

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 22-6880 ORIGINAL

Supreme Court, U.S.
FILED

FEB 22 2023

OFFICE OF THE CLERK

ROOSEVELT WASHINGTON,

PETITIONER,

VERSUS

STATE OF MISSISSIPPI,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

PETITIONER PRO SE:

Roosevelt Washington, #50085

SMCI, Area-2, Unit A-2

P. O. Box 1419

Leakesville, MS 39451

Questions Presented

A.

Whether Washington's sentence is
illegally imposed as a Matter of Law
and/or in the Interest of Justice.

List of Parties

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

RELATED CASES

Edwards v. State, 75 So.3d 73, 76 (Miss. Ct. App. 2011)

Small v. State, 141 So.3d 61, 76 (Miss. Ct. App. 2014)

Boyd v. State, 155 So.3d 914, 918 (Miss. Ct. App. 2014)

Salter v. State, 184 So.3d 944, 952 (Miss. 2015)

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Appendix "A" Order denying Motion for Reconsideration
To file PCR in Trial Court.

OPINIONS BELOW

The Order of The Mississippi Supreme Court (highest state court), -- denying Petitioner's Motion for Reconsideration-- of Application for Leave To File Post-Conviction Collateral Relief Motion in The Trial Court; is attached hereto as Appendix "A".

JURISDICTION

The date of which The highest state court decided Petitioner's case was November 29, 2022. A copy of This decision appears as Appendix "A".

The jurisdiction of This court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of The United States Constitution states in pertinent part, as follows:

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

U.S. CONST. XIV AM.

STATEMENT OF THE CASE

Petitioner Washington was indicted in the Circuit Court of Lincoln County, Mississippi for the offenses of: Count one - robbery [Miss. Code Ann. § 97-3-73]; Count two - Armed robbery [§ 97-3-79] (2 counts); Count three - armed robbery; Count four - burglary [Miss. Code Ann. § 97-17-21]; Count five - burglary [§ 97-17-21]; and, Count six - burglary [§ 97-17-21].

Petitioner Washington entered a plea of 'not guilty' to such charges, and the case was tried to a jury. Petitioner Washington was convicted of armed robbery and sentenced to forty-five (45) years imprisonment as a habitual offender -- pursuant to Miss. Code Ann. § 99-19-81 (Petitioner was indicted upon § 99-19-83)... To be served in the custody of the Mississippi Department of Corrections. Said conviction and sentence rendered and imposed on June 30, 1995.

The Supreme Court/Court of Appeals -- the Court of last jurisdiction -- denied Petitioner's Application for Leave to file Motion for Post-conviction Collateral Relief in the Trial Court on September 28, 2022, and denied Petitioner's Motion for Reconsideration on November 29, 2022.

REASONS FOR GRANTING THE WRIT

The Petitioner was convicted of armed robbery as an habitual offender, pursuant to Miss. Code Ann. § 99-19-81 and sentenced to forty-five (45) years imprisonment without the possibility of parole, on June 30, 1995, before The Honorable Keith Starrett. Petitioner appealed his conviction to the Supreme Court/Court of Appeals, which affirmed on December 20, 2001. Petitioner's final motion (for reconsideration) was subsequently denied on November 29, 2022. Petitioner asserts plain error and that, his sentence is illegal--due to the denial of due process in sentencing him as a habitual offender--where the State failed to introduce certified copies of his prior felony convictions or any evidence to support Petitioner's status as a habitual offender.

Young v. State, 507 So.2d 48 (Miss. 1987):

In 'Young', the defendant's sentence under the habitual offender statute required reversal--where the judge considered evidence which had been introduced during guilt phase of trial, but which had not been introduced during sentencing phase.

Further, 'Young' cites Seely v. State, 451 So.2d 213 (Miss. 1984). The use of evidence in a

Sentencing phase of a bifurcated Trial under the habitual offender statute is governed by 'Seely' supra. -- which contains some very important language about the procedures to be observed in such a Trial, as follows:

"The state has the same burden of proof as to the habitual offender portion of the indictment as it has on the principal charge. The defendant also have the same rights at both stages of the two-part Trial... There appears to be some tendency to routinely allow the state to produce some documentation of prior offenses and for the Trial Court to perfunctorily find the defendant a habitual offender -- then routinely pass out the sentence mandated by the statute. We wish to leave no doubt that a bifurcated Trial means a full two-phase Trial prior to any finding that the defendant is a habitual offender and subject to enhanced punishment... (451 So.2d at 215)."

