

MISSISSIPPI SUPREME COURT UPDATE
2015 Spring Public Defenders Training Conference
October 16, 2014 - April 9, 2015

Leslie Lee
Office of State Public Defender
601-576-4290
llee@ospd.ms.gov
www.ospd.ms.gov

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MISSISSIPPI SUPREME COURT DECISIONS
October 16, 2014 - April 9, 2015

DEATH PENALTY CASES:

November 13, 2014

Curtis Giovanni Flowers v. State, No. 2010-DP-01348-SCT (Miss. November 13, 2014)

CASE: Capital Murder x4

SENTENCE: Death

COURT: Montgomery County Circuit Court

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

APPELLANT ATTORNEY: Alison R. Steiner, Sheri Lynn Johnson, Keir M. Weyble

APPELLEE ATTORNEY: Melanie Dotson Thomas

TRIAL ATTORNEYS: Alison R. Steiner, Andre De Gruy, Ray Charles Carter, Doug Evans, Clyde Hill

DISTRICT ATTORNEY: Doug Evans

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

ISSUES: (1) Whether the in-court and out-of-court identifications of Flowers by Porkey Collins were admissible; (2) whether the trial court erred in excluding expert testimony on the reliability of eyewitness testimony and criminal investigation procedures; (3) whether the trial court erred in not excluding evidence of a single particle of gunshot residue found on Flowers's hand; (4) whether the evidence was sufficient to prove capital murder; (5) whether Flowers's right to a fair trial was violated by the prosecution referencing facts not in evidence; (6) whether there was a *Batson* violation; (7) Whether the venire was biased, resulting in an unfair trial; (8) whether there was error in the guilt-phase instructions, (9) whether there was error in the penalty-phase instructions, (10) whether Flowers's six trials for the Tardy Furniture murders violate his due process rights and the Double Jeopardy Clause; (11) whether the convictions and sentences were in violation of the state and federal constitutions; (12) whether the death penalty was disproportionate; (13) whether the Court should set aside its prior order denying Flowers's motion for remand and leave to file supplemental motion for new trial; and (14) whether there was cumulative error.

FACTS: On July 16, 1996, Bertha Tardy, Carmen Rigby, Robert Golden, and Derrick "BoBo" Stewart were shot to death at the Tardy Furniture Company in Winona. Curtis Giovanni Flowers was a former employee of Tardy's. Flowers was involved in an incident in which several batteries he was transporting were damaged. He was told he would be responsible. After failing to show up for work for several days, Tardy told him he no longer had a job and had no paycheck coming because of the

batteries. Flowers's payroll check was found at the store. Tardy's daughter testified that approximately \$400.00 was missing from the cash drawer. \$255.00 in cash was later discovered hidden in Flowers's bedroom. On the morning of the murder, a .380 pistol was stolen from Doyle Simpson's car. Flowers was aware Simpson, his uncle, normally kept a gun in his car. A witness saw Flowers walking toward where the car was parked on the morning of the murder. Another witness identified Flowers as the person she saw leaning against the car that same morning. A third witness testified that he saw Flowers leaving the direction of the car later that morning. The casings and fragments recovered from the scene matched projectiles used for target practice by Simpson with his .380. Approximately three hours after the murder, Flowers was questioned and denied being near the store that day. A small particle of gunshot residue was found on his right hand. Flowers was wearing size 10½ Nike tennis shoes when interviewed. A bloody tennis shoe track was discovered at the scene next and was consistent with Grant Hill Fila tennis shoes size 10½. A shoebox for Grant Hill Fila size 10 ½ shoes was found in his girlfriend's bedroom. A neighbor testified she had seen Flowers wearing Fila Grant Hill tennis shoes on the morning of the murder. A number of witnesses placed the appellant at or near the scene of the murder on the morning of the murders. Finally, while incarcerated Flowers made two separate confessions to fellow inmates. Flowers was first tried only for Bertha Tardy's murder. His conviction and death sentenced was reversed. *Flowers v. State*, 773 So. 2d 309 (Miss. 2000) ("*Flowers I*"). He was subsequently tried for the murder of Derrick Stewart and again convicted and sentenced to death. This trial was also reversed. *Flowers v. State*, 842 So. 2d 531 (Miss. 2003) ("*Flowers II*"). A third trial was held on all four counts, which was again reversed, this time on a *Batson* violation. *Flowers v. State*, 947 So. 2d 910 (Miss. 2007) ("*Flowers III*"). Flowers's fourth and fifth trials also were on all four counts, but both resulted in a hung jury. Flowers was again tried in June of 2010 for all four murders. He was convicted and again sentenced to death. He appealed.

HELD: (1) Porky Collins originally testified in 1999 that he saw Flowers and another man walking toward Tardy Furniture on the morning of the murder. He died in 2002, so his testimony was read to the jury. He was shown two photo line-ups by police and identified Flowers in the second array. He also identified Flowers at trial as the man he saw. In the photo array that included Flowers's photograph, Flowers's head is slightly larger than the others. However, Flowers failed to show that the lineup was unduly suggestive. Since Collins's out-of-court identification was not impermissibly suggestive, it could not give rise to the likelihood of an irreparable misidentification in court.

(2) Flowers attempted to call Robert Johnson as an expert in criminal investigation procedures. His proffer indicated he would have testified that the criminal investigation was flawed in various ways. However, he admitted there were no state or national minimum standards for criminal investigations. Although Johnson was qualified and his testimony was relevant, the trial court did not abuse its discretion by excluding the testimony as unreliable. There is no valid way of testing the field of police investigatory techniques. Johnson did not provide support for his statement that the standard police practices he referenced were generally accepted in law enforcement. Johnson's opinion was also cumulative, as the investigators in the Flowers case were cross-examined and admitted several flaws in the investigation.

Flowers also attempted to call Dr. Jeffery Neuschatz, an expert on the reliability of eyewitness identification. Dr. Neuschatz claimed that Collins's identification of Flowers could have been affected by a number of different circumstances, and that the identification procedure was flawed. However,

Dr. Neuschatz failed to document tests that supported his theories, and failed to submit any articles and studies supporting his theories to show that his theory is accepted in the scientific community. Therefore, the court did not abuse its discretion in excluding the expert.

The Court did note that “we do not hold that such expert testimony is *per se* inadmissible.” Trial judges must use their discretion and should balance the reliability of the testimony against the likelihood that the testimony would overwhelm or mislead the jury. Collins's identification was far from the only evidence of guilt in the instant case, and it cannot be considered critical. “If the case hinged on Collins's identification of Flowers, expert testimony on eyewitness identification may have been helpful to the jury.”

(3) Flowers claims that the prejudicial effect of the single particle of gunshot residue evidence greatly outweighed the probative value and should have been excluded. The expert was clear that the residue did not unequivocally prove that Flowers had fired a gun. Therefore, there is little risk that the jury was confused or misled by the testimony.

(4) Contrary to Flowers’s claim that this was a circumstantial evidence case, the State presented evidence from a jailhouse informant that Flowers admitted he committed the murders. This is direct evidence. Flowers also claimed the evidence suggested the murders could not have been committed by one person. However, he did not argue this at trial. As to motive, the State did provide evidence that Flowers had lost his job at Tardy Furniture and had his paycheck reduced as a result of the damaged batteries. The jury could infer the motive was robbery. The evidence supported the State’s theory Flowers knew a gun was in Simpson’s car. The jury heard testimony related to the reward offered for information about the murders. The jury resolves conflicts in witness testimony.

(5) During closing, Flowers claimed that prosecution misstated facts about when the victims were discovered, his motive, Collis’s response to the photo lineups, and the location of the victims at the crime scene. However, he failed to object when any of these comments were made. The claims are barred and are not plain error. The State’s arguments was backed by reasonable inferences from other evidence. Regardless, any misstatement relating to the time the victims were found was harmless error, and the error was cured by comments by defense counsel in their closing statements. Also, the State identified several facts that supported the inference that Flowers had a beef with Tardy Furniture. Although comments about the photo line-ups were “slightly inconsistent with the facts.” it did not amount to plain error. Finally, comments that the bodies were “laying in a pile” was a misstatement, but it was not plain error.

(6) During jury selection, the State accepted the first African-American juror, then exercised six peremptory strikes, five of which were against African-American venire members. The State then provided race-neutral reasons for the five strikes. After rebuttal, the court found the reasons credible. Flowers claimed that the State disparately questioned African-American jurors as compared to white jurors leading to purposeful discrimination. Evidence of disparate questioning, alone, is not dispositive of racial discrimination. “The State's assertion that elaboration and followup questions were needed with more of the African-American jurors is supported by the record.”

Juror Wright was struck by the State because she knew several witnesses, she was sued by Tardy Furniture for an overdue account, and she worked with Flowers’s father. Although white jurors also

knew several witnesses, none had been sued by Tardy Furniture or had worked closely with the defendant's father. Juror Copper was struck because she had worked with Flowers's father and sister; knew several witnesses and members of the Flowers family, and said she "leaned toward" Flowers's side of the case due to her relationships with the Flowers family. Copper also said that she would rather not serve as a juror. These were sufficient reasons.

Juror Jones was struck because she was related to Flowers, was late for jury selection twice, provided inconsistent statements on her view of the death penalty, and lied that she was against the death penalty on her juror questionnaire in an attempt to get out of jury service. Juror Cunningham was struck because of her working relationship with Flowers's sister, and her equivocating statements about the death penalty. Although Cunningham said she did not work closely with Flowers's sister, her supervisor testified they worked side-by-side on an assembly line together. The conflicting testimony was a race neutral reason. Also, no white jurors survived for-cause challenges who had views on the death penalty comparable to Cunningham's views.

Juror Burnside was struck because she knew Flowers and members of his family, was sued by Tardy Furniture, and provided inconsistent statements regarding her views on the death penalty. There were no white jurors in the venire whose views and hesitation regarding judgment were comparable to Burnside's views. The trial court did not err in denying Flowers's *Batson* challenges. The State provided multiple race-neutral reasons for the peremptory strikes against each of the five African-Americans.

(7) Flowers claimed that the jury did not adequately deliberate because it was influenced by racial bias. The jury deliberated for 29 minutes during the guilt phase and for an hour and a half during the sentencing phase. Based on length of the deliberations alone, Flowers's argument that the jury's deliberation was inadequate has no merit.

Flowers failed to prove the jury was bias. The Court's finding in *Flowers III* of a *Batson* violation does not prove community bias. The fact that two jurors were arrested for perjury in connection with Flowers's 4th trial, also fails to prove bias. A large law enforcement presence was not evidence of bias. Considering the notoriety of the crimes in the case, a large number of law enforcement personnel would be expected. Flowers further claimed that the venire was skewed in favor of the prosecution because a higher percentage of potential jurors who were familiar with Flowers and his family were struck. However, this was proper if jurors indicated that they could not be fair and impartial. There was no error in denying several challenges for cause, as the jurors challenged did not sit. Since Flowers still had peremptory challenges left, there was no error. Finally, if the community was bias, a cooling-off period would not help, as another venire from the same community likely would contain the same bias.

(8) The trial judge did not err in refusing 3 guilt-phase instructions. The first was a burden of proof instruction explaining inferences. The court found the instruction repetitious of the court's instruction. The two others were circumstantial evidence instructions. They were denied, as the admission to a jailhouse informant made it a direct evidence case. The informant was thoroughly cross-examined and the court granted a cautionary instruction on jailhouse snitches.

(9) There was no error in the penalty-phase instructions. The first was a "presumption of life" instruction. The next two instructed on the burden of proof for aggravating circumstances if based on circumstantial evidence. There is no abuse of discretion for denying circumstantial evidence instructions during the penalty-phase. There was also no error in denying an instruction telling the jury the court would sentence the defendant to life w/o parole if they failed to reach a verdict. The jury was adequately instructed on what to do if they failed to reach a verdict. There was also no error in denying two mercy instructions.

There was no error in allowing the jury to be instructed on the aggravating factor of "great risk of death to many persons." Based on the State's theory of the case, there was sufficient evidence on which the jury could have found that Flowers caused a great risk of death to people other than his intended victim, Bertha Tardy. There was also no error in instructing the jury to consider the aggravating factor of armed robbery for pecuniary gain. This did not improperly combine two aggravators. This is allowable as long as armed robbery and pecuniary gain are not listed as separate aggravating circumstances. Finally, there was no error instructing the jury on whether the capital offense occurred for the purpose of avoiding or preventing arrest as an aggravating factor. It could be "reasonably inferred" that Flowers attempted to conceal his identity, disposed of evidence, or tried to "cover his tracks."

(10) The Double Jeopardy Clause does not bar re-prosecution when a conviction has been set aside on appeal. Flowers has not been acquitted, his convictions have not been upheld on appeal, and he has not received multiple punishments. Because the double jeopardy protections have not been violated, Flowers cannot assert a due process claim on the same grounds.

(11) It was not error for Flowers to be tried for all four murders at a single trial when there were four single-count indictments rather than a multi-count indictment. Flowers never objected to being tried for all four murders at trial. This is permissible without an order to consolidate.

There was no error in failing to require the indictment to list the aggravating factors. Additionally, §97-3-19(2)(e) is not unconstitutional because it allows for the death penalty from felony murder, but not cases of deliberate design and depraved heart murder. Finally, it was not error to allow victim-impact evidence.

(12) The death penalty was not disproportionate in the case.

(13) Flowers sought to file a supplemental motion for new trial on the basis that the State failed to disclose information relating to the credibility of one of its witnesses, Patricia Odom. Four months prior to the start of Flowers's sixth trial, a federal grand jury indicted Odom for tax fraud. The State failed to disclose the indictment. (The State claimed it was unaware of the indictment). This matter was not presented to the trial court, so it is inappropriate for appeal.

(14) There was no cumulative error.

Dickinson, Presiding Justice, Dissenting:

Justice Dickinson dissented, arguing the trial judge erred in refusing to allow Dr. Neuschatz to testify

and by instructing the jury that it could consider the aggravating factor of killing to avoid arrest. Collins was the State's key eyewitness, the only witness who placed Flowers at the scene of the murders shortly before they were committed. The State offered no rebuttal to Dr. Neuschatz's opinion. "No experts, articles, studies, or evidence of any kind that tended to refute his opinions and methodology." Dr. Neuschatz's opinions were crucial to the defense and his testimony should have been allowed.

Further, the majority held that the avoiding arrest aggravator should be submitted if the jury may draw an inference from the evidence that avoiding arrest was a substantial reason for the killing. "Saying jurors may draw an inference is not enough, unless the inference is so strong that, standing alone, the inference is sufficient for a finding beyond a reasonable doubt. The inference in this case clearly does not fall into that category."

King, Justice, Dissenting:

Justice King dissented, believing Flowers did not receive a fair trial based on the State arguing facts not in evidence, as well as racial discrimination during jury selection. "As in *Flowers II*, the prosecution's repeated argument of facts not in evidence in today's case prejudiced Flowers and denied him his right to a fair trial....This Court's prior admonishment of essentially the same statements in *Flowers II* bolsters a finding of reversal."

Batson was violated during jury selection. The history of the Flowers case reveals a clear pattern of disparate treatment between white and African-American venire members. An analysis of the number and type of questions asked by the prosecutor in this trial further reveals a pattern of disparate treatment. "While the Court has focused on the interests of Flowers in having a jury not tainted by racial bias, it has ignored the right of prospective jurors not to be subjected to racial bias." The trial judge was required to do more to protect the rights of prospective jurors.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO99057.pdf>

Willie Jerome Manning a/k/a Fly v. State, No. 2013-CA-00882-SCT, consolidated with No. 1999-DP-01185-SCT and No. 1996-DP-00943-SCT (Miss. February 12, 2015)

CASE: PCR – Capital Murder x2

SENTENCE: Death

COURT: Oktibbeha County Circuit Court

TRIAL JUDGE: Hon. Lee J. Howard

TRIAL ATTORNEYS: David Voison, Marvin L. White, Jr.

APPELLANT ATTORNEY: David Paul Voisin, Robert S. Mink

APPELLEE ATTORNEY: Melanie Dotson Thomas, Marvin L. White, Jr.

DISPOSITION: Denial of PCR Reversed and Remanded. Randolph, Presiding Justice, for the Court. Waller, C.J., Dickinson, P.J., Lamar, Kitchens and Coleman, JJ., Concur. King, J., Concur in Result

Only Without Separate Written Opinion. Chandler, J., Dissents with Separate Written Opinion Joined by Pierce, J.

ISSUE: Whether the State violated Manning's due-process rights when it failed to provide favorable, material evidence.

FACTS: Willie Jerome Manning was convicted of the January 18, 1993 capital murder/robbery of 60 yr old Emmoline Jimmerson, and her 90 year old mother, Alberta Jordan, and was sentenced to death on both counts. Manning was seen by several individuals hanging out and drinking beer at the Brooksville Gardens Apartments in Starkville. The victims lived in an apartment there. Manning knew both victims. They both had their throats cut and had been severely beaten with an iron. Kevin Lucious testified he was with Manning that afternoon and heard Manning complain he needed money. He testified he later looked out the window of the apartment he shared with his girlfriend, Likeesha Jones, and saw Manning force his way into the victims' apartment. Manning later told Lucious he would not murdered the women had he know how little money they had. Lucious claimed Manning said he got about \$12. Lucious did not tell police about these conversations at first, but later agreed to tell police everything after being encouraged to tell the truth by his grandmother. He was in jail on a murder charge in St. Louis at the time. Another informant, Herbert Ashford saw Manning the day of the murders buying beer at the apartment across from the victims'. He later overheard Manning say he should have done more than he did to the ladies. Manning told police he was never in Brooksville Gardens the day or night of the murders, although several other witnesses saw him there during the day. Manning's conviction and sentence of death was affirmed on direct appeal. *Manning v. State*, 735 So. 2d 323 (Miss. 1999). In response to Manning's PCR, the SCT allowed him to proceed in the trial court on claims relating to the State withholding evidence, Kevin Lucious's testimony, and ineffective assistance of counsel. *Manning v. State*, 884 So. 2d 717 (Miss. 2004). The trial judge denied relief and Manning appealed.

HELD: The SCT agreed with the trial court's decision to reject Lucious's recanted testimony and Likeesha Jones's testimony. However the SCT found error in the State's failure to provide evidence which would have impeached Lucious's testimony about seeing Manning enter the victims' apartment.

The Starkville PD conducted a canvass of all residents of Brooksville Gardens Apartments during its investigation of the murders. Index cards recording the results of the canvass were completed and maintained by the police. An entry on the cards reveals that the apartment from which Lucious testified he observed Manning enter the victims' apartment was vacant at the time of the crime, and neither Lucious nor his girlfriend Jones was listed as a resident of any of the apartments canvassed until two weeks after the crime.

These cards were not turned over to the DA or the defense counsel. Both the defense attorneys and the DA testified that their actions in preparing for the case and presenting the case would have been different had they possessed the evidence. There is a reasonable probability that the outcome of the proceedings would have been different had the evidence been disclosed. Manning is entitled to a new trial.

Chandler, Justice, Dissenting:

Justice Chandler dissented, finding that the canvass cards did not facially contradict Lucious's testimony at trial. Lucious was known to frequent Brooksville Gardens at the time of the murders. The record supports the probability that Jones moved into the apartment before she signed a lease. He argued the trial court's findings that the recantations of Lucious and Jones were unreliable should be affirmed.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101695.pdf>

Sherwood Dwayne Brown (Sherwood) v. State, No. 2013-CA-01130-SCT (Miss. March 26, 2015)

CASE: PCR – Capital Murder

SENTENCE: Death

COURT: DeSoto County Circuit Court

TRIAL JUDGE: Hon. Robert P. Chamberlin

APPELLANT ATTORNEY: James Douglas Minor, Jr., Garland T. Stephens, John R. Lane

APPELLEE ATTORNEY: Jason L. Davis

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

ISSUES: (1) Whether the trial court applied an incorrect legal standard to the application of the *Chase* standard, (2) whether the trial court's finding that Brown did not have significant deficits in adaptive functioning was clearly erroneous, and (3) whether the trial court erred by admitting the report of State's expert (Dr. Storer) into evidence and by relying on certain statements therein.

FACTS: Sherwood Dwayne Brown was convicted of the 1993 capital murder of 13 year Evangela Boyd while in commission of felonious child abuse. He was also convicted of the murders of the child's mother, Verline, and grandmother, Betty. Brown was sentenced to death for the capital murder and life without parole as an habitual offender for the two other murders. All three had died from multiple chop wounds to the head. Bloody shoe prints were found at the scene and led to the home of Sherwood Brown, who lived nearby. The sheriff called Brown at his workplace and told him he needed to speak with him. When investigators arrived, Brown was gone. Officers spotted a shoe print at the workplace that appeared to be similar to the ones at the murder scene. Brown confessed to a friend while he was on the run that he committed the murders. Brown was arrested at his aunt's home several days later. Brown's size 12 Fila running shoes matched the bloody footprints at the Boyd home. His conviction was affirmed on direct appeal. *Brown v. State*, 690 So.2d 276 (Miss. Dec. 12, 1996). After numerous delays and disputes between various defense counsel, he finally filed an application for post-conviction relief, which was also denied. *Brown v. State*, 798 So.2d 481 (Miss. 2001). Brown subsequently filed a successive PCR alleging he is mentally retarded under *Atkins v. Virginia*, 536 U.S. 304 (2002). The SCT allowed Brown a successive writ since *Atkins* was an intervening decision exempting him from the procedural bar. Brown provided an affidavit from a

doctor who stated his IQ is in the lower 70's and that, in her opinion, Brown was mentally retarded at the time of the crime. *Brown v. State*, 875 So.2d 202 (Miss. June 17, 2004). At the subsequent evidentiary hearing, the trial judge denied relief, finding Brown failed to prove, by a preponderance of the evidence, that he was mentally retarded. Brown appealed.

HELD: The trial court did not err in finding Brown failed to prove he was mentally retarded. The court heard testimony from Brown's wife, a former teacher, the special-education director for DeSoto County Schools, and three doctors who had evaluated Brown. The trial judge found that Brown had the necessary subaverage intellectual functioning to be deemed mentally retarded pursuant to *Atkins* and *Chase v. State*, 873 So. 2d 1013 (Miss. 2004), but he failed to show that he had adaptive functioning deficits or mental retardation manifesting before age eighteen.

(1) *Chase* requires that the onset of significantly subaverage intellectual functioning and adaptive functioning deficits both must manifest prior to age eighteen. The trial judge had ample evidence of Brown's behavior and abilities before age eighteen in order to make a proper assessment. Brown's claim that the trial judge incorrectly heightened the standard by requiring Brown to utilize only evidence from before he was eighteen is not supported by the record.

In his analysis of adaptive functioning in the area of functional academics, the judge considered conflicting evidence of whether Brown had been identified as a learning-disabled student. Brown failed to present evidence of a formal evaluation or finding of a learning disability. Brown did not satisfy the burden of proof for establishing that he had a significant deficit in adaptive functioning in this area.

Brown argues that, in his analysis of the adaptive functioning area of work, the trial judge incorrectly focused on what Brown could do, rather than what he could not do. However, other than the apparent inability to hold a job, evidence was not presented about what Brown could not do in the area of work.

(2) In a twelve-page order, the judge outlined the testimony and evidence presented regarding each area of adaptive functioning. Brown did suffer from some deficiencies in academic achievement, but the deficiencies did not appear to be the type confined to those suffering from mental retardation. He also had substance abuse problems. Brown worked as a delivery person for several companies; worked for an energy company; worked as a packer on an assembly line; and had been in the Job Corps. Again, his problems at work could have been the result of substance abuse.

While Brown continued to live with his parents as an adult and allowed his mother and wife to take care of him, this did not necessarily meet the definition of an adaptive functioning deficit, but did fit the expected pattern of a drug abuser. Brown had several violent confrontations with family members and that Brown claimed he was fired from various jobs for fighting with management. Again, outbursts of anger described in testimony would be common for someone with a substance abuse problem and that Brown had failed to prove an adaptive functioning deficit.

Finally, there were conflicting expert opinions on Brown's adaptive functioning deficit in the areas of health and safety. The judge's findings were supported by the evidence presented and were not clearly erroneous.

(3) Brown claimed it was error to consider Dr. Robert Storer's expert report because it contained inadmissible hearsay. The report referenced interviews Dr. Storer had with witnesses who did not testify. The statements in question were not offered to prove the truth of the matter asserted, but were used to explain the basis of his conclusions and opinions regarding Brown's work history. The statements were not hearsay. The statements went to the weight of the testimony, not admissibility.

Dr. Storer was called to testify and testified in detail about his report, his opinions, and the information gleaned from interviewing Brown's family and friends. Brown had a sufficient opportunity to cross-examine Dr. Storer. The judge also admitted the report from the defense expert (Dr. Marc Zimmerman). There is no evidence that the trial judge relied on anything from Dr. Storer's report that was not presented at the hearing. Brown suffered no prejudice.

There is no indication from the record that the trial judge relied on any statement in the report that was not true or was improperly admitted into evidence.

Dickinson, Presiding Justice, Dissenting:

Justice Dickinson dissented, expressing grave concern about whether, under the current *Atkins* standards, courts can fairly determine which offenders are constitutionally exempt from the death penalty. Rather than allow a jury to determine if a defendant has reduced mental capacities, it is left to the mental health community to decide who can be executed. Mental health standards are in constant change. He argued the Court should consider a judicial definition of intellectual disability, similar to the way the *M'Naughten* rule dealing with insanity.

Kitchens, Justice, Dissenting:

Justice Kitchens dissented, believing the Court applied the wrong legal standard in determining Brown intellectual disability, and ignored the overwhelming weight of the evidence that Brown was mentally retarded. There was no dispute Brown's IQ was 75. The only question before this Court was whether Brown established two or more adaptive functioning deficits before the age of 18. He believed the evidence proved adaptive functioning deficits in functional academic skills and communication which manifested prior to age 18 by a preponderance of the evidence. He would find that Brown intellectually disabled under the *Chase* standard.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO103048.pdf>

***Jeffrey Keith Havard v. State*, No. 2013-DR-01995-SCT (March 27, 2015)**

The SCT found Havard should be granted leave to file a successive petition for post-conviction relief on a claim of newly discovered evidence. The Court denied the request to pursue a Brady claim and a claim of ineffective assistance of counsel for failing to interview Dr. Steven Hayne prior to trial.

To read the full order, click here:

<http://courts.ms.gov/Images/Opinions/197568.pdf>

NON-DEATH PENALTY CASES:

October 16, 2014

Tommy Hampton v. State, No. 2011-CT-01641-SCT (Miss. October 16, 2014)

CASE: Armed Robbery

SENTENCE: 20 years as an habitual offender

COURT: Lauderdale County Circuit Court

TRIAL JUDGE: Hon. Robert Walter Bailey

APPELLANT ATTORNEY: Justin Taylor Cook

APPELLEE ATTORNEY: Billy L. Gore

DISTRICT ATTORNEY: Bilbo Mitchell

TRIAL ATTORNEYS: James D. Angero, Lisa J. Howell, Marcus D. Evans

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

ISSUE: Whether the trial judge erred in sentencing Hampton to 20 years w/o parole, which exceeded his life expectancy, as only a jury can impose a life sentence for armed robbery.

FACTS: On December 2, 2010, a teller at Citizens National Bank saw an older, Black male standing close to her teller window. The man, later identified as Tommy Hampton, threw a plastic bag toward her and pointed an antique-looking revolver at her. He told her to put all her twenty dollar bills and one hundred dollar bills into the bag. The clerk complied with Hampton's demand. He then took the bag with the money and left the bank. After receiving tips concerning the bank robbery, the police identified Hampton as a suspect. The clerk and others at the bank identified Hampton from a photographic lineup. Hampton was convicted at trial. At sentencing, the circuit judge acknowledged that the jury was not asked to decide if a life sentence was appropriate; and therefore, "it would be up to the [circuit court] to sentence [Hampton] to some sentence reasonably calculated to be less than life..." Hampton was 63 at the time of sentencing. Due to his habitual-offender status, the court stated Hampton's sentence should be "reasonably calculated to be less than life but that his sentence would be served day for day, without the possibility of any type of early release consideration or any good time." Neither the State nor Hampton presented evidence or testimony on the issue of his life expectancy. He was sentenced to 20 years. The COA affirmed, finding the arguments about his life expectancy procedurally barred. [*Hampton v. State*](#), No. 2011-KA-01641-COA (Miss.Ct.App. February 19, 2013). The SCT granted certiorari.

HELD: The SCT affirmed the COA, and found the issue barred. "Hampton asks this Court to consider life-expectancy estimates, studies, and argument never presented at the trial level." Hampton

has “unequivocally gone outside the record.” Hampton also offered no argument or authority that his sentence was illegal based on a constitutional violation to escape the bar. Hampton's sentence does not exceed the maximum statutory penalty, so it is not illegal.

The SCT discussed *Stewart v. State*, 372 So. 2d 257 (Miss. 1979), which held that a trial court must sentence a defendant to something “reasonably expected to be less than life,” when the jury fails to give a life sentence. However, no such language is found in § 97-3-79. Life-expectancy tables are proper aides to the trial court when sentencing. However, Hampton did not present any to the trial court. Hampton’s sentence was not illegal.

Coleman, Justice, Specially Concurring:

Justice Coleman concurred relying on *Stewart*. However, he wrote to express his opinion that the Supreme Court exceeded its constitutional authority in *Stewart*, by effectively amending §97-3-79 to prohibit a judge from sentencing one convicted of armed robbery to any term of years greater than the defendant's life expectancy. He believed *Stewart* should be overruled.

Despite such limits on our power, the *Stewart* Court did indeed insert a requirement into Section 97-3-79 that the Legislature did not – the requirement that a judge-imposed sentence be for less than the defendant’s reasonable life expectancy.

He believed the language of the statute allows the trial court to give any sentence not less than 3 years.

Dickinson, Presiding Justice, Dissenting:

Justice Dickinson agreed with Justice Coleman's opinion that the Court exceeded the limits of its constitutional authority when it decided *Stewart* and should be overruled. However, any retroactive application of that change would create due-process concerns. Therefore, applying *Stewart* to this case, Hampton received an illegal sentence. He agreed with Justice Chandler that Hampton's claim is excepted from procedural bars, and that Hampton's sentence exceeded a reasonable calculation of his life expectancy.

Chandler, Justice, Dissenting:

Citing *Stewart*, Justice Chandler argued that Hampton’s sentence exceeded his life expectancy. He pointed out that the Court even requested additional briefing on whether race and gender should be considered along with age in calculating the life expectancy of a defendant. Yet, the majority found the issue barred. Procedural bars do not apply to illegal sentences. Courts can take judicial notices of life expectancy tables.

For four decades, this Court has correctly held that, under Section 97-3-79, when a jury of twelve peers fails to unanimously impose the maximum sentence of life, the judge lacks the authority to supersede the jury’s judgment by imposing a sentence equal to or exceeding life. *Stewart v. State*, 372 So. 2d 257, 259 (Miss. 1979). The trial court must therefore "make a record of and consider all relevant facts necessary to fix a sentence for a definite term [of years] *reasonably expected to be less than life*. The

court should consider the age and *life expectancy of the defendant* and any other pertinent facts which would aid in fixing a proper sentence. [emphasis in original]

Stare decisis should control, and based on *Stewart*, Hampton's sentence is illegal.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98356.pdf>

Eric James Foster v. State, No. 2011-CT-01796-SCT (Miss. October 16, 2014)

CASE: Armed Robbery

SENTENCE: 40 years

COURT: Franklin County Circuit Court

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

APPELLANT ATTORNEY: George T. Holmes

APPELLEE ATTORNEY: LaDonna C. Holland

DISTRICT ATTORNEY: Ronnie Lee Harper

TRIAL ATTORNEYS: Walter Beesley, Ronnie Harper, Debra Blackwell

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

ISSUE: Whether the trial court's sentence was illegal because it exceeded Foster's life expectancy.

FACTS: On December 2, 2009, the Bank of Franklin was robbed by two masked men. The men jumped over the counter, knocking a teller out of her chair and yelling to give them the money. One of the men was carrying a large knife. After taking money from the vault as well as from both the tellers' desks, the two men left the bank with approximately \$92,000. Police ultimately arrested Donald James Wilson, Tyrone Butler, and Eric Foster as the men responsible for committing the crimes. Butler testified for the State against Foster, admitting to being the getaway-car driver and to picking up Wilson and Foster after the robbery. Foster and Wilson gave Butler over \$6,000 of the stolen money. Foster testified and claimed that he had not left his house the day of the robbery and that Carlotta Gray had brought him lunch that day. He stated that he had never even met Wilson. Carlotta Gray testified that she was personal friends with Foster and that he would come eat lunch with her every day, including the day of the bank robbery. She admitted that she had never informed the police that Foster had eaten lunch with her until Foster's attorney asked her later. Foster was convicted and sentenced to 40 years, absent objection, taking into account "the seriousness of the crime, the impact on the victims, and the defendant's prior conviction for aggravated assault and his age of thirty-five." No actuarial, mortality, or life-expectancy tables were offered by Foster. The COA affirmed, holding in part that Foster claim that his sentence was illegal because it exceeded his life

expectancy was procedurally barred. *Foster v. State*, No. 2011-KA-01796-COA (Miss.Ct.App. March 26, 2013). The SCT granted certiorari on the sentencing issue only.

HELD: The SCT held in very similar language to *Hampton v. State*, No. 2011-CT-01641-SCT (Miss. October 16, 2014), that the COA did not err in finding Hampton's claim regarding his sentence to be procedurally barred.

Foster, a recidivist, was sentenced to a term of forty years by the trial court. This sentence conforms to the statute, i.e., the trial court did not sentence him to life and the term was more than three years. The trial court did not deviate from the statute when imposing the sentence. We find no abuse of discretion by the trial court.

Coleman, Justice, Specially Concurring:

Justice Coleman concurred relying on *Stewart v. State*, 372 So. 2d 257, 258 (Miss. 1979). However, he wrote to express his opinion that the Supreme Court exceeded its constitutional authority in *Stewart*, by effectively amending §97-3-79 to prohibit a judge from sentencing one convicted of armed robbery to any term of years greater than the defendant's life expectancy. He believed *Stewart* should be overruled.

Despite such limits on our power, the *Stewart* Court did indeed insert a requirement into Section 97-3-79 that the Legislature did not – the requirement that a judge-imposed sentence be for less than the defendant's reasonable life expectancy.

He believed the language of the statute allows the trial court to give any sentence not less than 3 years.

Dickinson, Presiding Justice, Dissenting:

Justice Dickinson agreed with Justice Coleman's opinion that the Court exceeded the limits of its constitutional authority when it decided *Stewart* and should be overruled. However, any retroactive application of that change would create due-process concerns. Therefore, applying *Stewart* to this case, Foster received an illegal sentence. He agreed with Justice King that Foster's claim is excepted from procedural bars, and that Foster's sentence exceeded a reasonable calculation of his life expectancy under *Stewart*.

King, Justice, Dissenting:

Justice King dissented, arguing that Foster's sentence is illegal under *Stewart*, as it is not reasonably less than his life expectancy. In this case, the trial court proceeded to sentencing immediately after the verdict. The court did not give the defendant any time to prepare for sentencing or any options regarding sentencing. He believed the language of § 97-3-79 only allows a jury to give a defendant a life sentence. *Stewart* correctly held that when a judge sentences a defendant on armed robbery where the jury did not impose a life sentence, the sentence must be at least 3 years, but reasonably less than life. A court may not sentence a defendant to an extraordinarily lengthy term of years in order to circumvent the requirement that only a jury may impose a life sentence.

The trial court in this case utterly failed to consider Foster's life expectancy as *Stewart* required. The trial court's consideration of Foster's age, but not his life expectancy, is simply not sufficient under our caselaw. Although advisable for the defendant put some evidence of his life expectancy before the trial court, it is ultimately the judge's responsibility to consider the defendant's age and life expectancy and any other pertinent factors before sentencing him under §97-3-79. In the absence of any other evidence whatsoever, the Court should take judicial notice of life expectancy tables and invalidate a sentence, such as Foster's, that is the equivalent of life imprisonment when a life sentence is forbidden.

Finally, he rejected the call to overrule *Stewart*. The Legislature has had ample opportunity to amend §97-3-79 if *Stewart* was an incorrect interpretation of the statute.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98757.pdf>

October 30, 2014

Jeremy Cage v. State, No. 2013-KA-00813-SCT (Miss. October 30, 2014)

CASE: Statutory Rape

SENTENCE: 20 years

COURT: Holmes County Circuit Court

TRIAL JUDGE: Hon. Jannie M. Lewis

APPELLANT ATTORNEY: Chokwe Antar Lumumba, Chokwe Lumumba

APPELLEE ATTORNEY: Scott Stuart, John R. Henry, Jr.

DISTRICT ATTORNEY: Akillie Malone Oliver

TRIAL ATTORNEYS: Akille Malone-oliver, Scott Rogillio, Tina Herrin, Latrice Westbrooks

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

ISSUE: (1) Whether the trial court improperly limited the defense's cross-examination of the victim's mother regarding her desire that charges be dropped; (2) whether the trial court erred in excluding the testimony of the regarding the victim's past sexual behavior; (3) whether Cage received ineffective assistance of counsel; and (4) whether the trial court erred in denying Cage's motion for a new trial based on newly discovered juror misconduct.

FACTS: At around 9:30 p.m. on August 26, 2010, 13-year-old A.S., walked outside her house in Mileston, to feed her dogs. She was grabbed by a man from behind and dragged her into a field adjacent to her house and raped her. She identified the man as her 21-year-old cousin Jeremy "Jay" Cage. Cage ran away when A.S.'s brother called for her. A.S. told her brother that she had been raped, but asked him not to tell anyone. The following day at school, she told a friend, K.J. that she wasn't feeling well. K.J. told the teacher and A.S. admitted what happened. The teacher sent A.S.

to talk to the school's guidance counselor, who called A.S.'s mother, Angel Spann. She picked A.S. up from school and took her to the police. A.S. then went to the hospital, and a rape-kit exam was done. Cage was arrested and provided a DNA sample to police. The sample excluded 99% of the population, but not Cage. Cage's mother told police she last saw him on the night of the rape at around 8pm. At the beginning of trial, Angel came to court with an affidavit saying her daughter wanted to drop the charges against Cage. Cage's mother had visited A.S. prior to trial and had arranged an attorney to draft up the affidavit. The trial court explained that Cage's prosecution rested in the State's discretion. The court appointed a guardian ad litem for A.S. During Angel's testimony, the defense was prohibited from asking about the affidavit. Cage presented an alibi defense, with his mother stating she last saw him around 9pm. K.J. was prohibited from testifying about A.S.'s alleged confession that she thought she was pregnant by someone else. She proffered this testimony. The court did allow her to testify about A.S.'s statements to her about the rape, but restricted her from calling A.S. a liar without specific supporting evidence. After his conviction, Cage gave a statement in which he admitted to the rape and asked the judge for leniency in sentencing.

HELD: (1) The trial court did not err in excluding evidence of Angel's affidavit, as the statements in the affidavit had no relevance to the determination of the issues in the case. The fact that Angel's family had forgiven Cage and wanted the charges against him dropped does not make Cage's guilt in the instant case more or less probable. Angel's affidavit was not relevant to show her bias, prejudice, or interest in the case.

(2) The trial court allowed K.J. to testify regarding A.S.'s statements that she had lied about the rape because she thought she was pregnant. However, the trial court prohibited K.J. from testifying regarding specific instances of A.S.'s past sexual behavior. The defense was late in requesting this MRE 412 evidence. It does not appear that this evidence was newly discovered and could not have been obtained earlier through the exercise of due diligence.

(3) Cage argued that he received ineffective assistance of counsel because his trial attorney failed to secure a serologist or DNA analyst to serve as an expert witness for the defense, even though the trial court had granted funds to hire such an expert. However, the record does not contain sufficient evidence to address Cage's ineffective-assistance claim. He is free to raise it again on PCR.

(4) In his JNOV motion, Cage claimed that he had obtained newly discovered evidence indicating that one of the jurors who had served on his case had not answered a question truthfully during voir dire. Cage presented the COA with the affidavit of his aunt, Shella M. Head, but failed to have the affidavit made part of the trial record. Further, Cage failed to include in the record on appeal the transcript of the hearing on his post-trial motions and the trial court's order denying his post-trial motions. "Because Cage did not fulfill his duty to provide a complete record for this Court's review, we decline to address the merits of his argument."

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO98316.pdf>

November 13, 2014

Rebecca Lynn Jones v. State, No. 2013-KA-00520-SCT (Miss. November 13, 2014)

CASE: Murder
SENTENCE: Life

COURT: Prentiss County Circuit Court
TRIAL JUDGE: Hon. James Seth Andrew Pounds

APPELLANT ATTORNEY: Richard Shane McLaughlin, Nicole H. McLaughlin
APPELLEE ATTORNEY: Laura Hogan Tedder
DISTRICT ATTORNEY: Trent Kelly

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

ISSUES: (1) Whether the court should have granted a directed verdict, (2) whether the trial judge erred in allowing evidence of defendant's past drug use, and (3) whether the verdict was against the weight of the evidence.

FACTS: Rebecca Lynn Jones and her mother, Jane Jones, got into an altercation which resulted in Jane being shot twice and killed in May of 2010. The two had a strained relationship stemming from Rebecca's prior drug use. In 1989, Rebecca had deeded some land to Jane with the belief it would later be deeded back to her. Jane also successfully sued for custody of Rebecca's daughter in 2003. At the time of Jane's death, Rebecca had participated in recovery programs and had ceased recreational use of drugs and alcohol. Several witnesses testified she was living a sober life in Alabama. On the date of the shooting, Rebecca traveled from Alabama to Booneville to visit friends and family. She then heard that her mother was planning to sell the land Rebecca had deeded to her. Rebecca said that she decided to go to Jane's house to check on her mother and to "get some stuff off her chest." Rebecca claimed that Jane saw the gun she kept in her purse and lunged for it, the two fought over the gun, and it accidentally discharged twice during the struggle. Jane called 911 and reported that Rebecca had shot her. Rebecca did not call 911 or try to administer first aid to her mother. A pathologist determined Jane's wounds were not contact wounds, but she was found without a shirt on and it was unclear whether she was wearing a shirt at the time of the shooting. When her uncle visited her in jail, Rebecca told him, "I killed my mother." She did not appear remorseful.

HELD: (1) Although she did not argue *Weathersby* at trial, Rebecca argued on appeal she was entitled to a directed verdict under *Weathersby*. Although the claim is barred, the Court found *Weathersby* inapplicable to the facts of this case. The State presented adequate evidence about Rebecca and Jane's tumultuous relationship, the crime scene, forensic and ballistic evidence, and physical facts to contradict Rebecca's story.

(2) Rebecca argued that evidence of her prior drug use should be excluded because she had been sober for years and there was no evidence that she had been under the influence of drugs or alcohol on the day of the shooting. However, the State's theory was that Rebecca's prior drug use resulted in her losing custody and having to give up her land. Although the court did not mention the magic words

of the balancing test under MRE 403, the court's "implicit" balancing test was sufficient, and there was no abuse of discretion.

(3) Rebecca admitted she was in the room with Jane at the time of her death. The weapon belonged to her. The jury heard testimony regarding the autopsy, lack of stippling, the crime scene, the presence of gunshot residue on both Jane's and Rebecca's hands, muzzle-to-garment tests, and the operation of the pistol. The jury also heard testimony about the history of Jane and Rebecca's relationship, and both parties questioned character witnesses. The verdict did not sanction an unconscionable injustice.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO97114.pdf>

Charles Edward Moore v. State, No. 2013-KA-00787-SCT (Miss. November 13, 2014)

CASE: Felony DUI (3rd Offense)

SENTENCE: 5 years

COURT: Forrest County Circuit Court

TRIAL JUDGE: Hon. Robert B. Helfrich

APPELLANT ATTORNEY: Benjamin Allen Suber, George T. Holmes

APPELLEE ATTORNEY: Jeffrey A. Klingfuss, John R. Henry, Jr.

DISTRICT ATTORNEY: Patricia A. Thomas Burchell

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 there was sufficient evidence to support the conviction

FACTS: On October 26, 2011, Officer Derek Holmes clocked a vehicle going 41 in a 30 mph zone. He turned on his blue lights, but the driver apparently did not see him, so he turned his siren on and off. The driver, Charles Moore, drove by another police officer who was conducting a separate traffic stop. Moore stopped in the middle of the road next to the officer. He then continued to drive, turning right on a nearby street and again stopped in the middle of the road. Holmes approached the vehicle and smelled a strong odor of alcohol coming from the vehicle and on Moore's breath. When Moore stepped out of the vehicle, he leaned against the side of the vehicle for a few seconds before he stepped to the back of the vehicle. Moore was swaying, his eyes were bloodshot, and his speech was slurred. He admitted he had drunk one-fourth of a twenty-four-ounce beer. Another officer arrived and saw a pint-sized bottle of vodka in the car. A second bottle was found under the passenger seat. Moore admitted taking a swallow from one of the bottles. Moore was arrested for DUI. He was given no field sobriety tests, and was unable to properly blow into the intoxilyzer.

HELD: The evidence was sufficient that Moore was driving under the influence. The State argued that Moore's speeding, stopping in the center of the road, admission to drinking some alcohol, smell of alcohol, swaying, bloodshot eyes, and slurred speech illustrate sufficient evidence. Even though Moore's BAC was never established, the evidence was sufficient for common law DUI.

To read the full opinion, click here:
<https://courts.ms.gov/images/Opinions/CO98715.pdf>

December 11, 2014

Anthony Carothers v. State, No. 2012-CT-00231-SCT (Miss. December 11, 2014)

CASE: Count I: Aggravated Assault; Count II: Aggravated Assault

SENTENCE: Count I: 20 years; Count II: 20 years with 5 years to serve and 15 years suspended; sentences to run consecutively

COURT: Lafayette County Circuit Court

TRIAL JUDGE: Hon. Andrew K. Howorth

TRIAL COURT ATTORNEYS: Honey Ussery, Josh Turner

APPELLANT ATTORNEY: George T. Holmes and Phillip Broadhead

APPELLEE ATTORNEY: Scott Stuart

DISTRICT ATTORNEY: Benjamin F. Creekmore

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

ISSUE: Whether the circuit court improperly allowed the State to treat Carothers's half-sibling, Sheena, as a hostile witness.

FACTS: Anthony Carothers took care of his half-sister's (Sheena's) children when she needed help. But when she dropped them off on March 18, 2011, Carothers told Sheena he was unable to watch her children. The two got into an argument. According to Carothers, after Sheena flew into a rage, he consented to keep the children. As he went to the car to get one of the children, Sheena hurled a heavy tool at him and broke a car window. She drove the car off at a high rate of speed with the child still in the back seat and ultimately crashed. However, other witnesses claimed that Carothers chased Sheena out of his house with a gun threatening to shoot her, at which time Sheena sped away. Carothers allegedly shot out the car's window with the gun. Sheena told police that Carothers chased her in his truck and bumped her car, causing her to wreck. She got out of the car and started running. When Carothers caught up to her, he assaulted her by slamming her face into the pavement, punching her, and kicking her. She suffered serious injuries. The next day, however, police requested a formal statement from Sheena and she refused, indicating that she was the cause of the accident, not Carothers. In testimony at a bond hearing, Sheena testified that she was driving erratically, lost control, collided with an oncoming vehicle, and suffered injuries. Nevertheless, Carothers was indicted on two counts of aggravated assault stemming from the incident. The prosecution asked that Sheena be treated as a hostile witness. Over objection, the trial court granted the request, and Sheena was impeached with her prior inconsistent statements that Carothers chased and attacked her. The jury returned a verdict of guilty. The COA reversed, holding that the circuit court committed reversible error by allowing the State to treat Sheena as a hostile witness because her testimony was not a surprise.

Carothers v. State, No. 2012-KA-00231-COA (Miss. Ct. App. October 29, 2013). The SCT granted certiorari.

HELD: The COA erred in not considering that Sheena’s prior inconsistent statements would have been admissible under other exceptions to hearsay: MRE 801(d)(1)(c) (identification evidence), MRE 803(2) (excited utterances), and MRE 803(4) (medical diagnosis and treatment). Therefore, any error by the trial court in allowing the State to admit Sheena’s prior statements as impeachment of a hostile witness was harmless beyond a reasonable doubt.

Further, we hold that while the elements of surprise and/or unexpected hostility are an acceptable basis for allowing a party to impeach its own witness, neither is required for purposes of Rule 607. To the extent *Wilkins v. State*, 603 So. 2d 309, 322 (Miss. 1992), holds otherwise, it is hereby overruled. Instead we hold that, in order to prevent abuse of Rule 607, impeachment of one's own witness should be only allowed when circumstances indicating good faith and the absence of subterfuge are present.

Instead of looking at surprise and hostility, the court should focus on the actual purpose for the impeachment. Although the State could not call Sheena solely for the purpose of impeaching her with her prior statements, the State was entitled to prove the relevant facts about which Sheena testified. The trial court did not abuse its discretion in allowing the State to impeach Sheena's testimony with prior contradictory statements.

While the elements of surprise and/or unexpected hostility are (and remain) an acceptable basis for allowing a party to impeach its own witness, they are not required for purposes of Rule 607. We hold that, to prevent abuse of Rule 607, impeachment should not be allowed where the trial court finds the purported purpose of impeachment for offering the statement(s) is in bad faith, or is subterfuge to mask the true purpose of offering the statement(s) to prove the matter asserted.

To read the full opinion, click here:

<http://courts.ms.gov/images/Opinions/CO98589.pdf>

LeeVester Brown v. State, No. 2012-KA-01581-SCT (Miss. December 11, 2014)

CASE: Capital Murder

SENTENCE: Life without Parole

COURT: Coahoma County Circuit Court

TRIAL JUDGE: Hon. Albert B. Smith, III

APPELLANT ATTORNEY: George T. Holmes

APPELLEE ATTORNEY: Stephanie B. Wood

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

ISSUES: (1) Whether the trial court erred in allowing the indictment to be amended; (2) whether the opinion of death by shaken baby syndrome is medically and legally invalid; (3) whether the evidence was sufficient and whether the verdict was against the weight of the evidence; (4) whether the trial court erred in denying funds for an independent defense expert; (5) whether the trial judge erred in improperly restricting cross-examination of the State's experts

FACTS: LeeVester Brown was convicted of the capital murder (child abuse) of his son, Le'Anthony Brown. Brown and Shirley Myles were married in 2002, and their son, Le'Anthony, was born on September 22, 2002. Le'Anthony was premature and stayed in the hospital for several weeks. Myles had two children from a prior marriage, Lester and Jureau. Myles worked during the day at a health center, while Brown worked nights at a casino. Brown took care of Le'Anthony during the day while Myles worked. On March 28, 2003, Myles came home for lunch. Her other children were at school. She fed and played with Le'Anthony and then left to return to work. Before she left, she gave Le'Anthony a bottle containing milk and cereal. Brown called her a few minutes later and said that Le'Anthony had choked on some milk, was having trouble breathing, and they needed to take him to the emergency room. Medical personnel tended to Le'Anthony over the next several hours, but his condition continued to deteriorate. A medivac helicopter finally picked him up around 6:30 pm to take him to Jackson. Myles and Brown drove to Jackson. Unfortunately, Le'Anthony died on the flight. Dr. Steven Hayne performed an autopsy on Le'Anthony and determined that the manner of death was homicide, and that the cause of death was "consistent with" Shaken Baby Syndrome. Brown was subsequently arrested, as his statement did not match what happened to Le'Anthony according to Dr. Hayne. With the help of family and friends, Brown was later able to make a \$75,000 bond and hire Johnnie Walls. The defense made a request for funds to hire an expert, but the trial judge denied the request without a hearing, finding no authority to allow funds for expert assistance to a defendant with retained counsel who has not been found to be indigent.

HELD: (1) The trial judge did not err in allowing the State to amend the capital murder indictment from "with" to "with or without" deliberate design. Under the capital murder statute, Brown never had the option to argue lack of intent or premeditation. Therefore, the amendment was not substantive.

(2) This issue of the validity of shaken baby syndrome is not properly before the court, as it was not argued before the trial court. None of the authorities cited by Brown's brief is in the record.

(3) Brown was alone with Le'Anthony when he began exhibiting distress. Jureau testified that Brown "hollered" at Le'Anthony and had "spanked" him once or twice. Myles and Jureau testified that Brown did not like them to pick up Le'Anthony every time he cried. Myles testified that she and Brown had had a disagreement about Le'Anthony and that Brown was angry when she left the house. Dr. Hayne testified that Le'Anthony's death was "consistent with" Shaken Baby Syndrome, that he had a "high degree of confidence" in that diagnosis, and that he had "no other explanation" for Le'Anthony's death. Taking the evidence in the light most favorable to the prosecution, a rational jury could find Brown guilty beyond a reasonable doubt.

(4) The trial judge did err in finding Brown was not entitled to funds to hire an expert because he had retained counsel. The court failed to hold a hearing on Brown's request. Dr. Hayne's opinion was the

basis for the capital murder charge. Without an independent expert, he had absolutely no way to counter the State's sole evidence of the cause of death, or even to determine the proper questions to ask to challenge Dr. Hayne on cross. Further, family and friends help him pay for his counsel. His affidavit of indigently explained he did not have the \$6,600 needed to hire an expert. Brown was entitled to a hearing to determine if he was indigent, regardless of who was paying his attorney fees.

(5) The trial judge also erred in restricting the defense counsel's cross-examination of the State's experts. During his cross of Dr. Wells, Le'Anthony's pediatrician, counsel attempted to ask her about with immunization studies that caused events in children that mimic Shaken Baby Syndrome. The State objected since the doctor was not qualified as an expert in immunizations. The State also objected to counsel's attempt to cross Dr. Hayne about medical personnel holding Le'Anthony's head in order to intubate him as having foundation in the record. However, this was incorrect as Dr. Wells testified Le'Anthony's head was held as the child was fighting the treatment. Sustaining the State's objections deprived Brown of the right to fully cross-examine to witnesses against him.

Kitchens, Justice, Specially Concurring:

Justice Kitchens, joined by all justices, wrote to express the Court's concern about how long this case lingered on post-trial motions (2006-2012).

Notwithstanding that Brown did achieve some degree of success in this Court, and regardless of the ultimate resolution of the grievous charge he still faces, all of us who bear responsibility for the reliable and timely functioning of our state's criminal justice system should be ashamed of the systemic failure which occurred in the case of Leevester Brown, so much so that we rededicate ourselves to a resolute determination that such a thing will never happen again.

To read the full opinion, click here:

<http://courts.ms.gov/images/Opinions/CO97974.pdf>

January 8, 2015

Kendrick Cowart a/k/a Rat v. State, No. 2012-KA-02051-SCT (Miss. January 8, 2015)

CASE: Armed robbery and Conspiracy

SENTENCE: 48 years for armed robbery and a consecutive 5 years for conspiracy.

COURT: Pike County Circuit Court

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

APPELLANT ATTORNEY: Dennis Charles Sweet, IV, Dennis C. Sweet, III, Terris Caton Harris

APPELLEE ATTORNEY: Barbara Wakeland Byrd

DISTRICT ATTORNEY: Dee Bates

DISPOSITION: Affirmed. Part I: King, Justice, for the Court. Dickinson, P.J., Kitchens, Chandler, Pierce and Coleman, JJ., Concur. Randolph, P.J. Specially Concur with Separate Written Opinion.

Lamar, J., Concur in Part and in Result Without Separate Written Opinion. Waller, C.J., Not Participating. Part II: Pierce, Justice, for the Court. Lamar and Coleman, JJ., Concur. Randolph, P.J., Specially Concur with Separate Written Opinion. King, J., Dissents with Separate Written Opinion Joined by Dickinson, P.J., Kitchens and Chandler, JJ. Waller, C.J., Not Participating.

