

Supreme Court, U.S.
FILED

APR 21 2020

OFFICE OF THE CLERK

*In The
Supreme Court Of The United States*

Melvin Damage,
Petitioners

v.

Cause No. **20-5372**

State Of Mississippi,
Respondents

*Petition for a Writ of Certiorari to the
United States Supreme Court*

Petition For Writ Of Certiorari

*Melvin Damage #56705, Pro se
CMCF3/A-2, C#6
P.O. Box 88550
Pearl, Ms. 39288-8550*

ORIGINAL

Question Presented

1. The indictment could not be amended following guilty verdict and just prior to sentencing to change habitual offender status.
2. Assuming that defendant was not properly indicted for violation of Miss. Code Ann. § 99-19-83, the evidence presented during sentencing (bifurcated trial) violated Miss. Code Ann. § 97-17-33(1), during the sentencing hearing that state failed to prove, beyond a reasonable doubt that Damage had been sentenced to and served separate terms of one year or more.
3. Damage maintained that the various issues that he raised survived the three (3)-year time bar of Miss. Code Ann. § 99-39-5(2) 2020; the Mississippi Supreme Court has previously acknowledged that errors affecting "fundamental constitutional rights" was exception to any bar, such as the right to a legal sentence.
4. Damage asserts there are: 1) the statutory exceptions are intervening decision; 2) there is also the court created exception for errors "affecting fundamental rights"; 3) trial court should have heard motion for postconviction relief in which defendant claimed he was illegally sentenced, regardless of three-year limitations period for postconviction relief, given that right to be free from illegal sentence is fundamental; defendant claim that his prior robbery and manslaughter convictions violated his right of protection against double jeopardy in that they were the underlying felony used to support burglary of an auto conviction implicated a fundamental right such that it was ex-

cepted from procedural bars of the Uniform Post-Conviction Collateral Relief Act (UCCRA).

5. Whether circumstances that constitute exceptions to rule precluding successive postconviction filings include: 1) cases in which the prisoner can show that there has been an intervening decision of the Mississippi or United States Supreme Court which would adversely affect the outcome of his conviction; 2) cases in which the prisoner has new evidence, not discoverable at trial that would have caused a different result in sentence; or 3) cases in which the prisoner claim his sentence has expired had he been sentence pursuant to Miss. Code Ann. § 99-19-81; 99-39-23(6). *Bradley v. State*, 919 So. 2d 1062 (Miss. Ct. App. 2005), was based on newly discovered evidence.
6. Citizen may not be deprived of constitutional rights without due process of law, and due process requires reasonable advance notice. U.S.C.A. Const. Amend. 5, 14.
7. Post-Conviction proceeding are for purpose of bringing to Court attention facts not known at time of judgment of the statutory exceptions are intervening decision, there is also the court created exception for errors "affecting fundamental rights. *Kennedy v. State*, 626 So. 2d 103, 105-06 (Miss. 1993); *Grubb v. State*, 584 So. 2d 786 (Miss. 1991).
8. The notice Petitioner that the state was seeking only a seven (7) year term, his court appointed attorney *Barnel D.*

Nicovich told Petitioner that maximum penalty under Miss. Code Ann. § 97-17-33(1) was seven-years sentence imposed for burglary of an auto and sentence imposed was life sentence without possibility for probation or parole under one of two separate habitual offender statutes, comparison of seven-year as opposed to life without parole was too significant a deprivation of liberty to be subject to procedural bar; therefore, Supreme Court was compelled to address such plain error in sentencing order in post-conviction proceeding. Code 1972, §§ 99-19-81, 99-19-83; Sup. Ct. Rule 6(b); U.S.C.A. Const. 5, 6, 14.

