20-6482

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Derrick Dewayne Moffite — PETITIONER
(Your Name)

vs.

Supt. Joe Errington — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of State of Mississippi
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Derrick D. Moffite, #L5476
(Your Name)
S.M.C.I., Area-2, Unit B-1
P.O. Box 1419
(Address)
Leakesville, MS 39451
(City, State, Zip Code)
N/A
(Phone Number)

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CASE(S): PAGE:

AUTHORITIES CON'D:

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

QUESTIONS PRESENTED

ONE: Whether it is a violation of due process where the evidence is insufficient to support the jury verdict of a greater offense; here Aggravated Assault, but a direct-remand for sentencing on the lesser included, provides no lesser sentence because the defendant is indicted as a habitual offender under section 99-19-83 and will receive the same sentence of life without parole, if the habitual allegations are proven.

TWO: Whether once the grand jury chose to indict Moffite under section 99-19-81, the judge had no authority, upon motion of the state, to amend the indictment to habitual under section 99-19-83 and such was a denial of Due Process of Law.

THREE: Whether the instructions on self-defense failed to tell the jury that what Moffite was defending against was the isolation, sensory deprivation and restricted contact of a suicide cell.

FOUR: Whether defendant was denied a fair trial and due process of law when the judge injected himself as an advocate for the prosecution in having Moffite agree that his answer of: "I don't recall" did not mean he was denying the subject the state was questioning him about.

FIVE: Whether a new trial should have been

granted because of the failure of the State to disclose the throat injury testimony of Jodi Dowdy to guarantee that the defendant would not be denied due process, the right of confrontation and a fair trial.

SIX: Whether it was a violation of due process and a fair trial on sentencing, if the sentence to life without parole or early release is not reversed because of insufficient proof of the elements of fact required for habitual sentencing. If the court concludes the insufficiency only is found in the length of time served of at least one year for the life sentence under section 99-19-83, then the case should be remanded for sentencing under the lesser non-violent habitual offender provisions of section 99-19-81.

SEVEN: Whether it was a violation of due process for the dwelling house burglary to be characterized as a "violent crime" for sentencing under section 99-19-83, where it was not a violent crime at the time of Moffite's guilty plea in 2002.

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

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

(vii)

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[✓] For cases from **state courts**:

The date on which the highest state court decided my case was 08/21/2020. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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:

> "No person shall be deprived of life, liberty, or property without or except by due process of law."

XIV Am. of U.S. CONST.

STATEMENT OF THE CASE

The Grand Jury of Lauderdale County indicted Moffite as a habitual criminal under section 99-19-81 (non-violent habitual) charging him with aggravated assault upon the jailer, Jodi Dowdy. (RE25) Over objection by defendant the court granted the motion of the state to amend the habitual offender allegation to add dwelling house burglary, made a violent crime by the legislature in July, 2015, that burglary conviction having been by guilty plea in 2002. (RE57) At the sentencing hearing Moffite moved to strike the dwelling burglary and argued the grand jury, since it had considered and ruled that Section 99-19-81 was a proper habitual offender charge, the amendment had to be done by the grand jury. (RE20) At RE71-81, is the hearing on Moffite's challenge to dwelling burglary as proper. Also, at RE20, Moffite argued unsuccessfully that the dwelling burglary proof had to be decided by a jury. Moffite brought his argument forward into his motion for new trial at RE39.

Moffite at sentencing challenged the "pen pack" testimony by an MDOC records compiler, LaTesha Lockhart (RE 148-190) as inadmissable hearsay under Mississippi Rule of Evidence,

803(6)(7) and Section 47-5-10 of Mississippi Code Annotated. He further; after the Testimony of Lockhart, moved to dismiss arguing the evidence was insufficient to prove beyond a reasonable doubt that Moffite had actually served one year on the dwelling burglary. At RE69 and 70, are respectively sentencing Exhibit 6, the MDOC offender data sheet, and Exhibit 7, the MDOC offender cover sheet. Exhibit 7 was said and represented to show the total days served on the grand larceny conviction, dwelling burglary conviction (these two concurrent sentences) and felon firearm conviction. see conviction and sentencing judgments and orders at RE 56,57,61,63 & 67.