'Young,' further stated in relevant part: "our rule is that, the habitual offender sentencing like the [a] capital sentence -- is itself a Trial on eligibility for a harsher sentence and therefore constitutes jeopardy... see, DeBussi v. State, 453 So.2d 1030, 1033 (Miss. 1984).

Because of The Double Jeopardy Clause, we cannot remand to have 'Young' resentenced under the habitual offender statute. However, as a matter of record, the Twenty-Two (22) year sentence -- if enhanced -- would be a reasonable for a rape conviction... consent and remand to the Trial Court to sentence Young to an unenhanced term of Twenty-Two (22) years imprisonment.

CASE AT BAR:

In The case at bar, the record is devoid of The State during sentencing phase introducing certified copies of Petitioner's prior felony convictions into the record and of any competent evidence to support Petitioner's habitual offender status. Thus, the State failed in its burden of proof -- as to the habitual offender portion of the indictment -- as a result, Petitioner must be re-sentenced to an unenhanced forty-five (45) year sentence.

Pursuant to the Court holding in 'Young' and 'Seely' -- inclusion elsewhere in the court file does not suffice. Actual admission into evidence at sentencing is required and a complete record of the second part of the bifurcated trial must be made... see, U.S. v. Recio, 371 F.3d 1093, 1103 (9th Cir. 2004); U.S. v. Stonefish, 402 F.3d 691, 699 (6th Cir. 2005); U.S. v. Hall, 515 F.3d 186, 194 (3d Cir. 2008).

Grayer v. State, 120 So.3d 964, 969 (Miss. 2013):

In 'Grayer', the court vacated a defendant's sentence as a habitual offender on the grounds that, the state did not provide competent evidence to support such a sentence. In that case, the state failed to move to enter the certified copies of 'Grayer's' prior convictions into evidence-- and the trial court had nothing more to rely on than a mere recitation of 'Grayer's' prior felony convictions. Id. The court held that, the state failed to prove 'Grayer's' prior convictions by competent evidence--which rose to the level of plain error. Id.

CASE AT BAR:

In the case at bar, it is similar to that of 'Grayer' in that, no prior felony convictions and/or competent evidence was introduced into evidence at sentencing to support petitioner's habitual status-- other than an order amending the indictment, and petitioner being indicted under § 99-19-83. Simply put, the state failed to prove petitioner's prior convictions by competent evidence. Thus, the circuit court committed error rising to the level of plain error, by sentencing petitioner as a habitual offender without evidence of his prior convictions. Therefore, petitioner's forty-five (45) year sentence as a habitual offender enhancement should be vacated and remanded to the circuit court for re-sentencing.

of Petitioner as a non-habitual offender... See, U.S. v. Murphy, 406 F.3d 857, 860 (7th cir. 2005); U.S. v. Weidner, 437 F.3d 1023, 1049-50 (10th cir. 2006); and, U.S. v. Page, 520 F.3d 545, 547 (6th cir. 2008).

Short v. State, 929 So.2d 420 (Miss. 2006);

In 'Short,' The court reversed and rendered Short's sentence and remanded for re-sentencing because the record revealed that there was insufficient evidence before the trial court to establish Short's habitual offender status.

