

**SYNOPSIS OF CRIMINAL OPINIONS IN THE COURT OF APPEALS OF THE STATE  
OF MISSISSIPPI HANDED DOWN MAY 24, 2016**

*Carl Lee Jordan v. State*, No. 2014-KA-00489-COA (Miss.Ct.App. May 24, 2016)

**CASE:** Aggravated Assault

**SENTENCE:** 15 years, with a consecutive 5 year use of a firearm enhancement

**COURT:** Harrison County Circuit Court

**TRIAL JUDGE:** Hon. Lawrence Paul Bourgeois, Jr.

**APPELLANT ATTORNEY:** Michael W. Crosby

**APPELLEE ATTORNEY:** Laura Hogan Tedder

**DISTRICT ATTORNEY:** Joel Smith

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

**ISSUE:** Whether the trial judge erred in excluding evidence of the victim's prior violence and threats against the defendant's girlfriend/fiancé.

**FACTS:** On December 10, 2011, Carl Jordan shot David Carter during an argument. Carter had his three children for visitation, and took them to his girlfriend's house. His ex-wife, Tanya, disapproved of this and came to Carter's girlfriend's house and demanded the children back. Carter refused. The two had divorced several months prior, but they had been separated for several years. At one point she reached for a pistol inside her purse. She eventually left. Later that night, Carter claimed he went out to his truck to get some things for the children, and he saw Tanya and Jordan, who was Tanya's boyfriend (or fiancé, depending on the testimony), coming down the sidewalk. He claimed they were intoxicated. Again, they demanded the children. Carter tried to talk to Tanya, but Jordan aggressively tried to intercede. Tanya started laughing and handed her pistol to Jordan. Jordan then fired on Carter, as Tanya yelled "no!" Carter turned to run when Jordan pointed the gun at him, but he was hit twice in the buttocks. He made it to a neighbor's house, who was watching the altercation. The neighbor testified at trial and largely confirmed Carter's account. Jordan and Tanya claimed Carter had a gun in his waistband. They were in the neighborhood to help a relative and Carter starting yelling at them. When Carter reached for his gun, Jordan took Tanya's pistol from her purse, and fired several warning shots at Carter. When Carter started to point his gun at Jordan, Jordan shot at Carter. The trial judge did not allow Tanya to testify about Carter's threats, physical abuse, and intimidation she suffered at Carter's hands during their marriage, separation, and divorce. It was excluded as inadmissible character evidence, and was too remote to be relevant. Jordan was convicted and appealed.

**HELD:** Jordan proffered Tanya's testimony about Carter's prior threats and actions. Carter had held knives and screwdrivers to her neck and choked her. He boasted he was not afraid of going to prison because he had already been there. Carter had been violent with his coworkers, leading to him being

required to attend therapy – where, with Tanya present, he admitted he had tried to kill her. He also admitted he had access to weapons. Tanya testified that Jordan was aware of these incidents. She also claimed Carter and his brother were members of a gang.

The State’s brief did not address the remoteness issue. MRE 404(a)(2) allows victim character evidence in support of self-defense. Further, MRE 405 allows proof of specific instances of conduct in cases where character is an essential element of a charge, claim, or defense. “A finding that some of the incidents were too remote for non-character purposes under Rule 404(b) does not equate to a finding that the incidents were too remote to evidence Carter's character under Rule 405.”

The trial judge erred in refusing to allow this evidence. It was not harmless. The evidence was sharply conflicting, essentially amounting to a swearing match between Carter and his neighbor and Jordan and Tanya. Accordingly, the defendant was denied a fair trial.

