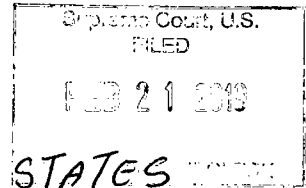


No. 18-8254 **ORIGINAL**

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IN THE  
SUPREME COURT OF THE UNITED STATES

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EDDIE EARL PHILLIPS - PETITIONER

VERSUS

JOE ERRINGTON - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF STATE OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI

EDDIE EARL PHILLIPS, #56407  
SMCI, AREA 2, UNIT C-2  
P. O. BOX 1419  
LEAKESVILLE, MS 39451

## QUESTIONS PRESENTED

Whether Phillips' conviction and sentence stems from a defective indictment, in violation of his due process rights?

... Petitioner answers, Yes.

Whether Phillips' indictment was improperly amended to sentence him as a habitual offender, in violation of his due process rights?

... Petitioner answers, Yes.

Whether Phillips' conviction and sentence derived from confusing and misleading jury instructions, in violation of his due process rights?

... Petitioner answers, Yes.

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Petitioner avers that the Respondent, is represented by the Attorney General's office of the State of Mississippi.

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IN THE  
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

PETITIONER respectfully prays That a writ of Certiorari issue To review the judgment below.

OPINIONS BELOW

The order of the Supreme Court of the State of Mississippi (highest state court) to review the merits appears at Appendix A (5 pages), to the petition, and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was December 13, 2018. A copy of that decision(s) appears at Appendix A. This instant petition is filed within ninety (90) days of said date. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment To The United States Constitution states in pertinent part as follows: "Nor shall any State deprive any person of life, liberty, or property without due process of law."

U.S. CONST. AM XIV...

## STATEMENT OF THE CASE

Petitioner Phillips was indicted in the Circuit Court of Harrison County, Mississippi, for the offense of murder. Phillips entered a plea of not guilty to such charge and the case was tried to a jury... Case NO. 82401-98-750.

Subsequently thereafter, Phillips was tried in the Circuit Court of Harrison County, Mississippi. That on or about December 9, 1998, the jury returned a verdict of guilty and Phillips was sentenced to serve life in prison without the possibility of parole, to be served in the custody of the Mississippi Department of Corrections, as a habitual offender, pursuant to Miss. Code Ann. § 99-19-81.

## REASONS FOR GRANTING THE PETITION

A..

PHILLIPS' CONVICTION AND SENTENCE STEMS FROM A DEFECTIVE INDICTMENT, AS HE WAS NOT INDICTED AS A HABITUAL OFFENDER AS SENTENCED, IN VIOLATION OF HIS DUE PROCESS RIGHTS.

In the case sub judice, the indictment was defective in failing to charge (indict) Petitioner as a habitual offender... in which he was sentenced as. When the statute imposes a higher penalty upon a second and third conviction respectively, it makes the prior convictions a part of the description and character of the offense intended to be punished -- and therefore, the facts of such prior convictions must be charged in the indictment and proved by competent evidence.

IT IS ESSENTIAL TO AN INDICTMENT, THAT THE FACTS CONSTITUTING THE OFFENSE(S) INTENDED TO BE PUNISHED SHOULD BE AVERRED. THIS IS REQUIRED BY A RULE OF COMMON LAW, AS WELL AS BY OUR OWN DECLARATION OF RIGHTS (ARTICLE 12). IN ORDER TO BE SENTENCED AS A HABITUAL OFFENDER -- ONE MUST BE

properly indicted as such-- it must be proved by competent evidence, and the accused provided a reasonable opportunity to challenge the State's proof. Herein, the State failed in these regards; rendering the indictment defective; see, Madden v. State, 991 So.2d 1231, 1236 (Miss. Ct. App. 2008) and Joiner v. State, 32 So.3d 542 (Miss. 2010).