ISSUES PART I: (1) Whether the trial judge erred in admitting photos of the victim; (2) whether the court's manslaughter instruction was incorrect; (3) whether the trial court erred in failing to suppress Cowart's statement to police; (4) whether the evidence was sufficient and whether the verdict was against the weight of the evidence; and **PART II** (5) whether the trial judge abused his discretion with an excessive sentence punishing Cowart for exercising his right to a trial.

FACTS: Early on Saturday, July 11, 2009, Peggy Sue Wilkinson Carter, a clerk at Express Cash in Pike County was found badly beaten. She died the following day. Eight months later, police developed several suspects, Terrence London, Tecory Wade, and Kendrick Cowart. London and Wade both eventually confessed to the crime, although London did not confess until after he learned that police had identified his DNA at the scene of the crime. Both men implicated Cowart. London and Cowart were indicted with depraved heart murder, armed robbery, and conspiracy to commit armed robbery. Wade pled to accessory after the fact and was sentenced to one year of jail time, one year of house arrest, and three years of probation. London pled guilty to manslaughter, armed robbery, and conspiracy to commit armed robbery, and appears to have received a sentence of 40 or 45 years. Both Wade and London testified against Cowart. A jailhouse informant also testified against Cowart. Cowart was acquitted of murder, but convicted of armed robbery and conspiracy, but the jury did not set the sentence at life. At sentencing, despite the fact that Cowart was acquitted of murder, Carter's son spoke about the effect of the loss of his mother's life and asked for justice. With a life expectancy of 50.86 years, Cowart was given 48 years for the armed robbery with a consecutive 5 years for the conspiracy.

HELD PART I: (1) Cowart argued pictures of the victim on life support were unduly prejudicial. The photographs were "unpleasant, bloody, and sad, and were likely prejudicial to Cowart," but the prejudicial effect did not far outweigh the probative value. The State needed to corroborate London's testimony about how Carter was struck by Cowart. The court did not abuse its discretion.

(2) Since Cowart was acquitted of murder and manslaughter, this issue is moot. Cowart attempted to argue that had the jury been properly instructed on manslaughter, it might have convicted him of manslaughter and acquitted him of armed robbery. However, Cowart offers no evidence that the jury did anything but follow the court's instructions.

(3) The trial judge only allowed the first portion of Cowart's statement to police. Anything said after he asked for an attorney was suppressed. Cowart failed to explain why his statement was not voluntary, knowing, and intelligent. Therefore, the claim his rights waiver was invalid is barred.

(4) Cowart claimed the verdict was based on the testimony of felons who hoped to benefit from their testimony. He pointed out his DNA was not found at the scene, on the victim, or on any evidence. Finally, he argued the State failed to show that Cowart took Express Check's cash from Carter. The evidence was sufficient. The jury was instructed on accomplice and jail informant testimony. Neither London nor Wade was substantially impeached. Cowart's girlfriend placed him with London and

Wade that day. The jailhouse informant also knew the place where the evidence was burned and that the victim was missing a ring.

The elements of armed robbery were also sufficiently proven. London's testimony that Cowart beat Carter and that they took the money from her, while suspect, was not legally insufficient. Cowart had some cash and his finances were in a better state than usual shortly after the time of the robbery. The testimony and evidence of phone records also sufficiently proved conspiracy. The verdict was also not against the weight of the evidence.

HELD PART II: (5) Cowart's 48 year sentence for armed robbery was not excessive. It was less than his life expectancy. Cowart argued that the trial court was required to consider London's sentence when sentencing Cowart. London pled guilty to manslaughter and armed robbery, and received either 40 or 45 years. Cowart failed to show he was being punished for going to trial. London likely received some discretionary leniency for taking responsibility for his actions and cooperating with the State. This is allowable. There was no "great disparity" in the sentences.

Randolph, Presiding Justice, Specially Concurring:

Justice Randolph wrote to point out the 4-4 vote on the sentencing issue is nevertheless an affirmance. "Accordingly, as Cowart's sentence has not been decided to be erroneous by a majority of the justices sitting in this case, we should affirm his sentence without opinion."

King, Justice, Dissenting to Part Two:

Justice King dissented, arguing that the trial court failed to account for the serious discrepancy between Cowart's sentence and London's sentence, "indicating that Cowart was improperly punished for exercising his right to trial by jury and for acquitted conduct..." First, Justice King noted the issue was not procedurally barred. Challenging the sentence in post-trial motions was sufficient. Second, Cowart was convicted of fewer crimes than London, and was not shown to be the "ringleader." Cowart had no previous felonies, but London had several. The trial judge failed to conduct a comparison of the sentences of the two defendants. Finally, the statements of the trial judge suggest Cowart was sentenced for his culpability for Carter's death, despite his acquittal for murder. The case should be remanded for a new sentencing hearing.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98711.pdf>

January 15, 2015

Richard W. Bowlin v. State, No. 2013-KA-00948-SCT (Miss. January 15, 2015)

CASE: Sale of Hydromorphone (Dilaudid), Sale of Meperidine (Demerol), and Sale of Oxycodone

SENTENCE: 30 years on each count as an habitual offender, all concurrent

COURT: Lowndes County Circuit Court

TRIAL JUDGE: Hon. Lee J. Howard

APPELLANT ATTORNEY: W. Daniel Hinchcliff, George T. Holmes

APPELLEE ATTORNEY: Barbara Wakeland Byrd

TRIAL ATTORNEY: Carrie A. Jourdan

DISTRICT ATTORNEY: Forrest Allgood

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

ISSUE: Whether Bowlin received effective assistance of counsel at trial and on appeal.

FACTS: In May 2009, Ashley Matthews, a resident of Alabama and daughter of Richard Bowlin, contacted Alabama authorities and informed them that she could perform an undercover drug buy from her father. Matthews was interviewed by the MBN agents, fitted with video and audio recording devices, and given \$200 with which to purchase the drugs. Matthews telephoned Bowlin and arranged their meeting for the purpose of purchasing drugs from him. The phone call was recorded. When Matthews arrived at Bowlin's home, she went into his house, where he sold her four bags of pills with the \$200 she had been provided. Matthews left and returned to the location where she had been fitted with the recording equipment. Bowlin left his house after the transaction was complete, and agents arrested him at a nearby store. The bills that MBN agents had provided Matthews were found by the arresting officers in Bowlin's billfold. Matthews testified at trial, and the audio of the transaction was played for the jury. On appeal, appellate counsel filed a *Lindsey* brief alleging no arguable issues for appeal. Bowlin filed a pro se brief alleging ineffective assistance of both his trial and appellate counsel.

HELD: “Bowlin's ineffective-assistance-of-counsel allegations are better left for an application for post-conviction relief, should he choose to pursue that potential avenue of relief.” The SCT found no viable issues to be argued on Bowlin's behalf on appeal.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100002.pdf>

January 22, 2015

Craig D. Sallie v. State, No. 2012-CT-01280-SCT (Miss. January 22, 2015)

CASE: Count I - Aggravated Assault; Count II – Possession of a Weapon by a Convicted Felon

SENTENCE: 20 years for Count I and 10 years on Count II to run concurrently, and a 10 year enhancement for the use of a firearm during the commission of a felony to run consecutively

COURT: Madison County Circuit Court

TRIAL JUDGE: Hon. John Huey Emfinger

APPELLANT ATTORNEY: Cynthia Ann Stewart

APPELLEE ATTORNEY: Scott Stuart

DISTRICT ATTORNEY: Michael Guest

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

ISSUE: Whether Sallie's lack of notice of the firearm enhancement rendered his sentence illegal.

FACTS: Craig Sallie had previously accused Gregory Johnson of stealing a bottle of alcohol. Johnson testified that Sallie had twice threatened him regarding the bottle. Johnson, unarmed, walked past Sallie's house and Sallie yelled at him, demanding that he come into Sallie's yard. Sallie then pulled out a gun and shot Johnson in the back when he refused to enter Sallie's yard. Sallie was found guilty at trial and sentenced to 30 years for the two counts plus an additional 10 years as an enhancement for using a firearm in the commission of a felony. The COA affirmed, holding in part, that the State was not required to use the language of the enhancement statute in its indictment. The court found that all the elements of the firearm enhancement had properly been submitted to the jury with the instructions for aggravated assault and possession of a weapon by a felon, and had been found by the jury beyond a reasonable doubt. Because there was no unfair surprise in the enhancement portion of his sentence, Sallie was not unfairly prejudiced. *Sallie v. State*, No. 2012-KA-01280-COA (Miss.Ct.App. December 3, 2013). The SCT granted certiorari on this issue.

HELD: At the sentencing hearing, Sallie objected to consideration of the §97-37-37 firearm enhancement based on a lack of notice from the State and based on the trial court raising the enhancement *sua sponte*. The SCT found that although the jury found the elements of the firearm enhancement beyond a reasonable doubt, Sallie had a right to fair notice that the sentence enhancement was being sought. The lack of notice violated his right to due process.

Sallie's indictment did not indicate that the State would seek any sentence enhancement. Furthermore, the State in no way indicated pretrial that it would seek the firearm enhancement. Only after the jury convicted Sallie did Sallie receive any indication that the trial court might consider the firearm enhancement at sentencing.

Dickinson, Presiding Justice, Concurring:

Justice Dickinson wrote to explain his belief that these types of sentence enhancements are really elements of a crime and should be indicted by a grand jury.

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

Justice Randolph believed the defendant was put on notice regarding the enhancement when the law was passed by the Legislature. “There is no requirement, pursuant to our Constitution, caselaw, court rules, or statutes, that the indictment must contain specific notice that an enhanced sentence will be given pursuant to Section 97-37-37(2). The trial court properly applied the mandatory ten-year sentencing enhancement to petitioner's sentence.”

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO97798.pdf>

February 5, 2015

Marvin Kirk v. State, No. 2013-KA-01742-SCT (Miss. February 5, 2015)

CASE: Aggravated Domestic Violence

SENTENCE: 20 years as an habitual offender

COURT: Madison County Circuit Court

TRIAL JUDGE: Hon. William E. Chapman, III

TRIAL ATTORNEYS: Mary B. Cotton, Gregory V. Miles

APPELLANT ATTORNEY: Laura Hogan Tedder, John R. Henry, Jr.

APPELLEE ATTORNEY: Phillip W. Broadhead, George T. Holmes

DISTRICT ATTORNEY: Michael Guest

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

ISSUES: (1) Whether it was plain error for the trial court to permit a law enforcement officer to testify to the medical causation of strangulation; (2) whether the trial court erred by denying Kirk's motion for JNOV or, in the alternative, for a new trial; (3) whether the trial court erred by excluding letters and a text message from the victim to defendant; (4) whether the trial court erred by prohibiting defense counsel from cross examining the victim regarding a drug hair follicle test; (5) whether the trial judge committed reversible error by discussing a possible *Sharplin* instruction to the jury foreperson.

FACTS: Marvin and Casey Kirk were married and had one son. On the weekend of January 25-26, 2013, Kirk was home from working offshore. On Friday night, after complaining the house was dirty, Casey claimed Kirk kicked her while she was cleaning dishes. He also grabbed her by the neck and choked her in the presence of her son. Kirk had taken Casey's cell phone, keys, and wallet, claiming she was doing drugs and cheating on him. Casey denied drug use that weekend. The next day, Casey tried to take back her keys. Kirk asked why she needed them. He threw the phone in the backyard and they struggled over the keys. He then continued to choke her until she lost consciousness. When she awoke, she let a cigarette, which upset Kirk, and he burned her with the cigarette. She took her son and attempted to flee to a neighbor's house, but no one was home. Kirk threatened to lock her out. Scared, she ran through the woods to the landlord's house. The landlord's wife called police. The 911 call was played for the jury. Responding deputies noticed the marks on her neck. Kirk denied the allegations, claiming Casey was upset with him for flushing her crystal meth and went on a tirade. He claimed her injuries must have occurred when she ran through the woods.

HELD: (1) Kirk failed to object when the deputy testified the marks on the victim's neck appeared to be from strangulation. While the deputy may have been able to testify regarding his observations of marks, testimony that it appeared she had been strangled constituted the sort of testimony properly reserved to an expert. However, this was not plain error. Kirk can raise the issue in a PCR as a claim of ineffective assistance of counsel.

(2) The evidence was sufficient and the verdict was not against the weight of the evidence. The State was required to prove Kirk strangled Casey by restricting "the flow of oxygen or blood by intentionally applying pressure on" Casey's neck. Casey testified Kirk grabbed her by the neck and choked her. She said she could not breathe and eventually lost consciousness. The State showed pictures of her neck, and deputies and her landlord's wife both saw red marks on her neck.

(3) The trial judge did not abuse his discretion by prohibiting the letters and text messages from Casey to Kirk. One letter was written before the incident. In the other, written 5 months after the crime, the victim talks about her drug rehab and what a good father Kirk had been. She also sent text messages which stated she was sorry and never meant to hurt Kirk. Although the State objected on relevancy, the trial court found them to be hearsay. Casey's statements were not admissions, nor was Casey unavailable. The letters and text messages were not present sense impressions.

(4) Casey had testified that she was not using crystal meth the weekend of the incident. Kirk hoped to impeach Casey's credibility by admitting a hair-follicle drug test that she had taken in April 2013. The test only showed that at some point during the ninety days prior to its administration, Casey had used drugs. Additionally, Casey testified she had a problem with drugs and was in rehab at the time of trial. The trial judge did not err in finding the test irrelevant.

(5) Two hours into deliberations, the jury foreperson told the judge the jury was deadlocked. The judge read the *Sharplin* instruction to the foreperson, and asked if he thought the instruction would help. The foreperson could only say that it might. The jury was then called back into the court and the instruction was given. The court also allowed a juror to call home during deliberations with a bailiff present. The SCT found the judge's actions "irregular," and soliciting the foreperson's advice on the *Sharplin* instruction "inappropriate."

"Nevertheless, considering the acquiescence of Kirk's counsel, and without any identifiable prejudicial effect on the jury, we find no reversible error. We caution bench and bar that this sort of practice could in some circumstances constitute reversible error and scrupulously should be avoided."

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO100830.pdf>

Terry Hye, Jr. v. State, No. 2010-CT-01780-SCT (Miss. February 5, 2015)

CASE: Capital Murder

SENTENCE: Life without parole

COURT: Jackson County Circuit Court

TRIAL JUDGE: Hon. Dale Harkey

TRIAL ATTORNEYS: Anthony Lawrence, III, Robert Knochel, Arthur Carlisle, Wendy Martin

APPELLANT ATTORNEY: Graham Patrick Carner

APPELLEE ATTORNEY: Lisa L. Blount

DISTRICT ATTORNEY: Anthony N. Lawrence, III

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

ISSUE: Whether the trial court erred by denying Hye an accessory-after-the-fact lesser offense instruction.

FACTS: On October 23, 2008, Michael and Linda Porter stopped at a Conoco gas station in Moss Point to ask for directions. As Michael returned to the car, her was attacked by two men. He was able to get back in the car, but was shot through the car window. Linda was unable to identify any of the three men she saw. The shooter was later identified as Darwin Wells, who was 15 years old at the time of the murder. Wells was convicted of deliberate-design murder and sentenced to life imprisonment. Three other juveniles were questioned about Michael's murder: Hye, Tevin Benjamin, and Alonzo Kelly. At the time of the murder, Hye was 16 years old, Benjamin was 14 years old, and Kelly was 17 years old. At Hye's capital murder trial, Kelly testified for the State. Kelly was initially charged with capital murder but ultimately pled guilty to accessory after the fact and served eleven months in jail. Hye testified in his own defense and denied any involvement with Michael's death. Benjamin and Wells were called to the stand but refused to testify, each invoking his right against self-incrimination. Hye was found guilty of capital murder and sentenced to life without parole. The COA affirmed Hye's conviction, but reversed and remanded the case for resentencing under [Miller v. Alabama](#), 132 S. Ct. 2455 (2012). Among other issues, the COA found no evidence to support an accessory after the fact instruction. [Hye v. State](#), No. 2010-KA-01780-COA (Miss.Ct.App. May 28, 2013). The SCT granted certiorari only on this issue.

HELD: The SCT agreed the denial of the instruction was proper because there was no evidentiary evidence to support it. "We also find, after much consideration on the matter, that a criminal defendant no longer has the unilateral right under Mississippi law to insist upon an instruction for lesser-related offenses which are not necessarily included in the charged offense(s), i.e., so-called lesser-nonincluded-offense instructions. And we overrule *Griffin v. State*, 533 So. 2d 444 (Miss. 1988), and its progeny, to the extent they hold otherwise."

The SCT found that Mississippi's practice of instructing the jury on lesser nonincluded crimes is "fundamentally unsound." The doctrine of stare decisis did not limit the Court from correcting the *Griffin* decision. Federal courts and the vast majority of states do not allow the practice. The State determines the charges to present to the grand jury. The State undertakes no duty to prove uncharged, nonincluded offenses.

The record did not support Hye's claim that he lied to police to cover for the other defendants. There was no evidence to suggest he was an accessory after the fact. Instead, the State meet its burden of proving Hye was a principal. They jury was instructed on aiding and abetting and accomplice liability.

The SCT also mentioned that giving the defense the power to request an uncharged, nonincluded offense, "over the State's objection, ... usurps the State's exclusive charging discretion, and may

therefore violate Mississippi's separation-of-powers clause..." [The Court stated it did not need to reach this question, but it is interesting to note.]

Chandler, Justice, Concurring in Part and in the Result:

Judge Chandler agreed there was insufficient evidence for the lesser offense instruction, but would not abandon the *Griffin* rule.

Kitchens, Justice, Dissenting:

In a long dissent, Justice Kitchens argued that the *Griffin* rule should not be overruled, and that Hye presented sufficient evidence to grant the instruction. He believed that lesser-related-offense instructions which are supported by the evidence ought to remain a viable component of Mississippi criminal law and practice. Testimony showed Hye colluded with Kelly, Benjamin, and Wells to concoct an exculpatory version of events. The state described this in closing as "a weekend alibi fest." Hye contended at trial that he had lied to police and had covered for other members of the group, which could have led the jury to believe that Terry was an accessory after the fact. Hye testified that he and Benjamin had caught a ride from Moss Point to Pascagoula, where they had stayed in Hye's aunt's house, providing shelter to Benjamin following the shooting. Hye presented a sufficient evidentiary foundation to support the giving of an accessory-after-the-fact instruction.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO101202.pdf>

February 12, 2015

Sheila Ealey v. State, No. 2013-KA-01800-SCT (Miss. February 12, 2015)

CASE: Capital Murder

SENTENCE: Life w/o parole

COURT: Madison County Circuit Court

TRIAL JUDGE: Hon. William E. Chapman, III

APPELLANT ATTORNEY: George T. Holmes

APPELLEE ATTORNEY: Barbara Wakeland Byrd

DISTRICT ATTORNEY: Michael Guest

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

ISSUES: (1) Whether the trial court erred in refusing an accident-or-misfortune jury instruction, (2) whether the evidence was sufficient, and whether the verdict was against the weight of the evidence, and (3) whether the State should abandon and replace the *M'Naghten* Rule on insanity.

FACTS: Sheila Ealey was a 41-year-old single mother of five children, the youngest three in middle

school. Witnesses testified she was a good mother and worker. She worked at a church daycare, and was involved in many church activities at Smith Chapel Baptist Church. On July 1, 2010, the body of an infant child was found in a suitcase partially hidden in the woods behind Smith Chapel. After the body was discovered, Ealey came to the sheriff's office and gave a statement. She claimed a man abducted and raped her in September 2009. Ealey did not tell anyone. She later discovered that she was pregnant. She did not tell anyone, and her family and coworkers never realized it. When she began to go into labor, she took a suitcase and a comforter, and rented a hotel room in Gluckstadt. She stated she had the baby and fell asleep. When she woke up, she wrapped the baby in the comforter, put the comforter in the suitcase, and put the suitcase in the trunk of her car. Ealey then drove to Smith Chapel and left the suitcase behind the church. Ealey went home, took a bath, and washed her clothes. Ealey attended church the following morning, but she said she could not sit through the entire service. Police conducted three interviews with Ealey and obtained two written statements. Her story was consistent each time with two exceptions: (1) whether Ealey had heard the baby cry, and (2) whether anyone other than the attacker could have been the baby's father. It was later determined that her long-time boyfriend and father of four of her children was also the father of the dead child. She was indicted for capital murder in the commission of felonious child abuse. She attempted an insanity defense at trial but was convicted. She appealed.

HELD: (1) The trial judge did not err in finding there was no evidentiary basis to support an accident-or-misfortune instruction. Ealey argued that, even if the child was alive when she put him in the suitcase, his death could have been an accident. However, there was no evidence she was delusional or delirious right after the birth. Ealey also claimed that the child could have died when she was asleep, so the child's death could have been an accident and the result of Ealey's choice to have an unattended birth. However, one of her statements indicated the child cried before being put in the trunk. Finally, there was no evidence to support the claim that Ealey's decision not to seek prenatal care and not to seek medical care during the birth was anything other than intentional and purposeful.

(2) Ealey voluntarily confessed, telling officers that she gave birth alone in a hotel room, wrapped the newborn baby in a comforter, put the comforter in a suitcase, and left the suitcase in the woods behind her church. The pathologist determined the cause of death was more likely than not asphyxia and the manner of death was homicide. The evidence was sufficient to show the child died as a result of felonious child abuse.

Ealey claimed that the weight of the evidence did not support a finding that she was sane. Three experts in forensic psychology or psychiatry testified at trial. They all agreed that Ealey suffered from depression and anxiety, but no one opined that she was legally insane with a reasonable degree of scientific certainty. Further, none of her family or coworkers testified that she acted differently at any time before or after the offense.

Ealey also claimed that, at most, the evidence supported a manslaughter conviction. However, Ealey did not request a manslaughter instruction at trial, so the claim is barred. Regardless, a person who causes death during the commission of felonious child abuse can be convicted of only capital murder, not manslaughter.

(3) The application of the *M'Naghten* rule did not violate Ealey's due process rights. The SCT declined to abandon *M'Naghten* based on the rule of *stare decisis*.

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO101079.pdf>

Larry Press Wells v. State, No. 2012-KA-01781-SCT (Miss. February 12, 2015)

CASE: Possession of Cocaine with intent

SENTENCE: 60 years w/o parole as an habitual offender and subsequent drug offender

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. Jerry O. Terry, Jr.

TRIAL ATTORNEYS: John Christopher Gargiulo, Glenn F. Rishel, Jr.

APPELLANT ATTORNEY: Hunter N. Aikens

APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISTRICT ATTORNEY: Joel Smith

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

ISSUES: (1) Whether the evidence was insufficient to support the verdict, and whether the verdict was against the weight of the evidence; (2) whether the trial court committed plain error in granting a lesser included instruction on simple possession; (3) whether the trial court erred in sentencing Wells as a habitual offender and a second or subsequent drug offender; and (4) whether Wells's constitutional right to a speedy trial was violated.

FACTS: On May 24, 2007, Officer Michael Guynes of the Gulfport PD, set up a drug sting. Guynes drove up to Larry Wells and asked him whether he would sell Guynes a "40," meaning a single hit of crack, or forty dollars' worth. Wells said that he could get that for Guynes, got into the car, and led Guynes to a small grove of trees and bushes. On the undercover tape, Wells is heard saying they were going to get "high," and Wells also said "I want to get me a hit." Guynes testified that he then gave Wells forty dollars in marked currency and Wells walked around the bushes to a group of people who were waiting there. When Wells returned to the vehicle, there was some confusion about whether he had bought some crack for Guynes's use, or only for himself. Wells took Guynes pipe and placed the crack cocaine in it, asking Guynes to light it. Wells ultimately asked Guynes to smoke some before Wells gave him the rest. Guynes gave the takedown signal, and law officers converged on the pair quickly, arresting Wells. Police found 0.04 grams of cocaine near the pipe. Wells was indicted with possession with intent to transfer. The State later filed a motion to amend the indictment to include his habitual offender status. After several continuances, he was tried almost two years later. Five days before trial, the State again amended the indictment to note Wells was a second drug offender.

HELD: (1) There was sufficient and clear evidence to convict Wells of possession of cocaine with intent to transfer. Guynes approached Wells and asked him whether he could get him a "40." Wells showed Guynes where to drive, took money from Guynes, and returned with drugs. Wells said that he would give Guynes his drugs if Guynes smoked the crack that Wells had put into the pipe. Wells put

crack cocaine in a pipe and attempted to hand it to Guynes—clearly an act evincing his intent to transfer a controlled substance to another.

(2) The trial judge did not err in granting a lesser-included offense instruction on simple possession of cocaine. Wells told the court he wanted the instruction. The jury was informed that, if the State failed to prove each and every element of possession with intent to distribute, then it must acquit on that charge and consider the lesser offense. This was not plain error.

(3) Both amendments to Wells's indictment stated that his prior convictions occurred "in the Circuit Court of Harrison County, Mississippi." However, the amendments failed to specify which judicial district. This was erroneous. However, the issue is barred for failing to object at trial.

The trial judge did not err by holding the sentencing hearing in the presence of the jury. The presence of the jurors in the courtroom was of no consequence.

Wells was not unduly surprised by the amendments to his indictment. He had been on notice for nearly eighteen months that the State was seeking to prosecute him as a habitual offender. The five-day notice on the subsequent offender amendment was sufficient, as Wells failed to show he was unfairly surprised.

The trial judge did err, however, stating his belief that he had no choice but to double Wells's sentence as a subsequent drug offender. Trial judges have complete discretion whether and how much to enhance a defendant's sentence as a subsequent drug offender under §41-29-147. The case is remanded for resentencing.

(4) Wells raised a speedy trial claim for the first time on appeal. The SCT declined to address the issue. Wells failed to obtain a ruling from the trial court on the speedy-trial motion filed on his behalf by the Harrison County Public Defender's Office, four months after his arrest (twenty-five days after his indictment). The SCT did note that the AG's Office should have addressed the issue.

Kitchens, Justice, Dissenting:

Justice Kitchens dissented, arguing that Wells made a valid constitutional claim on speedy trial that the State failed to address. "I would hold the State to the arguments that it has made on appeal, treating its failure to address Wells's claim as a concession that his speedy-trial rights were violated, and I would reverse and render Wells's conviction and sentence due to the denial of his right to a speedy trial."

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101774.pdf>

February 19, 2015

Zachary D. Barnes v. State, No. 2013-KA-01683-SCT (Miss. February 19, 2015)

CASE: Burglary of a Dwelling

SENTENCE: 25 years, with 20 to serve and 5 years PRS

COURT: Forrest County Circuit Court

TRIAL JUDGE: Hon. Robert B. Helfrich

TRIAL ATTORNEYS: Elizabeth Porter, Kathleen Chmelicek, Decarlo Hood, Zach Vaughn

APPELLANT ATTORNEY: Erin E. Pridgen, George T. Holmes

APPELLEE ATTORNEY: Barbara Byrd

DISTRICT ATTORNEY: Patricia A. Thomas Burchell

DISPOSITION: Reversed and Remanded. Lamar, Justice, for the Court. Dickinson and Randolph, P.JJ., Kitchens, Chandler, Pierce and Coleman, JJ., Concur. King, J., Concur in Part and in Result Without Separate Written Opinion. Waller, C.J., Not Participating.

ISSUES: (1) Whether the trial court erred in refusing a lesser-included offense of trespass, and (2) whether the trial court erred in failing to suppress Barnes's statement.

FACTS: On May 3, 2012, Michael Scott's apartment was broken into and burned. Fire Investigator Chip Brown spoke with 15-year-old Charles Darby and Darby's mother's boyfriend, Zachary Barnes. Darby and Barnes lived in a trailer across the road from Scott's apartment. Darby named Barnes as the perpetrator, and he was arrested. Brown spoke to Barnes twice at the jail. Barnes first denied any involvement in the fire. Barnes stated that he had had an altercation with a neighbor the night of the crime and was stabbed. Barnes went back home where his girlfriend, Rebecca Henson (Darby's mother), tried to stop the bleeding. Darby came in and said "Don't worry about that; you know, I handled that." During a second interview, Darby and Henson were present. Barnes said he changed his story because Brown promised he would get Barnes's bond reduced. Barnes wrote a statement implicating himself. He admitted he was with Darby when Darby set the fire. He stated he went to the house and threw some things around. Darby said he was going to set the house on fire, and Barnes saw him set the bed on fire. When Barnes was home tending to his stab wound, Darby called him to the kitchen window and he saw the house on fire. Barnes subsequently was indicted for arson and for directing a minor (Darby) to commit a felony. However, Darby later changed his story and said Barnes did not set the fire. Barnes's arson indictment was nol pros'd, but he was indicted for burglary.

HELD: (1) The trial judge erred in failing to grant a trespass instruction. Darby testified that it was his idea to go to Scott's apartment and vandalize it. He also testified that Barnes was in the apartment with him, but that Barnes only watched him throw things around. Henson testified that Darby and Barnes had both told her that Barnes had stayed outside Scott's apartment during the incident.

The SCT has consistently articulated a low threshold with regard to what the defendant must show in the record to support a tendered "theory-of-the-case" instruction. "We find sufficient evidence to support a trespass instruction in the record, especially in light of this Court's low threshold."

(2) Barnes argued that his inculpatory statement should have been suppressed because he had requested counsel, and because Brown had promised him a reduced bond in exchange for it. Barnes ambiguously requested counsel when he said "maybe I should get an attorney." The trial judge did not err in refusing to suppress the statement. "Barnes's decision to continue the interview—after already

having signed and initialed a *Miranda* waiver and being reminded that he could have an attorney at any time—indicates a "voluntary, knowing and intelligent" waiver of his right to counsel.”

Barnes's testimony that Brown had promised him a bond reduction if he would write down what Darby told him to write. (Barnes was granted a bond reduction about two weeks after his second statement, reducing the bond from \$40,000 to \$12,000). But the trial judge also heard Brown's testimony in which he unequivocally denied promising Barnes a bond reduction in exchange for his statement. It was within the trial judge's province to determine which witness was credible.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101499.pdf>

March 5, 2015

Jerome Totten v. State, No. 2013-KA-01768-SCT (Miss. March 5, 2015)

CASE: Burglary of a Dwelling and Grand Larceny

SENTENCE: 25 years for the burglary and a concurrent 10 years for the larceny, both as an habitual offender

COURT: Tate County Circuit Court

TRIAL JUDGE: Hon. Smith Murphey

TRIAL ATTORNEYS: Rhonda Amis, David Walker

APPELLANT ATTORNEY: W. Daniel Hinchcliff, George T. Holmes

APPELLEE ATTORNEY: Scott Stuart

DISTRICT ATTORNEY: John W. Champion

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

ISSUES: (1) Whether the State presented sufficient evidence of the actual value of the items stolen at the time of the theft; [Pro Se Issues] (2) whether the laptop and heater were improperly admitted as evidence because they were not obtained by a warrant; (3) whether the trial court erred in allowing Bo Mims to testify because he was not correctly identified as a state witness until after the jury was selected; and (4) whether trial counsel was ineffective.

FACTS: Corey Rakestraw had his home burglarized in March of 2012 while he was working out of town. Items missing included a clothes' dryer, a laptop, two chainsaws, an Amish heater, and all tools of value. Only the laptop and Amish heater were recovered. Annie Davis had purchased the heater directly from Jerome Totten for \$10. The laptop was recovered after Totten attempted to sell it to an acquaintance, Bo Mims. Rakestraw identified Totten as the man who spoke to him about buying a dirt bike a couple of weeks before the break-in. He remembered Totten following him home and looking closely at his house. Rakestraw testified he paid \$125 for the dryer approximately two weeks before the burglary. He paid \$350 for the laptop at Walmart. He bought the heater for \$185 at a surplus warehouse. Rakestraw estimated that one of the chainsaws was worth \$200. He testified that he paid

"well over \$1,000" for the tools from a local store. Totten testified on his own behalf and argued that, because he had a good job, he had no motivation to commit the burglary. Nevertheless, he was convicted and appealed.

HELD: (1) The evidence was sufficient to show the value of the stolen items was over \$500. Evidence of the purchase price of stolen items is relevant circumstantial evidence from which the jury can reasonably infer the market value of the items at the time of the theft. [Pro Se Issues] (2) The stolen laptop and heater were provided voluntarily to law enforcement by members of the public. A warrant was not needed. (3) Bo Mims was incorrectly identified as Boo Hines. The mistake was realized the morning of trial. The defense did not request a continuance. The record also reflects that Totten was not surprised at the testimony of Mims. (4) Ineffective assistance of counsel was not apparent from the record. The COA found this issue was best left for PCR.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100798.pdf>

Joseph Ronald Hartfield v. State, No. 2013-KA-00797-SCT (Miss. March 5, 2015)

CASE: conspiracy to commit murder

SENTENCE: 20 years

COURT: Lamar County Circuit Court

TRIAL JUDGE: Hon. Michael R. Eubanks

APPELLANT ATTORNEY: Robert Greer Whitacre

APPELLEE ATTORNEY: Stephanie Breland Wood

DISPOSITION: COA Reversed; Conviction Reinstated. Chandler, Justice, for the Court. Waller, C.j., Randolph, P.j., and Pierce, J., Concur. Lamar, J., Concur in Part and in Result Without Separate Written Opinion. Dickinson, P.J., Dissents with Separate Written Opinion Joined by Kitchens, King and Coleman, JJ. Coleman, J., Dissents With Separate Written Opinion Joined by Dickinson, P.J., Kitchens and King, JJ.

ISSUE: (1) Whether the trial court erred in excluding potentially exculpatory letters under the hearsay exception in MRE Rule 804(b)(3); (2) whether the trial judge erred in denying a peremptory challenge of a juror based on a reverse-*Batson* objection; (3) whether the evidence was sufficient for conspiracy to commit murder and whether the verdict was against the weight of the evidence.

FACTS: Tabitha Hartfield was murdered on the night of May 24, 2008. That night, Ronald Hartfield, Tabitha, Tabitha's cousin Natasha Graham, and Cody Dixon were at Graham's residence, a trailer located in rural Lamar County. After an argument with Hartfield, Tabitha tried to leave in Hartfield's car, but she wrecked the car in a pond dam on the property. Hartfield, Graham, and Dixon each gave conflicting statements on what happened after that. Dixon, testifying with a plea agreement, stated that after the wreck, Graham crushed some pills, mixed them in a glass of water, and brought the glass to Tabitha, who drank the mixture. Hartfield then strangled her with a dog leash. Dixon testified that Graham cut Tabitha's wrists with a kitchen knife, and helped wrap her body in a blanket. Dixon

originally told police he had strangled Tabitha while Hartfield slept. He later wrote a letter to investigators admitting that he had falsely implicated Hartfield to save himself. He later denied writing the letter. Graham reported the murder and stated she had killed her cousin. She told police Dixon had helped her but that Hartfield remained in the house. Hartfield's cellmate, Joseph Bryant, testified that Hartfield told him that Hartfield and his girlfriend had discussed killing his wife, and then they strangled her with a dog leash and buried her in the woods. Graham was called as a witness but invoked her 5th Amendment privilege. (She was later convicted in a separate trial. *Graham v. State*, 120 So. 3d 382 (Miss. June 13, 2013). Hartfield then sought to introduce several letters Graham had written indicating that Dixon, acting on his own, had strangled Tabitha while Hartfield was inside asleep. The letters raised a hearsay objection from the State. Defense counsel argued the letters would fall under the hearsay exception laid out in Rule 804(b)(3), but the trial court sustained the objection. The COA reversed and remanded, finding the letters were hearsay, but they had sufficient corroborating circumstances to indicate trustworthiness when the statements were used to exculpate the accused. The COA found it fundamentally unfair to deny the jury the opportunity to consider the defendant's defense (the letters) where there was testimony to support the theory. *Hartfield v. State*, No. 2012-KA-01232-COA (Miss. Ct. App. January 14, 2014). The State's petition for writ of certiorari was granted.

HELD: (1) The letters were clearly hearsay. To be admissible under the exception in MRE 804(b)(3), the declarant must be unavailable, must be against the declarant's penal interests, and corroborating circumstances clearly indicate the trustworthiness of the statement. The SCT found that the letters were not against the Graham's penal interest, and therefore were properly excluded by the trial court. In the letters, Graham asserted that she had participated in the crime under duress, therefore the letters were not against her penal interest. Her letters were nothing more than an attempt to exonerate herself from her pending murder charge and place all blame on Dixon. There was no need to discuss the trustworthiness of the letters.

(2) The trial judge did not err in denying a peremptory challenge to a white juror based on a reverse *Batson* challenge. When giving a race-neutral reason for the strike, counsel stated the juror had been sleeping. The trial judge confirmed the juror had been yawning and closed his eyes, but had not been asleep. The judge found from his observation that the juror's demeanor did not justify the strike for the proffered race-neutral reason, and that the proffered race-neutral reason was a pretext for discrimination.

(3) Hartfield argued that the evidence was insufficient that he entered into an agreement with anyone else to commit murder. Although his cellmate testified that Hartfield told him that he and Graham had talked about killing Tabitha, and then he killed her, he contends that there was no evidence that he entered into a common plan to kill Tabitha and knowingly intended to further the plan's common purpose. However, a reasonable juror could infer that Hartfield and Graham had entered into an agreement to kill Tabitha from Bryant's testimony that Hartfield admitted that he and Graham had discussed killing Tabitha, and then it occurred. Dixon's testimony also supports a reasonable inference that Hartfield had entered into a common plan to kill Tabitha and knowingly intended to further that plan's purpose.

Dickinson, Presiding Justice, Dissenting:

Justice Dickinson concurred with Justice Coleman's dissent, but wrote separately to express his belief that the trial judge erred in denying a peremptory strike based on a race-neutral reason of a sleeping juror.

Coleman, Justice, Dissenting:

Justice Coleman dissented on the Court's finding that Graham's letters were not against her penal interest. In his opinion, a reasonable person in the position of Graham indeed would not have made the statements she did unless she believed them to be true. The plurality failed to consider the position in which Graham found herself at the time she wrote the letters. He believed the COA was correct in finding the trial judge in error.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO99763.pdf>

March 12, 2015

Lawrence Byrd v. State, No. 2013-KA-01207-SCT (Miss.Ct.App. March 12, 2015)

CASE: Manslaughter

SENTENCE: 20 years

COURT: Amite County Circuit Court

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

TRIAL ATTORNEYS: Ronnie Lee Harper, Debra Blackwell, Jacob Ray

APPELLANT ATTORNEY: Erin Elizabeth Pridgen, Lawrence Byrd (Pro Se)

APPELLEE ATTORNEY: Lisa L. Blount

DISTRICT ATTORNEY: Ronnie Lee Harper

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

ISSUES: Whether there were arguable issues for appeal – *Lindsey* brief. Pro Se claims of (1) ineffective assistance of counsel, and (2) whether the evidence was sufficient.

FACTS: On the afternoon of June 6, 2011, Lawrence Byrd and his close friend Reginald Alexander were socializing with other friends in Liberty, MS. Alexander's sister, Anissa Johns, testified that Byrd was drunk. Byrd and Alexander got into a fight when Alexander refused to give Byrd a ride. Johns stated that, during the fight, Byrd took out a knife and waved it around; she did not see Alexander with a weapon. Byrd stabbed Alexander with the knife, and walked away without saying anything. A later autopsy revealed the presence of cocaine in Alexander's blood. Byrd was arrested shortly after the stabbing at his nearby residence. A four-inch pocket knife found in Byrd's pocket that was determined to be the weapon used to stab Alexander. Byrd seemed intoxicated and smelled like alcohol. Byrd admitted that he had been drinking, and repeatedly told an investigator that "he won't be hitting me no more." He gave a statement several days later which was recorded, but the final few minutes were

missing from the tape. MHP investigator Ellis Hollingsworth testified that in the missing portion of the tape, Byrd said that Alexander did not have a weapon and had not threatened to kill Byrd. He stated that, in the past year, Alexander sometimes had just "snapped" and jumped on him, and that this had happened twice in the past couple of months, including one recent incident when Alexander had struck him with a beer bottle. At trial, Byrd called Alexander's girlfriend to testify about one of those incidents. The statement from an absent witness was admitted stating Byrd had stabbed Alexander after Alexander had grabbed Byrd by the collar. The jury was instructed on murder, manslaughter, and self-defense, and it found Byrd guilty of manslaughter

HELD: (1) Byrd argued that his counsel was ineffective for asserting the theory of self-defense rather than accident. He also asserted that counsel failed to argue that Alexander, not Byrd, was the aggressor. However, Byrd points to nothing in the record supporting his allegation that his attorney's strategy of asserting self-defense rather than accident was prejudicial. Nothing in the record indicates that evidence existed to support an accident defense. Also, counsel thoroughly developed the theory that Alexander was the aggressor. The claim is without merit.

(2) The State presented sufficient evidence of manslaughter. Byrd and Alexander had an altercation during which Byrd waved a knife around and then stabbed Alexander. A rational jury could find that Byrd acted in the heat of passion or under a bona fide, but unfounded, belief that the stabbing was necessary to prevent great bodily harm. There was no evidence that Alexander had a weapon. Byrd never claimed to police that acted in self-defense or was ever in fear for his life. Byrd, at 5'7" and 170 pounds, was considerably larger than Alexander, who was 5'6" and 124 pounds.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101845.pdf>

Carl Richard Cook v. State, No. 2012-CT-01553-SCT (Miss.Ct.App. March 12, 2015)

[On rehearing, the style of the case was changed from ***Cook v. Rankin County*** to ***Cook v. State***. No other major changes from opinion issued on October 16, 2014.]

CASE: Misdemeanor DUI First Offense

SENTENCE: 48 hours, suspended, and a \$1,000 fine, with \$500 suspended

COURT: Rankin County Circuit Court

TRIAL JUDGE: Hon. John Huey Emfinger

APPELLANT ATTORNEY: Clarence Terrell Guthrie, III

APPELLEE ATTORNEY: Michael A. Boland, Richard H. Wilson

DISTRICT ATTORNEY: Michael Guest

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

ISSUE: Whether law enforcement officers in Mississippi may conduct an investigatory stop on a vehicle based on an anonymous tip that lacks any corroboration.

FACTS: On March 12, 2011, an officer received a call from dispatch to be on the lookout for a vehicle that was driving erratically and the driver of the vehicle was possibly flashing a badge of some sort. The officer did not know who made the initial call; to his knowledge, the tip was from an anonymous caller and was uncorroborated. The call described a gray Chevy Avalanche, and gave the license-plate number. The officer saw a vehicle matching the description and starting following it. The officer did not see the driver flash a badge of any sort or drive erratically. Nevertheless, the officer stopped the Avalanche and subsequently arrested Carl Cook for DUI. Cook was convicted in justice court and appealed for a de novo trial in county court. Cook argued the anonymous tip that led to the investigatory stop violated his 4th Amendment rights against illegal search and seizure. Cook then appealed to circuit court, but the court affirmed the conviction and found constitutional arguments raised by Cook to be waived as Cook failed to raise a contemporaneous objection at the justice court. Cook again appealed. The COA also affirmed, holding, first that the constitutional issues were not waived, but there was no error. The COA found that the stop did not violate Cook's 4th Amendment rights. Essentially, COA found that there was sufficient indicia of reliability when the officers located a vehicle matching the description of Cook's vehicle. Further, the court held that the behavior reported – reckless driving and impersonating a law enforcement official– justified the investigatory stop to resolve the ambiguous situation." Cook appealed once more and the SCT granted certiorari.

HELD: One anonymous caller reported a person driving erratically and flashing what appeared to be some type of badge at other drivers. This behavior was never observed by the officers prior to stopping Cook. Under these facts, the anonymous tip lacks the indicia of reliability. The officers here failed to take further action to corroborate the criminal activity reported in the tip prior to stopping Cook. Without taking further action to corroborate the criminal activity reported, the officers did not have reasonable suspicion to stop Cook. An accurate description of Cook's vehicle and location was insufficient.

“Further, permitting a stop solely on an anonymous tip such as the one here can open the door for legal stops based on tips provided by persons with intent to harass or embarrass others... To be clear, however, today's opinion does not stand for the proposition that any anonymous tip, standing alone, will not sufficiently justify a search. For example, a report of someone intending to carry out a mass shooting would not require the same indicia of reliability as a report of an erratic driver.”

Pierce, Justice, Dissenting:

Justice Pierce dissented, arguing that although seldom should an anonymous tip justify an investigatory stop, the facts in this case did. Here, the report provided the vehicle's location and gave a very specific description of the vehicle—its make, model, color, and license-plate number. The officer followed the vehicle and verified the license-plate number. Although he observed no erratic driving, he was concerned with the report that the driver had flashed what purported to be a law-enforcement badge at another motorist. He felt obligated to stop the vehicle to investigate in order to find out "if there was a police officer in some distress, a police officer in route to something, . . . or if somebody was impersonating a police officer." The stop was justified under the community-caretaking function of police. “..[A] reasonable officer could not have pursued any other prudent course.”

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO97124.pdf>

March 26, 2015

Robert Patrick Terrell v. State, No. 2014-KA-00157-SCT (Miss. March 26, 2015)

CASE: Mail Fraud, Conspiracy to Commit Mail Fraud, Fraudulent Use of Identity, Conspiracy to Commit Fraudulent Use of Identity, Timber Theft, Conspiracy to Commit Timber Theft, False Pretense, and Conspiracy to Commit False Pretense.

SENTENCE: N/A – Direct Appeal alleging double jeopardy

COURT: Jefferson Davis County Circuit Court

TRIAL JUDGE: Hon. Anthony Alan Mozingo

APPELLANT ATTORNEY: J. M. Ritchey

APPELLEE ATTORNEY: LaDonna C. Holland

DISTRICT ATTORNEY: Haldon J. Kittrell

DISPOSITION: Appeal Dismissed Without Prejudice. Coleman, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Lamar, Kitchens, Chandler, Pierce and King, JJ., Concur.

ISSUES: (1) Whether Terrell's appeal was properly before the Court, and (2) whether the trial court erred in failing to stay the case pending appeal.

FACTS: After Robert Terrell was charged in a 20 count indictment, he filed several motions to quash, consolidate, or dismiss various counts, claiming that many charges would result in a double jeopardy violation. The trial judge denied his motions. At the end of the hearing, Terrell's counsel indicated his intent to appeal, and the trial court referenced an interlocutory appeal. Terrell's counsel interrupted the court, saying he considered the court's ruling to be a final judgment on the double jeopardy claim and that the appeal would not be interlocutory. The court also refused a stay pending appeal, but apparently granted a continuance. Terrell filed a notice of appeal the following day.

HELD: (1) Because Terrell is appealing a pretrial order, it is certainly an interlocutory appeal. To appeal an interlocutory order, the party appealing must file a petition for permission to appeal with the clerk of the Supreme Court under MRAP 5. Since Terrell failed to do so, the Court declined to consider his appeal.

(2) Had Terrell properly petitioned the Court for interlocutory appeal, he could have requested a stay of the trial court proceedings. Regardless, the point is moot because the trial has been continued pending the appeal.

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO101900.pdf>

SCT POST-CONVICTION CASES:

Donald Keith Smith v. State, No.2012-CT-00159-SCT, consolidated with, No. 2012-CT-00926-SCT (Miss. October 30, 2014)

CASE: PCR—2 counts of Kidnapping, 1 count of Armed-Carjacking, 1 count of Felony Fleeing
SENTENCE: Counts I and II: 30 years, 18 to serve, 12 suspended; Count III: 30 years, 18 to serve, 12 suspended; Count IV: 5 years. All sentences to run concurrently.

COURT: Jackson County Circuit Court

TRIAL JUDGE: Hon. Dale Harkey, Hon. Robert P. Krebs

APPELLANT ATTORNEY: Donald Keith Smith (Pro Se)

APPELLEE ATTORNEY: Lisa L. Blount

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

ISSUES: (1) Whether the PCR was barred as a successive writ, and (2) whether Smith was entitled to a mental evaluation

FACTS: On September 2, 2007, Donald Smith held Dr. Evalyn Jerkins and Rebecca Alleneder at knife point in Dr. Jerkins's car. He then failed to obey police officers' directives to stop the car. He subsequently pled guilty. Before Smith's plea, the trial court ordered a mental evaluation of Smith that never was performed. The record is silent as to the reason the trial court ordered the mental evaluation. Smith timely filed two PCRs. The first, filed in December 2011, raised issues concerning the armed-carjacking conviction; the circuit court summarily dismissed this claim. He filed a notice of appeal in January 2012 and a second PCR in February 2012. Smith argued in the second PCR motion that he was entitled to a competency hearing prior to entering his guilty plea; that there was not a proper factual basis for his guilty plea; that his counsel was ineffective; and that cumulative error resulted in deprivation of his fundamental rights. The circuit court summarily dismissed the second PCR as a successive writ, determining that no reasonable ground existed to indicate that Smith was incompetent. Smith's appeals were consolidated. The COA first found that Smith's claim that he was entitled to a mental evaluation was barred as a successive writ, and secondly held that since nothing in the record indicated that the circuit court made the threshold finding that reasonable grounds existed to question Smith's competency, URCCCP Rule 9.06 did not apply. *Smith v. State*, No. 2012-CP-00159-COA (Miss. Ct. App. October 29, 2013). The SCT granted certiorari.

HELD: (1) Questions regarding a defendant's fundamental rights are excepted from procedural bars. The constitutional right not to be tried or convicted while incompetent is a fundamental right. The COA erred finding Smith's successive writ procedurally barred. No unlawful incarceration is constitutional.

(2) Once the trial court has reasonable grounds to believe a defendant is incompetent, Rule 9.06 mandates that the trial court shall order a mental evaluation followed by a competency hearing to determine whether the defendant is competent to stand trial. It is implied that once an evaluation is ordered, the trial judge has reasonable grounds to believe the defendant is incompetent. The record

is unclear on whether the mental evaluation (at Smith's expense) was ordered for the purpose of determining Smith's competence to stand trial or for other purposes, as the order did not state a reason. Because of the significant ambiguity surrounding the reason the trial court ordered a mental evaluation, the court reversed the COA and remanded for an evidentiary hearing.

...[I]f, after the evidentiary hearing, the trial court determines that the purpose of the court-ordered mental evaluation was to determine Smith's competency to stand trial, Smith's conviction cannot stand, and Smith must be either retried or institutionalized following a mental evaluation and competency hearing under Rule 9.06.

Coleman, Justice, Dissenting:

Justice Coleman, dissented, arguing the COA should be affirmed. There was nothing in the record to indicate that Smith's competency to stand trial was questioned. If the trial court's order allowing the defendant a mental exam was pursuant to Rule 9.06, then the evaluation would not have been at Smith's expense. Further, Justice Coleman reasoned that the doctrine of *res judicata* operates to bar Smith's second PCR because it bars the petitioner from litigating issues that he placed or could have placed before the court in his first petition. He believed that the doctrine of *res judicata* places a substantive – not procedural – bar, and it should apply it even when a petitioner asserts a fundamental right.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO96908.pdf>

Frederick Bell v. State, No. 2013-KA-00389-SCT (Miss. January 8, 2015)

CASE: PCR – Capital Murder

SENTENCE: Life w/o Parole

COURT: Grenada County Circuit Court

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

APPELLANT ATTORNEY: Glenn S. Swartzfager

APPELLEE ATTORNEY: Elliott George Flaggs

DISTRICT ATTORNEY: Doug Evans

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

ISSUE: Whether §99-19-107, requiring a sentence of life imprisonment without parole in the event the death penalty is held unconstitutional, applies to Bell's case.

FACTS: Frederick Bell was convicted of capital murder/robbery in the shooting death of Robert C. "Bert" Bell at the Stop-and-Go in Grenada County on May 6, 1991. Bell's conviction was affirmed, and his first PCR, which was filed in 2001, was denied in 2004. His petition for federal habeas review

was denied in 2006. The U.S. Supreme Court's decision in *Atkins v. Virginia*, prohibiting the execution of the mentally retarded, was decided in 2002. Bell later petitioned the SCT to allow a successive PCR based on an *Atkins* claim. The SCT allowed the PCR on that issue alone. [*Bell v. State*, 66 So.3d 90 \(Miss. February 3, 2011\)](#). On remand, doctors determined Bell was indeed mentally retarded under *Atkins*. The State filed a motion to resentence Bell, and the trial court, over objection, sentenced him to life without parole.

HELD: Bell argued he was entitled to be sentenced to life with the possibility of parole. Section 99-19-107 required a life without parole sentence only when the death penalty is declared unconstitutional. *Atkins* was not a wholesale declaration that the death penalty was unconstitutional, but instead held that mentally retarded defendants were not eligible. The Court noted the inconsistent case law dealing with §99-19-107. The Court concluded the legislative intent of the statute was to resentence a defendant to life without parole only when the death penalty itself was ruled unconstitutional. “Thus, an individual sentenced to death who is later determined to be mentally retarded pursuant to *Atkins* should be resentenced, not automatically given a sentence of life without parole.”

This was the original interpretation of §99-19-107 found in *Abram v. State*, 606 So. 2d 1015, 1039 (Miss. 1992). However, the Court overruled *Abram* in *Foster v. State*, 961 So. 2d 670 (Miss. 2007). After a discussion on the doctrine of *stare decisis*, the Court concluded the doctrine did not prevent the Court from going back to its original interpretation in *Abram*. Therefore, Bell should be resentenced to life with the possibility of parole, as death and life were the only two sentencing options at the time Bell was convicted and sentenced. Section 99-19-107 does not apply, as the death penalty was declared unconstitutional to only a certain class of defendants.

Pierce, Justice, Dissenting:

Justice Pierce dissented, believing the Court correctly interpreted Section 99-19-107 in *Foster*. “As *Foster* concluded, Section 99-19-107 intends to provide for an alternative sentence of life without the possibility of parole for those whose death sentences have been deemed unconstitutional.”

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO99789.pdf>

Antonio Williams v. State, No. 2013-CT-00575-SCT (Miss. February 26, 2015)

CASE: PCR – Burglary x2

SENTENCE: 3 years on one count and 5 years suspended on the other

COURT: Hon. Jeff Weill, Sr.

TRIAL JUDGE: Hinds County Circuit Court

APPELLANT ATTORNEY: Antonio Williams (Pro Se)

APPELLEE ATTORNEY: Stephanie B. Wood

DISPOSITION: Dismissal of PCR Vacated, but judgment Affirmed. Lamar, Justice, for the Court.

Waller, C.J., Dickinson and Randolph, P.JJ., Kitchens, Chandler, Pierce, King and Coleman, JJ, Concur.

ISSUE: Whether the COA erred in finding the circuit court did not have jurisdiction to rule on petitioner's motion to vacate.

FACTS: On July 27, 1982, Antonio Williams was convicted of two counts of burglary. In 1987, he was convicted of murder. Based on his two prior burglary convictions, Williams was sentenced to life without parole. Williams lost both his direct appeal in 1990 and a PCR regarding the murder in 2003. Williams filed a second PCR in 2006, which was denied. Another PCR was denied in 2009. The claims were addressed on the merits even though Williams failed to obtain permission to file the PCR. On May 24, 2012, Williams filed a motion to vacate the judgment and sentence with the circuit court, alleging his burglary convictions were involuntary due to ineffective assistance of counsel for failing to raise a speedy trial issue and coercing a plea. Williams alleged that because of this, his sentence of life without parole for murder was illegal. The circuit judge treated the filing as a PCR, and denied it, apparently on the merits. On July 12, 2013, Williams filed in the SCT a third motion for leave to file a PCR. This was also denied. Williams then went back and appealed the circuit court's judgment dismissing his 2012 motion to vacate. The COA dismissed the appeal, holding that the circuit court did not have jurisdiction to rule because Williams failed to get permission from the SCT to file. [*Williams v. State*](#), No. 2013-CP-00575-COA (Miss.Ct.App. June 3, 2014). Williams again appealed.