To read the full opinion, click here:

<https://courts.ms.gov/Images/Opinions/CO112674.pdf>

***Trevioun Lamont Cornelius Briggs v. State***, No. 2015-KA-00016-COA (Miss.Ct.App. May 24, 2016)

**CASE:** Robbery and Tampering with a Witness

**SENTENCE:** 15 years for the robbery, and a consecutive 2 years for witness tampering

**COURT:** Madison County Circuit Court

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

**APPELLANT ATTORNEY:** Justin T. Cook

**APPELLEE ATTORNEY:** Jeffrey A. Klingfuss

**DISTRICT ATTORNEY:** Michael Guest

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

**ISSUES:** (1) Whether the circuit court erred by not properly instructing the jury regarding the case being circumstantial; (2) whether his counsel was constitutionally ineffective for failing to request a proper circumstantial-evidence jury instruction; (3) whether the indictment for witness tampering was flawed; (4) whether the evidence was insufficient to convict him of witness tampering; and (5) whether the two charges are subject to reversal for retroactive misjoinder.

**FACTS:** In December 2013, a woman was walking through the parking lot of the mall carrying her two-year-old son and several shopping bags. As the woman opened her car door and placed the packages inside, a man came up from behind and hit her in the head. The man stole the shopping bags and ran away. The woman identified her attacker as a black male wearing "a reddish colored sweater." Shortly thereafter, police and mall security were alerted by one of the stores inside the

mall that a man was attempting to return several of the stolen items in question. Trevioun Briggs was arrested as he attempted to obtain a refund for one of the victim's stolen items. After he was apprehended, the other stolen items were found in Briggs's vehicle, along with an orange-colored sweater. In addition to being identified by mall store clerks, the mall security videos also showed Briggs inside the mall with the victim's packages as he entered various stores in attempts to return the stolen goods for cash. Briggs was charged with robbery, and placed in the Madison County Jail. While incarcerated, Briggs made numerous phone calls, asking several people to help him with an alibi. He was also charged with witness tampering. Briggs represented himself at trial with the help of appointed counsel. He was convicted of both charges and appealed.

**HELD:** (1) Briggs asserts that both the circuit court and his counsel erred by failing to provide a proper circumstantial-evidence jury instruction. However, at trial, the court made a comment that he did not think this was a circumstantial case, but asked if Briggs or counsel wanted to put anything on the record regarding that. Neither did so. Therefore, the claim is procedurally barred.

(2) There was nothing in the record to indicate ineffective assistance of counsel regarding the circumstantial evidence instruction. The COA declined to review the issue on direct appeal.

(3) Briggs's indictment for witness tampering under §97-9-115 was sufficient. The indictment read, in part, that Briggs attempted to induce "a witness or a person he believed may be called as a witness against him [to provide him with a false alibi.]" Briggs claimed that since the statute prohibits the inducement of a witness the defendant "believes will be called as a witness," the people he called were not witnesses.

The record reflects that Briggs contacted a woman and asked her to fabricate an alibi for him during the times in which he was not seen on the mall video. The fact that he was requesting that someone provide him with an alibi would most certainly make that person a witness in the case.

(4) The evidence was also sufficient for the witness tampering charge. The transcripts of the calls make it clear Briggs was not requesting help in proving a truthful alibi.

(5) Having found that Briggs was, in fact, properly charged with and convicted of witness tampering, Briggs's argument of retroactive misjoinder is without merit. The charges of robbery and witness tampering were properly joined and adjudicated.

To read the full opinion, click here:

<https://courts.ms.gov/Images/Opinions/CO112310.pdf>

***George J. Strickland v. State***, No. 2014-KA-01815-COA (Miss.Ct.App. May 24, 2016)

**CASE:** Manslaughter

**SENTENCE:** 20 years with 5 suspended and 5 years PRS

**COURT:** Lowndes County Circuit Court

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

**APPELLANT ATTORNEY:** Benjamin Allen Suber

**APPELLEE ATTORNEY:** Abbie Eason Koonce

**DISTRICT ATTORNEY:** Forrest Allgood

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

**ISSUES:** (1) Whether he was entitled to an acquittal under *Weathersby*, and (2) whether the manslaughter verdict was against the overwhelming weight of the evidence.