When the State has intention of sentencing an accused as a habitual offender, then the prior convictions to be relied upon for this purpose becomes an element of the principal charge. The two (2) leading antebellum cases on whether recidivism is an element were Plumbly v. Commonwealth, 68 Mass. 413, 1841 WL 3384 (1841) and Tuttle v. Commonwealth, 43 Mass. 505, 1854 WL 5131 (1854). In the latter case, the court explained the reason for treating as an element, the fact of prior conviction(s): "when the statute imposes a higher penalty upon a second and third conviction respectively, it makes the prior conviction(s) a part of the character and description of the offense intended to be punished." The court rested this rule on the common law and the equivalent of the Sixth Amendment notice clause; see, Commonwealth v. Haynes, 107 Mass. 194, 198, 1871 WL 8641 (1871) and Apprendi v. New Jersey, 530

U.S. 466, 484 (2000).

In this regard, The Court(s) has held that, where the indictment fails to charge a necessary element of a crime, the deficiency is deemed jurisdictional, and hence, not waivable; see, Banana v. State, 635 So.2d 851, 853 (Miss. 1994). The court(s) has squarely held that a substantial defect in an indictment may be raised in a motion for post-conviction collateral relief--as was done in this instant case; see, Jefferson v. State, 556 So.2d 1016, 1019 (Miss. 1989) and Robert H. Jackson v. State of Mississippi, 2009, Miss. App. (Miss. Ct. App. 02/24/09).

Petitioner was not indicted as a habitual offender--there was never anything mentioned as to a habitual offender sentence in any pre-trial proceedings... The same rule mandates a separate habitual offender status hearing after a conviction--also mandates that the accused be properly indicted as a habitual offender. In this case, Petitioner was not so indicted; see, Dalgo v. State, 435 So.2d 628, 630 (Miss. 1983). See also, Akins v. State, 493 So.2d 1321, 1322 (Miss. 1986) and Perkins v. State, 487 So.2d 791, 792 (Miss. 1986).

The indictment was defective because it did not denote (charge) the potential additional punishment as a habitual offender. This rule was

succinctly stated by Justice Clifford, in his separate opinion in U.S. v. Reese, 92 U.S. 214, 232 (1875): "The indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." In speaking of that principle, he explained, that it pervades the entire system of the adjudged law of criminal procedure -- as appears by all the relevant cases; that, wherever we move in that department of our jurisprudence, we come in contact with it... and that, we can no more escape from it, than from the atmosphere which surrounds us; see, Archbold's, 1 Bishop, cr. pro. 2d ed, sect. 81. See also, 1 Stark crim. Plead., 15th ed. 54; 1 AM cr. Law, 6th rev. ed. sect. 364; and Steel v. Smith, 1 Barn and Ald. 99.

As related, the Mississippi Supreme Court has held that; "Under our practice, if enhanced punishment is sought, the indictment or affidavit must include both, 'the principle charge' and 'a charge of previous convictions'; and, both charges proved before punishment may be enhanced." In the case at bar, the indictment did not charge prior convictions under the 'Habitual Offender Statute' rendering the indictment defective; see, Lay v. State, 310 So.2d 908, 910 (Miss. 1975). See also, Bell v. State, 355 So.2d 1106, 1108 (Miss. 1978) and Willie v. State, 738 So.2d 217, 220 (Miss. 1999).

In the instant case, The indictment failed to put Petitioner on notice -- that the State was seeking a habitual offender sentence. This omission failed to allow Petitioner an ample opportunity to prepare a defense against same, and thus, The indictment was therefore defective; see, Lambert v. State, 462 So.2d 308, 319 (Miss. 1984) and Berryhill v. State, 703 So.2d 250, 255 (Miss. 1997).

The familiar fundamental Constitutional right to notice of criminal charge(s) is guarded by both the State Constitution and Federal Bill of Rights-- Miss. State Const., Art. 3, Sec. 26 (in all criminal prosecutions, the accused shall have the right to demand the nature of, and cause of the accusation)... U.S. Const., 6th Am (in all criminal prosecutions, the accused shall enjoy the right to demand the nature of, and cause of the accusation). An indictment which fails to allege all essential elements of a crime runs afoul of our Constitutional rights, and is void; see, Thomas v. State, 126 So.3d 877, 879 (Miss. S.Ct. 2013).

B.

PHILLIPS' INDICTMENT WAS IMPROPERLY AMENDED TO SENTENCE HIM AS A HABITUAL OFFENDER, IN VIOLATION OF HIS DUE PROCESS RIGHTS.