HELD: The COA erred in finding the circuit court did not have jurisdiction to hear his motion. It was clear from Williams's motion that he was challenging his burglary convictions and not his murder conviction. Williams never appealed his burglary convictions, so he did not need permission to file a PCR. Regardless, the circuit judge did not err when he denied the motion. The record does not support his claim of a speedy trial violation or ineffective assistance of counsel. The COA incorrectly found the PCR successive writ barred, but correctly found it was time-barred.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101688.pdf>

SCT YOUTH COURT CASES:

In the Interest of J.P. a Minor: R.P. and D.O. v. State, No. 2013-CA-00688-SCT (Miss. November 13, 2014)

CASE: Civil - Juvenile Justice

COURT: Jefferson Davis County Youth Court

TRIAL JUDGE: Hon. Joe Dale Walker

APPELLANT ATTORNEYS: Jacob Wayne Howard, Robert B. Mcduff, Sibyl Byrd, David Neil McCarty, Jody Edward Owens, II, Vanessa Judith Carroll

APPELLEE ATTORNEYS: B. Scott Buffington, Christopher Randall Purdum

TRIAL ATTORNEYS: Reginald Blackledge, B. Scott Buffington, Christopher Randall Purdum

DISPOSITION: Youth Court Decision Reversed and Rendered. Kitchens, Justice, for the Court. Waller, C.J., Dickinson, P.J., Lamar, Chandler, Pierce, King and Coleman, JJ., Concur. Randolph, P.J., Concur in Part and in Result Without Separate Written Opinion.

ISSUES: (1) Whether the youth court erred in J.P.'s father to pay for detention for 5 days when he was never adjudicated a delinquent, and (2) whether the youth court erred in requiring both parents to pay for J.P.'s detention despite never having been declared delinquent.

FACTS: In 2011, J.P. was arrested for the possession of marijuana and was required to wear an ankle monitor. J.P. was brought back to youth court because it was alleged that he repeatedly had allowed the monitor to power down on weekends, making him impossible to track. J.P. and his father, D.O., were issued summonses to appear at a hearing on this violation. They were served two days before the hearing. J.P. was assigned court-appointed counsel for the hearing. Although no petition for contempt had been filed against J.P., the court ruled that it had the power *sua sponte* to find him in contempt and to sentence him to a juvenile detention facility for 5 days. D.O., was ordered to pay the costs associated with J.P.'s detention. On June 21, 2012, J.P. was arrested for possession of marijuana and a handgun. He was placed in the temporary custody of the Pike County Juvenile Detention Center until a detention hearing could be held on June 25, 2012. After the detention hearing, of which there is no transcript, the court ordered that J.P. would remain in the detention center until an adjudicatory hearing could be conducted. A prosecutorial petition was to be filed against J.P. within 5 days. J.P.'s parents (R.P. and D.O.) were ordered to pay \$55.00 per day each while J.P. was in juvenile detention. The State failed to file a petition. On August 13, 2012, the youth court ordered that a formal petition be filed against J.P. J.P. was then charged with contempt of court, but the charging document offered no facts in support of the petition. Summonses were issued to J.P. and his parents two days before the hearing date, but the court, on its own motion, ordered a continuance of the matter until October 2, 2012, J.P.'s 18th birthday. No record was made of this hearing. The court ordered J.P.'s mother and father to pay \$600 each per month to cover the costs of holding J.P. in the detention center. The adjudication hearing was again postponed, and the court transferred J.P. to the county jail because he had reached the age of eighteen. On October 18th, counsel for J.P. filed a Motion for Immediate Release, arguing that J.P.'s detention was unlawful. A hearing was held on the motion on October 31st, after which the court released J.P. from custody and terminated its jurisdiction over him. On January 16, 2013, R.P. filed a motion to vacate the order to pay the cost of detention. The court slightly reduced the amount owed, but upheld the majority of the costs. Both parents filed separate appeals from the order assessing \$9,380 against them for the detention of J.P., which occurred despite his never having been adjudicated delinquent. D.O. alone is appealing the earlier decision of the same court which charged him \$650 for the cost of holding his son, J.P., in a juvenile detention facility for five days. The cases were consolidated.

HELD: (1) D.O. argued that the youth court did not have jurisdiction to commit J.P. to the detention center for the ankle monitor violation, and therefore did not have the authority to order D.O. to pay \$650 for the cost of that detention. The SCT agreed. The chancellor was without authority to detain J.P. under the Youth Court Law. The proceedings against J.P. was in the nature of a contempt action, as he was already adjudicated on the marijuana charge. Although the court had the authority to detain J.P., the court failed to follow the requirements of § 43-21-613(1). No petition was filed and no copy

of the original disposition order was in the record. Accordingly, the youth court was without jurisdiction to modify its previous order.

D.O. further argued that he was given insufficient notice of the proceedings in 2011, that he was given insufficient notice about the penalties he might be facing, and that he was not informed that he had the right to counsel or appeal. D.O. was not given the required 3 day notice, but D.O. did appear, so he waived the insufficient notice. However, D.O. was not notified that he could be charged for J.P.'s detention, nor was he told the cost, nor was he given the opportunity to object to the charge. Since the youth court had no jurisdiction to detain J.P., it certainly was without jurisdiction to charge his father for the cost of that unlawful detainment.

(2) Despite spending 103 days in juvenile detention and 30 days in the county jail after turning 18, J.P. was never adjudicated delinquent. "...[I]t simply defies logic that a court could be able to commit a child to a detention facility without having found him or her guilty of anything, *and* be able to make the child's parents pay for it." [emphasis supplied]. Without an adjudication of delinquency, the youth court's assessment of costs against J.P.'s parents violated their rights to due process of law.

The Court went on to discuss the many sections of the youth court law that were violated. Even had J.P. been properly adjudicated delinquent, the youth court's procedure for assessing costs against J.P.'s parents falls short of protecting their basic due process rights. They were able to contest the sanction only when they obtained *pro bono* legal counsel after J.P. had spent more than 90 days in juvenile detention. "Mississippi's Constitution forbids the assessment of costs against adults who are charged with crimes but who are not convicted. The same rule applies to juveniles."

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO99052.pdf>

In the Interest of S.M.K.S., A Minor v. Youth Court of Union County, Mississippi, No. 2012-CT-01237-SCT (Miss. January 22, 2015)

CASE: Resisting Arrest

SENTENCE: Adjudicated Delinquent, 6 months probation and anger management counseling

COURT: Union County Youth Court

TRIAL JUDGE: Hon. Frederick Robbins Rogers

APPELLANT ATTORNEY: David G. Hill and Tiffany Leigh Kilpatrick

APPELLEE ATTORNEY: Stephen P. Livingston

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

ISSUE: Whether police had probable cause to arrest S.S. for anything, rendering a conviction for

resisting arrest improper since the arrest was unlawful.

FACTS: Officer Ben Kent of the New Albany PD, responded to a report of shots fired by suspects in a tan Cutlass. Kent knew where he could find a tan Cutlass and drove in that direction. When he arrived, two boys were standing next to a tan Cutlass. With his weapon drawn, he told 13-year-old S.S. and his 16-year-old brother D.S. to display their hands to make sure they were not armed. Neither complied. Both boys were told to place their hands on the car. Kent stated S.S. said, "I'm not putting my hands on the car." Kent then holstered his weapon and put S.S. "over the hood of the car" to check if S.S. had any weapons. Other officers arrived at the scene. One of those officers, Officer Gabe Wilson, stated S.S. was doing everything he could to not put his hands behind his back – kicking, yelling, punching. S.S. had to be eventually tased. S.S. then stopped resisting, was handcuffed and arrested. The youth court found S.S. delinquent for resisting arrest. The COA affirmed, finding Kent did not need probable cause to question S.S., and S.S. could have been arrested for a breach of the peace when S.S. failed to comply with Kent's order to place his hands on the car. [*In the Interest of S.M.K.S.*](#), No. 2012-CA-01237-COA (Miss.Ct.App. January 7, 2014). The SCT granted certiorari.

HELD: Essentially, S.S.'s argument was that police did not have probable cause to arrest him for anything. Therefore, Kent's actions in arresting him were unlawful, and one cannot be properly charged and convicted of resisting an unlawful arrest. However, the SCT found S.S. was charged with disorderly conduct and resisting arrest. The Court found the arrest for disorderly conduct was lawful, as the officer personally observed S.S. committing what he perceived to be a breach of the peace. The evidence was sufficient to adjudicate S.S. as a delinquent.

We find that S.S.'s refusal to "promptly comply with or obey a request, command, or order of" Officer Kent—"a law enforcement officer, having the authority to . . . arrest any person for a violation of the law"—constituted a circumstance "which may cause or occasion a breach of the peace," as two of the other officers at the scene described the situation as "very hostile" and as "mass chaos." So Officer Kent, as a New Albany police officer, lawfully arrested S.S. for disorderly conduct when S.S. failed to obey Kent's commands to show his hands or to place his hands on the car under circumstances that could lead to a breach of the peace, which is all that is required under the disorderly conduct statute.

Waller, Chief Justice, Specially Concurring:

Chief Justice Waller concurred in the ruling, but wrote to express his belief that S.S. was never seized within the meaning of the 4th Amendment. "I would find S.S. was never seized because he never actually submitted to Officer Kent's show of force." Police do not need probable cause to approach an individual while investigating criminal activity. S.S. was not unlawfully detained at any time prior to his refusal to obey Kent's orders. While Kent testified that he believed D.S., and not S.S., was involved in the shooting, a reasonable officer under the circumstances would conclude that S.S. may have had information regarding the shooting. Kent was justified in approaching S.S., and due to the threat posed by a potential armed gunman in the area, Kent acted reasonably in having his weapon drawn as he approached S.S.

Dickinson, Presiding Justice, Dissenting:

Justice Dickinson dissented, arguing that the assumption S.S. was arrested for disorderly conduct was never asserted at trial. The petition in youth court never charged S.S. with disorderly conduct. Officer Kent never expressed a concern that S.S. had a weapon. The officer specifically stated he did not believe S.S. had fired the weapon. Kent had no probable cause or reasonable suspicion concerning S.S. At the youth court hearing, the prosecutor never argued S.S.'s refusal to put his hands on the car was likely to lead to a breach of the peace.

According to the majority, a citizen standing on a public sidewalk who is committing no crime, who has committed no crime and who is not even suspected of having committed a crime may properly be arrested for "*disorderly conduct*" for refusing to put his hands on a car to be searched by a police officer *who admits* he has no probable cause or reasonable suspicion to conduct the search. [emphasis supplied].

S.S. committed no crime to be arrested for, therefore he could not be guilty of resisting an unlawful arrest. "But I would reverse it for the additional reason that police officers who lack any probable cause or reasonable suspicion concerning a citizen have no right to order that citizen to put their hands on a car to be searched. And I am astonished that a majority of this Court believes otherwise."

Chandler, Justice, Dissenting:

Justice Chandler also dissented, but also wanted to express his understanding of the difficult situations law enforcement officers encounter. "However, with full appreciation of this challenge, I must agree with Justice Dickinson that, in this instance, the officer lacked probable cause and reasonable suspicion to arrest or perform a *Terry* stop on the youth...I cannot endorse the creation of a circular justification for such stops and arrests."

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100928.pdf>

MISCELLANEOUS CASES

Frank Sanders Tipton v. State, No. 2013-CA-00415-SCT (Miss. October 30, 2014)
[original opinion affirming the case from March 20, 2014 was withdrawn]

CRIME: Extortion

SENTENCE: One year in MDOC and 4 years of house arrest followed by 2 years of PRS

COURT: Jackson County Circuit Court

TRIAL JUDGE: Hon. Robert P. Krebs

APPELLANT ATTORNEYS: Thomas M. Fortner & Ross Parker Simons

APPELLEE ATTORNEYS: Melissa Winfield & John R. Henry, Jr.

TRIAL ATTORNEYS: Thomas M. Fortner, Ross Parker Simons, Erik M. Lowery, Roger Googe

DISPOSITION: Reversed and Rendered. Kitchens, Justice, for the Court. Waller, C.J., Dickinson, P.J., Chandler and King, JJ., Concur. Coleman, J., Dissents with Separate Written Opinion Joined by

Randolph, P.J., Lamar and Pierce, JJ.

ISSUE: Whether a person wrongfully convicted of a crime and placed under house arrest is entitled to compensation under the wrongful imprisonment statute.

FACTS: Tipton was convicted of extortion and sentenced to one year in MDOC and four years of house arrest (Intensive Supervision Program or ISP), followed by two years of post-release supervision. Tipton appealed and the SCT reversed and vacated Tipton's conviction. Having already served the entirety of his sentence, Tipton filed a complaint seeking compensation for wrongful incarceration. The trial court awarded compensation for the year spent in MDOC, but refused compensation for the period of house-arrest. Tipton appealed. The Supreme Court initially held that the house-arrest statute is considered an alternative to incarceration, and the statute providing for compensation for wrongful imprisonment states a person has to be imprisoned for the statute to apply. A motion for rehearing was filed.

HELD: Although ISP is called an "alternative to incarceration," inmates in that program are under the complete jurisdiction of the MDOC. House arrest required Tipton to submit completely to the MDOC, giving the State access to his home and his body; and he was required to forego several significant constitutional rights.

We find that the confinement that inmates experience in the ISP constitutes "imprisonment" under Mississippi's wrongful conviction compensation statutes. Inmates who have served time in the ISP are entitled to compensation for that time if they were wrongfully convicted.

Coleman, Justice, Dissenting:

Justice Coleman dissented, arguing that, as a matter of law, house arrest does not equate to incarceration, and incarceration is required to receive compensation. He believed the clear intent of the compensation statute is to help those who have been victimized by being unable to have regular contact with the free world by being imprisoned. In Tipton's criminal appeal, he argued house arrest and incarceration services cannot be synonymous as house arrest may be used as an alternative to incarceration. Judicial estoppel should prevent him from arguing just the opposite in his civil suit for compensation.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO97325.pdf>

Conley v. Epps, No. 2012-CT-01914-SCT (Miss. November 6, 2014)

CASE: Civil – Challenged decision of MDOC Administrative Remedies Program

COURT: Sunflower County Circuit Court

TRIAL JUDGE: Hon. Richard A. Smith

APPELLANT ATTORNEY: Glen Conley (Pro Se)

APPELLEE ATTORNEYS: R. Stewart Smith, Jr. and James M. Norris, Anthony Louis Schmidt, Jr.

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

ISSUE: Whether MDOC erred in denying petitioner a parole eligibility date.

FACTS: Glen Conley was convicted of capital murder and sentenced to life without the possibility of parole. The murder occurred on May 23, 1994. At that time, there were only two penalties for capital murder: death and life with the possibility of parole. Before he was convicted, § 99-19-101 was amended to include life without parole. Conley was sentenced on July 3, 1998, to life without parole. Conley raised the issue of his sentence on direct appeal and lost. *Conley v. State*, 790 So. 2d 773 (¶123) (Miss. 2001). Conley asked MDOC for a parole-eligibility date. When this request was denied, Conley utilized the Administrative Remedies Program to ask for a parole-eligibility date. This request was also denied. Conley appealed this decision to the circuit court, which dismissed his appeal. Conley now argued on appeal that his sentence is unconstitutional as a violation of the Ex Post Facto Clause. The COA affirmed the trial court, and held that Conley was barred from relitigating the issue under the doctrine of res judicata. The COA disagreed with Conley's argument that his appeal was a civil claim of equal protection rather than a criminal issue involving ex post facto claims. [*Conley v. Epps*](#), No. 2012-CP-01914-COA (Miss.Ct.App. December 3, 2013). The SCT granted certiorari.

HELD: The parole board lacked the authority to review Conley's sentence of life without parole. By applying the doctrine of res judicata, the COA treated Conley's complaint as a PCR. Treating Conley's complaint as a PCR was inappropriate because Conley sought judicial review of the parole board's denial of his application for a parole eligibility date. This was essentially the same issue he raised on direct appeal, but claimed MDOC's decision to enforce an illegally imposed sentence was a denial of due process. In Conley's direct appeal, the Court did not find the sentence illegal. Therefore, the parole board did not have the authority to grant the relief Conley requested.

DICKINSON, PRESIDING JUSTICE, SPECIALLY CONCURRING:

Justice Dickinson agreed with the majority that the Court could not reach the merits of Conley's ex post facto claim. However, he believed the SCT erred in its ex post facto decision in Conley's direct appeal. In Conley's direct appeal, the Court found that adding the life-without-parole sentence to capital murder was ameliorative, as it did not raise the maximum possible punishment. However, the Court failed to take into consideration the changes to the parole statute. The amendments, which removes parole eligibility for anyone sentenced to life for capital murder, occurred after Conley committed the offense. This amendment not only removed parole eligibility for a crime where it previously had existed, but it also effectively increased the mandatory minimum sentence, violating the ex post facto clause.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO99029.pdf>

Rebecca Hentz v. State, No. 2013-CA-01217-SCT (Miss. December 11, 2014)

CASE: Civil - Expungement

COURT: Tallahatchie County Circuit Court

TRIAL JUDGE: Hon. James McClure, III

APPELLANT ATTORNEY: Tommy Wayne Defer

APPELLEE ATTORNEY: Lisa L. Blount

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

ISSUE: Whether a convicted felon is entitled to an expungement of a conviction after receiving an executive pardon.

FACTS: On September 25, 2000, Rebecca Hentz pled guilty to one count of attempted manufacture of methamphetamine. She was sentenced to 30 years, suspended, unsupervised probation, and a \$5,000 fine. On January 10, 2012, Governor Haley Barbour granted Hentz a "full, complete, and unconditional pardon" for the attempt-to-manufacture-methamphetamine conviction. Hentz later filed a Motion to Expunge Record, claiming that the records of her conviction should be expunged because she had received a pardon. After hearing oral argument from Hentz's counsel, the trial court denied her motion. Hentz appealed.

HELD: "Because there is no statutory basis in Mississippi for an expungement after a criminal defendant receives an executive pardon, the trial court in today's case did not err in denying Hentz's motion to expunge her criminal record."

Randolph, Presiding Justice, Specially Concurring:

Justice Randolph pointed out that this issue was recently decided by the Court (5-4) in *Polk v. State*, No. 2013-CA-00701-SCT (Oct. 9, 2014). "Today, four justices agree to affirm the trial court's judgment, and four justices disagree. Thus, the judgment of the trial court should be affirmed."

Kitchens, Justice, Dissenting:

Justice Kitchens dissented, arguing Mississippi's common law allows Hentz an expungement of her criminal record based on the pardon. §99-15-52(2) provides that, "[u]pon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped or there was no disposition of such case." He believed this statute, coupled with common law, authorizes expungement after a gubernatorial pardon.

To read the full opinion, click here:

<http://courts.ms.gov/images/Opinions/CO96526.pdf>

Harvey Williams, Jr. a/k/a Smokie v. State, No. 2013-IA-00402-SCT (Miss. December 11, 2014)

CASE: Murder - Interlocutory Appeal

COURT: Hinds County Circuit Court

TRIAL JUDGE: Hon. Jeff Weill, Sr.

APPELLANT ATTORNEY: Charles Richard Mullins, Merrida Coxwell

APPELLEE ATTORNEY: Harold Edward Pizzetta, III, Mary Jo Woods

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

ISSUE: Whether a circuit court judge has the authority and/or jurisdiction to appoint the Mississippi Attorney General as a special prosecutor where the district attorney opposes such action.

FACTS: Harvey Williams was convicted of murder, but later had his conviction reversed and remanded by the SCT. *Williams v. State*, 54 So. 3d 212 (Miss. 2011). On remand, the DA sought an order of nolle prosequi based on "new evidence" indicating Williams may have acted in self-defense. Judge Breland Hilburn, who had presided over Williams's trial, signed an order on June 13, 2011, granting the State's nol pros motion. Two days later, however, Judge Hilburn withdrew the order. Nine months later, Judge Hilburn entered an order recusing the DA's Office and transferring the case to the AG's Office, to allow the original prosecutors from the trial, who now worked for the AG, to re-prosecute the case. A later order appointed the Public Integrity Division of the AG's Office as special prosecutor. Williams later filed a motion to dismiss the case, claiming that Judge Hilburn's original nol pros order effectively brought the case to an end and that the charges could not be revived by the judge. The case was reassigned to Judge Jeff Weill. At a hearing, the DA expressed his objection to the AG intervening in the case. The AG's Office maintained it had the right to prosecute the case. Judge Weill agreed the nol pros ended the case, but since the DA was not going to prosecute, the AG's Office could be appointed as a special prosecutor and "pursue future prosecution of this Defendant, in its discretion." Williams filed a petition for interlocutory appeal.

HELD: "Neither the Constitution nor any case law authorized Judge Hilburn's or Judge Weill's orders appointing the Office of the Attorney General as special prosecutor to prosecute the case against Williams, where the local district attorney, in his discretion, had made the decision not to prosecute." Williams's murder prosecution was not a matter of state-wide interest. The Mississippi attorney general is without authority to direct, control, or override the official actions of a local district attorney and has no authority over him or her. The DA did not request the AG's assistance in the case. The appointment of the AG's Office is reversed and rendered.

Pierce, Justice, Dissenting:

Justice Pierce dissented, first arguing the circuit court did have the right to rescind the nol pros order. After Judge Hilburn rescinded the order, the DA informed the court his office would not prosecute the matter. “At that point, [the DA] became ‘absent’ for purposes of Mississippi Code Section 25-31-21, which contemplates such a circumstance.” Judge Hilburn then acted accordingly to law in transferring and appointing the AG to the case.

Coleman, Justice, Dissenting:

Justice Coleman dissented, arguing that the Attorney General's authority to intervene comes from the Constitution and common law, not from statutes. The AG has the power, through the Constitution and common law, to initiate or intervene should he so chose.

To read the full opinion, click here:

<http://courts.ms.gov/images/Opinions/CO99909.pdf>

Tyrone Lewis, Sheriff Hinds County, Mississippi v. Hinds County Circuit Court, No. 2013-CA-01842-SCT (Miss. February 19, 2015)

CASE: Civil – Sheriff’s appeal of circuit court’s order regarding the court’s authority over bailiff’s

COURT: Hinds County Circuit Court

TRIAL JUDGE: Hon. William A. Gowan, Jr.

APPELLANT ATTORNEY: Dana P. Sims

APPELLEE ATTORNEY: Anne Marie Livingston

DISPOSITION: Vacated in Part and Rendered. Coleman, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Lamar, Kitchens, Chandler, Pierce and King, JJ., Concur.

ISSUES: (1) Whether §19-25-19 authorizes a sheriff to appoint, assign, and compensate bailiffs without the express permission of the circuit court, (2) whether §19-25-21 authorizes a sheriff to enforce the training requirements of §19-25-21 and §45-6-11 for law enforcement officers serving as bailiffs, and (3) whether the circuit court's 1996 and 2012 orders violated the doctrine of separation of powers under Article 1, Sections 1 and 2 of the Mississippi Constitution.

FACTS: A dispute arose in Hinds County over the sheriff’s authority over court bailiffs. Sheriff Lewis attempted to make hiring, firing, and compensation changes affecting bailiffs. In response, the circuit court issued an Order and Opinion in 2012 upholding a previous Order from 1996, which found that bailiffs fell under the authority of the judiciary rather than the sheriff. Lewis sought relief, but the court only granted him the power to compensate bailiffs if he followed the terms of the 1996 Order. The Order addressed the hours, uniform, discipline, and duties of bailiffs, specifically finding that the bailiffs were not law enforcement. The sheriff could only use them for county emergencies. Lewis appealed.

HELD: (1) The plain language of §19-25-19 empowers a sheriff to compensate and remove deputies at pleasure and makes no distinction between deputies and bailiffs. The only qualifier on the sheriff’s

power is that the deputies must be assisting the sheriff in carrying out his duties. §19-25-35 requires the sheriff to attend all sessions of court with a sufficient number of deputies or bailiffs. Therefore, the sheriff has the authority to compensate, appoint, and remove bailiffs, as bailiffs are deputies of the sheriff. The circuit court may remove a bailiff after a hearing and a showing that removal will serve the public interest.

(2) The sheriff argued that as law enforcement officers, bailiffs must satisfy the required course curriculum and qualifications under §19-25-21 and §45-6-11. Since bailiffs have law enforcement duties, they are law enforcement officers. Therefore, they are subject to law enforcement training and certification requirements.

(3) The sheriff is a member of the executive branch of government. Although bailiffs work in a courtroom, they are members of the executive branch. The 1996 Order and 2012 Order and Opinion are void to the extent that they contradict statutory law. It is not within the province of the court to determine the hours of a bailiff's workday. The sheriff must ensure they attend all sessions of court.

Courts have inherent power over their courtrooms, including the authority to define the attire of bailiffs and others in attendance. The duties of the bailiff may be non-judicial, since it conforms to the statutory duties of the sheriff to the court under §19-25-69. Bailiffs are always assigned to the sheriff and attend court as deputies of the sheriff. The circuit court order designating bailiffs as officers of the court and not law enforcement officers is void. §19-25-31 grants judges only the authority to appoint riding bailiffs who are compensated by the county.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101090.pdf>

Clarence Jones v. State, No. 2013-CA-01501-SCT (Miss. February 26, 2015)

CASE: Civil – Expungement

COURT: Warren County Circuit Court

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

TRIAL ATTORNEYS: Bert Carraway, Thomas M. Fortner

APPELLANT ATTORNEY: Thomas M. Fortner

APPELLEE ATTORNEY: Billy L. Gore

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

ISSUE: Whether the circuit court erred in refusing to expunge a criminal conviction after a pardon.

FACTS: In 1992, Clarence Jones pled guilty to murder and was sentenced to life. Jones's sentence was indefinitely suspended in 2004 by Governor Musgrove. He was released from prison on parole. In 2008, Governor Barbour granted Jones a pardon. In 2013, Jones petitioned the circuit court to expunge his record because he had received a full and complete pardon for his conviction. The circuit

court denied relief, finding the expungement statute did not include a pardon as a ground for expungement eligibility. Jones appealed.

HELD: The SCT recently held in a similar case that there is no statutory basis to allow a conviction to be expunged based on a gubernatorial pardon. *Polk v. State*, 150 So. 3d 967, 968 (Miss. October 9, 2014). Based on the reasoning of *Polk*, the circuit court was affirmed.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100857.pdf>

U.S. SUPREME COURT NOTES:

Carroll v. Carman, No. 14-212 (November 10, 2014). The U.S. Supreme Court held, per curiam, that government officials retain qualified immunity unless “existing precedent [. . .] placed the statutory or constitutional question beyond debate.” Pennsylvania State Troopers Jeremy Carroll and Brian Roberts, responded to a report that a car thief, Michael Zita, had fled to the home of Andrew and Karen Carman. The officers parked in a gravel area facing the side of Carman’s property. They approached the back door and knocked. Andrew Carman refused to give his name, and refused to answer when officers asked if Zita was inside. When Carman turned away, an officer grabbed his arm to keep him from possibly reaching for a weapon. Carman lost his balance and fell. Karen then came outside, identified herself and consented to a search. Zita was not found. The Carman’s filed suit under 42 USC 1983, alleging that their Fourth Amendment rights were violated when officers went to their back door instead of the front. The district court denied the Carman’s motion for judgment as a matter of law, and the jury returned a verdict in favor of the officers. Respondents appealed, and the Third Circuit reversed, holding that the “knock and talk” exception to the warrant requirement requires officers to “begin their encounter at the front door, where they have implied invitation to go.” The officers appealed, and SCOTUS reversed and remanded, holding that the Third Circuit erred when it held that Carroll was not entitled to qualified immunity.

To read the full opinion, click here:

http://www.supremecourt.gov/opinions/14pdf/14-212_c07d.pdf

Glebe v. Frost, No. 14-95 (November 17, 2014). The U.S. Supreme Court held, per curiam, that a limitation on closing argument is not a structural error, warranting automatic reversal, but rather allows the possibility that such a limitation is subject to harmless error review. Joshua James Frost assisted two individuals in a series of armed robberies and was then charged with robbery and related offenses. At trial, Frost argued (1) that the State failed to meet its burden of proving that he was an accomplice to the crimes, and (2) that he acted under duress. The trial court insisted that Frost choose between the two arguments. Frost therefore limited his closing argument to duress and was subsequently convicted. The Washington Supreme Court sustained Respondent’s conviction, even though it rejected the trial court’s view that Respondent could not simultaneously contest criminal liability and argue duress. The Washington Supreme Court held that the trial court’s error was only a mistake reviewable for harmlessness and not a mistake requiring automatic reversal. Frost then sought habeas review. The district court dismissed his petition, but the Ninth Circuit reversed and ordered the district court to grant relief, stating that the Washington Supreme Court unreasonably applied established federal law by failing to classify the trial court’s error as a mistake requiring

automatic reversal. SCOTUS reversed. The Court highlighted that only mistakes that affect the entire trial process warrant reversal, and stated that none of the Court's cases places improper restriction of argument in this category.

To read the full opinion, click here:

http://www.supremecourt.gov/opinions/14pdf/14-95_3204.pdf

Warger v. Shauers, No. 13-517 (December 9, 2014). The U.S. Supreme Court held 9-0 (Sotomayor, J., for the Court), that Federal Rule of Evidence 606(b) precludes a party seeking a new trial from using one juror's affidavit of what another juror said in deliberations to demonstrate that the other juror was dishonest during jury selection.

Petitioner Gregory Warger sued Respondent Randy Shauers in federal court for damages resulting from an auto accident. After the jury returned a verdict for Shauers, Warger was contacted by a jury member, who told him that the jury foreperson had revealed—during deliberation—that her daughter had been in a similar auto accident, and that a lawsuit would have ruined her daughter's life. Warger—with an affidavit from the juror—moved for a new trial, arguing that the jury foreperson had lied about her impartiality during voir dire. The District Court denied Warger's motion, explaining that Federal Rule of Evidence 606(b), which bars evidence about statements made during the jury's deliberation, barred any investigation into the jury member's statement. The Eighth Circuit affirmed. SCOTUS also affirmed. The Court held that Rule 606(b) applies to juror testimony during a proceeding in which a party seeks a new trial on the ground that a juror lied during voir dire. Specifically, the Court highlighted that 606(b) applies to an inquiry into the validity of a verdict and explained that Petitioner's affidavit from the juror did not fall within any exception to 606(b).

To read the full opinion, click here:

http://www.supremecourt.gov/opinions/14pdf/13-517_7148.pdf

Heien v North Carolina, No. 13-604 (December 15, 2014). The U.S. Supreme Court held 8-1 (Roberts, C. J., for the Court, joined by Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, and Kagan, JJ. Kagan, J., filed a concurring opinion, in which Ginsburg, J., joined, and Sotomayor, J., dissented), that a stop initiated by an Officer's reasonable mistake of law is not a violation of the Fourth Amendment of the United States Constitution. Nicholas Brady Heien was a passenger when stopped by a sheriff's deputy because only one brake light came on when the driver slowed down. The deputy issued a warning ticket to the driver for the brake light, he returned to the vehicle to question Heien and the driver because they appeared nervous. After the driver consented to a search of the vehicle, and Heien consented to a search of his belongings, the search revealed cocaine. Heien was charged with attempted trafficking of cocaine. The trial court his motion to suppress, and Heien pled guilty, but preserved his right to appeal the suppression decision. The North Carolina Court of Appeals reversed the trial court decision and held that the initial stop was not valid because driving with only one working brake light is not a violation of North Carolina law. The State appealed and the North Carolina Supreme Court reversed, holding that the deputy's search initiated by a reasonable mistake of law does not violate the Fourth Amendment, and affirmed the trial court's decision. SCOTUS affirmed, holding that the Fourth Amendment allows for some mistakes as long as the government official was acting reasonably and since the North Carolina Court of Appeals had never previously interpreted the brake light statute, the deputy was subjectively reasonable in his interpretation of the

law, and thus the stop was valid.

To read the full opinion, click here:

http://www.supremecourt.gov/opinions/14pdf/13-604_ec8f.pdf

Whitfield v. United States, No. 13-9026 (January 13, 2015). The U.S. Supreme Court held 9-0 (Scalia, J. for the Court), that the word "accompany" in 18 U.S.C. §2113, which creates increased penalties for actions taken during the commission of, or flight from, a bank robbery, means "to go with" even over short distances. While eluding capture after a failed bank robbery, Larry Whitfield entered the home of a 79-year-old woman. There he moved her a short distance into another room where she died of a heart attack. Federal law provides a mandatory minimum 10-year sentence when a bank robber "forces a person to accompany him" during the robbery or flight thereafter. After pleading not guilty, Whitfield was convicted by a jury. On appeal he argued that the severity of the punishment carried by this aggravating factor must require accompaniment over a substantial distance, and that it should not apply to his moving his victim into the next room. The Fourth Circuit disagreed, affirming the trial court. SCOTUS affirmed, holding that "accompany" means "to go with" even over short distances. The Court referred to newspaper articles, a wedding announcement, the dictionary, and British Literature classics to illustrate the clear meaning of the word "accompany." "It is simply not in accord with English usage to give 'accompany' a meaning that covers only large distances."

To read the full opinion, click here:

http://www.supremecourt.gov/opinions/14pdf/13-9026_11o2.pdf

Jennings v. Stephens, No. 13-7211 (January 14, 2015). The U.S. Supreme Court held 6-3 (Scalia, J., for the Court, joined by Roberts, C.J., Ginsburg, Breyer, Sotomayor, and Kagan, JJ. Thomas, J., filed dissenting opinion, joined by Kennedy and Alito, JJ.), that a petitioner seeking habeas relief for ineffective assistance of counsel citing the failure to present certain mitigation evidence, was not required to file cross-appeal to preserve an ineffective assistance claim based on counsel's argument, as it would not enlarge Petitioner's rights nor diminish the rights of the State. Robert Mitchell Jennings was convicted of capital murder. During the sentencing phase of trial, Jennings argued that his attorney failed to introduce evidence that he had a disadvantaged personal background and mental illness. Counsel also made the comment that he could not "quarrel with" a death penalty verdict against petitioner. After receiving the death penalty, Jennings filed a federal habeas petition citing *Wiggins v. Smith*, 539 U.S. 510 (2003) to address petitioner's failure to provide evidence as to petitioner's disadvantaged personal background and mental illness. Petitioner also challenged the constitutional ineffectiveness of his attorney's remarks during sentencing. A federal court provided petitioner with relief based on the mitigation errors, but not the argument error. The State appealed, and the Fifth Circuit reversed, but held that the court did not have jurisdiction to review the argument claim because petitioner had not filed a cross-appeal to preserve it for review. SCOTUS found that review of the argument claim did not require a cross-appeal to be preserved for review. Despite not filing a cross-appeal, Jennings could "urge in support of a decree any matter appearing before the record, although his argument may involve an attack upon the reasoning of the lower court." However, a petitioner who fails to file a cross-appeal cannot "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." The Court held that because review of petitioner's claim would not enlarge petitioner's rights nor diminish the rights of the State under a District Court's judgment Jennings was not required to file for a cross-appeal or get a

certificate of appealability.

To read the full opinion, click here:

http://www.supremecourt.gov/opinions/14pdf/13-7211_8o6a.pdf

Christeson v. Roper, No. 14-6873 (January 20, 2015). The U.S. Supreme Court held, per curiam, that substitution of a habeas petitioner's appointed counsel is permissible when appointed counsel faces a conflict of interest due to counsel's possible malfeasance in abandonment of petitioner's case. Mark Christeson was convicted of three counts of capital murder and received the death penalty for all three convictions in 1999. The Missouri Supreme Court affirmed the death penalty sentences in 2004. The federal district court did not appoint Christeson habeas counsel until nine months before the expiration of the statute of limitations. Counsel did not meet with Christeson until more than six weeks after the statute of limitations on petitioner's habeas request had expired. His subsequent habeas petition was denied without a certificate of appealability. Seven years later, counsel contacted two new attorneys to handle Christeson's case. The two new attorneys submitted a motion for substitution of counsel, which was denied by the circuit court because it would not be in petitioner's best interest. Petitioner appealed and the Eighth Circuit determined that the two new attorneys were not authorized to file an appeal on petitioner's behalf and dismissed for lack of jurisdiction. SCOTUS found that 18 U.S.C. §3599 "entitles indigent defendants to the appointment of counsel in capital cases, including habeas corpus proceedings" and observed that a court "may 'replace' appointed counsel with 'similarly qualified counsel... upon motion' of the petitioner." The Court further noted that in *Martel v. Clair*, 132 S.Ct. 1276 (2012), the Court had adopted a broader standard for reviewing petitions for substituting counsel in the interest of justice. The Court held that the appointed attorneys did have a conflict of interest and that the district court should have granted petitioner's motion for a substitution of counsel.

To read the full opinion, click here:

http://www.supremecourt.gov/opinions/14pdf/14-6873_21p3.pdf

Holt v. Hobbs, No. 13-6827 (January 20, 2015). The U.S. Supreme Court held 9-0 (Alito, J. for the Court), that the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), does not allow a Department of Corrections to enforce a policy that prohibits an inmate from growing a half inch beard in accordance with his religious beliefs. Gregory Houston Holt, a/k/a Abdul Maalik Muhammad, is an inmate in custody of the Arkansas Department of Corrections (ADOC) and is also a devout Muslim. Holt wanted to grow a half inch beard due to his religious beliefs. ADOC does not allow inmates to grow facial hair absent a specific skin condition. Holt sued in federal court, which found in favor of ADOC's grooming policy, and the Eighth Circuit affirmed. SCOTUS reversed, holding that the ADOC's policy violated RLUIPA. The Court reasoned that while maintaining security in a prison is a compelling government interest, ADOC failed to show how the prohibition would further this interest. The Court further reasoned that the prohibition on facial hair was under-inclusive because of an exception that allowed for inmates with a skin condition to grow a fourth inch beard. The Court also reasoned that the interest in preventing contraband was not served by the prohibition on facial hair because there was no similar prohibition on the length of hair on the head. Even if the prohibition would serve this compelling interest, ADOC would have to prove that it was the least restrictive means of achieving the interest, but the Court reasoned that the interest could be achieved by simply checking a half inch beard, instead of prohibiting it.

To read the full opinion, click here:

http://www.supremecourt.gov/opinions/14pdf/13-6827_5h26.pdf

Yates v. United States, No. 13-7451 (February 25, 2015). The U.S. Supreme Court held (5-4, Ginsburg, J., for the Court, joined by Roberts, C. J., and Breyer and Sotomayor, JJ., with Alito, J., concurring. Kagan, J., dissented, joined by Scalia, Kennedy, and Thomas, JJ.), that the term, "Tangible object," as used in 18 USC § 1519 and elsewhere in the Sarbanes-Oxley Act of 2002, refers to a physical object capable of recording or preserving information. John Yates was cited for possession of prohibited fish during an inspection of his commercial fishing vessel. Yates was ordered to store the fish, but instead disposed of the evidence before returning to port. He was charged and convicted of violating 18 USC § 1519, which imposes a criminal penalty for destroying tangible objects with the intent to impede federal investigations. The Eleventh Circuit affirmed, holding that the plain meaning of "tangible object" was to apply to any physical object that is not a "document" or a "record." SCOTUS reversed, holding that § 1519 uses "tangible object" to refer to an object involving records or documents, i.e. a physical object capable of recording or preserving information. The section's language, the Sarbanes-Oxley Act, the section's caption, its placement in the U.S. Code, and canons of construction all directed the Court to interpret the definition narrowly; noting that one who "falsifies, or makes a false entry in any ... tangible object" can only do so if that object can be falsified or contain false entries when recording or preserving information. Finally, as a criminal statute, the Rule of Lenity favors the narrow interpretation of the term.

To read the full opinion, click here:

http://www.supremecourt.gov/opinions/14pdf/13-7451_m64o.pdf

Grady v. North Carolina, No. 14-593 (March 30, 2015). The U.S. Supreme Court held, per curiam, that the Court would not decide whether North Carolina's satellite based monitoring is an unreasonable search under the Fourth Amendment when the State's appellate courts did not first examine the reasonableness of the search. Torrey Dale Grady was subject to satellite based monitoring for life as a recidivist sex offender. He argued the monitoring violated his Fourth Amendment right against unreasonable searches. State courts rejected his argument. SCOTUS remanded the case to the North Carolina Supreme Court. The Court reasoned that the Fourth Amendment only limits unreasonable searches, and because the North Carolina Court of Appeals and Supreme Court did not examine the reasonableness, the Court will not do so in the first instance.

To read the full opinion, click here:

http://www.supremecourt.gov/opinions/14pdf/14-593_o7jq.pdf

Woods v. Donald, No. 14-618 (March 30, 2015). The U.S. Supreme Court held, per curiam, that a temporary absence by defense counsel is not per se ineffective assistance of counsel when it occurs during testimony about co-defendants that defense counsel deems irrelevant to defendant's theory of the case. Cory Donald and two co-defendants were tried and convicted in state court for felony murder and armed robbery. At trial, the state introduced evidence about a series of phone calls by the defendants. Donald's co-defendants objected, but Donald's counsel did not. Counsel was then absent for about ten minutes during testimony introducing that evidence, and repeated his lack of objection when he returned. All three defendants were convicted. Donald exhausted state court appeals, and then sought federal habeas relief. The federal district court granted habeas relief and the Sixth Circuit

affirmed, holding that the absence constituted per se ineffective assistance of counsel because Donald was denied counsel at a critical stage of his trial. SCOTUS reversed. The conduct of Respondent's counsel failed to overcome the presumption that defense counsel's conduct is effective assistance.

To read the full opinion, click here:

http://www.supremecourt.gov/opinions/14pdf/14-618_4357.pdf

MISSISSIPPI COURT OF APPEALS CRIMINAL DECISIONS
October 14, 2014 – April 7, 2015

COA DIRECT APPEAL CASES

October 14, 2014

Robert Floyd McGuire v. State, No. 2013-KA-00683-COA (Miss.Ct.App. October 14, 2014)

CASE: Murder

SENTENCE: Life

COURT: Rankin County Circuit Court

TRIAL JUDGE: Hon. John Huey Emfinger

APPELLANT ATTORNEY: W. Daniel Hinchcliff

APPELLEE ATTORNEY: Lisa L. Blount

DISTRICT ATTORNEY: Michael Guest

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

ISSUES: (1) Whether the trial court erred in admitting impermissible evidence of other bad acts under hearsay exceptions; (2) whether the trial court erred in refusing to grant a peremptory instruction under *Weatherspoon*; (3) whether the trial court erred in failing to grant a new trial.

FACTS: On December 3, 2011, John Santistevan was at his home in Rankin County when Robert McGuire, his next-door neighbor, knocked on his door. McGuire asked Santistevan to call 911 because he had just shot his girlfriend, Lynda Tate, at their home. When emergency officials arrived, they discovered Tate, deceased in a chair in her living room, with a gunshot wound to her head. McGuire admitted he had been drinking alcohol that day, and that Tate had to pick him up so he could avoid getting a DUI. He also said that Tate wanted him to quit drinking. He testified he got out his .45-caliber Hi Point pistol in order to clean it. Still holding the pistol, McGuire leaned in to give Tate a kiss on the cheek/ear lobe. He stated that the hand holding the pistol was placed on the back of the chair. McGuire said Tate swatted at him with her hand, as if to shoo him away, and the gun then inexplicably discharged. McGuire testified that he loved Tate and never intended to shoot her.

HELD: (1) McGuire argued that the circuit court erred in the admission of a portion of the 911 call where Santistevan tells the dispatcher he does not know if McGuire killed his girlfriend as he did not hear any shots, but “He's . . . probably been beating her up.” McGuire then moved for a mistrial. Prior to playing the 911 call, counsel only objected to hearsay. On appeal, he claimed the comments were prejudicial since they implied McGuire beat his girlfriend. McGuire made a timely and contemporaneous objection only as to hearsay. He failed to object to the relevance or the unfair prejudicial nature of the statement until after it was played for the jury. His claim is therefore procedurally barred.

(2) McGuire was not entitled to a directed verdict under *Weathersby v. State*, 147 So. 481 (1933). McGuire asserted that he was the sole eyewitness, that his version of the events that the shooting was accidental was reasonable, and were not contradicted in material particulars or by the physical facts. The COA disagreed. First, McGuire did not argue *Weathersby* at trial, so the claim is barred. Regardless, *Weathersby* is not inapplicable to these facts and the evidence was sufficient. McGuire's version of the events was contradicted by the physical facts. McGuire did change his story slightly and the pistol could not discharge by accident with the safety on. Further, the locations of Tate's injuries were inconsistent with McGuire's testimony that the pistol went off from the back of the chair, as the back of the chair was higher than Tate's head.

(3) The jury's verdict was not against the weight of the evidence. "A reasonable juror could infer that Tate and McGuire were at odds, specifically on that day, over his drinking. This information, coupled with the physical evidence that contradicts an accidental discharge of the pistol, would support the jury's verdict of murder over manslaughter."

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO97440.pdf>

Antonio Daniel Wallace v. State, No. 2013-KA-01181-COA (Miss.Ct.App. October 14, 2014)

CASE: Armed Robbery, Kidnapping, and Conspiracy to Commit Armed Robbery

SENTENCE: 34 years for the armed robbery, 34 years for kidnapping, and 5 years for conspiracy, all running concurrently

COURT: Madison County Circuit Court

TRIAL JUDGE: Hon. William E. Chapman, III

APPELLANT ATTORNEY: Justin Taylor Cook

APPELLEE ATTORNEY: Scott Stuart

DISTRICT ATTORNEY: Michael Guest

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

ISSUES: (1) Whether there was insufficient evidence; (2) whether the verdict is against the overwhelming weight of the evidence; and (3) whether the trial court erred in admitting his prior conviction into evidence.

FACTS: On November 28, 2011, Kimberly Lewis, assistant manager at Sand Dollar Lifestyles in Ridgeland, was leaving the store to deposit money at the bank when she was approached by an armed male, later identified as Demarcus Timmons. Timmons got into Lewis's car and told her to drive into the back parking lot of the Embassy Suites Hotel, also in Ridgeland. Timmons took five dollars from Lewis's wallet, her driver's license, her cell phone, and her car keys. Timmons also took the store deposits, totaling approximately \$8,000, and fled. Kenisha Rush also worked at the store as an assistant manager. Apparently Rush's boyfriend, Antonio Wallace, concocted a plan for Timmons, his cousin, to rob Lewis in the parking lot of the store. Wallace's brother, Reginald Wallace, would

drive the getaway car. When Lewis was about to leave the store, Rush sent a text message at 1:09 p.m. to Wallace saying, "She about to leave." Wallace then contacted Reginald, who was in the car with Timmons and Kimberly Gates in the parking lot near Lewis's car. Phone records show that Wallace and Reginald texted and called each other several times between 1:09 p.m. and 1:41 p.m. Wallace, Timmons, and Reginald split the money. Wallace got \$2,500, and gave \$500 to Rush. Timmons and Reginald each testified that Wallace was not involved in the robbery and received no money.

HELD: (1) Wallace argues the evidence shows he was not a direct participant in the armed robbery or kidnapping because he was not present; thus, he was not an aider and abettor. Wallace says, at most, he was merely a knowing spectator. However, there was evidence that Wallace was involved in the planning and implementation of the robbery. Rush testified Wallace needed money to pay his attorney. Wallace received a text from Rush that Lewis was exiting the store. Wallace then contacted Reginald, who was waiting in the parking lot with Timmons and Gates. Although there was conflicting evidence, the jury believed Wallace was involved.

(2) Based on the evidence at trial, allowing the verdict to stand would sanction an unconscionable injustice.

(3) Wallace claimed the trial court erred in allowing the State to produce evidence of his prior burglary conviction from 2007 for impeachment if Wallace testified. The court found the conviction more probative than prejudicial. Wallace subsequently decided not to testify. Although Wallace claimed the ruling had a "chilling effect" on his right to testify, he failed to proffer what his testimony would have been. The claim is therefore barred.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO97332.pdf>

October 21, 2014

Eddie McCoy, Jr. v. State, No. 2013-KA-00198-COA (Miss.Ct.App. October 21, 2014)

CASE: Possession of a Controlled Substance with Intent to Distribute

SENTENCE: Life without Parole as an habitual offender

COURT: Forrest County Circuit Court

TRIAL JUDGE: Hon. Robert B. Helfrich

APPELLANT ATTORNEY: George T. Holmes, Hunter Nolan Aikens

APPELLEE ATTORNEY: John R. Henry, Jr., Laura Hogan Tedder

DISTRICT ATTORNEY: Patricia A. Thomas Burchell

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

ISSUES: (1) Whether the trial judge erred in refusing to suppress the drugs found in the apartment

defendant was occupying; (2) whether the evidence was sufficient; (3) whether his rights to a speedy trial were violated; and (4) whether there was ineffective assistance of counsel.

FACTS: A confidential informant told the Hattiesburg Police Department that Eddie McCoy was selling drugs out of unit A-7 in Pineview Apartments. Officers went to the apartment for a "knock and talk" since they did not have probable cause for a warrant. McCoy's girlfriend, Chante Robinson, answered the door. Chante lived in the apartment with her mother. While the officers were talking with Chante, McCoy walked into the living room. Officers noticed McCoy had his hands shoved into his pockets. When the officers asked if McCoy would speak to them too, McCoy darted to the bathroom and tried to shut the door. Fearing McCoy was either retrieving a weapon or destroying evidence, the officers ran into the bathroom. They found McCoy hovered over a trash can and escorted him outside of the apartment. Both Chante and her mother then gave police permission to search the apartment. Officers found a bag of cocaine in the trash can of the bathroom where McCoy fled. They also found a cup containing small empty baggies. In Chante's bedroom, they found a set of scales, a gun, and brass knuckles. They arrested McCoy. During the search incident to arrest, they found more than \$1,200 in cash in his pocket. McCoy was later indicted for possession of 2.7 grams of cocaine with the intent to distribute.

HELD: (1) First, the "knock and talk" was not illegal. Officers were simply talking to Chante, but based on McCoy's reaction, they believed he was either heading for a weapon or destroying evidence, so exigent circumstance led them to run after McCoy to stop him. The officers did not search the premises until Cynthia gave her written consent to search the apartment and Chante gave her verbal consent to search her bedroom.

At trial, Chante claimed McCoy did not live in the apartment. Therefore, the trial judge did not err in finding McCoy had no expectation of privacy in the apartment and had no standing to raise a 4th Amendment objection. McCoy's grandmother also testified and stated that he lived with her, and only stayed with Chante every now and then.

On appeal, McCoy claimed the evidence suggested he was an overnight guest and did have an expectation of privacy. However, his trial strategy was to try and prove he was not an occupant at the time police conducted the "knock and talk." Regardless, even if true, police had exigent circumstances to follow him to the bathroom. Chante voluntarily allowed police into the apartment and later consented to a search.

(2) There was sufficient evidence that McCoy constructively possessed the cocaine and baggies found in the bathroom, as well as the scales, brass knuckles, and gun found in Chante's bedroom. Besides his proximity to the drugs, he had his hands stuffed in his pockets before running. It was reasonable for jurors to conclude McCoy was trying to hide or destroy drugs. When caught, he yelled to Chante, "Hold up for your sh*t." This shows he was aware of the presence of drugs. The other items were found near where McCoy had stored some of his clothes. Finally, after his arrest, officers found a large amount of cash in his pocket.

(3) In a pro se brief, McCoy claimed an over 8 month delay in his trial was prejudicial. McCoy was out on bail and never asserted his right to a speedy trial. He claimed there was an unnamed witness who died before trial that visited the apartment before police arrived who could have left the drugs.

But this unidentified man's existence—let alone his death—is in no way verified from the record. McCoy failed to show any prejudice from the delay.

(4) The record was insufficient to determine this issue. McCoy is free to raise it again on PCR.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO97823.pdf>

Michael T. Anderson v. State, No. 2012-KA-01066-COA (Miss.Ct.App. October 21, 2014)

CASE: Murder, Aggravated Assault, and Felon in Possession of Firearm

SENTENCE: Three consecutive life terms as an habitual offender

COURT: Hinds County Circuit Court

TRIAL JUDGE: Hon. Winston L. Kidd

APPELLANT ATTORNEY: Mollie Marie McMillin

APPELLEE ATTORNEY: LaDonna C. Holland

DISTRICT ATTORNEY: Robert Shuler Smith

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

ISSUES: (1) Whether the trial court erred in giving a flight instruction to the jury; (2) whether the trial court erred in instructing the jury that self-defense is not a viable defense to possession of a firearm by a convicted felon; and (3) whether the trial court erred in refusing to allow evidence of Sanders's blood-alcohol content (BAC) at the time of his autopsy.

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, and 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 walking away from the store. He then 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.

HELD: (1) Anderson claimed the State was not allowed a flight instruction because he raised self-defense as his defense theory at trial. However, Anderson presented no evidence of an existing threat at the store at the time when he walked away from the store after shooting Sanders on the store's sidewalk. Anderson never provided a reasonable explanation for his flight from the murder scene.

(2) Anderson claimed that the trial court committed reversible error by preventing his theory of self-defense from being submitted to the jury on the felon-in-possession-of-firearm charge, by instructing the jury that self-defense is not a viable defense. Anderson apparently confused self-defense with the defense of necessity. He claimed Sanders was the initial aggressor, and he took possession of the gun out of necessity in self-defense after being hit. However, Anderson never requested a necessity instruction. There was no evidence that Sanders possessed a firearm or weapon when Anderson shot him.

Further, there was an insufficient evidentiary foundation for the necessity defense. Anderson failed to show that no adequate alternative was available other than possessing the firearm he used to shoot Sanders, when Sanders was unarmed. Anderson was given an instruction on his right to use reasonable force to defend himself.

(3) The trial judge did not err in refusing to allow the defense to introduce evidence of Sanders's blood-alcohol level at the time of his autopsy. The court found Sanders's BAC at the time of his death was not relevant to the case. There was testimony that Sanders had been drinking beer prior to going to the store and may have been there to purchase more. However, the record reflects no evidence to show that Sanders became violent, or possessed a propensity for violence, when drunk. Anderson's testimony that Sanders hit him did open the door Sanders's character for violence, but the jury had already heard that Sanders had been drinking. The evidence of Sanders's BAC was cumulative.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO97747.pdf>

Jonathan Keen v. State, No. 2013-KA-00088-COA (Miss.Ct.App. October 21, 2014)

CASE: Capital Murder

SENTENCE: Life w/o Parole

COURT: Madison County Circuit Court

TRIAL JUDGE: Hon. John Huey Emfinger

APPELLANT ATTORNEY: Benjamin Freeman Robinson, Matthew Allen Baldrige

APPELLEE ATTORNEY: Laura Hogan Tedder

DISTRICT ATTORNEY: Michael Guest

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

ISSUES: (1) Whether State effectively amended the indictment by proceeding on a theory that the

victim was robbed of his van instead of cash, by dismissing a motor vehicle theft count, and (2) whether the evidence was insufficient to find that Keen committed the predicate offense of robbery.

FACTS: On the night of October 8, 2011, Jonathan Keen told his drug dealer, Willie Myers, that he planned to steal a van and sell it for parts, and, in turn, pay back Myers for \$400 he owed him for drugs. Myers drove Keen out to the Ross Barnett Reservoir and parked beside a white van, which belonged to Kerry Prisock. Prisock, a handyman, lived in his van and parked at the Reservoir at night. After a struggle, Keen killed Prisock using a hammer that he had found in the van. Keen drove the van with the body, south of Jackson and abandoned it. Myers testified he followed the van and gave Keen a ride to a hotel to change clothes and clean-up. Prisock's van and body were discovered a few days later. Myers and Keen were later arrested. Keen confessed to killing Prisock but claimed that he did so in self-defense, stating that Prisock hit him with the hammer first. Myers pled guilty to accessory after the fact of murder and to motor-vehicle theft, and testified against Keen.