9. The present case at bar, the grand juror returned an indictment citing two previous conviction for sentencing under Section 99-19-81, that the maximum penalty under Miss. Code Ann. § 97-17-33(1) was in fact seven-years, the trial court committed reversible error in allowing the state to amend the indictment after jury verdict and just prior to sentencing to change habitual offender statute from §§ 99-19-81 to 99-19-83 was an improper amendment, the state sought conviction of Gamage as a recidivist, and returned indictment clearly notice him the state was only seeking seven-year term, but he was wrongfully sentenced under Section 99-19-83 for life without parole, this plain error was of constitutional dimension. Code of 1972, §§ 99-19-81, 99-19-83; Sup. Ct. Rules 6(b), U.S.C.A. Const. Amend. 5, 6, 14.
10. Even though Petitioner is not entitled to have a jury to pass upon this issue, the state has the burden of prov-

ing beyond a reasonable doubt all the elements required to convict an accused under Miss. Code Ann. § 99-19-83 (1984).

11. Pursuant to Miss. Code Ann. § 99-19-83 provide that every person convicted in Mississippi of a felony who shall have been convicted twice of any felony or federal crime upon charges separate brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one year or more in any state and/or federal penal institution whether in this state or elsewhere, and where any one of such felonies shall have been a crime of violent shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation. An essential ingredient of Miss. Code Ann. § 99-19-83 (1984) is that the defendant (Romage) shall have served at least one (1) year under each sentence.
12. The indictment returned by the Grand Jurors on the 15th day of August, 1984, in Cause No. 3901, whereas he claims that his robbery, manslaughter in causes nos N-1587 and 55 convictions violated his right of protection against double jeopardy in that it was the underlying felonies used to support robbery conviction implicated a fundamental right such that it was excepted from the procedural bars of the Uniform Post-Conviction Collateral Relief Act (UPCCRA); *Rowland v. State*, 98 So.3d 1032 (2012); *Rowland*, 42 So.3d 503 at 508; *Rowland*, 98 So.3d 1034-35, 1036-37 at 1038

13. The trial court erred when it declared that the indictment was properly amended by a de facto amendment made by the trial court to circumstances that constitute exceptions to rule precluding successive postconviction filing include: (1) cases in which the petitioner can show that there has been an intervening decision of the Mississippi or United States Supreme Court which would adversely affect the outcome of his sentence; (2) cases in which the petitioner has new evidence, not discoverable at trial that would have caused a different result in sentencing, or (3) cases in which the petitioner claims his sentence has expired. Miss. Code Ann. § 99-39-23(6). *Bradley v. State*, 919 So. 2d 1062 (Miss. Ct. App. 2005).
14. Like a double jeopardy claim, a claim of illegal sentence or denial of due process in sentencing also must be considered regardless of when it is raised and is not time-barred under the three-year statute of limitation of the Uniform Post-Conviction Collateral Relief Act (UPCRA) because the state is without authority or right to impose a sentence illegally or without due process. U.S.C.A. Const. Amendments. 5, 14; West's A.M.C. § 99-39-21(1).
15. The trial court heard improper evidence during sentencing hearing because no one during sentencing that petitioner had actually served the required one (1) year served on each conviction separately. All petitioners prior conviction were served concurrently (simultaneously).

16. Failing in its attempt on first trial to provide sufficient proof of two separate prior convictions for habitual offender sentencing purposes, state were barred from perfecting its evidence through successive attempts. Code of 1972, § 99-19-83; Const. Art. 3 § 22.
17. Ineffective assistance of counsel; as relating to Sixth Amendment claims of counsel prejudice is presumed only if petitioner demonstrate that counsel actively represented conflicting interests and that an actual conflict adversely affected his lawyer performance. U.S.C.A. Const. Amendment 6.