At trial, the victim jailer, Ms Dowdy, Testified, to the surprise of defense counsel, that she had some permanent injury inside her throat from the scuffle with Moffite. On the motion for directed verdict (RE 201-204), for new trial (RE39) and at the hearing on it (RE 191-200), defense counsel argued and at the hearing proved that the State had not disclosed that evidence. In that regard, at the new Trial hearing, defense introduced Exhibit 3 (RE51), Dowdy's victim information statement dated November 27, 2017, written nearly four months after July 25th jail scuffle between her and Moffite and Exhibit 4, the State's disclosure of the use of

Exhibit 3 (RE54), which also disclosed a discharge sheet from Dowdy's visit at Rush Hospital ER, which disclosed nothing about her throat problem.

Instruction C-7, S-1A (RE28) on the elements of aggravated assault read in part:

> "The defendant, Derrick Dewayne Moffite, did knowingly or purposely cause serious bodily injury to Jody Dowdy, a correctional officer acting within the scope of her duty and office by grabbing her around the neck and applying pressure cutting off blood and airflow to her brain..."

The defendant in his motion for directed verdict at RE 201-204 argued that serious bodily injury was not proven and that only hearsay and undisclosed testimony by Dowdy showed some condition, of unknown origin, in her throat. The judge in his ruling (RE203), T354 said Dowdy had testified to serious bodily injury, that she could not breath for ten second and blood and air flow was cut off to her brain, and she had continuous injuries (throat problem). The judge agreed there was no medical documentation of serious bodily injury.

At T354 is a jury note (Exhibit 15 for I. D. and also see the discussion of the note at

T 518-524, relevant to the defendant's contention that the undisclosed throat problem was critical to the jury's verdict of guilty of aggravated assault. The note had two multi-lined statements, both stricken by large x's, then the question.

The first stricken note says:

> "Bodily injury is (in?)
> Aggravated? injury during attack of blood flow and air flow cut off does not meet criteria of aggravated as far as serious bodily injury?"

The second stricken note says:

> "Does she have serious injuries now that meet criteria for aggravated assault?"

The actual note says:

> "Serious bodily injury during attack constitute aggravated, or does serious injury have to be after attack?"

The judge's note back was "any injury which is inflicted after alleged attack is not

relevant to these charges."

Continuing in this regard, state's instructions-8, given as C-6 (RE 33) was a definition of "Serious bodily injury" and read:

> "The court instruct the jury that 'serious bodily injury' means bodily injury which creates a substantial risk of death, or, which causes serious, permanent disfigurement, or, protected loss or impairment of the function of any bodily member or organ of the body."

Defense objected at T471-472, RE 133-134, because there was no proof of bodily injury, which creates a substantial risk of death and he added that, the injury had to be an injury and his objection was overruled.

Instruction C-8 (RE 32), state's S-7A, on the lesser offense of simple assault included the exact same element language, above quoted for instruction C-7, only leaving out the word 'serious' to modify bodily injury and referenced the same operative acts that supposedly cause bodily injury. That the jury verdict being aggravated assault, draws into fatal

question the sufficiency of such verdict and suggest strong proof, if any verdict, it should have been simple assault.

Jailer Charlie Eakins, while testifying on cross, RE125-130, T278-283, contradicted to Dowdy's testimony that, she never sprayed 'Sabre Red' on Moffite in the corner. He established that, in fact, she had sprayed him. The purpose of Eakins' testimony is to show she testified falsely about her part in assaulting Moffite with 'Sabre Red,' and, just as she had repeatedly falsely testified of not spraying Moffite, she would have testified falsely about everything else and especially about his arm around her neck cut off her oxygen and blood flow to her brain, which she didn't report until November 11th, over three (3) months after the assault. Dowdy's false swearing as to 'Sabre Red' drew into question, her testimony that Moffite grabbed her and threw her to the ground, as opposed to her simply falling and Moffite falling on top of her. Surely the falsehoods raised grave doubt as to any permanent throat injury since she presented no medical evidence on that.

REASONS FOR GRANTING THE PETITION

REASON ONE:

The jury evidence was insufficient to prove aggravated assault as charge in the indictment and the Court of Appeals wrongly considered the issue as a charge of where one attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm, but the jury was not instructed on that type of aggravated assault...