HELD: The State did not effectively amend the indictment when it identified Prisock's van, and not his cash, as the personal property of which Prisock was robbed. A capital-murder indictment, with robbery as the predicate offense, does not have to identify the item that is the subject of the robbery. The State dismissed a separate motor vehicle theft count to ensure there were no double jeopardy issues. "The State's decision to dismiss the separate count involving theft of the van, and its explanation that it was proceeding under the theory that the van was the object of the robbery, did not amend or alter the indictment in any way." The indictment was sufficient.

(2) There was sufficient evidence to establish that Keen robbed Prisock of the van. Keen told Myers his plan was to steal a van and sell its parts for cash. Myers drove Keen to the Reservoir. Although Keen told police that he "freaked out" and abandoned his intent to "rob" Prisock of anything, his actions do not support his claim. After approaching the van and finding Prisock, Keen did not walk away. Keen subdued Prisock by clubbing him to death with a claw hammer, and drove off. Keen admitted driving the van. This was further supported by Myers's testimony. Abandonment cannot occur after a crime has begun to take place.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO97908.pdf>

October 28, 2014

Sammie Smith v. State, No. 2013-KA-00603-COA (Miss.Ct.App. October 28, 2014)

CASE: Burglary of a Dwelling

SENTENCE: 10 years, followed by 5 years PRS

COURT: Bolivar County Circuit Court

TRIAL JUDGE: Hon. Charles E. Webster

APPELLANT ATTORNEY: Mollie Marie McMillin

APPELLEE ATTORNEY: Laura Hogan Tedder

DISTRICT ATTORNEY: Brenda Fay Mitchell

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

ISSUES: (1) Whether the court erred in denying a proposed jury instruction for a lesser nonincluded offense; (2) whether the court erred in denying the motion for a new trial; and (3) whether the indictment was sufficient.

FACTS: On the night of November 11, 2011, Jeremy Williams's home was burglarized. Williams saw Sammie Smith running away from his house, sometime around 12am. Williams's neighbor, Dacorious Clark, testified that on November 11th, Smith showed up at his house after midnight with a computer tucked into his pants. According to Clark, Smith offered to sell him the computer. Clark declined the offer, but Smith asked him to hold onto the computer anyway, which he did. Clark knew the computer belonged to Williams after he opened the computer and saw the login information. Clark returned the computer to Williams a week later. Smith testified that he was at a football game the night of the burglary and later ran into his cousin, who had a computer with him. Smith stated that he bought the computer for a "quarter bag" of marijuana and then traded it to Clark for \$60 worth of cocaine. Smith's theory of defense was that he received the computer as stolen property. However, Smith was denied instructions on the crime of receiving stolen property, both misdemeanor and felony, as a lesser non-included offense of burglary.

HELD: (1) The court refused both misdemeanor and felony instructions for receiving stolen property, as neither side presented evidence of the computer's value. The crime of receipt of stolen property requires proof of monetary value. Therefore, the proper foundation for the instructions were not laid.

(2) The verdict was not against the weight of the evidence. Williams testified he saw Smith fleeing his home on the night of the burglary. Clark testified that Smith came to his house that same night with a computer and offered to sell it. The jury clearly did not find Smith's testimony credible.

(3) Smith submitted a pro se claim that his indictment was insufficient. Smith's indictment stated that he did "unlawfully, willfully, and feloniously break and enter the dwelling house of Jeremy Williams . . . with the intent to commit the crime of larceny . . ." Smith's claim that the omission of the term "burglarious" rendered the indictment insufficient is without merit.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO97698.pdf>

Benjamin Shelton v. State, No. 2012-KA-01556-COA (Miss.Ct.App. October 28, 2014)

CASE: Sexual Battery

SENTENCE: 12 years, with 7 to serve and 5 years suspended on PRS

COURT: Lowndes County Circuit Court

TRIAL JUDGE: Hon. Lee J. Howard

APPELLANT ATTORNEY: Rodney A. Ray

APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISTRICT ATTORNEY: Forrest Allgood

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

ISSUES: (1) Whether the circuit erred by denying his motion for a JNOV; and (2) whether the jury instructions adequately inform the jury of the charge of sexual battery.

FACTS: 17-year-old F.N.L. met Benjamin Shelton in the summer of 2008 when he began attending Eastview Baptist Church in Columbus, MS. Shelton would sometimes teach F.N.L.'s Sunday school class, and would help with the youth group at the church. In July 2008, F.N.L. attended a two-night youth retreat at Lake Lowndes. The group stayed in a duplex-like cabin, with all the boys on the right side and all the girls on the left side. Shelton stayed in a bedroom off from the living room of the cabin. On the first night, at roughly 2 a.m., a water-balloon fight broke out inside the cabin. To get away from the fight, F.N.L. went into Sheldon's bedroom and climbed into bed. Shelton was not present. At approximately 6 a.m., F.N.L. awoke to Shelton's hands in his underwear and Shelton's penis in his mouth. F.N.L. pushed Shelton away, went outside and stayed out there until everyone else woke up. F.N.L. told a friend what happened. Shelton did not say anything until the next morning when he apologized via text message. F.N.L. stopped going to church for a while. When he returned, Shelton apologized, asked him not to tell anyone, and offered to make it up to F.N.L. Shelton then began to give F.N.L. and his friends rides and take them out to eat. F.N.L. turned 18 in December of 2008. On January 8, 2009, he contacted Shelton about getting a ride to Wal-Mart. After doing so, Shelton drove to a self-storage building, parked, locked the doors, and forced F.N.L. to perform oral sex. The following day, F.N.L. filed a police report. Shelton admitted that he had consensual oral sex with F.N.L. on January 8, 2009, and had engaged in sexually explicit text messaging with F.N.L, but denied any sexual allegations regarding the incident in July 2008.

HELD: Shelton was convicted under §97-3-95(2), or sexual battery by a person of trust over the victim. Shelton claimed there was insufficient evidence of penetration. Shelton maintained that prior to trial, F.N.L. never stated that Shelton forced him to perform oral sex in July 2008, only that he touched the genitals of F.N.L. F.N.L. testified that his statement with the sheriff's office inaccurately stated that Shelton's mouth was on his penis. However, he corrected this statement during his testimony. He stated that Shelton forced him to perform oral sex. This conduct clearly falls within the conduct provided by the statute. F.N.L.'s unsupported testimony regarding the explicit details of his sexual encounter with Shelton was not discredited or contradicted.

In his reply brief, Shelton raised a new argument regarding the sufficiency of the evidence as it pertains to the element of position of trust or authority. This claim is barred.

(2) Shelton argued that the instructions failed to adequately define sexual penetration and position of trust or authority. However, Shelton's attorney declined to object to the instruction and agreed that it was a correct statement of law. The claim is barred.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO95672.pdf>

Gyrone Marcell McSwain v. State, No. 2013-CP-00845-COA (Miss.Ct.App. October 28, 2014)

CASE: Possession of a Cocaine

SENTENCE: 16 years with 4 suspended on PRS

COURT: Forrest County Circuit Court

TRIAL JUDGE: Hon. Robert B. Helfrich

APPELLANT ATTORNEY: Justin Taylor Cook

APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISTRICT ATTORNEY: Patricia A. Thomas Burchell

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

ISSUES: *Lindsey* brief. Pro se claims of (1) whether the search of his house was illegal; (2) whether he received ineffective assistance of counsel; and (3) various instances of misconduct which occurred during the trial.

FACTS: On December 8, 2011, police executed search warrant at 405 East Fifth Street in Hattiesburg. A few days earlier, officers had made a "controlled buy" of crack cocaine at the same address from Tyrone McSwain, Gyrone McSwain's's fraternal twin brother, giving them probable cause to obtain the search warrant. When officers arrived, they identified McSwain leaving the residence, heading toward his car. He was detained during the search. Police found two pistols above the door frame of a bedroom that contained items connecting McSwain to the bedroom. In the bedroom, police found mail addressed to McSwain. They also found a picture of McSwain affixed to the mirror of the dresser in the bedroom. On the same dresser, they found crack cocaine. In the bedroom closet, police found one bag of a crack cocaine, a scale, and a cologne box containing \$4,800 in cash. Mail addressed to Tyrone and other narcotics were found elsewhere in the house. Tyrone appeared at the residence during the search and was also arrested. At trial, McSwain admitted living at the house with Tyrone and a nephew, and having keys to the house. However, he claimed the drugs found in the bedroom were not his.

HELD: Appellate counsel filed a *Lindsey* brief, alleging no arguable issues for appeal. McSwain filed a pro se brief. (1) McSwain alleged the search was illegal because his brother Tyrone's name was listed in the search warrant, and not his. The warrant alleged the premises were controlled and occupied by Tyrone and unknown occupants. However, McSwain admitted that he resided at the same residence as Tyrone. Further, since the police officers had a valid search warrant, whether or not they had the warrant in their possession at the time of the search does not make the search illegal.

(2) The record does not affirmatively show ineffectiveness of counsel. McSwain can raise the issue again on PCR.

(3) McSwain alleges that prosecutorial misconduct occurred throughout the trial. There was no

misconduct during voir dire when the prosecutor asked if there was anyone “who believes or thinks that in a drug case if the State cannot show that Mr. McSwain was holding the drugs, then he wasn't in possession of [them]?”

McSwain further alleges that the prosecutor misled the jurors with his word choice during the trial, specifically during his opening and closing statements. The prosecutor told a story about a dog that was left in a room and later feathers from pillows were found everywhere, insinuating that this case had similar circumstantial evidence. The COA did not find the statements made by the prosecutor were improper and led to a prejudicial outcome.

Finally, McSwain argues that further misconduct occurred as a result of how the circuit court handled the jury when it asked a question about the verdict. The jury asked how to write the verdict if they disagreed. The court responded, "Please refer to the instructions. The verdict must be unanimous." McSwain failed to show how the response to the jury was inadequate or prejudicial.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98310.pdf>

November 4, 2015

Quincy Fox v. State, No. 2013-KA-01384-COA (Miss.Ct.App. November 4, 2014)

CASE: Armed Carjacking, Kidnapping x2, and Armed Robbery

SENTENCE: Life without parole as a violent habitual offender on each count

COURT: Lauderdale County Circuit Court

TRIAL JUDGE: Hon. Lester F. Williamson Jr.

APPELLANT ATTORNEY: Benjamin Allen Suber

APPELLEE ATTORNEY: Laura Hogan Tedder

DISTRICT ATTORNEY: Bilbo Mitchell

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

ISSUES: (1) Whether the circuit court erred in denying his second motion for a new trial, and (2) whether the circuit court erred in allowing the State to introduce evidence of Fox's other crimes.

FACTS: Quincy Fox and Jessie Jones were indicted for the armed carjacking of Robin Rosenbaum, the kidnapping of Rosenbaum and Amanda Davis, and the armed robbery of Davis. Davis and Rosenbaum were nurses who were teaching a class at Rush Hospital. On January 10, 2012, they were robbed by two men with hoodies over their faces. Davis and Rosenbaum did not have any money. Davis was eventually able to withdraw \$500 from an ATM. In addition to the \$500, the men also took Davis's cell phone and keys. A week after the robbery, police saw Jones and Fox and wanted to talk to them. Police found a gun in Fox's pocket and they fled. Jones was apprehended and after questioning, told police they were responsible for the robbery. At trial, Jones testified for the State.

He disclosed he had been offered a plea deal for 40 years, with 20 years suspended. Jones acknowledged that he was a previously convicted felon and would receive life sentences if he went to trial and convicted. On the day of trial, the circuit court entered an agreed order granting Fox's motion to exclude any reference to Fox's prior convictions or pending charges. However, during Jones's testimony, he testified police asked him about Fox because Fox "was on papers for two armed robbery charges." Fox's motion for a mistrial was denied and the court admonished the jury to disregard the testimony. Fox called his sister as an alibi witnesses and several inmates who discredited Jones. He was convicted and subsequently filed a notice of appeal. He then filed a second motion for a new trial, claiming Jones was sentenced to less than what he stated his plea deal was at trial. The circuit court denied the motion.

HELD: (1) Jones's singular and brief reference to Fox's criminal record was not the result of the State's attempt to elicit evidence excluded by the motion in limine. The court instructed the jury to disregard the statement. The jury was polled and agreed to do so. Fox was not seriously damaged by the statement. No substantial or irreparable prejudice occurred.

(2) Fox's second motion for a new trial was filed after Fox filed a notice of appeal. Because the circuit court lacked jurisdiction to consider Fox's second motion for a new trial, the COA also lacks jurisdiction to consider the motion.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO98061.pdf>

Christopher McNulty a/k/a "Big Hurt" v. State, No. 2013-KA-01068-COA (Miss.Ct.App. November 4, 2014)

CASE: Sale of at least 1/10th but less than 2 grams of Cocaine

SENTENCE: 30 years as an habitual offender

COURT: Lincoln County Circuit Court

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

APPELLANT ATTORNEY: Joseph A. Fernald, Jr.

APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISTRICT ATTORNEY: Dee Bates

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

ISSUE: Whether the State failed to secure an order setting aside the amendment to a lesser-included offense and reinstating the original indictment, wrongfully convicting him of sale of cocaine under an indictment for possession of cocaine.

FACTS: Christopher McNulty was indicted for the sale of at least one-tenth but less than two grams of cocaine. The indictment followed a controlled buy where a CI met with McNulty and received the

substance from him. The interaction was videotaped. McNulty ultimately reached an agreement with the State, which offered to amend the indictment to the lesser-included offense of unlawful possession of more than one-tenth but less than two grams of cocaine. During the plea hearing, the circuit court discovered that McNulty was currently serving probation for automobile burglary. Subsequently, the circuit court was not willing to follow the State's recommendation. The court allowed McNulty to withdraw his guilty plea and the State to withdraw the motion to amend the indictment. The State filed another motion to amend the indictment to include McNulty's habitual offender status. McNulty went to trial and was convicted. After the verdict, the court granted the State's motion to amend the indictment adding habitual offender language.

HELD: McNulty argued there was no substantive motion or order to amend relating back to the original indictment. He asserted that the amended indictment charging him with possession instead of sale was still in effect. However, this amendment was withdrawn when the court and the State learned at the plea hearing that McNulty had several prior convictions. The original indictment was reinstated, and the State was later granted an amendment to include his habitual-offender status. The amendment to the original indictment was conditioned on the acceptance of McNulty's guilty plea.

McNulty also argued that the habitual-offender portion of his indictment should be stricken because the indictment did not include the words "against the peace and dignity of the State of Mississippi." McNulty raised this issue for the first time on appeal. The claim is barred.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO96724.pdf>

Carl Anthony Houston, Jr. v. State, No. 2012-KA-01853-COA (Miss.Ct.App. November 4, 2014)

CASE: Possession of Contraband in a Correctional Facility

SENTENCE: 15 years with 5 suspended

COURT: Leake County Circuit Court

TRIAL JUDGE: Hon. Vernon R. Cotten

APPELLANT ATTORNEY: Edmund J. Phillips Jr.

APPELLEE ATTORNEY: Laura H. Tedder

DISTRICT ATTORNEY: Mark Duncan

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

ISSUES: (1) Whether §47-5-193 is unconstitutionally vague, and (2) whether he was properly sentenced.

FACTS: Carl A. Houston, Jr., was incarcerated in Leake County Regional Correctional Facility. Antwon Pankey, a guard at the facility, searched Houston after he had completed his visitation with his girlfriend. Pankey felt something hard in the back pocket of Houston's pants, and he reached into Houston's pants pocket and pulled out a cellular Subscriber Information Module (SIM) card. Houston

denied the charges. Houston testified that he did not have a SIM card in his back pocket and that no one gave him a SIM card. Regardless, he was convicted and appealed.

HELD: (1) Houston contends that §47-5-193 is unconstitutionally vague because the designation of "offender" does not include him. He argues that he was incarcerated at the facility as an accused and not as an offender. However, §47-5-193 makes it unlawful "for any . . . person or offender" to possess a SIM card in a correctional facility. The claim is without merit.

(2) Houston argued that he should have been sentenced as a non-offender under §47-5-192. However, since Houston was properly convicted under §47-5-193, his sentencing was also proper.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO97890.pdf>

Bennie Gunn v. State, No. 2013-KA-00344-COA (Miss.Ct.App. November 4, 2014)

CASE: Capital Murder, Felon in Possession of a Firearm, Armed Robbery x2, and Aggravated Assault x2

SENTENCE: Life without parole for the murder, 10 years on each weapons charge, 35 years for each armed robbery, and 30 years for each aggravated assault, all consecutively

COURT: Hinds County Circuit Court

TRIAL JUDGE: Hon. William A. Gowan, Jr.

APPELLANT ATTORNEY: Vicki L. Gilliam

APPELLEE ATTORNEY: Stephanie Breland Wood

DISTRICT ATTORNEY: Robert Smith

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

ISSUES: (1) Whether the trial court erred when it failed *sua sponte* to sever a multiple-count indictment; (2) whether the trial court erred when it allowed the State to introduce improper evidence and the State emphasized that evidence in closing argument; (3) whether the firearm enhancement subjected Gunn to double jeopardy; (4) whether the State improperly commented on Gunn's right to remain silent; (5) whether the verdict was against the overwhelming weight of the evidence and the evidence was insufficient to support the verdict; (6) whether Gunn received ineffective assistance of counsel; and (7) whether cumulative error requires reversal.

FACTS: On September 10, 2010, William Morris was shot and killed while making a delivery to the Super Save store in Jackson. Surveillance video showed two black males who had something covering their heads. They approached the gas pumps and then disappeared from view. A few seconds later, Morris came into view on the video. He was staggering and holding his left side. Morris grabbed the door to the store and fell in the doorway. A store clerk recognized one of the men in the video (Bennie Gunn) as a regular customer, but refused to identify him at trial because she was scared to do so. Police found clothing nearby which DNA tests connected with Dante Evans. A witness who lived next

to the store saw two men shortly after the robbery in her neighbor's yard. One man had Nike shoes with a green "swoosh." She later identified Gunn as that man. On September 11, 2010, Sylvester Wright stopped at the Shell station on Terry Road. While inside the store, he saw two men get inside his vehicle. He ran out to confront them, but fled when he saw a gun. He identified Gunn as one of the men. On September 12, 2010, twelve-year-old Om Patel was sitting with Naveen Ava, the desk clerk of the E. Com Lodge in Jackson, when two men in wolves masks came inside. Ava went to check on some noise and was shot. The men then shot Patel and demanded money. He crawled to the cash register and opened it. On September 14, 2010, a Neshoba County deputy spotted a white Pontiac that Jackson police were looking for. The car flipped during a short chase, and Evans and Chasity Davis were apprehended. Gunn jumped from the vehicle and ran across the highway, jumped into a Pearl River Resort truck and fled. After another chase, Gunn ditched the truck and started to run. He was found 30 minutes later in the woods. Police recovered a weapon on a porch of a nearby house, and Nike tennis shoes with a green "swoosh" being worn by Gunn. On the way back to Jackson, Gunn told police to tell Morris's family that he was sorry and that it was not supposed to happen like that. Gunn's girlfriend, Chasity Davis, testified that she and Evans's girlfriend, Nankedia Lowe, waited in a car across the highway from the E. Com Lodge while Gunn and Evans robbed it. Evans told police he shot Morris and Gunn was not with him. However, a later guilty plea hearing, Evans stated Gunn was with him and both had firearms. He proffered testimony that he lied about Gunn being with him. Gunn was convicted of all seven counts.

HELD: (1) Gunn argued that the trial court committed reversible error when it failed, *sua sponte*, to sever the counts of the indictment. He claimed the counts did not contain a common scheme or plan. Gunn did not seek to have the counts severed prior to trial. This was not plain error. Gunn's offenses were committed over a 72-hour period. All of the offenses Gunn was charged with were similar in type – they involved armed assaults and robberies. The criminal participants were the same and they were found together while fleeing after the third armed robbery.

(2) It was not error for the jury to hear evidence of the separate crimes committed over the three-day period. Again, Gunn never requested a severance. Gunn also argued that it was error for the trial court to allow three witnesses to testify that they were threatened by Gunn regarding their trial testimony.

Gunn wrote a letter to Chasity Davis warning her not to testify. Sylvester Wright, who was incarcerated with Gunn, testified Gunn threatened him. Nankedia Lowe was an extremely reluctant witness. Eventually she admitted Gunn was present at the E. Com Lodge robbery. Lowe also admitted Gunn called her and threatened her if she testified. She also stated she was stabbed by a woman over her testimony, and that Gunn's brother had also threatened her. Gunn failed to object to any of this testimony, so the claims were waived. Regardless, the COA found the threats, including those from Gunn's brother and the knife-wielding girl, were sufficiently connected to Gunn to be admissible.

Gunn also failed to object to several hearsay statements. Dante Evans gave three conflicting accounts of what transpired. Gunn stipulated the jury should hear all three. Gunn also complained that Lowe should have been allowed to testify as a hostile witness. The record indicates the State was surprised by Lowe refusing to initially testify about the threats against her. Regardless, Gunn never objected to any of her statements. Therefore, the use of her statements in closing were proper. Gunn also failed to object to hearsay statements to police by Lowe. Gunn did not object to prior statements by Davis.

Counsel for Gunn even used these statement to downplay Gunn's involvement. Finally, there was no error in allowing a detective to testify that an anonymous source told him that Dante Evans was seen running in the area and he might have some involvement in the Morris shooting. Police officers are allowed to mention information they receive, without going into detail, to explain what they did in an investigation.

Gunn further complained that, although he stipulated to the introduction of Evans's guilty-plea transcript, it contained material that should have been redacted. Specifically, there was reference to Gunn being apprehended in unrelated cases. This did invite speculation he was involved in even more crimes. Evidence of Gunn's flight in Philadelphia was relevant, as material evidence was recovered from Gunn at the time of his arrest. It showed Gunn's consciousness of guilt and was necessary to present to the jury the complete story of the crime.

When a detective was testifying about how he obtained the Nike shoes from Gunn, he mentioned Gunn was taken into custody for carjacking, kidnapping and a subsequent armed carjacking. After objection, the officer corrected himself and stated he misspoke about the kidnapping. No further objection was made. This brief, corrected reference to a kidnapping did not prejudice Gunn.

(3) Gunn received four firearm sentence enhancements under §97-37-37(2). Gunn argued that to convict him for being a felon in possession of a weapon, and to then increase his sentences for the armed-robbery and aggravated-assault counts because he was a convicted felon using a firearm, constitutes a double-jeopardy violation. Although not objected to at trial, double jeopardy can be raised for the first time on appeal. Regardless, the firearm-enhancement is not a separate offense, therefore there is no double jeopardy violation.

(4) Gunn claimed the State improperly commented on his right to remain silent by asking a detective if he gave any statement after being advised of his *Miranda* rights. After objection, the prosecutor followed-up by asking/commenting to the officer that suspects are not required to talk to police. The defense made no further objection or requested any further curative action by the court. This brief reference was not unduly prejudicial.

(5) The evidence was sufficient and the verdict was not against the weight of the evidence. Gunn does not claim that any particular element of the crimes he was convicted of was unproven, other than to claim that his identity as the perpetrator was unproven. The jury heard Evans's sworn statement that he shot Morris while he and Gunn were robbing Morris. This was corroborated by Davis hearing Evans on the phone admitting to shooting Morris and by Gunn telling Davis that he was present when Evans shot Morris. There was at least enough evidence to prove Gunn was an aider and abettor. Wright identified Gunn and Evans in separate photo lineups shortly after they stole his car. Davis and Lowe both connected Gunn to the robbery and shootings at the E. Com Lodge. Evans and Gunn were accomplices on all the charged crimes.

(6) The record was insufficient to decide the ineffective assistance claim. Gunn is free to raise the issue again on PCR.

(7) There was no cumulative error.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO97894.pdf>

Kyle Millie Platt v. State, No. 2013-KM-01024-COA (Miss.Ct.App. November 4, 2014)

CASE: First Offense DUI

SENTENCE: 48 hours, suspended

COURT: Madison County Circuit Court

TRIAL JUDGE: Hon. John Huey Emfinger

APPELLANT ATTORNEY: David S. Van Every, Sr.

APPELLEE ATTORNEY: Billy L. Gore

DISTRICT ATTORNEY: Michael Guest

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

ISSUES: (1) Whether the evidence was insufficient to support his conviction; (2) whether the county court erred by finding that there was probable cause for the stop; (3) whether the county court erred by admitting the blood test results; and (4) whether the county court erred by amending the charges.

FACTS: On November 3, 2009, a deputy sheriff arrested Kyle Platt for DUI after stopping Platt for driving with an expired tag. The deputy testified that he noticed Platt's expired tag when Platt abruptly merged into a left-turn lane and then turned into the parking lot of a convenience store. Platt admitted that he had consumed alcoholic beverages about an hour prior to being stopped and that he had been driving with an expired tag. There was also a half-empty, open beer container in Platt's vehicle. The deputy administered several field sobriety tests, including two portable breath tests that yielded positive results, and an horizontal -gaze-nystagmus (HGN) test, the walk-and-turn test, and the one-leg-stand test. Platt failed the HGN test and the walk-and-turn test, although he successfully passed the one-leg-stand test. Platt was given a blood test, which showed his BAC at .09%. Platt was convicted of common law DUI in justice court. Platt appealed to the county court. During trial, after Platt's blood test results were admitted into evidence, the county court granted the State's ore tenus motion to amend Platt's charges to include per se DUI. The county court found Platt guilty of common law DUI. Platt appealed to circuit court, which affirmed. He again appealed.

HELD: (1) The evidence was sufficient. Platt abruptly merged into a turn lane and then into the parking lot of a convenience store. He admitted consuming alcohol about an hour before. He had no explanation for the open beer found in his vehicle. Platt insisted that the one test he passed, the one-leg-stand test, is evidence that he was not driving under the influence. However, the deputy testified that Platt's speech was slurred and that Platt swayed back and forth in the store's parking lot.

(2) The deputy testified he stopped Platt because of an expired tag. Platt argues that the deputy lacked probable cause to stop him because it was impossible for the deputy to have seen his expired tag because they were traveling in opposite directions. However, Platt admitted his tag was expired. The conflicting evidence was resolved against Platt.

(3) At trial, Platt called Kirk Rosenhan, an expert in the field of DUI. Rosenhan testified that the alcohol from the swab used before taking Platt's blood may have contaminated the blood sample and may have led to inaccurate results. Platt therefore argued that the court erred by admitting the blood test results because there was uncontradicted, uncontested evidence that the blood sample used to test his BAC level was contaminated. However, Platt only objected to admission of the blood test on the basis that the machine allegedly had not been calibrated. The claim the blood was contaminated is barred. Regardless, there was ample evidence that the sample was not contaminated and that the machine used to analyze the blood sample had been properly calibrated.

(4) Platt claimed the county court erred in allowing the charge to be amended to include per se DUI. The county court allowed the amendment to reflect the evidence presented during trial, and the amendment did not materially alter the charges made against Platt or his defense. Platt was offered a continuance to prepare based on the amendment, but declined. Regardless, Platt was not convicted of per se DUI.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO98558.pdf>

Molly M. Brown v. State, No. 2013-KA-01037-COA (Miss.Ct.App. November 4, 2014)

CASE: Sale of Hydrocodone and Acetaminophen

SENTENCE: 10 years

COURT: Neshoba County Circuit Court

TRIAL JUDGE: Hon. Marcus D. Gordon

APPELLANT ATTORNEY: Julie Ann Epps

APPELLEE ATTORNEY: Barbara Wakeland Byrd

DISTRICT ATTORNEY: Mark Sheldon Duncan

DISPOSITION: Reversed and Remanded. Irving, P.J., for the Court. Lee, C.J., Barnes, Ishee, Roberts, Maxwell, Fair and James, JJ., Concur. Carlton, J., Dissents with Separate Written Opinion, Joined by Griffis, P.J.

ISSUES: (1) Whether Brown was deprived of her constitutional rights to a fair trial and an impartial jury, as a biased juror was allowed to serve on the jury; (2) whether her attorney's failure to challenge the biased juror constitutes ineffective assistance of counsel; and (3) whether the verdict was against the overwhelming weight of the evidence.

FACTS: Molly Brown was convicted of the sale of Hydrocodone and Acetaminophen. During voir dire, a prospective juror, Dena Bishop, stated that she had a nephew who was a DEA agent. Brown's counsel asked her if she would take a hard stance on a drug-related case. Bishop answered, "It would be hard to be impartial." When asked if she thought she probably should not sit, Bishop answered, "Probably so." No further inquiry was conducted either by the defense, the State, or the circuit court. Bishop was not challenged, and sat as a juror for Brown's trial. The issue was not raised in trial counsel's post-trial motions. With new counsel, Brown appealed.

HELD: Brown's trial counsel was ineffective for allowing a biased juror to serve on the jury, thereby denying Brown a fair and impartial trial. The record is sufficient on direct appeal to demonstrate Brown's trial counsel was constitutionally ineffective. A defendant's counsel, under the umbrella of trial strategy, cannot waive the defendant's right to an impartial jury. Bishop's responses warranted further inquiry. "Therefore...bias is presumed since there was no rehabilitation of Bishop demonstrating that, notwithstanding her partiality, she could decide the case based solely on the evidence."

Carlton, J., Dissenting:

Judge Carlton dissented, believing the issue was better suited for post-conviction. She believed the issue was procedurally barred since counsel did not seek to strike the juror.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO97762.pdf>

November 18, 2014

Clarence Dwayne Jefferson v. State, No. 2013-KA-02048-COA (Miss.Ct.App. November 18, 2014)

CASE: Felony DUI

SENTENCE: 5 years, with one suspended and 4 to serve as an habitual offender

COURT: Marion County Circuit Court

TRIAL JUDGE: Hon. Prentiss Greene Harrell

APPELLANT ATTORNEY: Benjamin Allen Suber

APPELLEE ATTORNEY: Stephanie Breland Wood

DISTRICT ATTORNEY: Haldon J. Kittrell

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

ISSUE: Whether the evidence was sufficient to support the verdict.

FACTS: On October 15, 2012, Clarence Jefferson was stopped at a safety checkpoint in Columbia, Mississippi, at around 9:45 p.m. Officer Justin McKenzie testified Jefferson seemed pretty nervous. He was pacing back and forth, had bloodshot eyes, and smelled of alcohol. A portable breathalyzer indicated positive for the presence of alcohol. Jefferson then failed several field sobriety tests. After his arrest, Jefferson eventually agreed to an Intoxilyzer test, but the machine was not working properly. He did not respond to offers to have his blood drawn. Jefferson also admitted he had "a few earlier." Jefferson was charged with a felony based on two prior DUIs. The prosecution admitted a certified abstract of a conviction from Petal of a "Clarence D Jefferson" for a DUI committed on January 17, 2010, and a certified abstract of conviction from the Marion County Justice Court for a DUI committed by "Jefferson Clarence Dwayne" on January 18, 2010. The Marion County abstract contained

identifying information, but it was not exactly the same as the Petal abstract. The same day and month were given for the birth, but the year was different – 1969 on the Petal abstract and 1964 on the Marion County abstract. A different address was shown, but both were in Columbia. The Marion County abstract had no box for a social security number, but it gave a driver's license number that was the same as Jefferson's social security number on the Petal abstract.

HELD: The evidence was sufficient to prove common law DUI. McKenzie testified that Jefferson admitted he had been drinking earlier; that he smelled of alcoholic beverages, had bloodshot eyes, appeared nervous, and acted obstinately; tested positive for alcohol on a portable breathalyzer; and failed or could not complete the field sobriety tests. These are all evidence of intoxication.

The evidence was also sufficient to show Jefferson had been convicted of two prior DUIs. All of the documents bear the same social security or driver's license number, and McKenzie testified that it was both Jefferson's social security number and driver's license number. The differing year of birth can be explained as a scrivener's error, given the similarity of the numerals "4" and "9" and testimony that the Petal abstract was entered into a computer from a handwritten ticket. The fact that the home address on each abstract was different goes to the weight of this evidence rather than its sufficiency.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98493.pdf>

Joshua Daniel Graham v. State, No. 2013-KA-01040-COA (Miss.Ct.App. November 18, 2014)

CASE: Aggravated Assault on a LEO

SENTENCE: 18 years, followed by 12 years of PRS

COURT: DeSoto County Circuit Court

TRIAL JUDGE: Hon. Robert P. Chamberlin

APPELLANT ATTORNEY: Mollie Marie McMillin

APPELLEE ATTORNEY: Melanie Dotson Thomas

DISTRICT ATTORNEY: John W. Champion

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

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

FACTS: During the early morning of February 27, 2012, Officer Mitzi Stewart, a Southaven police officer, spotted a blue Ford Crown Victoria, with no tag, driving slowly through the parking lot of a convenience store. The store was closed at the time. After the car came to a stop, Stewart parked her patrol car behind the car and radioed to dispatch. Joshua Graham exited the car and walked towards the patrol car. Graham told her he was searching for an air machine in order to put air in his front. Officer Stewart determined that the tire was not low. Graham stated that he was from Memphis, and was visiting his girlfriend. However, Graham was unable to provide his girlfriend's name, the name of the college she attended, or her major. Graham said the car belonged to his girlfriend and that she

had his drivers license. Stewart performed a pat-down search and found what she believed was marijuana. While attempted to handcuff Graham, he fled to his car and tried to drive away. Stewart tried to grab him as he got into the car, but was instead partially pulled into the car. She had to run along side the car to prevent being dragged. Graham kicked her and hit her several times in the face, breaking her nose. She was eventually able to retrieve her weapon and subdue Graham until back-up arrived. Graham only admitted to hitting her once in the face.

HELD: Graham argued that the evidence shows that he did not cause or attempt to cause serious bodily injury to Stewart with a deadly weapon or with other means likely to produce death or serious bodily harm. Graham insists that the evidence only supports a conviction for simple assault because Stewart's injuries were minor. However, the jury was given the option to convict him of simple assault of a LEO. The COA agreed with the State that the evidence revealed that Stewart was severely injured by Graham during the altercation, and that she had to receive medical treatment for her injuries. The verdict did not sanction an unconscionable injustice.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98943.pdf>

Robert Fitzgerald Smith v. State, No. 2013-KA-01073-COA (Miss.Ct.App. November 18, 2014)

CASE: Statutory Rape

SENTENCE: 20 years, with 11 years to serve, 9 year suspended, and 5 years supervised probation

COURT: Washington County Circuit Court

TRIAL JUDGE: Hon. Margaret Carey-McCray

APPELLANT ATTORNEY: Erin Elizabeth Pridgen

APPELLEE ATTORNEY: Scott Stuart

DISTRICT ATTORNEY:

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

ISSUE: Whether the verdict was against the weight of the evidence.

FACTS: During the weekend of May 31, 2008, through June 1, 2008, B.G. visited her grandmother's house with her two younger brothers. Robert Smith [B.G.'s 39 year old uncle] also lived at the house with several others. B.G. turned 9 years old that weekend. B.G. behaved normally after being picked up by her mother, but did say she did not want to visit the house again without her older sister coming with her. In December, B.G. was taken to a pediatrician where she complained about an irregular menstruation. The doctor said that was normal, but B.G.'s mother sought a second opinion in January of 2009 from a nurse practitioner. B.G. denied any sexual activity, but after she tested positive for trichomoniasis and bacterial vaginosis, she admitted that Smith had "messed with" her the last time she visited her grandmother's house. B.G. subsequently told a DHS counselor that Smith had raped her. Although her second interview with the counselor changed slightly, she reiterated that Smith took her out of the room where she was sleeping, licked her, hit her and that she then fled to the bathroom.

B.G. told a forensic interviewer that Smith had raped her at her grandmother's house. Smith had "licked her private part[,] and she also stated that he had touched her private part with his private part[.] [H]e held her down, and then he hit her in the face." At trial, B.G. testimony was similar to her statements. She also said Smith threatened to kill her the next morning if she told anyone. Smith testified that he did not rape B.G. He did not have trichomoniasis, but he had been treated with antibiotics for a toothache prior to being tested.

HELD: Smith argued that B.G.'s contradictory statements were simply repeated over and over again to the jury through the hearsay testimony of several witnesses. This, combined with the lack of physical evidence, proves that the verdict was against the overwhelming weight of the evidence. However, B.G.'s statements were not contradictory. "Despite some inconsistencies, B.G.'s statements—that Smith pulled her from a bed, took her into another room, and raped her at [her grandmother's] house the weekend of B.G.'s ninth birthday—remained consistent." The unsupported word of the victim of a sex crime is sufficient to support a guilty verdict where the testimony is not discredited or contradicted by other credible evidence. Physical evidence of sexual penetration is not necessary.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98928.pdf>

James John Rodgers v. State, No. 2013-KA-01718-COA (Miss.Ct.App. November 18, 2014)

CASE: Murder

SENTENCE: Life

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. John C. Gargiulo

APPELLANT ATTORNEY: Mollie Marie McMillin

APPELLEE ATTORNEY: Barbara Wakeland Byrd

DISTRICT ATTORNEY: Joel Smith

DISPOSITION: Affirmed. Roberts, J., for the Court. Irving and Griffis, P.JJ., Ishee, Carlton, Maxwell, Fair and James, JJ., Concur. Lee, C.J., Dissents with Separate Written Opinion, Joined by Barnes, J.

ISSUES: (1) Whether the trial court committed plain error in giving a self-defense jury instruction containing "at peril" language; (2) whether there was sufficient evidence to support the guilty verdict; and (3) whether the guilty verdict was against the overwhelming weight of the evidence.

FACTS: On January 24, 2011, James Rodgers was at his home in Gulfport, along with his girlfriend, Megan Taylor, his son, Jessie Rodgers, and his girlfriend. Taylor received a phone call from Clinton Jackson, a prior boyfriend. Jackson was purportedly upset about photographs taken by Rodgers showing Taylor's car at Jackson's house. Rodgers and Jackson spoke briefly. Taylor testified she heard Rodgers tell Jackson something like "come talk face-to-face." Taylor and Waller both testified Rodgers was agitated after his conversation with Jackson. Jackson came to Rodgers's home about 30

minutes later. Jessie was instructed by Rodgers not to let Jackson inside. Jessie escorted Jackson to his car. Jackson and Jessie then got into an altercation. Jessie began to back away from Jackson just as Rodgers emerged from the house carrying a gun. Jackson stepped towards Rodgers and Rodgers shot Jackson in the chest. Jackson was approximately 10-14 feet from Rodgers when he fired. Taylor testified she attempted to keep Rodgers from going outside to confront Jackson, while armed, but was unsuccessful. Rodgers testified he shot Jackson in self-defense because he thought he saw Jackson looking in the console of his car and assumed Jackson was searching for a weapon. However, he admitted he never told police he thought Jackson was armed. When he was arrested, he had a can of mace in his front pocket.

HELD: (1) The trial judge did err in granting a self-defense instruction (without objection) which told the jury that when “a person repels an assault with a deadly weapon, he acts at his own peril and the question of whether he was justified in using the weapon is for determination by the jury.” The SCT condemned the “at your peril” instruction in 1985, finding it self-contradictory and confusing. However, the COA found the granting of the instruction was not plain error.

There were six jury instructions covering self-defense. Clearly there was an error in allowing the "at peril" phrase to infect one of the self-defense instructions, but this was not per se reversible error. “The jury was instructed no less than six times that they must acquit if Rodgers had a reasonable fear of death or serious harm to himself or another. There is no reason to believe that the one reference to Rodgers acting at his peril swept these instructions from the jury's mind.”

(2) The evidence was sufficient for deliberate design murder. The jury was instructed on the Castle Doctrine, but rejected that defense. (3) The verdict was not against the weight of the evidence. To allow the verdict to stand would sanction an unconscionable injustice.

Lee, C.J., Dissenting:

Chief Judge Lee dissented, believing the “at peril” jury instruction to be plain error. He pointed out the SCT stated the instruction “constitutes reversible error in this case and will be so considered in future cases.” *Flowers v. State*, 473 So. 2d 164, 165 (Miss. 1985). More recently, the SCT also reversed a case where other proper self-instructions were given along with the “at peril” instruction. *Johnson v. State*, 908 So. 2d 758, 764 (¶20) (Miss. 2005).

In this instance, I find that the inclusion of the "at peril" language – language which has been repeatedly condemned – violated Rodgers's due-process rights; thus, I would reverse and remand for a new trial.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98564.pdf>

D'Andre Terrell v. State, No. 2013-KM-01129-COA (Miss.Ct.App. November 18, 2014)

CASE: First Offense DUI

SENTENCE: \$500 fine

COURT: Copiah County Circuit Court
TRIAL JUDGE: Hon. Lamar Pickard

APPELLANT ATTORNEY: Jeffrey A. Varas
APPELLEE ATTORNEY: Jeffrey A. Klingfuss
DISTRICT ATTORNEY: Elise Munn

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

ISSUES: (1) Whether the circuit court erred in denying a motion for a directed verdict, and (2) whether the evidence was sufficient to support his conviction.

FACTS: On November 10, 2012, D'Andre Terrell drove towards a driver's license checkpoint set up by Mississippi Highway Patrol Troopers Craig Morgan and Timothy Fuller. Terrell approached as they were setting up. Morgan noticed that Terrell's pupils were dilated, that his eyes were red, and that he was somewhat argumentative. He also smelled alcohol on Terrell's breath. When he exited his vehicle, Terrell had to lean on his car for support. A portable breath test (PBT) yielded positive results. Terrell told the trooper it was his birthday. Morgan also observed a marijuana cigarette in Terrell's vehicle and tested positive on a second PBT. Morgan was later unable to get any BAC-test results in two attempts. Nevertheless, he was charged with DUI. Terrell was convicted in justice court, and appealed to circuit court for a trial de novo. Terrell testified he had an adequate explanation for each factor that Morgan considered in charging him with DUI. He also claimed he dealt with Trooper Fuller, not Morgan. He denied drinking and said he eyes were red because he had an irritated contact and that he was suffering from a cold. He also stated he had several cough drops which may have explained the smell of alcohol on his breath. He was again convicted in a bench trial. He appealed.

HELD: (1) and (2) Since this was a bench trial, he really did not ask for a directed verdict, but rather a dismissal for insufficient evidence. His two issues for review are really the same claim. Morgan testified that when Terrell stopped at the checkpoint, he smelled alcohol on Terrell's breath and he noticed that Terrell had dilated pupils and red eyes. Morgan stated that when he asked Terrell to exit his vehicle, Terrell had to lean on the vehicle to support himself. Additionally two PBTs revealed alcohol on Terrell's breath. Terrell never objected to Morgan's testimony. Terrell's testimony went to the weight, not the sufficiency of the evidence.

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO98980.pdf>

November 25, 2014

David Camp Pittman v. City of Starkville, No. 2013-KM-00752-COA (Miss.Ct.App. November 25, 2014)

CASE: First Offense DUI
SENTENCE: 48 hours, suspended

COURT: Oktibbeha County Circuit Court

TRIAL JUDGE: Hon. Lee J. Howard

APPELLANT ATTORNEY: Rodney A. Ray

APPELLEE ATTORNEY: Caroline Crawley Moore

CITY PROSEUCTOR: Caroline Crawley Moore

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

ISSUE: Whether the evidence was sufficient to support the verdict.

FACTS: On September 7, 2012, Officer Derrick Nelson of the Starkville PD noticed a vehicle positioned halfway in the street and halfway on the curb. Nelson noticed several garbage cans strewn about the adjacent yard. Based on the position of the vehicle, he believed that the garbage cans had just been hit by the vehicle. David Pittman was sitting in the driver's seat of the vehicle with the key still in the ignition. Nelson smelled alcohol and marijuana. Nelson helped Pittman exit the car. Pittman was very off balance, staggering, and struggling to hold himself up on the car. Pittman informed Nelson that he lived at the house, but several witnesses nearby denied this and asserted that Pittman had run into the garbage cans and into the yard. Pittman was so intoxicated that he was unable to hold a conversation. He refused to perform any field sobriety tests and was arrested. He later refused an Intoxilyzer test. Pittman pled no contest in municipal court. He then appealed to circuit court and was again convicted in a trial de novo. He again appealed.

HELD: Pittman asserts that the City failed to prove the elements of common-law DUI. He contends that the testimony failed to establish that he was driving or operating a vehicle. Although Nelson did not watch Pittman drive the vehicle, Pittman was in a position where he was capable of moving the vehicle. Pittman was unable to walk, talk, or stand without extreme difficulty. Both officers present stated that they smelled an intoxicating substance when they encountered Pittman. The City proved beyond a reasonable doubt that Pittman was guilty of common-law DUI.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO96722.pdf>

Larry Gene Singleton v. State, No. 2013-KA-01996-COA (Miss.Ct.App. November 25, 2014)

CASE: Gratification of Lust x4, Sexual Battery of a Child under 14 x3, Sexual Battery of a Child Between 14-16 x3, and Possession of Child Pornography x10

SENTENCE: Mostly concurrent terms with one consecutive, for a total of 30 years.

COURT: Tate County Circuit Court

TRIAL JUDGE: Hon. James McClure, III

APPELLANT ATTORNEY: Benjamin Allen Suber

APPELLEE ATTORNEY: Melanie Dotson Thomas

DISTRICT ATTORNEY: John W. Champion

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

ISSUES: (1) Whether the trial judge erred in denying Singleton's motion to sever the child pornography counts in the indictment; (2) whether the trial judge erred in admitting Exhibit 5 into evidence; and (3) whether the trial judge erred in denying Singleton's motion to suppress his custodial statement.

FACTS: Larry Gene Singleton was convicted of two counts of gratification of lust, three counts of sexual battery of a child under fourteen years of age, three counts of sexual battery of a child at least fourteen but under sixteen years of age, and ten counts of possession of child pornography. From approximately March 2005 to October 2012, Singleton engaged in a sexual relationship with Daniel Doe, a child who lived next door to Singleton. Daniel first went to Singleton's house to play with Singleton's grandson and to do odd chores. When Daniel was 11, Singleton showed Daniel his genitalia and asked to see Daniel's. This progressed to physical contact and eventually oral and anal sex. Singleton also took pictures of a nude, prepubescent Daniel. As Daniel got older, Singleton bribed him with alcohol, cigarettes, and pornography in exchange for sex, with the final encounter occurring in October 2012. Shortly thereafter, Daniel contacted the police regarding the acts perpetrated by Singleton. Police had Daniel call Singleton and recorded the conversation. During the conversation, Singleton confirmed some of the abuse, gave Daniel advice about sex, and commented on the changes in Daniel's body from when he was a child. Police then executed a search warrant, seizing a personal computer and pornographic pictures from his home. Singleton denied all allegations until the investigators played the recorded phone conversation between Singleton and Daniel. Singleton eventually admitted the allegations made against him.

HELD: (1) Singleton argued that because the State could not prove the exact time when the pictures were taken, the photographs could neither serve as evidence in the non-pornographic counts, nor could all the counts be considered as intertwined. The court found the time period between occurrences was insignificant. The court determined that similar acts with the same victim over several years established a common scheme or plan. The trial court did not abuse its discretion in finding the multi-count indictment was proper.

(2) Singleton's claim that the trial court erred in admitting photographs of the victim into evidence as a violation of MRE 404(b) is procedurally barred. The photos were also the basis of the 10 counts of child pornography. Trial counsel failed to object to the exhibit's admission at trial.

(3) Singleton challenged the validity of his confession due to his altered mental state from his lack of medication and certain religious references made during his interrogation. As to religious references, the investigator simply told Singleton that it was "time to come to Jesus" after he played the tape-recorded conversation between Singleton and Daniel. Singleton, a preacher for 54 years, argued that police took advantage of his religious beliefs by using Jesus to elicit a confession. This inducement to tell the truth without more does not rise to the level of coercion.

Investigators testified that Singleton did not appear confused or in any altered mental state during the entirety of the interrogation. At no time did Singleton ask the interrogation to stop due to illness or

ask for medical assistance. Singleton failed to demonstrate how his lack of medication led to an intoxicated or sickened state that adversely affected the voluntariness of his confession.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98268.pdf>

Jeremy Edwards v. State, No. 2013-KA-02091-COA (Miss.Ct.App. November 25, 2014)

CASE: Shooting a Firearm into an Occupied Building

SENTENCE: 5 years, with 1 to serve and 4 years of PRS

COURT: Washington County Circuit Court

TRIAL JUDGE: Hon. Richard A. Smith

APPELLANT ATTORNEY: W. Daniel Hinchcliff

APPELLEE ATTORNEY: Stephanie Breland Wood

DISTRICT ATTORNEY: Willie Dewayne Richardson

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

ISSUE: Whether the evidence was sufficient to support the verdict.

FACTS: On August 11, 2012, Jimmy Whatley, the owner of K&J Grocery and Grill in Greenville, saw a group of men gathered outside of his store. Concerned this would hurt business, he asked the group to leave. All of the men, except for Jeremy Edwards, dispersed for the night. Edwards then came into the store, purchased a cigar, and began cursing and yelling. Edwards shouted at Whatley, asking whether he was talking to Edwards specifically when Whatley asked the men to leave. Whatley then escorted Edwards out of the establishment. Later in the evening, Whatley went outside of the store just prior to closing. Whatley saw Edwards across the street holding something black in his hands. Moments later, after Whatley went back inside the store, several gunshots rang out. At least one projectile hit the front door of the store, and another possibly struck a vehicle belonging to Whatley. Whatley told police that he did not see the perpetrator, but believed Edwards was responsible for the shooting. Police did not recover any evidence from the scene other than Whatley's statement and a few photographs of the storefront. Whatley went to the police station and showed officers a hole in the rear driver's side door of his vehicle. Whatley claimed he parked the vehicle outside of the store the previous night and it remained near the store during the shooting. Police recovered a projectile from the vehicle's door, but did not trace it to a gun or to a person.

HELD: The evidence clearly showed someone fired into the store. Edwards claimed the evidence was insufficient to show he was the person who fired the shots. The police failed to link a gun either to Edwards or to the projectile retrieved from the vehicle. Testimony proved Edwards stood outside of the store immediately prior to the shooting. Whatley testified Edwards held something black in his hand and appeared alone. Whatley did not see who committed the act, but no other person was in the vicinity at the time of the shooting. Given reasonable inferences from the evidence, the jury could have found Whatley guilty beyond a reasonable doubt.

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO98295.pdf>

December 2, 2014

Clarence Wydell Hynes v. State, No. 2013-KA-01428-COA (Miss.Ct.App. December 2, 2014)

CASE: Possession of at least .1 gram but less than 2 grams of Methamphetamine

SENTENCE: 10 years as a subsequent drug offender

COURT: Scott County Circuit Court

TRIAL JUDGE: Hon. Marcus D. Gordon

APPELLANT ATTORNEY: Edmund J. Phillips Jr.

APPELLEE ATTORNEY: Lisa L. Blount

DISTRICT ATTORNEY: Mark Sheldon Duncan

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

ISSUES: (1) Whether the trial court erred in admitting into evidence the search of Hynes's person, and (2) whether the trial court erred in admitting Hynes's confession into evidence.

FACTS: On November 10, 2011, Clarence Wydell Hynes was with his friend, Ryan Jackson, at the intersection of VFW Road and a dirt road. Deputies were driving on VFW Road, and saw Jackson and Hynes duck behind a car. Hynes then left and a Deputy Joey Rigby stopped him for speeding. Hynes admitted he had a suspended drivers license and Rigby arrested him. While searching his pockets, Ribgy found a pill bottle which was later determined to contain methamphetamine. Hynes told Rigby that he had a problem with drugs and bought the drugs from someone named "Brusha." Hynes volunteered this information as Rigby did not question him. Investigator Leonard Harrison testified that Hynes was read his rights and that Hynes appeared to have understood those rights. Harrison also testified that while Hynes was in custody, he never asked for an attorney and gave a written, signed statement. Jackson testified at trial that when Hynes saw the police, he got into his car and left, but was not speeding.

HELD: (1) Rigby testified that he stopped Hynes because he was speeding. Hynes then admitted he had a suspended license. Hynes was then arrested. The search of his person was properly conducted incident to arrest. (2) The trial court did not err when it admitted Hynes's confession into evidence. The confession was not the product of an illegal arrest. Several officers testified that Hynes gave his statement voluntarily and was not coerced in any way.

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO98749.pdf>

Brandy Nicole Williams v. State, No. 2012-KA-01839-COA (Miss.Ct.App. December 2, 2014)

CASE: Capital Murder
SENTENCE: Life Without Parole

COURT: George County Circuit Court
TRIAL JUDGE: Hon. Richard W. Mckenzie

APPELLANT ATTORNEY: George T. Holmes, Andre De Gruy
APPELLEE ATTORNEY: Scott Stuart
DISTRICT ATTORNEY: Anthony N. Lawrence, III

DISPOSITION: Reversed and Remanded. Griffis, P.J., for the Court. Lee, C.J., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur. Irving, P.J., Dissents Without Separate Written Opinion.

ISSUES: (1) Whether the trial court erred in excluding the co-defendant's statement to police; (2) whether the trial court erred in giving instruction S-7A on liability for a contributing cause of death; (3) whether the trial court erred in refusing a defense jury instruction on identification evidence; (4) whether the trial court erred in giving instruction S-5A on accomplice liability; (5) whether the trial court erred in preventing the defense from introducing the State's closing argument from the co-defendant's trial; and (6) whether the verdict was against the overwhelming weight of the evidence.

FACTS: On July 19, 2010, Christopher Lee Baxter failed to appear for his sentencing hearing for manufacture and possession of methamphetamine, and a bench warrant was issued for his arrest. On July 21st, Sheriff Gary Welford told deputies to be on the lookout for Baxter. Later that day, Deputy Bobby Daffin saw Brandy Williams, Baxter's girlfriend, driving her father's truck in Lucedale. Daffin began following the truck and a high speed chase ensued. The driver refused to stop, leading law enforcement on a 17-mile chase, with speeds reaching over 100 miles per hour. Sheriff Welford and several deputies set up a roadblock for the truck. The truck accelerated through the intersection and swerved around the cars, striking Sheriff Welford. None of the officers could positively identify the driver at the time Welford was struck. The truck eventually crashed and the occupants fled. Baxter and Williams were found the following morning hiding in a trailer in the woods. Baxter later confessed and admitted to his participation in the high-speed chase, stating the he was the driver for the entire pursuit. He later stated that Williams was initially driving, but explained that they switched seats before the sheriff was hit. He was adamant that Williams played no part in the crime, only acting at his direction. Both Baxter and Williams were charged with the capital murder of Sheriff Welford. Baxter's conviction was affirmed earlier this year. *Baxter v. State*, No. 2012-KA-01032-COA (Miss.Ct.App. July 29, 2014). Baxter was called as a defense witness in Williams's trial, but invoked the 5th Amendment. Calling it a "close call," the trial judge did not allow the defense to enter Baxter's statement into evidence. She appealed.

HELD: (1) Williams argued that Baxter's statement exculpates her and that it is corroborated by other independent reliable evidence—Megan Jarmin's testimony that she saw the truck cross Highway 98 moments after it passed through the roadblock, and it was being driven by a male, and the facts that Baxter's DNA was found on the steering wheel and no female DNA was recovered from the truck. Baxter's statement met all the requirements as an exception to hearsay under MRE 804(b)(3). He was unavailable, his statement was against his interests and subjected him to criminal liability. A

reasonable person in Baxter's situation would not have made such a statement unless he believed it to be true. Finally, there was corroborating evidence to indicate the trustworthiness of the statement. "Had the jury heard Baxter's statement to law enforcement, it is possible that they could have found that Williams was not driving at the time Sheriff Welford was killed and that Williams sought to end the chase and was not an active participant in Welford's death." Baxter told police that Williams tried to get him to stop. Had the jury heard this, she may not have been convicted of capital murder. It was reversible error to exclude the statement.