The court stated: "for this court to affirm an enhanced sentence under § 99-19-81, the trial court's basis for imposing the sentence must appear on the record on appeal 'Vince,' 844 So.2d at 517. In 'Vince,' the sole evidence of 'Vince's' habitual offender status apparent from the appellate record--was a transcript excerpt in which the prosecutor informed the trial court of an NCIC report listing 'Vince's' various convictions and sentences. Id. The NCIC report itself was not admitted as an exhibit at trial or made a part of the appellate record. Id. Finding that the state failed to sustain its burden of proof of the prior convictions beyond a reasonable doubt--this court affirmed 'Vince's' conviction, but vacated his sentence and remanded

for re-sentencing. Id. We quoted The Supreme Court's warning in 'Seely' infra.... "against The Tendency To routinely allow The State To produce Some documentation of prior offenses and for The Trial Court To perfunctorily find The defendant a habitual offender. Id. at 21... See also, U.S. v. Smith, 444 F.3d 996, 997-98 (8th Cir. 2006); U.S. v. Schalk, 515 F.3d 768, 776 (7th Cir. 2008); and, U.S. v. Guarino, 517 F.3d 1067, 1068 (8th Cir. 2008).

CASE AT BAR:

In The case at bar; just like in 'Short' and 'Vince' The record reveals error in sentencing. The record shows "no proof" of any of Petitioner's prior convictions were introduced as exhibits or even mentioned during Petitioner's Trial or at sentencing.

The State has The burden To prove The defendant's habitual offender status beyond a reasonable doubt-- by producing sufficient evidence That The defendant was convicted Twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different Times and for which The defendant was sentenced To separate Terms of at least one year imprisonment. The best evidence of a conviction is a certified copy of The judgment of conviction. Id. at 518... See, U.S. v. Henderson, 409 F.3d 1293, 1307 (11th Cir. 2005); U.S. v. Blandin, 435 F.3d 1191, 1195

(9th Cir 2006); and, U.S. v. Garretti, 528 F3d 525, 529-30 (7th Cir, 2008).

As a matter of record, The State failed to prove its burden of proof--as to Petitioner's habitual offender status--beyond a reasonable doubt; by producing competent evidence of Petitioner's prior convictions--pursuant to the herein cited precedent(s)--as a matter of law Petitioner's sentence should be vacated and remanded for an enhanced re-sentencing in the interest of justice.

Notwithstanding the fact, that the Court of Appeals of the State of Mississippi affirmed Petitioner's conviction and sentence [December 20, 2001]-- Petitioner has been diligent in his search for justice, since that time and would further argue:

TIME BAR:

Notwithstanding the fact, that the UPCCRA [Miss. Code Ann. §99-39-5(2)], provides that a motion for relief shall be made within three (3) years after the time in which the Petitioner's direct appeal is ruled on-- however, claim(s) of illegally imposed sentence can be litigated at any time. Due process of law is a fundamental constitutional right guaranteed by both the United States Constitution-- Amendment XIV, §1 (no state shall deprive any

person of life, liberty or property, without due process of law) and, Mississippi Constitution-- Article 3, Section 14 (No person shall be deprived of life, liberty or property except by due process of law)... See, Patterson v. New York, 432 U.S. 197, 201-02 (1977) and, Means v. State, 43 So.3d 438, 447 (Miss. 2016). See also, U.S. v. Olano, 507 U.S. 725, 731 (1993); Washington v. State, 800 So.2d 1140, 1141 (Miss. 2001); and, Cooper v. Oklahoma, 517 U.S. 348, 367 (1996).

In The Case sub judice, Petitioner raises non-procedural barred Claim: "Plain error was committed when Petitioner was illegally sentenced in violation of due process rights in sentencing as a habitual offender. The court has 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... See, Smith v. State, 477 So.2d 191, 195 (Miss. 1985); U.S. v. Wolfe, 245 F.3d 257, 261 (3d Cir. 2001); U.S. v. Evans, 478 F.3d 1332, 1338 (11th Cir. 2007); and, Rowland v. State, 42 So.3d 503, 508 (Miss. 2010).

Petitioner submits That, There are no successive-writ bar, or procedural bars to prevent this action from being heard. The Constitution

of The State of Mississippi guarantees one's rights To be heard in a court of law--Article 3, Section 25, holds as follows:

"No person shall be debarred from prosecuting or defending any civil cause for, or against him, or herself before any Tribunal in the State; by him or herself, or counsel, or both."