**FACTS:** George Strickland (Strickland) and his wife, Patricia, had been separated for a number of years. Patricia and her boyfriend, Christopher George (George), lived in Birmingham. However, according to the terms of George's parole, he was supposed to remain in Lowndes County. So Patricia and George would stay at Strickland's house for a few days every month to allow George to check in with his parole officer. On January 31, 2011, Patricia and George had been staying at Strickland's house. According to Strickland, Patricia and George had taken his 1968 Firebird earlier that day, and they planned on taking his four other cars as well as his trailer park, land, shop, tools, equipment, Rolex, and house. As Strickland was leaving the house that day, he put his .38 revolver in his pocket. He gave police several reasons for doing so. Strickland said he had an argument with Patricia and George, and they told him to "get the f\*\*\* out the house." Later, Strickland found George with a box containing his 12-volt car lights. Strickland said he confronted George about the lights, and George attacked him. Strickland claimed he shot George in self-defense. George was shot four times. Strickland claimed Patricia came at him with a baseball bat or a knife, and he fired a warning shot at her. Strickland later stated that he did not remember shooting at Patricia. Strickland was convicted of the lesser included offense of manslaughter in George's death, and found not guilty of the aggravated assault of Patricia. He appealed.

**HELD:** (1) Strickland claimed he was entitled to an acquittal under the *Weathersby* rule. However, Strickland failed to specifically argue the *Weathersby* rule before the trial court as a ground for a directed verdict. The claim is procedurally barred. Regardless, the evidence was sufficient to support the verdict. Strickland's version of the shooting was not credible. He repeatedly contradicted himself throughout his police interview, changing his story multiple times with regard to why he placed the gun in his pocket and whether he fired a bullet at Patricia. He also admitted anticipating the altercation.

(2) Strickland admitted he had been arguing with Patricia and George right before the altercation. They had taken his car and told him they were planning on taking more of his belongings as well as his house. The jury could have found that Strickland was provoked after finding George with his box of 12-volt car lights, especially after the previous arguments. Furthermore, Strickland also told several people that he caught Patricia and George having sexual intercourse, which could also have led the jury to find him guilty of manslaughter.

To read the full opinion, click [here](#):

<https://courts.ms.gov/Images/Opinions/CO112433.pdf>

***Sheral Lee Smith v. State***, No. 2014-CA-01285-COA (Miss.Ct.App. May 24, 2016)

**CASE:** PCR – Statutory Rape x4

**SENTENCE:** 20 years, with 13 years suspended and 7 years to serve on each count, with the sentences to run concurrently

**COURT:** Rankin County Circuit Court

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

**APPELLANT ATTORNEY:** William B. Kirksey, Nathan H. Elmore, Bruce L. Barker

**APPELLEE ATTORNEY:** Barbara Byrd

**DISPOSITION:** Denial of PCR Affirmed. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Carlton, Fair, James, Wilson and Greenlee, JJ., Concur.

**ISSUES:** (1) Whether the trial court erred in not granting an evidentiary hearing, and (2) whether Smith received ineffective assistance of counsel.

**FACTS:** In 2008, Sheral Smith was indicted on four counts of statutory rape after it was discovered that she had sex with her son's 14-year-old friend at the boy's home and at her own home between June 2008 and August 2008. She was evaluated at Whitfield, and Dr. Reb McMichael initially found she was likely not competent, but he requested further evaluation. He later found she was not suffering from any mental illness but was faking numerous conditions, including memory impairment. Dr. McMichael was the only expert to testify at the competency hearing. Several opinions from other psychologists were introduced, all of which indicated that Smith was mentally ill and unfit to stand trial. Smith's husband, James Steven Smith, testified that after Smith fell and hit her head, she did not understand what was happening around her. Smith appeared to have trouble remembering certain events. The circuit judge determined that Smith appeared to have "selective memory," and found her competent to stand trial. She subsequently pled guilty instead of going to trial. Several witnesses later testified Smith's attorney, John Collette, promised that Smith would be out before she served the whole 7 years. During the plea, the circuit judge emphasized that Smith would have to serve seven years, and that sex offenders were not eligible for early release. Smith later filed a PCR claiming ineffective assistance of counsel. The petition was denied and she appealed.

