Significant Criminal Decisions of the Mississippi Supreme Court and Mississippi Court of Appeals, April 2016 to October 2017

Judge Jack Wilson - Mississippi Court of Appeals

I. Venue – *Greg Davis v. State*, 2014–KA–00977–COA, 196 So. 3d 194 (Miss. Ct. App. July 19, 2016). Trial judge erred by not granting former mayor's motion for a change of venue. The judge should have ruled on the motion prior to the trial date and should not have reserved ruling until after jury voir dire. Reversed and remanded for a new trial.

II. Joinder / Severance –

A. *Lomax v. State*, No. 2014–KA–00835–SCT, 192 So. 3d 975 (Miss. June 2, 2016). Trial court abused its discretion by denying a motion to sever forcible rape charges from two counts of simple assault on a law enforcement officer, which arose out of the defendant's questioning on the rape charges.

B. "Retroactive misjoinder" - *Reynolds v. State*, No. 2016-KA-00846-COA, 2017 WL 4157930 (Miss. Ct. App. Sept. 19, 2017). The doctrine of "retroactive misjoinder" does not apply simply because the jury acquits the defendant on one count of a multi-count indictment. The doctrine potentially applies if the defendant is tried on one or more counts that are later held invalid *as a matter of law*.

C. *Roberson v. State*, No. 2014-KA-00652-COA, 2017 WL 3872182 (Miss. Ct. App. Sept. 5, 2017). Former coach was not entitled to severance of charges charging him with exploitation or gratification of lust against two victims. Victims were both former players; time span was approximately two years.

III. Failure to disclose witnesses / discovery issues

A. *Overton v. State*, No. 2013–CT–01236–SCT, 195 So. 3d 715 (Miss. Apr. 26, 2016). Defendant convicted of possession of cocaine and possession of a firearm by a convicted felon. The COA affirmed. The MSSC reversed, holding (6-2) that the trial judge abused his discretion by excluding two defense witnesses who were not disclosed until the day before trial. The witnesses would have supported the defendant's testimony that the gun and cocaine belonged to others. The Court reasoned that there was no evidence of

a "deliberate, cynical scheme to gain a substantial tactical advantage" because the defendant's family "came up with these witnesses" just before trial.

B. *White v. State*, No. 2015–KA–00913–COA, 223 So. 3d 859 (Miss. Ct. App. Aug. 1, 2017) (7-3 decision). COA reversed and remanded for a new trial based on State's discovery violation. Shortly after defendant was arrested, State recorded five phone calls from defendant to his girlfriend, approximately 1.5 hours total. The State failed to disclose the recordings until just before opening statements in the trial two years later. The trial judge recessed the trial long enough for defense counsel to listen to the recordings, but the judge denied the defendant's requests to exclude the evidence or for a mistrial or continuance. The COA held this was an abuse of discretion and that the error was not harmless. The COA held that the recordings had been in the possession of the State for two years purposes of discovery, even though the DA claimed that the police had not turned them over to his office until just before opening statements.

C. *Willard v. State*, No. 2015–KA–01893–COA, 219 So. 3d 569 (Miss. Ct. App. May 9, 2017). Similar to *Overton*, *supra*, the COA held (in a 6-1-3 decision) that the trial judge abused his discretion by limiting the testimony of the defendant's son. Although the son was not disclosed as a witness until after the State rested, the COA majority emphasized that father and son had a strained relationship, and found no evidence that the son was not disclosed as part of a "cynical scheme to gain a substantial tactical advantage."

D. *Pelletier v. State*, 2014-KA-00869-COA, 207 So. 3d 1263 (Miss. Ct. App. Mar. 17, 2016), cert. granted, 204 So. 3d 291 (Miss. Nov. 17, 2016), cert. dismissed (Miss. Jan. 19, 2017). Defendant convicted of possession of a controlled substance and a weapon (brass knuckles) by a convicted felon. The COA ruled (in a 5-5 decision) that the trial judge did not abuse his discretion by excluding a defense witness who was not disclosed until after the State rested. The witness, the defendant's stepfather, would have testified that the brass knuckles and tool bag in which they were found belonged to him. The opinion affirming concluded that the trial judge did not abuse his discretion in excluding the witness based on the deliberate discovery violation. The 5-judge dissent disagreed. The MSSC granted cert (on a 4-4 vote) but later dismissed.

E. *Davis v. State*, No. 2015-KA-01491-COA, 2017 WL 4386694 (Miss. Ct. App. Oct. 3, 2017). COA held that the trial judge did not abuse her discretion in excluding a defense witness first disclosed after the State rested. There was

evidence that the defense failed to disclose the witness in order to obtain a tactical advantage.

