griffis, P.J., Barnes, Ishee, Fair and Greenlee, JJ., Concur. James, J., Dissents with Separate Written Opinion, Joined by Lee, C.J., Irving, P.J., and Carlton, J.

**ISSUES:** (1) Whether Dillon’s sentence was illegal because he did not waive the right to the jury to decide if the elderly victim enhancement should apply, and (2) whether the circuit court erred in failing to hold an evidentiary hearing.

**FACTS:** On November 10, 2010, Dillon Williams pled guilty to burglary and the aggravated assault of 91-year old Pasquealeen Crum. During a later sentencing hearing, the circuit judge sentenced Williams to 25 years for burglary and 20 years for aggravated assault. The judge then enhanced the aggravated assault sentence based on the victim’s age, increasing it to 40 years to run consecutively to the burglary sentence. Williams voiced no objection to the sentence or the procedures under which it was imposed. In November 2013, Williams filed his third PCR and alleged for the first time that his sentence is illegal because a jury was not impaneled to find that his conviction for aggravated assault was subject to a sentencing enhancement. Under §99-19-355(1), a defendant can waive a jury to determine whether an enhancement should be applied if pleading guilty. Williams claimed he never waived the jury, so his sentence was illegal. The trial judge found the PCR procedurally barred as a successive writ and denied relief. Williams appealed.

**HELD:** The circuit court correctly denied Williams's PCR as procedurally barred. First, Williams's claim was capable of determination at the time of his sentencing. Williams's failure to raise the issue at that time precludes him from raising the issue in a PCR. Second, Williams's claim is barred because it is raised in a successive writ. Williams’s sentence is not illegal, as it does not exceed the maximum penalty for the crime. The maximum statutory penalty for aggravated assault on an elderly victim is 40 years. The enhancement was set forth in his indictment. Therefore there is no exception to the procedural bar.

“Given the unique procedure set out in section 99-19-355, it would have been better for the circuit judge to confirm specifically on the record that Williams did not want a sentencing jury. But this omission does not render Williams's sentence ‘illegal.’”

**James, J., Dissenting:**

Judge James dissented, arguing that Williams's sentence was illegal, therefore the procedural bar did not apply. Section 99-19-355 states that a sentencing proceeding should not be conducted before the court unless the defendant waives his right to have the sentencing proceeding conducted before a jury. While Williams did waive his right to a jury for purposes of deciding guilt, he did not do the same for the purpose of being sentenced. The circuit court consequently lacked jurisdiction to impose any enhancement, rendering Williams's sentence illegal. She would reverse and remand this matter for a sentencing hearing to be conducted before a jury.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO112164.pdf>

**March 29, 2016**

*Thomas J. Hooghe v. State*, No. 2015-CP-00601-COA (Miss.Ct.App. March 29, 2016)

**CASE:** PCR – Motor Vehicle Theft and Grand Larceny x3

**SENTENCE:** 45 years

**COURT:** Madison County Circuit Court

**TRIAL JUDGE:** Hon. John Huey Emfinger

**APPELLANT ATTORNEY:** Thomas J. Hooghe (Pro Se)

**APPELLEE ATTORNEY:** Billy L. Gore

**DISPOSITION:** Dismissal of PCR Affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUE:** Whether the trial judge erred in dismissing Hooghe's PCR.

**FACTS:** On September 22, 2014, Thomas Hooghe pled guilty to one count of motor-vehicle theft, as a subsequent motor-vehicle offender, and two counts of grand larceny. He was sentenced as a subsequent offender to 15 years under the motor-vehicle theft, and 10 years for each grand larceny. He also pled guilty in a separate case to one count of grand larceny and received another 10 years. All sentences were ordered to run consecutively. In a subsequent PCR, Hooghe did not include a sworn statement of specific facts, nor was the PCR accompanied by a verified oath. The circuit court dismissed the PCR and Hooghe appealed.

**HELD:** It is plain from the face of the motion that Hooghe is not entitled to any relief because his PCR motion was not sworn to and did not contain a verified oath as required by §99-39-9(1)(d) and (3). The COA affirmed the circuit court's dismissal, but without prejudice to allow Hooghe to refile a procedurally proper PCR.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110549.pdf>

**April 5, 2016**

**Johnny Holton v. State**, No. 2015-CP-00008-COA (Miss.Ct.App. April 5, 2016)

**CASE:** PCR – Sexual Battery of a child under 14 and Sexual Battery of a child under 18 by a person in a position of trust or authority.

