IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2004-KA-01204-COA

DARYL HAWKINS — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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V.

STATE OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Daryl Hawkins

THIS 28th day of November, 2007.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Daryl Hawkins

By: George T. Holmes
George T. Holmes, Staff Attorney

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of the Second Judicial District of Bolivar County, Mississippi where Daryl Hawkins was convicted of attempted auto burglary. A jury trial was conducted May10, 2004, with Honorable Albert Smith, III, Circuit Judge, presiding. Since Hawkins was an habitual offender under MCA §99-19-83 (1972), he was sentenced to life imprisonment without parole. Hawkins is presently incarcerated with the Mississippi Department of Corrections where he will be until he dies unless this Court requires otherwise.

FACTS

Around 3:00 a. m., on March 7, 2004, officer Robert Graham of the Cleveland MS Police Department was staked out by himself in plain clothes in

the parking lot of the Colony Apartments in Cleveland MS in an unmarked sport utility vehicle. [T. 12]. Graham, who was on "special detail", testified he watched a Nissan Altima with two passengers circle the parking lot and then stop. *Id.* Graham said he saw Daryl Hawkins, whom he recognized, exit the vehicle and walk towards another automobile [T. 13-14]. Graham said Hawkins looked inside several windows of parked vehicles, and then broke a window out of one of them. [T. 14-15]. Graham radioed for back-up, then a car burglar alarm sounded. *Id.* The person who broke the window got back into the Altima with the driver and they drove off. [T. 15-16].

Graham followed and continued to request back-up. [T. 16-17]. The Altima was eventually blocked in and its two occupants arrested. *Id.* Graham identified the driver as Brandon James and the passenger as Daryl Hawkins. *Id.*

Hawkins' co-defendant, Brandon James, testified that Hawkins paid him five dollars for a ride to the apartment complex on the date in question. [T. 42]. Brandon said he dropped Hawkins off in the parking lot and then Hawkins got back in the car acting "paranoid" and said, "[d]rive before somebody thinks we're trying to break into something" while a car alarm was going off. [T. 43]. As they were driving off, Brandon testified that Daryl said, "I broke the window out of the car, man, we're fixing to go to jail." [T. 46].

Hawkins testified that he never got out of James' car, but James got out and broke the car window. [T. 60-61].

SUMMARY OF THE ARGUMENT

For several reasons, the trial court should have granted a directed verdict. Alternatively, the court should have allowed an instruction on the defense of abandonment. The verdict was contrary to the weight of the evidence. The sentence of life imprisonment for breaking a car window is unconstitutionally disproportionate to the offense resulting in cruel and unusual punishment.

ARGUMENT

ISSUE NO. 1: WHETHER THE INDICTMENT IS VOID FOR FAILURE TO STATE A NECESSARY ELEMENT OF THE OFFENSE?

Whether an indictment is defective is a question of law, thus, the standard of review on appeal is *de novo. Peterson v. State*, 671 So.2d 647, 652 (Miss.1996), and *Brown v. State*, 961 So.2d 720, 724 (Miss. Ct. App.2007).

Under common law, "an attempt to commit a crime consists of three elements: (1) an intent to commit a particular crime; (2) a direct ineffectual act done toward its commission; and (3) the failure to consummate its commission." *Henderson v. State*, 660 So. 2d 220, 222 (Miss. 1995). The offense of attempt is

codified in Miss. Code Ann. §97-1-7 (1972).[1]

The indictment in this case purports to charge Hawkins with attempted burglary of an automobile. [R. 1]. However, since the third and, as will be shown, most important element of the offense that the defendant "failed or was prevented from completing the offense" was excluded, the indictment is void *ab initio* under Rule 7.06 of the Unif. Crim. R. Cir. Ct. Prac.

There was no trial court level objection here. Nevertheless, failure to object or demur to an indictment is no bar to the issue being raised on appeal. *Durr v. State*, 446 So.2d 1016, 1017 (Miss.1984).

In *Durr v. State, supra,* the indictment intended to charge the defendant with attempted burglary, but, did not contain any statutory language that the defendant "performed an overt act toward the commission of the offense charged." 446 So.2d at 1017. Durr did not demur to the indictment. *Id.*

First, the *Durr* court pointed out that failure to allege an essential element in an indictment is not waived on appeal for failure to object, and said '[w]e have held that indictments under Mississippi Code Annotated, § 97-1-7 (1972), the

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MC A § 97-1-7 (1972) Every person who shall design and endeavor to commit an offense, and shall do any overt act toward the commission thereof, but shall fail therein, or shall be prevented from committing the same, on conviction thereof, shall,[unless provided otherwise be sentenced to 10 years if a capital offense is attempted, otherwise, no greater sentence than that authorized for the attempted offense].

general attempt statute, must set forth an overt act toward the commission of the offense." Citing, *Murray v. State*, 403 So.2d 149, 152 (Miss. 1981); and *Maxie v. State*, 330 So.2d 277 (Miss. 1976).