End Of Question Presented

List Of Parties

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

Table Of Contents

Questions Presented	i-vi
Table Of Contents	vii
Table Of Authorities	ix-xi
Opinion Below	i
Jurisdiction	i
Constitutional And Statutory Provision Involved	
Statement	5-8
Reason For Granting The Writ	8-17
Conclusion	17-18

Index To Appendices

Appendix A In The Supreme Court Of Mississippi	
Appendix B Legal and Priority Mail Receipt	
Appendix C Affidavit Of Melvin Gamage	
Appendix D Order Of The Circuit Court Of Harrison County, Mississippi (1969)	

Appendix E Indictment in Cause No. 3901 and attached two additional sheet shows my point of all of my prior conviction was served concurrent.

Table Of Authorities

Akins v. State, 493 So.2d 1321 at 1322 (Miss. 1986)	13
Bolton v. City of Greenville, 253 Miss. 656, 666, 178 So.2d 667, 672 (1960)	15
Brooks v. State, 209 Miss. 150, 46 So. 2d 94 (1950)	9
Bucks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed. 2d 1 (1978)	12
Clowers v. State, 522 So.2d 762 (Miss. 1988)	14
Contreras v. 445 So.2d 543, 545 (Miss. 1984)	12
Dalgo v. State, 435 So.2d 628 (Miss. 1983)	6, 12
DeBussis v. State, 453 So.2d 1030 (Miss. 1984)	12
Drubbl v. State, 584 So.2d 786, 789 (Miss. 1991)	17
Dwy v. State, 731 So.2d 601, 603 (Miss. 1999)	16
Jenkins v. State, 483 So.2d 1330 (Miss. 1986)	14
Jones v. State, 279 So.2d 650, 651 (Miss. 1973)	12
Kennedy v. State, 732 So.2d 184, 186-87 (Miss. 1999)	16

Powell, 806 So. 2d at 1074	17
Presley v. State, 474 So. 2d 612 (Miss. 1985) . . .	14-15
Read v. State, 430 So. 2d 832 (Miss. 1983) . . .	9
Rowland v. State, 98 So. 2d at 1038	16
Smith v. State, 477 So. 2d 191 (Miss. 1980) . . .	10, 16, 17
Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed. 2d 637 (1983)	14

Constitution Provision

United States Constitution, Amendment 5, 6, 14

Statutes

97-17-33 (1)	passim
99-14-81	passim
99-18-83	passim
Sec. 11, §4	4
Sec. 22	4
Sec. 22	11

Art. 8, § 169	5
99-39-21(1).	16

In The
Supreme Court Of The United States

Melvin Damage,
Petitioner,

V.

Cause No. _____

State Of Mississippi,
Respondent.

Petition for a Writ of Certiorari to the
United States Supreme Court

Petition For Writ Of Certiorari

Melvin Damage (hereinafter "petitioner") petition for a writ of certiorari to review the judgment of the Mississippi Supreme Court for the State of Mississippi, render in their writ of certiorari appeal, which judgment affirmed the denial by the trial court of his post-conviction relief (PCR) motion to vacate illegal sentence or, alternatively, to allow an evidentiary hearing to attempt to determine the "constitutionality of sentence is the subject of this motion seeking correction of illegally imposed sentence". The indictment against Petitioner charge burglary of an auto and alleges two "... prior conviction which was 'run concurrently not separate incidences at different times and having been sentenced to concurrent sentence thereon, not but only one separate term in

Cause Number N-1587, whereas I served less than a year on said sentence see exhibit "H and B";

Opinions Below

The ill-opinions of the Mississippi Supreme is not reported.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

☒ For cases from state court:

☒ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Mississippi Supreme Court is unpublished.

☒ For cases from state court:

The date on which the highest state court decided my case was March 24, 2020. A copy of that decision appears at Appendix A, but see Appendix B.

Constitutional And Statutory Provision Involved

The following constitutional provisions and statutes are involved in this case:

United States Constitution, Fifth, Sixth and Fourteenth Amendments, which provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provision of this article.

Mississippi Constitution of 1890

Section 11. The right of the people peaceably to assemble and petition the government on any subject shall never be impaired.

Section 14. No person shall be deprived of life, liberty or property, except by due process of law.