**SENTENCE:** Two concurrent 30 year terms

**COURT:** Winston County Circuit Court

**TRIAL JUDGE:** Hon. C.E. Morgan, III

**APPELLANT ATTORNEY:** Johnny Holton (Pro Se)

**APPELLEE ATTORNEY:** Alicia Marie Ainsworth

**DISPOSITION:** Denial of PCR Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Carlton, Fair, James and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUES:** (1) Whether his PCR was timely; (2) whether the trial judge should have sua sponte recused since he had accepted Holton's guilty plea; and (3) whether his counsel was ineffective.

**FACTS:** On October 21, 2011, Johnny Holton pled guilty to two counts of sexual battery. The victims were Holton's stepdaughters. In exchange for his plea, the State dropped seven other related counts against him. On November 24, 2014, Holton filed a PCR, asserting his counsel was ineffective, and this prejudiced his defense and rendered his plea involuntary. The trial court summarily denied Holton's PCR and he appealed.

**HELD:** (1) Holton's judgment of conviction was entered on October 25, 2011, making the deadline to file his PCR October 25, 2014. Holton filed his PCR on November 11, 2014. Thus, his motion was untimely. While an additional 30 days is allowed from the time of conviction when no direct appeal is taken, this provision does not apply to a guilty plea.

(2) Holton asserted he was denied due process because the judge had prior knowledge of the case and was biased and should have sua sponte recused himself. This claim is procedurally barred, as he failed to raise it before the trial court. Notwithstanding the bar, Holton has pointed to nothing in the record demonstrating an appearance of impropriety on behalf of the judge. Presiding over both guilty-plea and PCR proceedings, alone, does not create an appearance of impropriety.

(3) Holton first argues his counsel was ineffective for failing to request a mental examination. However, there is no indication in the record that Holton was incompetent to enter his plea, nor does Holton give any reason why his attorney should have questioned his competency. An affidavit from his sister was not presented to the trial court.

Holton also claims his attorney and the court failed to inform him that he would withdraw his guilty plea within 30 days. However, Holton could not have simply withdrawn his plea and opted for a trial. Holton has not shown any ground for the withdrawal of his guilty plea, and he has not shown he was prejudiced by his attorney's alleged failure to inform him he could move to withdraw his guilty plea. Further, Holton has not shown prejudice from his attorney's alleged failure to inform him he could file a PCR motion.

The record fails to support Holton's assertion that his attorney failed to negotiate on his behalf or act in his best interests. Holton's own statements that he committed the crimes and that he was satisfied with counsel contradict his ineffectiveness claims.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110480.pdf>

**April 12, 2016**

*Nathan Sinko v. State*, No. 2015-CA-00107-COA (Miss.Ct.App. April 12, 2016)

**CASE:** PCR – Manufacturing (Count I) and Possessing (Count II) Methamphetamine

**SENTENCE:** Concurrent sentences of 12 years with 5 years PRS on each count

**COURT:** Hon. Lee J. Howard

**TRIAL JUDGE:** Hon. Lee J. Howard

**APPELLANT ATTORNEY:** Jim Waide

**APPELLEE ATTORNEY:** Barbara Wakeland Byrd, Anthony Louis Schmidt, Jr.

**DISPOSITION:** Denial of PCR Reversed and Remanded. Wilson, J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Fair, James and Greenlee, JJ., Concur. Irving, P.J., Concur in Part and in the Result Without Separate Written Opinion. Carlton, J., Dissents Without Separate Written Opinion.

**ISSUES:** (1) Whether Sinko's claim that he is eligible for parole is properly before this Court, and (2) whether Sinko's conviction for manufacturing methamphetamine renders him ineligible for parole.

**FACTS:** In May 2012, Nathan Sinko pled guilty to manufacturing and possessing methamphetamine. (A third count for generating waste in connection with the manufacturing of methamphetamine was dropped as part of the plea). Although Sinko should have been ineligible for parole, in July 2014, MDOC gave him a parole date of September 22, 2014. However, MDOC subsequently notified Sinko that they were mistaken, and he was not eligible for parole. Sinko filed a PCR, alleging his guilty plea was entered with the understanding he would be eligible for parole. Sinko subsequently obtained counsel, and on November 13, 2014, he filed a new PCR. The circuit court dismissed his petition. He appealed.