The evidence was insufficient on "serious bodily injury."

Part I of the Court's opinion, the Court, examines the definition of aggravated assault, and dispatches the indictment's and instruction c-7's element of actual causation of, and "serious bodily injury," through the means of characterizing Moffite's use of hands and arms as being a deadly weapon. However, Moffite was not charged with the version of aggravated assault where 'deadly weapon' or the above described means of assault, eliminate the duty to charge and prove serious bodily injury.

The relevant part of the section 97-3-7(2)(a) of MCA (3026) reads:

"A person is guilty of aggravated assault if he (i) attempts to cause

serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; (ii) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (iii) causes any injury to a child who is in the process of boarding or exiting a school bus in the course of a violation of Section 63-3-615; and, upon conviction, he shall be punished by imprisonment in the county jail for not more than one (1) year or in the penitentiary for not more than twenty (20) years" (writer's emphasis).

Instruction C-7, S-1A (RE 28) on the elements of aggravated assault (tracking the exact language in the indictment) read in part: "The defendant, Derrick Dewayne Moffite, did knowingly or purposely cause serious bodily injury to Jody Dowdy, a correctional officer acting within the scope of her duty and office by grabbing her around the neck and applying pressure cutting off blood and airflow to her brain."

The court quoted Jackson v. State,

594 So.2d 20, 24 (Miss. 1992), as precedent which eliminates proof of 'serious bodily injury' when a deadly weapon or 'means likely' is charged. However, The jury was not instructed on needing to find first that "hands and arms" were a means likely to produce death or serious bodily harm, because the state was proceeding under actual serious bodily harm/injury. The jury in its note is focused on serious bodily injury, not attempt by use of means likely to produce death or serious bodily harm. The state undertook by its indictment and its instruction, the burden of proof of serious bodily injury.

The jury was not instructed on whether use of arms to stop air and blood flow was a means likely to produce death or serious bodily harm. Sufficiency of "means likely to produce death or serious bodily harm" is a necessary factual finding to be made only by the jury under proper instruction... See, Harrison v. State, 724 So.2d 978, 983 (Miss. App. 1998) and Jackson v. State, 594 So.2d 20, 24 (Miss. 1992).

Direct remand is prejudicial and a new trial is required. A new trial is justified, and Moffite suffers prejudice if it is not granted, because the jury found serious bodily injury, where the evidence was transparently insufficient, the jury was not instructed on Moffite's theory of

defense and the Trial judge got to involved in concluding in front of the jury that Moffite's saying--(I don't recall), meant he was not denying what the phone conversations, and they may have occurred. Moffite's defense would apply to simple assault conviction only, Thus, clear prejudice is here and direct remand denies Moffite a Trial by jury.

The jurors had to commit, all Twelve, to serious bodily injury to reach the verdict they did. The Court of Appeals in its rationale of means likely excuses this finding by justifying a conclosion of aggravated assault, essentially finding that Moffite used means likely. The state below was at fault in the failure of its evidence to meet the standard of serious bodily injury. Their jury instruction defining serious bodily injury, guaranteed that a verdict of aggravated assault would not be supported by the evidence.

Instruction c-10(cp40) was the self-defense right against excessive force by jailers, which in relevant part said: "if you do so find, from the evidence, the presence of excessive force and that the actions of the Defendant were reasonable, under the circumstance, in resisting it, then you shall find that the Defendant is not guilty.

Significantly, Moffite arguably showed,

he was holding Sergeant Dowdy, as a shield against the other officers' spraying him with Sabre Red. The State wanted the jury to believe that Moffite's actions were, as the majority has written, a plan to beat up on female officers, this from telephone conversations way before the jailers were attempting to put him in a suicide cell. The physical contact between Moffite and the jailers was totally Moffite's resistance to close confinement in the suicide cell. The jury was not instructed on Moffite's theory of defense, separately addressed below.

A remand for new trial is required to avoid prejudice, because the insufficiency of the evidence of 'serious bodily injury' and, with all due respect, the somewhat strained discussion, required to reject the insufficiency argument, exposes the weakness of a claim of actual serious bodily injury. Moffite submits that, serious bodily injury was never present in the evidence and the case should have begun and ended as a 'simple injury' one. Serious bodily injury inflamed the jury to dismiss out of hand Moffite's self-defense argument. This tainted the jury deliberations.