Durr is particularly controlling here because it is, like the case at bar, an attempted burglary case. The language from *Durr* is crystal clear that, "[b]ecause an essential ingredient of the offense is missing from the indictment, it failed to charge a crime and is void." 446 So.2d at 1017.

In *Hawthorne v. State*, 751 So.2d 1090, 1092-94 (Miss. Ct. App.1999), Hawthorne was charged with attempted sexual battery, but the indictment failed to allege an overt act. The *Hawthorne* court reiterated the longstanding rule that "in order to be sufficient, [an] indictment must contain the essential elements of the crime with which the accused is charged."

> It is fundamental ... that an indictment, to be effective as such, must set forth the constituent elements of a criminal offense; if the facts alleged do not constitute such an offense within the terms and meaning of the law or laws on which the accusation is based, or if the facts alleged may all be true and yet constitute no offense, the indictment is insufficient.... Every material fact and essential ingredient of the offense-every essential element of the offense-must be alleged with precision and certainty, or, as has been stated, every fact which is an element in a prima facie case of guilty must be stated in the indictment." [Citation omitted]

The *Hawthorne* court held that in a charge of an attempted crime under Miss. Code Ann. § 97-1-7 (1972) "an allegation of an overt act is 'mandatory.'"

[Citations omitted]. So, by law, an indictment, as the one here in Hawkins' case, which fails to contain an essential element is fatally defective for failing "to provide [a] concise and plain statement of the essential facts that would be alleged." The *Hawthorne* court ruled, "[c]onsequently, the indictment failed to charge Hawthorne with the crime for which he was convicted." Therefore, Daryl Hawkins was never charged with the crime for which he was convicted either.

It is fair to note that Hawkins' indictment does list Miss. Code. Ann. §97-1-7 (1972) at the top, but that is not enough. There must be specifics stated as to the elements of the offense, particularly that the attempt to commit the intended crime was incomplete. In *Hersick v. State*, 904 So.2d 116, 126 (Miss.2004), the Supreme Court ruled that, even with a listing of the attempt statute at the top of an attempted kidnaping charge, there must nevertheless be found in an indictment a sufficient description of the overt act with details of the "thwarted attempt" to give legal notice to a defendant, under UCCR Rule 7.06. See also *Brown v. State*, 961 So.2d 720, 724-25 (Miss. Ct. App. 2007.)

The state cannot argue here that Hawkins had notice of the nature of the offense from some other source, such as discovery or jury instructions. In *White v. State*, 851 So.2d 400, 403-04 (Miss. Ct. App. 2003), the defendant was charged

with attempted accessory after the fact, but the indictment was defective for failing to include the overt act element. In reversing the conviction, the *White* court said in no uncertain terms,

> the State may not avoid the requirement by showing that the defendant had actual notice from some other source of the specific nature of the State's allegations. [Citing *Hawthorne, supra,* 751 So.2d at 1095]. There is no acceptable substitute or cure in the law for an indictment that omits the essential charging information. 851 So. 2d. at 403.

Hawkins here merely asks for application of the clear principles set out above. These well established rules require reversal in this case.

The importance of the third element of crime of attempt is explained in *West v. State,* 437 So.2d 1212, 1214 (Miss. 1983). West was charged with attempted sexual battery, a crime requiring penetration, so the state would have been required to show an attempt at penetration. Yet the proof was that West merely fondled the victim with no proof of a specific intent or attempt to penetrate. The *West* court said that, even though the overt act is important,

> [t]he attempt statute requires that, before one may be convicted of attempt, he 'shall fail therein, or shall be prevented from committing the same'. The gravamen of this offense of attempt is that the accused have done an overt act . . . ***and be prevented from its commission.*** [Emphasis added.].

The *West* court then ruled that the failure is a more important element than the overt act. *Id.* It follows, that the most important element of the offense

purportedly charged against Hawkins, was missing from his indictment.

In at least two prior cases the Mississippi Supreme Court has reversed for a trial court's failure to include "failure or prevention of conclusion" in attempt jury instructions. See *Henderson v. State* 660 So. 2d 220, 222-23 (Miss. 1995) and *Armstead v. State*, 716 So. 2d 576, 583 (Miss.1998). It is axiomatic that the element should be included in attempt indictments.