**HELD:** (1) Sinko argued to the trial court that he was entitled to have his sentence set aside and to be re-sentenced to time served on constitutional grounds. Although raised for the first time on appeal, Sinko alleges he is parole eligible based on the amendments the Legislature approved to the parole statutes in HB 585. These claims have merit, and it would be unjust to require Sinko to start over in a new circuit court action or administrative proceeding. The COA exercised its discretion to consider these claims even though they should be waived.

(2) When Sinko pled guilty to manufacturing methamphetamine, he clearly was ineligible for parole under §47-7-3(h). HB 585 changed that by amending to the statute to state those provisions would

not apply to anyone convicted after July 1, 2014. Additionally §41-29-139 was amended to add different sentencing classification based on the amount of drugs manufactured. Under the current versions of §47-3-7(f) and §41-29-139(b), Sinko would be eligible for parole.

The statutes' language is plain, and their meaning is straightforward: offenders convicted prior to July 1, 2014, of selling or manufacturing controlled substances not exceeding the amounts specified in section 41-29-139(b) may be eligible for parole. Sinko is such an offender; therefore, in the absence of some other disqualification, he is eligible for parole under section 47-3-7(f).

The COA directed MDOC to act as expeditiously as possible to take any steps necessary to re-determine Sinko's eligibility for parole.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111763.pdf>

**Jeffrey Brasso v. State**, No. 2014-CA-01061-COA (Miss.Ct.App. April 12, 2016)

**CASE:** PCR – Sexual Battery with a child under 14

**SENTENCE:** 25 years, with 12 years to serve day-for-day, and 5 years PRS

**COURT:** Jackson County Circuit Court

**TRIAL JUDGE:** Hon. Dale Harkey

**APPELLANT ATTORNEY:** Raymond Osborn Boutwell, Jr.

**APPELLEE ATTORNEY:** Scott Stuart

**DISPOSITION:** Dismissal of PCR Reversed and Remanded. James, J., for the Court. Lee, C.J., Irving, P.J., Barnes and Greenlee, JJ., Concur. Carlton, J., Concurs in Result Only Without Separate Written Opinion. Wilson, J., Dissents with Separate Written Opinion, Joined by Griffis, P.J., Ishee and Fair, JJ.

**ISSUE:** Whether Brasso was competent to enter a guilty plea.

**FACTS:** On October 13, 2009, Jeffrey Brasso was indicted for sexual battery for having sexual relations with a minor under the age of 14, between January 2004 and September 2008. Brasso's mother adopted a minor foster child, M.P. Brasso, his mother, and his adopted sister, M.P., lived together. Brasso, 32, began sexually abusing M.P. when she was 9-years old. Brasso began having sexual intercourse with M.P. when she was 11-years old. Brasso fathered a child with M.P. when she was 13-years old. Sometime after M.P. gave birth to the child, Brasso and M.P. went to Louisiana to get married. M.P.'s biological mother signed a waiver for Brasso and M.P. to get married. Sometime later, M.P. moved out of the house, and the marriage ended. It is uncertain whether the marriage was annulled, or whether it was void in the first instance due to M.P.'s age. Regardless, M.P.'s biological mother lacked authority to sign an effective waiver after she was adopted. During the plea hearing, the trial court was advised of Brasso's special education background, his history of mental illness and disease, his organic brain damage, and that he had been taking medications.

However, the court still accepted his plea before Brasso underwent a mental examination followed by a competency hearing. On April 17, 2014, Brasso filed a PCR which the trial judge summarily dismissed. He appealed.

**HELD:** The record contains sufficient proof that gave the circuit court reasonable grounds to believe that Brasso was incompetent to stand trial. Therefore, a mental evaluation followed by a competency hearing under Rule 9.06 was warranted before Brasso was able to enter his guilty plea based on the record before the Court.

Although the circuit court did order a mental examination followed by a competency hearing prior to his sentencing, Rule 9.06 does not provide for retroactive mental evaluation to determine a defendant's competency to stand trial. "The record is replete with information that, when objectively considered, certainly should have raised doubt as to Brasso's competency. Throughout this record, the circuit court was alerted to and even acknowledged proof of Brasso's possible incompetency." Brasso should be either retried or institutionalized following a mental evaluation and competency hearing under Rule 9.06.