Also when considering whether to remand for new trial, the other errors of: (1) arguably fabricated and never disclosed persistent throat injury from the assault; (2) Sergeant Dowdy's testimony contrary to

what the jail camera revealed; and (3) the trial judge's erroneous clarification of Moffite's "I don't recall" answers to very critical facts, i.e., the jail phone calls, making it clear that Moffite wasn't actually denying such, but just not recalling, all show that prejudice is sufficiently present, if Moffite is not granted a new trial.

The Court thoroughly discussed the jurisprudence underlying the direct-remand rule in Shields v. State, 722 So.2d 584, 587 (Miss. 1998). The Supreme Court explained that the logic behind the direct-remand rule was that, "guilt of a true lesser-included offense is implicitly found in the jury's verdict of guilt on the greater offense." Id. (citation omitted).

At 585-587 of Shields, the direct-remand rule was discussed, with the court focusing on prejudice to a limited degree but adopting the Allison test, that included prejudice and concluded a failure to instruct on the lesser was not prejudice. So, the issue becomes that Moffite is denied a trial by jury by a direct-remand, not failure to instruct on the lesser, since the state obtained a simple assault instruction.

In U.S. v. Hunt, 129 F.3d 739, 744 (5th Cir. 1997), the Fifth Circuit, cited Rutledge v. U.S., 517 U.S. 860 (1996) and wrote: Those circumstances have been outlined as follows: It must be clear

(1) That the evidence adduced at Trial fails to support one or more elements of the crime of which appellant was convicted, (2) that such evidence sufficiently sustains all the elements of another offense, (3) that the latter is a lesser included offense of the former, and (4) that no undue prejudice will result to the accused... Allison v. U.S., 409 F.2d 445, 451 (D.C. Cir. 1969)... (cited with approval in Rutledge, 517 U.S. at---n.15); See also, U.S. v. Smith, 13 F.3d 380, 383 (10th Cir 1993)... (suggesting that the referred-to prejudice generally arises when the defenses presented to the jury would have differed).

Another Trial will assure Moffite a fair Trial on simple assault on a correctional officer, under a clear instruction on Moffite's theory of the case, a right to a Trial by jury under proper instructions, a fundamental right, in the basic sense of the jurisprudence of due process of law. Moffite's right to a jury Trial is denied if a new Trial is not ordered.

REASON TWO:

The Court of Appeals on the issue whether Moffite was denied the right to have the jury consider his defense that his physical resistance was to the close confinement in an isolation cell is contrary to the ruling in Stringfellow v. State, 595 So.2d 1320,

1322 (Miss. 1992). The instruction on self-defense, defense from personal assault by the officers did not instruct the jury on Moffite's defense. The Trial Court neglected its ultimate duty to render proper guidance to the jury, stated by Kolberg V. State, 829 So.2d 29, 45 (Miss. 2002)...

Defendant raised this defense of strict confinement as the basis for his physical resistance, when he objected to instruction S-4. The defendant at RE132, T470 objected that instruction S-4 (RE29) (concerning whether the correctional officers had committed an unnecessary assault on Moffite while attempting to put him in the suicide cell and if the jury so found then Moffite would be not guilty), that it would not include Moffite's theory that Moffite was not defending for his own protection (T471) against an assault by the officers, but defending against the confinement in the suicide cell. (T470).

In Brown V. State, 39 So.3d 890, 900 (Miss. 2010), The court stated the law of instruction on defense theory as follows:

> The ultimate responsibility of assuring that the jury is properly instructed on all relevant issues of law in a case falls upon the trial judge. Therefore, when the judge is confronted with what the judge perceives to be

an improperly worded jury instruction attempting to set out a point of law on which the jury should be instructed, and which is not covered elsewhere in other jury instructions, already given, the judge should take whatever remedial action necessary to present a properly worded instruction to the jury on that point of law. Davis, 18 So.3d at 849 (citing Duvall v. State, 634 So.2d 524, 526 (Miss. 1994). See also, Kolberg v. State, 829 So.2d 29, 45 (Miss. 2002) (in which this court stated there is no doubt that the trial court is ultimately responsible for rendering proper guidance to the jury via appropriately given jury instructions, even sua sponte.).