Section 22. No person's life or liberty shall be placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution.

Section 26. In all criminal prosecution the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation,

to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and in all prosecutions by indictment or information, a speedy and public try by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself; but in prosecutions for rape, adultery, fornication, sodomy or the crime against nature, the court may in its discretion exclude from the court room all persons except such as are necessary in the conduct of the trial.

Section 32. The enumeration of rights in this constitution shall not constructed to deny or impair others retained by, and inherent in, the people.

Statement Of The Case

The indictment against Bamage charged burglary, of an auto and alleges two "... separate incidences at different times and having been sentenced thereon to separate terms of one (1) year or more in various state institutions..." On two additional pages of the indictment were words "page 2 and 3 of the indictment; this was "contrary to law" specific to Mississippi Constitution Article 6, 3/69 Style of process;" this making the said Melvin Bamage Jr. eligible for a life sentence without benefit of parole under Section 99-19-83 of

-
1. The style of all process shall be "The State of Mississippi;" and all prosecutions shall be carried on in the name and by authority of

the Mississippi Code of 1972, Annotated, As amended, he was indicted under "Miss. Code Ann. § 97-17-33(1), from wording of indictment returned he was to be sentence pursuant 99-19-81."

In this case sub-judice, the indictment did not cite under which of the two habitual offender statutes the state was proceeding by reference to the code section number. The Mississippi Supreme Court has previous held that the failure to include habitual offender section number in the indictment was not essential to the validity of the indictment, if the indictment itself was sufficient to apprise the defendant that the state was seeking to impose a life sentence. *Dalep v. State*, 435 So.2d 628 (Miss. 1983).

Petitioner assert that hereafter cited cases, "are those cases in which petitioner can demonstrate that there has been an 'intervening' decision of the Supreme Court or either the Mississippi Supreme Court which would have actually adversely affected the outcome of his sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that would be practically conclusive that had such been introduced at the sentencing hearing it would have caused a different result in the sentence". Likewise excepted are those cases in which the petitioner claim had he been sentenced correctly in 1984, his sentence would have expired in October of 1991. The indictment in the present case at bar, did not allege that petitioner had actually

the "State of Mississippi," and all indictments shall conclude
"against the peace and dignity of the state."

served any time. No contention was made at trial (sentencing hearing) that the State had failed to prove petitioner came under Miss. Code Ann. § 99-19-83 (1984), and petitioner's direct appeal the question was never presented by his attorney as she stated she would. Petitioner filed a motion to vacate his sentence as a habitual offender because the State never proved in the circuit court that he actually served one year or more on his previous sentences, because all but one was concurrent sentence except the Hinds County Circuit Court in Cause Number N-1587 whereas petitioner served less than six (6) months. An essential ingredient of § 99-19-83 was that Damage was required to have served at least one year under each sentence.

The Mississippi Code has two statutes permitting sentence as on habitual offender. Miss. Code Ann. § 99-19-81 (Supp. 1984) is as follows:

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separate brought and arising out of separate incidents at different time and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

The second statute is Miss. Code Ann. § 99-19-83 (Supp. 1984) and provide as follows:

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separate brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

As noted, section 99-19-81 does not required the serving of any time on the two prior felony crimes; Whereas, section 99-19-83 does require that the petitioner shall have "served separate terms of one (1) year or more in any state and/or federal penal institution..." one of which felonies shall be a crime of violence. Likewise, the former statute provides a sentence "to the maximum term of imprisonment prescribed for such felony", referring to the felony for which the petitioner is currently being tried. The latter statute, section 99-19-83 requires a sentence of life imprisonment. Both statutes provide that the sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

Reasons For Granting The Petition

As the Mississippi Supreme Court has ill-suggests, it is noted that the issue was not raised on direct appeal by Darnell D. Nicovich petitioner trial and appeal attorney, nor does the motion here

show such facts as are necessary to demonstrate that this claim is not procedurally barred.