(2) The trial judge also erred in granting an instruction concerning whether Williams's action were a contributory cause of death. The jury was given three separate aiding and abetting instructions. These instructions adequately explained the source of Williams's liability. By adding an instruction on contributing causes of death, the court needlessly created a risk that the jury would convict unless the defense could prove that the initial flight was not a contributing cause of the death. The instruction improperly shifted the burden of proof to the defense to prove that Williams was not driving at the moment of impact, and that she had abandoned the flight.

(3) The trial judge did not err in denying an identification instruction. The instruction stated in part: "If...you are not convinced beyond a reasonable doubt that [Williams] is the person who was driving at the time the Sheriff was hit, then you must find her not guilty." This was an incorrect statement of the law. Williams may be guilty if she aided and abetted Baxter even if she was not driving.

(4) The trial judge did not err in granting an accomplish liability instruction which stated in part: that "one who willfully, unlawfully, and feloniously aids and abets, assists, participates or otherwise encourages the commission of a crime is just as guilty under the law as if he or she had committed the whole crime with his or her own hands." Williams argued that the instruction permitted the jury to convict Williams if she did anything to further any element of the crime, even if she abandoned her participation. However, reading the instruction together with the other aiding and abetting instructions, as well as an abandonment instruction, the jury was accurately and fairly instructed.

(5) The trial judge did not err in refusing to allow the defense to read the prosecution's closing argument from Baxter's trial. In that argument, the State contended primarily that Baxter was driving the truck when it struck Welford, but that even if Williams was driving, she was under Baxter's control and he was responsible for the death. In Williams's trial, the State argued that Williams was driving, but even if she was not, she was liable as an aider and abettor. In Baxter's trial, the State acknowledged that either Baxter or Williams could have been driving.

(6) The decision to reverse the conviction and remand for a new trial makes the weight of the evidence argument moot.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO90846.pdf>

Ryan McClendon v. State, No. 2013-KA-01405-COA (Miss.Ct.App. December 2, 2014)

CASE: Armed Robbery

SENTENCE:25 years, with 15 suspended and 5 years PRS

COURT: Lee County Circuit Court

TRIAL JUDGE: Hon. Thomas J. Gardner, III

APPELLANT ATTORNEY: Jonathan W. Martin

APPELLEE ATTORNEY: Lisa L. Blount

DISTRICT ATTORNEY: John Richard Young

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

ISSUES: (1) Whether McClendon's trial counsel was ineffective, and (2) whether the verdict was against the overwhelming weight of the evidence.

FACTS: On November 20, 2010, Nancy Hudson was robbed at gunpoint on a well-lit area on Jackson Street in Tupelo. The robber was dressed in all black with a black toboggan cap. The robber ran across the street and was almost hit by a car driven by Kayla Lawrence. Elizabeth Watts and Pam Genry were passengers in Kayla's car. Police responded and began tracking the robber with a K-9. The dog tracked the suspect through a field and to the back of a house where a black shirt, a purse, and a gun were found. Later that evening, Elizabeth saw the robber again walking down another street and called police. Ryan McClendon was later arrested. Elizabeth and Kayla identified him as the robber at trial, despite both having previously identified someone else in a photo lineup. At trial, Christopher Allen, an acquaintance of McClendon, testified that on the night of the robbery, McClendon told him that he was "fixing to hit a lick." Christopher further testified that McClendon was wearing a black sweatshirt, pants, and a toboggan cap. Candace Nalls, Christopher's girlfriend, also testified that McClendon told her that he was trying to "hit a lick." She also saw McClendon about a week later, and McClendon told her he hit a lick, but didn't get any money because he dropped the purse while running away. Jeremy McClendon, the defendant's cousin, told police McClendon committed the robbery. McClendon claimed alibi, which was corroborated by his girlfriend.

HELD: (1) "The record does not affirmatively show ineffectiveness of constitutional dimensions, and the parties have not stipulated that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the circuit court." McClendon can raise the issue again on PCR.

(2) McClendon asserted that Elizabeth's and Kayla's photo-lineup misidentification, the lack of physical evidence, and the conflicting testimony prove that the verdict was against the weight of evidence. However, both Kayla and Elizabeth identified McClendon at trial as the man they saw running from the scene. Christopher and Candace testified that McClendon told them that he was going to hit a lick. About a week later, he told Candace he hit a lick, dropped the purse while running away. Jeremy came forward and made a statement that his cousin, McClendon, committed the robbery. A gun, Nancy's purse, and a black long-sleeve tee shirt were found near the area where McClendon was last seen. The verdict does not sanction an unconscionable injustice.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO99334.pdf>

Fred Harrell v. State, No. 2013-KA-01194-COA (Miss.Ct.App. December 2, 2014)

CASE: Attempted Aggravated Assault

SENTENCE: 6 years, followed by 3 years PRS

COURT: Tunica County Circuit Court

TRIAL JUDGE: Hon. Johnnie E. Walls, Jr.

APPELLANT ATTORNEY: George T. Holmes

APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISTRICT ATTORNEY: Brenda Fay Mitchell

DISPOSITION: Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur. Barnes, J., Dissents with Separate Written Opinion.

ISSUES: (1) Whether the trial court erred by excluding evidence showing that the defendant was threatened by the victim before the incident at issue took place, and (2) whether the trial court erred by excluding evidence of the victim's propensity for violence.

FACTS: Fred Harrell worked for James Daniel and Dennis Daniel, two brothers that owned a farming business. The Daniels were also part-owners of a truck stop, with their sister, Jeraldean Daniel, and her boyfriend, Leonard Davis. On October 24, 2014, Harrell ate breakfast at the truck stop and was waited on by Jeraldean. Harrell apparently made a sexually explicit comment to Jeraldean, and also touched her inappropriately. Jeraldean mentioned it to Leonard. Because he and Harrell had prior verbal altercations, Leonard decided to find James and tell him about it. Leonard caught up with Dennis on the way and started discussing what happened. He did not know Harrell was in the bed of Dennis's truck. Leonard told Dennis, "I feel like if you all don't talk to [Harrell] and do something with [Harrell,] it is going to be a problem at the store." Dennis parked a short distance away with Leonard following. Harrell then jumped out of the truck, retrieved a rifle from the back cab of the truck, and fired at Leonard. He was not hit. At trial, Harrell attempted to explain he got the rifle because Leonard threatened him. The trial judge would not allow Harrell to say what Leonard said because the State objected to hearsay. The court also prohibited Harrell from questioning Leonard about a prior violent encounter with a customer at the truck stop.

HELD: (1) The trial court erred by sustaining the State's objection to the admissibility of Leonard's alleged threat based on hearsay. However, Harrell suffered no prejudice. Later testimony established Leonard did see Harrell in the truck and said, "'I'm talking to you m----- f-----.'" Harrell characterized Leonard's statement to him as a threat, but it clearly was not. It is more accurate to say that Leonard cursed at Harrell rather than threatened him. The jury was made aware of that conversation that Dennis and Leonard had that Harrell overheard.

(2) Although the State objected to questioning Leonard about his fight with a truck stop patron, the court allowed Harrell's counsel to cross-examine Leonard about the incident to show his propensity for violence. Even if the court had not allowed the testimony, Harrell failed to establish a predicate for admission of that type of evidence.

Barnes, J., Dissenting:

Judge Barnes dissented, believing the trial court erred in not allowing Harrell to fully testify about the threats made by Leonard. "I find that the prosecutors' and trial court's errors interrupting and precluding Harrell's testimony when he was trying to present his defense severely prejudiced Harrell." She did not believe, "I'm talking to you m****r f****r," was the full threat. The threat at issue was made when Leonard did not know Harrell was in the bed of Dennis's truck. Harrell was not allowed to testify to this threat. [The majority noted that if this were the case, the defense was obligated to proffer the testimony Harrell wanted present about what Leonard said.]

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98311.pdf>

Stacy L. Miller v. State, No. 2013-KM-01881-COA (Miss.Ct.App. December 2, 2014)

CASE: First Offense DUI

SENTENCE: 48 hours, suspended

COURT: Montgomery County Circuit Court

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

APPELLANT ATTORNEY: Mark Kevin Horan

APPELLEE ATTORNEY: Stephanie Breland Wood

DISTRICT ATTORNEY: Doug Evans

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

ISSUES: (1) Whether the trial court erred in holding that the officer had probable cause to administer the portable breathalyzer; and (2) whether the trial court erred in failing to exclude the intoxilyzer results.

FACTS: Stacy Miller was charged with DUI after being stopped at a license checkpoint around 9:30 p.m. on July 5, 2012, and registering a .10% BAC on the Intoxilyzer 8000. Trooper Josh McBride testified that he asked for Miller's driver's license and he noticed several empty beer containers on the driver's floorboard. McBride also smelled a strong odor of alcohol in the car and then inquired about Miller's alcohol consumption. Miller admitted that he, along with a few friends, had gone fishing and had several beers. McBride then offered Miller a portable breath test, which detected alcohol. Miller was ordered out of the vehicle. When Miller stepped out, he seemed to be unsteady on his feet. Miller noted that there was a strong alcohol odor emanating from Miller's person, and Miller was transferred to the county EOC where he was tested on the Intoxilyzer around 10:15 p.m. Miller was convicted in justice court, and the conviction was affirmed in circuit court.

HELD: (1) Sufficient evidence existed to establish probable cause for McBride to administer the portable breathalyzer test. Miller admitted to drinking, had red glassy eyes, smelled of alcohol, and was

unsteady on his feet. These observations were enough to give Miller the breathalyzer test. Field sobriety tests were not necessary

(2) McBride testified as to the proper procedure he followed in administering the Intoxilyzer test. He testified that he was certified to operate the machine, and the certificate of calibration and McBride's certification were admitted into the record. The intoxilyzer test did not violate the Confrontation Clause. There is nothing in the record to suggest that the results of the test were invalid because the machine was not calibrated properly.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98750.pdf>

December 9, 2014

Leon Edwards Jr. v. State, No. 2013-KA-01561-COA (Miss.Ct.App. December 9, 2014)

CASE: Manslaughter

SENTENCE: 20 years with 15 to serve, 5 years suspended, and 5 years of probation

COURT: Coahoma County Circuit Court

TRIAL JUDGE: Hon. Albert B. Smith, III

APPELLANT ATTORNEY: Justin Taylor Cook

APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISTRICT ATTORNEY: Brenda Fay Mitchell

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

ISSUES: (1) Whether the trial court erred in not instructing the jury on the castle doctrine, and (2) whether the State violated his due-process rights by failing to adequately test the victim's firearm, thereby depriving him of the opportunity to present his complete theory of defense.

FACTS: Leon Edwards's wife, Sheila Edwards, was having an affair with Darrin Dickerson. Edwards saw their cars in the parking lot of a hotel in Tunica. He tried to confront her, but she refused to speak to him. The next day, Edwards went to Dickerson's home. Edwards knocked on Dickerson's neighbor's door, where a man Edwards worked with lived with his girlfriend, and put a gun in their closet. He went home a second time to retrieve another gun to keep inside his vehicle. When Edwards returned to Dickerson's apartment, he called a tow truck to remove his wife's vehicle. Sheila ran outside to stop it and Dickerson followed. Edwards testified that Dickerson came out of his apartment with both of his hands in his pockets. He testified that he warned Dickerson not to come any closer. When Dickerson would not stop, Edwards went to his vehicle to retrieve his gun. Edwards testified that when he walked back towards Sheila's vehicle, Dickerson made a gesture like he was going to pull something out of his pocket. Edwards proceeded to shoot Dickerson. Sheila rode with Dickerson in the ambulance to the helicopter pad to be airlifted to the hospital. She asked one of the medical employees for Dickerson's cell phone. When the employee reached into Dickerson's pocket, he pulled

out a gun and handed it to Sheila. The gun belonged to Sheila. Sheila testified that she tried to put the safety on the gun, but there was a bullet jammed in the chamber. She was questioned that night by police, but did not tell them about the gun. Six days later, Sheila brought the gun to the police department.

HELD: (1) Edwards argued that the trial court erred by neglecting to instruct the jury on the castle doctrine. However, Edwards never raised this defense at trial. The claim is therefore barred.

(2) Officer Ulyda Johnson testified that she did not find it necessary to test fire the weapon because too many people had touched the gun before she received it and no spent shell casings of the gun's caliber were found at the scene. Although clearly Dickerson should have been searched at the scene, the evidence does not suggest the police acted in bad faith in failing to search Dickerson or for failing to test the weapon. This gun was admitted into evidence. Officer Johnson testified that the gun, the clip, and the unspent bullet were in substantially the same condition as they were when Sheila brought them to her. Edwards was able to elicit testimony from Sheila that a bullet was jammed in the chamber, raising the inference that the gun was fired.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98934.pdf>

December 16, 2014

Jeremy William Radau v. State, No. 2013-KA-01904-COA (Miss.Ct.App. December 16, 2014)

CASE: Capital Murder

SENTENCE: Life without Parole

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. Roger T. Clark

APPELLANT ATTORNEY: Justin Taylor Cook

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, Roberts, Carlton, Fair and James, JJ., Concur.

ISSUE: (1) Whether the evidence was sufficient, and (2) whether the verdict was against the weight of the evidence.

FACTS: Around 7:30 a.m. on September 19, 2009, Jeremy Radau and his girlfriend, Megan Kinberger, went to the apartment of 74-year-old Charles Pickell in Biloxi. The couple had been on a binge all night—with Radau drinking heavily and Kinberger drinking and taking Xanax. According to Kinberger, they intended to rob Pickell, and she also hoped to get some Xanax pills from him. Radau gained entry to the apartment by telling Pickell he was friends with his daughter. A neighbor was suspicious of the two and called Pickell. Pickell said he knew them and that he was fine. The

neighbor nevertheless videotaped the couple before he had to leave. Radau claimed he did not intend to rob Pickell. The three discussed Kinberger doing some cleaning for Pickell, and Pickell gave him \$140. They also discussed trading sex with Kinberger for pills. Kinberger rummaged around looking for something to steal. When she returned to the living room, she discovered Radau beating Pickell "pretty hard" with a baseball bat. Kinberger saw Radau with money in his hand and noticed one of Pickell's pants pockets was inside out. Radau claimed Pickell tried to hit him with the bat, which Radau wrestled from him. He hit Pickell a few times when he tried to get up. Then he "blacked out." Kinberger suggested they call for help since Pickell was still alive and making noises. But Radau said they should flee. Radau took Pickell's baseball bat because he knew it would be evidence. The couple left, drove to the beach, rented a room at the Motel Six, then snacked on Krispy Kreme donuts. They were arrested the next day. Police recovered cash and the bloody bat.

HELD: (1) Radau admitted killing Pickell, but he argued the evidence was insufficient to show the killing occurred during a robbery. The evidence was sufficient. Kinberger testified that she and Radau went to Pickell's house to rob him. Once inside, Kinberger looked for something to steal. She saw Radau with cash in hand, as he beat Pickell to death with a bat. She also noticed Pickell's pants pocket was inside-out. Kinberger recalled Radau counting the stolen cash. Law enforcement recovered cash from Radau the next morning. (2) "For the same reasons we found the State sufficiently proved robbery, we likewise find the robbery-based capital-murder guilty verdict was by no means against the weight of the evidence."

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO99748.pdf>

January 13, 2015

Henry Lawson v. State, No. 2013-KA-00641-COA (Miss.Ct.App. January 13, 2015)

CASE: Possession of a vehicle with altered or mutilated VINs

SENTENCE: 5 years as an habitual offender

COURT: Prentiss County Circuit Court

TRIAL JUDGE: Hon. James Lamar Roberts, Jr.

APPELLANT ATTORNEY: William C. Stennett

APPELLEE ATTORNEY: Stephanie Breland Wood

DISTRICT ATTORNEY: John Richard Young

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

ISSUES: (1) Whether evidence stemming from an invalid search and seizure of Lawson's property in 2007 was improperly admitted; (2) whether the grant of the State's motion to amend the indictment to include a habitual status was improper; and (3) whether the weight and sufficiency of the evidence did not support the verdict.

FACTS: Henry Lawson was indicted on four charges related to his operating a "chop shop" in Prentiss County. He was convicted on only one count of possession of a vehicle with altered or mutilated vehicle identification numbers (VIN). In 2007, sheriff's deputies executed a search warrant at Lawson's residence in Jumpertown. During this search, the officers seized several parts from various vehicles (such as a truck frame, a truck bed, a truck cab, doors, and a hood), and VIN plates, all of which were documented by notes and photographs. In 2009, after receiving information from a CI, officer executed a search warrant at the home of Lawson's brother-in-law in Booneville. A VIN attached to a truck at this residence had previously been seen on a different vehicle during the search of Lawson's property in 2007. Another search was executed at Lawson's on June 23, 2009. Evidence from the search led to a third search warranted executed on July 10, 2009. Numerous vehicle parts and items were again seized, including a 2008 white Chevrolet four-door rollback truck. The VIN on the rollback truck showed the truck should have been a two-door standard-cab truck, while the truck was actually an extended-cab truck. Evidence indicated the rollback truck was actually put together with pieces of a truck stolen from Jeff Sanders of Tupelo in 2008. This was the basis of the jury's one conviction.

HELD: (1) The trial court did not err in allowing evidence from the 2007 search of Lawson's property. Lawson argued that the search was illegal because the warrant that officers presented to Lawson was unsigned and thus invalid. Therefore, all subsequent evidence was fruit of the poisonous tree. A copy of an unsigned warrant was entered into evidence. However, the State produced a signed search warrant. A copy of an unsigned warrant entered into evidence does not establish that a proper, signed warrant was not obtained prior to the search of Lawson's property.

The warrant also allowed the search of the surrounding area of Lawson's residence, including sheds and vehicles. It did not need to name the owner of the property. The warrant alleged Lawson occupied and controlled the areas. "Whether or not Lawson owned or controlled the area of the search warrant does not affect the validity of the warrant."

(2) The trial judge did not err in allowing the State to amend the indictment 4 days prior to trial to allege Lawson's habitual offender status. The defense only alleged the amendment was untimely. Lawson failed to show any prejudice in the timing of the motion to amend. Any claim that his prior convictions did not allege separate incidents is barred for failing to object on that ground.

(3) The evidence was sufficient and the verdict was not against the weight of the evidence. Lawson argued he had no criminal intent in possessing the Chevy rollback vehicle, which he stated was used to carry his racing vehicles to events. Officers found pieces of all sorts of vehicles and saw blades used to cut-up vehicles. Pieces from the truck stolen from Sanders in 2008 were found in Lawson's basement. Sanders's insurance company provided the sheriff with a duplicate key from the truck which opened a glove compartment box, a tailgate lock, and the bumper lug-lock for a spare tire, all found in Lawson's basement. Also found in Lawson's junkyard was the bed of a white Z-71 4X4 truck consistent with the make and model of Sanders's truck. The VIN of the rollback truck was the wrong size cab and make. A rational jury could infer from this evidence that the rollback truck was put together as a result of a chop shop, made from a cut-up truck that belonged to Sanders.

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO100082.pdf>

January 20, 2015

Verenzo Cartrell Green v. State, No. 2013-KA-01228-COA (Miss.Ct.App. January 20, 2015)

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. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Roberts, Carlton, Maxwell and James, JJ., Concur. Barnes, J., Dissents with Separate Opinion, Joined by Ishee, J.

ISSUES: (1) Whether the trial court erred in denying his motion to suppress, and (2) whether his conviction for trafficking stolen firearms was supported by sufficient evidence.

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 committed a month before. 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 appealed.

HELD: (1) The trial court did not err in finding Green's actions and the surrounding facts indicated that he abandoned the car. "As a result, Green had no Fourth Amendment protection in regard to the vehicle." Even if Green had standing to object, the police conducted a valid inventory search while waiting for the tow truck to arrive. The record lacks any evidence of bad faith on the part of the officers in conducting the search.

(2) Green did not challenge the sufficiency of the evidence properly at trial or in post-trial motions. The claim is therefore barred. Notwithstanding the bar, the evidence was sufficient. Green did not raise the issue of whether §97-37-5(1) allows for multiple convictions when more than one weapon

is possessed simultaneously by the defendant. This is an issue of first impression. The COA declined to address the issue as plain error.

Barnes, J., Dissenting:

Judge Barnes agreed the search was valid, but argued the double jeopardy issue was plain error. The issue was whether §97-37-5(1), which prohibits a convicted felon from possessing "any firearm," allows for multiple convictions when several weapons are possessed simultaneously. Citing how other states have addressed this issue, her opinion was that the "any firearm" language makes the statute ambiguous, warranting a statutory construction in favor of leniency. She also argued Green's sufficiency of the evidence claim was sufficient to preserve the issue. Regardless, to be free from double jeopardy is a fundamental right. "...I find the simultaneous possession of three weapons in this instance is insufficient to convict Green on all three counts..." She would remand for resentencing.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98491.pdf>

Antonio Maurice Parks v. State, No. 2013-KA-00810-COA (Miss.Ct.App. January 20, 2015)

CASE: Possession of more than 30 grams of Cocaine

SENTENCE: 25 years with 10 suspended and 5 years PRS, consecutive to a prior sentence

COURT: Attala County Circuit Court

TRIAL JUDGE: Hon. Joseph H. Loper Jr.

APPELLANT ATTORNEY: Rosalind Hayden Jordan

APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISTRICT ATTORNEY: Doug Evans

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

ISSUE: Whether the circuit court's admission of evidence obtained during an investigatory stop was an abuse of discretion, as the stop and subsequent search of Parks violated his rights under the Fourth Amendment.

FACTS: On August 3, 2012, MBN Agent Clint Walker received information from a CI that two African American males, traveling from Winston County in a green SUV with a Holmes County plates, were transporting approximately two ounces of crack cocaine. Walker spotted the SUV about two hours later traveling through Ackerman. Following the vehicle, Walker observed it cross the center line "a couple of times." Concerned about the potential for a high-speed pursuit, Walker requested assistance from the sheriff's office in making a traffic stop. A fake safety checkpoint was set up on Highway 12. As the SUV stopped at the checkpoint, four deputies and Walker approached the car, with guns drawn. Parks was the driver of the vehicle. He and his passenger, Curtis Blackmon,

were ordered from the vehicle and placed in handcuffs. Parks claimed he was taken to the rear of the vehicle and given a *Terry* pat-down search. Walker did a quick search of the car to check for any weapons in plain sight. He then proceeded to search Blackmon, but he found nothing. After obtaining Parks's verbal consent, Walker searched the vehicle a second time, but found no contraband. Walker then lifted Parks's shirt to check for any concealed weapon or contraband and saw three to four inches of the top of a sealed plastic bag sticking up from the waistband of Parks's pants. The bag was removed and contained an off-white, hard, rock-like substance later determined to be approximately 40 grams of crack cocaine.

HELD: Parks claimed he had already been frisked, so the subsequent lifting of his shirt exceeded the scope of *Terry* and violated the 4th Amendment. However, Walker testified he was unsure if Parks had been properly frisked, even though he was handcuffed. Walker stated suspects can access a weapon even if handcuffed. Under the totality of the circumstances, Walker's second pat-down of Parks was permissible. Further, the lifting of Parks's shirt did not exceed the scope of *Terry*. Limited intrusions designed to discover guns, knives, clubs or other instruments of assault are permissible. Walker's slight lifting of the shirt to view Parks's waistband was a "limited intrusion," and did not violate Parks's Fourth Amendment rights.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100068.pdf>

Terris Torrell Stevenson v. State, No. 2013-KA-00580-COA (Miss.Ct.App. January 20, 2015)

CASE: Domestic Violence, Third Offense

SENTENCE: 10 years

COURT: Warren County Circuit Court

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

APPELLANT ATTORNEY: W. Daniel Hinchcliff, George T. Holmes, Eugene A. Perrier

APPELLEE ATTORNEY: Billy L. Gore, Joseph Lane Campbell

DISTRICT ATTORNEY: Richard Earl Smith, Jr.

DISPOSITION: Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton and Fair, JJ., Concur. Roberts, J., Concur in Part and Dissents in Part with Separate Written Opinion, Joined by Maxwell and James, JJ.

ISSUES: (1) Whether the State committed reversible error in commenting during closing about defendant's possible sentence, and (2) whether the trial judge erred in denying the State's post-trial motion to amend the indictment.

FACTS: Terris Torrell Stevenson and Dalasi Taylor dated for about 3 years. On March 31, 2012, several months after the relationship ended, Taylor was walking with a "friend guy" on Crawford Street in Vicksburg, when Stevenson drove by and stopped his car. He told Taylor he loved her and wanted her back. Taylor was scared, but got into the car. A police officer stopped and told Taylor she would have to drive as Stevenson appeared intoxicated. Stevenson slapped her once during the drive

and eventually took her an apartment where his daughter lived. Stevenson told her to remove all her clothes. He then hit her with an electric cord. She also testified that Stevenson hit her on the head with the heel of a stiletto boot. After the incident, Stevenson called her multiple times and asked her to drop the charges, even though Taylor had obtained a restraining order against him. Stevenson arranged to meet Taylor at the police station. Taylor requested the police to drop the restraining order as well as the charges against Stevenson. Beverly Prentiss, a domestic-violence investigator, interviewed Taylor. Taylor agreed with Stevenson's claim that the beating occurred during "kinky sex." Prentiss further testified that Stevenson had two prior domestic-violence convictions, which Taylor knew about, yet he served no jail time on either conviction.

HELD: (1) During closing arguments, the State commented on Taylor having to be judged for taking a beating and for knowing Stevenson would not go to jail for any length of time on a simple assault. On appeal, Stevenson argued that argument referring to his potential sentence was improper. First, the claim is barred, as there was no objection at trial. Second, notwithstanding the bar, the comments were meant to refer to the victim's state of mind, as opposed to making a reference to Stevenson's potential sentence. He suffered no prejudice.

(2) Stevenson was indicted as a §99-19-83 habitual offender. However, after Stevenson's conviction, the State realized Stevenson did not meet those requirements, and sought to amend the indictment to show Stevenson was §99-19-81 habitual offender. That motion was denied and Stevenson was sentenced with no enhancement. The State cross-appealed. The COA found the judge acted in his discretion in refusing the amendment. The State filed the motion to amend the indictment well after trial and before the sentencing hearing.

Roberts, J., Concurring in Part and Dissenting in Part:

Judge Roberts concurred in affirming the conviction, but would reverse the case for a resentencing hearing to allow the State to proceed on a §99-19-81 habitual offender hearing. "By the grand jury indicting Stevenson as a section 99-19-83 habitual offender, Stevenson was necessarily charged also as a section 99-19-81 habitual offender." Stevenson could not have been unfairly surprised under *Gowdy*. "I submit that since Stevenson was aware that the State was seeking an enhancement, he had notice of the elements of both habitual-offender statutes, and he was not unfairly surprised by the amendment."

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO97891.pdf>

January 27, 2015

Shirley Warren v. State, No. 2013-KA-00926-COA (Miss.Ct.App. January 27, 2015)

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.

APPELLANT ATTORNEY: Andy Davis

APPELLEE ATTORNEY: Billy L. Gore

DISTRICT ATTORNEY: Doug Evans

DISPOSITION: Reversed and Remanded. James, J., for the Court. Lee, C.J., Irving, P.J., Ishee, Roberts and Fair, JJ., Concur. Carlton, J., Dissents with Separate Written Opinion, Joined by Griffis, P.J., Barnes and Maxwell, JJ.

ISSUE: Whether the trial court erred in denying her motion to dismiss due to a defective indictment.

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.

HELD: It is clear that the indictment failed to specify the nature of the controlled substance that Warren was alleged to have possessed. The State's failure to include the identity of the controlled substance prevented Warren from preparing a possible defense: namely, that her possession of the controlled substance was lawful. "The State should have included the identity of the controlled substances in the original indictment, or sought to re-indict Warren in order to include the identity of the controlled substances so as to adequately inform Warren of the precise nature of the charges against her and permit her to prepare a defense."

Carlton, J., Dissenting:

Judge Carlton dissented, arguing that §47-5-198(1) prohibits any person from selling within, possessing within, or bringing to any correctional facility or jail in Mississippi any controlled substance or narcotic. Because §47-5-198(1) prohibits all such substances, it is immaterial which specific narcotic or controlled substance is in question. Warren presented no evidence to show that she was authorized by law to possess such controlled narcotics in a correctional facility. The indictment sufficiently placed Warren on notice of the charge against her for unlawful possession of narcotics in a correctional facility.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98741.pdf>

Dareadell (Terrell) Thompson v. State, No. 2013-KA-00944-COA (Miss.Ct.App. January 27, 2015)

CASE: Wire Fraud

SENTENCE: 5 years, with 4 suspended, 1 year to be served on ISP, and 5 years supervised probation.

COURT: Lauderdale County Circuit Court
TRIAL JUDGE: Hon. Robert Walter Bailey

APPELLANT ATTORNEY: Charles W. Wright, Jr.
APPELLEE ATTORNEY: Lisa L. Blount
DISTRICT ATTORNEY: Bilbo Mitchell

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

ISSUES: (1) Whether the trial court erred by failing to suppress statements he made during the police internal investigation; and (2) whether he was prohibited from presenting evidence supporting his theory of defense.

FACTS: Dareadell "Terrell" Thompson was employed as a police officer in Meridian. In January of 2008, Detective Rita Jack filed a grievance against Thompson alleging that he had forged her signature, and the signature of a municipal judge, on a subpoena that Thompson issued to AT&T in order to obtain his wife's cellular-telephone records. Thompson was given a polygraph examination which indicated deception. Thompson was read his *Miranda* rights, and told the examiner that he suspected that his wife was communicating with a man with whom she had a previous affair, and that he forged the signatures on the subpoena to get her phone records. The police chief decided to handle the matter internally, and informed Thompson that he intended to terminate his employment. However, he subsequently wrote the mayor recommending that disciplinary action be taken against Thompson in lieu of his termination. In March of 2008, Thompson was suspended without pay for a period of ten weeks and demoted to the rank of police orderly, with a twelve-month probationary period. The letter further informed Thompson that he would not be considered for a promotion for a period of two years, and that he was required to undergo twelve months of mandatory counseling. The police chief retired in October of 2009. The new chief met with Thompson in January of 2009. Thompson admitted the forgery and was subsequently fired. The chief requested the AG's Office conduct an independent investigation of the matter. Thompson was later indicted and convicted of wire fraud. He appealed.

HELD: (1) Thompson argued that his statements should have been suppressed because the statements were used in violation of the *Garrity* rule. *Garrity* held that statements made by a police officer, which result from either the threat of termination if he does not answer or a promise that the statements will not be used in a criminal proceeding, are deemed to have been coerced and are therefore inadmissible in a subsequent criminal proceeding. *Garrity v. New Jersey*, 385 U.S. 493 (1967). However, the police chief testified he that he did not, either expressly or impliedly, threaten Thompson with termination from employment if Thompson refused to cooperate with the investigation. The new chief also testified he did not threaten to terminate Thompson if he did not answer his questions. The trial judge did not abuse his discretion in allowing the statements.

(2) Thompson claimed his theory of defense was that his alleged conduct was a misdemeanor that was handled internally by the police department. "We fail to see how the fact that Thompson's alleged conduct may conform to one of several misdemeanor offenses, in addition to a felony offense, is

relevant to Thompson's theory of defense at trial.” The jury was given instructions on the lesser misdemeanor offenses of impersonating a public officer or employee and unauthorized use of the name of another person to a telegram, petition, or related communication. Thus, Thompson was not denied his right to present his theory of defense at trial.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO99381.pdf>

Christi Jane Knight v. State, No. 2013-KA-01767-COA (Miss.Ct.App. January 27, 2015)

CASE: Manslaughter

SENTENCE: 20 years

COURT: Tishomingo County Circuit Court

TRIAL JUDGE: Hon. James Lamar Roberts Jr.

APPELLANT ATTORNEY: Justin Taylor Cook, George T. Holmes

APPELLEE ATTORNEY: Laura Hogan Tedder

DISTRICT ATTORNEY: John Richard Young

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

ISSUES: (1) Whether the trial court erred when it denied Knight's motion for a JNOV and (2) whether the trial court erred when it denied Knight's motion for a new trial.

FACTS: On July 12, 2012, Shad Reed called 911 and reported an accidental shooting. Tishomingo Police Chief Mike Kemp responded and saw Reed attempting to perform CPR on Doug Long. Kemp believed that Reed was the shooter and took him into custody. Meanwhile, he heard Christi Jane Knight screaming inside a trailer. She demanded to know why Reed was in custody. She seemed intoxicated and smelled of alcohol. She told Kemp that she had shot Long believing he was a deer. Reed testified that Long was the boyfriend of Knight's daughter, Stephanie Truelock. Truelock accused Long of abusing her. Reed got a shotgun and confronted Long. Another witness, Charles Crosby, saw Reed pointing a shotgun at Long and reported this to police. Long told Reed that Truelock had also hit him. Reed placed the gun on the hood of his truck to go get Truelock. That is when he heard Knight arguing with Long and then heard a gunshot. Reed told Knight to call 911 and began CPR. Reed asked what happened, and Knight told him she shot Long. Truelock testified that she and Long had been in a relationship for nine or ten months, and they were both addicted to methamphetamine and alcohol. Truelock also stated that everyone was drinking and that she was "wasted," and had passed out before the shooting occurred. Knight told Truelock that she shot Long and that "that ***** probably deserved it." Knight testified at trial that she shot Long in self-defense when he approached her after he had pushed her and threatened her. Long's BAC was 0.17%. Tried for murder, Knight was convicted of manslaughter.

HELD: The evidence was sufficient and the verdict was not against the weight of the evidence. Knight claimed she had no duty to retreat as she was dealing with an assailant at her home. The jury

was instructed on self-defense, duty to retreat, and manslaughter. Further, Knight told Kemp she shot Long because she thought he was a deer. The initial 911 call stated the shooting was an accident. Knight's assertion of self-defense did not occur until after her arrest. No other party present heard the threats Long made to Knight before the shooting.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO99343.pdf>

Kendrick D. Smith v. State, No.2013-KA-01408-COA (Miss.Ct.App. January 27, 2015)

CASE: Armed Robbery and Aggravated Assault upon a LEO

SENTENCE: 40 years for the armed robbery, and 30 years for the assault, to be served consequently

COURT: Adams County Circuit Court

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

APPELLANT ATTORNEY: Mollie Marie McMillin

APPELLEE ATTORNEY: Laura Hogan Tedder

DISTRICT ATTORNEY: Ronnie Lee Harper

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

ISSUES: (1) Whether there was juror misconduct; (2) whether Smith was entitled to a mistrial when a deputy was seen taking photographs in the courtroom; (3) whether Smith was entitled to a mistrial after a DNA expert testified to evidence allegedly not provided in discovery; and (4) whether Smith raised any arguable issues in his pro se brief.

FACTS: On June 24, 2011, an employee of a KFC in Natchez noticed a man crouched in the bushes outside the restaurant. The man, masked by a bandana, gestured to the employee to keep quiet. Fearing the man was going to rob customers in the drive-thru lane, the manager notified three deputies who were in the restaurant. When the deputies went outside to confront the man in the bushes, they saw him running away from the United Mississippi Bank next to the KFC. The suspect, wearing a bandana, cap, and t-shirt, fired three shots in the direction of the officers, wounding Deputy Buddy Frank in his right leg. Frank fired back, hitting the suspect in the shoulder. After he was shot, the suspect threw money into the air, leaving behind a trail of money. The police later arrested Kendrick Smith, who was found near the crime scene behind some apartments. Smith was missing a t-shirt and hat, but otherwise matched the description of the suspect. Smith also had a gunshot wound in the same area as the suspect. Police testified Smith confessed to the robbery a few days later, signing a statement. However, Smith claimed at trial that he had been sitting in a friend's car drinking gin when someone lured him behind the apartments asking for help. He was then robbed at gunpoint, forced to change into different clothing, and shot from behind.

HELD: (1) During trial, Smith's attorney informed the court that one of the jurors made a comment about the case, using the words "pleading guilty." The meaning behind the juror's statement was unclear, but nevertheless, the court removed the juror and replaced him with the first alternate. Since

Smith failed to move for a mistrial contemporaneously with his motion to excuse the juror, this issue is procedurally barred. Regardless, nothing in the evidence demonstrates that Smith was prejudiced by the juror's comment or that the jury was tainted in any way.

(2) Smith requested a mistrial after an employee from the sheriff's department was seen taking photographs in the courtroom during the trial. The judge stated that taking pictures of the jury was "clearly inappropriate" but that the employee may not have been aware that photos were prohibited. He further determined that the conduct did not warrant a mistrial. There is no evidence that the jury was intimidated by the photographer.

(3) A DNA expert testified that Smith's DNA was consistent with the DNA found on a two-dollar bill from the crime scene. It was disputed as to whether this was disclosed to the defense. The expert had already testified that Smith's DNA was consistent with the DNA found on the bandana, hat, and glove recovered in the woods near the crime scene. The judge sustained the objection and instructed the jury to disregard. The record lacks any indication that Smith was prejudiced or that the jury was tainted by the testimony.

(4) Smith raised several issues regarding the denial of certain pretrial motions in a pro se brief. Despite the State's incomplete response, the COA found no arguable issues in support of his appeal that merit discussion on review.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100414.pdf>

Trevor Hoskins v. State, No. 2013-KA-00912-COA (Miss.Ct.App. January 27, 2015)

CASE: Domestic Aggravated Assault

SENTENCE: 20 years

COURT: Washington County Circuit Court

TRIAL JUDGE: Hon. W. Ashley Hines

APPELLANT ATTORNEY: Erin Elizabeth Pridgen

APPELLEE ATTORNEY: Laura Hogan Tedder

DISTRICT ATTORNEY: Willie Dewayne Richardson

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

ISSUES: (1) Whether the trial court erred by allowing photographs of Taylor's injuries into evidence because they were more prejudicial than probative; (2) whether the trial court erred in denying a mistrial and suppression of a knife, as well as failing to sustain several objections at trial; (3) whether there was prosecutorial misconduct; (4) whether an investigator committed perjury; (5) whether conflicting testimony warranted a reversal; (6) whether the evidence was sufficient and whether the verdict was against the weight of the evidence; (7) whether he was prejudiced during the sentencing

hearing when the State offered evidence of his criminal history; (8) whether the State removed pages of the trial transcript in bad faith; and (9) whether he was denied a speedy trial.

FACTS: Trevor Hoskins and Linda Taylor were in a relationship. After drinking at May's Café, a local club, Hoskins dropped off Taylor's sister and his nephew. Hoskins then began to argue with Taylor about her ex-boyfriends. According to Taylor, Hoskins then brutally beat her and choked her. At one point, he retrieved a rusty knife. Since she was drifting in and out of consciousness, she stated she did not remember him cutting her, but woke up with lacerations to her neck. Taylor stated Hoskins halted his assault when she began to pray. He asked her what she was going to tell her family. Satisfied with the answer, he took her home. Taylor's aunt called an ambulance and she was taken to a hospital. Hoskins denied being with Taylor when she received her injuries. He claimed she wanted to go back to the club. He drove around for about 45 minutes until he saw her again. When he did, she was on her hands and knees. He then took her to her aunt's house.

HELD: (1) Hoskins objected to the admissibility of the photos of Taylor's injuries on the ground that they were cumulative. Five of the eleven photographs that were admitted into evidence either showed close-ups of four of Taylor's wounds or a different perspective of one of the wounds. While the photos did not tend to prove the assailant's identity, the State also had to prove Taylor suffered serious bodily injury, and that some wounds were caused by a deadly weapon. The pictures were taken to preserve evidence of the severity of Taylor's injuries and were not offered to inflame the jury.

(2) Hoskins argued several other issues in a supplemental pro se brief. The trial judge did not err in denying a mistrial after investigator Larry Quijas said he investigated the area of the attack. Hoskins claimed the State had failed to disclose any information regarding this investigation. The court sustained the objection and instructed the jury to disregard. "That the jury heard about an investigation and then was asked to disregard it was not so prejudicial as to warrant a mistrial."

There was no error in failing to suppress the knife found on the driver's side floorboard in plain view in Hoskins's car. Given the amount of blood in the vehicle, there was cause to believe the vehicle contained evidence of the crime and that the knife had been used to inflict injury.

Hoskins cited no authority for his claims that the trial judge erred in failing to sustain several objections to evidence and testimony at trial. A review of the record does not reveal any obvious error on the part of the trial court.

(3) Hoskins does not state with any specificity which statements during cross examination by the prosecutor constituted misconduct. The prosecutor's comments during closing were reasonable inferences from the evidence. Hoskins raised no objection to the prosecutor's comments during voir dire that Taylor had been stabbed.

(4) Hoskins offered no support to his claims of perjury or the use of perjured testimony.

(5) The credibility of witnesses is not for the a court to review. The jury resolves conflicts in testimony.

(6) Hoskins' argument rests on the lone assertion that the ER physician did not testify that the lacerations to Taylor's neck were caused by a knife. A knife was found on the driver's side floorboard of Hoskins's vehicle. Taylor testified that she saw Hoskins go to his vehicle to retrieve the knife. The doctor testified that at least one of her wounds was caused by "some sort of instrument." This evidence raises an inference that Hoskins caused or attempted to cause serious bodily injury with a knife.

(7) Hoskins received the statutory maximum sentence for domestic aggravated assault. Given the extent of Taylor's wounds, the trial court did not abuse its discretion in sentencing Hoskins to 20 years.

(8) A review of the trial transcript reveals that no pages were missing or blank.

(9) Hoskins never brought his demand for a speedy trial before the trial court. Hoskins was tried 70 days after he was arraigned and 377 days after his arrest. Hoskins failed to submit a sufficient record to review this issue. There is nothing in the record to indicate that Hoskins was prejudiced by the delay.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO99927.pdf>

Ethan M. Smith v. State, No. 2013-KA-01551-COA (Miss.Ct.App. January 27, 2015)

CASE: Murder

SENTENCE: Life

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. Lisa P. Dodson

APPELLANT ATTORNEY: Justin Taylor Cook

APPELLEE ATTORNEY: Billy L. Gore

DISTRICT ATTORNEY: Joel Smith

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

ISSUES: (1) Whether the trial court erred in refusing jury instructions D-1A on culpable-negligence manslaughter, and D-3 on excusable homicide by accident and misfortune; (2) whether the evidence was insufficient to support the verdict; and (3) whether the verdict was against the overwhelming weight of the evidence.

FACTS: On or about March 28, 2011, Ethan Smith, Eric Midkiff, Kameron Dixon, Jacindo Vo, and Rikki Treloar were inside a pop-out camper in the yard of Dixon's home. Smith, Midkiff, and Dixon had been drinking vodka, but no one appeared intoxicated. Smith pulled out a gun and started playing with its safety features. He gave the gun to Midkiff, who handled it for a time. There was no horseplay. Midkiff handed the gun back to Smith. After Smith put the gun away, Smith, Midkiff, Vo, and Treloar lay down on the bed. Dixon played video games. Vo testified that at some point while

the four of them were on the bed, Smith told Midkiff to leave in three seconds or he was going to shoot him. (Apparently, Smith had been texting with Treloar about having sex with her and wanting everyone to leave). Midkiff said he did not want to leave and Smith asked him again. Vo testified that she saw Smith grab the gun and lean over her to get to Midkiff. The next thing Vo heard was a gunshot, and everyone ran out of the camper. Smith, still holding the gun, told them to leave. Smith called 911 and told dispatch that his friend had shot himself in the head and asked what to do with him. Smith had gunshot residue on his hands.

HELD: (1) There was no error in denying a culpable negligence instruction. There was no evidence of horseplay. No one pointed the gun at anyone anytime prior to the shooting. There is nothing to indicate the gun misfired or was shot by accident. Smith threatened Midkiff that if he did not leave, he was going to shoot him. Midkiff did not leave, so Smith put the gun to Midkiff's head and shot him. Smith proceeded to call 911 and told dispatch that his friend had shot himself in the head.

There was also no error in failing to instruct on excusable homicide by accident and misfortune. There is nothing to indicate that the gun misfired or was shot by accident. There was no evidence Smith was acting in the heat of passion upon sudden and sufficient provocation. There was no argument and Midkiff did not reach for the gun or in any way try to defend himself.

(2) and (3) The testimony of the three eyewitnesses was virtually the same. Smith told Midkiff that if he did not leave, he was going to shoot him. This manifested his intent. When Midkiff refused to leave, Smith put the gun to Midkiff's head and shot and killed him. There was no evidence that Midkiff threatened or provoked Smith. Midkiff did not reach for the gun. There was no struggle. The gun Smith used had five safety features and that an accidental discharge was highly unlikely.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO99926.pdf>

February 10, 2015

Sheridan Torrance Davis v. State, No. 2013-KA-01747-COA (Miss.Ct.App. February 10, 2015)

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

SENTENCE: Life for the Murder, 16 years for the possession of cocaine, and 10 years for the felon in possession charge, all consecutively and as an habitual offender.

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. Lisa P. Dodson

APPELLANT ATTORNEY: George T. Holmes, Benjamin Allen Suber

APPELLEE ATTORNEY: Barbara Wakeland Byrd

DISTRICT ATTORNEY: Joel Smith

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

ISSUES: (1) Whether the evidence was sufficient to show Davis did not act in self-defense; (2) whether the murder and felon in possession a firearm verdicts were against the weight of the evidence; and (3) whether the trial court inappropriately admitted hearsay testimony from the victim as dying declarations or excited utterances.

FACTS: On the night of November 2, 2011, Sheridan Davis saw an acquaintance, Marcaris Lowe, at the Island View Casino in Gulfport. Lowe asked Davis for drugs, and Davis complied. They gambled for a while and then Davis left after losing between \$700- \$800. Lowe accompanied Davis to a friend's apartment. Davis testified he slept on the couch until he felt Lowe feeling around in his pockets in a search for drugs. Davis and Lowe engaged in a fight when Lowe allegedly pulled out a gun. Davis testified he successfully took the gun from Lowe and claimed he shot Lowe in self-defense. He then fled with the gun. A friend picked him up, but when they were stopped by police, Davis ran. He was soon tracked down and arrested. During the pursuit, officers found Davis's shoes and a firearm near the home where he was arrested. When Davis was searched, police found a small bag of cocaine in his pocket. Lowe was shot 4 times in the back. He managed to crawl to the balcony and call for help. He told police Davis had shot him. He died several days later of a pulmonary embolism.

HELD: (1) Davis claimed the State failed to show he did not act in self-defense. Davis admitted to shooting Lowe, but argued he did so in self-defense during the course of a physical altercation. Though Lowe possessed the physical upperhand, the State put on evidence that placed reasonable doubt regarding the self-defense claim. The apartment where Davis shot Lowe showed no signs of a struggle or any type of altercation other than the shooting. Davis and Lowe had no injuries indicating a physical struggle. Notably, Davis shot Lowe four times, all of which entered through Lowe's back.

(2) The verdicts were not against the weight of the evidence. Davis claimed he possessed the firearm out of necessity. Though Davis alleges he shot Lowe in order to stop Lowe from shooting him, Davis did not meet the required elements of necessity regarding the shooting, and failed to explain why he kept the firearm when he fled the scene. The jury found Davis's actions did not constitute necessity.

(3) Lowe told the 911 operator that a man named "Shelly," later identified as Davis, shot him. When police arrived on scene, a detective asked Lowe questions regarding the incident which were recorded. Lowe again named Davis as his shooter. Lowe asked for medical attention, clearly related he could not feel his legs, had labored breathing, and lost a large quantity of blood. The trial court did not err in admitting the statements as dying declarations. The COA did not address whether the statements were also excited utterances.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO100319.pdf>

Ronnell Phillips v. State, No.2013-KA-01703-COA (Miss.Ct.App. February 10, 2015)

CASE: Count I, Conspiracy, Count II, Shooting into a Dwelling, and Count III, Murder

SENTENCE: Count I, 5 years; Count II, 10 years; and Count III 40 years, all consecutively

COURT: Lamar County Circuit Court

TRIAL JUDGE: Hon. Anthony Alan Mozingo

APPELLANT ATTORNEY: W. Daniel Hinchcliff

APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISTRICT ATTORNEY: Haldon J. Kittrell

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

ISSUES: (1) Whether the trial judge erred in failing to grant a mistrial when a police officer commented about Phillips's refusal to make a statement, and (2) whether the trial judge erred in failing to grant a mistrial when a witness testified that Phillips was a member of a gang.

FACTS: On the night of August 13, 2011, Ronnell Phillips had been texting and calling Janisha Rice, making threats to Janisha and her mother, Cassandra Rice. At one point, Phillips arrived at Cassandra's house in Lamar County looking for Janisha. He knocked on the door and when Cassandra opened the door, he showed Cassandra and her other daughter, Alexia, a gun. After closing the door and calling the police, Alexia testified she heard gunshots. Four 911 calls were made from Cassandra's home that night, reporting Phillips's threats and gunshots. Early on the morning of August 14, 2011, Phillips fired a gun into the house. Cassandra was struck in the head, and later died from her injuries. Phillips, Oscar Scott, and Terrance Bolton were all arrested for Cassandra's murder. Nathan Smalls was implicated but fled the country. Bolton testified against Phillips. Phillips was convicted and now appeals.

HELD: (1) During the testimony of an investigator, he stated that he attempted to get a statement from Phillips and read Phillips his *Miranda* warning, but before he could continue, defense counsel objected. The investigator was silenced before making an improper comment, so the COA found no abuse of discretion by the trial court in denying Phillips's motion for a mistrial. The Court further noted that any error would be harmless due to the overwhelming evidence of Phillips's guilt.

There was also no error during closing when the State argued there was no conflicting testimony. This was a comment on a lack of a defense, not a comment on Phillips's right to remain silent.

(2) During Bolton's testimony, he started to say that he was on his way to the casino when a friend of Phillips "or one of his gang members asked me..." He was then interrupted with a defense objection. The trial judge denied a mistrial and instructed the jury to disregard the comment. The trial court did not abuse its discretion in denying the mistrial.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO100059.pdf>

March 3, 2015

Jeffrey Allen v. State, No.2014-KA-00188-COA (Miss.Ct.App. March 3, 2015)

CASE: Capital Murder

SENTENCE: Life w/o Parole

COURT: Jackson County Circuit Court

TRIAL JUDGE: Hon. Robert P. Krebs

APPELLANT ATTORNEY: George T. Holmes, Andre De Gruy

APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISTRICT ATTORNEY: Anthony N. Lawrence, III

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

ISSUES: (1) Whether the trial court erred in allowing hearsay testimony of alleged prior bad acts and character evidence; and (2) whether the verdict was supported by the weight of the evidence.

FACTS: Jeffrey Grey Allen was convicted of the 2011 capital murder of Charles Ike Mason, Jr. during a robbery. Mason's body was found with a single gunshot to his back. Investigators also observed that Mason's left pants pocket was turned out, but investigators found cash in Mason's right pants pocket. Donna Freeman, Mason's former girlfriend, and Allen were eventually arrested and charged with murdering Mason. Freeman and Mason were romantically involved for approximately eight years. Although Freeman eventually began a relationship with Allen, Mason continued to provide her with money, clothes, automobiles, and other items. Jermaine Sims, a Jackson County jail inmate, informed investigators that Allen had given him "information" relating to Mason's death. Sims testified Allen told him that Freeman shot Mason, and then afterwards, Allen removed \$4,000 "out of the left front pocket of the victim." Sims's description of a young man who was with Freeman and Allen led to Joshua Archie, a neighbor. Archie testified Freeman shot Mason and Allen took money from his pocket. Archie pled guilty to accessory after the fact. Allen admitted to police that he was with Freeman when she shot Mason, and that he helped Freeman dispose of the rifle. He claimed he did not realize at the time that Mason had actually been shot, and that Mason was alive when he left the house. The rifle was eventually retrieved from a creek.

HELD: (1) The jury heard testimony from several witnesses who all testified that Mason told them that Freeman and Allen were stealing from him; that Freeman and Allen were using drugs; and that Mason thought Allen was "no good," a "bad guy," and a "dope head." Allen filed a motion in limine requesting the trial court to exclude and suppress all of the prior-bad-acts testimony and bad character evidence. However, Allen failed to object to any testimony regarding his specific bad acts. The trial court did not abuse his discretion in allowing the prior bad acts for the permissible purpose of showing motive for the robbery.

(2) Allen argued the evidence only supports a conviction for accessory after the fact. He claimed that the State's case consisted almost entirely of a jailhouse snitch and an accomplice. However, the jury heard testimony from Davis stating that he overheard Allen and Freeman discussing plans to steal Mason's money. Davis rode to Mason's house with Freeman and Allen on the day of the murder. He and Allen remained in the car while Freeman went inside Mason's house and shot Mason. Davis stated Allen went inside Mason's house and removed money from Mason's pants pocket. Mason was visibly

dead when Allen removed the money. Allen threw Mason's gun, wallet, and cell phone into a creek. Additionally, Sims testified that Allen informed him that after Freeman shot Mason, Allen went inside the house and removed money from Mason's pants pocket.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100532.pdf>

March 10, 2015

James Anthony Swilley v. State, No. 2013-KA-02150-COA (Miss.Ct.App. March 10, 2015)

CASE: Burglary of a Dwelling and Grand Larceny

SENTENCE: Count I, burglary of a dwelling, 7 years, and Count II, grand larceny, a consecutive 10 ten years, both as an habitual offender.

COURT: Copiah County Circuit Court

TRIAL JUDGE: Hon. Lamar Pickard

APPELLANT ATTORNEY: Mollie Marie McMillin, James Anthony Swilley (Pro Se)

APPELLEE ATTORNEY: Lisa L. Blount

DISTRICT ATTORNEY: Alexander C. Martin

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

ISSUES: Whether there were any arguable issues for appeal – *Lindsey* brief, (1) Pro Se claim of defective indictment, and (2) Pro se claim of ineffective assistance of counsel.

FACTS: On May 1, 2013, James Swilley was arrested while attempting to leave Kitchens Brothers lumber yard in Hazlehurst. Upon arrest, Swilley signed a waiver-of-rights form and admitted to the police that he broke into the building and stole over \$500 worth of scrap metal. Counsel on appeal filed a *Lindsey* brief.

HELD: (1) The trial judge did not err in allowing the State to amend his indictment to include habitual offender language under §99-19-81 rather than §99-19-83. (2) This claim is not apparent from the direct appeal record and is better left to post-conviction proceedings.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100741.pdf>

Curtis Leslie v. State, No. 2013-KA-01790-COA (Miss.Ct.App. March 10, 2015)

CASE: Armed Carjacking

SENTENCE: 15 years, followed by five years PRS

COURT: Bolivar County Circuit Court

TRIAL JUDGE: Hon. Charles E. Webster

APPELLANT ATTORNEY: George T. Holmes, Phillip Broadhead

APPELLEE ATTORNEY: Jeffrey A. Klingfuss, John R. Henry Jr.

DISTRICT ATTORNEY: Brenda Fay Mitchell

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

ISSUES: (1) Whether the defendant's retrial after the State requested a mistrial violated Leslie's rights against double jeopardy; (2) whether the defendant was denied an instruction on his theory of defense; and (3) whether the evidence was sufficient and whether the verdict was against the weight of the evidence.