Stringfellow v. State, 595 So.2d 1320, 1322 (Miss. 1992), instructs that if serious doubt exists as to whether an instruction should be included, the doubt should be resolved in favor of the accused. The primary concern should be that, the jury was fairly instructed and that each party's proof-grounded theory of the case was placed before it; Splain v. Hines, 609 So.2d 1234, 1239 (Miss. 1992) (citing Rester v. Lott, 566 So.2d 1266, 1269 (Miss. 1990).

The absence of this instruction limited the

jury to decide the case on the State's theory of a plan to attack female jailers and the details of the altercation and created an injustice against the defendant contrary to Milano v. State, 790 So.2d 179 at 185 (Miss. 2001). Such was fundamental error and bolstered the State's theory and legitimated and made more critical State's evidence that was only tangential to the reason behind Moffite's resistance to suicide cell confinement.

Failure to apply plain error. The Court of Appeals in rejecting Moffite's argument that 'plain error' applied to this failure to instruct on the defense, was a violation of a fundamental right by established legal precedent. The above authorities define this as a fundamental right. The general understanding of the meaning and application of 'plain error' was not followed by the Court of Appeals. Under the plain error doctrine, this Court can recognize obvious error which was not properly raised by the defendant and which affects a defendant's fundamental substantive right; Conners v. State, 92 So.3d 676, 682 (Miss. 2012) (quoting Smith v. State, 986 So.2d 290, 294 (Miss. 2008)). Meaningful opportunity to present a complete defense is a fundamental right; see, Holmes v. South Carolina, 547 U.S. 319, 324 (2006) and Chesney v. State, 165 So. 3d 498, 503 (Miss. Ct. App. 2015) (citing Boyd v. State, 47 So.3d 121, 127 (Miss. 2010).

Cinstructing the jury on every element of the charged crime is so basic to our system of justice that it should be enforced by reversal in every case where inadequate instructions are given, regardless of a failure to submit to the jury the essential elements of a crime amounts to plain error; Pollard v. State, 932 So.2d 82, 87 (Miss. Ct. App. 2006).

REASON THREE:

The Trial court became an advocate and was not properly impartial...

The judge injected himself into the State's cross-examination of Moffite by exacting from him the admission that when Moffite answered a State's question saying -- "I don't recall" -- that meant that Moffite admitted he may have said the words that were asked of him by the State. (RE 82-117, T429-444). Moffite was being confronted with the jail phone calls he was said to have had made which Major McCarter had extracted and listed where Moffite was supposed to have stated that he was going to be kept in booking and he was going to beat girls up and everything. (T429) Moffite had gone on to explain on cross that he had insisted that a higher authority, even the sheriff, first be contacted to approve his

confinement in the suicide cell, because he wasn't suicidal. (T434-436) also see T. 445-463.

The court, in its opinion, at page 12, ¶ 34, references Moffite's citation of West v. State, 519 So.2d 418, 421 (Miss. 1988), distinguishing that reversal there was ordered because the judge bolstered the state's case. With due respect, the court was not bolstering, it was developing the state's evidence.

In West, the court cited Brashier v. State, 20 So.2d 65 (Miss. 1944), (The jurors are subordinate to the judge. He has large control over them... it is the supreme duty of a trial judge, in so far as it is humanly possible, to hold the scales of justice evenly balanced between the litigants.), and Thompson v. State, 468 So.2d 852, 854 (Miss. 1985) (He cannot be too careful and guarded in language and conduct in the presence of the jury, to avoid prejudice to either party). It was humanly possible to hold the scales of justice evenly balanced and the trial judge, respectfully did not act with care and guard his language. Such is reversible under all the circumstances.

REASON FOUR:

Moffite was factually confused by the sudden evidence of the 'throat injury,' in light

of the STATE's assertion it had been disclosed, where the proof shows it wasn't and a new trial should have been ordered...

