

IN THE SUPREME COURT OF THE UNITED STATES

OTIS J. CUMMINGS, Jr.

PETITIONER

v.

NO. _____

STATE OF MISSISSIPPI

RESPONDENT(S)

AN PETITION FOR WRIT OF CERTIORARI
to the MISSISSIPPI SUPREME COURT

FILED

NOV 09 2023

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Petitioner, pro'se:

Otis J. Cummings, Jr.
Otis J. Cummings, Jr., #33844

SMCI-2; D-1; B-199

Post Office Box 1419

Leakesville, Miss. 39451

QUESTION PRESENTED

- A). . . . Whether the Court was denied, "Subject Matter Jurisdiction" proceedings, due to a totally defective indictment?
- B). . . . Whether the indictment was amended unconstitutionally?
- C). . . . Whether 'Cummings' was denied the rights to due process, equal due process protection of the law and a constitutional right to a fair and impartial trial?
- D). . . . Whether 'Cummings' was denied the effective assistance of trial counsel, resulting in an illegal sentence?

In regards to the questions presented above in references to "A-D", the petitioner would answer in the affirmative-Yes!

LIST OF PARTIES

All parties appears in the Caption of the case...as shown on the title/cover page..., "State of Mississippi".

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The opinion of the Mississippi Supreme Court, denying Cummings' Application for Leave to Proceed in the Trial Court and File Post-Conviction Collateral Relief is attached hereto as APPENDIX-A.

JURISDICTION:

The date in which petitioner received a copy of the Mississippi Supreme Court's Order of denial was the 19th day of September, 2023.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

The Sixth Amendment to the United States Constitution states in pertinent part, as follows: "That the accused shall have the right to effective assistance of counsel in all criminal prosecutions, for his defense," U.S. Const. amend. 6 ...,

The Fourteenth Amendment to the United States Constitution states in pertinent part, as follows: ("No State.. shall deprive any person of life, liberty or property without due process of law"). .. U.S. Const. amend. XIV, also, ...,

Section 14 of the Mississippi Constitution states in pertinent part, as follows: ("No person shall be deprived of life, liberty, or property, except by due process of law"). Miss. Const. Art. 3, § 14.,

STATEMENT OF THE CASE

That on/or about the 22nd day of July, 2008, the State executed a fatally defective indictment in cause no. 2008-D10CR, within the Choctaw County, Mississippi; Which failed to contain on its face --- the, "County and judicial district in which the indictment is brought," according to Uniform Rule of Circuit, County Court Practice Rule 4.06, wherefore, failure to include an essential element that would make the indictment viable and sufficient. The indictment also failed to be accompany by the grand jury foreman's affidavit attesting to the fact that the indictment was concurred on by some twelve (12) or more members of the grand jury and that, at least fifteen (15) members of the grand jurors were present during all deliberations.

The trial court lacked "Subject matter jurisdiction," on the basis that, the indictment further failure to include on its face the essential elements of a criminal offense; ("the County and judicial district in which the indictment was brought"), - - which affects a fundamental constitutional rights... See, Carson v. State, 212 So. 3d 22, 31 (Miss. 2016) (quoting Ross v. State, 984 So. 2d 968, 1015 (Miss. 2007)).

This resulted in Cummings' being unconstitutionally haled into Court without probable cause, wherefore, he was tried, convicted and illegally sentenced to a term of life without the benefit of probation or parole, - in direct violation of his fundamental constitutional rights to due process, equal due process protection of the law, and the right to a fair and impartial trial.... See, U.S. Const. amends. 4, 5, 6, & 14 and Article 3, Sections 14, 26 & 27 (1890) Miss. Const.

Cummings' original indictment (EXHIBIT-A) does not charge him as a habitual offender. That on/or about the 17th day of February, 2009, the Court amended Cummings' indictment to charge him as a habitual offender, pursuant to Miss. Code Ann. §99-19-81 and §99-19-83, then less than twenty-four (24) hours later commenced his illegal trial.