**HELD:** (1) The circuit judge reviewed the transcripts from Smith's guilty-plea hearing, her sentencing hearing, and her competency hearing, as well as her criminal file, and determined that an evidentiary hearing was not necessary. Smith's allegations regarding the misinformation she allegedly received from Collette did not go uncorrected. The circuit judge stated on the record to Smith that she would not be eligible for earned time or for early release after she was sentenced.

(2) Smith presented affidavits with varying testimonies regarding Collette's alleged faulty advice. Likewise, Smith contends that she was not fully aware of the sentence to which she was pleading.

Nonetheless, the transcript of the plea hearing shows that Smith was advised by the trial court of the exact terms of her sentence. The plea petition also outlined the proper terms of her sentence. The circuit judge specifically stated that Smith would not be eligible for time-served credit since the crime for which she was being convicted was a sex crime. Smith clearly indicated that she understood the terms of the plea and accepted them. She also indicated that she had no complaints or problems with her counsel and that she was fully satisfied with his services. Smith was facing up to 120 years in prison since each of the four counts carried a maximum of thirty years.

To read the full opinion, click here:

<https://courts.ms.gov/Images/Opinions/CO112278.pdf>

*David Adams v. State*, No. 2014-CP-01508-COA (Miss.Ct.App. May 24, 2016)

**CASE:** PCR – Armed Robbery x3

**SENTENCE:** 15 years with 6 to serve, 9 years suspended, and 5 years of supervised probation on each court to run concurrently

**COURT:** Madison County Circuit Court

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

**APPELLANT ATTORNEY:** David Adams (Pro Se)

**APPELLEE ATTORNEY:** Alicia Marie Ainsworth

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

**ISSUES:** (1) Whether he understood his rights during the revocation hearing; (2) whether the trial court failed to inquire as to his failure to pay fees and court costs; (3) whether he was denied a preliminary hearing; and (4) whether his sentence was unconstitutional.

**FACTS:** In 2005, David Adams pled guilty to three counts of armed robbery. After serving six years in custody, he was released on supervised probation. In September 2013, MDOC filed a petition alleging Adams violated his probation by failing to report to his probation officer and to pay fees and court costs. Adams signed a waiver of his right to a preliminary probation-revocation hearing. On November 14, 2013, a formal revocation hearing was held. Adams admitted to violating his probation by failing to report and pay fees and court costs. Adams stated under oath that he failed to report because he was under the influence of illegal drugs. The trial court revoked Adams's probation and ordered him to serve his remaining nine years. Adams subsequently filed a PCR, which the trial court denied. He appealed.

**HELD:** The COA first noted that Adams's motion was procedurally barred since it did not contain a "separate statement of the specific facts which are within the personal knowledge of the petitioner and . . . sworn to by the petitioner," as required by §99-39-9(1)(d). Regardless, the Court addressed his claims.

(1) Adams first argued that due to medical issues, he was not fully cognizant of his rights during the revocation. However, Adams offered no support for his claim that his medical issues (drug abuse and withdrawal symptoms) affected his ability to understand the proceeding. Adams was also not entitled to an attorney. First, he did not request one. Second, the issues were not difficult or complex. Adams admitted he violated his probation.

(2) Adams claimed the trial court erred by not inquiring as to why Adams failed to pay fees and court costs. However, Adams admitted to another parole violation – failure to report – so the revocation was not based solely on his failure to pay fines.

(3) Adams signed a waiver of his right to a preliminary probation-revocation hearing. Additionally, Adams was afforded all the necessary due-process safeguards associated with his final revocation hearing and has not shown any prejudice resulting from the failure to hold a preliminary hearing.

(4) Adams also briefly states that his parole violations were "technical"; thus, the imposition of a nine-year sentence was cruel and unusual punishment. However, at the time Adams's parole was revoked (pre-HB 585), it was within the trial court's discretion to revoke and reinstate a defendant's entire suspended sentence.