F. *Roberson v. State*, No. 2014-KA-00652-COA, 2017 WL 3872182 (Miss. Ct. App. Sept. 5, 2017). Former coach was not entitled to a new trial based on pretrial ruling quashing subpoena for statements and other documents related to school board's investigation of allegations against him. The COA ordered an in camera review as part of a limited remand on the issue, and the review revealed nothing materially exculpatory.

IV. Motions to suppress

A. *Martin v. State*, No. 2015-KA-00772-SCT, 2017 WL 4694088 (Miss. Oct. 19, 2017). The MSSC held that an officer had probable cause to stop motorist for careless driving after observing him cross over the "fog line" once and then come "close" to the fog line again. Once he stopped the car, the smell of marijuana gave the officer probable cause to search the vehicle.

B. *May v. State*, 2014-KA-00681-COA, 222 So. 3d 1074 (Miss. Ct. App. Dec. 13, 2016), reh'g denied (Apr. 11, 2017), cert. denied, 223 So. 3d 785 (Miss. 2017). Defendant was a passenger in a car pulled over on I-10. Officer said he was "fidgety" and kept looking down at his shoes, so officer asked him if he would mind taking off his shoes, and defendant consented. When defendant removed his shoes, a Zippo lighter fell out. The officer picked it up, examined it, and then took it apart. Hidden inside the lighter, the officer found marijuana and crack cocaine. On appeal, the COA held (one judge dissenting) that defendant's consent to remove his shoes did not extend to consent to searching the lighter and that officer lacked probable cause to search the lighter.

C. *Pinter v. State*, 2016–KA–01029–COA, 221 So. 3d 378 (Miss. Ct. App. June 6, 2017). (1) Police chief's testimony concerning his normal practices was sufficient to establish that drugs were discovered in the course of a valid "inventory search." (2) Defendant's confession was admissible where he was advised of his rights and stated that he understood his rights. An express written or oral "waiver" of his rights was unnecessary.

V. Guilty pleas / effective assistance

A. *Wrenn v. State*, 2015–CA–00696–COA, 207 So. 3d 1252 (Miss. Ct. App. Jan. 10, 2017). Defendant's guilty plea and conviction were set aside because he was misinformed that he might receive as little as one year in prison if he pled guilty to possession of a firearm by a convicted felon *as a habitual offender*.

Defendant was sentenced to ten years without eligibility for parole or probation, as required by law. The defendant's misinformation stemmed from his original attorney's intention to make a "proportionality" argument for a lesser sentence; however, the defendant fired his original attorney after he pled guilty but before he was sentenced.

B. *Thinnes v. State*, No. 2014-CA-01772-COA, 196 So. 3d 204 (Miss. Ct. App. July 19, 2016). It is not a prerequisite to a voluntary plea that a defendant understand the nature of parole and his eligibility for parole. However, a plea is involuntary if the defendant is affirmatively misinformed as to his eligibility for parole, the misinformation is not corrected, and the defendant relies on the misinformation in pleading guilty. Here, the defendant alleged that his attorneys told him that he would be eligible for parole after 3 years (of 12 years to serve), which was incorrect. The defendant also submitted nonparty affidavits to support his claim. The alleged misinformation was not corrected at his plea hearing, because the court only cautioned the defendant that no one could guarantee him parole, which if anything tended to suggest that there was at least some possibility of parole. The COA reversed the denial of post-conviction relief, holding that the petitioner was entitled to an evidentiary hearing on his claims.

C. *Green v. State*, No. 2014–CP–00743–COA, 195 So. 3d 246 (Miss. Ct. App. June 28, 2016). Defendant pled guilty to drug charges in two separate indictments. At his plea hearing, it was also discussed that the State had agreed to forgo prosecution on other unindicted charges, although those charges were not identified with any specificity. Defendant subsequently was indicted and pled guilty to one count of selling cocaine that predated the prior plea agreement and that, in retrospect, clearly appeared to have been covered by that agreement. Yet nothing was said about the prior plea agreement when he pled guilty and was sentenced for selling cocaine. He subsequently filed a pro se PCR motion, which the circuit court denied. The COA reversed and set aside the conviction and sentence for sale of cocaine, holding that it was covered by the prior plea agreement.

VI. Crimes –

A. **Robbery** - *Reynolds v. State*, No. 2016-KA-00846-COA, 2017 WL 4157930 (Miss. Ct. App. Sept. 19, 2017). Property was taken "from the presence" of the victim, an employee of a retail store, even though she was not in the immediate physical presence of the robbers when the taking occurred. The employee fled

to the back of the store because she was intimidated by the robbers, which is a sufficient basis for conviction under the statute.

B. **Larceny** – "The total value of property taken and carried away by the person from a single victim shall be aggregated in determining the gravity of the offense." MS Code 97-17-41 (grand larceny) and -43 (petit larceny).