Pursuant to M.L.A. §99-19-81, the amended indictment specified, using the mandatory language "shall", that if convicted, Cummings' shall be sentenced to a term of five (5) years, day for day.

The same amended indictment (EXHIBITS-B&C), also charged Cummings' as a habitual offender, pursuant to M.L.A. §99-19-83, and specified, using the mandatory language "shall", that if Cummings' was convicted, he shall be sentenced to a term of life imprisonment without the benefit of probation or parole.

The amended indictment (EXHIBITS-B&C) cause no. 2008-044 CR was inconsistent with Cummings' original indictment (EXHIBIT-A) cause no. 2008-010 CR, the amended indictment (B&C), also fails to include the principle charge of "FELONY DWI", as purported in Uniform Rules of Circuit, County Court Practice (URCCCP), Rule 11.03, which is considered an essential element, therefore, fails to charge or specify any offense or crime and standing alone omits in every regard the essential elements and/or statutory reference to a crime. Thus, with no criminal offense charged, and a specified mandate, that if convicted, Cummings' would be doubly sentenced under two (2) separate habitual offender's statutes, -- a mandatory five (5) year sentence, pursuant to §99-19-81, and a mandatory life sentence, pursuant to §99-19-83.

REASONS FOR GRANTING THE WRIT:

The case before this Honorable Court presents a challenge to the validity of the indictment and its failure to charge the essential elements of a criminal offense, the classic example of the trial courts' deviation of a legal rule, which constitutes "Plain Error", which is plain, clear or obvious; also the trial court's violation and denial of Cummings' substantial rights of a fundamental constitutional nature, under amends. 4, 5, 13 & 14

of the U.S. Const., and Art. 3, Sec. 14, 26 & 27 (1890), Miss. Const.

When an error impacts a fundamental right of the defendant, procedural rules give way to prevent a miscarriage of justice, requiring the Court to address issues on plain-error review and correct any fundamental violations. . . See, Gray v. State, 549 So. 2d 1316, 1326 (Miss. 1989). Furthermore, 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, See, Bowland v. State, 98 So. 3d at *1036 n. 6 (Miss. 2012).

A.

SUBJECT MATTER JURISDICTION:

Herein, Cummings' asserts that the trial court was without subject matter jurisdiction to hale him into Court on/or about the 18th day of February, 2009, without a grand jury indictment, information and absence the proper authority to sit in judgment in a felony prosecution and therein, unconstitutionally tried, convicted and sentenced Cummings' to an illegal term of life imprisonment without the benefit of probation or parole and without due process, equal protection of the law, in direct violations of Amends. 4, 5, 6 & 14 to the U.S. Const., and the laws of Miss., and it's Const., Art. 3, Sec. 14, 26 & 27 (1890).

Cummings' submits that the grand jury is the only body of law that can hand down an indictment and it is the grand jury's indictment which gives the Circuit court subject matter jurisdiction concerning a felony prosecution of the accused. The Miss. Const. art. 3, § 27 (1890), requires an indictment by a grand jury before any prosecution may be had in a felony case. . . See, State v. Sansome, 133 Miss. 428 (Miss. 1923). Before a person may be punished

on a felony charge, the Court must have jurisdiction of the charge and the person. See, Box v. State, 241 So. 2d 759 [1][2] (1970).

See also, Jefferson, 556 So. 2d 1016, 1019 (Miss. 1989). A defendant cannot be convicted based on an indictment that fails to include all the essential elements of the crime.

This Court explained in 1894, that the absence of an element of a crime voids the indictment, stating: "[I]f the indictment omits altogether any averment, which averment we hold to be essential in such an indictment, there would be a total omission of substance, of the offense, and the indictment would be void as charging no offense, and the judgment and sentence of law could not follow upon a conviction had under it, and a matter of constitutional right [is] thus involved." See, EXHIBITS-A, B & C).