However, the Mississippi Supreme Court justices has previously held that errors affecting fundamental rights are exceptions to the rules that question not raised in the trial court cannot be raised for the first time on appeal. *Read v. State*, 430 So. 2d 832 (Miss. 1983); *Brooks v. State*, 209 Miss. 150, 46 So. 2d 94 (1950). It is noted that in the case sub judice that the defense counsel failed to raise the sentence issue on appeal, but that petitioner has been raising the issue in his petition to the state highest court to correct sentence.

This Court recognized that citizens may not be deprived of constitutional rights without due process of law and that due process requires reasonable advance notice and a meaningful opportunity to be heard. *Read, supra*. An analysis of the indictment returned in this case, together with the foregoing sentencing transcript of the sentencing proceeding (hearing) clearly show a denial of due process in sentencing. The comparison of a seven year sentence, as opposed to a life sentence without probation or parole is too significant a deprivation of liberty to be subjected to a procedural bar.

Petitioner assert that this Honorable Court is compelled to address this plain error in the sentencing order. It is clear that the state sought conviction and sentence of petitioner as a recidivist. Only the quantity of time is in doubt, and the indictment clearly notifies the petitioner that the state was seeking only a seven year term. The petitioner was wrongfully sentenced under section 99-19-83 to life imprisonment.

This plain error is of constitutional dimension.

This Court should therefore reverse the sentencing portion of this case and remand to the trial court for resentencing to no more than seven years imprisonment without eligibility for parole or probation and discharge, since he would serve his seven year sentence in 1996.

1. Even though a petitioner is not entitled to have a jury to pass upon the issue, the state has the burden of proving beyond a reasonable doubt all the elements required to convict an accused under Miss. Code Ann. § 99-19-83 (1984).

The Mississippi Supreme Court has held in the case of Wilson v. State, 395 So.2d 957 (Miss. 1981), that even though a petitioner is not entitled to have a jury to pass upon the issue, the state has the burden of proving beyond a reasonable doubt all the 'elements' required to convict an accused under Miss. Code Ann. § 99-19-83². An essential ingredient of this section is that the petitioner shall have served at least one year under each sentence. The state failed to meet this burden at his sentencing hearing. The state proof would only have sustained a conviction under Miss. Code Ann. § 99-19-81.

This case, therefore, comes under Smith v. State, 477 So.2d 191 (Miss. 1985). Petitioner argues that his sentence was improper, in that indictment, prior to improper amendment, did not apprise petitioner that the State was seeking life in prison without probation or parole and record was devoid of proof that petitioner actually served more than one year or more

on two separate prior felonies.

Mississippi Constitution, Art. 3, § 22 (1890) reads: "No person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution." Consistent with above, this Court has held that an habitual offender's sentencing hearing, as a trial on the sentence, constitutes jeopardy; therefore, when a petitioner's conviction "has been overturned due to a failure of proof at trial, the prosecution cannot complain of prejudice, for it has been given one fair opportunity

1. Petitioner Melvin Ramage was indicted and tried as an habitual offender under Miss. Code Ann. § 99-19-83 (Supp. 1984). Under § 99-19-81 petitioner was subject to a prison term of 7 years without chance for probation or parole.⁽¹⁾ After the petitioner was convicted, but before he was sentenced, the state was illegally allowed to amend the indictment after his verdict and have him sentenced under Miss. Code Ann. § 99-19-83 (Supp. 1984) to a sentence of life in prison without chance for probation or parole.

- (1) Miss. Code Ann. § 97-17-33(1) (Supp. 1984) provides a maximum prison sentence of seven (7) years for one convicted of burglary of an auto.

