Synopsis of the criminal opinions by the Mississippi Court of Appeals on April 8, 2008.

Vickers v. State, No. 2006-KA-01711-COA (Miss.App. April 8, 2008)

CRIME: Capital Murder, Aggravated Assault, Conspiracy to Commit Capital Murder, and Possession of a Firearm by a Convicted Felon
DECISION: Affirmed
COUNTY: Washington
MAJORITY: Roberts (Barnes concurs in part and in result only; Carlton not participating)

FACTS: James Dwight Vickers, Sr., was convicted of the capital murder of his brother David, the aggravated assault of David's wife, Brenda, two counts of conspiracy to commit capital murder, and of being a felon in possession of a firearm. The jury could not reach a unanimous verdict during sentencing, so Vickers was sentenced to life without parole, plus a total of 20 additional years. The State presented evidence that in the fall of 2001, Vickers tried to hire several people to kill his brother and his brother's wife. On January 12, 2002, David and Brenda Vickers were attacked in their Greenville home. David was shot and killed and Brenda was shot and wounded in the abdomen. She was able to get to a neighbor's house for help. Charles Allen testified Vickers tried to hire him in September of 2001. He went to police and agreed to continue to meet Vickers. Vickers told him he wanted David killed because of a dispute over their father's will. Allen went back to police to report what Vickers said, but was arrested on some outstanding fines. Vickers later paid him $2,000 but he did not return to police or meet with Vickers again. Daniel Spencer and James Woodruff also testified Vickers paid them money to kill David and Brenda. After several weeks of planning and unsuccessful attempts, Vickers allegedly hire Jerome Booth to commit the murders. Woodruff and Spencer were to help Booth secure a getaway car. Vickers also wanted them to kill Booth after the job was completed. Woodruff and Spencer both identified Booth as the shooter. Phone records revealed Vickers called Booth's employer several times on the morning of the murder. He also had several calls between Woodruff and Spencer. Police also found David's wallet, allegedly taken during the shooting, in a subsequent search of Vickers's home several weeks after the murder. Woodruff and Spencer also claimed Vickers provided them with 3 different weapons to carry out the murder. Two of these weapons were later recovered from Vicker's girl-friend's house. They were registered to her. Two other witnesses testified they heard Vickers threaten to kill David.

HELD: The evidence was sufficient to support the capital murder verdict and was not against the weight of the evidence. Booth did not testify. Vickers claimed there was not direct evidence proving he paid Booth anything to kill David. However, both Woodruff and Spencer testified Vickers told them he had found someone else to do the job. Vickers told them he had hired and paid Booth. Woodruff and Spencer saw Booth in David's yard immediately before the murder. They saw Booth get into Vickers's truck after the murder. Although having no business relationship with Booth's employer, Vickers called there three times on the day of the murder. The evidence was also sufficient to prove the aggravated assault against Brenda.

==>The evidence was sufficient to show Vickers conspired with Spencer to commit the murder. Although Spencer testified he never intended on actually committing the murders, he did testify as to his involvement in the attempts to murder David and Brenda. He scouted their home and arranged for Vickers to meet Woodruff. The jury could have discounted his claim he never intended to kill anyone.

==>The evidence was sufficient to show Vickers conspired with Woodruff to commit the murder. Woodruff testified it was not in his nature to kill and could not go through with it. The fact that an individual can not complete a crime is immaterial to whether or not a conspiracy existed. Vickers was guilty of conspiracy the moment he and Woodruff came to an understanding regarding the murder.

==>The evidence was also sufficient to show Vickers possessed a firearm. Spencer and Woodruff both testified that Vickers was in possession of no less than 3 pistols. It was up to the jury whether or not to believe them.

==>There was no error granting an instruction that stated Vickers could be convicted of possession of a firearm if he possessed a .38 pistol, a .22 pistol, or a 9mm pistol. However the jury was also instructed that they must determine that the pistol they have unanimously determined he possessed was capable of being fired. Additionally, the instruction was sufficient even though no specific dates were included on when Vickers supposedly possessed the firearms.

==>Vickers was not subjected to double jeopardy by being convicted of both capital murder for hire and conspiracy to commit capital murder. This might have been the case had Vickers been charged with conspiracy with Booth. However, the two counts of conspiracy regarding Woodruff and Spencer require additional proof besides the hiring of Booth. After Booth was hired, Woodruff and Spencer were offered more money to assist Booth. The crimes did not merge.