The Legislature of the State of Mississippi has re-enforced the right To be heard with the passage of House Bill 1456--Miss. Legislative--Regular Session, #2018, Code § Sec. A099, 0039, 0005-A099, 0039, 0027; which specifically mandates as follows:

"Title: an act To amend § 99-39-5 and § 99-39-27; To provide That The dismissal of, or denial of post-conviction relief; "shall" not be a bar To a second or successive application (motion for relief)."

Furthermore, in Mississippi jurisprudence; since 'Rowland' (2010), There are four Types of "fundamental Constitutional rights To survive post-conviction relief motions' procedural bars: (1) The right against double jeopardy; (2) The right To be free

from an illegal Sentence; (3) The right To due process at Sentencing; and, (4) The right not To be Subject To ex post facto laws. In accordance with the single claim argued by Petitioner, [i.e., illegal sentence/denial of due process at sentencing], Petitioner highlights the second and third factors in showing that said claim(s) is excepted from any procedural bars... U.S. v. St. Pierre, 488 F.3d 76, 80 n. 2 (1st Cir. 2007); U.S. v. Baker, 489 F.3d 366, 374 (D.C. Cir. 2007); Boyd v. State, 155 So.3d 914, 918 (Miss. Ct. App. 2014); and, Salter v. State, 184 So.3d 944, 952 (Miss. 2015).

Also, Miss. Code Ann. § 99-39-21(1), states in pertinent part, as follows:

" Failure by a prisoner to raise objections, defenses, claims, questions, issues, or errors, either in fact or law--which were capable of determination at trial and/or direct appeal, acts as a procedural bar--unless the prisoner makes a showing of cause and actual prejudice to grant relief."

However, the court(s) holds that errors affecting fundamental constitutional rights, [i.e., illegal sentence/violation of due process in sentencing], are excepted from the procedural bars of UPCCRA.

(To include Miss. Code Ann. § 99-39-21)... See, Ivy v. State, 731 So.2d 601, 603 (Miss. 1999) (holding that Ivy's petition alleging an illegal sentence was not time-barred) and, Kennedy v. State, 732 So.2d 184, 186-87 (Miss. 1999) (holding that Kennedy's petition alleging an illegal sentence was not time-barred or barred by res judicata). See also, U.S. v. Brown, 450 F.3d 76, 79 (1st Cir. 2006); and, U.S. v. Burns, 526 F.3d 852, 858 (5th Cir. 2008).

The rule-of-thumb is that, a defendant who fails to make a contemporaneous objection-- must rely on plain error to raise the assignment on appeal... See, Foster v. State, 639 So.2d 1263, 1288-89 (Miss. 1994); U.S. v. Candelario, 240 F.3d 1300, 1309 (11th Cir. 2001); Randall v. State, 806 So.2d 185, 195 (Miss. 2001); and, Perkins v. State, 863 So.2d 47, 55 (Miss. 2003). Plain error is defined as: (1) an error; (2) that is clear or plain; (3) that affects the defendant's substantial rights; and (4) that seriously affects (adversely) the fairness, integrity or public reputation of judicial proceedings... See, U.S. v. Vasquez, 216 F.3d 456, 459 (5th Cir. 2000); and, U.S. v. Moreci, 283 F.3d 293, 297 (5th Cir. 2002).

The plain error doctrine has a two-part test which requires: (i) an error at the trial level (i.e., due process violation in habitual offender sentencing and (ii) such an error resulted in a mani-

fest miscarriage of justice (i.e., habitual offender sentence illegally imposed as a matter of law and/or in the interest of justice... see, Gray v. State, 549 So.2d 1316, 1321 (Miss. 1989); Grubb v. State, 584 So.2d 786, 789 (Miss. 1991); U.S. v. Sanchez, 269 F.3d 1250 (11th Cir. 2001); and, Kelly v. State, 910 So.2d 535, 540 (Miss. 2005).

In regards to Petitioner's claim -- illegally imposed sentence -- The Courts hold this to be a fundamental right excepted from procedural bars of UPCCRA. Errors affecting certain fundamental constitutional rights are excepted from procedural bars... see, U.S. v. Williams, 527 F.3d 1235, 1240 (11th Cir. 2008); Carter v. State, 203 So.3d 730, 731 (Miss. Ct. App. 2016); Green v. State, 235 So.3d 1438, 1440 (Miss. Ct. App. 2017); and, Hays v. State, 282 So.3d 714, 720 (Miss. 2019).