**Wilson, J., Dissenting:**

Judge Wilson dissented. "The trial judge in this case was not presented with any information that called into question Brasso's understanding of the charges against him or his ability to consult with his lawyer. Accordingly, the trial judge did not abuse his discretion by not ordering a competency hearing sua sponte." Brasso's attorney confirmed that she did not have any difficulties communicating with him, and she never expressed any concern to the court regarding Brasso's competence.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO112732.pdf>

*Vernon Brown, Jr. v. State*, No. 2014-CP-01338-COA (Miss.Ct.App. April 12, 2016)

**CASE:** PCR – Sale and Possession with intent of hydrocodone, alprazolam, oxycodone, and cocaine (11 counts)

**SENTENCE:** Total of 71 years

**COURT:** Lowndes County Circuit Court

**TRIAL JUDGE:** Hon. Lee J. Howard

**APPELLANT ATTORNEY:** Vernon Brown Jr. (Pro Se)

**APPELLEE ATTORNEY:** Alicia Marie Ainsworth

**DISPOSITION:** Dismissal of PCR affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair and Wilson, JJ., Concur. Greenlee, J., Not Participating.

**ISSUE:** Whether the trial judge erred in sentencing Brown to consecutive sentences exceeding his life expectancy.

**FACTS:** Vernon Brown, Jr., was indicted on 11 different drug counts. On May 29, 2012, Brown pled guilty to all eleven counts. As part of the plea, the prosecution did not seek habitual offender enhancements. The trial judge ordered all his sentences to run consecutively for a total of 71 years. On August 4, 2014, Brown filed a PCR. Brown, who was 57 years old at the time of his sentencing, argued that the combined total sentence of 71 years was excessive because it exceeded his life expectancy, and the trial court erred because it did not consider his actuarial life expectancy. The trial court dismissed the PCR and Brown appealed.

**HELD:** The trial court was correct in that it did not have to consider Brown's life expectancy for his conviction of the eleven counts under §41-29-139. Because the total of the sentences may exceed the actuarial life expectancy of the defendant, the trial court did not err when sentencing Brown.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110906.pdf>

***Derrick Stokes v. State***, No. 2014-CP-01811-COA (Miss.Ct.App. April 12, 2016)

**CASE:** PCR – Gratification of Lust and Exploitation of a Child

**SENTENCE:** 15 years with a consecutive 10 years with 5 suspended and 5 years PRS

**COURT:** Madison County Circuit Court

**TRIAL JUDGE:** Hon. John Huey Emfinger

**APPELLANT ATTORNEY:** Derrick Stokes (Pro Se)

**APPELLEE ATTORNEY:** LaDonna C. Holland

**DISPOSITION:** Dismissal of PCR Affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, Wilson and Greenlee, JJ., Concur.

**ISSUES:** (1) Whether his claims are excepted from the procedural bars; (2) whether he was entitled to an evidentiary hearing; (3) whether he received ineffective assistance of counsel; and (4) whether his indictment was fatally defective.

**FACTS:** On May 14, 2008, Derrick Stokes pled guilty to gratification of lust and exploitation of a child. On November 14, 2014, Stokes filed his 4<sup>th</sup> PCR, having been unsuccessful in his previous attempts. His claims were dismissed as procedurally barred and he appealed.

**HELD:** (1) Stokes's PCR is both time barred and successive writ barred. Stokes has failed to meet his burden of showing that any statutory exception or fundamental-right exception applies to his claims.

(2) Stokes claims that his counsel was ineffective when he failed to retrieve certain text messages from the victims' mother, challenge the sufficiency of his indictment, and secure a sign-language interpreter for his plea hearing. Stokes has already raised his claim that he received ineffective assistance of counsel in previous PCR motions. The claim is barred as res judicata.

(3) Stokes argues for the first time on appeal that his indictment was defective. Stokes's claim of defective indictment is time-barred.

(4) Stokes's motion failed to show on its face that he was entitled to any relief, and the circuit court did not err in dismissing the motion without an evidentiary hearing.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111400.pdf>

*Curtis C. Evans v. State*, No. 2015-CP-00078-COA (Miss.Ct.App. April 12, 2016)

**CASE:** PCR – Armed Robbery

**SENTENCE:** 16 years with 8 suspended, followed by 3 years PRS

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Michael H. Ward

**APPELLANT ATTORNEY:** Curtis C. Evans (Pro Se)

**APPELLEE ATTORNEY:** Lisa L. Blount

**DISPOSITION:** Denial of PCR Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Fair, James and Greenlee, JJ., Concur. Wilson, J., Concur in Part and in the Result Without Separate Written Opinion.