1. *Nations v. State*, No. 2015-KA-00770-COA, 199 So. 3d 1265, 1272-75 (¶¶24-31) (Miss. Ct. App. 2016), discusses and rejects a defendant's claim that the State was improperly allowed to aggregate the values of a number of different items to satisfy the grand larceny threshold. She argued that there was insufficient proof that these items were all taken as part of one "continuous transaction," rather than being separate takings on multiple occasions. The COA rejected this argument, finding no proof to the contrary. The State argued that the above-quoted language of section 97-17-41, which was added to the statute in 2004, obviated the need for a "continuous transaction" argument. The State argued that this 2004 amendment overruled longstanding precedent permitting aggregation only when items were taken as part of a "continuous transaction." The COA found it unnecessary to address the State's argument on the facts of the case. The COA noted that the statute and prior precedent could be read consistently.

2. *Lowell v. State*, No. 2016-CP-01309-COA, 2017 WL 4156907, at *2-*3 (¶¶5-12) (Miss. Ct. App. Sept. 19, 2017), addressed a motion for post-conviction relief in which the defendant alleged that his convictions following a guilty plea for both larceny a riding lawn mower and possession of a stolen bicycle belonging to the same owner violated double jeopardy and the "single larceny rule." The COA rejected the claim, reasoning that it was possible that the offenses were factually distinct, and the defendant therefore waived any double jeopardy challenge by pleading guilty to offenses that offenses that, at least as alleged, were separate and distinct.

C. **Heat-of-Passion Manslaughter** - *Parks v. State*, No. 2015-KA-01462-COA, 2017 WL 1333053 (Miss. Ct. App. Apr. 11, 2017). Defendant was indicted for murder. At trial, defendant objected to a manslaughter instruction. However, there was sufficient evidence from which the jury could have inferred "heat of passion," so the trial judge did not err in instructing the jury on manslaughter, there was sufficient evidence to support the conviction for manslaughter, and the verdict was not against the weight of the evidence. Victim allegedly stole

tools from the defendant and later returned to his property; jurors could have determined that these actions provoked defendant to a heat of passion.

D. **Sexual battery / molestation** (or "fondling") – Sexual battery and molestation are distinct offenses, and a defendant may be convicted of both depending on the facts of the case. However, in *Stewart v. State*, No. 2014-KA-01520-COA, 2017 WL 499184 (Miss. Ct. App. Feb. 7, 2017), the touching (molestation) was part of the same act as the penetration (sexual battery). Therefore, molestation was a lesser-included-offense of sexual battery and defendant's conviction on both charges violated double jeopardy. The conviction for molestation was reversed and rendered.

VII. Defenses

A. **Accident or misfortune -** *Kuebler v. State*, No. 2012–CT–01825–SCT, 204 So.3d 1220 (Miss. Nov. 10, 2016). Defendant convicted of murder. Reversing the COA, the MSSC holds (5-3) that the trial court committed reversible error by not instructing the jury on defendant's theory of the case, "accident or misfortune." Although defendant did not testify, the victim had GSR particles on her hands, there were no fingerprints on the gun, and defendant's post-shooting behavior "indicated concern for" the victim.

B. **Defense of others -** *Wells v. State*, No. 2016-KA-00959-SCT, 2017 WL 4456735 (Miss. Oct. 5, 2017). Defendant who shot victim in front of the Madison County Courthouse was not entitled to introduce evidence that victim had threatened to kill his mother. There was no "imminent danger" to the defendant's mother, so the justification of "defense of others" was unavailable. Nor was the evidence relevant or admissible to support a "heat of passion"/manslaughter instruction.

C. **Duress -** *Williams v. State*, No. 2016-KA-00552-SCT, 2017 WL 4178352 (Miss. Sept. 21, 2017). Defendant convicted of capital murder for striking and killing George County Sheriff during a high-speed car chase. She was not entitled to a "duress" defense based on alleged threats by her boyfriend, who was in the car with her. She recklessly or negligently put herself in the situation and had viable alternatives to her actions.

VIII. Evidence

A. *Jordan v. State*, No. 2014–CT–00615–SCT, 212 So. 3d 817 (Miss. Dec. 13, 2016), affirming by an evenly divided Court, 212 So. 3d 836 (Miss. Ct. App. Dec. 8, 2015). **COA held (6-4) that rap video "about killing snitches" was**

relevant and admissible to show consciousness of guilt. Defendant appeared in the video, which was published on YouTube after two witnesses had implicated the defendant in a murder. **MSSC affirms COA without op. (4-4).** The same rap video was admitted in the separate trial of a codefendant. The COA affirmed without dissent, and the MSSC denied cert. *Henderson v. State*, No. 2015–KA–00164–COA (Miss. Ct. App. June 28, 2016). The defendant in the second case (*Henderson*) was featured throughout the video, whereas the defendant in the first case (*Jordan*) was more of an "extra" in part of the video.

B. *Willie v. State*, 2014–KA–01041–SCT, 204 So. 3d 1268 (Dec. 8, 2016). Failure to object to **ballistics expert** was not ineffective assistance.