Not only was Hawkins' indictment fatally defective, it charged a totally different crime altogether. In *Spears v. State,* 942 So.2d 772, 775 (Miss. 2006), the Supreme Court ruled that an indictment worded exactly like the one in this case charges burglary not attempted burglary. This will be addressed further in a subsequent issue.

ISSUE NO. 2: WHETHER HAWKINS WAS ENTITLED TO AN ABANDONMENT JURY INSTRUCTION?

Hawkins requested an abandonment instruction as D-2, but the request was denied. [R. 37].[2] There is strong legal precedent in support of the appellant's position that the trial court erred in denying this request, as Hawkins was, most

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D-2: If you find from the evidence, beyond a reasonable doubt, that Daryl Hawkins freely and voluntarily abandoned his intent to commit the crime of burglary of an automobile before the defendant performed any overt act toward the commission of that crime, and if you further believe there was not an outside cause prompting the abandonment, then you shall find the defendant not guilty. (Refused).[R. 37].

definitely, entitled to a jury instruction on his theory of defense of abandonment.

The case of *Bucklew v. State*, 206 So. 2d 200, 202-04 (Miss. 1968) demonstrates a good case of abandonment. Bucklew was the mayor of Laurel. He was indicted for attempted embezzlement regarding attempting to obtain a city check to pay an automobile repair bill. Bucklew took steps to have the bill approved for payment, but never presented the invoice for the check to actually be issued. The court ruled that there was never any showing of an intent to commit a crime, but if there was, any the criminal intent was abandoned prior to a completion of an unambiguous overt act and the trial court should have granted a directed verdict of acquittal based on abandonment.

In *Hester v. State*, 602 So.2d 869 (Miss. 1992), the defendant was found to be entitled to an abandonment instruction where the defendant was charged and convicted of capital murder involving the armed robbery and shooting of a sailor in Pascagoula by four young men. Hester testified that he tried to abandon the hastily planned robbery. There was testimony however from others that he did not abandon. As in the present case, a proffered jury instruction the defense of abandonment was refused, and the Supreme Court reversed.

There was a factual basis for an abandonment instruction here in Hawkins' case that any criminal intent he allegedly had was abandoned. In the testimony

of Officer Graham, his description of the events was that the car window was broken, Graham called for back-up, and then the alarm sounded. [T. 15]. Also, the co-defendant Brandon James said that he did not hear a car alarm going off until Hawkins got in the car and said "drive". [T. 43]. Hawkins had every opportunity to reach in the car with the broken window and steal something, but he did not.

Criminal defendants are entitled to jury instructions embodying their theories of defense if the same have a factual basis. *Welch v. State*, 566 So.2d 680, 684 (Miss. 1990). Failure to afford the same constitutes reversible error. *Id.*

ISSUE NO. 3: WHETHER THE COURT SHOULD HAVE GRANTED A DIRECTED VERDICT OR A JNOV?

Hawkins' motion for directed verdict should have been sustained and the case should not have gone to the jury. Alternatively, a JNOV should have been granted.

In reviewing a motion for directed verdict which challenges the sufficiency of evidence, "the Court looks to all the evidence before the jurors to determine whether a reasonable, hypothetical juror could find, beyond a reasonable doubt, that the defendant is guilty" of the crime charged in the indictment. *Nichols v. State* 822 So.2d 984, 989 (Miss. Ct. App. 2002).

As stated previously, the indictment in this case charges burglary, not attempted burglary. *Spears v. State,* 942 So.2d 772, 775 (Miss. 2006). Since the state failed to prove burglary, the issue is easy to decide. There was no evidence to support a conviction of burglary.

Alternatively, if the Court finds that an attempted burglary was properly pled, the trial court should, nevertheless, have granted a directed verdict because the state proved nothing more than mere vandalism. There was no evidence of an intent to steal anything.

The offense of attempt "requires the specific intent to commit a particular offense." *Armstead v. State,* 716 So. 2d 576, 583 (Miss. 1998). The state will argue that Hawkins' allegedly looking into the cars was proof of intent to steal. However, that conclusion is somewhat hasty. Hawkins could have left something of his own in a vehicle and was attempting to retrieve it, he could have been seeking some kind of revenge against someone by breaking their car window. The act of looking into car windows does not necessarily lead to a conclusion that the looker intends to steal. He could have been looking in windows for purposes of identifying an intended target of vandalism, for example. Hence, the evidence was ambiguous at best.

