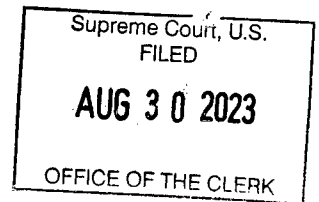


No. 23-5608 **ORIGINAL**



IN THE
SUPREME COURT OF UNITED STATES

George Butler PETITIONER

V

State of Mississippi RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Mississippi Supreme Court of Appeals

PETITION FOR WRIT OF CERTIORARI

George Butler
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QUESTIONS PRESENTED

(1) The Conviction and/or Sentence was in violation of the United States Constitution, Mississippi Constitution, and Laws of Mississippi.

(2) The Conviction and/or Sentence as a Habitual by amending indictment the day of Sentencing is in violation of Miss. R. Cr. P. 14.1(6) and Contrary to S.Ct. decisions violating Price v Vincent 538 US 634, 155 LEd 2d 877, 123 S.Ct. 1848 (2003).

(3) Improper indictment- Does not list all elements of Burglary and none of the elements of the Underlying Charge of Larceny, therefore, Not Charging the crime of Burglary, violation of US Const. 5th Amend. and Miss. Const. Art 3 Sec. 27.

(4) Ineffective assistance of Counsel in Violation of US Const. 6th & 14th Amend., Miss. Const. Art. 3 Sec. 27, Strickland v Washington 466 US 668, & US v Cronic 466 US at 658, & Harding v Davis 878 F2d 1341, 1345, (CA 11 1988).

(5) There has been an intervening decision of the Supreme Court, "Hughes v State 291 So3d 792 (2020)"

which would of adversely affected the outcome
of the Sentence in accordance with Miss Code Ann
99-39-5-(a)(9)(i), and 99-39-8 en Seq.

LIST OF PARTIES

MS Attorney General
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IN THE
SUPREME COURT OF 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 State Court

The opinions of the highest State Court to review the
merits appear at App'x A to the Petition and is
Reported at 2008-0040; 2023-M-00717.

The Opinion of the Mississippi Supreme Court
of Appeals appears at App'x A to the Petition is.
Reported at 2023-M-00717

JURISDICTION

For Cases from State Court.

The date on which the highest State Court
decided my Case was August 22, 2023.

A copy of that decision appears at Appx A.

A petition for rehearing for a post conviction Collateral Relief is not allowed by M.R. App. P. Rule 27.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS
INVOLVED

The Case at bar is Contrary to the Mississippi Supreme Court ruling in Hughes v State 291 So3d 792 (Miss 2020); and Miss. Code Ann. Sec; M.R.Cr.P. 14.1(a)-(b); M.R.Cr.P. 14.1(b)(2), as to the Indictment being amended to Miss. Code Ann. Sec. 99-19-81 Habitual at the time of Sentencing after refusing a 5 year plea offer as a nonhabitual.

The Case at bar is in violation of US Const. 5th Amend, due process of law, 6th Amend ineffective assistance of Counsel, 14th Amend, equal protection of the law.

The Case at bar is in violation of Miss. Const. Art 3 Sec. 27 ineffective assistance of Counsel,

In the case at bar the indictment should of been quashed under Miss. Code Ann. Sec, 99-07-23 as an improper indictment for not listing all essential elements of Burglary under Miss Code Ann 97-17-23.

IN The case at bar is (Post Conviction Collateral Relief) was filed in accordance with Miss Code Ann

Sec. 99-39-5) Contrary to an intervening decision of the Mississippi Supreme Court and this Honorable US Supreme Court should review the case at bar and issue this writ for certiorari in accordance with Price V Vincent 538 US 634, 155 LEd2d 877, 123 S.Ct. 1848 (2003) as the State Tunica County Circuit Courts decision is Contrary to a S Ct decision.

~~Specific Facts of the Case~~ ~~Relevant Facts~~ ~~Relevant Knowledge~~

On or about Sept. 29, 2007, George Butler, (hereinafter Butler), was charged with Burglary of dwelling pursuant to Miss. Code Sec. 97-17-23 in Tunica County Miss. On Feb. 5, 2008, Butler was indicted by a Tunica County grand jury, and on Feb. 21, 2008, Honorable Wilbert Johnson was appointed to represent Butler. This was the 1st time Butler met Honorable Wilbert Johnson (hereinafter Johnson). On April 9, 2008 was the 2nd time Butler met with Johnson when the State offered Butler a plea bargain for 25 years without the habitual Status, and with Butler understanding that no habitual Status is pending, Butler refused the plea deal. After Butler refused the plea deal on April 9, 2008 only 6 days before trial and after Court the State filed a notice to intent to charge habitual Status. On April 15, 2008 trial began with Butler believing that habitual Status was not pending. On April 15, 2008, at trial was the 3rd time Butler met Johnson. After a 1 day trial the jury returned a verdict of guilty. After guilty verdict and conviction and before