The primary difference in the language of the two code sections, pertinent to this appeal, is that § 99-19-81 requires that a petitioner have been twice convicted and sentenced to serve separate terms

to offer whatever proof it could assemble." *DeBussi*, 453 So. 2d 1830 (Miss. 1984), quoting *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

To be permissible, the amendment to an indictment must be of form and not of substance. *Contreras v. State*, 445 So. 2d 543, 545 (Miss. 1984). Likewise, a trial court may not amend an indictment to change the charge in the indictment to another crime, except by action of the grand jury who returned the indictment. *Jones v. State*, 279 So. 2d 650, 651 (Miss. 1973).

In *Dalgo v. State*, 435 So. 2d 628, 630 (Miss. 1983), the Mississippi Supreme Court held that if an indictment was sufficient to apprise a petitioner that the state was seeking to impose a life sentence without chance for probation or parole, the inclusion of the statutory section number was not essential to the validity of the indictment. This state Supreme Court in *Dalgo* noted that the indictment in question listed the principle charge and the "previous convictions with required particularity". 435 So. 2d at 630.

of one year or more in prison, while § 99-19-83 requires that a petitioner have been twice convicted, and served terms of one year or more in prison, and one of the felonies must have been a crime of violence.

In this case, the indictment did not allege that the petitioner had been twice convicted, sentenced to and actually served separate terms of one year or more in prison. Therefore, this Court should find the indictment was not sufficient to apprise the petitioner that the state was seeking life in prison without probation or parole and that the amendment was one of substance, not merely of form.

In addition, the record is devoid of any proof that petitioner actually served one year or more on two separate, prior felonies.

For those reasons this Court should find petitioner's sentence under Miss. Code Ann. § 99-19-83 (Supp. 1984) must be vacated.

Petitioner asserts, had the state subpoenaed at the sentencing hearing either the Chief or Assistant Record Officer of the Mississippi Department of Corrections, to testified that all of petitioner's prior convictions were run concurrently, shows petitioner's previous conviction was served "simultaneously" not separate with the exception of cause number N-1587 whereas he served less than a year on said conviction. See Akins v. State, 493 So.2d 1321 at 1322 (Miss. 1986), the Mississippi Supreme Court here held that an amendment to the indictment which changed the habitual offender charge from the "little" enhancement (Section 99-19-81) to the "big" enhancement (Section 99-19-83) was an impermissible amendment. In the case sub judice petitioner originally was charged as a habitual offender under Miss. Code Ann. §§ 99-17-33(1), 99-19-81, and faced a maximum penalty of seven (7) years. Petitioner claims implicated a fundamental right such that it was excepted from the procedural bars of the Uniform Post-Conviction Collateral Relief Act (UPCCRA).

2. A recidivism sentence of life imprisonment without parole is subject to scrutiny under the cruel and unusual punishment clause of U.S. Const. Amend. VIII. When faced with such an issue, trial courts are charged to engage in proportionality analysis under the Eighth Amendment, guided by objective criteria, including (i) harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; and (iii) the sentence imposed for commission of the same crime in other jurisdictions.

In *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed. 2d 637 (1983), the Supreme Court held that a recidivism sentence of life imprisonment without parole was subject to scrutiny under the cruel and unusual punishment clause of the Eighth Amendment to the Constitution of the United States. When faced with such an issue, trial courts are charged to engage in proportionality analysis under the Eighth Amendment

guided by objective criteria, including (i) harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; and (iii) the sentence imposed for commission of the same crime in other jurisdictions.

463 U.S. at 292, 103 S.Ct. at 3011, 77 L.Ed. 2d at 650. See also *Jenkins v. State*, 483 So.2d 1330 (Miss. 1986); and *Presley v. State*, 474 So.2d 612 (Miss. 1985).

In *Clowers v. State*, 522 So.2d 762 (Miss. 1988), the Supreme Court of Mississippi held, we accepted our responsibility to

to respect the Solem teachings. We there stated:

The fact that the trial judge lacks sentencing discretion does not necessarily mean the prescribed sentence meets federal constitutionality proportionality requirements. Notwithstanding 399-19-81, the trial court has authority to review a particular sentence in light of constitutional principles of proportionality as expressed in Solem v. Helm. That authority is a function of the Supremacy Clause, U.S. Const. Art. VI, cl. 2 Bolton v. City of Greenville, 253 Miss. 656, 666, 178 So.2d 667, 672 (1965).