==>The trial judge did not err in refusing to allow Vickers to cross-examine Allen on a 26 year old conviction for burglary, as well as several other arrests that did not result in conviction. Vickers claimed the conviction and arrests were probative to prove Allen had worked as an informant for the State for years. Vickers failed to show the probative value of this evidence. There was never any evidence presented that Allen received favorable treatment by the State.

==>The trial judge did not err in failing to grant a new trial based on juror misconduct. Vickers claimed three jurors failed to truthfully answer questions, causing him to not to use challenges on them. One juror stated on her questionnaire that she had once been assaulted by a juvenile, yet did not answer in voir dire that she had been a victim of a violent crime. The juror explained she thought counsel meant a crime like murder. Another juror stated on his questionnaire that he had been a witness in a criminal prosecution, yet during voir dire stated he did not know the prosecutors. The juror explained he thought was asking if he had a professional or personal relationship with them. Finally, a third jurors failed to indicate until after trial that he knew one of the State's witnesses, Charles Allen. The juror explained he recognized Allen after he saw him, but did not tell this to the

court. The juror explained only know Allen well enough to say hello and he was not a friend. The trial judge did not err in finding Vickers suffered not prejudice for the jurors' responses.

==>Vickers was not prevented from presenting a meaningful defense by various evidentiary ruling. There was no error in preventing Brenda from being crossed on the status of Vickers' father's estate. The court stated the issue could be revisited if the proper predicate was laid. There was no error in failing to allow Brenda to be cross-examined on her statements to law enforcement while under hypnosis. The hypnotic statements were not admissible under MRE 613(b).

==>There was no error in preventing the defense from asking an investigator if Woodruff first identified Brenda as the person who hired him to kill David. This was hearsay. Regardless, Woodruff testified that he did initially tell a detective Brenda had hired him.

==>There was no error in preventing the defense from asking an investigator why Woodruff was never charged with being a felon in possession of a firearm. The record reveals the defense was not prohibiting from asking this. Regardless, the investigation does not have the discretion to determine what charges are brought against a defendant.

==>There was no error prohibiting the defense from questioning a former employee of Vickers about the civil suit involving his father's estate. Although the State did object, the witness was questioned about the case. The defense was also allowed to ask Brenda about the wrongful death suit she filed against Vickers in David's death. Finally, counsel withdrew his question to a witness about who the executor of David's estate after the State objected to the question. Therefore there is no error to review.

==>There was no cumulative error.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO47381.pdf

Downing v. State, No. 2007-KA-00263-COA (Miss.App. April 8, 2008)

CRIME: Sale of Cocaine
DECISION: Affirmed
COUNTY: Coahoma
MAJORITY: Chandler

FACTS: Milton Downing was convicted of sale of cocaine, and was sentenced to 10 years, with 5 suspended to be served on supervised probation. Downing was arrested and charged with sale of cocaine to an undercover agent with the North Central Mississippi Narcotics Task Force. On August 30, 2006, pursuant to an undercover operation, Agent Bobby Walker drove around Clarksdale in an unmarked car. Inside the car was a soda can equipped with a hidden camera that recorded video, but not sound. Agent Walker came across a man on the street, stopped his car, and asked the man if he

could buy some "hard," otherwise known as crack cocaine. The man got into the car's passenger seat and directed Agent Walker to drive to a residence in Clarksdale. The man exited the car and returned with a substance that appeared to be crack cocaine. Agent Walker gave the man $40 in cash in exchange. Agent Walker dropped the man off at an unknown location and secured the substance inside an evidence bag. The Crime Lab determined the substance was .2 gram of crack cocaine. The videotape was played for the jury. A Clarksdale police officer identified the man shown on the videotape as Downing. Agent Walker identified Downing in court as the man from whom he had purchased cocaine. Downing testified, denying that he was the man who appeared on the videotape. Downing maintained that he was elsewhere in Clarksdale at the time the crime allegedly occurred.

HELD: The trial judge did err in allowing the cocaine into evidence. Downing argued that the State had failed to establish a proper chain of custody. There was sufficient evidence to enable a reasonable jury to conclude beyond a reasonable doubt that the bag of cocaine admitted as the State's exhibit was that substance sold by Downing to the agent. The agent pointed out his initials on the bag, the case number, and his seal. Though he initially was mistaken about which agent carried the substance to the lab, the State established through the lab report and the agent's subsequent testimony which agent carried the substance to the lab.