See, Norton v. State, 72 Miss. 128 (1894), ...

Cummings states, in the affirmative that if an indictment omits any essential element of a crime ... and any conviction or sentence procured by it is unconstitutional. In Carson v. State, *infra*, The Supreme Court stated; it has squarely held that, challenges to the substantive sufficiency of an indictment are not waivable and may be raised at any time. For example, a challenge to an indictment for failure to charge the essential elements of offense affects a fundamental right, and may not be waived.

See, State v. Berryhill, 703 So. 2d 250 (Miss. 1997) and Ross v. State, *infra*. Justice Kitchens, dissenting in the Carson case results stated: "An indictment that fails to provide sufficient notice of a specific offense charged violates defendant's constitutional due process right;" citing, Cole v. Arkansas, 333 U.S. 196 (1948).

The esteemed justice added; "an indictment must contain (1) "the essential elements of the offense charged; (2) "sufficient facts to fairly inform the defendant of the charge against him, which he must defend," and (3) "sufficient facts to enable him

to plead double jeopardy in the event of future prosecution for the same offense... See, Gilmer v. State, 955 So. 2d 829 (Miss. 2007).

Crucial to Justice Kitchens' dissent in his averment that... to pass constitutional muster, an indictment must do more than list the statutory elements of the offense. The U.S. Supreme Court has held that: "It is general sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense punishment". See, Hamling v. U.S., 418 U.S. 87 (1974).

An indictment is not sufficient if it fails to state a material element of the offense - U.S. v. McGilberry, 480 F. 3d 326 (5th Cir. 2007)... See also, EXHIBITS-A, B&C).

In Love v. State, 52 So. 2d 470 (Miss. 1950), The Court stated: "An indictment must set forth the constituent elements of the offense -- and must be alleged with precision and certainty."

B. UNCONSTITUTIONAL AMENDED INDICTMENT:

Cummings' original indictment (EXHIBIT-A) does not charge him as a habitual offender. On February 17, 2009, the Court amended Cummings' indictment to charge him as a habitual offender, pursuant to Miss. Code Ann. §99-19-81, and specified, using the mandatory language "shall" that, if convicted, Cummings "shall" be sentenced to a term of five (5) years. The same amended indictment, did also charge Cummings as a habitual offender, pursuant to Miss. Code Ann. §99-19-83, and specified, using the mandatory language "shall" that if convicted, he "shall" be sentenced to a term of life imprisonment without the benefit of probation or parole.

The amended indictment (EXHIBIT-C(1),(2)), also fails to include

the principal charge of "FELONY DWI", as purported in Rule 11.03 of the WRCCP; -- which is considered to be an essential element, therefore, also fails to charge or specify any offense or crime and, standing alone, omits in every regard the essential elements and/or some statutory reference to any crime.

Thus, with no crime and a specified mandate, that if convicted, Cummings' would be doubly sentenced under two (2) separate habitual offender's statutes -- a mandatory five (5) years, pursuant to Miss. Code Ann. §99-19-81 and a mandatory life sentence, pursuant to Miss. Code Ann. §99-19-83. The conflicts and omissions specifically forbidden by the specific referenced Federal and State case law above denying and depriving Cummings' of any opportunity to properly prepare a defense, without adequate notice of a criminal offense, and specifying confusion as to punishment, which effectively denied Cummings' his fundamental constitutional rights to due process, equal protection of the law, and a fair trial, ... U.S. Const. amends. 4, 5, 6 & 14, also, Art. 3, §14, of the Miss. Const. The Federal and State Constitutions duly guarantees the right to advance notice of criminal charges, pursuant to U.S. Const. amend. VI; and Miss. Const. art. 3, §26 (1890). ... The purpose of an indictment is to provide a defendant with reasonable notice of the offense charged, so as to enable him an opportunity to prepare an adequate defense. ... See, Boyd v. State, 113 So. 2d 1252, 1255 (Miss. 2013) (citing, Boyd v. State, 56 So. 3d 540, 546 (Miss. 2010)).