Sentencing, the Court amended Butlers indictment to Charge Butler as a habitual offender and sentenced Butler to a term of 25 years day for day in the Custody of the Miss. Dept. of Corrections. Johnson did not object or Challenge Butlers priors or habitual status at this critical stage. On April 23, 2008 Johnson filed a motion for JNOV for/or new trial, The Court denied the motion and Johnson was silent and did not object to this denial, another critical stage of Butlers trial. On April 23, 2008 motion was denied and on May 21, 2008 Johnson filed a notice of appeal. On July 30, 2009, the Miss. Supreme Court of Appeals affirmed Butlers Conviction and Sentence. Johnson only had 48 days to prepare for trial and He never ask for a continuance so He could properly prepare a defense, He only met and talked with Butler 2 times before trial, did not investigate the witnesses or crime, did not object at critical stages of Butlers trial, advised Butler that He was not under habitual Status hence Butler refusing the plea deal, Johnson, did not give Butler His loyalty violation the US Constitution 6th Amend., & Miss. Constitution Art. 3. Sec 26, rendering ineffective assistance of Counsel.

(1) Butlers indictment was improper and did not Charge the crime of burglary of dwelling or the underlying Charge of larceny, as follows:

If any one of the essential elements is omitted or mis-stated, An indictment containing nothing more than the words of the Statute will be insufficient. The time, place of crime, the day, month, & year must be alleged and in larceny, the value of the property, and property must be stated since the degree of the offense and the consequent punishment depend on it and all essential elements must be stated in indictment. Due process clause forbids a state from convicting a person of a crime without proving every essential element of that crime beyond a reasonable doubt; Bunkley v Florida, 538 US 835, 155 LEd. 2d 1046, 123 S.Ct. 2020, (2003).

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable generally of determining for himself whether the indictment is good or bad; Powell v Alabama 287 US 45, 77 L.Ed 158, 53, 8.Ct. 55 (1932).

Failure of indictment for burglary to charge an essential element was not a mere defect which could be remedied by amendment but was a fatal defect which could be raised for the first time on appeal; Crosby v State (Miss. 1941) 191 Miss. 173, 280.2d 813. Criminal Law 1032(5).

The essential elements of burglary are, ⁽¹⁾ Breaking and entering into the dwelling, ⁽²⁾ With intent to commit a felony therein.

The essential elements of larceny are, ⁽¹⁾ The trespass,

(a) Taking, (3) Carry away, (4) kind of property, (5) value of property, (6) ownership of property, (7) Intent to deprive the owner of the property, (8) address of property.

Butlers indictment reads as follows:

George Lee Butler, late of the County aforesaid, on or about September 29, 2007, in the County and State aforesaid, and within the jurisdiction of this Court, did then and there, unlawfully, wilfully, feloniously, and burglariously break and enter the dwelling house of Otis Whalen, located at 1020 Grant Street, Tunica Mississippi, with the intent to commit the crime of larceny therein.

Butlers indictment does not list the time of crime, or knowingly for the burglary, and none of the elements of the underlying crime of larceny. Since the indictment lists the particular underlying crime of larceny, laws, case precedent, and the Constitution requires an indictment to charge every fact and element of both crimes or the indictment fails to charge the crime rendering the indictment

INSUFFICIENT.

At most Butler's indictment only charges criminal trespass, therefore, the burglary conviction and Statute 97-17-23 is unconstitutional and 25 year sentence is an illegal sentence and must be vacated.

(2) Butler had ineffective assistance of Counsel before trial, during trial, and post trial and conviction and sentencing as follows:

Cronic permits a presumption of prejudice if an actual or constructive denial of Counsel occurs during a critical stage of the trial; US v Cronic 466 US 608, 104 S.Ct. 2039, 80 L.Ed.2d 657, (1984); US v Cronic 839 F.2d 1401 (CA10 1985); Fusi v OBrien 621 F.3d 1, (CA1 2010).

p.2060- The Court has recognized that the "right to Counsel is the right to effective assistance of Counsel.

p.2065- Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty to avoid conflicts of interest; Strickland v Washington 466 US 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984); see: Cuyler v Sullivan 466 US 335, 64 L.Ed.2d 333, 100 S.Ct. 1708, (1980),

p.900.- A defendant's communication with counsel is critical to the attorney's representation. Denial of this opportunity is constitutional error requiring reversal. Id. Mr. Larkin was denied the right to Counsel. Counsel means open and complete communication. The fact that Mr. Larkin was denied the opportunity to speak freely with his attorney denied him Counsel; Larkin v State 44 F.Supp 2d 897 (E.D. Mich. 1999); Geders v US 425 US 80, 91, 96 S.Ct. 1339, 47 L.Ed.2d 592, (1976),

p.1396- Counsel has a duty to investigate all reasonable lines of defense, or make reasonable determination that such investigation is not necessary. (Strickland(.))