**ISSUES:** (1) Whether he was denied assistance of counsel at the revocation hearing; (2) whether he was improperly denied an initial appearance; (3) whether he received an illegal sentence; and (4) whether the trial court failed to advise him he could appeal his sentence.

**FACTS:** On August 13, 2002, Evans pled guilty to armed robbery. On April 18, 2010, while on PRS, Gulfport police arrested Evans for robbery and indecent exposure. On July 6, 2010, after a revocation hearing, the trial court revoked Evans's PRS, and sentenced him to serve his original 16-year sentence in the custody of MDOC, with credit received for time served. On November 12, 2013, Evans filed a PCR, claiming the trial court illegally revoked his PRS. The trial court denied relief and Evans appealed.

**HELD:** First, the COA did not find the PCR time-barred, and reviewed the case on the merits.

(1) The record reflects that Evans waived his right to a preliminary hearing. The trial court also found that "at no point did Evans request counsel, the assistance of counsel, or additional time to obtain counsel." The case was no particularly complex and Evans admitted he owed fees and also provided testimony admitting to the facts surrounding his arrest.

(2) Evans next argues that he failed to receive an initial appearance. Evans claims that his initial appearance is the time in the proceedings when he would have learned of his rights regarding counsel. However, Evans waived his preliminary hearing. The transcript from the revocation hearing also shows that Evans possessed the opportunity to defend himself against the allegations as well as

question the witnesses. He was not denied due process.

(3) Evans's original sentence was legal. The court revoked all of his sentence with credit for time served. The sentence was legally imposed.

(4) Evans was not entitled to appeal a probation revocation. "We find no requirement that a trial court advise a defendant of his right to seek postconviction relief from a probation-revocation hearing."

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111582.pdf>

**Courtney Elkins v. State**, No. 2013-CP-02023-COA (Miss.Ct.App. April 12, 2016)

**CASE:** PCR – Murder

**SENTENCE:** Life

**COURT:** Sunflower County Circuit Court

**TRIAL JUDGE:** Hon. Richard A. Smith

**APPELLANT ATTORNEY:** Courtney Elkins (Pro Se)

**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss

**DISPOSITION:** Dismissal of PCR Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Fair, James, Wilson and Greenlee, JJ., Concur.

**ISSUE:** Whether the trial judge erred in upholding the revocation of Elkins's parole.

**FACTS:** On February 17, 1995, Courtney Elkins pled guilty to murder, and then twelve years later, the Mississippi Parole Board granted Elkins conditional parole and allowed him to relocate to Chicago. While in Chicago, Elkins was arrested on June 4, 2009, and charged with domestic battery, after he allegedly pushed down his girlfriend. Upon learning of his arrest, a preliminary parole hearing determined a parole-violation hearing should be conducted. But two days later, the charge was nol-prossed. In August 2009, Elkins was extradited to Mississippi. The purported victim provided the Parole Board an affidavit in which she recanted the battery allegation. The Board still revoked Elkins' parole and was sent back to prison for life. Elkins filed a PCR motion on April 29, 2011, alleging his parole had been unlawfully revoked. The trial court summarily dismissed Elkins' PCR without conducting a hearing. The COA reversed, finding Elkins was entitled to an evidentiary hearing. *Elkins v. State*, 116 So.3d 185 (Miss.Ct.App. June 25, 2013). The circuit court subsequently held an evidentiary hearing. Elkins's girlfriend denied he hurt her and testified she only called police because she was angry with Elkins, and she knew that an arrest would cause problems with his parole. Additional evidence was admitted showing the Board also considered an earlier arrest in Chicago, where Elkins stabbed his father with a knife in 2008. The court upheld the revocation of Elkins's parole. He appealed.