In the case sub judice, it was not until the day trial commenced (December 8, 1998), that the prosecutor filed a motion to amend the indictment to charge/sentence Petitioner as a habitual offender. The trial court issued its order on the same date (12/08/98), with Petitioner-as a habitual offender... being sentenced the following day (12/09/98). This delayed move by the prosecutor served as an element of surprise and deprived of timely and effective notice; in violation of Petitioner's due process rights; See, Williams v. State, 131 So.3d 1174 (Miss. S.Ct. 2014).

In the present case, Petitioner was charged with murder, by the grand jury of the first judicial District of Harrison County. The grand jury's indictment that was returned on August 6, 1998, did not charge Petitioner as a habitual offender. It was not until--more than four (4) months later--on December 8, 1998, that the prosecutor filed a motion asking the trial court to elevate the charge by amending the indictment to charge Petitioner as a habitual offender, pursuant to Miss. Code Ann. § 99-19-81; which exposed Petitioner to a mandatory life sentence without possibility of reduction, suspension, or parole. Thus, after having failed to obtain the grand

jury's approval of proceeding against Petitioner as a habitual offender.

Throughout nearly Two (2) centuries of jurisprudence in Mississippi, the grand jury -- not the prosecutor and not the circuit judge -- has been the only legal entity authorized to bring felony charges into circuit court, and this by means of indictments, duly considered and approved by at least fifteen (15) or rather -- twelve (12) members of the grand jury, at the time(s) when at least fifteen (15) of the grand jurors are present and participating; see, Miss. Code Ann. § 9-1-19... also Miss. Constitution Art. 3, sec. 27 (no person shall, for any indictable offense, be proceeded against criminally by information, except... where a defendant represented by counsel by sworn statement waives indictment... This court has bedrock constitutional framework of both our national and state constitutions, whereas the singular power of the indictment is possessed by the grand jury; see, State v. SanSome, 97 So. 753 (Miss. 1923). See also, State v. Berryhill, 703 So.2d 250, 258 (Miss. 1997) and U.S. v. Cotton, 535 U.S. 625, 634 (2002).

Petitioner was indicted by a grand jury for wilfully, feloniously and without authority of law, kill and murder Anthony Thornton, Jr. (Miss.



code Ann. § 97-3-19(1)(a), as amended). Petitioner's indictment by the grand jury made no mention of petitioner's habitual offender status. Herein, on the date (12/08/98) of the trial--trial ended on the next day (12/09/98)--the defense (petitioner) was served with a copy of the state's motion to amend the indictment to change/sentence petitioner as a habitual offender. Notwithstanding the fact that--in absence of a certified penpak--(using a copy of a document to show petitioner's habitual offender status), on December 9, 1998, petitioner was adjudicated a habitual offender, and sentenced to life without possibility of parole. This is plain error, which is correctable by this court or any appellate court; see, Stirone v. U.S., 361 U.S. 212, 217 (1960). See also, U.S. v. Goode, 483 F.3d 676, 681 (10th Cir. 2007) and Williams v. State, 131 So.3d 1174, 1175 (Miss. S.Ct. 2014).

The question herein becomes one that is easily answered by the facts and supporting case law set forth, and elsewhere in the record--whether the trial court erred in granting the state's motion to amend the indictment to sentence petitioner as a recidivist... The trial court's decision to allow the indictment to be amended is a question of law to be resolved by this

Court; See, Jones v. State, 912 So.2d 973, 975 (Miss. 2005). See also, Jackson v. State, 943 So.2d 746, 749 (Miss. Ct. App. 2006) and Powell v. State, 80 So.3d 845, 852 (Miss. Ct. App. 2012).

Rule 7.09, of The Uniform Rules of Circuit and County Court Practice, provides in pertinent part that, indictments may indeed be amended to charge one as a habitual offender. However, this rule does not speak to the timing of the amendment... but, this rule implicitly recognizes a right to fair notice by prohibiting amendments to indictments where the defendant is not afforded a fair opportunity to present a defense, or, is unfairly surprised. The court has held that adequate notice is achieved through formal pleadings, which include the specific amendment to be offered, and which are filed sufficiently in advance of trial to ensure that, a defendant will have a fair opportunity to present a defense; See, Gowdy v. State, 56 So.3d 540, 545 (Miss. 2011). See also, McCain v. State, 81 So.3d 1055, 1061 (Miss. 2012) and Boyd v. State, 113 So.3d 1252, 1256 (Miss. 2013).