FACTS: On April 4, 2011, Travis Taylor drove his girlfriend's 1996 Buick to a club in Benoit. Taylor shot pool with a man he knew as "B Love." Taylor noticed B Love was wearing a red, white, and blue collared shirt and blue jeans, and B Love's black hooded sweatshirt was draped over a chair near the pool table. A man known as "J Dub" was also at the club. After leaving the club, Taylor pulled over to work on his sound system. He saw J Dub drive by and later saw B Love walk past him. He was scrolling through Facebook on his phone, when J Dub came up from behind him and put a gun in Taylor's face. J Dub told Taylor to move over, and B Love got into the front passenger's seat, pinning Taylor between B Love and J Dub. While both men had masked their faces, Taylor recognized J Dub's voice, and also recognized B Love's clothes. They drove for a while and then made Taylor get out on a gravel road. They stripped all of his clothes off and told him to run. Taylor heard a gunshot and fell down. He remained still under the car drove away. He then ran back toward town. Taylor reached Adam Thomas's house. He knew Adam and Adam provided him some clothes and called the sheriff. He told Adam he had been carjacked by J Dub and B Love. Taylor claimed Adam told him that J Dub's real name was Jonathan Johnson and B Love's real name was Curtis Leslie. However, Adam testified at trial Taylor never said who robbed him. Police Chief Billie Williams owned the club where Taylor and Leslie had been playing pool that night. He testified Taylor's description of the clothes matched what he remembered Leslie wearing that night. During the first trial, counsel for Leslie asked Taylor if the reason he remembered what Leslie was wearing that night was because Leslie had described his attire in messages to Taylor on Facebook. However, the trial judge later determined counsel misrepresented that the messages contained a description of what Leslie had been wearing the night of the carjacking. The court granted the State's request for a mistrial. Leslie was convicted at a later retrial.

HELD: (1) Because the judge in this case granted a mistrial at the State's request, the declaration of a mistrial had to be based on manifest necessity in order to lawfully retry Leslie. Leslie failed to provide a transcript from his first trial. The COA had to rely on the order and comments from the trial judge. The trial judge's view that a mistrial was necessary due to the misrepresentations of counsel was entitled to deference.

(2) Leslie claimed the key issue in the defense's theory of the case was Taylor's lack of credibility in identifying the carjackers. However, the defense instruction on impeachment concerned prior inconsistent statements. While Taylor's testimony was contradicted by Adam's, it was not impeached

by any prior inconsistent statement made by Taylor himself. The instruction was properly refused as it did not present Leslie's theory of the case. The jury was properly instructed on their role of assigning what weight and credibility each witness's testimony should receive.

(3) The evidence was sufficient. A reasonable juror could have believed Taylor's testimony that he recognized his assailants right away as J Dub and B Love, that he told Adam that night J Dub and B Love were the ones who robbed him. The jury could have reasonably concluded that Adam was not being truthful or accurately remembering what had happened when he testified, contrary to Taylor, that he did not tell Taylor J Dub's and B Love's real names. The verdict was not against the weight of the evidence. It was the jury's prerogative to find Taylor more credible than Adam.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO99928.pdf>

March 17, 2015

Rodney Wayne Mitchell v. State, No.2013-KA-02012-COA (Miss.Ct.App. March 17, 2015)

CASE: Felony Shoplifting

SENTENCE: 10 years with 2 suspended

COURT: Jones County Circuit Court

TRIAL JUDGE: Hon. Billy Joe Landrum

APPELLANT ATTORNEY: Erin E. Pridgen

APPELLEE ATTORNEY: Billy L. Gore

DISTRICT ATTORNEY: Anthony J. Buckley

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

ISSUE: Whether the evidence was insufficient to prove that the value of the goods stolen met the minimum monetary requirement for felony shoplifting.

FACTS: On March 5, 2013, Rodney Wayne Mitchell was pulled over by police on an outstanding warrant. An officer observed several items in this car hidden under a blanket. Mitchell was unable to provide a receipt or an explanation for his possession of the goods. Further investigation found that the goods had been stolen from Wal-Mart. Rham Patrick Singh, the asset-protection manager for the local Wal-Mart, identified Mitchell as the thief after observing him on the store's video-surveillance tapes taking most of the items and leaving the store without paying for them. The store's surveillance tapes showed Mitchell placing \$413.44 worth of items into his shopping cart. However, Singh also identified numerous items that were already in Mitchell's shopping cart and with which Mitchell exited the store without paying. These items totaled another \$106.39. Other items were also in Mitchell's shopping cart when he left the store without paying. Those items were placed in Mitchell's vehicle and later recovered by police. However, the surveillance tapes were not clear enough for Singh to

specifically identify them. Mitchell was convicted of felony shoplifting and appealed, claiming the evidence was insufficient to prove over \$500 in items were taken.

HELD: The facts and inferences provided to the jury were sufficient to support a finding of guilty for felony shoplifting. Despite the lack of surveillance tapes showing Mitchell actually taking the remaining \$86.56 worth of items, the jury had more than enough evidence before it to infer that the other items Singh identified, which were in the shopping cart and later recovered from Mitchell's vehicle, had also been feloniously shoplifted by Mitchell.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100688.pdf>

Lorenzo Hull v. State, No. 2013-KA-01813-COA (Miss.Ct.App. March 17, 2015)

CASE: Depraved-heart Murder

SENTENCE: 35 years as an habitual offender

COURT: Warren County Circuit Court

TRIAL JUDGE: Hon. Isadore W. Patrick Jr.

APPELLANT ATTORNEY: Hunter Nolan Aikens

APPELLEE ATTORNEY: Billy L. Gore

DISTRICT ATTORNEY: Richard Earl Smith Jr.

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

ISSUES: (1) Whether the trial judge erred in allowing the State's expert to opine that the victim's injuries were inconsistent with the defendant's story; (2) whether the trial court erred in refusing to redact alleged hearsay from the victim's death certificate; (3) whether the verdict was sufficient and whether the verdict was against the weight of the evidence; (4) whether the trial judge erred in refusing instructions on misdemeanor manslaughter and excusable homicide; and (5) whether there was sufficient evidence to prove Hull was an habitual offender.

FACTS: Lorenzo Hull was convicted of the depraved-heart murder of his girlfriend, Angela Andrews. On the morning of December 5, 2011, Hull called 911 after finding Andrews unresponsive and hot, with red eyes and mucus coming from her mouth and nose. Hull told dispatchers he and Andrews got into a "little fight" and "things got out of hand" the night before. Hull admitted the argument became physical, and he initiated it by slapping her a few times. Andrews later died from subdural hematoma caused by blunt force trauma. Andrews, a military veteran, was a habitual crack cocaine user and suffered from seizures. Hull explained he helped Andrews keep up with her medication and made sure her bills were paid. Andrews gave Hull a portion of her check each month to use for bills. On the night of the fight, Andrews came home after a cocaine binge of several days. Hull stated that during an argument, Andrews ran out of the house and fell down some concrete stairs. He hit her at least one more time before helping her take a bath and putting her to bed. Hull maintained he did not think she was seriously injured. An EMT testified that after working on Andrews for awhile, Hull stated, "I

think I messed up this time." Hull's hands were swollen from beating her. The jury was instructed on depraved-heart murder, culpable-negligence manslaughter, and heat-of-passion manslaughter, but found Hull guilty of murder. He appealed.

HELD: (1) Hull claimed that the State's expert witness, forensic pathologist Dr. Erin Barnhart, was improperly allowed to give "speculative opinion" that Andrews's injuries were inconsistent with Hull's claim of Andrews falling and hitting her head on concrete steps. Dr. Barnhart did not find injuries consistent with a fall. Dr. Barnhart gave her expert opinion on the possible cause of Andrews's wounds based upon her personal observation of her external and internal wounds while performing the autopsy, which is proper.

(2) Hull claimed the trial court erred in refusing to redact Andrews's certified death certificate to exclude the statement "subject struck in head" in answering the query "how or by what means injury occurred." A death certificate is clearly admissible an official record and is not hearsay. Hull's own theory of the case was Andrews's died due to being "struck in the head" through impact with a stepping stone. It was an issue for the jury to determine what or who delivered the fatal blow – a stepping stone or Hull. The death certificate did not violation Hull's confrontation rights. The death certificate is a nontestimonial record of vital statistics. Further, the pathologist who conducted the autopsy testified and was cross-examined.

(3) Hull claimed the evidence was insufficient to prove murder. At most, he should be guilty of culpable-negligence or heat-of-passion manslaughter. He claimed Andrews's death resulted from the delay in getting her medical attention, whether she fell down the stairs or whether Hull struck her, which proves only culpable negligence. "The fact that he could have gotten her medical attention sooner does not mitigate the fact that he originally caused her deadly injury." There was sufficient evidence presented of malicious intent to convict Hull of depraved-heart murder. Hull acted with a degree of recklessness from which malice or deliberate design could be implied.

(4) The trial judge did not err in refusing instructions on misdemeanor manslaughter and excusable homicide. The evidence did not support Hull was engaged in a simple assault and Andrews fell and hit her head. Hull's multiple blows with his fist to Andrews's head are sufficient to establish the felony of, at a minimum, aggravated assault, and not misdemeanor assault. The evidence also did not support an excusable homicide based on sudden combat or by an accidental fall while fleeing Hull in the heat of passion.

(5) The trial judge did err in finding sufficient evidence to prove Hull was an habitual offender. Although Hull did not contest he was an habitual offender, the State failed to introduce his prior convictions into evidence or make them part of the record. Hull's sentence as a habitual offender is vacated and remanded for the sole purpose of resentencing Hull as a nonhabitual offender.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101259.pdf>

March 24, 2015

Derome M. Cavitt v. State, No. 2013-KA-01890-COA (Miss.Ct.App. March 24, 2015)

CASE: Burglary of a Dwelling
SENTENCE: 25 years as an habitual offender

COURT: Rankin County Circuit Court
TRIAL JUDGE: Hon. William E. Chapman, III

APPELLANT ATTORNEY: Kevin Dale Camp, Jared Keith Tomlinson
APPELLEE ATTORNEY: Stephanie Breland Wood
DISTRICT ATTORNEY: Michael Guest

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

ISSUES: (1) Whether there was sufficient evidence to support the verdict, and (2) whether the verdict was against the overwhelming weight of the evidence.

FACTS: On February 11, 2013, Nicholas Watkins returned to the apartment he shared with two other friends in Flowood, MS, to discover they had been burglarized. The screen from the kitchen window was on the floor of the living room and that several items, including their television, were missing from the apartment. Police determined that the intruder obtained entry to the apartment by removing the exterior window screen and forcing the lock on the window. Detectives processed the apartment for fingerprints and recovered a latent fingerprint on the metal frame of the window. The fingerprint belonged to Derome Cavitt. Cavitt's sister, Demetrius Cavitt, resided in the same apartment complex. Cavitt presented an alibi defense by calling his former live-in girlfriend. She testified Cavitt was at home with her that morning, other than when he walked their son to preschool and when he rode with her father to pick up auto parts for her car. Cavitt was convicted and appealed.

HELD: (1) and (2) Cavitt claimed the State's proof was insufficient, as it relied solely on his fingerprint on the window. However, in this case, the location of the fingerprint tends to exclude the possibility that the fingerprint was left at a time other than at the time of the burglary. The fingerprint was found on the metal frame of the window's exterior, therefore the fingerprint could not have been left on the window without first removing the screen. Cavitt's sister lived in the same complex. A jury is under no obligation to believe a defendant's alibi defense.

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO101048.pdf>

Ryan P. Catledge v. State, No. 2013-KA-01150-COA (Miss.Ct.App. March 24, 2015)

CASE: Statutory Rape
SENTENCE: 20 years, with 12 to serve, 8 years suspended, and 5 years supervised probation

COURT: Winston County Circuit Court
TRIAL JUDGE: Hon. Joseph H. Loper Jr.

APPELLANT ATTORNEY: Michael D. Goggans, John Dickson Mayo

APPELLEE ATTORNEY: Melanie Dotson Thomas

DISTRICT ATTORNEY: Doug Evans

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

ISSUES: (1) Whether the trial judge erred in refusing to suppress the confession, (2) whether the trial court improperly limited his cross-examination of the investigator, and (3) whether the evidence was sufficient.

FACTS: Ryan Catledge was convicted of the statutory rape of "Samantha," who was 11 or 12 year old at the time. Catledge, who was 20 years old, was regarded as the victim's stepbrother, though their parents were not actually married. Samantha told a friend that Catledge had been having sex with her. Eventually police were notified. Margie Bell, an investigator with the sheriff's office went to the home where the victim and several family members lived. She was unaware that Catledge still lived there until he came outside while Bell was speaking with Samantha's mother. Bell placed Catledge in some sort of administrative custody because she was afraid for the victim. It is unclear whether she had probable cause to arrest him at this point. After further investigation, Catledge was interrogated four days later and being read his *Miranda* rights. In a short, hand-written statement, he admitted he was high and drunk and had consensual sex with Samantha.

HELD: (1) Although Catledge's arrest may have been without probable cause, the confession was still admissible. Four days passed between his initial detention and his interrogation. A detention longer than 48 hours without an initial appearance does not always render a confession inadmissible. A lawyer hired by his family was unable to make contact with investigators before the interrogation, but Catledge failed to show any misconduct by the sheriff's department regarding this.

Although investigators continued to gather evidence against Catledge after his arrest, the evidence did not stem from the illegal arrest. Catledge's detention was not extended for tactical advantage. Catledge was also fully Mirandized before he confessed. Investigators obtained probable cause shortly after his detention, but the probable cause did not stem from the detention itself.

Finally, Deputy Bell testified that she removed Catledge from the scene to protect the victim. She did not attempt to interrogate Catledge at that time or otherwise exploit his illegal arrest to gather evidence. The trial court did not abuse its discretion in allowing the confession.

(2) Catledge next claimed that the trial court erred by granting a motion in limine that precluded him from cross-examining Deputy Bell about her alleged improper use of a fuel card. This had allegedly led to the end of her employment with the sheriff's department. Bell was never charged with a crime and Catledge failed to make a proffer of the cross-examination he intended. He never cited MRE 608(b). The COA found the issue was waived, and further, that the record is insufficient to find reversible error on this point.

(3) The victim testified at trial to repeated acts of sexual intercourse with Catledge, and Catledge's confession to a single instance of sexual intercourse with the victim was admitted into evidence.

Catledge denied the charges when he testified in his own defense, but this presented a simple conflict in the evidence. The victim's claims were corroborated by Catledge's confession. Credibility was an issue for the jury to resolve.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101838.pdf>

Ryan Rhymer v. State, No. 2013-KM-01603-COA (Miss.Ct.App. March 24, 2015)

CASE: First Offense DUI and Careless Driving

SENTENCE: \$300 fine for the DUI and a \$25 for careless driving

COURT: Oktibbeha County Circuit Court

TRIAL JUDGE: Hon. Lee Sorrels Coleman

APPELLANT ATTORNEY: Lance O'neal Mixon

APPELLEE ATTORNEY: Jeffrey A. Klingfuss

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

ISSUE: Whether the verdicts were against the overwhelming weight of the evidence.

FACTS: Just before 2 a.m. on July 20, 2012, Deputy Tim pulled Ryan Rhymer over after witnessing Rhymer's truck weave across the center lane of traffic. Cook testified that when he approached Rhymer's truck he smelled alcohol coming from inside the vehicle and saw an open beer can inside the truck. A portable breath-test machine registered a positive for alcohol. Rhymer was later tested on the Intoxilyzer 8000 at the sheriff's office which indicated a BAC of .10%. Rhymer claimed he told the deputy he had tobacco in his mouth. He claimed he was allowed to spit, but was never given the chance to rinse his mouth. Cook denied this. Rhymer presented expert testimony that his chewing tobacco contained ethyl alcohol, which could affect a breath test. The expert estimated his true BAC was between 0.027 % and 0.066 %. Rhymer also had friends and co-workers testified that he did drink that night, but stopped at midnight. None of his witnesses believed he was impaired. Rhymer was convicted in justice court and appealed. At a bench trial de novo, he was again convicted in circuit court.

HELD: Although conflicting testimony was presented about whether Rhymer had tobacco in his mouth at the time Cook administered the breath test, the circuit court determined Cook's testimony to be the most credible. Rhymer had consumed five or six beers prior to the traffic stop. The circuit court also noted that the defense witnesses who testified about the amount of alcohol Rhymer consumed prior to the traffic stop were both Rhymer's close friends and his subordinate employees. The circuit court did not abuse his discretion in denying a new trial.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101522.pdf>

Briceson Augusta Haskins v. State, No. 2013-KA-01771-COA (Miss.Ct.App. March 24, 2015)

CASE: Business Burglary

SENTENCE: 7 Years as an habitual offender

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. John C. Gargiulo

APPELLANT ATTORNEY: George T. Holmes

APPELLEE ATTORNEY: Lisa L. Blount

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

ISSUES: Pro Se claims: (1) Whether Haskins was entitled to a new court-appointed attorney; (2) whether Haskins was entitled to a different trial judge; and (3) whether the State's attorney "intimidated" him and made him "scared to testify."

FACTS: Briceson Haskins was found guilty of burglary of a business. His appellate counsel filed a *Lindsey* brief, finding no arguable issues for appeal. Haskins then filed his own brief.

HELD: (1) Haskins claimed the circuit court erred in failing to appoint him new counsel because his court-appointed attorney had represented him on previous charges. However, Haskins failed to argue that his court-appointed attorney was ineffective. Further, Haskins failed to cite any legal authority or to offer any record evidence to show that he was entitled to a new court-appointed attorney.

(2) Haskins next asserted that he should have been given a new trial judge because the circuit court judge presiding over his trial had been involved in every case in which he had been convicted. This claim is also barred, Haskins failed to object to the circuit court judge or to file a motion asking the circuit court judge to recuse himself. He was also convicted by a jury, not in a bench trial. This issue is also without merit, as Haskins failed to provide sufficient evidence to raise a reasonable doubt as to the circuit court judge's impartiality.

(3) Finally, Haskins claimed that the State's attorney said she would show pictures of his mug shots to jurors and the jurors would learn of his prior convictions. This claim is also barred and is without merit. The record contains no evidence to support his allegation that the State's attorney intimidated him to compel him not to testify.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101535.pdf>

Richard Moise v. State, No. 2013-KA-01597-COA (Miss.Ct.App. March 24, 2015)

CASE: Aggravated Assault

SENTENCE: 20 years, with 16 suspended and 4 years to serve, with 5 years PRS

COURT: Lee County Circuit Court

TRIAL JUDGE: Hon. James Lamar Roberts Jr.

APPELLANT ATTORNEY: Paul Alvin Chiniche

APPELLEE ATTORNEY: Scott Stuart

DISTRICT ATTORNEY: John Richard Young

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

ISSUES: (1) Whether the trial judge erred in failing to grant a “two theory” instruction on circumstances evidence and an instruction regarding mere suspicion, (2) whether the circuit court erred when it denied Moise's motions for a directed verdict and a JNOV, (3) whether the circuit court erred when it denied Moise's motion for a mistrial, and (4) whether there was cumulative error.

FACTS: On December 31, 2012, Brent McMillin, Kerri McMillin, Sandy Moise, Kirk Boyd, and Charlie Knight celebrated New Year's Eve together. The group ended up at Brent and Kerri McMillin's house in Verona. Around 1:00 a.m., Knight left the McMillins' house, and Brent and Kerri went to bed. Brent gave Boyd a pillow and blanket, and he went to sleep on a couch in the living room. Sandy, however, called her husband, Richard Moise, and him to come pick her up. She and Moise had recently separated. He agreed, and he arrived at the McMillins' home at approximately 2:00 or 2:30 in the morning. Brent testified that he woke up to a loud noise coming from the living room. He found Boyd lying face down on an ottoman, with blood everywhere. Brent then saw Sandy standing in the carport. Moise then came into the carport. Moise's face was red, and he had an angry scowl on his face. Moise grabbed Sandy and took her to his car and they drove away. Kerri and Sandy both testified that Moise was extremely jealous and controlling during his and Sandy's marriage. Sandy stated she only learned later that Boyd had been beaten up. Kerri testified Moise had a motive because she assumed he was jealous that Boyd was with the group. Moise denied assaulting Boyd and claimed he never entered the house.

HELD: (1) The trial judge did not err in refusing the proffered defense instructions on circumstantial evidence and on mere suspicion. These theories were already covered in the court's instructions.

(2) There was sufficient evidence to support the jury's findings. The only people in the house were Brent and Kerri McMillin and Boyd. Sandy was outside waiting to be picked up. Sandy testified Boyd was sleeping and uninjured as she walked by about 5 minutes before Moise arrived. Brent saw Moise less than 30 seconds after he was awoken by a loud noise. Moise appeared red-faced and trembling. A reasonable juror could have found Moise guilty of aggravated assault.

(3) During closing argument, the defense objected to the prosecutor's comments about defense counsel tricks of throwing out anything when they didn't have a defense. The objection was sustained. Moise did not ask for a curative instruction, and waited until after the argument was concluded before requesting a mistrial. The argument did not constitute error, as the remarks were regarding Moise's lack of a defense.

(4) Since the court found no error, there can be no cumulative error.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101050.pdf>

March 31, 2015

Twonia Renee Williams v. State, No. 2014-KA-00320-COA (Miss.Ct.App. March 31, 2015)

CASE: Murder

SENTENCE: Life

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. Roger T. Clark

APPELLANT ATTORNEY: Benjamin Allen Suber

APPELLEE ATTORNEY: Lisa L. Blount

DISTRICT ATTORNEY: Joel Smith

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

ISSUES: (1) Whether the evidence was sufficient, and (2) whether the verdict was against the weight of the evidence.

FACTS: Twonia Williams had been dating Sean Lindsay for about 4 years when she caught him cheating with Katrina Sargent. She kicked him out of her house and Sean moved in with Katrina. On the night of December 4, 2009, Williams went looking for Sean because she was upset because she heard that Katrina was driving Sean's truck, which she had helped pay off. Williams wanted her money back. She called Sean several times and Katrina's niece, Stacey McCall, overheard Williams say she was "going to come over there and blow up everybody in the house." Williams later drove to Katrina's house. She grew more upset when she saw Christmas lights on Katrina's house, because Sean, a proclaimed Muslim, never allowed Christmas lights on their house when they lived together. Katrina and Stacey came out of the house and Stacey saw Williams had a gun in her lap. Williams got out of the car with the gun behind her back, asking for Sean. Katrina and Stacey walked back towards the house, and Katrina said she was going to call the police. Williams replied, "I don't give a f***," pointed the gun at Katrina's head, and shot her. Williams admitted shooting Katrina, but said that she went there to see Sean, not to shoot Katrina. Williams testified that she shot Katrina out of anger during a heated argument and with no premeditation. Williams was convicted of murder and appealed.

HELD: (1) and (2) Williams testified that she shot Katrina in the heat of passion. Stacey testified that she heard Williams on speaker phone say she was coming over to "blow up everybody in the house." Williams arrived at Katrina's house with a loaded gun and walked onto Katrina's yard. Katrina was unarmed. Williams shot Katrina in the face right after Katrina threatened to call the police. Katrina's

neighbor testified and corroborated Stacey's recitation of events. The evidence was sufficient and not against the weight of the evidence.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101904.pdf>

Darrell Ross Brooks v. State, No. 2013-KA-02103-COA (Miss.Ct.App. March 31, 2015)

CASE: Murder

SENTENCE: Life w/o parole as an habitual offender

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. John C. Gargiulo

APPELLANT ATTORNEY: William Alex Brady, II

APPELLEE ATTORNEY: Barbara Wakeland Byrd

DISTRICT ATTORNEY: Joel Smith

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

ISSUES: (1) Whether the evidence was sufficient, and (2) whether the trial judge erred in not granting a new trial.

FACTS: Darrell Ross Brooks was convicted of shooting David Shivers in the back of the head on December 7, 2009. Shivers was shot through the kitchen window of his mother's house. Police investigation determined that Shivers had been dating Amy Brooks, Brooks's estranged wife. Brooks had become depressed after his separation from Amy and told a friend he would kill anyway who tried to date her. A co-worker testified Brooks knew Amy was seeing Shivers and threatened to kill him. Brooks also told the co-worker he was looking for a gun. Brooks also asked another friend to give him an alibi for the night of the murder. Brooks's theory of defense was that several recent burglaries in the neighborhood could have been related to Shivers's murder.

HELD: (1) and (2) The evidence against Brooks was circumstantial. No physical evidence linked him to the crime, and no eyewitness saw him shoot Shivers. However, in the days leading up to Shivers's death, Brooks told two people that he was going to kill Shivers. There was testimony that Brooks had been following Amy and knew what Shivers looked like. On the day of Shivers's death, Brooks tried to obtain a gun from two people in order to handle a problem concerning his wife and her boyfriend. Brooks stated he only needed to use the gun one time. There was also testimony that Brooks had a gun in his possession at 9:00 p.m. on the night of the murder. Furthermore, two witnesses testified that Brooks attempted to use them as an alibi for the night of Shivers's murder.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101825.pdf>

Orvin Harris v. State, No. 2014-KA-00140-COA (Miss.Ct.App. March 31, 2015)

CASE: Gratification of Lust x2

SENTENCE: 15 years on Count I, and a consecutive 15 years with 10 suspended and 5 years probation on Count II

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. Lisa P. Dodson

APPELLANT ATTORNEY: Hunter Nolan Aikens

APPELLEE ATTORNEY: Laura Hogan Tedder

DISTRICT ATTORNEY: Joel Smith

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

ISSUES: (1) Whether the trial judge erred in admitting prior bad acts into evidence and (2) whether the trial judge erred in admitting unreliable hearsay testimony under the tender-years exception.

FACTS: Orvin Harris moved to Gulfport in August 2011. His daughter, Sharon, lived nearby. Sharon's daughter, T.M., who was 10 years old at that time, began visiting Harris's house regularly. On June 19, 2012, Sharon took T.M. to her pediatrician because T.M. had discovered bumps on her genitals. She returned the following month when the condition had not improved. At some point Sharon asked T.M. if she had been inappropriately touched. T.M. responded, "I don't want him to go to jail." Sharon and her husband later asked T.M. at home if anyone had touched her inappropriately. T.M. told them Harris had touched her genital area with his hands, and he had placed her hand on his genitals. T.M. was taken to police and interviewed. T.M. again said that Harris had touched her "private parts," and he had placed her hand on his "private parts." T.M. said these incidents occurred at night in Harris's bed. T.M. stated that Harris told her not to tell anyone. T.M. later told a forensic interviewer with the Child Advocacy Center the same allegation.

HELD: (1) At trial, the State sought to have two of Harris's adult stepdaughters, Susan (38) and Mary (41), testify that he had molested them when they were children. The trial judge did not err in allowing this testimony. Both testified Harris abused them when they were small children and the abuse mostly occurred in Harris's house at night. The trial court conducted an extensive on-the-record analysis, applying Rules 403 and 404(b) and the holding in *Derouen v. State*, 994 So. 2d 748 (Miss. 2008), to determine whether Susan's and Mary's testimonies were admissible.

(2) Harris also claimed T.M.'s statements to Sharon, a police officer and the CAC forensic interviewer, lacked sufficient indicia of reliability. Again, the trial court conducted a lengthy analysis of Rule 803(25), applying the list of factors from the comments to the rule. There was no abuse of discretion.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101606.pdf>

Branden P. Keogh v. State, No. 2013-KM-01387-COA (Miss.Ct.App. March 31, 2015)

CASE: Simple Assault

SENTENCE: \$7,154.04 in fines, assessments, and/or restitution

COURT: Oktibbeha County Circuit Court

TRIAL JUDGE: Hon. James T. Kitchens Jr.

APPELLANT ATTORNEY: Stephanie L. Mallette

APPELLEE ATTORNEY: Caroline Crawley Moore

DISTRICT ATTORNEY: Forrest Allgood

DISPOSITION: Dismissal of appeal and enforcement of writ of procedendo affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Roberts, Maxwell, Fair and James, JJ., Concur. Barnes, J., Concurs in Part and in the Result Without Separate Written Opinion.

ISSUE: Whether the circuit court erred in issuing a writ of procedendo.

FACTS: Following his simple-assault conviction in municipal court, Branden Keogh filed an appeal to the circuit court on March 10, 2010, for a trial de novo. After several continuances, all unresolved matters related to Keogh's case were scheduled for trial on January 24, 2011. When Keogh failed to appear for trial on the scheduled date, the City raised an ore tenus motion for the circuit court to dismiss Keogh's appeal and issue a writ of procedendo. The court granted the motion and remanded Keogh's case to the municipal court for enforcement of that court's judgment. Keogh failed to appear in municipal court on the scheduled date for imposition of the judgment against him. A default judgment was entered. When Keogh failed to pay, a warrant was issued and Keogh was arrested in George and transported back to Mississippi on April 19, 2012. On October 9, 2012, Keogh sought to have the writ of procedendo set aside. This was denied, as well as a motion to reconsider. Keogh appealed.

HELD: Keogh asserted that the circuit court should have issued an arrest warrant for his failure to appear instead of issuing the writ of procedendo. Keogh failed to assert a timely appeal regarding the circuit court's dismissal of his appeal from municipal court. He also failed to timely file any post-trial motions following the dismissal of his case. Instead, Keogh waited until almost a year after the municipal court's imposition of the judgment against him to file his motion to set aside the writ of procedendo and his related motion to reconsider. The circuit court possessed no jurisdiction to grant his requested relief. There was no abuse of discretion.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101519.pdf>

April 7, 2015

Robert Anthony Moore (Robert) v. State, No. 2013-KA-01817-COA (Miss.Ct.App. April 7, 2015)

CASE: Sexual Battery and Exploitation of a Child

SENTENCE: 20 years on each count to run concurrently

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. Lisa P. Dodson

APPELLANT ATTORNEY: George T. Holmes, Benjamin Allen Suber

APPELLEE ATTORNEY: Billy L. Gore, John R. Henry, Jr.

DISTRICT ATTORNEY: Joel Smith

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

ISSUES: (1) Whether the trial judge erred in allowing photos found on defendant's phone into evidence, (2) whether the evidence was sufficient, and (3) whether the trial judge erred in failing to sever the two counts.

FACTS: Fifteen-year-old Sarah lived with her grandmother. So did her younger sisters and her "cousin," Robert Moore. Moore was not actually related to her, but was a family friend. Early morning New Year's Day, while everyone was still asleep— including Sarah's boyfriend who was staying over—Sarah got up to use the restroom. On her way back to her room, Moore called out to her. When she went into Moore's room, Moore blocked her from leaving and asked her to have sex with him. Sarah said she tried to leave but Moore physically threatened her. Moore then asked her to take off her clothes. She testified she complied out of fear for herself and her family. Moore then asked the naked Sarah to pose herself in various positions so he could take sexually explicit photographs of her. Moore then sexually battered her, photographing that as well. She did not tell anyone, but several days later, rumors began circulating concerns the photographs. Sarah reported what happened. Police learned that Moore had used a black LG TracFone to photograph the crime. Moore had been jailed on an unrelated crime, and the phone was in Moore's property bag at the jail. Police obtained a warrant for the phone, and the pictures were immediately found. Police later obtained a second warrant, expressly authorizing them to search and download any and all electronic data, including photographs, stored on the LG phone. Moore was subsequently convicted.

HELD: (1) Moore claimed the first warrant—the one to search his phone located in the jail—only authorized the investigator to retrieve the phone, not turn it on and search through the pictures. The affidavit supporting the search warrant for Moore's phone was clear. The device was being sought because it contained photographic evidence of the sexual battery of Sarah. Thus, we find the warrant was specific enough to authorize not just the physical seizure of the device but also the search of the photo library on the device.

Regardless, even if the investigator's search through the photographs had somehow exceeded the scope of the warrant, the investigator testified he believed he was acting under this warrant when he powered up the phone and searched its photo library. The good faith exception should apply.

(2) Sarah was fifteen years old at the time of the crime and Moore was three decades her senior. Sarah testified Moore put his finger in her vagina and also directed her to put her mouth on his penis. Sarah's testimony was corroborated by the graphic photographs shown to the jury. The evidence was also sufficient to support each element of the crime of exploitation of a child through possession of

photographs of an actual child engaged in sexually explicit conduct. Sarah's credibility was an issue for the jury, which was presented Moore's defense that Sarah was not to be trusted.

(3) Because Moore's sexual battery of Sarah and his possession of sexually explicit photos of Sarah intertwined in the same event, both the multi-count indictment and single trial were permissible.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101980.pdf>

Ryan Nicholas O'Donnell v. State, No. 2013-KA-01715-COA (Miss.Ct.App. April 7, 2015)

CASE: Possession of Methamphetamine

SENTENCE: 8 years as an habitual offender

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. Roger T. Clark

APPELLANT ATTORNEY: George T. Holmes, Phillip Broadhead

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, Roberts, Maxwell and Fair, JJ., Concur. James, J., Concur in Part Without Separate Written Opinion. Carlton, J., Not Participating.

ISSUES: (1) Whether the trial court erred in failing to suppress evidence found during the search of the motel room, (2) whether the trial judge erred in denying his *Batson* challenge, and (3) whether the trial judge erred in denying his motion for a JNOV or new trial.

FACTS: On the morning of February 24, 2012, officers were attempting to serve an arrest warrant on Ryan O'Donnell. They believed he was in a hotel room. The manager let police into the room since it was past check-out time. When the motel door opened, O'Donnell was getting out of bed. Two others were in the room and officers asked O'Donnell if he had some identification. O'Donnell responded that he did, but did not know where it was and asked for help locating it. O'Donnell directed Investigator Matt Haley to the area near the television. Haley found a white pouch which felt like it contained an ID card. Inside of the pouch, he found O'Donnell's Mississippi identification card, a VISA card, and inside of the pouch, he found O'Donnell's Mississippi identification card, a VISA card, and .79 grams of methamphetamine. At trial, O'Donnell admitted that he was addicted to methamphetamine, and that the white pouch belonged to him, but denied knowledge of the drugs found in the pouch. He claimed had he known drugs were in the pouch, he would have used some.

HELD: (1) O'Donnell claimed he was arrested on an unsigned warrant, but the warrant he submitted was for a different charge. O'Donnell also claimed the search of the motel room was illegally conducted because he did not voluntarily consent to the search for his identification, and even if he did, Haley exceeded the scope O'Donnell gave him. The trial judge did not abuse his discretion in finding O'Donnell's consent was voluntary. Haley merely came across the drugs at the same time he was

looking for and found the identification card. There was no need for a search warrant, as the drugs were in plain view after consent was given. The claim was barred anyway for failing to object.

(2) The trial court found no pattern of discrimination and did not require the State to give race neutral for its strikes. The State's initial peremptory strikes were used on four white females, one white male, and one black female. The State used its one peremptory strike of an alternate for a black male. The jury ultimately included two black females. Since O'Donnell failed to establish a prima facie case showing a pattern of discrimination, the inquiry ended.

(3) O'Donnell did not have actual possession of the methamphetamine; so he was convicted under the theory of constructive possession. Although O'Donnell denied that the methamphetamine was his, the other items, including the pouch, he claimed were his possessions, which he had brought to the motel. The pouch was on the TV stand in front of O'Donnell's bed, exactly where he directed Investigator Haley to search for his identification card. According to this incriminating evidence, O'Donnell was in constructive possession of the methamphetamine.

The expert testimony was sufficient to prove the substance found was methamphetamine. Officers were not required to take pictures.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101828.pdf>

L. A. Barksdale v. State, No. 2013-KA-01949-COA (Miss.Ct.App. April 7, 2015)

CASE: Statutory Rape of a Child under 14

SENTENCE: 30 years

COURT: Attala County Circuit Court

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

APPELLANT ATTORNEY: George T. Holmes

APPELLEE ATTORNEY: Lisa L. Blount

DISTRICT ATTORNEY: Doug Evans

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

ISSUES: (1) Whether the trial court erred by conducting the trial in his absence, and (2) whether the trial court erred by denying his request for funds to hire an expert witness.

FACTS: On October 19, 2012, thirteen-year-old Jane spent the night with her half-siblings at their father's home in Kosciusko. L.A. Barksdale, 49, was also at the home. Jane had met Barksdale on two prior occasions. He sometimes babysat Jane's half-sisters. Early the following morning, Jane was sleeping on the couch when Barksdale got on top of her, pulled her pants down, and had vaginal intercourse with her. Jane testified that she cried and tried to shove Barksdale off of her, but she did not call for help. After he ejaculated inside of her vagina, he stood up, handed her ten dollars, and

went to the bathroom. She immediately told her half-sister what happened, and the sister told Jane's father. Her father got up, knocked on the bathroom door, and asked Barksdale what had happened. Jane testified that when Barksdale did not respond, Clifford went back to sleep. Barksdale left later that morning. The following day, Jane told her godmother what happened and she was taken to a hospital and law enforcement was notified. Barksdale admitted to police he was at the house that night, but denied the rape. DNA evidence from a sexual assault kit implicated Barksdale. Barksdale was released on bond pending his trial. He was tried in absentia when he failed to appear for his trial.

HELD: (1) Before trying Barksdale in his absence, the trial judge questioned his attorney to ascertain that he had knowledge of the trial date. It was not plain error to conduct his trial in absentia. He was well aware of his trial date, understood he had to be at trial, and offered no proof that his absence was not willful, voluntary, and deliberate.

(2) Barksdale argued that the trial court erred by denying his request for funds to hire an expert witness to counter the State's DNA expert. Although the court erred in finding Barksdale was not indigent for the purpose of providing an expert, the error was harmless, as Barksdale was not denied a fair trial. Barksdale had the opportunity to cross-examine the State's expert. There is nothing to indicate that the State's expert was prejudiced or incompetent. Further, the State's case was not totally dependent of expert testimony. Jane testified Barksdale raped her. Her testimony was credible and uncontradicted. Even without the testimony of the State's expert, the evidence against Barksdale was overwhelming.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO102068.pdf>

COA POST-CONVICTION CASES

October 14, 2014

Willie James Allen v. State, No. 2013-CP-01186-COA (Miss.Ct.App. October 14, 2014)

CASE: PCR – Murder, Manslaughter, and Aggravated assault.

SENTENCE: Life for murder, a consecutive 20 years for manslaughter and a concurrent 10 years for aggravated assault

COURT: Wilkinson County Circuit Court

TRIAL JUDGE: Hon. Lillie Blackmon Sanders

APPELLANT ATTORNEY: Willie James Allen (Pro Se)

APPELLEE ATTORNEY: LaDonna C. Holland

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

ISSUES: Whether the trial court erred in dismissing the PCR.

FACTS: Willie James Allen was charged with killing two people and injuring another during a 1993 nightclub shooting. He subsequently pled guilty in 1995 to murder, manslaughter, and aggravated assault. Almost twenty years into his life sentence, he argued his guilty pleas were involuntary and new evidence showed he was not guilty. Allen asked for appointed counsel to pursue these claims. The circuit judge treated his filing as a PCR and dismissed the motion as time barred. He appealed. **HELD:** Allen's first PCR motion was dismissed by the circuit court on March 20, 2003. His present PCR is both time barred and successive writ barred. Allen failed to show an exception to the bars. Ineffective assistance claims are subject to procedural bars. His guilty plea waived any speedy trial claim. Allen's new evidence claim fails, as this evidence of the true killer consisted only of what someone told him. He failed to submit any affidavits to support the claim. Finally, the court found no need for an evidentiary hearing, so declined to appoint counsel. This was not an abuse of discretion.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO97654.pdf>

Armon Randall v. State, No. 2013-CA-01334-COA (Miss.Ct.App. October 14, 2014)

CASE: PCR – Capital Murder

SENTENCE: Life w/o Parole

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. Roger T. Clark

APPELLANT ATTORNEY: Michael W. Crosby

APPELLEE ATTORNEY: Lisa L. Blount

DISPOSITION: Denial of PCR Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Fair and James, JJ., Concur.

ISSUES: Whether the underlying crime of robbery was properly pled in Randall's capital murder indictment.

FACTS: In 1998, a jury found Armon Randall guilty of the 1993 capital murder of Eugene Daniels. Randall was sentenced to death, but his case was reversed by the Supreme Court. *Randall v. State*, 806 So. 2d 185 (Miss. 2001). After remand, Randall pled guilty in May of 2002, and was sentenced to life without parole. In July of 2005, Randall filed his first PCR, challenging the legality of his sentence. The petition was denied and affirmed on appeal. *Randall v. State*, 987 So. 2d 453 (Miss. Ct. App. 2008). In January of 2012, Randall filed a second PCR, again arguing his sentence was illegal. He also claimed that his capital-murder indictment was defective. The petition was again denied and Randall appealed.

HELD: Randall's PCR is almost seven years too late and is time-barred. Randall's present PCR is also barred as a successive writ. The PCR is also without merit. Randall's indictment identified the underlying felony as robbery and listed the section of the statute under which he was charged. The capital-murder charge was sufficiently pled and his indictment was not defective.

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO97547.pdf>

Carnell Mohead v. State, No. 2013-CP-01070-COA (Miss.Ct.App. October 14, 2014)

CASE: PCR – Felony Simple Domestic Violence x3

SENTENCE: Three concurrent terms of 10 years, suspended for 5 years, with 1 year of supervised probation

COURT: Grenada County Circuit Court

TRIAL JUDGE: Hon. Joseph H. Loper Jr.

APPELLANT ATTORNEY: Carnell Mohead (Pro Se)

APPELLEE ATTORNEY: Stephanie Breland Wood

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

ISSUES: Whether the trial judge erred in dismissing Mohead’s PCR as a successive writ when he alleged an unlawful revocation of his suspended sentence.

FACTS: Carnell Mohead was indicted on three counts of felony simple domestic violence for hitting and choking his then-girlfriend on three separate occasions. Mohead entered his guilty plea to all three counts on July 16, 2010. As per his sentence, he was placed on probation. Mohead's probation was extended by circuit court order after he was arrested for public intoxication. On February 11, 2011, Mohead’s probation was revoked after he was convicted in the municipal court of domestic violence. Mohead subsequently appealed the conviction to circuit court. Five months later, the circuit court remanded the charge to the files. Mohead then filed a PCR, claiming that since his municipal-court conviction was remanded to the files, his probation was unlawfully revoked. The circuit court summarily dismissed his PCR, and Mohead did not appeal the summary dismissal. Mohead then filed a second PCR, and again argued that his probation was unlawfully revoked. The PCR was summarily dismissed as a successive writ. He appealed.

HELD:. Mohead's claim that his probation was unlawfully revoked was raised in his first PCR and summarily dismissed. He did not appeal that dismissal. Res judicata now bars Mohead from asserting the same claim in his present PCR. The circuit court's summary dismissal of Mohead's PCR was the right result, although it was barred by res judicata and not as a successive writ.

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO97558.pdf>

Marco S. Raine v. State, No. 2013-CP-01600-COA (Miss.Ct.App. October 14, 2014)

CASE: PCR – Uttering a Forgery

SENTENCE: 10 years, with 4 years to serve and 5 years PRS

COURT: Rankin County Circuit Court

TRIAL JUDGE: Hon. William E. Chapman, III

APPELLANT ATTORNEY: Marco S. Raine (Pro Se)

APPELLEE ATTORNEY: Jeffrey A. Klingfuss

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

ISSUES: (1) Whether Rankin County had subject-matter jurisdiction over his guilty plea, and (2) whether the circuit court erred in failing to grant an evidentiary hearing.

FACTS: On January 4, 2010, Marco Raine pled guilty to one count of uttering a forgery in Rankin County. On July 1, 2013, Raine filed a writ of habeas corpus, alleging his guilty plea should be set aside since he actually passed the fraudulent check in Hattiesburg. He attached a letter from PriorityOne Bank that stated the transaction did occur at the Hattiesburg branch of PriorityOne Bank. After reviewing the guilty plea transcript where Raine admitted he committed the crime as alleged, the trial court treated the motion as a PCR and summarily dismissed it. Raine appealed.

HELD: (1) First, Raine's PCR is time-barred. Further, his claim did not fall within any of the exceptions to the time-bar. Notwithstanding the bar, Raine was properly served with the indictment in Rankin County, giving the court subject-matter jurisdiction.

At his plea hearing, the circuit court read that the State would have to prove the crime was committed in Rankin County. Raine agreed that he understood the elements of the crime as outlined and that he did commit the crime. Raine never asserted that the crime did not actually occur in Rankin County. Although he attached an unsworn letter from PriorityOne Bank, the file contained a 2007 sworn affidavit from a branch manager of PriorityOne Bank, asserting that Raine opened a checking account in Richland, MS with a forged check.

(2) Raine bore the burden to prove by a preponderance of the evidence that he is entitled to relief. When a PCR movant swears before the circuit court to the truth of one material fact during his plea colloquy, yet swears to the opposite fact as truth in his PCR motion, he simply is not entitled to an evidentiary hearing.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO97559.pdf>

Garrett Birmingham v. State, No. 2013-CP-01186-COA (Miss.Ct.App. October 14, 2014)

CASE: PCR – Conspiracy to shoot into an occupied dwelling

SENTENCE: 5 years, with 5 suspended, followed by 5 years of supervised probation upon successful completion of RID

COURT: Lee County Circuit Court
TRIAL JUDGE: Hon. Paul S. Funderburk

APPELLANT ATTORNEY: Garrett Birmingham (Pro Se)
APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISPOSITION: Dismissal of PCR Affirmed. Barnes, J., for the Court. Lee, C.J., Irving, P.J., Ishee, Carlton, Fair and James, JJ., Concur. Roberts, J., Concur in Result Only with Separate Written Opinion, Joined by Griffis, P.J., and Maxwell, J.

ISSUE: Whether the trial court erred in dismissing the PCR based on lack of jurisdiction.

FACTS: In 1997, fourteen-year-old Garrett Birmingham was charged with shooting into an occupied dwelling. On February 23, 1998, Birmingham pled guilty to a conspiracy charge. Birmingham had been certified by the youth court to circuit court because the charge had originally involved a firearm. Birmingham's mother assisted in the plea negotiation and in explaining things to her son. Birmingham was sentenced to 5 years, with 5 years suspended, followed by 5 years of supervised probation upon successful completion of the Regimented Inmate Discipline Program. Birmingham was subsequently arrested in a drive-by shooting, and on October 21, 1999, his probation was revoked by the circuit court. He was remanded into custody to serve the remainder of his five-year sentence. Birmingham's sentence expired in 2004. Currently in federal custody, Birmingham filed a PCR on January 31, 2013, requesting that his 1998 conviction be vacated. The circuit court dismissed the motion for lack of jurisdiction since Birmingham is no longer in custody under a Mississippi sentence. He appealed.

HELD: Since his sentence expired in 2004, Birmingham has no standing to file a PCR. Although the changes in the 2009 amendments to the PCR statute state, "Any person sentenced by a court of record of the State of Mississippi," can file a PCR, the COA held that such a liberal interpretation of the statute "would eviscerate the very purpose of the PCR statute's enactment." Birmingham is not eligible to file a motion for PCR for his 1998 Mississippi conviction, as his sentence expired in 2004, and is not on parole or probation or subject to sex offender registration in Mississippi. The circuit court lacked jurisdiction to consider his PCR motion.

Roberts, J., Concurring in Result Only:

Judge Roberts, as he has previously stated, disagreed with the majority's interpretation of the 2009 amendments to the PCR statute. The amendment removed the phrase "prisoner in custody under" and replaced it with following new language: "Any person sentenced by a court of record" With this change, the Legislature fully intended to significantly expand the concept of standing in PCRs. Nevertheless, Birmingham's PCR was time-barred. Birmingham argued that the circuit court lacked jurisdiction to accept his guilty plea because the youth court had exclusive jurisdiction. However, this is not a valid exception to the time-bar.

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO97412.pdf>

October 28, 2015

Edmond Quintezes Mosley v. State, No. 2013-CP-00843-COA (Miss.Ct.App. October 28, 2014)

CASE: PCR – Armed Robbery x2

SENTENCE: Concurrent terms of 40 years on each robbery

COURT: Lauderdale County Circuit Court

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

APPELLANT ATTORNEY: Edmond Quintezes Mosley (Pro Se)

APPELLEE ATTORNEY: Scott Stuart

DISPOSITION: Denial of PCR Affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Maxwell and Fair, JJ., Concur.

ISSUES: (1) Whether Mosley was denied effective assistance of counsel; (2) whether Mosley's plea was voluntary and whether the trial court erred in denying Mosley's petition without first conducting an evidentiary hearing.

FACTS: On August 22, 2011, Edmond Quintezes Mosley pled guilty to two counts of armed robbery, each count arising from a separate incident. The first indictment, cause number 157-11, charged Mosley with armed robbery stemming from his participation in the November 16, 2010 armed robbery of Linda Edwards, doing business as Hodgepodge. The second indictment, cause number 155-11, charged Mosley with armed robbery stemming from his participation in the November 19, 2010 armed robbery of Nan Casciaro, doing business as Antique Mall. In each case, Mosley was indicted as a habitual offender. Mosby was also indicted for 5 other felonies as an habitual offender. As part of the plea, the five indictments were dismissed in exchange for Mosley's guilty pleas to the two armed robberies in cause number 157-11 and 155-11. On March 7, 2012, Mosley filed a motion to vacate and set aside his guilty plea, which the trial court treated as a PCR and denied. Mosley appealed.

HELD: First, Mosley improperly attacked two judgments in a single PCR. Nowhere in the petition does Mosley specifically identify the proceeding by cause number or reference facts necessary to identify a particular cause number. Thus, it would have been proper for the trial court to dismiss Mosley's petition on that basis alone.

(1) Regardless, Mosley was not coerced by his attorney to plead guilty. Mosley's attorney told him that if he did not accept the plea offer of a forty-year sentence, Mosley could face life in prison. However, this was accurate. The attorney would have been in error if he had failed to advise Mosley of the sentence that he faced if convicted by a jury.

(2) Mosley's pleas were voluntary. A review of the transcript shows that the trial court advised Mosley concerning the nature of the charges against him and the consequences of the plea. There was also a sufficient factual basis for the plea. At least twice during the plea hearing, the trial court outlined, and Mosley assented to, the factual basis for each charge of armed robbery. It does not matter that he was not the "principal actor" in the robbery.

Finally, the court did not err in denying an evidentiary hearing. It appears the court was incorrect in telling Mosley that he faced day for day only on the first 10 years of his sentence. However, this was harmless error. It is clear from the record that Mosley's overriding motivation to plead guilty was the dismissal of five felony indictments. Mosley was indicted as a habitual offender in seven separate felony causes.

“We agree with the trial court's finding that the motivating factor for Mosley's pleas was not his parole eligibility and that any misinformation he received concerning parole eligibility was harmless and does not invalidate his voluntary guilty pleas.”

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO97742.pdf>

Charles Douglas Owens, II v. State, No. 2013-CP-01447-COA (Miss.Ct.App. October 28, 2014)

CASE: PCR – Armed robbery and Aggravated Assault

SENTENCE: 30 years for the armed robbery and a consecutive 10 years for the aggravated assault

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. Lisa P. Dodson

APPELLANT ATTORNEY: Charle Douglas Owens, II (Pro Se)

APPELLEE ATTORNEY: LaDonna C. Holland

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

ISSUES: (1) Whether the trial court erred in finding that Owens's double-jeopardy claim was without merit; and (2) whether the trial court erred in finding that Owens's prior claims were procedurally barred.

FACTS: On February 4, 2003, Charles Douglas Owens, II pled guilty to one count of armed robbery and one count of aggravated assault. Owens has had two prior PCRs denied by the trial court and affirmed on appeal. On June 7, 2013, Owens filed a third PCR asserting that his conviction and sentence violated the prohibition against double jeopardy since the two conviction arose from the same set of facts. Owens robbed and shot Raleigh Richard Carter. Owens also asserted that he received ineffective assistance of counsel, and that his plea was involuntary and it should be revisited. The trial judge found his convictions did not violate double jeopardy and his other claims were procedurally barred.

HELD: (1) Owens's conviction for armed robbery and aggravated assault did not violate double jeopardy. It is clear that the two crimes required proof of an element which the other did not. Owens could have been found guilty of armed robbery without having shot Carter, and Owens could have been found guilty of aggravated assault without taking Carter's property.

(2) Owen's other claims are time-barred and successive writ barred. *Padilla v. Kentucky*, 559 U.S. 356 (2010), was not an intervening decision which allows exemption of ineffective assistance of counsel claims from procedural bars. Additionally, *Salter v. State*, 64 So. 3d 514 (Miss. Ct. App. 2010), is also not an intervening decision which allows an exception to the bar. Any erroneous advice that Owens may have received was corrected during his plea hearing. Finally, Owen's case does not involve the failure to communicate a plea offer, so *Missouri v. Frye*, 132 S. Ct. 1399 (2012), is also not an intervening decision that would adversely affect the outcome of his conviction or sentence.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO97577.pdf>

Willie Earl Riley v. State, No. 2013-CP-01595-COA (Miss.Ct.App. October 28, 2014)

CASE: PCR – Murder

SENTENCE: Life

COURT: Holmes County Circuit Court

TRIAL JUDGE: Hon. Jannie M. Lewis

APPELLANT ATTORNEY: Willie Earl Riley (Pro Se)

APPELLEE ATTORNEY: Barbara Wakeland Byrd

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

ISSUE: Whether the trial judge erred in finding Riley's 6th PCR time-barred and successive writ barred.

FACTS: On October 20, 1999, Willie Earl Riley pled guilty to the murder of his girlfriend, Ann Marie Weatherall. He confessed that he shot her in the head after she told him that she did not want to be with him anymore. Riley subsequently filed 5 different PCRs which were denied and/or dismissed. "Undeterred, on July 19, 2013, Riley filed his sixth PCR motion." Riley raised a myriad of claims that primarily focused on the concept that he received ineffective assistance of counsel. Riley also briefly claimed that the circuit court did not inform him that he was waiving a number of his rights during the guilty-plea hearing. The trial judge summarily dismissed the 6th PCR. Riley again appealed.

HELD: This is at least the third time Riley has raised an ineffective assistance claim on PCR. The supreme court has not held that an ineffective-assistance-of-counsel claim invokes a "fundamental right" that circumvents all procedural bars that apply to PCRs. Regardless, since this issue has been previously decided, it is barred as res judicata. Further, Riley's claim that the circuit court did not inform him that by pleading guilty, he was waiving his rights to be tried by a jury, confront adverse witnesses, and avoid self-incrimination, "is patently false." The record indicates he was informed of his rights.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO97749.pdf>

November 4, 2015

Abdullah Qasem Alsaquni v. State, No. 2013-CA-01378-COA (Miss.Ct.App. November 4, 2014)

CASE: PCR – Selling Pseudoephedrine to unlawfully manufacture a controlled substance.

SENTENCE: Nonadjudicated probation for 5 years and a fine

COURT: Oktibbeha County Circuit Court

TRIAL JUDGE: Hon. Lee J. Howard

APPELLANT ATTORNEY: Mark Kevin Horan, Hartwell Virginia Harris

APPELLEE ATTORNEY: Lisa L. Blount

DISPOSITION: Dismissal of PCR Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Maxwell and James, JJ., Concur.

ISSUE: Whether the trial court erred in dismissing the PCR for lack of jurisdiction.

FACTS: On October 12, 2006, and November 7, 2006, a CI entered Abdullah Qasem Alsaquni's convenience store and purchased over 250 dosage units of pseudoephedrine to be used in manufacturing methamphetamine. The State agreed to a nonadjudication. On September 14, 2011, the court released Alsaquni from probation and dismissed his charges. Despite the dismissal of the charges, Alsaquni's guilty plea negatively affected his immigration status; he was taken into federal custody for potential deportation. He subsequently filed a PCR, claiming his attorney should have advised him of the consequences associated with his guilty plea. Federal officials would not release Alsaquni for the hearing. Alsaquni and the State agreed to submit memorandums briefing the issues in lieu of a hearing. Alsaquni's attorney admitted he had no experience in immigration law and therefore did not inform Alsaquni he would be deported following a guilty plea. The court dismissed the PCR, finding it had no jurisdiction. However, the court also found no merit to his claims. Alsaquni filed a second PCR on June 28, 2013. The court summarily dismissed the motion, again finding it lacked jurisdiction and also holding his second PCR motion to be a successive writ. Alsaquni appealed.