C. *Johnson v. State*, 2014–CT–00664–SCT, 204 So. 3d 763 (Miss. Dec. 1, 2016). Reversing the COA, **the MSSC held (9-0) in this aggravated domestic violence case that defendant's prior acts of domestic violence were admissible under Rule 404(b) to prove "intent," "motive," and "plan."** The MSSC and COA both held that evidence that the victim had worked as an escort or exotic dancer was not relevant to her credibility.

D. *Roberson v. State*, No. 2014-KA-00652-COA, 2017 WL 3872182 (Miss. Ct. App. Sept. 5, 2017). Coach convicted of child exploitation and gratification of lust. Victims were former players. **COA held that evidence of coach's prior relationships with other students years earlier was admissible under MRE 404(b).** COA held that evidence that one of the students became pregnant was irrelevant and should have been excluded, but the error was deemed harmless.

E. **A criminal defendant has a near-absolute right under the Confrontation Clause and Rules of Evidence to cross-examine the State's witnesses about prior felony convictions.** *Reed v. State*, No. 2014–KA–01203–COA, 191 So. 3d 134 (Miss. Ct. App. May 10, 2016). No "balancing test" of the probative value and prejudicial effect is required "except in extreme situations such as where the prosecution witness has a prior conviction that is both highly inflammatory and completely unrelated to the charges pending against the accused." (quoting MSSC cases) Trial judge's ruling prohibiting Reed from cross-examining the State's main witness about his prior felony convictions was reversible error.

F. **Self-defense – evidence of victim's history of violence -** Defendant was convicted of aggravated assault for shooting his girlfriend's ex-husband. Defendant claimed self-defense, but his girlfriend was precluded from testifying about her ex-husband's history of threatening and physically abusing

her. COA held that the exclusion of the evidence was reversible error. *Jordan v. State*, No. 2014-KA–00489–COA, 211 So. 3d 713 (Miss. Ct. App. May 24, 2016), reh'g denied (Nov. 1, 2016).

G. **Against-penal-interest exception to hearsay rule -** *Small v. State*, 2016–KA–00595–COA, 224 So.3d 1272 (Miss. Ct. App. Aug. 15, 2017). Small was indicted for murder for handing a gun to a codefendant, who was tried separately, just before codefendant shot and killed the victim. Small sought to introduce the codefendant's statement to police that the gun was his and that no one handed it to him. Trial judge excluded the statement, and the COA affirmed, finding no abuse of discretion. The statement was not against the codefendant's penal interest because it was part and parcel of his self-defense narrative. Also, the statement lacked sufficient corroborating circumstances under Rule 804(b)(3).

H. Admission of witness's testimony from probable cause hearing, where defendant called her as a witness and examined her, did not violate Confrontation Clause. *Harris v. State*, No. 2016-KA-00347-COA, 2017 WL 4251671 (Miss. Ct. App. Sept. 26, 2017).

I. Even if a confession is admissible, the defendant is entitled to attack its trustworthiness by presenting evidence that it was not voluntary based on the circumstances in which the statement was given. In *Allen v. State*, 2015–KA–00506–COA, 212 So. 3d 98 (Miss. Ct. App. Nov. 8, 2016), reh'g denied (Mar. 14, 2017), **the COA held that the trial judge properly admitted the defendant's confession but committed reversible error by precluding defendant from attacking its trustworthiness through evidence that it was induced by promises of leniency.**

J. **Impeachment of party's own witness with prior inconsistent statements -** *Pustay v. State*, No. 2013-KA-00977-COA, 221 So. 3d 320, 327 (Miss. Ct. App. Oct. 4, 2016), reh'g denied (Feb. 21, 2017), cert. denied, 216 So. 3d 1150 (Miss. 2017). Pustay was convicted of molestation and sexual battery of his biological niece/adopted daughter. At trial, Pustay's wife denied that the sexual abuse had occurred or that Pustay had ever confessed to her. Over Pustay's objection, his wife was then impeached with her prior statements to police, in which she stated that Pustay had admitted that he had sex with their niece/daughter. After the wife claimed that her prior statements were coerced, recorded statements were played and admitted into evidence. COA held that the trial judge did not abuse his discretion in allowing the impeachment, because the prior statements were inconsistent with wife's trial testimony, and

there was no showing that the State acted in "bad faith" in calling her as a witness. The COA also held that the trial judge did not abuse his discretion in admitting the wife's prior statements into evidence, because the wife did not simply admit to the statements but rather claimed that they were coerced.

IX. Jury instructions

A. **"Imperfect self-defense" -** *Brown v. State*, 2014–CT–00331–SCT, 222 So. 3d 302 (Miss. May 4, 2017). Reversing the COA, **the MSSC held (9-0) that the trial court erred by giving an "imperfect self-defense" manslaughter instruction where defendant denied that he was the shooter.** Manslaughter conviction reversed. (COA had reversed 4 aggravated assault convictions on an unrelated error in the jury instructions.)