A decision not to investigate cannot be deemed reasonable if it is uninformed; Fisher v Gibson 282 F.3d 1283, (CA10 2002).

The ultimate question in this appeal is whether defendant's right to counsel was actually or constructively denied is a mixed question of law and fact, subject to de novo review; Childress v Johnson 103 F.3d 1221, 1224 (CA5 1995); Strickland 466 US at 698, 104 S.Ct. at 2070.

Attorney Lovelace was silent throughout virtually the entire trial, but most crucially, he remained silent as the judge directed a verdict against the criminal defendant client. We hold that his silence at the point the verdict was directed against his client was so likely to prejudice Harding that the cost of litigating its effect is unjustified and prejudice is presumed; Harding v Davis 878 F.2d 1346, 1345, (CA11 1989), Cronin 466 US at 658.

Defense Counsel's incompetency, however lay in his failure to seek formal discovery, to investigate the crime, to interview witnesses, and to develop a working relationship with defendant; Crandell v Bunnell 144 F.3d 1213, 1217, (CA9 1998).

Our examination of the trial record leads us to agree with the district courts and conclude that Counsel's failure to object at the proper time to the

introduction of Lyons prior convictions, or seek to limit the use of such evidence, constituted Constitutionally deficient assistance of Counsel; Lyons v McCotter 770 F.2d 529 (CA5 1985).

The 6th Amend. US Constitution and Art. 3 Sec. 26 Miss. Constitution right to Counsel in a criminal trial includes "the right to effective assistance of Counsel," McMann v Richardson 397 US 759, 771, n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), This right extends to "All Critical Stages of the Criminal process," IOWA v Tovar 541 US 77, 80-81, 124 S.Ct 1379, 158 L.Ed.2d 209 (2004), Summerlin v Schriro 427 F.3d 632 (CA9 2005), Arraignment is a critical stage, presentence interview is a critical stage, pretrial, trial, post trial, indictment amendment & prior convictions, Sentencing, and directed verdict JNOV are all critical stages; Hamilton v Alabama 368 US 52, 7 L.Ed.2d 114, 82 S.Ct 157 (1961), US v Washington 619 F.3d 1252 (CA10 2010), Robinson v Ignacia 36 F.3d 1044 (CA9 2004), US v Cronin 466 US at 659, 104 S.Ct 2039, US v Bell 122 S.Ct 1851-52.

Butler was denied effective assistance of Counsel during pretrial in that Johnson only had 48 days to prepare for trial and did not ask for a continuance, did not prepare a proper defense, Only met with Butler twice before trial, did not develop an open and complete communication with Butler, Mis-led Butler during plea negotiation causing Butler

to refuse the plea deal, had Johnson told Butler that if He went to trial He would be tried as a habitual under Miss. Code Sec. 99-19-81 Butler would of taken the plea offer, did not investigate the crime, during trial in that Johnson did not object to prosecutors line of questioning or the Witnesses answers and testimony, post-trial after Conviction in that Johnson did not object to prior Convictions or amendment to Charge habitual Status, did not offer mitigating evidence at Sentencing, did not object to or at Sentencing, Stayed Silent and did not object when JNOV, directed Verdict was denied, therefore Butler was denied effective assistance of counsel during several critical stages of his trial, Johnson knew defense was not prepared in time for trial and refused to ask for a continuance. Johnson denied his duty of loyalty to Butler and Butler was prejudiced at every critical stage of his trial, therefore denying Butler effective assistance of counsel.

(3) The trial Judge erred by allowing the amendment of indictment to Charge Butler as a habitual Offender under Miss. Code Sec. 99-19-81 after Conviction and before Sentencing. Before trial, Butler by advise of Counsel Johnson, was of the understanding that He would not be under habitual status, Had Butler know he would be under habitual status He would not of went to trial, He would of taken the plea offer. Amendment after conviction is an issue of law that is reviewed de novo; Ferguson v State 136 So3d 421, 423, (118) (Miss 2014).

Every prosecution and sentence must be in compliance with statutory authority, case precedent, and the procedural rules of court. The substantive right protected by rule governing an amendment to an indictment to allege an habitual offender status is the notice to a defendant of the liberty he stands to lose; Hughes v State 2020, 291 So.3d 792.