**HELD:** Elkins argues that his parole should be reinstated because the charges stemming from both incidents of domestic violence (stabbing his father and pushing his girlfriend) were dropped. The

trial judge did not err. Elkins failed to prove by a preponderance of the evidence that he is entitled to a reinstatement of his parole. Furthermore, the State showed that reasonable grounds outside of Elkins's charge of domestic violence existed for the revocation of parole.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111227.pdf>

**Charles McLaurin, Jr. v. State**, No. 2014-CP-01389-COA (Miss.Ct.App. April 12, 2016)

**CASE:** PCR – Felony Shoplifting x2

**SENTENCE:** 4 years

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Roger T. Clark

**APPELLANT ATTORNEY:** Charles McLaurin Jr. (Pro Se)

**APPELLEE ATTORNEY:** Billy L. Gore

**DISPOSITION:** Denial of PCR Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Fair, James, Wilson and Greenlee, JJ., Concur.

**ISSUES:** (1) Whether McLaurin's guilty plea was voluntary; (2) whether McLaurin's previous motions should have been ruled upon; (3) whether McLaurin received an illegal sentence; (4) whether McLaurin was entitled to the transcript of the plea hearing or, alternatively, should have received an evidentiary hearing; (5) whether McLaurin received ineffective assistance of counsel; and (6) whether McLaurin's due-process rights were violated.

**FACTS:** On July 15, 2013, Charles McLaurin pled guilty as a habitual offender to two felony shoplifting offenses that occurred in 2010. McLaurin was already serving a four-year sentence in Louisiana, and the judge agreed to allow McLaurin's Mississippi sentence to run concurrently with the time he was serving in Louisiana. McLaurin misunderstood this sentence and thought that (1) he would receive credit for the time he served in Louisiana, and (2) he would be returned to Louisiana to serve the remainder of his Mississippi sentence. He sought relief through the MDOC administrative process, then filed a motion with the circuit court for a review. He subsequently filed multiple motions and pleadings with the circuit court in an effort to be transferred to Louisiana and to clarify his sentence. The circuit court clarified that the Mississippi and Louisiana sentences were to run concurrently during the time that the sentences overlapped from the date that the Mississippi sentence began, and also that the court could not order another state to house a Mississippi inmate. McLaurin then filed a PCR, which was denied. He appealed.

**HELD:** (1) McLaurin's plea was voluntary. A review of the plea-hearing transcript reveals that the circuit court never agreed to send McLaurin to Louisiana, though the court did agree to allow his Mississippi sentence to run concurrently with his Louisiana sentence.

(2) McLaurin argued that his requests for discovery, his motion to suppress, and his demand for a speedy trial were never addressed by the trial court. However, his valid plea waived these issues.

(3) McLaurin claimed that his sentence is illegal because he was not sent back to Louisiana and did not receive credit for 22 months that he served in Louisiana prior to his guilty plea in Mississippi. The circuit court never ordered or even discussed the possibility that McLaurin would be sent back to Louisiana. His sentence was within statutory limits.

(4) When McLaurin initially requested a copy of his transcript and the record, he did not list any reasons for his request and simply stated that it was "necessary." Because he did not show a specific need for the transcript, the court properly denied his request. The court reviewed the record and determined that an evidentiary hearing was not necessary.

(5) McLaurin's claims of ineffective assistance of counsel again rely upon his misrepresentations of what occurred at the plea hearing. At the hearing, he told the judge that he was satisfied with the services and advice from his attorney. "We see no evidence that McLaurin received ineffective assistance of counsel, and McLaurin has provided nothing more than his own bare assertions."

(6) McLaurin contends that his due-process rights have been violated as he is being held in the custody of MDOC for 48 months, without credit for time served for 22 months that he served in Louisiana. This claim is without merit.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO111225.pdf>

## **COA MISCELLANEOUS CASES**

***James Brady v. Officer James Hollins, Raymond Byrd, Warden, Lt. Tirah Wesly and MDOC***, No. 2014-CP-01630-COA (Miss.Ct.App. January 19, 2016)

**CASE:** Appeal of MDOC RVR finding of guilt

**COURT:** Rankin County Circuit Court

**TRIAL JUDGE:** Hon. John Huey Emfinger

**APPELLANT ATTORNEY:** James Brady (Pro Se)

**APPELLEE ATTORNEY:** Anthony Louis Schmidt, Jr., James M. Norris

**DISPOSITION:** MDOC decision Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Carlton, Fair, James and Wilson, JJ., Concur.