On February 17, 2009, Cummings' indictment is amended charging him as a habitual offender under both statutes §99-19-81 and §99-19-83, whereas to provide any contemplation of a defense was denied, "DUE PROCESS", pursuant to the Miss. Const. art. 3, §14; also, U.S. Const. amends. 4, 5, 6 & 14. Less than twenty-four (24) hours later, on February 18, 2009, Cummings' was unconstitutionally tried by an all white petit jury, found guilty without any evidence or any proof of any crime to the pre-indictment amendment offense,

received a bifurcated hearing as to the habitual offender's punishment, pursuant to Miss. Code Ann. §99-19-81 and §99-19-83, and was fully and illegally sentenced by the circuit court of Choctaw County, Mississippi to a term of life without probation or parole. See, EXHIBITS-A, B, C, D & F).

The Court subjected Cummings' to an "unfair surprise", without ample opportunity to challenge the validity and sufficiency of the indictment and all the States' proof as guaranteed by Rule 7.09, 25RCLEP, and Keys v. State, 549 So. 2d 949, 951 (Miss. 1989), also, Grazier v. State, 120 So. 3d 964 (Miss. 2013).

The amended indictment in cause no. 2008-244CR, which is fully inconsistent with Cummings' original indictment cause no. 2008-210CR (EXHIBITS-A, B & C), states: "that Cummings is a habitual offender, pursuant to §99-19-81, in reference to the statute, informs Cummings that, if convicted, he shall be sentenced to a term of five (5) years, the amended indictment further states, that Cummings is a habitual offender, pursuant to §99-19-83, and in reference to the statute, informs Cummings that, if convicted, he shall be sentenced to a term of life imprisonment without the benefit of probation or parole. With two (2) statutes involving two (2) separate punishments are in conflict, the precedent decision of Grillis v. State, 17 So. 2d at 527 (Miss. 1944), which states: "When facts which constitutes law falls within or under either of two (2) statutes or when there is a substantial doubt as to which statute is to be applied, the statute which imposes the lesser punishment prevails.

That long held principle lives on in State v. Willis, 539 So. 2d at *1045, *1046 (Miss. 1989); in which the State Supreme Court held that any uncertainty in sentencing orders must be resolved in favor of the accused. All along, Cummings' was confused, uncertain and unable to determine what aspects of his amended indictment that he was suppose to defend against. Grillis, Supra, resolves the

conflict, Cummings' sentence of life is illegal without due process, equal protection of the law, and a unfair trial is the results, therefore, it must be vacated, set aside and administered whatever relief that this Honorable Court deems proper, just and appropriate that's consistent with the statutes and/or laws of the United States Constitution and the Mississippi Constitution.

C. DENIAL OF DUE PROCESS:

The U.S. Const. amend. VI and Miss. Const. art. 3, §26 (1890), states: "In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation against him..." The trial court never gave Cummings' "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process."

See, Smith v. O'Grady, 312 U.S. 329 (1941).

Moreover, §99-39-21(5), instructs this Honorable Court to examine the entire record to determine whether Cummings' has made a substantial showing of the denial of a Federal and State Constitutional right... See, Moore v. Roth, 556 So. 2d at *1059 [8] (1990). Cummings avers that, due to the illegal sentence that was imposed by the Circuit Court of Choctaw County, Mississippi on February 18, 2009, in cause number 2008-0102R, his habitual sentence of life, without probation or parole, pursuant to §99-19-83, is an infringement of his due process protection... Art. 3, §14, Miss. Const. The comparison of a five (5) year sentence as opposed to a life sentence without probation or parole is too significant of a deprivation of liberty to be subjected to a procedural bar... See, Smith v. State, 477 So. 2d at *195 [3] [4] [5] [6], 196 (Miss. 1985), and Rowland v. State, 42 So. 3d 503, 507 (Miss. 2010).