As Moffite pointed out in his principal brief, Defense Counsel made no immediate objection. Defense was totally surprised, but the issue was brought up at the Motion for Directed Verdict (T 353-354) and in the Motion for New Trial. In that regard at the new trial hearing, Defense introduced Exhibit 3 (RE51), Dowdys victim information statement dated November 27, 2017 written nearly four (4) months after the July 23rd jail scuffle between her and Moffite and Exhibit 4, the State's disclosure of the use of Exhibit 3 (RE54), which also disclosed a discharge sheet from Dowdys visit at Rush Hospital ER, which disclosed nothing about her throat problem. She agreed that was all the injuries she had. (T. 328-329) At T. 350, with Sergeant Dowdy on re-direct, the State again referred to the purported permanent damage to the throat.

Now, the Court has said Moffite should have asked for a continuance, but, since defense counsel was confused, and as he said at the hearing on the Motion for New Trial.

The Court of Appeals was in error in saying Moffite waived the issue by not objecting and

then not requesting a continuance. See Key 41, of the Opinion. The Court acknowledge the proposition here that Moffite argues--"a miscarriage of justice,--" citing Smith v. State, 28 So.3d 678, 680 (Miss. 2010).

The best "finding" by the Court is at Key 42, where it writes:

> "Even though Moffite contends he was unaware of Sergeant Dowdy's plan to testify about existing scar tissue, the record shows that Moffite did receive notice that the state intended to question Sergeant Dowdy about her injuries and ongoing problems from the attack. The state also forwarded Sergeant Dowdy's statement--which referenced the trauma of the attack and the lasting issues--to Moffite. If Moffite was truly surprised by previously undisclosed discovery, he should have moved the Court for a continuance."

To conclude objection and failure to request a continuance fairly resolves the issue does not resolve the fact a "miscarriage of justice" occurred and a reversal and a new trial are required.

REASON FIVE:

(A) Moffite was improperly sentenced to life without early release, because use of the 2003 guilty plea to house burglary as the "violent crime" by applying a 2014 statute first defining "violent crime" was a violation of due process and further since no evidence was presented that it was violent.

(B) There was insufficient evidence to meet the pre-requisites for a sentence of life without early release, since proof of serving a year in prison on each crime was not proven...

House burglary conviction, when entered, was not a violent crime and not proven below at the sentencing hearing as a violent crime.

Section 97-3-2(1) of MCA defined House Burglary in 2014, for the first time, as a crime of violence, in the prison reform legislation House Bill 585. It has now been declared not only as affecting prison reform, but permitted to be retroactive for sentencing under Section 99-19-83 of MCA (Rev. 2015) to allow mandatory life without early release sentences as the sentence upon a third conviction, where one of the prior convictions is

defined by name per se as of 2014 by section 97-3-2(1) is a violent crime. Such interpretation is contrary to the intent of House Bill 585. of course, the state's advantage in plea bargaining for convictions was enhanced and for imposition of mandatory day for day sentences, increasing guilty pleas(s) sentences for any third conviction.

The Court has ruled that, section 97-3-2, is not retroactive, if it has beneficial effects on denying parole from a prison sentence. See, Johnson v. State, 214 So.3d 317, 318 (Miss. App. 2017) (Though Mississippi Code Annotated section 97-3-2 (Rev. 2014) revised parole eligibility under Section 47-7-3 (Rev. 2015) to allow a person convicted of statutory rape to have a judge make a determination if it should be classified as violent, but the review is not retroactive).

The classification of dwelling house burglary as a violent crime after Moffite's plea to that conviction many years earlier, in fairness and under due process should have disallowed, absence proof in 2003 or proof at this sentencing that such was a violent crime; See, Miller v. State, 225 So.3d 12 (Ct. Appeals 2017)(contra).

Looking at the actual language, Moffite contends the house burglary conviction should have

not been used since it was not a crime of violence at the time of the burglary conviction. This is since section 99-19-83 reads, in part, describing such prior conviction as, "where any one of such felonies shall have been a crime of violence, as defined by section 97-3-2. shall have been-- means at the time of the conviction, and thus, section 97-3-2 was not meant to be retroactive, but required earlier proof or present proof of violence; Brown v. State, 102 so.3d 1087, 1092 (Miss. 2012).