Though some may contend that an allegation of a criminal defendant's status as a habitual offender under Sections 99-19-81 through 99-19-87, does not constitute a charge, or part of

a charge. IT is, nevertheless, an unproven accusation in the selfsame way as every other aspect of an indictment's charging language. Indeed in this instant case, the prosecutor's eleventh-hour motion, asking the trial court to amend the indictment to sentence petitioner as a habitual offender, and the trial court's order granting that motion authorizing the amendment of the indictment in this case, charging petitioner with murder as a habitual offender--as petitioner has two (2) prior felony convictions--clearly, the enhancement of a charge becomes part and parcel of the principle charge; see, U.S. v. Olan, 507 U.S. 725, 731 (1993). See also, U.S. v. Wolfe, 245 F.3d 257, 261 (3d Cir. 2001) and U.S. v. Hoover, 467 F.3d 496, 502 (5th Cir. 2006).

Further, it is not inconceivable nor disputable that the overarching problem in this case is one of fundamental unfairness. Had petitioner and his defense counsel known in August, when he was served with the indictment--rather than four (4) months later--(day of trial), that he was to be prosecuted as a habitual offender, it is reasonable to assume that they would have approached the charge with a greatly heightened level of concern; see, U.S. v. Combs, 369 F.3d 925, 935 (6th

cir. 2004). See also, U.S. v. Hall, 515 F.3d 186, 194 (3d cir. 2008) and U.S. v. Benton, 523 F.3d 424, 433 (4th cir. 2008).

After careful review of the record, it can only be concluded that petitioner was denied due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, and Article 3, Section 14, of the Mississippi Constitution -- in light of the unfair surprise visited upon him by the extreme untimeliness of the state's motion to amend the indictment, and the trial court granted of it... A reversal is warranted; See, U.S. v. Morton, 412 F.3d 901, 905 (8th cir. 2005). See also, U.S. v. Burns, 576 F.3d 852, 858 (5th cir. 2008) and U.S. v. Page, 520 F.3d 545, 547 (6th cir. 2008).

C.

PHILLIPS' CONVICTION AND SENTENCE DERIVED FROM CONFUSING AND MISLEADING JURY INSTRUCTIONS, IN VIOLATION OF HIS DUE PROCESS RIGHTS.

Petitioner contends that the jury instructions provided by the trial court was vague, and at best confusing and misleading. In jury

instruction S-1, given by The Trial Court on December 9, 1998, at No. 2, it states as follows: "The defendant, Eddie Earl Phillips, did feloniously, wilfully, and without authority of law, and of his deliberate design kill Anthony Curtis Thornton, Jr. The prosecutor made the exact same statement in No. 2, of jury instruction S-4. However, in No. 2, in jury instruction S-4, it states: "The defendant, Eddie Earl Phillips, did wilfully kill Anthony Curtis Thornton, Jr., without deliberate design and in the heat of passion, by the use of a deadly weapon.

Petitioner argues that prior to Windham v. State, 602 So.2d 798 (Miss. 1992) and the court's holding in Mallett v. State, 606 So.2d 1092 (Miss. 1992), it has always been beyond dispute that malice aforethought, also known as deliberate design, is what separates murder from manslaughter. The court(s) have said so, over and over again, in the following and in many other ways... The chief distinction between murder and manslaughter is the presence of deliberation and malice in murder, and its absence in manslaughter; see, Moore v. State, 38 So.2d 504 (Miss. 1905). See also, Carter v. State, 25 So.2d 470 (Miss. 1946); Goldsby v. State, 78 So.2d 762 (Miss. 1955); Rogers v. State, 76 So.2d 702 (Miss. 1955); and Hammock v. State, 379 So.2d 323, 328 (Miss. 1980).

The problem is that No. 2, in jury instruction S-1, defines murder as the killing of a human being with malice aforethought, with the premeditated and deliberate design to effect the death of the person killed... and, the instruction then contradicts itself in jury instruction S-4, by saying murder includes a killing done in commission of an act without any premeditated design to effect the death of the person killed, and not an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although not in self defense. The first part of the instruction S-1 states that murder requires a deliberate design to kill another, and then instruction S-4 takes away this requirement... it is self-contradictory, and therefore confusing and misleading, and should not have been given in this case -- in that -- it gives two (2) definitions as to what the law is for the jury to apply to the facts to determine whether the crime is murder or manslaughter.