To read the full opinion, click here:

<https://courts.ms.gov/Images/Opinions/CO112434.pdf>

***Tracey Rushing v. State***, No. 2015-CP-00036-COA (Miss.Ct.App. May 24, 2016)

**CASE:** PCR – Sale of Cocaine

**SENTENCE:** 30 years

**COURT:** Madison County Circuit Court

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

**APPELLANT ATTORNEY:** Tracey Rushing (Pro Se)

**APPELLEE ATTORNEY:** Abbie Eason Koonce

**DISPOSITION:** Denial of PCR Affirmed. Wilson, J., for the Court. Griffis, P.J., Carlton, Fair and Greenlee, JJ., Concur. Lee, C.J., Dissents with Separate Written Opinion, Joined by Irving, P.J., Barnes, Ishee and James, JJ.

**ISSUE:** Whether the trial judge erred in failing to apply the new sentencing provisions of §41-29-139, effective on the date of his plea, but not on the date of the offense.

**FACTS:** On August 29, 2013, Tracey Rushing sold approximately one tenth of a gram of crack cocaine to a CI working with the Ridgeland Police. The informant met Rushing at the Red Roof Inn just north of County Line Road in Ridgeland and gave him \$40 for the cocaine. Rushing was arrested and indicted for selling "a quantity of Cocaine" in violation of §41-29-139. On June 23, 2014, Rushing filed a petition to plead guilty. In his petition, Rushing acknowledged that his plea

was an open plea and that the maximum sentence was 30 years. In the petition, Rushing's attorney took the position that he should be sentenced pursuant to the version of §41-29-139, amended by HB 585, effective July 1, 2014. However, the State's position was that he should be sentenced under the statute as it read at the time of his offense. Given the amount sold by Rushing, his maximum sentence would be 8 years under the new law. Rushing's plea hearing was held on July 7, 2014. The circuit judge advised Rushing that he agreed with the State that the amendments in HB 585 did not apply to offenses committed prior to the bill's effective date, so he would sentence Rushing under the statute as it read at the time of Rushing's offense. Rushing confirmed that he understood the court's position and still desired to plead guilty, and the court accepted Rushing's plea. The court, basing his decision on Rushing's prior record, sentenced him to 30 years. Rushing filed a PCR which was denied. He appealed.

**HELD:** This exact issue was recently decided by the COA in *Wilson v. State*, No. 2014 KA-01478-COA (Miss. Ct. App. Mar. 22, 2016). Although Rushing is slightly different, in that the exact amount of cocaine sold was alleged at the plea hearing, the COA denied relief.

...[W]e cannot retroactively apply the amendments to sentences without also retroactively applying the amendments to the elements of the offenses. For a defendant convicted of selling cocaine, we cannot determine which new sentencing range would apply without first determining how much cocaine the defendant sold. In most cases, this would require this Court to engage in impermissible appellate fact-finding.

A defendant cannot benefit from new, more lenient sentences provisions, if the statute also changed the elements of the offense, which the Legislature did by requiring the State to prove the amount of cocaine sold in the statute's amendment. Although the amount sold is known in this case, it does not obviate the need to retroactively apply the amendments related to the elements of the offenses under the statute, which is not permitted under §99-19-1 and Mississippi case law.

To the extent that the circuit judge has discretion in imposing a sentence in a particular case, the judge certainly *may* impose a sentence based on House Bill 585's new quantity-based sentencing structure. But the judge is not *required* to do so. Accordingly, the circuit judge's denial of Rushing's PCR motion is affirmed. [emphasis supplied].

**Lee, C.J., Dissenting:**

Chief Judge Lee believed the HB 585 amendments should apply in this case since the weight of the substance was known and introduced to the trial court through the factual basis for the plea.

To read the full opinion, click here:

<https://courts.ms.gov/Images/Opinions/CO113448.pdf>



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