However, in a habitual sentencing context, in Apprendi v. New Jersey, 530 U.S. 466, 483 (2000), the Supreme Court held that, under the Sixth Amendment, other than the fact of a prior conviction, any facts that increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. Id. at 490. See also, Justice Kitchens, P.J., dissenting, joined by King, P.J. and Ishee, J., in Fogleman v. State, 283 so.3d 685, 692 (Miss. 2019).

Moffite urges the court not to vacate his sentence under section 99-19-83, and remand for sentencing under section 99-19-81.

Failure of proof of service of a

sentence of one year under the predicate crimes, requires reversal of the sentence and remand for proper sentencing.

With due respect, Moffite submits, that the citation in the Opinion to Davis v. State, 680 So.2d 848, 851 (Miss. 1996) is not persuasive. There the proof of one year was shown by testimony from a jail administrator providing the date of Davis' first day jailed on the charge, and his parole officer's testimony as to continuous imprisonment for at least a year.

Also distinguished is Taylor v. State, 122 So.3d 707, 711 (Miss. 2013), where certified copies of the actual judgments of convictions and sentencing orders were entered. Distinguishing here is that, the issue is not whether convicted, but the length of time served. The court's citation to Sumrell v. State, 163 So.3d 997, 1000 (Miss. ct. App. 2015), likewise does not show a record with such strange testimony as Moffite saw at his sentencing hearing. Below in this case there was no such credible evidence beyond a reasonable doubt, but a confusing system of calculations, one from some computer system, Legato, that wasn't fully explained, so as to meet the burden of proof of such confinements beyond a reasonable doubt.

The record below again.

The STaTe used LaKesha LocKharT, an operaTions supervisor with MDOC in Jackson, whose job was To prepare pen-packs. AT The senTencing hearing The pen-pack inforMaTion was noT admiTTed in Compliance with Mississippi Rule of Evidence 803(6) and 803(7) and SecTion 47-5-10, of MCA. Ms LocKharT's TesTimony was ToTally hearsay. As To The elemenT of The length of Time MoffiTe served on each senTence The peculiar percenTage calculaTion of The concurrenT senTences for The grand larceny and dwelling house burglary jusTify a Conclusion ThaT There was no evidence and Surely noT any beyond a reasonable doubT, as To how long MoffiTe Served on Those SenTences.

LaKesha LocKharT and her TesTimony are in Record ExcerpTs pages 56-70. The CourT is urged To STudy ThaT TesTimony and examine The objecTions and The exhibiTs and Then conclode The senTence muST be reversed and remanded for senTencing under SecTion 99-19-81, non-violenT habiTual. FurTher The CourT should direcT ThaT any re-senTencing be To non-violenT habiTual.

See, Conner V. STaTe, 138 So.3d 143, 151 (Miss. 2014), for The mandaTory procedures and

standard of proof at habitual sentencing hearings and the following cases cited there: Davis v. State, 680 So.2d 843, 851 (Miss. 1996); Taylor v. State, 122 So.3d 707, 709 (Miss. 2013); Young v. State, 507 So.2d 48, 50 (Miss. 1987); Grayer v. State, 120 So.3d 964 (Miss. 2013) and Charleston v. State, 205 So. 3d 1141, 1145 (Miss. App. 2016).

Herein, Moffite submits the proof of the time required to be served on each predicate crime for a sentence under section 99-19-83 of MCA and the sentence of life without any early release should be reversed and remanded for sentencing under section 99-19-81 of MCA.

CONCLUSION

Moffite respectfully contends that the court should issue the writ and reverse and remand for a new trial on a charge of simple assault upon a law enforcement officer. He urges the court in the minimum to reverse the sentence and remand for re-sentencing under the non-violent habitual offender statute. He requests relief to guarantee his rights to a fair jury trial, due process of law and fundamental fairness under the constitution.

The Petition for a Writ of Certiorari should be granted...

Respectfully Submitted,

DERRICK D. MOFFITE

SWORN TO AND SUBSCRIBED BEFORE ME,
This the 18 day of NOV, 2020.

"NOTARY PUBLIC"

MY COMMISSION EXPIRES:

STATE OF MISSISSIPPI
NOTARY PUBLIC
ID # 87335
LAURA TILLEY
Commission Expires
Oct. 12, 2023
GREENE COUNTY