Presley v. State, 474 So.2d 612 (Miss. 1985) is similarly instructive. In that case the defendant stole two steaks and displayed a pocket knife in the course of his escape, thus technically committing armed robbery, a crime of violence. We reversed the residivism sentence, however, and remand to give the defendant the opportunity to present evidence in mitigation of sentence.

On the authority of Solem, Clowers and Presley, we vacate the sentence imposed upon Ashley and remand for an additional sentencing hearing and for resentencing consistent with the Solem teachings.

- (1) error in the imposition of an enhanced sentence based on fact found by the trial court was plain error, and
- (2) error in the imposition of an enhanced sentence based

on fact found by the trial court was not harmless.

3. Like a double jeopardy claim of illegal sentence or denial of due process in sentencing also must be considered regardless of when it is raised and is not time-barred under the three-year statute of limitations of the Uniform Post-Conviction Collateral Relief Act (UPCCRA) because the state is without authority or right to impose a sentence illegally or without due process. U.S.C.A. Const. Amends. 5, 14; West's A.M.C. § 99-39-21(1).

In addition to the statutory exceptions afforded by the Act, the Mississippi Supreme Court held, we have provided that an exception to the procedural bars exists for errors affecting certain constitutional rights. See *Smith v. State*, 477 So. 2d 191, 195 (Miss. 1985) (citations omitted) ("errors affecting fundamental rights are exception to the rule that questions not raised in the trial court cannot be raised for the first time on appeal"). On certiorari review from the Court of Appeals, we found specifically that errors that "implicate the fundamental constitutional right to be free from double jeopardy" ... are excepted from the procedural bars of the UPCCRA. *Rowland*, 98 So.3d at 1038.

This case involves several issues: whether the trial court erred in denying Hamage's motion and the Supreme Court of Mississippi his motion for relief, because the manslaughter and strongarm robbery convictions violated his right against double jeopardy. See *Byr v. State*, 731 So. 2d 601, 603 (Miss. 1999) (finding claim of illegal sentence not time-barred); *Kennedy v. State*, 732 So. 2d 184, 186-87 (Miss. 1999) (finding claim of illegal

sentence not time-barred or barred by res judicata); *Drubb v. State*, 584 So.2d 786, 789 (Miss. 1991) ("considering plain error illegal sentence notwithstanding procedural bars which might otherwise prohibit its consideration"; *Smith*, 477 So.2d at 195 ("finding a deprivation of due process in sentencing 'too significant a deprivation of liberty to be subjected to a procedural bar'"). Like a double-jeopardy claim, a claim of illegal sentence or denial of due process in sentencing also must be considered regardless of when it is raised, because the State is without authority or right to impose a sentence illegally or without due process. The deprivation of liberty--that inalienable without authority of law distinguishes these excepted errors from all other post conviction claims.

Conclusion.

Finding that Damage was placed in double jeopardy when he was convicted of burglary of an auto and the included

-
2. The trial court violated the prohibitions of the double jeopardy clause of the United States and Mississippi Constitutions by convicting Damage of the burglary of an auto and the underlying felony of strongarm robbery in Case 55 convicted in November, 1969, effectively convicting and sentencing Damage twice for the crime of strongarm robbery (a fifteen year old conviction. See *Powell*, 806 So. 2d at 1074 (listing three constitutional protections against double jeopardy).

offense of manslaughter and stranger robbery. This Court should reverse and remand for resentencing pursuant to Miss. Code Ann. §§ 97-17-33(1) and 99-19-81 and discharge due to had Gamage been properly sentence in 1984 his sentence of seven (7) years would expired in October of 1991.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Melvin Gamage
Melvin Gamage

Noted: 4-21-20