B. **"Flight instruction" -** *Kuebler v. State*, No. 2012–CT–01825–SCT, 204 So.3d 1220 (Miss. Nov. 10, 2016). Trial court committed reversible error by giving a "flight instruction" because defendant provided an explanation for his flight.

   1. *But see Ford v. State*, No. 2015-KA-00691-SCT, 206 So. 3d 486 (Miss. Sept. 22, 2016) (5-4 decision). Trial court did not abuse his discretion by giving "flight instruction." Defendant went to the police and gave a statement shortly after the murder; however, after a warrant was issued for his arrest, the police found him hiding in the attic of his mother's house, and he offered no explanation for this "flight."

C. **"Pre-arming instruction" -** *Boston v. State*, No. 2016-KA-00047-SCT, 2017 WL 3913925 (Miss. Sept. 7, 2017). MSSC granted a new trial because the trial court erroneously gave a "pre-arming" instruction. Such instructions "should be given only in exceedingly rare circumstances" and have been approved only in cases where "the record was uncontradicted that the defendants armed themselves with the intent to initiate a confrontation."

D. *Potts v. State*, No. 2015-KA-01377-SCT, 2017 WL 2505125 (Miss. June 8, 2017) (no error in granting an "acquit-first" instruction that combined first- and second-degree murder and two theories of manslaughter).

E. **Supplemental jury instructions in response to jury questions -** *Willie v. State*, No. 2014–KA–01041–SCT, 204 So. 3d 1268 (Miss. Dec. 8, 2016). During deliberations in a murder trial, the jury sent the following note to the judge: "Sir, can we say he is guilty of having the gun without saying he is guilty of murder?" The judge answered, "no," because the defendant was not charged with any lesser offense of possession of a firearm. Defense counsel

did not object. The Supreme Court held (5-4) that this was plain error because the jury might have been asking a different question, and the answer could have been interpreted as a peremptory instruction to the effect that the defendant was guilty of murder if he possessed the gun.

F. **Supplemental instructions to deadlocked jury -** *Bell v. State*, No. 2015-KA-00643-SCT, 202 So. 3d 1239 (Miss. Oct. 27, 2016). Trial judge's comments to a deadlocked jury reversible error, where judge stated, "I don't want you going back there just being stubborn. Go back there with the seriousness of purpose because you came here to do a job and if we can get a unanimous decision from you, we would like to."

G. **Accomplice instruction -** *Carson v. State*, No. 2013–KA–02011–SCT, 212 So. 3d 22 (Miss. Nov. 17, 2016). Trial counsel was ineffective in failing to request an accomplice instruction where accomplice's testimony was uncorroborated; however, defendant was not prejudiced by counsel's omission.

    1. *See also Jones v. State*, No. 2014–KA–00993–SCT203 So. 3d 600 (Miss. Aug. 11, 2016). MSSC debates proper form of cautionary accomplice instruction, but no opinion was joined in full by a majority of the justices.

H. **Cautionary instruction regarding informant testimony -** *Gale v. State*, No. 2016-KA-00735-COA, 2017 WL 3868998 (Miss. Ct. App. Sept. 5, 2017). The trial court has discretion to deny a cautionary instruction re informant testimony "if the details of the informant's pay arrangement are disclosed to the jury and the informant is subject to cross-examination."

I. *Moody v. State*, No. 2015-KA-00562-SCT, 202 So. 3d 1235 (Miss. Oct. 27, 2016). Reversible error to instruct jury that inmate charged with possession of a cell phone in a correctional institution was "presumed to be in constructive possession of [the] phone . . . unless that presumption is overcome by competent evidence."

J. *White v. State*, No. 2013–CT–02132–SCT, 195 So. 3d 765 (Miss. July 21, 2016) (holding that it was unnecessary to define "larceny" for the jury in a burglary case).

K. **Reasonable doubt instruction -** *Thompson v. State*, 2015–KA–00623–COA, 2017 WL 1075712 (Miss. Ct. App. Mar. 21, 2017) (6-3 decision), *cert. denied*. COA held that trial judge's refusal of a defense instruction on reasonable doubt was not an abuse of discretion. The instruction is among the "Court's Standard

Instructions" in the MJC model instructions (§ 1:13, "reasonable doubt from the evidence"), and it has been given in many cases, but in *Roby v. State*, 183 So. 3d 857, 874 (¶69) (Miss. 2016), the MSSC held that it was not an abuse of discretion for a trial judge to refuse, provided that other instructions adequately address the concept of reasonable doubt.

L. **Alibi instruction -** *Ford v. State*, No. 2016-CA-01498-COA, 2017 WL 3190723 (Miss. Ct. App. July 25, 2017). Evidence did not support an alibi instruction where the alibi was in bed asleep (supposedly with the defendant) when the crime was committed nearby.