Cummings asserts and maintains that a null and void indict-

ment that was never sanctioned, could not be sanctioned by the grand jury, due to its non-jurisdiction to hear the case or hand down an indictment in this case, resulted in the Court's imposition of an illegal sentence, which violated and deprived Cummings' his constitutional rights to fundamental and procedural due process of law. See, (EXHIBITS-R&L).

Due process of law is a fundamental right guaranteed by both the U.S. Const. and the Miss. Const.. See, U.S. Const. amend. XIV, §1, ("No State shall deprive any person of life, liberty or property, without due process of law"); also, Miss. Const. Art. 3, §24, ("No person shall be deprived of life, liberty, except by due process of law"). This prohibition is intended to guarantee the protection of fundamental constitutional rights, so that a fair trial may result. Every person is entitled to a fair and impartial trial, and the dispensing of justice is the object of courts.

Thus, where fundamental constitutional rights are ignored, due process does not exist, and a fair trial in contemplation of law cannot be had... Thus, in light of the foregoing precedent, we hold that errors affecting fundamental constitutional rights are excepted from the procedural bars of the URCEP... See, Rowland, Supra, at *507 (¶11) (n.12) (Miss, 2010).

When an error impacts a fundamental right of the defendant, procedural rules give way to prevent a miscarriage of justice, requiring the Court to address issues on plain-error review and correct any fundamental violations... See, Gray v. State, 519 So.2d 1316, 1321 (Miss, 1989). Further, 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, Rowland, infra. Finding that this error inherently affected the fairness of his judicial proceedings, resulting in a miscarriage

of justice, which subjected Cummings to a greater punishment, than the law and/or statute annexed to the crime.

Furthermore, the defendant must prove that the lower court's error seriously affected the fairness, integrity or public reputation of judicial proceedings... Olang, 507 U.S. at *732, 113 S.Ct. 1770.

The plain-error doctrine requires that there be an error and the error must have resulted in a manifest miscarriage of justice... Flora, 925 So.2d at 811. Cummings' has proven beyond a preponderance of the evidence, that the Circuit Court of Choctaw County, Mississippi has effectively denied and deprived Cummings of his fundamental constitutional rights to due process, equal protection of the law and a fair trial, which resulted in a manifest miscarriage of justice.

D. INEFFECTIVE ASSISTANCE OF COUNSEL WHICH RESULTED IN A ILLEGAL LIFE SENTENCE:

Cummings would further show unto this Honorable Court several more reasons why his current conviction and life sentence is illegally imposed. Without a grand jury indictment, the circuit court had no jurisdiction, power, or authority to sit in judgment over the cause or the person.

It is the grand jury's indictment that empowers or that grants the Circuit Court subject matter jurisdiction of a felony case... See, Jefferson, *infra*.

The Supreme Court, in Cozart v. State, 226 So.3d 574 (Miss. 2017), provided that it may at its own option, notice a plain error, not identified or distinctly specified, Miss. R. App. P. 28(a)(3)...

Scrubbs v. State, 584 So.2d at *789, *790 (Miss. 1991) (procedural rules give way to prevent a miscarriage of justice; and Lafayette v. State, 90 So.3d 1215 (Miss. 2012).

Fundamental violations such as an illegal sentence overcomes procedural bars... See, Van v. State, 270 So.3d 1117 (Miss. 2018) (citing Carter v. State, 203 So.3d 730 (Miss. Ct. App. 2016)). On or about May 19, 2008, after 9:30 p.m. Cummings' was arrested for the alleged crime of "FELONY DWI" by Trooper John Mitch Marolt. See, EXHIBIT-A). On May 20, 2008, the Choctaw County Sheriff Dept., presented Cummings before the justice Court for initial appearance hearing, the Honorable Ann Bowie presiding.

Judge Bowie signed an order for, "Appointment of Counsel", after finding the defendant indigent, set an appearance bond and the preliminary hearing date was set for June 26, 2008, at 4:00 p.m. See, EXHIBIT-K).