IT is reversible error to give instructions likely to mislead or confuse the jury as to the principles of law applicable to the facts in evidence; see, Moak v. Black, 92 So.2d 845 (Miss. 1959) and Film Transport Co. v. Cropps, 58 So.2d 364 (Miss. 1952)... The decision of the court con-

demning The giving of contradictory and conflicting instructions are too numerous to require citation; See, Heardon v. Henderson, 41 Miss. 584 (Miss. 1868). See also, Solomon v. City Compress Co., 69 Miss. 319 (Miss. 1891) and Jackson v. Leggett, 186 Miss. 123 (Miss. 1939).

The court has struggled to define depraved heart murder without malice, as distinguished from manslaughter. IT IS unreasonable to expect a jury of laypeople to draw a distinction between murder and manslaughter when the court itself cannot. Justice Banks hit the nail on the head in a dissenting opinion in which he wrote -- "the majority reading of depraved heart murder subsumes both deliberate design and most, if not all, of our various manslaughter statutes. That's the problem... While it may be difficult to explain why this would be a loss to society, the power of the legislature to define crimes includes the power to make distinctions. Our duty to construe statutes to give effect to all of their provisions compels us to recognize such distinctions; See, State v. Russell, 185 Miss. 13 (Miss. 1939). See also, Miss. Public Ser. Comm. v. City of Jackson, 328 So. 2d 656, 658 (Miss. 1976) and Pinkerton v. State, 481 So. 2d 306, 310 (Miss. 1985). In Windham, supra. (Banks, J., dissenting, joined

by Dan M. Lee, P.J.).

IT is noted that Justice Hawkins likewise wrote a separate concurring opinion in Windham, where he stated-- if the slaying in this case was indeed a subparagraph (b) murder, then there is no way any court can ever direct a verdict to a jury that the defendant is, at most, guilty of manslaughter. Every instance of a slaying in the heat of passion is preforce committing an act dangerous to another. Whether the defendant is convicted of murder or manslaughter will depend upon the whim or circumstance of the jury hearing the case; not upon understandable instructions delineating what constitutes each crime. The Legislature, if it chose to do so, could have very well made the crime of slaying in the heat of passion a murder; See, U.S. v. Browner, 889 F.2d 549 (5th Cir. 1989).

If we read the statute as the legislature manifestly meant it to be read, we would encounter no difficulty. This statute says quite simply that a person who (1) engages in some act extremely dangerous to others; and (2) who does so with an evil state of mind (e.g., placing a bomb in a building), this meets the requirement. If we leave it at that, we would have no problem... we had none in the



first 150 years we had the statute. It is when a court seeks to expand the statute to mean something else that we run into trouble; Windham, supra. (Hawkins, P.J., concurring).

The penalty for both subsumed sections is life... Miss. Code Ann. § 97-3-21. However, on July 1, 2013, the legislature solved this problem and amended Miss. Code § 97-3-19(A)(B) to reflect such: § 97-3-19(A)(B)--(i) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases: (A) when done with deliberate design to effect the death of the person killed, or of any human being, shall be first degree murder; (B) when done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be second degree murder.

The legislature went a step further and created a sentencing option for subsection (B) of § 97-3-19, as follows: Every person who shall be convicted of second degree murder shall be imprisoned for life in the custody of the Department of Corrections, if the punishment is so fixed by the jury in its verdict after a sentencing

proceeding conducted under § 99-19-101. If the jury fails to agree on fixing the penalty at life, the court shall fix the penalty at not less than twenty-five (25) years, and not more than forty (40) years. Petitioner asserts that this substantive criminal law and criminal procedure change has created a harsher penalty for him and therefore should be applied retroactive through a new trial.

### CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

Eddie Phillips  
Eddie Phillips  
EDDIE E. PHILLIPS

SWORN TO AND SUBSCRIBED BEFORE ME,  
this the 16 day of January, 2019.

Geannette King  
"NOTARY PUBLIC"

MY COMMISSION EXPIRES: \_\_\_\_\_