M. **"Stand your ground" and "Castle doctrine" instructions –** *Shaheed v. State*, 2015–KA–00743–COA, 205 So. 3d 1105 (Miss. Ct. App. Dec. 13, 2016). Trial judge did not abuse her discretion by denying a "stand your ground" instruction where there was no evidence of any opportunity to retreat. Trial judge did not abuse her discretion by denying "castle doctrine" instructions where the defendant left his girlfriend's apartment and went downstairs before approaching the victim.

N. **Content of self-defense instructions –** *Cooper v. State*, No. 2015-KA-00846-COA, 2017 WL 1162825 (Miss. Ct. App. Mar. 28, 2017). In *Maye v. State*, 49 So. 3d 1124 (Miss. 2010), the Supreme Court held that the defendant was entitled to an instruction telling jurors not to judge his actions "in the cool, calm light of after-developed facts, but instead . . . in light of the circumstances confronting [him] at the time, as . . . those circumstances reasonably appeared to [him] at that instant." In *Maye*, the defendant shot a police officer executing a warrant, and the defendant mistakenly believed the officer to be an intruder. In *Cooper*, the COA held that *Maye*'s holding did not apply because the case did not involve any "after-developed facts."

O. Reversible error for trial court to give "castle doctrine"-type instructions "favoring the victim" in a homicide trial. *Husband v. State*, No. 2015–KA–00558–COA204 So. 3d 353, 355 (Miss. Ct. App. July 26, 2016), reh'g denied (Nov. 22, 2016).

P. **"Castle doctrine"** – Defendant was in the backseat of a friend's car when he shot the owner of a gas station. The victim was reaching into the car because the defendant had pumped more gas than he had paid for. COA held (8-2) that defendant was NOT entitled to "castle doctrine" instructions. He was engaged in multiple illegal activities at the time – he illegally possessed a gun as a minor, and he was stealing gas. *Beal v. State*, No. 2014-KA-01424-COA, 2016

WL 3907083 (Miss. Ct. App. July 19, 2016), reh'g denied (Apr. 11, 2017), cert. denied, 222 So. 3d 311 (Miss. 2017).

X. Weight and Sufficiency of the Evidence

A. Sufficiency of the Evidence –

1. **Constructive Possession - *Carver v. State*, No. 2015-CT-00384-SCT, 2017 WL 4546635 (Miss. Oct. 12, 2017).** Carver and Ingram were stopped for speeding on I-55 South in Madison County. Ingram was driving. Ingram had a gun under his seat and $893 in his pockets. Carver had no money. There was a very small quantity of marijuana (0.2 grams) in the center console. There was a much larger quantity (3.8 ounces) in the trunk. Ingram admitted the marijuana in the trunk was all his; Carver denied ownership. Ingram and Carver were indicted for possession w/ intent and conspiracy to distribute the marijuana in the trunk. Ingram pled guilty. Carver went to trial and was convicted of simple possession. COA affirmed the conviction in a 5-5 decision. MSSC reversed (8-0). "Proximity" to drugs is not sufficient to prove possession; "dominion and control" must be proven. Proof that Carver was aware of the marijuana in the console, or even the marijuana in the trunk, or even that he intended to smoke some with Ingram did not established that he exercised dominion or control.

2. *Shaheed v. State*, 2015–KA–00743–COA, 205 So. 3d 1105 (Miss. Ct. App. Dec. 13, 2016) (7-3 decision). **"Unobjected-to hearsay evidence, once received by the court and presented to the jury, becomes competent evidence and may aid in supporting a verdict the same as any other competent evidence."**

3. *Johnson v. State*, No. 2015–KA–00853–SCT, 224 So. 3d 66 (Miss. Dec. 15, 2016) (evidence sufficient to exclude "every reasonable hypothesis of innocence" in circumstantial case) (5-4 decision).

4. *Brooks v. State*, No. 2015–KA–00933–SCT, 203 So. 3d 1134 (Miss. Nov. 17, 2016) ("*Weathersby* rule" does not apply if the defendant provides "conflicting stories about the homicide").