HELD: Alsaquni filed his PCR motions after his charges were dismissed. Although Alsaquni pled guilty, the court did not accept his guilty plea. He was neither convicted nor sentenced in accordance with §99-39-5. Therefore, Alsaquni lacked standing to file a PCR motion.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO98054.pdf>

Kenneth Blake Watkins v. State, No. 2013-CA-00961-COA (Miss.Ct.App. November 4, 2014)

CASE: PCR – Sexual battery and Felony Child Abuse

SENTENCE: 20 years for the sexual battery and a consecutive 10 years PRS for the child abuse

COURT: Desoto County Circuit Court
TRIAL JUDGE: Hon. Robert P. Chamberlin

APPELLANT ATTORNEY: John A. Ferrell
APPELLEE ATTORNEY: Barbara Wakeland Byrd

DISPOSITION: Denial of PCR Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Fair and James, JJ., Concur.

ISSUES: (1) Whether the plea was voluntary, and (2) whether newly discovered evidence entitled Watkins to a new trial.

FACTS: On January 25, 2008, Kenneth Watkins, 17, lived in a house in Walls with his girlfriend, Tiffany, and her 16-month-old daughter from a prior relationship, Ann. Two other roommates also lived in the house—Mary and Mary's daughter. Tiffany had a morning class, so Watkins stayed with Ann. Watkins was the only person with Ann. When Tiffany returned home, she took a nap, and Watkins left to visit his mother in Holly Springs. Later that evening, Tiffany found blood in Ann's diaper, so she and Mary took Ann to a hospital. Ann also had bruises, scratches, and abrasions on her body. Her genital area was also damaged. A doctor and nurse practitioner confirmed Ann had very recently been sexually assaulted. Watkins's semen was found in the child's diaper. Watkins was charged and later went to trial. Some of the jurors were brought to tears after seeing some of the evidence. The state offered Watkins a plea. Based on how the case was going, his counsel recommended he take the plea. Watkins did so, and was sentenced to 20 years, with 10 years PRS. Watkins later filed a PCR, claiming his plea was involuntary and newly discovered evidence required both pleas be vacated. After an evidentiary hearing, the PCR was denied and Watkins appealed.

HELD: (1) Watkins claimed he only pled guilty because he was pressured to do so by his attorney and family. The record shows the circuit judge thoroughly questioned Watkins during the plea hearing. Some family members testified his attorney told Watkins the judge had already made up his mind to sentence him to life. However, his mother and sister remembered the attorney telling him he could get life, which was a correct statement of the law. A lawyer can try and persuade a defendant to take a plea, as long as the persuasion does not result from fear, violence, deception, or improper inducements. There was clearly a factual basis for the plea.

(2) Watkins claimed that he has new evidence of another male present at the house that day which he only discovered after his plea. However, the evidence consisted of Watkins's roommate, Mary, claiming Tiffany told her another male was at the home that day. Tiffany denied this and had no idea why Mary would say that.

To read the full opinion, click here:
<https://courts.ms.gov/images/Opinions/CO98097.pdf>

Kevin Warren v. State, No. 2013-CP-02024-COA (Miss.Ct.App. November 4, 2014)

CASE: PCR – Possession of more than one kilo but less than five kilos of Marijuana
SENTENCE: Life as an habitual offender

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

APPELLANT ATTORNEY: Kevin Warren (Pro Se)
APPELLEE ATTORNEY: Melanie Thomas

DISPOSITION: Dismissal of PCR Affirmed. Roberts, 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 judge erred in dismissing the PCR as time-barred.

FACTS: In May 2000, El Paso airport officials contacted MBN to inform them that Kevin Warren had checked luggage that contained marijuana on a flight to Jackson. When Warren landed in Jackson, he could not find his luggage. Warren reported that it was missing. Warren was then arrested on an outstanding warrant. MBN obtained a search warrant for the luggage and found marijuana. On October 9, 2001, he was convicted at trial of possession of more than one kilogram but less than five kilograms of marijuana. He was sentenced to life as an habitual offender. On November 12, 2002, Warren filed a "notice of out of time appeal." This was denied, as Warren failed to state a reason for the untimely appeal. On October 28, 2010, Warren filed a document titled "Reconsideration of Sentence," asking the court to lower his sentence because he planned to become a chef, write an inspirational book, and be "very active in ministering the word of God." He also wanted to get married and help raise his son. This was also denied. On October 4, 2013, Warren filed a PCR, alleging a search warrant was defective and that he did not actively or constructively possess marijuana in Rankin County. The PCR was dismissed as time-barred.

HELD: Warren essentially argues that he is entitled to post-conviction relief because there was insufficient evidence that he had active or constructive possession of marijuana in Rankin County. The sufficiency of the evidence against Warren could have and should have been raised at trial or on direct appeal. Warren's PCR motion was more than 7 years after his conviction and was too late.

To read the full opinion, click here:
<https://courts.ms.gov/images/Opinions/CO98079.pdf>

Anthony Miles Fortenberry v. State, No. 2013-CA-01003-COA(Miss.Ct.App. November 4, 2014)

CASE: PCR – Sexual Battery
SENTENCE: 20 years, with 13 suspended and 5 years supervised probation

COURT: Rankin County Circuit Court
TRIAL JUDGE: Hon. William E. Chapman, III

APPELLANT ATTORNEY: Earnestine Alexander
APPELLEE ATTORNEY: Stephanie Breland Wood

DISPOSITION: Summary Dismissal of PCR Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether the trial court erred in failing to grant an evidentiary hearing, (2) whether there was a factual basis for the acceptance of his plea, and (3) whether he was denied effective assistance of counsel.

FACTS: On November 30, 2011, Anthony Fortenberry pled guilty to sexual battery for inserting his finger into the vagina of a 14-year-old girl. On July 26, 2012, Fortenberry filed a pro se PCR, which was summarily denied. He appealed.

HELD: (1) The record does not demonstrate that the trial court's dismissal of Fortenberry's PCR was clearly erroneous. Fortenberry claimed that he did not voluntarily plead guilty because of his use of mind-altering prescription drugs, and he did not understand what he was signing. However, the record demonstrated that the trial judge made sure the prescription drugs did not impede Fortenberry's decision-making abilities. (2) This claim is barred, as it was not presented to the trial court. (3) Fortenberry argued that his counsel knew or should have known that he was under the influence of mind-altering drugs. However, he stated he was satisfied with counsel at his plea. He provided no evidence that his mind was altered at his plea.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO98548.pdf>

Wendell Duncan v. State, No. 2013-CP-01487-COA (Miss.Ct.App. November 4, 2014)

CASE: PCR – Conspiracy and Burglary of a Business

SENTENCE: 5 years for the conspiracy and a consecutive 7 years for the burglary as a habitual offender

COURT: Washington County Circuit Court

TRIAL JUDGE: Hon. W. Ashley Hines

APPELLANT ATTORNEY: Wendell Duncan (Pro Se)

APPELLEE ATTORNEY: Billy Gore

DISPOSITION: Dismissal of PCR Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the trial judge erred in dismissing petitioner's 4th PCR.

FACTS: On November 30, 1994, Wendell Duncan was convicted by a jury of conspiracy and burglary of a business. Duncan failed to file a direct appeal after his 1994 conviction and sentence. Duncan was also later convicted of armed robbery in March 1995. After noting the State's failure to prove habitual-offender status for Duncan, the circuit judge sentenced Duncan as a non-habitual offender to 30 years, with the sentence to run consecutively to the previously imposed sentence as a habitual offender of 12 years for Duncan's burglary and conspiracy convictions. Over the years, Duncan has

filed several petitions challenging his convictions. On January 19, 2011, the SCT dismissed Duncan's motion for leave to proceed in the trial court after finding that Duncan had failed to file a direct appeal of his 1994 convictions and sentence. Nonetheless, Duncan filed a motion to correct sentence in the circuit court, which the circuit judge treated as a PCR. The circuit judge dismissed Duncan's motion as successive-writ barred. His appeal was denied. *Duncan v. State*, 100 So. 3d 996 (Miss. Ct. App. 2012). On July 9, 2013, the circuit court dismissed, for the fourth time, a PCR filed by Duncan challenging his 12-year sentence for conspiracy and burglary imposed in 1994. He appealed.

HELD: It is clear that the current PCR filed by Duncan is time-barred by more than fifteen years. As such, even if an error was found regarding his habitual-offender status, the Court could not cure the defect since the sentence Duncan complains of is technically over. Furthermore, Duncan does not state that any exception to the time bar applies. The PCR is also successive writ barred.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO98557.pdf>

Robert Dewayne Barnes v. State, No. 2013-CP-01016-COA (Miss.Ct.App. November 4, 2014)

CASE: PCR – Armed Robbery x3

SENTENCE: 3 years on each count, concurrently, and 5 years of PRS

COURT: Jackson County Circuit Court

TRIAL JUDGE: Hon. Robert P. Krebs

APPELLANT ATTORNEY: Robert Dewayne Barnes (Pro Se)

APPELLEE ATTORNEY: Lisa L. Blount

DISPOSITION: Denial of out-of-time Appeal Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair and James, JJ., Concur. Roberts and Maxwell, JJ., Concur in Part and in the Result.

ISSUE: Whether the trial court erred in denying petitioner an out of time appeal of the dismissal of his PCR.

FACTS: In 2005, Robert Dewayne Barnes pled guilty to three counts of armed robbery. On April 24, 2012, his post-release supervision was revoked. In August 2012, Barnes filed a motion for reconsideration, and in October 2012, he filed a petition to clarify the order of revocation. While these two motions were pending, Barnes filed PCR on November 1, 2012. By order dated November 20, 2012, the trial court addressed all Barnes's motions together and denied relief. Barnes did not appeal this order. On December 7, 2012, Barnes filed another PCR, which the trial court denied. On June 14, 2013, Barnes sought relief from the Mississippi Supreme Court. The SCT treated Barnes's motion as a request for an out-of-time appeal and remanded for the trial court to consider whether Barnes was entitled to proceed with an out-of-time appeal. On September 24, 2013, the trial court entered an order denying Barnes's request for an out-of-time appeal. He appealed.

HELD: Barnes presented no proof other than mere allegations that he failed to receive notice of the trial court's order denying relief from his December 2012 PCR. Regardless, this was his second PCR and should have been barred as a successive writ. The trial court fully addressed his claim of wrongful revocation in the November 20, 2012 order denying Barnes's first PCR.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO98036.pdf>

Milton Trotter v. State, No. 2013-CA-00547-COA (Miss.Ct.App. November 4, 2014)

CASE: PCR – Murder

SENTENCE: Life, concurrent with a federal life sentence for kidnapping

COURT: Lauderdale County Circuit Court

TRIAL JUDGE: Hon. Robert Walter Bailey

APPELLANT ATTORNEY: James A. Williams

APPELLEE ATTORNEY: Stephanie Breland Wood

DISPOSITION: Dismissal of PCR Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton and Fair, JJ., Concur. James, J., Dissents with Separate Written Opinion.

ISSUE: Whether the trial judge erred in dismissing the PCR.

FACTS: Milton Trotter received a life sentence in federal court for kidnapping. Shortly after, Trotter waived indictment and pled guilty in a Mississippi circuit court to a murder committed by his accessories during the abduction in 1981. The sentencing order stated Trotter was "allowed" to serve the concurrent Mississippi life sentence in federal prison. Trotter had served 30 years in federal prison when the federal parole board granted him parole on the kidnapping conviction. But the Mississippi Parole Board denied him parole on his state murder conviction. So Trotter was transferred to a Mississippi prison to continue serving his life term. Trotter filed a PCR, complaining this was not the deal he struck with the state prosecutor. He argued that since his life sentence for murder was ordered to run concurrently with his federal sentence and because he was "allowed" to serve his time in federal prison, the State was bound to parole him upon his parole release from federal custody. This is Trotter's second PCR, as he filed one in 2003.

HELD: Trotter asserts his PCR is not time barred or successive writ barred. He does not escape the bar because he claimed his sentence has expired. A life sentence does not expire. He is really asserting he is being unlawfully held. Therefore the procedural bars do not apply. However, his actual innocence claim is barred, as that was the basis for his 2003 PCR.

Trotter was serving two distinct life sentences, in two separate jurisdictions, for two different crimes. And nothing in the record suggests Trotter was promised state parole as part of his plea agreement on the murder charge. Furthermore, Mississippi prisoners have no constitutionally recognized liberty

interest in parole. Instead, the sole discretion to grant or deny parole lies with the Parole Board, not the courts. Trotter is serving the exact sentence he bargained for.

James, J., Dissenting:

Judge James dissented, believing the plea agreement was breached. According to the agreement, Trotter did not consent to serve time in the Mississippi Department of Corrections. Trotter raises due-process concerns over his continued incarceration after being awarded parole from the United States Parole Commission. Trotter was therefore improperly induced to plea guilty on the promise of serving his time only in federal custody. An evidentiary hearing should be conducted by the trial court to determine what type of relief Trotter is entitled to receive.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO98291.pdf>

November 18, 2014

Tyler Graham v. State, No. 2013-CP-02059-COA (Miss.Ct.App. November 18, 2014)

CASE: PCR – Aggravated Assault and Armed Robbery

SENTENCE: 20 years for the aggravated assault and a concurrent 25 years for robbery

COURT: Carroll County Circuit Court

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

APPELLANT ATTORNEY: Tyler Graham (Pro Se)

APPELLEE ATTORNEY: Melanie Dotson Thomas

DISPOSITION: Denial of PCR Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether his claim that his attorney gave him incorrect advice about parole eligibility was time-barred; (2) whether he was entitled to any type of relief due to his attorney's incorrect advice about parole eligibility; (3) whether the circuit court failed to address his claim regarding intervening decisions of the U.S. Supreme Court; and (4) whether his convictions violated the Double Jeopardy Clause

FACTS: On November 20, 2006, Graham pled guilty to aggravated assault and armed robbery. On June 7, 2013, Graham filed a PCR, and on July 12, 2013, he filed a motion to vacate his conviction and sentence. The circuit court judge consolidated Graham's motions after finding that both motions sought to set aside Graham's convictions and sentences due to a violation of the Double Jeopardy Clause and incorrect advice from Graham's attorney regarding parole eligibility. The court denial of the motions as time-barred and Graham appealed.

HELD: (1) and (2) Graham argued that, because this claim of ineffective assistance of counsel concerns a constitutional-rights violation, the claim is excepted from the time bar. Graham also argued

that the circuit court erroneously found his claim of ineffective assistance of counsel failed to entitle him to any type of relief. However, claims of ineffective assistance of counsel and involuntary guilty pleas are subject to the procedural bars. Notwithstanding the bar, Graham acknowledged under oath during his plea colloquy that he knew and understood the maximum punishment for both crimes charged in his indictment. Graham also stated under oath during the plea colloquy that he was completely satisfied with the representation provided by his attorney. Graham also failed to include supporting affidavits.

(3) Graham also claimed *Padilla v. Kentucky*, 559 U.S. 356 (2010), and *Missouri v. Frye*, 132 S. Ct. 1399 (2012), supported his assertion that his attorney's incorrect advice regarding parole eligibility entitles him to relief. Graham's case was final when these cases were handed down. His claim is still time-barred. Regardless, he failed to demonstrate how these cases impact the outcome of his convictions and sentences.

(4) Graham's convictions for armed robbery and aggravated assault do not violate the Double Jeopardy Clause. Aggravated assault does not require the taking or attempt to take property. Armed robbery does not require an attempt to cause bodily injury.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98023.pdf>

Freddrick Stamps v. State, No. 2013-CP-01147-COA (Miss.Ct.App. November 18, 2014)

CASE: PCR – Burglary

SENTENCE: 15 years, with 10 suspended and 5 years to serve, followed by 3 years PRS

COURT: Sharkey County Circuit Court

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

APPELLANT ATTORNEY: Freddrick Stamps (Pro Se)

APPELLEE ATTORNEY: LaDonna C. Holland

DISPOSITION: Denial of PCR Affirmed. Roberts, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether the failure to provide an initial appearance within 48 hours should cause his plea to be vacated; (2) whether his indictment should have been dismissed for a violation of the double jeopardy clause; (3) whether he received effective assistance of counsel; (4) whether the plea was voluntary; (5) whether there was a factual basis for the plea; (6) whether there was sufficient evidence that he was guilty of burglary; (7) whether the State committed a discovery violation; (8) whether there was a speedy trial violation; and (9) whether the indictment was sufficient.

FACTS: October 9, 2012, Freddrick Stamps pled guilty to burglary. He had also been indicted for sexual battery and as an habitual offender. The sexual battery and the enhancement were dropped in exchange for his plea. In January 2013, Stamps filed a PCR raising several issues. Two months later,

Stamps filed an "amendment" to his PCR, raising four additional issues. The circuit court reviewed all the claims and denied relief. Stamps appealed.

HELD: (1) Stamps did not claim that he experienced any particular prejudice because his initial appearance was delayed, but suggested that he was immune to prosecution simply because his initial appearance was approximately thirty-three hours too late. No evidence was obtained from Stamps during the delay. The claim is without merit.

(2) Stamps was not subjected to double jeopardy by being charged with sexual battery and burglary. Although raised for the first time on appeal, double jeopardy is a fundamental right and is exempt from procedural bars. Regardless, the claim is without merit. Burglary and sexual battery require proof of different facts.

(3) Stamps failed to support any of his claims with affidavits. Furthermore, his claims were not specific enough to review. Stamps does not demonstrate how his lawyer's performance was deficient for advising him that he did not have a defense.

(4) Stamps's plea was voluntary. Stamps claimed his lawyer coerced him to accept the plea deal. During the hearing, Stamps swore that he wanted to plead guilty. He was 36 years old and he had a 12th grade education. He said he understood his guilty-plea petition, and he signed it.

(5) This claim is barred for raising the issue for the first time on appeal.

(6) Stamps's guilty plea waived any claim that the evidence was insufficient.

(7) This claim is barred for raising the issue for the first time on appeal.

(8) Stamps apparently claims that he was denied his right to a speedy trial because 436 days passed between the time of his arrest and the date he pled guilty. However, again, he failed to raise this issue with the circuit court. The claim is barred. Regardless, a valid plea waives a speedy trial claim.

(9) Finally, Stamps claims the indictment was insufficient for burglary. Stamps seems to reiterate his claim that he could not be charged with sexual battery and burglary, where the underlying intent of the burglary was to commit sexual battery. This is simply a revised version of his meritless double-jeopardy claim. Regardless, a guilty plea waives all non-jurisdictional defects in an indictment.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98060.pdf>

Derrick Randle a/k/a Derrick Cox v. State, No. 2013-CP-00910-COA (Miss.Ct.App. November 18, 2014)

CASE: PCR – Business Burglary and Receiving Stolen Property

SENTENCE: Concurrent terms of 5 years in each case with 2 to serve and 3 years PRS

COURT: Holmes County Circuit Court
TRIAL JUDGE: Hon. Jannie M. Lewis

APPELLANT ATTORNEY: Derrick Randle (Pro Se)
APPELLEE ATTORNEY: Scott Stuart

DISPOSITION: Appeal Dismissal for lack of jurisdiction. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether the circuit court erred in using the same facts at two different revocation hearings, and (2) whether the circuit court erred in revoking his suspended sentence in a case for which he claims he had not started serving the PRS portion of that sentence.

FACTS: On February 5, 2008, Derrick Randle pled guilty to burglary of a commercial building and receiving stolen property in two different cause numbers. On September 22, 2010, following a revocation hearing, the circuit court modified Randle's probation, and ordered him to complete a restitution program. On October 1, 2010, Randle entered a plea of guilty to another business burglary. He was sentenced to 5 years, with 6 months to serve, credit for time already served, and thereafter 4½ years on PRS. On February 11, 2011, at a revocation hearing in all three cases, the State presented evidence that he had failed to comply with the rules of the restitution program. The circuit court ordered that Randle be transferred to another restitution center. On March 22, 2011, the circuit court held a second revocation hearing in all three cause numbers. The State presented evidence that Randle became aggressive towards officers during the attempt to transfer Randle to the new restitution center. The court revoked Randle's probation in all three cause numbers. On November 29, 2012, Randle filed a PCR, which was summarily denied on January 11, 2013. He never appealed that order, but did appeal the circuit court's response to his petition for a writ of mandamus.

HELD: Randle apparently appealed the circuit court's response to his petition for a writ of mandamus. Therefore, there is no order to appeal. "To the extent that Randle seeks to appeal from the order of the circuit court entered on January 11, 2013, it is obvious that he is much too late, as his notice of appeal was filed well beyond the thirty days permitted by Rule 4(a) of the Mississippi Rules of Appellate Procedure. He has not sought an out-of-time appeal, and one has not been granted. Accordingly, we find that this appeal must be dismissed for lack of jurisdiction."

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO98966.pdf>

Monica Carson v. State, No. 2013-CP-01586-COA (Miss.Ct.App. November 18, 2014)

CASE: PCR – Robbery
SENTENCE: 15 years

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

APPELLANT ATTORNEY: Monica Carson (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, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether she received ineffective assistance of counsel, (2) whether there was disparate sentencing, (3) whether the trial court erred in accepting her plea, (4) whether the trial court erred in denying an evidentiary hearing, (5) whether the trial court erred in denying her PCR, and (6) whether there was cumulative error.

FACTS: On June 6, 2011, Monica Carson pled guilty to robbery. She also pled guilty to robbery in two other related cause numbers, and received suspended sentences of 15 years each, to run concurrently with each other but consecutively to the first sentence. On June 26, 2013, Carson filed a PCR, which the trial court denied without a hearing. Carson appealed

HELD: (1) Carson argued her counsel was ineffective because he failed to advise her about the law of robbery and accessory after the fact, inform her of the consequences of her plea, and investigate the case and interview witnesses. However, Carson's PCR rests entirely on her own bare assertions. She offered no additional proof to support her claim that her trial counsel's assistance was deficient and that she would not have pled guilty had it been otherwise.

(2) Carson argued that her codefendant received probation, so her due-process rights were violated. A trial court is not required to impose the same sentence on coconspirators.

(3) There was a sufficient factual basis for the plea. Carson confessed to jumping out of a vehicle with two other people, one of them held the gun, and one of them demanded money from the victim, who gave them his wallet. She agreed to these facts at her plea hearing.

(4) The trial court did not err in failing to hold an evidentiary hearing. Carson relied entirely on her own assertions as evidence that she is entitled to post-conviction relief. The trial court was entitled to rely on Carson's sworn statements. Carson can prove no set of facts that would entitle her to relief.

(5) and (6) The trial judge did not err in denying relief and there was no error, much less cumulative error.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98426.pdf>

November 25, 2015

Rickey Sturkey v. State, No. 2013-CP-02081-COA (Miss.Ct.App. November 25, 2014)

CASE: PCR – Sale of Cocaine

SENTENCE: 60 years as a repeat drug offender and a habitual offender

COURT: Scott County Circuit Court
TRIAL JUDGE: Hon. Vernon R. Cotten

APPELLANT ATTORNEY: Rickey Sturkey (Pro Se)
APPELLEE ATTORNEY: Stephanie Breland Wood

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

ISSUES: (1) Whether the trial court erred in failing to grant him an evidentiary hearing.

FACTS: Rickey Sturkey was convicted of selling cocaine and was sentenced to 60 years without parole. On April 18, 2001, a controlled buy was set-up with a CI and MBN. The CI telephoned Sturkey to find out if he was home and if he had any drugs. The CI then went to Sturkey's residence. An MBN agent and the CI were let into the house where they found Sturkey "cooking dope in the microwave." They paid \$460 for eight balls of crack cocaine. Sturkey was later arrested and charged as a second drug offender and an habitual offender. His conviction was affirmed on direct appeal. *Sturkey v. State*, 946 So. 2d 790 (Miss. Ct. App. 2006). Sturkey unsuccessfully sought the supreme court's leave to file a PCR at least three times. In his fourth request for leave to file a PCR, Sturkey claimed for the first time that his trial attorney was ineffective because she did not call two witnesses who would have allegedly provided alibi testimony in Sturkey's defense. The request was granted in August of 2012, but Sturkey was not given a deadline to file. He did file his PCR until January of 2013. "From that point forward, the record is exceedingly confusing." After several petitions for a writ of mandamus, the SCT ordered the circuit court to rule on Sturkey's PCR. The circuit court then summarily denied the PCR 5 days later as time barred. Sturkey appealed.

HELD: The SCT's decision to grant his request for leave to proceed in the circuit court was not the equivalent of a guarantee to an evidentiary hearing. The SCT did not order the circuit court to conduct a hearing, but to rule on Sturkey's motion. Although Sturkey provided affidavits from two proposed alibi witnesses, he submitted no affidavits alleging his attorney was ineffective for failing to call them. This issue could have been raised prior the end of the three-year statute of limitations. Sturkey did not claim this was newly discovered evidence.

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO98497.pdf>

James Creel v. Ron King and Christopher Epps, No. 2013-CP-01209-COA (Miss.Ct.App. November 25, 2014)

CASE: Escape
SENTENCE: Life w/o parole

COURT: Covington County Circuit Court
TRIAL JUDGE: Hon. Eddie H. Bowen

APPELLANT ATTORNEY: James Creel (Pro Se)
APPELLEE ATTORNEY: James M. Norris, Anthony L. Schmidt

DISPOSITION: Dismissal of PCR Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the trial judge erred in treating his habeas motion as a PCR and dismissing it as time barred.

FACTS: On July 18, 1994, James Walter Creel was convicted of escape and subsequently sentenced to life without the possibility of parole as a habitual offender. Creel did not appeal. On October 13, 1997, Creel filed a motion contending that his counsel failed to perfect his appeal. Creel's motion was denied as time barred. From February 1998 to February 2001, Creel filed four additional PCRs, all of which was denied as time barred and/or successive writ barred. On July 2, 2012, Creel filed a petition for a writ of habeas corpus ad subjiciendum. The SCT later ordered the circuit court to address Creel's habeas motion. The trial court treated the motion as a PCR and dismissed it as procedurally barred. Creel appealed.

HELD: Creel's motion for a writ of habeas corpus ad subjiciendum was properly denied by the trial court as an untimely and successive PCR.

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO98266.pdf>

December 2, 2014

Bobby Eugene Epps v. State, No. 2013-CP-01109-COA (Miss.Ct.App. December 2, 2014)

CASE: PCR – Manufacturing Methamphetamine

SENTENCE: 35 years as an habitual offender

COURT: Panola County Circuit Court

TRIAL JUDGE: Hon. James McClure, III

APPELLANT ATTORNEY: Bobby Eugene Epps (Pro Se)

APPELLEE ATTORNEY: Billy L. Gore

DISPOSITION: Denial of PCR Affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Maxwell and Fair, JJ., Concur.

ISSUES: (1) Whether the trial court improperly sentenced him as a habitual offender pursuant to §99-19-81; and (2) whether he was denied effective assistance of counsel.

FACTS: On January 22, 2010, Bobby Eugene Epps pled guilty to manufacturing methamphetamine as a habitual offender. In exchange for his guilty plea, four other drug counts were remanded and the State agreed to reduce Epps's habitual-offender status from §99-19-83 to §99-19-81. On September

11, 2012, Epps filed a PCR in which he asserted that the trial court erred in convicting him as a habitual offender without first conducting a separate recidivism hearing. Epps also asserted that his trial counsel was ineffective for failing to request a separate hearing. The trial court denied the PCR, and Epps appealed.

HELD: (1) The trial court did not err when it sentenced Epps as a habitual offender without conducting a separate recidivism hearing. Epps was properly indicted as a habitual offender, the State offered competent evidence regarding the prior offenses, and Epps had the opportunity to contest the State's evidence. There is nothing in the record that indicates that Epps requested a separate hearing at the time of the sentencing.

(2) Epps failed to provide any supporting affidavits or other evidence in support of his claim that his trial counsel was ineffective. Epps merely asserted that his trial counsel failed to request a separate recidivism hearing prior to Epps's sentencing. Since this was a guilty plea, Epps was not entitled to a separate hearing prior to being sentenced as a habitual offender. Accordingly, Epps's trial counsel was not ineffective for failing to request a separate hearing.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98747.pdf>

John Joseph Dedeaux v. State, No. 2013-CP-00903-COA (Miss.Ct.App. December 2, 2014)

CASE: PCR – Receiving Stolen Property

SENTENCE: 5 years

COURT: Hancock County Circuit Court

TRIAL JUDGE: Hon. John C. Gargiulo

APPELLANT ATTORNEY: John Joseph Dedeaux Sr. (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, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether the circuit court convicted him of a crime for which he had not been indicted and had not waived indictment, and (2) whether he had received ineffective assistance of counsel.

FACTS: John Joseph Dedeaux was indicted for burglary of the Bay Senior High School in Bay St. Louis. On November 13, 1990, Dedeaux pled guilty to receiving stolen property and was sentenced to 5 years. In 1994, Dedeaux was convicted of transfer of a controlled substance, his third felony conviction, and was sentenced to 30 years as an habitual offender. On February 21, 2013, Dedeaux filed his fourth PCR challenging his receiving stolen property conviction. The court found his motion time-barred and without merit. After he filed an appeal, Dedeaux filed a motion arguing that the circuit court erred in failing to set aside his conviction for receiving stolen property. The court subsequently set aside its order denying relief, and instructed the State to file a response to Dedeaux's PCR motion and post-trial motion. After the State's response, the court again denied relief.

HELD: The COA first noted the circuit court had no jurisdiction to set aside its original order denying relief. Dedeaux had filed an appeal, so the circuit court no longer had jurisdiction. The Court went on to hold Dedeaux's PCR was clearly time-barred. Dedeaux's sentence was not illegal, so the PCR is not excepted from the time-bar. The PCR was also successive writ barred. He also raised this issue in his previous PCRs, so the claim is barred by the doctrine of res judicata. Finally, the COA went on to briefly explain why Dedeaux's plea to the lesser charge of receiving stolen property was proper after being indicted for burglary.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO99317.pdf>

Jomorris Thornton v. State, No. 2013-CP-01903-COA (Miss.Ct.App. December 2, 2014)

CASE: PCR – Conspiracy to commit Murder and Murder

SENTENCE: 25 years for the conspiracy and a concurrent life sentence for the murder

COURT: Wayne County Circuit Court

TRIAL JUDGE: Hon. Robert Walter Bailey

APPELLANT ATTORNEY: Jomorris Thornton (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, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether he was denied effective assistance of counsel due to his trial counsel's advice that he should take a plea bargain because he could receive the death penalty, and (2) whether he was denied effective assistance by counsel's failure to conduct an investigation to determine whether the State offered to pay money to a codefendant in exchange for evidence against him.

FACTS: Jomorris Thornton pled guilty to conspiracy to commit murder and to murder. Thornton subsequently filed a motion to vacate and set aside his conviction and sentence for murder, which the circuit court treated as a PCR, and summarily denied. Thornton appealed.

HELD: (1) Thornton claims he was ill-advised when he was told that he was facing the death penalty. However, during his plea hearing, he was told he faced a maximum of life in prison. Based on Thornton's statements during the plea, and the verbiage in the guilty-plea petition, Thornton's plea was entered voluntarily and intelligently. Even if trial counsel misinformed Thornton, the circuit court clarified any misconceptions.

(2) Thornton failed to support his claim with an affidavit from his codefendant affirming his belief that she was offered money to testify against him. He failed to identify the person representing the State who allegedly made the offer. Accordingly, the claim is without merit.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO99325.pdf>

December 9, 2014

Melissa Webster v. State, No. 2013-CP-00922-COA, consolidated with No. 2013-CP-01145-COA (Miss.Ct.App. December 9, 2014)

CASE: PCR – Exploitation of a Vulnerable Adult

SENTENCE: 10 years, with 8 to serve and 2 years of PRS, with all counts to run concurrently

COURT: Jackson County Circuit Court

TRIAL JUDGE: Hon. Robert P. Krebs

APPELLANT ATTORNEY: Melissa Webster (Pro Se)

APPELLEE ATTORNEY: Scott Stuart

DISPOSITION: Dismissal and Denial of PCR Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Fair and James, JJ., Concur.

ISSUES: Whether she was denied effective assistance of counsel, (2) whether her 5th Amendment rights were violated, (3)

FACTS: On January 23, 2012, Melissa Webster entered guilty pleas to three counts of exploitation of a vulnerable adult. On October 5, 2012, Webster filed a PCR, arguing her trial attorney was ineffective and that she was never read her *Miranda* rights. After the PCR was dismissed, Webster filed a motion to reconsider her sentence. Webster argued she should have been granted house arrest because she did not violate any jailhouse rules. She also insisted that MDOC erred in classifying her as a violent offender since she was only convicted of exploitation of a vulnerable adult and not abuse. The circuit court treated the motion as a PCR and denied relief. She appealed both rulings, and the cases were consolidated on appeal.

HELD: (1) Webster claimed her counsel was ineffective for failing to contact witnesses, file motions, seek discovery, and only met with her once. However, she does not say what witnesses should have been contacted or what they would have said. She also failed to provide affidavits or any other viable evidence to support her claim. At her plea she stated she was satisfied with her counsel. She has failed to properly allege or prove ineffective assistance.

(2) Webster claimed investigators lied to her and threatened her, failed read her *Miranda* rights, and continued to interrogate her even though she had requested an attorney. However, she again offered nothing more than broad assertions without even specifying what lies or threats were made. The accusations were not even reduced to a sworn affidavit, much less proved by another source. Webster's valid guilty plea waived all these issues.

(3) Finally, Webster argued that MDOC erroneously classified her as a violent offender when it denied her parole. However, classification issues are not proper for post-conviction relief. Further, Webster has since been released on parole, so now her inmate-classification challenge is moot.

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO99146.pdf>

Donnie Sylvester v. State, No. 2013-CP-01332-COA (Miss.Ct.App. December 9, 2014)

CASE: PCR – Drive-by Shooting and Aggravated Assault

SENTENCE: 30 years, with 15 to serve and 15 suspended and 5 years PRS for drive-by shooting, and a concurrent 15 years for the aggravated assault

COURT: Perry County Circuit Court

TRIAL JUDGE: Hon. Robert B. Helfrich

APPELLANT ATTORNEY: Donnie Sylvester (Pro Se)

APPELLEE ATTORNEY: Barbara Wakeland Byrd

DISPOSITION: Denial of PCR Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Fair and James, JJ., Concur.

ISSUES: (1) Whether the circuit judge misunderstood the law about earned-time allowances, (2) whether Sylvester was denied effective assistance of counsel, (3) whether the plea was voluntary, (4) whether the court erred in considering an affidavit in lieu of testimony, (5) whether the trial court erred in allowing trial counsel to testified without taking the oath, (6) whether the trial court erred by meeting with Sylvester’s trial counsel in chambers prior to the hearing, and (7) whether there was cumulative error.

FACTS: On September 2, 2009 Donnie Sylvester pled guilty to drive-by shooting and aggravated assault. He later filed a PCR alleging his plea was involuntary and his attorney was ineffective. Sylvester claimed that he would not have pled guilty had he been advised he would have to actually serve more than 5 years. He claimed his attorney incorrectly told him he would receive earned-time, trusty-earned-time, and meritorious-earned-time allowances and would be released on PRS after serving just five years. His motion was supported by an affidavit from his sister saying essentially the same thing. The circuit judge summarily dismissed Sylvester's PCR, but the COA reversed and remanded for an evidentiary hearing on the merits because his sister's third-party affidavit. [*Sylvester v. State*](#), 113 So. 3d 618 (Miss. Ct. App. 2013). On remand, Sylvester's trial attorney, Eric Tiebauer, maintained he did not tell Sylvester he would get earned time because he always counsels his clients that these allowances are regulated by the MDOC. The circuit judge found Tiebauer's testimony more credible, and denied the PCR. Sylvester appealed again.

HELD: (1) The Legislature clearly empowered MDOC with sole authority to grant earned-time, trusty-earned-time, and meritorious-earned-time allowances. The judge's comment that he could not imagine any lawyer advising a client as to what MDOC would do, showed the court’s correct appreciation of MDOC's discretionary authority, not a misunderstanding of the law.

(2) Sylvester argued his trial attorney was ineffective for advising him he would be released early under earned-time provisions, and his PCR attorney was ineffective for not objecting at the evidentiary

hearing to his trial counsel's testimony about reviewing his file before the hearing. Sylvester failed to show how his result would have been different had the allowance programs been governed by MDOC regulation instead of statute. The attorney's misunderstanding was immaterial. It was within the judge's discretion to conclude counsel did not give erroneous advice that prejudiced Sylvester. Sylvester has not show deficient performance of his PCR counsel for failing to object to his trial counsel's testimony.

(3) The judge did not clearly err by relying on Sylvester's prior sworn representations that his attorney had not promised him a specific sentence.

(4) Sylvester's PCR attorney told the court he could call Sylvester's sister to testify or just argue the motion based on her affidavit. The court suggested argument was fine. Since counsel suggested this approached, the issue is waived on appeal.

(5) The trial court did not err by not requiring Sylvester's trial attorney to take an oath before testifying. Sylvester's PCR attorney did not object to waiving the oath. Sylvester's failure to object was a waiver of the oath requirement.

(6) Sylvester submitted two affidavits attesting that before the PCR hearing, they saw Tiebauer enter the circuit judge's chambers. Neither affiant specified how long the two were in chambers or what the alleged wrongful conduct was. The COA could not conclude any improper conduct occurred.

(7) There was no cumulative error.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO99406.pdf>

Deriera Magee v. State, No. 2013-CP-01121-COA (Miss.Ct.App. December 9, 2014)

CASE: PCR – Possession of a Controlled Substance

SENTENCE: 14 years, with 6 to serve and 8 year PRS

COURT: Pearl River County Circuit Court

TRIAL JUDGE: Hon. Anthony Alan Mozingo

APPELLANT ATTORNEY: Deriera Magee (Pro Se)

APPELLEE ATTORNEY: Barbara Wakeland Byrd

DISPOSITION: Dismissal of PCR Affirmed. Barnes, J., for the Court. Lee, C.J., Irving, P.J., Ishee and Carlton, JJ., Concur. Roberts, J., Specially Concur with Separate Written Opinion, Joined by Griffis, P.J., Maxwell and Fair, JJ. James, J., Concur in Part Without Separate Written Opinion.

ISSUES: (1) Whether Magee's PCR was time-barred, (2) whether his revocation was lawful, and (3) whether he was denied effective assistance of counsel.

FACTS: On July 21, 2000, Deriera Magee pled guilty to possession of a controlled substance. On May 17, 2001, Magee pled guilty to possession with intent. The prison time in this sentence was consecutive to his 2000 plea, but the PRS was to be concurrent. Magee was discharged on April 29, 2008, to begin serving his two concurrent PRS terms. However, on March 27, 2009, Magee was arrested and charged with possession with intent to distribute. The circuit court revoked Magee's eight-year term of PRS that he received with his 2000 conviction on July 21, 2009. (The PRS in the 2001 plea had been “inexplicably” terminated prior to his revocation). Over three years later, on September 5, 2012, Magee filed a PCR claiming his PRS was unlawfully revoked. The circuit court dismissed Magee's PCR as being procedurally barred under § 99-39-5(2). Magee appealed.

HELD: (1) The trial court erred in finding Magee’s PCR time-barred. §99-39-5(2)(b) provides an exception from the time-bar when the claim is an expired sentence or an unlawful revocation. In the recent case of *Fluker v. State*, No. 2013-CP-00608-COA (Miss. Ct. App. June 17, 2014), the COA stated in dicta that the general statute of limitations of §15-1-49 would provide a three year statute of limitation on these types of claims. However, the COA now holds that would violate the spirit of the PCR Act. These types of claims are excepted from procedural bars.

(2) Magee’s release from his 2001 PRS did not release him from the PRS he was concurrently serving for his 2000 conviction. He failed to cite any evidence to support his claim. (3) Magee claimed his attorney failed to provide the court with the petition for the termination of PRS for the 2001 conviction. However, this was immaterial to the revocation on the 2000 conviction.

Roberts, J., Specially Concurring:

Judge Roberts wrote to express his opinion that the PCR was indeed time-barred. Magee filed his PCR over three years after his alleged unlawful revocation. Even though the three year statute of limitations in the PCR statute did not apply, that did not mean that Magee had an unlimited amount of time to file his unlawful-revocation claim. As stated in *Fluker*, the general statute of limitations found in §15-1-49 applies. He did not believe this was dicta. It was appropriate for the circuit court to summarily dismiss the untimely PCR. The circuit court mistakenly found that Magee's PCR motion was untimely under §99-39-5(2) instead of §15-1-49(1), but the circuit court reached the right result.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98032.pdf>

December 16, 2014

Timothy B. Sharp v. State, No. 2013-CP-02020-COA (Miss.Ct.App. December 16, 2014)

CASE: PCR – Sexual Battery and Fondling

SENTENCE: 30 years for the sexual battery, with ten years suspended, and a concurrent 5 years for the fondling

COURT: Itawamba County Circuit Court

TRIAL JUDGE: Hon. Thomas J. Gardner, III

APPELLANT ATTORNEY: Timothy B. Sharp (Pro Se)

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, Roberts, Carlton, Fair and James, JJ., Concur.

ISSUE: Whether the trial judge erred in failing to grant relief based on recanted testimony.

FACTS: After receiving an anonymous tip that A.S., Timothy Sharp's 10 year old relative, had been the victim of sexual abuse, DHS interviewed the child. The child reported one incident where Sharp had penetrated her vagina with his penis. She further reported an incident in which she had awoken to discover that Sharp was rubbing his penis against her buttocks area. The child was subsequently examined and found to have a torn hymen and physical abnormalities in the child's anal region that were consistent with sexual activities inappropriate for her age. He was convicted of one count of sexual battery and one count of fondling. His convictions were affirmed in 2004. *Sharp v. State*, 862 So. 2d 576 (Miss.Ct.App. January 6, 2004). Sharp later filed a PCR, arguing he received ineffective assistance of counsel. The trial court dismissed his motion, and the COA affirmed. *Sharp v. State*, 979 So. 2d 713 (Miss.Ct.App. October 23, 2007). Sharp then sought leave to file a successive PCR on a claim of newly discovered evidence, which the MSCT granted in 2013. The PCR was based on the victim's recanted testimony in an affidavit from September of 2012. She claimed he committed no crime against her and that she falsely testified because she was scared and Sharp had hit her mother. However, in December of 2012, she signed another affidavit, this time saying she recanted her testimony because her brother pressured her to do so. A.S. claimed she was indeed "sexually abused." At the evidentiary hearing, A.S., now 22, testified Sharp did fondle her, but never penetrated her with his penis. She said he may have penetrated her with his fingers, but not his penis. She believed Sharp had served enough time and would not hurt anyone else. Her mother testified that A.S. told her that Sharp never penetrated her. A.S.'s brother also testified that A.S. told him and their mother that Sharp never penetrated her with his penis. The circuit judge denied relief and Sharp appealed.

HELD: The trial judge did not err in denying relief. Medical testimony supported A.S.'s trial testimony. The court found that A.S.'s hearing testimony and conflicting affidavits were confusing and differed substantially, declined to rely on any of her post-trial explanations. The circuit judge did not find any of A.S.'s recanted, post-trial testimony credible. The circuit judge viewed all of A.S.'s recanted testimony as highly suspect, which was his prerogative to do.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO99486.pdf>

Ricky Moore v. State, No. 2013-CP-01968-COA (Miss.Ct.App. December 16, 2014)

CASE: PCR – Armed Carjacking and Possession of a Firearm by a Convicted Felon

SENTENCE: 30 years, with 27 to serve followed by 3 years PRS for the carjacking, and a consecutive 10 years for the weapons charge, with one day to serve, followed by 5 years PRS

COURT: Madison County Circuit Court

TRIAL JUDGE: Hon. William E. Chapman, III

APPELLANT ATTORNEY: Ricky Moore (Pro Se)

APPELLEE ATTORNEY: Lisa L. Blount

DISPOSITION: Summary Dismissal of PCR Affirmed. Roberts, 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 sentencing him in a manner that made him ineligible for parole.

FACTS: On November 10, 2009, Ricky Moore pled guilty to armed carjacking and possession of a firearm by a convicted felon. On October 28, 2013, Moore filed a PCR. Moore claimed that the circuit court failed to specify that he would have to serve the entire portion of his sentence for armed carjacking. Moore also complained that the circuit court had impermissibly rendered him ineligible for parole. Therefore, Moore reasoned that he had been subjected to an illegal sentence. However, the circuit court found that Moore's PCR motion was untimely. The circuit court summarily dismissed Moore's PCR motion and he appealed.

HELD: Moore's PCR was clearly untimely. While an illegal sentence is excepted from the time bar, Moore's sentence was not illegal. A conviction for armed carjacking carries a maximum sentence of 30 years. A person convicted of armed carjacking is not eligible for parole under §47-7-3(1)(c)(ii). The circuit court never misled Moore by telling him that he would be eligible for parole. He clearly told Moore he would have to serve his time "day for day."

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO99374.pdf>

January 20, 2015

Derrick Jackson v. State, No. 2013-CP-01476-COA (Miss.Ct.App. January 20, 2015)

CASE: PCR – Armed Robbery

SENTENCE: 15 years, with 8 years suspended, and five years of PRS

COURT: Sunflower County Circuit Court

TRIAL JUDGE: Hon. W. Ashley Hines

APPELLANT ATTORNEY: Derrick Jackson (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, Roberts, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the trial judge erred in revoking Jackson's post-release supervision.

FACTS: On June 29, 2005, Derrick Jackson was convicted of armed robbery in the Sunflower County. In March 2012, Jackson was arrested and charged with aggravated assault and possession of a firearm

by a felon. At a subsequent revocation hearing, the trial court found that Jackson indeed violated the terms and conditions of his PRS by failing to report to his probation officer, failing to submit to a required chemical test, and failing to pay supervision fees. He was ordered to serve his 8 year suspended sentence. Jackson filed a PCR on April 2, 2013, claiming that the trial court erred by revoking his PRS after finding that he committed a crime. Jackson further claimed the trial court failed to provide him with a chance to explain his failure to report to his field officer or explain his failure to pay his supervision fees and restitution. The trial court dismissed Jackson's PCR motion and he appealed.

HELD: Jackson claimed the trial court never convicted him of the charges of aggravated assault and being a felon in possession of a firearm, and as a result, the trial court erred in revoking his PRS. However, Jackson failed to report to his probation officer for over six months. As a result, Jackson was arrested in Indianola in March 2012. Jackson was given an opportunity to explain, but did not address his failure to report.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98482.pdf>

Lauron Smith v. State, No. 2013-CP-02097-COA (Miss.Ct.App. January 20, 2015)

CASE: PCR – Taking of a motor vehicle

SENTENCE: 6 years, suspended, with 3 years PRS

COURT: Rankin County Circuit Court

TRIAL JUDGE: Hon. William E. Chapman, III

APPELLANT ATTORNEY: Lauron Smith (Pro Se)

APPELLEE ATTORNEY: Anthony Louis Schmidt Jr., James M. Norris

DISPOSITION: Dismissal of PCR Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the revocation of Smith's PRS was legal.

FACTS: In March 2009, Lauron Smith pled guilty in Harrison County to the charge of the taking of a motor vehicle. While on PRS, Smith absconded supervision, failed to pay his supervision fees, and failed to pay his court fines as ordered, and a warrant was issued for his arrest on November 18, 2011. On May 21, 2012, the trial court revoked Smith's PRS and revoked the suspension of his sentence, ordering him to serve his original 6-year sentence. In September 2013, Smith filed a request for a writ of habeas corpus in Rankin County, alleging illegal imprisonment related to his extradition from Michigan to Mississippi as a result of his probation revocation. This was treated as a PCR and denied. Smith appealed, asserting that the revocation of his suspended sentence and PRS was illegal, and thus, his extradition for that conviction and sentence was illegal.

HELD: Smith argued that he was entitled to an evidentiary hearing on the issues of whether or not MDOC Commissioner Christopher Epps attempted to murder Smith by poisoning him and also

whether Smith's probation officer used the extradition waiver to kidnap Smith. The trial judge did not err in dismissing Smith's PCR for lack of jurisdiction. Smith needed to file in the county of his conviction.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98483.pdf>

Tim Turner v. State, No. 2013-CP-01896-COA (Miss.Ct.App. January 20, 2015)

CASE: PCR – Sale of Cocaine

SENTENCE: 30 years with 28 suspended with 5 years PRS

COURT: Itawamba County Circuit Court

TRIAL JUDGE: Hon. James Seth Andrew Pounds

APPELLANT ATTORNEY: Tim Turner (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, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the trial judge erred in revoking Turner's PRS.

FACTS: In September 2011, Tim Turner pled guilty in Itawamba County for the sale of cocaine. Most of his sentence was suspended, and with credit for time served, he was released after his plea. In December 2011, the State filed its first petition to revoke Turner's PRS and impose the suspended sentence. The Court giving Turner another chance, modified Turner's post-release supervision, ordering him to enter and complete an inpatient drug rehabilitation program. On March 3, 2012, Turner tested positive for cocaine after returning to the program after a three hour pass. He was discharged and the State again sought revocation. In May 2012, Turner was ordered to serve 20 years of his original sentence. Turner filed a PCR, arguing that the revocation of his PRS was illegal, his sentence was too harsh, and the drug test was improper and invalid. The PCR was denied and Turner appealed.

HELD: Turner argued the revocation of his PRS and imposition of his suspended sentence were unlawful because there was no proof he committed another crime justifying these actions. However, Turner did not need to commit another crime to have his PRS revoked. His suspended sentence was conditioned on abstaining from drug usage and completing a court-ordered drug-treatment program, among other matters. Because Turner failed to abide by the terms of his PRS, there was no error when the trial court reinstated twenty years of his original sentence.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100126.pdf>

January 27, 2015

Hence David Davis a/k/a Hence Davis a/k/a "Shawn" a/k/a "Shean" a/k/a "Sean" v. State, No. 2014-CP-00076-COA (Miss.Ct.App. January 27, 2015)

CASE: PCR – Sale of Cocaine

SENTENCE: 40 years as a second offender

COURT: Lauderdale County Circuit Court

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

APPELLANT ATTORNEY: Hence David Davis (Pro Se)

APPELLEE ATTORNEY: Billy L. Gore

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

ISSUES: (1) Whether his indictment was defective, and (2) whether his sentence is illegal.

FACTS: On November 15, 2011, Hence Davis pled guilty to the sale of cocaine as a second offender. Although indicted as an habitual offender, the state dropped the enhancement. On June 28, 2013, Davis simultaneously filed two motions for reconsideration of his sentence, which the trial court treated as a PCR. On July 22, 2013, Davis filed a third motion for reconsideration, and four days later, he filed a PCR, arguing that his second-offender enhancement was illegal due to entrapment, that his indictment was improper, and that he received ineffective assistance of counsel. On September 26, 2013, Davis filed a second PCR. The trial court, after finding that all five pleadings were filed very close in time and contained nearly identical arguments, stated that it would consider Davis's claims together as one request for post-conviction relief. The trial judge denied relief and dismissed the PCR. Davis appealed.

HELD: (1) The record reflects that the trial court correctly found that the indictment tracked the language of the statute. The identity of the CI is not an element of the offense. Davis's guilty plea waived his right to confront adverse witnesses.

(2) Davis faced up to 60 years for selling cocaine for the second time. Davis's 40-year sentence is within the sentencing guidelines and thus not illegal.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98967.pdf>

Jessie Earl White v. State, No. 2013-CP-01323-COA (Miss.Ct.App. January 27, 2015)

CASE: PCR – Rape of a child under 12

SENTENCE: Life

COURT: Clay County Circuit Court

TRIAL JUDGE: Hon. Lee J. Howard

APPELLANT ATTORNEY: Jessie Earl White (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, Roberts and Carlton, JJ., Concur. Maxwell, J., Concur in Part and in the Result Without Separate Written Opinion. James, J., Concur in Part and Dissents in Part with Separate Written Opinion.

ISSUE: Whether White's life sentence imposed by a judge and not a jury was legal.

FACTS: In 1978, Jessie Earl White pled guilty to the rape of a child under the age of 12. White subsequently filed for habeas corpus, alleging that he could only be sentenced to life by a jury, not a judge. This pleading was dismissed by the circuit court. On March 28, 2013, White filed a PCR renewing his claim of an illegal sentence for the same reason. The trial judge denied relief, finding the sentence was not illegal. White appealed.

HELD: Since White has alleged that he is being held under an illegal sentence, a violation of a fundamental constitutional right, his claim is not barred by res judicata. Additionally, the claim is not procedurally barred as time-barred or successive-writ barred.

The statute in effect at the time of White's offense, plea, and sentence permitted only two sentences for rape of a child under twelve: death or life imprisonment. The record indicates the victim in this case was 10 years old at the time of the offense. The trial judge correctly sentenced White to the only sentence allowed by law for the offense.

James, J., Concurring in Part and Dissenting in Part:

Judge James concurred that the sentence was legal, but dissented in finding that the mere assertion of an illegal sentence defeats all procedural bars. She also disagreed with the majority's determination that res judicata is not applicable.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100545.pdf>

February 10, 2015

Paul R. Ferrell v. State, No. 2013-CP-01836-COA (Miss.Ct.App. February 10, 2015)

CASE: PCR – Possession of Methamphetamine, Possession of Precursors in the presence of a minor, and Interstate removal of a child under 14.

SENTENCE: Total of 30 years, with 18 to serve followed by 5 years PRS

COURT: Rankin County Circuit Court

TRIAL JUDGE: Hon. John Huey Emfinger

APPELLANT ATTORNEY: Paul R. Ferrell (Pro Se)

APPELLEE ATTORNEY: John R. Henry Jr.

DISPOSITION: Dismissal of PCR Affirmed in Part, Reversed and Remanded in Part. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Roberts, Maxwell and James, JJ., Concur. Carlton, J., Dissents in Part with Separate Written Opinion, Joined in Part by Barnes, J.

ISSUES: (1) Whether Ferrell was "falsely imprisoned" because the indictment for interstate removal of a child under fourteen was defective; (2) whether Ferrell was actually innocent of the "kidnapping" charge; (3) whether the indictment for interstate removal was defective because it failed to say which state the child had been removed to; (4) whether his conviction for interstate removal was proper since the child was in the temporary custody of Ferrell's mother; (5) whether his enhancement as a second offender was proper; (6) whether this indictment of possession of precursors was defective for listing the wrong subsection; (7) whether the evidence was sufficient to show a child was present during his possession of precursors; (8) whether his indictment for possession of precursors failed to allege venue; (9) whether the statute outlawing the possession of precursors is unconstitutionally vague; (10) whether it was error not to inform him he was pleading guilty to a sex offense requiring registration; (11) whether his plea was voluntary; (12) whether his attorney erroneously advised him on parole eligibility; (13) whether he received ineffective assistance of counsel; and (14) whether his sentence was disproportionate.

FACTS: Paul Ferrell pled guilty to possession of methamphetamine as a second offender, possession of precursors in the presence of a minor, and interstate removal of a child under fourteen. Ferrell filed a timely motion for post-conviction relief making various challenges to his convictions, which the circuit court dismissed without an evidentiary hearing. Ferrell appealed.

HELD: (1) Ferrell alleged that the indictment was "duplicitous" because it references both the kidnapping statute and the interstate removal statute (§ 97-3-51). The charge is clearly for interstate removal, of which all the elements are alleged, but it includes at least some of the elements of kidnapping, such as that the removal was against the will of the child. Ferrell ultimately pled guilty to interstate removal. The plea waived all nonjurisdictional defects in an indictment.

(2) Ferrell presented an affidavit from his daughter stating that her removal from the state by Ferrell was not against her will and that she had in fact asked him to do it. However, interstate removal does not require proof that the removal was against the will of the child. Regardless, the will of the legal guardian controls, not the will of the child.

(3) Ferrell provides no authority for this claim. The statute does not require the State to prove that the child was removed to any specific state, just that she was removed from Mississippi.

(4) Ferrell simply asserts the child was under the temporary custody of his mother. This is not substantiated in the record. This is another factual defense that Ferrell waived when he admitted his guilt and pled guilty, and is procedurally barred. Regardless, Mississippi's interstate removal statute provides a specific definition of custody that does not exclude temporary orders.