In Hughes v State 291 So.3d 792 (716) (2020), The State sought to amend and file the amended indictment on June 13, 2018, the day of trial. The State informed the trial court that on January 31, 2018, the defense was told, as part of plea negotiations, that it intended to amend Hughes' indictment to charge him as a habitual offender. Defense counsel did not dispute the state's assertions that it intended to amend Hughes' indictment. The parties agree that defense counsel went back and spoke to Hughes again, but no plea deal was reached. On January 31, 2018, the state had presented the judge with a motion to amend, and the judge signed and dated the order amending the indictment. Neither the motion nor the order was filed with the court. In fact the prosecutor admitted that he still had the unfiled motion and the order in his possession on the day of trial. Although defense counsel did not dispute the above facts, he objected to the state's untimely filing of the motion to amend the indictment. The trial court overruled the objection and allowed the amendment to be filed. The facts of this case are not unique but present an old quandary

that the rule is designed to resolve. Hughes was not sentenced according to new rules of criminal procedure, and therefore, his sentence was vacated and remanded for a new sentence in accordance with Miss. Code Sec. 99-17-23 without the habitual offender status.

M.R.Cr. P. Rule 14.1(a)-(b) is the notice to a defendant of the liberty he stands to lose. Notice of the charge includes notice of the applicable minimum and maximum penalties, Gowdy v State 56 So3d 540 at 546 (921)(2010). Rule 14.1(b)(2) is clear and leaves no discretion with the state or ambiguity for the defendant. The rule expressly states that when the defendant is eligible and the state intends to have the indicttee sentenced as a habitual offender, the state "shall... after indictment, and at least 30 days before trial... file with the court formal notice of such prior convictions,"⁴ *800 M.R.Cr.P. 14.1(b)(2) (emphasis added). The rule goes on to say that "an untimely-filed formal notice is permitted only when... expressly waived in writing by the defendant." ⁴ (emphasis added). The rule leaves little for interpretation, and it is not reflected in the record that its directives were followed; Hughes v State 291 So3d 792 (918,21)(2020).

In Gowdy v State 56 So3d 540, 544-45 (Miss 2010), the Mississippi Supreme Court vacated Gowdy's sentence under Miss. Code Sec. 99-19-83 (Rev. 2007). Id. at 546 (922). In that case the state informed the court of its intention to

Amend the indictment after Gowdy's trial and conviction, Id. at 544-45 (¶15). The State was not aware of Gowdy's prior convictions in Iowa. Id. at 544 (¶15). The State waited until Gowdy's Sentencing hearing two months later to file the motion to amend. Id. Our Supreme Court held that to amend the indictment under these circumstances subjected Gowdy to unfair surprise and deprived him of due process of law and fair notice. Id. at 545-46 (¶¶16, 19-21). As the Supreme Court noted, "it logically follows that if the State may not amend the indictment to charge the "big" enhancement after conviction when the original indictment charged only the "little" enhancement, then the State may not amend the indictment to add an enhanced penalty after conviction, Id. at 545 (¶19). On appeal, this Court held that the amendment was improper, and this Court vacated Gowdy's enhanced sentence.

Pursuant to the intervening precedent from the Miss. Supreme Court in, Hughes v State 291 So3d 792 (2020), Gowdy v State 56 So3d 540 (2010), & Ferguson v State 136 So3d 421, 423 (Miss 2014), & M.R.C.P. 14.1(a)-(b) & (b)(2), of our uniform rules, the State should not of been permitted to amend the indictment after conviction. Therefore, this Court should vacate the enhanced portion of Butler's sentence and remand the case for resentencing, under Miss. Code Sec. 97-17-23.

Butler, prays that this Court grants the above and foregoing relief requested on above 3 listed errors.

REASONS WRIT SHOULD BE GRANTED

The Petitioners indictment should not of been amended to Habitual Status at Sentencing after Conviction for refusing a 5 year plea offer as Nonhabitual Status and defense Counsel not objecting was ineffective and at this Critical Stage Petitioner was denied Counsel in accordance with US v Cronk 466 US 608, 104 Sct 2039, 80 LEd 2d 657 (1984), and being Sentenced on an improper indictment as a habitual offender severely prejudiced this Petitioner in violation of Strickland v Washington 466 US 668, 80 LEd 2d 674, 104 Sct 2052 (1984) violating Petitioner's fundamental and Constitutional and Statutory rights so this Court should grant relief.

CONCLUSION

Petitioner respectfully prays that this Honorable court issues a writ of Certiorari and enters and orders a new trial, resentencing, or dismissal of indictment.

In the alternative an evidentiary hearing,

The Petition for Writ of Certiorari Should be granted.

I declare under penalty of perjury this 30
day of August, 2023.

Respectfully Submitted

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