==>The evidence was sufficient to support the verdict. Downing claimed that, due to the inadequacy of the agent's identification of him as the person who sold the cocaine, the jury was bound to accept Downing's conflicting testimony that he was elsewhere in Clarksdale at the time of the cocaine sale. However, another officer indicated that he had a high degree of familiarity with Downing, stemming from numerous encounters with him, and testified that Downing was the person on the videotape. The totality of the evidence supporting Downing's identification as the cocaine seller was sufficient to enable a rational jury to conclude he was that person.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO47375.pdf

Fryou v. State, No. 2007-KA-00635-COA (Miss.App. April 8, 2008)

CRIME: Capital Murder
DECISION: Affirmed
COUNTY: Harrison
MAJORITY: Chandler

FACTS: Victor Lowell Fryou was convicted of capital murder while in the commission of a robbery, and was sentenced to life without parole. On the morning of August 20, 2005, Fryou went to the residence of the victim, Patrick Devriendt. While there he proceeded to stab and cut the victim 57 times before driving off in the victim's truck and allegedly taking his wallet and $1,000 cash. Fryou admitted to killing Devriendt, but he claimed it was in self-defense or that he was provoked by comments Devriendt made about Fryou's girlfriend, Aubrey Newsome. During the fight, Devriendt was slamming Fryou's head into the kitchen floor. Fryou claimed that he found a knife on the floor

and began stabbing Devriendt in self-defense. Fryou claimed he blacked out and did not remember any of the fight. He said the next thing he remembered was standing over Devriendt's dead body. However Fryou told police that he swung at Devriendt twice and he tried to hold him down on the floor. Fryou testified that throughout the fight, Devriendt tried to get the knife from him. He told police that when Devriendt finally fell down by the wall, he stabbed him in the back a couple more times to make sure he did not get up. Fryou also admitted to police he took Devriendt's wallet and truck. Fryou also told his girlfriend, Newsome, that he had killed Devriendt. Newsome believed Fryou killed Devriendt because she had sex with Devriendt while Fryou was in jail in order to get bond money for Fryou.

HELD: The trial judge did not err in refusing an instruction on simple murder. Fryou admitted on the stand that he killed the victim and took his truck. Even though he later denied it, following Fryou's arrest, he told police officers that he took the victim's wallet. Officers later found the wallet buried in Fryou's sister's yard after Fryou told them where he buried it. There was no evidence that would have allowed a jury to convict Fryou of simple murder and not find capital murder.

==>The trial judge did not err in refusing a manslaughter instructions. Mere words, no matter how provocative, are insufficient to reduce an intentional and unjustifiable homicide from murder to manslaughter. The only evidence Fryou cites to support heat of passion was a single comment by Devriendt after Fryou told him that he left Newsome. Fryou claims it was after Devriendt allegedly made the derogatory remark that Fryou began to attack him. This evidence would not have allowed the jury to find manslaughter. Fryou killed the victim while engaged in a robbery. Therefore, his intent in killing him was irrelevant.

==>The trial judge did not err in denying the defense's requested *Weathersby* instruction. Fryou claimed that because there was no one else in the trailer when he killed the victim who could contradict his version of events. *Weathersby* is inapplicable if the defendant's account is merely contradictory or if the defendant's conduct and statements following the killing are inconsistent with his version of the events as recounted at trial. Fryou's statements to police officers following his arrest were clearly inconsistent with his testimony at trial, so *Weathersby* was inapplicable.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO47323.pdf

McGregory v. State, No. 2006-KA-01698-COA (Miss.App. April 8, 2008)

CRIME: Simple Assault on a LEO and Aggravated Assault on a LEO
DECISION: Affirmed
COUNTY: Hinds
MAJORITY: King (Irving and Barnes concur in result only)