On June 26, 2008, at approx. 3:30 p.m. Cummings' arrived at the Choctaw County Justice Court for the preliminary hearing trial, Court convened at 4:00 p.m., When Cummings' case was called, the plaintiff John Mitch Marolt did not appear on the trial date. According to the Uniform Rules of Procedure for Justice Court Rule 2.06; FAILURE to APPEAR on the Trial Date: This legal rule plainly and clearly states: (a). If the defendant fails to appear on the trial date, and the plaintiff appears, then the Court may enter a default judgement as under Rule 2.12; and, (b). If the plaintiff fails to appear on the trial date and the defendant appears, the Court "shall" dismiss the case with prejudice; and also, (c). If neither the plaintiff nor the defendant appears on the trial date, the Court "shall" dismiss the case with prejudice. Judge Bowie did not follow the letters of the law nor the rules of the Court, but instead continued the case until the 24th day of July, 2008, wherefore, duly violating Cummings' fundamental and procedural rights to due process, equal protection of the law and constitutional right to a fair trial.

The Court deviated from a legal rule, which constitutes "Plain Error", reversible error per se. Had Cummings failed to appear on the trial date, there's no doubt the Judge Bowie would have followed the letters of the law and the rules of the Court and entered a default judgment against Cummings' for failure to appear on the

trial date, according to Unif. R. of Procedure for Justice Court, Rule 2.12, which is discriminatory in nature and also a manifest miscarriage of justice. This Court employs the plain-error rule only, "When a defendant's substantive or fundamental rights are affected... See, Mayer v. State, 42 So. 3d 33, 44 (Miss. Ct. App., 2015), overruled on other grounds by, Sallie v. State, 155 So. 3d 760 (Miss. 2015).

To determine if plain error has occurred, this Court has deviated from a legal rule; whether the error is plain, clear or obvious and whether that error has prejudiced the outcome of the trial... See, Lafayette v. State, 90 So. 3d 1215, 1220 (Miss. 2012) (quoting, Flora v. State, 925 So. 2d 797, 811 (Miss. 2006).

While Cummings was awaiting the next phase of the preliminary hearing on July 24, 2008, the Choctaw County Grand Jury indicted Cummings on July 22, 2008, in cause number 2008-DIOCR, without any type of evidence or proof of a crime, while the justice court still retained jurisdiction over the cause and the person, wherefore, the case was still "OPEN/PENDING" in the justice court... See EXHIBITS-A&L).

The jurisdiction of the justice court over the cause denied the the grand jury "subject matter jurisdiction", over the cause or the person, which subjected Cummings to an illegal indictment.

As this Honorable Court can clearly see, Cummings' case was still "OPEN/PENDING", in the preliminary stage under the jurisdiction of the Choctaw County Justice Court, therefore, the grand jury had no jurisdiction or authority whatsoever to act in this case, which makes this indictment in cause number 2008-DIOCR null and void. See, EXHIBITS-A, K&L). During this wholly illegal process, Cummings has been denied and deprived of his basic fundamental constitutional and procedural rights to due process, equal protection of the law, and a fair and impartial trial... See, U.S. Const. amends. 4, 5, 6 & 14; also, Art. 3, Sections 14, 26 & 27 (1890), Miss. Const. There were never any evidence or any proof against Cummings for the alleged crime of "FELONY DWI", "RO

breath test, no blood test and no urine test, only the verbal testimony of the arresting officer, which were fabricated. (perjury).

The preliminary hearing date had already been set and the hearing commenced on June 26, 2008, it cannot be waived, unless by the defendant in writing or by counsel with the client consent.

The Circuit Court of Choctaw County, Mississippi consisted of the following: "A white judge; two (2) white prosecutors; a white arresting officer; an all white petit jury; and last, but not least, a white public defender (trial counsel), whom Cummings' formally filed a bar complaint against on/or about March 12, 2001 with the MBA, which created a 'Conflict of Interest', between client and trial counsel.