B. Weight of the Evidence

1. ***Little v. State*, No. 2014-CT-01505-SCT, 2017 WL 4546740 (Miss. Oct. 12, 2017).** Appellate courts don't sit as a "13th juror" when

addressing a challenge to the weight of the evidence. Little was convicted of aggravated assault based on victim's testimony identifying him as the assailant. Little argued that his conviction was against the overwhelming weight of the evidence because the victim's description of the assailant conflicted with his actual appearance in multiple respects. The COA agreed (6-3), found that the trial judge abused his discretion by denying Little's motion for a new trial, and reversed and remanded for a new trial. The MSSC reversed the COA (5-2) and affirmed the conviction. Key language: "Despite this Court's prior language suggesting otherwise, neither this Court nor the [COA] assumes the role of juror on appeal. We do not reweigh evidence. We do not assess the witnesses' credibility. And we do not resolve conflicts between evidence. Those decisions belong solely to the jury. Our role as appellate court is to view the evidence in the light most favorable to the verdict and disturb the verdict only when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." (¶1) "We do not make independent resolutions of conflicting evidence. Nor do we reweigh the evidence or make witness-credibility determinations." (¶20)

XI. Double jeopardy – *Reynolds v. State*, No. 2016-KA-00846-COA, 2017 WL 4157930 (Miss. Ct. App. Sept. 19, 2017). Defendant may be convicted on two counts of armed robbery based on the robbery of two employees of the same store, even if the same property is taken from each employee. Robbery is a crime against a person; larceny is a crime against property.

XII. Sentencing

A. **House Bill 585 amendments do not apply to crimes committed prior to HB 585's effective date.** *Wilson v. State*, No. 2015–KA–00066–SCT, 194 So. 3d 855 (Miss. June 23, 2016). Trial court properly sentenced defendant under the statute as it existed at the time of the offense; defendant was not entitled to be sentenced under the amended version of the statute in effect at the time of trial. This holding applies to value thresholds, drug quantities, sentences, etc. that were amended by House Bill 585. Prosecutions and sentences for offenses committed prior to July 1, 2014, should proceed under the prior versions of the amended statutes.

B. *Bester v. State*, No., 2013–CT–00058–SCT, 188 So. 3d 526 (Miss. Apr. 14, 2016). Holding that a trial judge may sentence a defendant to life imprisonment under the forcible rape statute *without* a jury recommendation,

overruling precedent dating to 1975. In *Young v. State*, No. 2016-CP-00542-COA, 2017 WL 4386676 (Miss. Ct. App. Oct. 3, 2017) (5-1-3 decision), the COA held that *Bester* also applies to armed robbery cases, although the MSSC has yet to formally overrule precedent under the armed robbery statute.

C. *Miller v. State*, 2015–KA–01229–COA, 225 So. 3d 12 (Miss. Ct. App. May 2, 2017). House Bill 585's new definition of "crime of violence" applies to predicate felonies committed prior to July 1, 2014, for purposes of determining violent habitual offender status. This does not violate the Ex Post Facto Clause of the State or Federal Constitution.'

D. *Shaheed v. State*, 2015–KA–00743–COA, 205 So. 3d 1105, 1114 (¶29) (Miss. Ct. App. Dec. 13, 2016). A circuit court cannot suspend any part of a life sentence. See MS Code 47-7-33(1). Thus, the circuit court erred by suspending all but 20 years of the defendant's life sentence. The State was able to raise this issue on cross-appeal once the defendant appealed the conviction. See MS Code 99-35-103(c).

E. *Rosebur v. State*, 2016–KA–00260–COA, 214 So. 3d 307 (Miss. Ct. App. Apr. 4, 2017) (holding that a sentence enhancement for using a firearm during the commission of the crime of shooting into a dwelling does not violate double jeopardy (collecting additional cases))

F. *Miller v. Alabama* and *Montgomery v. Louisiana* cases

1. *Cook v. State*, No. 2016-CA-00687-COA, 2017 WL 3424877 (Miss. Ct. App. Aug. 8, 2017) (motion for rehearing pending): When a trial judge sentences a juvenile offender to life without parole, the appellate court's standard of review is abuse of discretion, not "heightened scrutiny." The trial judge *must* consider the factors discussed in *Miller*, but there is no "presumption" that the offender is entitled to be eligible for parole. Also, there is no right to a jury trial on the issue, at least where the defendant pled guilty and was originally sentenced by a judge. In this case, the trial judge did not abuse his discretion by sentencing the defendant to life without parole.

2. *Mason v. State*, No. 2015-CP-00523-COA, 2017 WL 2335516 (Miss. Ct. App. May 30, 2017) (petition for cert pending). *Miller* and *Montgomery* did not apply to a fifty-year sentence where the trial judge had discretion to impose any sentence between 2 and 50 years and the

defendant's tentative release date was at age 57 and his maximum release date was at age 65.

XIII. Probation / parole

A. *Walker v. State*, No. 2015-CT-00912-SCT, 2017 WL 4247962 (Miss. Sept. 21, 2017). Provisions of House Bill 585, Miss. Code § 47-7-37, referring to 1st, 2nd, 3rd, 4th and subsequent **"technical violations"** refer to violations of conditions of probation, not revocation orders.

B. *Fisher v. Drankus*, No. 2015–CA–01045–SCT, 204 So. 3d 1232 (Miss. Dec. 8, 2016) (holding that House Bill 585's provisions regarding **"case plans" and "presumptive parole"** do not apply to inmates sentenced prior to HB 585's effective date); *see also Barnes v. State*, No. 2016-CP-01254-COA, 2017 WL 3600384 (Miss. Ct. App. Aug. 22, 2017) (same as to House Bill 585's requirement of annual parole hearings).