FACTS: Willie McGregory, Jr. was found guilty of three counts of simple assault on a LEO and one count of aggravated assault on a LEO. He was sentenced to 5 years on each of the simple assault

counts and 30 on the aggravated assault count. On May 18, 2005, McGregory had recently returned from a gun show when he was pulled over for speeding. Officer Billy Sanders requested McGregory's driver's license. Sanders began to write citations for an expired tag, speeding, and no insurance. Sanders also discovered that McGregory had two outstanding warrants. Sanders informed McGregory of the outstanding warrants and placed him under arrest. Sanders testified that he extended to McGregory the courtesy of calling someone to retrieve his car. Initially, McGregory was cooperative and appeared to be talking on his cell phone, but shortly thereafter, he attempted to drive away. McGregory drove his car toward the police car, almost hitting Sanders. As McGregory was accelerating past, Sanders drew his weapon and fired a single shot at McGregory's vehicle. He attempted to pursue, but he was not able to apprehend McGregory. McGregory was spotted later and officers tried to pull him over. McGregory testified that he went home to get the mace off his face and pick up his semi-automatic assault rifle. Officer Willie Allen followed McGregory, who stopped in the middle of the street, exited the vehicle, and pointed an assault rifle in Officer Allen's direction. Lying down on the front seat, Officer Allen put his vehicle in reverse and sped backward to avoid the possibility of being shot. Police continued to pursue McGregory as he stopped at a tire shop and went into the building. There was an exchange of fire between McGregory and officers of the Jackson PD, including Officers Lee Robinson, Walton McJordan, and Charles Banks. The gun battle ceased when McGregory was struck by a bullet and injured.

HELD: The trial judge did not abuse his discretion by excluding two defense witnesses (his mother and his girlfriend) that were not disclosed in discovery. McGregory claims that the trial court should have granted a continuance, and the decision to exclude the witnesses effectively shut down his self-defense claim. However, McGregory was still able to put forth his own testimony in support of his self-defense claim. The trial court believed this discovery violation was an attempt to gain a tactical advantage.

==>McGregory failed to object to the trial court decision to grant several court's instructions which contained a lesser-included offense instruction of simple assault. McGregory claimed he would have been found not guilty if the lesser included instruction had not been given. However, since he did not object, McGregory is procedurally barred from raising this issue on appeal.

==>McGregory was not denied his right to a fair trial before an impartial jury. The determination of whether a juror is fair and impartial is a judicial question. Two jurors stated that they would follow the law, fairly consider the evidence, and would not prejudge the issues. McGregory did not challenge these jurors. McGregory did challenge a third juror who voiced her thoughts about self-defense against law enforcement. However, she later stated that she would be able to follow the law.

==>The evidence was sufficient to support the verdict. Testimony was provided that the officers were acting within the scope of their employment when they responded to the tire shop and set up a perimeter around the building. The officers testified that McGregory shot at them. An investigator collected seventeen 7.62 x 39 mm spent cartridges from the crime scene. These were the same type of cartridges that McGregory had outside of the tire shop.

==>McGregory was not denied effective assistance of counsel. The record does not give the unquestionable impression that McGregory's counsel was ineffective. There is no basis to hold that the trial court should have sua sponte found that McGregory's counsel was constitutionally ineffective. He can raise the matter again on PCR.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO48098.pdf

Stroud v. State, No. 2006-CP-01908-COA (Miss.App. April 8, 2008)

CRIME: PCR – Aggravated Assault, Possession of a controlled substance, and Possession of a Firearm by a Felon
DECISION: Denial of PCR affirmed
COUNTY: Jackson
MAJORITY: Roberts

FACTS: Bennie Stroud, Jr. pled guilty in March of 1997 to the charges of aggravated assault, possession of a firearm by a felon, and two counts of possession of a controlled substance. Stroud filed a PCR in October of 1997 which was denied. Stroud filed an appeal, but it was dismissed because it was filed more than 30 days after the court's judgment. Stroud filed another PCR in February of 2006. This motion was denied as time barred. Stroud appealed.

HELD: The trial judge did not err in denying Stroud's PCR. Stroud's PCR is both time barred and successive writ barred.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO47379.pdf

Owens v. State, No. 2007-CA-00153-COA (Miss.App. April 8, 2008)

CRIME: PCR – Armed Robbery and Aggravated Assault
DECISION: Denial of PCR affirmed
COUNTY: Harrison
MAJORITY: Barnes (Roberts concurs in result only)

FACTS: Charles Douglas Owens pled guilty to one count of armed robbery and one count of aggravated assault for robbing and shooting his employer. Owens was sentenced on March 13, 2003 to 30 years for the armed robbery and a consecutive 10 years for the aggravated assault. The State had recommended a total of 25 years. He filed a motion to reconsider or in the alternative a motion to withdraw his guilty plea, but apparently no ruling was ever entered. On February 2, 2006, Owens filed a PCR. Owens claimed the judge failed to consider his completion of various Bible studies and that he had become an ordained minister in prison. Owens also claimed his plea was involuntary and that the court failed to abide by the plea agreement. The court denied relief, ruling some documents

were dated after his sentencing and some should have been presented at sentencing. The court also found even if submitted, it would not have resulted in a different sentence.