See EXHIBIT-E). Attorney Steve Wright abandoned his client (Cummings') before, during and after trial, due to retaliation against the defendant for his filing a formal complaint with the Mississippi Bar Association (MBA) against Steve Wright.

Trial Counsel did not put in an appearance at the preliminary hearing on 6/26/2008, so he did not register a motion to dismiss this case, according to the Urit. R. of Procedure for Justice Court, Rule 2.06; FAILURE TO APPEAR ON THE TRIAL DATE.

Due Process clause causes for this case to be dismissed by the Court without Attorney Wright's motion or presence, due to the facts there were no accuser present, (Trooper Morolt).

Attorney did not interview with the States' only witness to check for inconsistencies of testimony at trial.

Attorney Wright did not appear as counsel for the defense at the arraignment; did no independent investigation to gather facts; evidence; witnesses; circumstances, and laws surrounding the case. Counsel never once asked his client, if he was innocent or guilty of the alleged crime; did not prepare a defense for Cummings' trial; did not prep the accused for trial; Counsel filed no pre-trial motions; Counsel did not once contest the validity or the

legality of the indictment formulated without jurisdiction nor the violation of Cummings' rights to due process; Counsel subpoenaed no witnesses; Subpoenaed no patrol car's in-dash cam video tape, nor did he subpoena the radio dispatcher's audio tape or the log-book report; and, Counsel never argued the "Batson" challenge, due to the exclusion of all black jurors and the selection of an all white jury (petit jury). Attorney Wright did nothing to defend his clients' rights to due process, equal protection of the law and a fair and impartial trial, therefore, Counsel intentionally left Cummings defenseless, vulnerable to the prosecution, which resulted in an unconstitutional trial, wrongful conviction and the imposition of an illegal sentence.

This Honorable Court has the jurisdiction and the authority to subpoena or demand production of the petit jury's application on file in the Choctaw County Circuit Clerk's Office, which confirms their race. See; Tr. page 44 (attached hereto).

As of this date, Cummings' has never been legally indicted nor legally tried in any Court of law that had proper, "Subject Matter Jurisdiction", over the cause or the person... See, Box v. State, 241 So. 2d 759 (Miss. 1970), and Rowland, *infra*.

In addition to the Statutory exceptions afforded by the Act, we have provided that an exception to the procedural bars exists for errors affecting certain constitutional rights, ... Rowland, *infra*.

Thus, on prior review, we recognize that the State has neither the authority nor the right to subject a person to double jeopardy.

We have also recognized exceptions to procedural bars for claims asserting illegal sentence and denial of due process at sentencing... See, Ly 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); Lockett v. State, 582 So. 2d 428, 430 (Miss. 1991) (excepting claim that disclose[d] a denial of

due process in sentencing from time limitations); Grubb v. State, 584 So. 2d 786, 789 (Miss. 1991) (consider[ing] plain error [illegal sentence] notwithstanding procedural bars which might otherwise prohibit its consideration); Smith v. State, 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 double jeopardy claim, a claim of illegal sentence or denial of due process in sentencing, also must be considered regardless of when its raised, because the State is without authority or right to impose a sentence illegally or without due process.

The deprivation of liberty.... that unalienable, natural right inherent in all persons since time immemorial--- without authority of law distinguishes these three (3) excepted errors from all other post-conviction claims... Rowland, Supra, 42 So. 3d at *508.

CONCLUSION:

For the foregoing reasons -- Supported by case law, and as a matter of record, a Writ of Certiorari should be issued in this cause, and Cummings' granted relief requested and/or such relief as this Honorable Court may deem to be just and proper.

Respectfully Submitted,
Ottis G. Cummings, Jr.

SWORN TO AND SUBSCRIBED BEFORE ME, this the 9th day of
November, 2023.

Laura Denmark
NOTARY PUBLIC

MY COMMISSION EXPIRES: _____