(5) Contrary to his admissions under oath at the guilty plea hearing, Ferrell claims he had not been previously convicted of a drug offense. Ferrell asserted his prior had to be nonadjudicated because

he was sentenced to the RID program. However, nothing in the sentencing order suggests that Ferrell's prior conviction was nonadjudicated. His sentence was suspended pending his completion of RID.

(6) Ferrell was indicted for possession of precursors §41-29-313, with the enhancement that he possessed the precursors in the presence of a minor. The indictment, however, recites that Ferrell violated subsection (6), which deals with possession of precursors in hotels or apartment buildings. Ferrell's plea waived the defect.

(7) Ferrell admitted under oath that the child was present, and, therefore waived his right to present a defense when he pled guilty.

(8) This argument is plainly without merit; the indictment begins with the statement that it is brought "In the Circuit Court of Rankin County."

(9) Ferrell admitted to possession of sodium hydroxide, sulphuric acid, hexane, and heptane. Ferrell never explains why he believes the statute is vague. The statute requires the knowing possession that the chemicals will be used to unlawfully manufacture a controlled substance.

(10) Ferrell was not convicted of an offense requiring registration as a sex offender.

(11) Ferrell's claim that the judge did not advise him of the minimum and maximum penalties is clearly belied by the record, as the trial judge patiently spelled these out to Ferrell, on the record, before accepting the guilty plea.

(12) Ferrell offered affidavits from two people who stated that his attorney told them Ferrell would be paroled after 4½ years. Ferrell stated under oath that he understood that no one can assure him of parole or early release. However, his admission that he knew he could not be "assured of parole" does not exclude the possibility that he had been advised that he would be parole eligible. The trial judge should not have summarily dismissed this claim. The affidavits are sufficient corroboration to create a fact issue that can only be resolved through an evidentiary hearing. The hearing on remand was limited to the specific question of whether Ferrell was affirmatively misinformed of his eligibility for parole on the two enhanced counts.

(13) Ferrell offers little more than his own assertions to substantiate this issue. His claims are without merit.

(14) Ferrell's sentences are within the statutory limits, and he has not made a serious effort to substantiate a disproportionality claim.

Carlton, J., Dissenting in Part:

Judge Carlton would affirm the summary dismissal of all of Ferrell's claims. She believed the affidavits Ferrell submitted were insufficient to establish his claim that his guilty plea was involuntary because his attorney misinformed him that he would be eligible for parole on his two enhanced counts. Neither supporting affidavit state that the affiant was actually present with Ferrell when his attorney allegedly misinformed him regarding his parole eligibility.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO99543.pdf>

Sam Bradford, Sr. v. State, No.2013-CP-01976-COA (Miss.Ct.App. February 10, 2015)

CASE: PCR – Murder

SENTENCE: Life

COURT: Jefferson County Circuit Court

TRIAL JUDGE: Hon. Lamar Pickard

APPELLANT ATTORNEY: Sam Bradford Sr. (Pro Se)

APPELLEE ATTORNEY: Barbara Wakeland Byrd

DISPOSITION: Denied Motion for Judgment on the Pleadings Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, Jj., Concur.

ISSUE: Whether the circuit court erred in dismissing Bradford's motion for a judgment on the pleadings.

FACTS: Sam Bradford was convicted by a jury of the August 31, 2003, murder of his wife. His conviction was affirmed on direct appeal. *Bradford v. State*, 910 So. 2d 1232 (Miss. Ct. App. September 6, 2005). Bradford requested to file a PCR, but the SCT denied the request, finding his claims barred, as they were either raised on direct appeal or could have been raised. A request for leave to file a subsequent PCR was also denied. Regardless, Bradford filed a motion to vacate and set aside his murder conviction and to resentence him for manslaughter in the circuit court in March of 2011. The trial court treated the motion as a PCR and found it time-barred and successive writ barred. Bradford was also sanctioned. On January 13, 2012, Bradford filed a motion for relief from the judgment pursuant to Mississippi Rule of Civil Procedure 60(b)(4). The circuit court dismissed for lack of jurisdiction, and the COA affirmed. *Bradford v. State*, 116 So. 3d 164 (Miss. Ct. App. December 11, 2012). On October 7, 2013, Bradford filed a motion for a judgment on the pleadings in the circuit court. Again, the circuit court dismissed for lack of jurisdiction and Bradford again appealed.

HELD: Bradford filed his motion for a judgment on the pleadings without permission of the SCT. The circuit court's dismissal for lack of jurisdiction was affirmed.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO100321.pdf>

February 17, 2015

Alfred Banks v. State, No. 2013-CP-01406-COA (Miss.Ct.App. February 17, 2015)

CASE: PCR – Aggravated Assault

SENTENCE: 10 years

COURT: Claiborne County Circuit Court

TRIAL JUDGE: Hon. Lamar Pickard

APPELLANT ATTORNEY: Alfred Banks (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, Roberts, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether the guilty plea was involuntary; (2) whether Banks was denied due process of law; and (3) whether Banks received ineffective assistance of counsel.

FACTS: On May 31, 2011, Alfred Banks pled guilty to aggravated assault and was sentenced to 10 years. As part of the plea, charges of armed robbery and conspiracy were dropped. On July 16, 2013, Banks filed a PCR. The trial judge denied relief, finding Banks's plea was knowing and voluntary. Banks appealed.

HELD: (1) Banks argues that he did not shoot the victim, and never admitted to committing such an act. Before accepting his plea, the court thoroughly examined Banks (and his two co-defendants) to determine whether he understood the consequences of his plea and was satisfied with the legal advice provided by his attorney. Under oath, Banks acknowledged he understood the plea and was satisfied with his attorney. The State was prepared to prove that, even though only one person among the three actually shot the victim, the other two men in the group knowingly participated in the crime and served as accessories before the fact. The claim is without merit.

(2) Banks argued that he was denied due process of law because he was convicted of aggravated assault without admitting to all the elements required to prove the offense. However, at the plea, Banks stated he understood he could be charged as an accessory before the fact. Banks also informed the court that the proffer by the State was true and correct.

(3) Banks failed to present specific evidence to demonstrate that his attorney's performance was deficient and caused him to suffer prejudice. His mere assertions regarding ineffective assistance of counsel are insufficient.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100407.pdf>

February 24, 2015

Shelby Ray Parham v. State, No. 2013-CP-00239-COA (Miss.Ct.App. February 24, 2015)

CASE: PCR – Uttering a Forgery

SENTENCE: 10 years as an habitual offender

COURT: Clay County Circuit Court

TRIAL JUDGE: Hon. James T. Kitchens Jr.

APPELLANT ATTORNEY: Shelby Ray Parham (Pro Se)

APPELLEE ATTORNEY: Melanie Thomas

DISPOSITION: Dismissal of PCR Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the trial court erred in dismissing Parham’s second PCR.

FACTS: In 2004, Shelby Ray Parham pled guilty to uttering a forgery. Parham filed a PCR in 2009, which was dismissed as time-barred and without merit. The trial court was affirmed on appeal. [*Parham v. State*](#), 54 So. 3d 867 (Miss. Ct. App. 2010). In 2012, Parham filed another PCR in the circuit court that was later dismissed. He again appealed.

HELD: Parham was aware of the State's intent to amend his indictment before he entered a guilty plea. He even joined the State's motion to amend the indictment. His case is not exempt from the statute of limitations. His claim that he was illegally sentenced as an habitual offender was raised in his first PCR. The claim is time barred and successive writ barred.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100553.pdf>

Lewis Jenkins v. State, No. 2013-CP-01828-COA (Miss.Ct.App. February 24, 2015)

CASE: PCR – Manslaughter

SENTENCE: 20 years with 15 to serve and 5 years PRS

COURT: Jones County Circuit Court

TRIAL JUDGE: Hon. Billy Joe Landrum

APPELLANT ATTORNEY: Lewis Jenkins (Pro Se)

APPELLEE ATTORNEY: Billy L. Gore

DISPOSITION: Dismissal of PCR Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: Whether the trial judge erred in dismissing Jenkins’s habeas motion.

FACTS: Lewis Jenkins confessed two times to killing Teresa Gillum and disposing of her body in a shallow grave. Jenkins was indicted for depraved-heart murder, but pled guilty to manslaughter in 2004. On August 19, 2013, Jenkins filed a habeas motion that was treated as a PCR and dismissed as time-barred. This is actually Jenkins's second PCR. His first was denied and affirmed on appeal. [*Jenkins v. State*](#), 986 So. 2d 1031 (Miss. Ct. App. 2008).

HELD: The trial judge properly treated his habeas motion as a PCR. Because the COA denied Jenkins's first PCR in 2008, he is procedurally barred from filing this PCR as well as any future PCR motions. His claim of actual innocence and involuntary plea does not defeat the time bar.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100583.pdf>

March 3, 2015

Terrell G. Bass v. State, No. 2013-CP-01812-COA (Miss.Ct.App. March 3, 2015)

CASE: PCR – Capital Murder, Manslaughter, and Aggravated Assault

SENTENCE: Life, with a consecutive 20 years for manslaughter and a consecutive 20 years with 10 suspended and 5 years PRS for the aggravated assault

COURT: Marion County Circuit Court

TRIAL JUDGE: Hon. Anthony Alan Mozingo

APPELLANT ATTORNEY: Terrell G. Bass (Pro Se)

APPELLEE ATTORNEY: Melanie Dotson Thomas

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

ISSUES: (1) Whether petitioner received ineffective assistance of counsel, (2) whether his plea was voluntary, (3) whether the evidence was sufficient, and whether the indictment was sufficient.

FACTS: Terrell G. Bass was estranged from his wife, Tonya Stogner. Tonya was staying with her brother, Hershel Stogner. After a confrontation, Hershel told Bass that he was not welcome at his house. Later that night, Bass kicked in Hershel's door. Armed with a shotgun, Bass killed Tonya. Bass also killed Ronald Plummer. Bass shot Hershel, but Hershel survived. The next morning, Bass confessed. On August 29, 2008, he pled guilty to one count of capital murder, one count of manslaughter, and one count of aggravated assault. On December 6, 2011, Bass filed a PCR, alleging that because he pled guilty to manslaughter in count two, he could not be convicted of capital murder in count one. The trial court dismissed his PCR and Bass appealed.

HELD: (1) Bass did not raise IAC in the PCR that he filed in the circuit court, so the claim is barred. Additionally, Bass only offered his own affidavit to support his claim. (2) Bass claimed the circuit court judge coerced all three of his guilty pleas. However, again, he failed to raise this claim in the trial court and it is procedurally barred. The claim is also without merit, as the circuit court did not

err in refusing to appoint two different defense attorneys two weeks before Bass's trial. That decision did not coerce any of Bass's three guilty pleas.

(3) Again, Bass failed to raise this issue in the trial court. Regardless, Bass's plea waived any challenge to the sufficiency of the evidence. (4) Bass claims that the two capital-murder charges in the indictment were insufficient to charge him with a crime. The indictment alleged that he murdered Tonya while engaged in the burglary of Herschel's house, with the intent to commit aggravated assault and murder. The claim is without merit.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101041.pdf>

March 10, 2015

Johnny Lewis Washington v. State, No. 2013-CP-02159-COA (Miss.Ct.App. March 10, 2015)

CASE: PCR – Armed Robbery

SENTENCE: 40 years

COURT: Lowndes County Circuit Court

TRIAL JUDGE: Hon. James T. Kitchens Jr.

APPELLANT ATTORNEY: Johnny Lewis Washington (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, Roberts, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether Washington's prior conviction of capital murder prohibited a second conviction of armed robbery of a different victim in the same incident.

FACTS: Johnny Lewis Washington was indicted in 1977 for the capital murder of J.K. Woods. He was convicted and sentenced to death. The case was affirmed on appeal. *Washington v. State*, 361 So. 2d 61 (Miss. 1978). After getting relief in federal habeas, he was resentenced to life. He was subsequently indicted for the armed robbery of Roy Thompson, as well as the aggravated assault of Elouise Clark, both involving the same incident as the capital murder. Washington pled guilty to both, but later filed two PCRs in July 2011, one challenging his conviction for the aggravated assault, and the other challenging his armed-robbery conviction. The COA affirmed the denial of any relief, finding that double jeopardy posed no bar to Washington's subsequent prosecution for aggravated assault against Clark. *Washington v. State*, 154 So. 3d 34 (Miss. Ct. App. 2012). Washington filed another PCR in June 2013, asking the trial court to vacate and set aside his conviction and sentence for the armed robbery of Thompson. Washington argued that his related prior conviction for the capital murder of Woods and his subsequent indictment and conviction for armed robbery against Thompson constituted double jeopardy. The circuit court denied relief and Washington appealed.

HELD: Washington claimed that he was punished multiple times for the same offense—armed robbery. However, the indictments charged separate and distinct offenses, and involved different victims. Washington was convicted of capital murder for robbing and then killing Woods, while his subsequent armed-robbery conviction resulted from robbing Thompson. Accordingly, the convictions each required proof of different elements, and thus constituted different offenses. Apparently, Washington believed he could not be charged with robbing Thompson if the property taken belonged to Woods. Washington failed to raise a threshold showing of double jeopardy.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101227.pdf>

Eddie Charles Williams v. State, No. 2014-CP-00242-COA (Miss.Ct.App. March 10, 2015)

CASE: PCR – Armed Robbery

SENTENCE: 30 years

COURT: Lauderdale County Circuit Court

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

APPELLANT ATTORNEY: Eddie Charles Williams (Pro Se)

APPELLEE ATTORNEY: Barbara Wakeland Byrd

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

ISSUES: (1) Whether the sentence was illegal, overcoming the time bar; and (2) whether the plea was involuntary.

FACTS: On December 11, 1997, Eddie Charles Williams pled guilty to armed robbery and was sentenced to 30 years. During the plea, the trial judge told Williams he may have to serve the entire sentence. The ADA stated he thought he could be paroled after serving 10 years, but the judge made it clear he could serve all 30. He may be eligible for release after 27 or 28 years, but he would be serving a long sentence. Williams stated he still wanted to plead guilty. On March 12, 2013, Williams filed a PCR, the trial court summarily dismissed. Williams appealed.

HELD: (1) Williams asserted that, although his PCR was not timely, he has overcome the procedural bar by asserting his fundamental right to be free from an illegal sentence. Williams claimed that he relied upon the erroneous advice of his attorney and the statement by the ADA that he would be eligible for parole in ten years. However, Williams’s 30 year sentence for armed robbery was not illegal.

(2) The plea was not involuntary. The claim is time-barred. Regardless, the plea transcript reflects that, despite the inaccurate information relayed to the circuit court about Williams's parole eligibility, the circuit court informed Williams that he was still likely to serve 30 years. The plea colloquy clearly shows that his plea of guilty was freely and voluntarily made.

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO101863.pdf>

March 17, 2015

Abdulhkim Borou v. State, No. 2014-CA-00403-COA (Miss.Ct.App. March 17, 2015)

CASE: PCR – Sale of Pseudoephedrine
SENTENCE: Non-Adjudicated with \$5,000 fine

COURT: Lowndes County Circuit Court
TRIAL JUDGE: Hon. Lee J. Howard

APPELLANT ATTORNEY: Mark Kevin Horan, Hartwell Virginia Harris
APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISPOSITION: Dismissal of PCR Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Maxwell and James, JJ., Concur.

ISSUES: Whether the trial judge erred in dismissing Borou’s PCR.

FACTS: Abdulhkim Borou pled guilty to one count of selling Pseudoephedrine on May 19, 2009. The trial court withheld acceptance of Borou's guilty plea and placed him on nonadjudicated probation for 5 years and assessed a fine. On July 27, 2012, Borou was discharged early from his nonadjudicated probation, and the trial court dismissed the charge against him on December 18, 2012. An order of expungement was entered two days later. Despite the dismissal and expungement, Borou's guilty plea negatively affected his immigration status. He filed a PCR claiming ineffective assistance of counsel because he was not advised of immigration consequences of his guilty plea. The trial judge dismissed the PCR since Borou was not in custody or under any sentence of the court. He appealed.

HELD: Borou was discharged from his nonadjudicated probation. Thereafter, his charge was dismissed and his record was expunged. He was neither convicted nor sentenced in accordance with §99-39-5. Therefore, Borou lacked standing to file a PCR, and the Court did not address the merits of Borou's claims.

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO101303.pdf>

Billy Wheater v. State, No. 2013-CP-01810-COA (Miss.Ct.App. March 17, 2015)

CASE: PCR – Aggravated Assault
SENTENCE: 20 years, with six months to serve, and 19 years and 6 months PRS, and payment of \$6,025.33 in restitution.

COURT: Desoto County Circuit Court

TRIAL JUDGE: Hon. Robert P. Chamberlin

APPELLANT ATTORNEY: Billy Wheeler (Pro Se)

APPELLEE ATTORNEY: Barbara Byrd

DISPOSITION: Denial of PCR affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: Whether the trial court improperly revoked PRS for failing to pay restitution.

FACTS: In 2000, Billy Wheeler was convicted of aggravated assault. Wheeler was involved in a bar fight, where he picked up a four-bar tire iron and hit another man over the head with it. The man suffered from a fractured skull and incurred over \$6,000 in medical bills. After Wheeler was released on PRS in 2001, he was ordered to pay monthly installments toward his restitution as a condition of his PRS. The State sought to revoke him several times during the next 10 years for failing to make timely payments. Wheeler explained he had family problems and illnesses, and had trouble finding a job. For years Wheeler made no restitution payments despite warnings from the court and multiple continuances granted as opportunities for Wheeler to find employment and make payments. He was given an opportunity to work as a CI with the sheriff's office, but despite making over \$2,200, he did not make any restitution payments. In 2011, the circuit court determined that Wheeler had only paid \$800 of his over \$6,000 restitution and had willingly failed to make scheduled payments, despite assistance from the court. His PRS was revoked and he appealed.

HELD: The circuit court found Wheeler wilfully refused to pay, not that he was unable to pay. The court granted Wheeler ten years worth of opportunities to make payments toward his restitution. After a decade of excuses, the court got Wheeler a job as a CI, but he still did not make a payment. The circuit judge made every effort to afford Wheeler the opportunity to make payments in the eleven years after his sentence was imposed. The trial judge did not improperly revoke Wheeler because he was unable to pay.

Wheeler also claimed his sentence was illegal because §47-7-34(3) limits post-release supervision to a maximum of 5 years. The claim is without merit, as the statute only limits MDOC's supervision to 5 years. The court can set a longer non-supervised PRS.

§ 99-19-25 regarding the suspension of misdemeanor sentences does apply to Wheeler's case. He was convicted of a felony and he was released on PRS, not a strict suspended sentence.

Finally, Wheeler's request for credit for time served should go through MDOC first.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100550.pdf>

James Harris v. State, No. 2014-CP-00045-COA (Miss.Ct.App. March 17, 2015)

CASE: PCR – Burglary

SENTENCE: 25 years

COURT: Hon. William E. Chapman, III
TRIAL JUDGE: Rankin County Circuit Court

APPELLANT ATTORNEY: James Harris (Pro Se)
APPELLEE ATTORNEY: Billy L. Gore

DISPOSITION: Dismissal of PCR affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the trial court erred in dismissing Harris's PCR as time-barred.

FACTS: James Harris was convicted of house burglary in 2003. His direct appeal was affirmed in 2005. He subsequently filed a motion for leave to file a PCR. This was denied in 2010. On November 14, 2013, Harris filed a PCR with the Rankin County Circuit, challenging his classification as a habitual offender. The circuit court dismissed Harris's petition as time-barred. He appealed.

HELD: The SCT denied Harris's request to file a PCR in the circuit court, yet Harris filed a PCR with the circuit court three years later. The circuit court did not have jurisdiction to consider Harris's motion. However, the circuit court dismissed the motion as procedurally time-barred. The COA affirmed the dismissal on the alternative ground that the circuit court lacked jurisdiction.

To read the full opinion, click here:
<http://courts.ms.gov/Images/Opinions/CO100792.pdf>

March 24, 2015

Charlie Bounds v. State, No. 2014-CP-00171-COA (Miss.Ct.App. March 24, 2015)

CASE: PCR – Rape
SENTENCE: Life

COURT: Jones County Circuit Court
TRIAL JUDGE: Hon. Billy Joe Landrum

APPELLANT ATTORNEY: Charlie Bounds (Pro Se)
APPELLEE ATTORNEY: Billy L. Gore

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

ISSUES: Whether the circuit court erred in denying post-conviction relief.

FACTS: Charlie Bounds was convicted of rape in 1971. His direct appeal was affirmed. *Bounds v. State*, 271 So. 2d 435 (Miss. 1973). Over 40 years later, Bounds filed a PCR asserting that he was given an illegal sentence, as Mississippi law allows a sentence of life for rape to be assessed only by

a jury, not a judge. The circuit court denied relief, in part because Bounds failed to seek leave from the SCT to file the PCR, and in part because the circuit court found that his case is not excepted from the statute of limitations. Bounds then sought leave from the SCT and then filed an appeal of the circuit court's order. The SCT denied his motion to leave.

HELD: Since Bounds was not given permission to file the PCR, the circuit court and the COA were without jurisdiction to hear the case.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100687.pdf>

Kevin Thomas a/k/a "KK" v. State, No. 2013-CA-00379-COA (Miss.Ct.App. March 24, 2015)

CASE: PCR – Armed Robbery

SENTENCE: 15 years, with 10 years to serve and 5 years of PRS

COURT: Coahoma County Circuit Court

TRIAL JUDGE: Hon. Johnnie E. Walls, Jr.

APPELLANT ATTORNEY: Earnestine Alexander

APPELLEE ATTORNEY: Stephanie Breland Wood

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

ISSUES: (1) Whether Thomas's guilty plea was voluntarily, knowingly, and intelligently given, (2) whether defense counsel's failure to investigate and present available mitigation evidence constituted ineffective assistance of counsel.

FACTS: Kevin Thomas, along with two accomplices, was charged with armed robbery of a jewelry store and brandishing a knife at the store employees in 2001. Because he had to finish serving time in Illinois, he did not plead guilty until 2011. On February 22, 2012, Thomas filed a motion to vacate his sentence and conviction and other post-conviction relief, raising issues of whether his guilty plea was knowingly and intelligently given and whether he received ineffective assistance of counsel. The circuit court dismissed the PCR and Thomas appealed.

HELD: (1) Contrary to Thomas's assertions, there was nothing in the record to indicate Thomas was unaware of the charge for which he was pleading guilty. There was a factual basis for the plea as Thomas agreed to what the State indicated the evidence would show. The plea was voluntary.

(2) Thomas further contended that his counsel failed to bring mitigation evidence to the trial court's attention. However, Thomas failed to support this claim with an affidavit. He failed to show his attorney was aware of any mitigation evidence. Finally, he stated he was satisfied with counsel at his plea.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101412.pdf>

Dean C. Boyd v. State, No. 2013-CP-01945-COA (Miss.Ct.App. March 24, 2015)

CASE: PCR – Statutory Rape

SENTENCE: 25 years

COURT: Leake County Circuit Court

TRIAL JUDGE: Hon. Marcus D. Gordon

APPELLANT ATTORNEY: Dean C. Boyd (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, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether he received ineffective assistance of counsel, and (2) whether his plea was voluntary.

FACTS: On April 26, 2011, Dean C. Boyd pled guilty to the statutory rape of his minor daughter, Deborah. DNA tests confirmed that Boyd was the natural father of Deborah's child. Boyd filed a PCR on March 27, 2012, asserting claims of ineffective assistance of counsel and an involuntary guilty plea. The trial judge dismissed the motion. Boyd filed a second PCR motion on May 10, 2013, asserting the same issues, and additionally claiming newly discovered evidence, and that he was charged under the wrong statute, violating his fundamental rights against double jeopardy. The trial judge denied the motion as a successive writ. Boyd appealed.

HELD: Boyd cited no intervening decision to support his claim of a fundamental-right violation, nor did Boyd provide any evidence not reasonably discoverable at the time of his guilty plea that would have caused a different result in his conviction or sentence. Boyd contends that Deborah was fourteen years old at the time the rape occurred; thus, he was charged under the wrong statute. There was evidence in the record to show the date of crime was correct. Regardless, this was discoverable at the time of the plea. Boyd knew Deborah's birthday. Nothing in the record, nor in Boyd's PCR motion, suggests that his plea was not knowingly and voluntarily entered, or that the plea was otherwise invalid. The PCR was procedurally barred.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101624.pdf>

Jesus Adilio Rivera Castro v. State, No. 2014-CP-00359-COA (Miss.Ct.App. March 24, 2015)

CASE: Murder

SENTENCE: Life

COURT: DeSoto County Circuit Court

TRIAL JUDGE: Hon. Robert P. Chamberlin

APPELLANT ATTORNEY: Jesus Adilio Rivera Castro (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, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether the guilty plea was involuntary, (2) whether counsel was ineffective, and (3) whether he had an ineffective translator.

FACTS: In July of 2010, Jesus Adilio Rivera Castro and two codefendants were indicted for capital murder and conspiracy to commit armed robbery. Castro is a Spanish speaker and a Salvadorian citizen. One of his two attorneys was "somewhat conversant in Spanish." Castro entered a plea of murder. A translator was used throughout the plea hearing. Castro initially disagreed with the evidence that the State was ready to produce at trial. He also did not want to give up his rights by entering a plea of guilty. The circuit court addressed both issues with Castro. He eventually agreed and the court accepted his plea and sentenced him to life. Castro subsequently filed a PCR, claiming he was confused on what he was agreeing to at the plea hearing because of minimal time to speak with his lawyers through a translator. The trial court dismissed his PCR without an evidentiary hearing, and Castro appealed.

HELD: (1) Castro's plea was not involuntary. Any confusion he may have had regarding what his attorney told him about a life sentence was addressed by the trial judge. (2) Before accepting Castro's guilty plea, the circuit judge thoroughly examined Castro about the legal advice he received. Instead of testifying that he had been given contradictory, confusing, and incorrect advice, Castro testified he had been thoroughly advised and that he was satisfied with his attorneys' services. (3) Castro offers no evidence and admits that there is no evidence on whether he was accidentally misled or intentionally deceived when conversing with his attorney through the translator. The trial judge did not err in dismissing the PCR.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101436.pdf>

March 31, 2015

David Paul Anderson v. State, No. 2014-CA-00323-COA (Miss.Ct.App. March 31, 2015)

CASE: PCR – Statutory Rape and Sexual Battery

SENTENCE: 2 concurrent life sentences

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. Lawrence Paul Bourgeois, Jr.

APPELLANT ATTORNEY: Thomas C. Levidiotis

APPELLEE ATTORNEY: Scott Stuart

DISPOSITION: Denial of PCR Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ.,

Barnes, Ishee, Roberts, Carlton, Maxwell and James, JJ., Concur.

ISSUES: (1) Whether the trial court erred in granting summary judgment for the State, and (2) whether his sentence was excessive.

FACTS: John Paul Anderson was convicted of the statutory rape and sexual battery of his eleven-year-old daughter. His convictions and sentences were affirmed on direct appeal. [Anderson v. State](#), 62 So. 3d 927 (Miss. 2011). Anderson requested and received leave of the SCT to file a PCR to advance his claims that he lacked the mental capacity to commit the crimes or to assist in his own defense. Although granted an evidentiary hearing, Anderson's counsel indicated he was amendable to deciding the case on the record. The circuit court subsequently denied relief without specifically stating it was granting the State's motion for summary judgment. Anderson appealed.

HELD: (1) The trial court did not err in denying relief. Summary judgment is not prohibited when the SCT grants leave to file a PCR. Further, Anderson's claim is founded almost entirely on a childhood IQ test score of 69 conducted in 1974, when Anderson was about 14 years old. However the tests results indicated his full scale IQ was brought down by his verbal skills tests which appeared to be caused by a speech impediment. The results of an examination conducted after he filed his PCR were never made part of the record. Anderson failed to produce evidence sufficient to create a genuine issue of material fact on any of his claims.

(2) Anderson could have raised this issue on direct appeal. The claim was procedurally barred and barred by res judicata. The issue is also without merit.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO102156.pdf>

Johnny Yearby, Jr. v. State, No. 2013-CP-00467-COA (Miss.Ct.App. March 31, 2015)

CASE: PCR – Uttering a Forgery x2

SENTENCE: Two concurrent 8 year terms, but he was given credit for time served and the remainder of his sentence was suspended and he was placed on PRS for 5 years

COURT: Adams County Circuit Court

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

APPELLANT ATTORNEY: Johnny Yearby, Jr. (Pro Se)

APPELLEE ATTORNEY: Scott Stuart

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

ISSUE: Whether the trial court erred in failing to reinstate Yearby's probation.

FACTS: On March 1, 2010, Johnny Yearby pled guilty to two counts of uttering a forgery. He was originally charged with 13 counts. He was placed on PRS, but was arrested the following year for escaping from the restitution center. Yearby admitted that he left the grounds without permission because he was upset about the amount of money being applied to his court-ordered payments. Following the hearing, the court was provided with a supplemental report stating he brought contraband into the jail. Yearby's PRS was revoked. His motion to vacate the revocation was treated as a PCR and denied. He subsequently filed a motion to reinstate his probation which was also denied. He appealed.

HELD: The trial court properly treated Yearby's first motion as a PCR. Therefore the second motion was considered a successive writ. It is clear that the issues which were raised in Yearby's current appeal are the same issues that were raised in his earlier motion. In both motions, Yearby claims that his probation was unlawfully revoked, that he was not informed of the probation violation against him, that he was denied proper notice of his preliminary hearing, and that he was denied his due-process rights in the final revocation hearing. The motion was barred by res judicata.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101456.pdf>

Dennis Terry Hutchins v. State, No. 2014-CA-00054-COA (Miss.Ct.App. March 31, 2015)

CASE: PCR – Sale of a Controlled Substance x 4

SENTENCE: 12 years as an habitual offender

COURT: Forrest County Circuit Court

TRIAL JUDGE: Hon. Robert B. Helfrich

APPELLANT ATTORNEY: Lisa Mishune Ross

APPELLEE ATTORNEY: Barbara Wakeland Byrd

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

ISSUE: Whether trial counsel was ineffective for failing to object to his habitual offender status.

FACTS: Dennis Hutchins was charged in an eight count indictment for sale of a controlled substance. The State later amended the indictment to include his habitual offender status under § 99-18-83. Hutchins had been convicted of grand larceny in 1990, and simple assault on a police officer in 1991. A jury found Hutchins guilty of two of the eight counts. Prior to sentencing, a plea deal was reached where Hutchins would plead guilty to two additional counts and, in return, be sentenced for all four counts under §99-19-81. Hutchins subsequently filed a PCR alleging his trial counsel provided ineffective assistance. Hutchins claimed his trial counsel should have objected to the motion to amend the indictment because Hutchins had not served one year for his conviction for simple assault on a police officer.

HELD: Because Hutchins's sentence for simple assault on a police officer ran concurrently with his sentence for grand larceny, he served the same amount of time for both convictions. Hutchins served more than one year in prison for his grand-larceny conviction. The time served for his grand-larceny conviction counted as time served for his conviction for simple assault on a police officer. Thus, it was not improper for the State to initially charge Hutchins as a habitual offender under section 99-19-83.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101607.pdf>

April 7, 2015

Victor D. Jones v. State, No. 2013-CP-01789-COA (Miss.Ct.App. April 7, 2015)

CASE: PCR – Sexual Battery x2

SENTENCE: 40 years

COURT: Pike County Circuit Court

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

APPELLANT ATTORNEY: Victor D. Jones (Pro Se)

APPELLEE ATTORNEY: Laura Hogan Tedder

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

ISSUE: Whether the trial court erred in finding Jones’s claims procedurally barred.

FACTS: In June of 2004, Victor Jones pled guilty to two counts of sexual battery, with a plea recommendation of 20 years, 10 years to serve and the remainder on probation. The circuit court did not accept the State's recommendation and sentenced Jones to 20 years, on each count, to be served consecutively. Jones filed two prior PCRs which were both denied. On August 30, 2013, Jones filed a third PCR. The circuit court summarily dismissed Jones's PCR, finding that the PCR was procedurally barred as a successive writ, and was time-barred. It noted: "The motion is substantively identical to three previously filed motions which have all been denied." Jones appealed again.

HELD: Jones's appeal centers around one issue: his competency to enter his guilty pleas. This is not the first time issues of his competency, ineffective assistance of counsel, or the voluntariness of his guilty pleas have been raised in his PCRs. The SCT previously determined that Jones's fundamental constitutional claims to competency and to effective representation by counsel when he pled were time-barred and barred by res judicata. “We detect no logical reason to deviate from that same determination on his present, and third, PCR motion.”

It is apparent from the record that Jones gave neither the circuit court nor his attorney any reason to question Jones's competency at his guilty-plea hearing. While Jones did submit numerous medical records with his PCR motion, none relate to his competency around or at the time of his guilty pleas.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101974.pdf>

Camille Seago v. State, No. 2013-CP-01346-COA (Miss.Ct.App. April 7, 2015)

CASE: PCR – False Pretense x2

SENTENCE: 10 years on both counts concurrently

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. Roger T. Clark

APPELLANT ATTORNEY: Camille Seago (Pro Se)

APPELLEE ATTORNEY: Melanie Dotson Thomas

DISPOSITION: Denial of PCR Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether petitioner was denied due process because her ten-year sentence was greater than the four-year nonadjudication probationary period she originally received.

FACTS: On June 7, 2010, Camille Seago pled guilty to two counts of false pretense. She was non-adjudicated, but later violated the terms of her probation. Seago admitted her probation violation, explaining that she had to flee Mississippi because her husband had abused her. She was revoked and given the full ten year sentence on each count to be served concurrently. She appealed.

HELD: Seago argued her sentence was illegal because it is greater than the four-year nonadjudication probationary period she originally received. Seago was not adjudicated guilty, nor was she sentenced at the original plea hearing. Since Seago was never actually sentenced, the trial court was not limited to the four-year nonadjudication probationary period imposed. Seago's sentence of ten years falls within the statutory limits.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO102067.pdf>

Dennis Darnell Howard v. State, No. 2013-CP-01809-COA (Miss.Ct.App. April 7, 2015)

CASE: PCR – Armed Robbery

SENTENCE: 25 years

COURT: Attala County Circuit Court

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

APPELLANT ATTORNEY: Dennis Darnell Howard (Pro Se)

APPELLEE ATTORNEY: Laura Hogan Tender

DISPOSITION: Denial of PCR Affirmed. Fair, J., for the Court. Lee, C.J., Griffis, P.J., Ishee, Roberts, Carlton and Maxwell, JJ., Concur. Barnes, J., Concur in Part and in the Result Without Separate Written Opinion. James, J., Concur in Part Without Separate Written Opinion. Irving, P.J., Dissents with Separate Written Opinion, Joined in Part by James, J.

ISSUES: (1) Whether the trial judge erred in failing to sua sponte issue a subpoena for Howard's trial counsel for the evidentiary opinion, (2) whether the trial court erred in failing to expand the evidentiary hearing to additional issues, (3) whether the trial court erred in failing to move the hearing, appoint counsel, or grant a continuance to find counsel, (4) whether the trial court erred in finding his claim baseless.

FACTS: Dennis Darnell Howard was convicted of armed robbery and was sentenced to 25 years. On June 27, 2005, Craig Smith, a manager at Burger King, drove to the bank to deposit about \$1,300. He was followed by another employee, Cassandra Weatherby. As he returned to his vehicle, Howard emerged from a wooded area. Howard hit him in the head with a small handgun and demanded money. Smith told him the money had already been deposited, and Howard left. The conviction was affirmed on direct appeal. *Howard v. State*, 2 So. 3d 669 (Miss.Ct.App. August 12, 2008). Howard subsequently requested and received permission from the SCT to file a PCR on the question of whether his trial counsel had prevented him from testifying in his own defense. The trial court denied relief, finding Howard's claims that he did not know he could testify were incredible. He appealed.

HELD: (1) The trial court was not required to sua sponte issue a subpoena for Howard's attorney. Howard argued that the court should have done this since the attorney would have been the only person able to confirm or deny Howard's claim. The Court found the burden was on Howard. He should have at least tried to get a written statement from him.

(2) The trial court did not err in refusing to allow Howard to expand the issues to be heard in the evidentiary hearing. The absence of leave from the supreme court is not a mere procedural bar; it is jurisdictional. The trial court correctly found that it had no authority to go beyond the supreme court's order.

(3) The trial court did not err in failing to move the hearing to Attala County. Howard failed to allege what he could not investigate or how he could not prepare for the hearing from prison.

The trial court did not err in failing to appoint counsel. Howard might have benefitted from the presence of an attorney, but his claim was not particularly novel or complicated, nor did it require extensive investigation. Howard has failed to show the trial judge abused his discretion in denying the motion for appointed counsel.

The trial court did not err in failing to grant Howard a continuance to secure counsel. The court denied his request 10 days before the hearing. Howard stated he was ready to proceed, but then waited until the middle of the hearing before asking for a continuance to find counsel. He failed to show prejudice or any manifest injustice.

(4) Howard did not directly attack the court's factual finding, so the issue is waived. Regardless, Howard's claim is that he intended to testify in his own defense, but his attorney prevented him from doing so, was supported only by Howard's own testimony, and the trial judge found that Howard was not credible. At his trial, Howard's right to testify was explained by the trial court. After a brief recess to allow Howard to consult with counsel, counsel rested. Howard only complained years later that he was prevented from testifying. He also used the same attorney on appeal.

Irving, P.J., Dissenting:

“I disagree with the majority and the circuit court that the record supports a finding that Howard waived his constitutional right to testify in his trial, as there is no evidence supporting such a finding—only speculation and surmise—and I cannot agree that a finding of waiver of such a substantial constitutional right can be predicated on pure speculation and surmise.”

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO103190.pdf>

COA MISCELLANEOUS CASES

Vadell Johnson v. State, No. 2013-CA-01780-COA (Miss.Ct.App. November 18, 2014)

CASE: Possession of a Weapon by a Convicted Felon

COURT: Bolivar County Circuit Court

TRIAL JUDGE: Hon. Albert B. Smith, III

APPELLANT ATTORNEY: Edward J. Bogen, Jr.

APPELLEE ATTORNEY: John R. Henry, Jr., Billy L. Gore

DISPOSITION: Refusal to grant pre-conviction Writ of Habeas Corpus Affirmed. Maxwell, J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Roberts, Carlton and Fair, JJ., Concur. Irving, P.J., Concur in Part and in the Result Without Separate Written Opinion. James, J., Concur in Part Without Separate Written Opinion.

ISSUES: (1) Whether Johnson was entitled to a hearing on his petition for writ of habeas corpus, and (2) whether the circuit court erred in finding Johnson was not entitled to relief.

FACTS: Vadell Johnson was arrested on two counts of stalking while free on bond pending trial for murder. The charges were based on two women's claims that Johnson pulled a gun on them, told them they had better not mention his name, and threatened to kill them. After he was convicted in justice court on two counts of "threatening with a weapon," Johnson appealed to county court for a trial de novo. Johnson was then arrested on a charge of possession of a weapon by a convicted felon based on the same incident. Johnson's counsel worked out a plea to simple stalking, or two counts of "threatening without a weapon," in county court. Immediately following this county court conviction, Johnson, who was being held without bond on the felon-in-possession-of-a-firearm charge, petitioned the circuit court for a writ of habeas corpus. He claimed he had been "tried" in county court on two

counts of threatening with a gun but had only been found guilty of two counts of threatening with no weapon involved. He asserted the State could not lawfully hold him on the charge of felon in possession of a weapon without violating his rights against double jeopardy. The circuit court refused to grant the writ and Johnson appealed.

HELD: (1) Under both §11-43-11 and URCCC Rule 2.07(A)(6)(c), the court may refuse to grant a writ if it is manifest from the showing made in the petition that the person is not entitled to any relief. Only where the writ is granted must the court hold a hearing.

(2) Johnson was not entitled to relief based on double jeopardy. The USSCT has held double jeopardy protects an accused from "a second prosecution for the same offense after conviction," and "multiple punishments for the same offense." This also includes "attempts to relitigate the facts underlying a prior acquittal," citing *Blockburger* and *Ashe v. Swenson*, 397 U.S. 436 (1970).

Blockburger does not apply, as the two crimes of aggravated stalking and possession of a weapon clearly each have elements that the other does not. The doctrine of collateral estoppel does not apply as set forth in *Ashe* since Johnson was never acquitted in a prior case. The issue of whether Johnson unlawfully possessed a gun was not decided in his prior pleas to threatening without a weapon. The issue was never litigated, as Johnson pled to a lesser charge.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO98277.pdf>

In the Matter of the Removal of Azalean Rogers from the Board of Aldermen of the City of Boyle v. State of Mississippi, Office of the Attorney General, No. 2013-CP-01088-COA consolidated with *Azalean Rogers v. State*, No. 2013-CP-01184-COA (Miss. November 18, 2014)

CASE: Civil - Prohibition from Running for Office as a Felon and Expungement

COURT: Bolivar County Circuit Court

TRIAL JUDGE: Hon. Charles E. Webster (Cause No. 2013-CP-01088), Hon. Johnnie E. Walls, Jr. (Cause No. 2013-CP-01184)

APPELLANT ATTORNEY: Azalean Rogers (Pro Se)

APPELLEE ATTORNEY: Alison Elizabeth O'Neal, Harold Edward Pizzetta, III

DISPOSITION: Denial of PCR Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether there was sufficient evidence appellant was a convicted felon, and (2) whether the trial court erred in failing to expunge appellant's criminal record.

FACTS: The Attorney General filed a petition to remove Azalean Rogers from the Board of Aldermen of the City of Boyle, alleging that she had pled guilty to two felony counts of forgery in 1979. The trial court found Rogers to be a convicted felon, but it denied the petition to remove her from office and instead entered an order finding that Rogers was not a qualified elector and could not have her name

placed on the ballot in future elections. Rogers appealed, pro se, from that judgment, as well as a separate judgment from the same circuit denying her motion to expunge the convictions. The cases were consolidated on appeal.

HELD: (1) There was a factual dispute about whether Rogers is a convicted felon because the files and minute book pages from both of her convictions are missing. The Bolivar County Circuit Clerk cannot explain why. However, the docket sheets show she was indicted for two counts of forgery, was arraigned and appointed counsel. The docket indicates she pled guilty and was given a 3 year suspended sentence and placed on probation. There was also an entry indicating an order terminating probation and a discharge order were filed in 1981. Rogers claimed this was a nonadjudication (supported by her probation officer), but nonadjudications were not available in 1979 or 1981. The trial judge did not err in concluding Rogers's convictions had never been dismissed or expunged. (2) The trial judge did not err in finding Rogers was not entitled to expungement for a forgery conviction.

One (1) 2011 Chevrolet Silverado 1500, Kelly Bowen Wilson and Stephen Elliott Pergande v. Panola County Narcotics Task Force, No. 2013-CA-01255-COA (Miss.Ct.App. November 25, 2014)

CASE: Civil Forfeiture

COURT: Panola County Circuit Court

TRIAL JUDGE: Hon. James McClure, III

APPELLANT ATTORNEY: Thomas Alan Womble

APPELLEE ATTORNEY: Darrin Jay Westfaul

DISPOSITION: Denial of Motion for Reconsideration of Forfeiture Reversed and Rendered. Roberts, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Maxwell, Fair and James, JJ., Concur. Carlton, J., Dissents with Separate Written Opinion.

ISSUE: Whether the circuit court's civil forfeiture of a truck after a drug arrest was grossly disproportionate to the crime.

FACTS: Kelly Bowen Wilson and her son, Stephen Elliott Pergande were residents of Texas and the co-owners of a 2011 Chevrolet Silverado truck. Pergande's grandfather gave him the truck as a gift and it was valued at over \$30,000. In April of 2012, Pergande, 20, and a friend were driving from Austin, TX to Nashville, TN. They planned to meet some friends in Batesville, but got lost. They then got the truck stuck trying to drive across the median of I-55. Police arrived and found the boys' conduct "erratic." Police eventually discovered approximately 8.3 grams of cocaine. After his arrest, Pergande reached a plea agreement to pled to conspiracy to possess cocaine. The court placed Pergande on nonadjudicated probation for three years, fined him \$500, and ordered him to pay \$125 in restitution. After his plea, Panola County sought to forfeit the truck. Wilson contested the forfeiture. She argued that the truck should not be subject to forfeiture because she was an innocent, joint owner of the truck, and she did not know that her minor son had left Texas, or that he and a friend had cocaine in the truck. Wilson and Pergande also claimed that forfeiture of the truck was grossly disproportionate to the offense that led to its seizure. The circuit court disagreed and awarded the truck to Panola County. Wilson and Pergande appealed.

HELD: Looking at the SCT’s four-element proportionality test for civil forfeitures, the forfeiture of the truck was grossly disproportionate to the crime of conspiracy to possess cocaine. There was no evidence the truck had any relationship to the conspiracy charge or that the truck somehow facilitated their possession of cocaine. “And although there was a trace amount of cocaine in the floorboard of the truck, the majority of the cocaine was in Pergande's and [his friend’s] pockets. In that sense, their pants were arguably more instrumental in their possession of cocaine than the truck.” Pergande had no prior felony convictions and was nonadjudicated. Neither the instrumentality test nor the proportionality test favored forfeiture.

Carlton, J., Dissenting:

Judge Carlton dissented, finding the circuit court considered all the prongs of the proportionality/instrumentality test set forth in *One (1) Charter Arms v. State ex rel. Moore*, 721 So. 2d 620 (Miss. 1998). She argued that was substantial evidence in the record to support the circuit court's judgment ordering forfeiture, and the COA should affirm.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO97897.pdf>

Scottie Moore v. State, No. 2012-KA-01239-COA (Miss.Ct.App. December 9, 2014)

CASE: Armed Robbery x3

SENTENCE: Count I: 15 years; Count II: 25 years; Count III: 25 years. Counts II and III to run concurrently with Count I

COURT: Tunica County Circuit Court

TRIAL JUDGE: Hon. Johnnie E. Walls, Jr.

APPELLANT ATTORNEY: Erin E. Pridgen

APPELLEE ATTORNEY: John R. Henry

DISPOSITION: Motion to Remand for a New Trial Granted. Conviction Vacated and Remanded. Order signed by Carlton, J.

FACTS: Two months after Scottie Moore was convicted and filed his notice of appeal, the court reporter from the trial died. The district attorney prepared a nine page “Summary of the Testimony,” which the DA and trial defense counsel subsequently signed. However, this summary lacked “significant and substantial” portions of the trial proceedings. The case was transferred for briefing to the Office of Indigent Appeals. Appellate counsel later filed a motion to remand for a new trial, due to the absence of a trial transcript. Counsel asserted the summary prepared in the trial court was inadequate for appeal. The State failed to response to the motion and the COA ordered the State to respond. The State alleged the summary was an adequate reconstruction of the record.

HELD: The State failed to show how the summary complied with MRAP 10(d). The summary failed to show any objections to any trial testimony. It did not address jury selection, opening and closing

statements, rulings on motions or jury instructions. Further, the trial judge did not approve the summary as an accurate reflection of what occurred at trial. Significantly, appellate counsel was different than the trial counsel. Therefore, Moore did not have to show prejudice.

To read the full order, click here:

http://courts.ms.gov/Images/Orders/700_138917.pdf

Craig Steven Bentrup v. Christopher Epps, No. 2012-CP-02032-COA (Miss.Ct.App. December 16, 2014)

CASE: PCR – Appeal from MDOC’s ARP Program Decisions

COURT: Rankin County Circuit Court

TRIAL JUDGE: Hon. John Huey Emfinger

APPELLANT ATTORNEY: Craig Steve Bentrup (Pro Se)

APPELLEE ATTORNEY: Anthony Louis Schmidt, Jr., James M. Norris

DISPOSITION: Dismissal of complaints due to failure to exhaust Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur. Barnes, J., Concur in Part and in the Result Without Separate Written Opinion.

ISSUE: Whether the trial judge erred in dismissing two of petitioners complaints and affirming the MDOC on the rest.

FACTS: Craig Steven Bentrup filed five grievances with MDOC’s Administrative Remedy Program (ARP). Unsatisfied with the decisions, he appealed to the Rankin County Circuit Court. The circuit court found that Bentrup exhausted his administrative remedies on three claims (loss of legal materials, MDOC’s haircut procedures, and that an RVR be expunged), reviewed those claims, and affirmed the MDOC actions. The circuit court denied the other two claims (one based on discrimination and one claiming MDOC deprived him of his personal property) because Bentrup did not exhaust all administrative remedies. The claims were dismissed as premature. Bentrup appealed.

HELD: The trial judge did not err in finding MDOC’s actions were either proper or premature. Bentrup failed to show he possessed the particular legal documents that he claimed were lost. Further, Bentrup admitted that he did not suffer an injury from a haircut. Contrary to the circuit court’s findings, Bentrup did exhaust his claims of discrimination, however, once again, Bentrup did not present evidence or case authority to support his claim of discrimination. Bentrup’s claim he was deprived of personal property is moot, as MDOC gave Bentrup his list of requested items. Finally, Bentrup claims that he received an unwarranted RVR on his record after a fight. However, MDOC never processed an RVR on that incident.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO99776.pdf>

James Welch v. Epps, Taylor and MDOC, No. 2014-CP-00529-COA (Miss.Ct.App. February 3,

2015)

CASE: Civil - Appeal of MDOC's ARP Decision

COURT: Rankin County Circuit Court

TRIAL JUDGE: Hon. John Huey Emfinger

APPELLANT ATTORNEY: James Welch (Pro Se)

APPELLEE ATTORNEY: Anthony Louis Schmidt, Jr., James M. Norris

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

ISSUE: Whether MDOC correctly credited his pre-trial detention.

FACTS: In 2011, James Welch was sentenced in Hinds County to four terms of five years to be served concurrently to each other. He was paroled in July of 2011. While out on parole, he was arrested for three counts of grand larceny in Rankin County. He was held in the local jail for eight months before pleading guilty to the new charges. He was sentenced to three ten-year terms, to be served consecutively to each other. Welch's parole was revoked following his guilty plea. Since the sentencing order from Rankin County did not find his new sentences should be consecutive to his Hinds County sentences, MDOC calculated them as concurrent. Welch asserted he would be entitled to credit for the time he spent in the Rankin County jail if he were being held there on the Rankin County charges. He sought relief from MDOC's ARP because he claimed he was not properly credited for the pre-trial detention. The circuit court denied relief and Welch appealed.

HELD: The record was unclear on whether Welch was being held in the Rankin County jail on pre-trial detention or on a parole violation. Regardless, apparently MDOC gave him credit for the time in Rankin County, as well as the time he was on parole. MDOC gave him credit for the 2013 charges beginning when he started serving the Hinds County sentences. Thus, although he was not properly credited with the pretrial detention time, he was not harmed at all since he did receive credit for it.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO100416.pdf>

Lauron Smith (Lauron) v. Wesley and Epps, No.2013-CP-02029-COA(Miss.Ct.App. February 3, 2015)

CASE: Civil - Appeal of MDOC's ARP Decision

COURT: Rankin County Circuit Court

TRIAL JUDGE: Hon. William E. Chapman, III

APPELLANT ATTORNEY: Lauron Smith (Pro Se)

APPELLEE ATTORNEY: Anthony Louis Schmidt, Jr., James M. Norris

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

ISSUES: Whether the trial judge erred in dismissing Smith's compliant

FACTS: Lauron Smith was convicted in 2012 for vehicle theft in Harrison County, and was sentenced to six years. On June 20, 2013, Smith was issued an RVR for walking out of a building without permission and refusing to obey staff's orders. Smith refused to attend the hearing. He was found guilty on June 26, 2013. His punishment was a 30-day loss of privileges. He appealed through the ARP program, claiming he never received notice of the RVR hearing. Four days later, MDOC returned Smith's ARP complaint because he had failed to attach a copy of the required RVR to the form. On August 20, 2013, Smith filed a complaint with the Rankin County Circuit Court, seeking review of the MDOC's administrative decision. MDOC responded, arguing that Smith failed to exhaust his administrative remedies. On November 4, 2013, the circuit court affirmed the MDOC's decision and entered a judgment of dismissal. Smith appealed.

HELD: Smith claimed he was not afforded a hearing, but the RVR states that Smith "refused to come out" to attend the hearing. Smith presented no evidence to refute the MDOC's findings that he walked out of a building without permission. Smith just summarily claims he was denied an investigation and hearing. Smith failed to exhaust his administrative remedies. The trial judge did not err in affirming MDOC's decision. Although Smith argues his due-process rights were violated, his punishment was a thirty-day loss of privileges, which is not generally considered to be a constitutionally protected liberty interest.

To read the full opinion, click here:

<https://courts.ms.gov/images/Opinions/CO100301.pdf>

Albert Lee Norwood v. State, No. 2013-CP-01825-COA (Miss.Ct.App. March 3, 2015)

CASE: Civil - Request of Records - Failure to re-register as a sex offender

SENTENCE: 4 years

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. John C. Gargiulo

APPELLANT ATTORNEY: Albert Lee Norwood (Pro Se)

APPELLEE ATTORNEY: Scott Stuart

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

ISSUE: Whether the trial court erred in denying copies of transcripts and other documents from petitioner's guilty plea.

FACTS: On April 9, 2012, Albert Norwood pled guilty to failing to re-register as a convicted sex offender. On October 15, 2013, Norwood mailed a letter to the circuit court asking for various documents from his failure-to-register case. The court treated Norwood's letter as a motion and denied his request, noting he failed to show good cause for free documents. Norwood appealed.

HELD: Norwood forfeited his right to a direct appeal when he pled guilty. His only available avenue for relief was to bring a PCR, but he failed to do so. If Norwood files a proper and timely PCR, and it withstands summary dismissal, he then may be entitled to trial transcripts or other relevant documents. His appeal was dismissed for lack of appellate jurisdiction.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO101233.pdf>

Douglas M. Magee v. City of Mendenhall, No. 2013-CA-01668-COA (Miss.Ct.App. March 10, 2015)

CASE: Civil – Parking Violation

SENTENCE: \$250 fine

COURT: Simpson County Circuit Court

TRIAL JUDGE: Hon. Eddie H. Bowen

APPELLANT ATTORNEY: Douglas M. Magee (Pro Se)

APPELLEE ATTORNEY: L. Wesley Broadhead

DISPOSITION: Circuit Court Affirmance Reversed and Rendered. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Maxwell, Fair and James, JJ., Concur.

ISSUES: Whether the circuit court erred in finding Magee guilty of violating a municipal ordinance at the trial de novo in circuit court.

FACTS: Douglas Magee received a parking citation from the City of Mendenhall based on a violation of a city parking ordinance. On March 27, 2013, the municipal court fined Magee \$100. Magee filed a timely notice of appeal with the circuit court on April 11, 2013, seeking a trial de novo. At the hearing on Magee's appeal, the circuit court judge determined that Magee sought to challenge the constitutionality of the ordinance rather than to contest the municipal court's ruling that he violated the ordinance. Finding Magee's appeal as to the constitutionality of ordinance to be untimely, the circuit court judge refused to rule that the ordinance was unconstitutional. However, the circuit court judge allowed Magee to make a record for appeal. A review of the record reflects that Mendenhall failed to offer any evidence during the hearing to support Magee's conviction for violating the parking ordinance. After the City rested, the circuit court judge found that Magee had violated the parking ordinance and fined him \$250. Magee appealed.

HELD: Magee had the right to a trial de novo in circuit court. That new trial required the City to present evidence of Magee's guilt, not just defend his claim that the ordinance was unconstitutional. Mendenhall failed to meet its burden of proof for a trial de novo to show beyond a reasonable doubt that Magee violated the parking ordinance. The conviction was reversed and rendered.

To read the full opinion, click here:

<http://courts.ms.gov/Images/Opinions/CO100559.pdf>