HELD: The trial judge did not err in denying relief without an evidentiary hearing. Owens knew that trial judge was not bound by the State's recommendation because it was clearly stated in his petition to plead guilty. His sentence was within statutory guidelines.

==>Owens's claim that he detrimentally relied upon the prosecution's recommendation of 25 years is without merit. There was nothing in the trial judge's remarks during his plea that could have led Owens to believe that the judge was going to follow the State's recommended sentence.

==>Owens's guilty plea was voluntary. The transcript from Owens' plea hearing clearly shows that he testified under oath that he had read and understood his guilty plea petition, which stated that the trial judge was not required to follow the State's sentencing recommendation. The transcript also shows that Owens was told the maximum and minimum sentences that he could receive for the crimes with which he was charged.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO47561.pdf

Flowers v. State, No. 2006-CP-01844-COA (Miss.App. April 8, 2008)

CRIME: PCR – Armed Robbery
DECISION: Dismissal of PCR affirmed
COUNTY: Washington
MAJORITY: Chandler

FACTS: Edward D. Flowers pled guilty to armed robbery in 1999. He was sentenced to 20 years with 5 suspended. Flowers filed a PCR which was denied. This was affirmed on appeal in 2002. Flowers apparently filed a second PCR in 2004. Flowers filed another PCR in November of 2005, where he claimed he had not filed any other motions for post-conviction relief. The trial court summarily dismissed the petition and Flowers appealed.

HELD: This was Flowers's third PCR attacking his armed robbery conviction. His current PCR is procedurally barred as a successive motion. Flowers claimed the bar did not apply because the State waived the bar by failing to raise it before the circuit court. Under §99-39-11(3), the state does not have to respond to a PCR unless ordered to do so by the court. Flowers failed to show an exception to the bar. Regardless, the judge did not have to inform him of his right to appeal his sentence. There was no requirement that the State prosecute him for the lesser of the two counts of his indictment, aggravated assault instead of armed robbery. The trial judge is affirmed, as it reached the right result for the wrong reason.

To read the full opinion, click here:

http://www.mssc.state.ms.us/Images/Opinions/CO47380.pdf

Sago v. State, No. 2006-CP-01881-COA (Miss.App. April 8, 2008)

CRIME: PCR – Business Burglary
DECISION: Denial of PCR affirmed
COUNTY: Hinds
MAJORITY: Lee

FACTS: Vernell Sago pled guilty in August of 2005 to the crime of business burglary and was sentenced to 5 years with 2 years supervised probation. Sago subsequently filed a motion for post-conviction relief which was denied. He appealed.

HELD: Sago's plea was not involuntary because he was promised a lesser sentence. Sago's plea hearing was not included on appeal. Sago claimed he was offered 5 years with only 3 to serve. Although an habitual offender, the State did not seek to enhance his sentence. The claim is barred for failure to provide a full record for the Court to review.

==>Sago's plea waived his claim that the State improperly amended his indictment from house burglary to business burglary.

==>The trial judge did not err in sentencing Sago to two years probation because he was a convicted felon. The right to be free from illegal sentences applies to sentences where the defendant suffers a greater sentence rather than the luxury of a lesser sentence.

==>Sago was not denied effective assistance of counsel. Sago claimed his counsel was working for the State and not in his best interests. Sago's sentence was less than if he had been sentenced as a habitual offender.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO47385.pdf

DISCLAIMER: These synopses are provided as a service by the Mississippi Office of Indigent Appeals. They are designed for the educational and research benefits of Mississippi public defenders only. As such, they do not necessarily represent the official opinion of the Office of Indigent Appeals or the Mississippi Public Defenders Association. They may be FREELY distributed whole or in part. ---Leslie Lee, Director, Office of Indigent Appeals.