In the case at bar, as the record will reflect, the court (prosecutor) relied solely upon the language of the indictment -- as proof of Petitioner's habitual offender status. In imposing a habitual offender sentence -- it is required that the accused be properly indicted as a habitual offender, and that, the prosecution prove the prior offenses by competent evidence. Language within the indictment is not proof per se, by competent evi-

of Petitioner's habitual offender status... See, Keyes v. State, 549 So.2d 949 (Miss. 1989); U.S. v. Banks, 464 F.3d 184, 189 (2d cir. 2006); U.S. v. Cardenas-Celestino, 510 F.3d 830, 833 (8th cir. 2008); and, U.S. v. Gonzalez-Terrazas, 529 F.3d 293, 296 (5th cir. 2008).

As herein, when habitual offender status is alleged and the accused goes to trial, the trial court must hold a separate hearing (bifurcated trial) to determine whether habitual offender status should be imposed-- not relying solely on the indictment charge. The grand jury is an accusatory-- not an adjudicative body-- not evidence of any fact, in and of itself... see, Smith v. State, 477 So.2d 191 (Miss. 1985); Nathan v. State, 552 So.2d 99 (Miss. 1989); In Re Sealed Case, 356 F.3d 313, 319 (D.C. cir. 2004); U.S. v. Ruhbayan, 406 F.3d 292, 302 (4th cir. 2005); U.S. v. Goode, 483 F.3d 676, 681 (10th cir. 2007); U.S. v. Bailey, 488 F.3d 363, 368 (6th cir. 2007); U.S. v. Rendon-Duarte, 490 F.3d 1142, 1146 (9th cir. 2007); U.S. v. Hardwick, 523 F.3d 94, 98 (2d cir. 2008); U.S. v. Johnson, 529 F.3d 493, 502 (2d cir. 2008); and, U.S. v. Bryant, 523 F.3d 349, 354 (D.C. cir. 2008).

Herein, The habitual offender phase of the trial was so infirm that it cannot survive review-- where no two-phase bifurcated trial occurred-- because the state did not introduce any testimonial or documentary evidence to prove prior convictions in

sentencing phase of the trial. The trial judge-- in error-- simply relying on the charge of habitual offender status charged in the indictment... See, Seely v. State, 451 So.2d 213 (Miss. 1984); Bandy v. State, 495 So.2d 486 (Miss. 1984); Seely v. State, 451 So.2d 213 (Miss. 1984); Young v. State, 507 So.2d 48 (Miss. 1987); U.S. v. Highgate, 521 F.3d 590, 596-97 (6th cir. 2008):

In The instant case, an analysis of the indictment charging Petitioner as a habitual offender-- Together with The Transcript of The sentencing hearing, (bifurcated trial); plainly and clearly shows a denial of due process in sentencing-- resulting in an illegally imposed habitual offender sentence of life imprisonment, without the possibility of parole. The right to be free from an illegal sentence is a fundamental constitutional right-- That has been found to survive potential procedural bars... See, Walker v. State, 823 So.2d 557, 562-63 (Miss. Ct. App. 2002); U.S. v. Balderama-Iribe, 490 F.3d 1199, 1204 (10th cir. 2007); White v. State, 59 So.3d 633, 636 (Miss. Ct. App. 2011); and, Green v. State, 235 So.3d 1438, 1440 (Miss. Ct. App. 2007).

CONCLUSION

WHEREFORE THESE PREMISES CONSIDERED, Petitioner respectfully prays that a writ of certiorari issue in this cause; Petitioner prays

for such other and further relief as The court
may deem to be just and proper.

Respectfully Submitted,

Roosevelt Washington
ROOSEVELT WASHINGTON

SWORN TO AND SUBSCRIBED BEFORE ME,
This the 22 day of February, 2023.

Laura Tilley
"NOTARY PUBLIC"



MY COMMISSION EXPIRES: _____