**ISSUE:** Whether the circuit erred in affirming MDOC's decision.

**FACTS:** While serving a 22-year sentence for drug-related offenses, James Brady was found guilty of a rule violation by the MDOC for fighting with another inmate who was confined to a wheelchair in May 2014. Brady challenged the finding in the Rankin County Circuit Court. Brady does not dispute that the altercation occurred, and even admitted to throwing the first punch. His punishment consisted of a thirty-day loss of all privileges. He claimed was denied due process as he was unaware

of the hearing and was at the MDOC health clinic during the hearing. The circuit court affirmed MDOC's decision, and Brady filed this appeal.

**HELD:** Brady was not denied due process. The rule violation report (RVR) indicated Brady refused to come out of his cell for the hearing. Further, Brady's loss of privileges does not constitute a constitutional violation of due process, so this issue is without merit. Brady submitted a form from the medical clinic, but the date was illegible. Brady has failed to offer any evidence that MDOC's actions were arbitrary or capricious.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO108775.pdf>

**Jamar Amin Moore v. State**, No. 2015-CA-00357-COA (Miss.Ct.App. April 12, 2016)

**CASE:** PCR – Possession of Hydrocodone

**SENTENCE:** 16 years as a habitual offender

**COURT:** Coahoma County Circuit Court

**TRIAL JUDGE:** Hon. Charles E. Webster

**APPELLANT ATTORNEY:** Richard Brooks Lewis, Jr.

**APPELLEE ATTORNEY:** Wilson Douglas Minor

**DISPOSITION:** Summary Judgment Granted in Favor of Appellee Reversed, Rendered, and Remanded. Wilson, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Fair, James and Greenlee, JJ., Concur. Carlton, J., Dissents with Separate Written Opinion. Barnes, J., Not Participating.

**ISSUE:** Whether the trial judge erred in granting the State summary judgment in a wrongful incarceration compliant.

**FACTS:** Jamar Moore was indicted for possessing hydrocodone, alleged as a schedule II controlled substance. He was convicted at trial and sentenced to 16 years without parole. His conviction was upheld on appeal. *Moore v. State*, 64 So. 3d 542 (Miss.Ct.App. 2011). Moore subsequently discovered a Crime Lab report showing that his pills were actually a Schedule III preparation of hydrocodone and acetaminophen, not Schedule II hydrocodone. Possession of eleven dosage units of the Schedule III substance is a misdemeanor punishable by imprisonment of not more than one year. He filed a PCR, in which he expressly admitted that he committed the misdemeanor offense of possession of a Schedule III substance, and he moved to amend his judgment of conviction to show conviction of a misdemeanor, to be resentenced for that offense, and to be released immediately. The State did not oppose the motion, and the circuit court granted the PCR, vacated the conviction, and ordered Moore's immediate release. Moore had served two years and 235 days in prison. The State then nol prossed his original indictment and did not pursue the misdemeanor charge. Moore subsequent filed a compliant asking of compensation for his wrongful conviction. The court reasoned that because Moore admitted that he was guilty of misdemeanor possession of a Schedule III

controlled substance, he could not show that his conviction was vacated on grounds consistent with innocence. The circuit court granted the State summary judgment and Moore appealed.

**HELD:** Moore clearly satisfies §11-44-7's several requirements for obtaining a judgment and compensation for a wrongful conviction. He was innocent of *felony* possession of hydrocodone. His conduct constituted a crime—but not "a felony." Misdemeanor possession of a Schedule III controlled substance is not a "lesser-included offense" of felony possession of a Schedule II controlled substance.

The case is distinguishable from the recent case of *Jefferson v. State*, 95 So. 3d 709 (Miss. Ct. App. 2012). In *Jefferson*, the court used the direct remand rule to find the appellant guilty of trespass after being convicted of burglary. However, unlike Moore, Jefferson's indictment was never nol prossed.

Moore satisfies these requirements because his conviction was vacated on the ground that he was innocent of the sole felony of which he was convicted. Because Moore also satisfies the requirements of section 11-44-7, and because there are no genuine issues of material fact, we reverse and render as to liability and remand the case to the circuit court to determine appropriate compensation under section 11-44-7.

**Carlton, J., Dissenting:**

Judge Carlton dissented, believing that §11-44-7 requires factual innocence, not legal innocence. Since Moore failed to meet his burden of proof of showing grounds not inconsistent with innocence, he is not entitled to compensation.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO110684.pdf>