XIV. Forfeitures

A. **Pleading -** *City of Meridian v. $104,960.00 U.S. Currency*, No. 2015-CT-00710-SCT, 2017 WL 4314606 (Miss. Sept. 28, 2017). County court dismissed forfeiture petition, circuit court affirmed, and COA affirmed (6-4), where the petition simply alleged, without elaboration, that cash and a truck had "been used, or [were] intended for use or [were] proceeds in violation of the Mississippi Uniform Controlled Substances Law." The MSSC reversed, holding (6-2) that this conclusory allegation was sufficient to survive a motion to dismiss.

B. **Sufficiency of the evidence -** *Ruiz v. State*, No. 2015-CA-00342-COA, 2016 WL 5390623 (Miss. Ct. App. Sept. 27, 2016), reh'g denied (May 23, 2017), cert. denied, 223 So. 3d 789 (Miss. 2017). COA held (8-2) that evidence was insufficient to support forfeiture of cash found in defendant's car. The primary evidence connecting the cash to drugs was testimony that law enforcement found a small amount of what "appeared to be marijuana debris" near the money; however, the sheriff's department did not collect or test any of the debris, and never told Ruiz what they suspected, so the allegation could not be tested.

XV. Assistance of counsel - *McCollum v. State*, No. 2014–KA–01522–COA, 186 So. 3d 948 (Miss. Ct. App. 2016), *interlocutory appeal after remand*, No. 2017-IA-00026-SCT. Defendant did not impliedly waive or forfeit his right to counsel by filing bar complaints against his attorney, attempting to fire his attorney, or

refusing to cooperate with his attorney. Subsequent interlocutory appeal raises the question whether the now-deceased victim's testimony at the first trial can be admitted at the retrial.

XVI. Miscellaneous

A. **Jurisdiction – Circuit Court v. Youth Court –** *Meadows v. State*, Nos. 2015-KA-01432-COA & 2015-KA-01525-COA, 217 So. 3d 772 (Miss. Ct. App. Feb. 14, 2017). Crews and Meadows were indicted in circuit court for heat-of-passion manslaughter after they killed Crews's mother's boyfriend by beating him with their fists and strangling him. Both Crews and Meadows were seventeen years old at the time. Both were convicted of manslaughter following a jury trial. In a case involving a minor, the circuit court has original jurisdiction if the offense is punishable by life imprisonment or death or if the offense was committed with the use of a deadly weapon. *See* MS Code 43-21-151. Otherwise, the youth court has exclusive original jurisdiction. As this case was not punishable by life imprisonment or death and did not involve a deadly weapon, the youth court had original jurisdiction. The COA held that the convictions had to be reversed because the circuit court lacked jurisdiction. The COA also rejected the State's suggestion that, on remand, the youth court could conduct a "retrospective" transfer hearing to determine whether it would have transferred the case to circuit court had such a transfer been requested prior to trial.

B. **Sleeping jurors** – *Bush v. State*, No. 2016–KA–00648–COA, 222 So. 3d 326 (Miss. Ct. App. June 6, 2017). Defendant waived objection to sleeping jurors by not requesting that they be removed from the jury.

C. **Juror's communications with defendant's fiancé requires a new trial -** Murry v. State, 2015–KA–01811–COA, 218 So. 3d 303 (Miss. Ct. App. Apr. 18, 2017). Juror conversed with defendant's fiancé outside the courthouse and later called and texted her. Juror and fiancé had very different versions of whom approached whom and the nature of their communications. Trial judge denied defendant's motion for a new trial following a hearing where the juror and the fiancé both testified. COA held, 6-4, that trial judge abused his discretion by denying a new trial.

D. *Wilcher v. State*, No. 2015-KA-01008-SCT, 2017 WL 1091682 (Miss. Mar. 23, 2017) (affirming conviction for "retaliation" against a public servant based on harm to deputy's reputation resulting from false rape allegations; holding that the statute, Miss. Code § 97-9-127, was not unconstitutionally vague).

E. *Colburn v. State*, No. 2014–KA–01368–SCT, 201 So. 3d 462 (Miss. Aug. 11, 2016) (holding that the Vulnerable Persons Act was not unconstitutionally vague).

F. Circuit judge improperly proceeded with trial in absentia; COA reverses (7-3) and remands for a new trial. *Haynes v. State*, No. 2015–KA–00683–COA, 208 So. 3d 4 (Miss. Ct. App. Feb. 13, 2016)

G. COA holds that City's failure to file a brief on appeal warranted reversal of a DUI conviction. *Webber v. State*, No. 2014–KM–01800–COA, 197 So. 3d 926 (Miss. Ct. App. Aug. 9, 2016) (6-4 decision).