As in *Bucklew, supra,* here in Hawkin's case, there was never any showing

of an intent to commit a theft, but if there was, any specific intent was abandoned prior to a completion of an unambiguous overt act and since the Supreme Court has "held that the law requires that the State establish criminal intent as an element to the crime of attempt 'to commit a crime'", the trial court here should have granted a directed verdict of acquittal. 206 So. 2nd 202-04.

The *Bucklew* court pointed out that "that the defendant's [overt] act must be a direct, unequivocal act toward the commission of the intended crime." 206 So.2d 202-03. Since Hawkins' alleged act of breaking a car window is ambiguous, coupled with his other actions, the trial court should have granted the requested directed verdict.

Alternatively, the court should have granted a new trial or rendered a not guilty verdict. In reviewing a motion for *JNOV*, to determine whether trial evidence is sufficient to sustain a conviction "the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed.'" *Bush v. State*, 895 So.2d 836, 843(¶ 16) (Miss. 2005) (quoting *Carr v. State*, 208 So.2d 886, 889 (Miss.1968)). The deciding factor is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." *Id.* If the minimum conclusion is reached that, "reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense," the evidence is sufficient. *Id.*

If the Court follows the decision of *Spears v. State, supra,* and finds that a burglary case was actually charged in this case, once again the decision is easy. No reasonable jury could find the defendant guilty of burglary in this case.

Even if the Court finds the indictment sufficiently charges attempted automobile burglary, the trial court should have nevertheless granted a new trial or an aquittal JNOV. The appellant's position is that the state's purported proof of an overt act is insufficient to have proven any intent to steal, at best the proof of the overt act is ambiguous. See *Bucklew, supra.*

In the present case, the best evidence of Hawkins' intent comes from his comments to Brandon James when they were pulling off. See *Armstead, supra.* It is the appellant's position that, looking at the state's case in the best possible light, the only crime that was proved was mere vandalism. Going any further is pure speculation.

Recall that in *West v. State, supra,* the defendant was charged with attempted sexual battery which would require an attempt to penetrate. 437 So.2d at 1214. The defendant's offense conduct proved at trial was that he accosted a

young woman and did no more than fondle her and expose himself without any attempt at penetration. The failure to attempt penetration "was not the product of his victim's ... resistance or the intervention of extraneous causes." *Id.*

The *West* court reversed the attempted sexual battery conviction. "Attempt requires 'design' which, therefore, "contemplates 'intent'". The Court said, "[w]hatever West's intent may have been when he originally inveigled his victim into the apartment ... [it had] dissipated by the time he committed his so-called "overt acts" . . . [i]f one walks into a bank with a loaded pistol in his pocket intending to rob the bank and walks up to the teller's window, but then changes his mind, he has not committed the crime of attempted bank robbery." *Id.*

Sometimes it is a defendant's actions, and sometimes it is the defendant's words and actions which give proof of intent. In *Ishee v. State*, 799 So. 2d 70, 73-75 (Miss. 2001) a defendant's specific request for a young boy to perform a sex act coupled with gesturing made it clear, thus unambiguous for the court to see intent.

In the present case, Hawkins' words show no intent to commit an offense and his actions are ambiguous as previously shown.[3] A judgement

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Brandon said he dropped Hawkins off in the parking lot and then Hawkins got back in the car acting "paranoid" and said, "[d]rive before somebody thinks we're trying to break into something." [T. 43]. As they were driving off, Brandon testified that Daryl said, "I broke the window out of the car, man, we're fixing to go to jail." [T. 46].

notwithstanding the verdict was in order upon request. Appellant respectfully looks to this Court for a remedy.

ISSUE NO. 4: IS HAWKIN'S SENTENCE OF LIFE WITHOUT PAROLE UNCONSTITUTIONALLY DISPROPORTIONATE?

Since Hawkins had three prior convictions, one robbery in 1987 and two burglaries in 1988 occurring one day apart, the indictment in this case, as amended, charged him as an habitual offender under MCA §99-19-83 (1972).

Even though trial counsel requested a proportionality review, and even though the law requires it, the trial court denied Hawkins' request finding a lack of discretion. [T. 100-01]. Hawkins' position is that his life sentence without parole for breaking one car window is unconstitutionally too severe and clearly disproportionate to the offense conduct. U. S. Const. Eighth and Fourteenth Amendments, Miss. Const. Art. 3 § 28.

The United States Supreme Court in *Solem v. Helm*, 463 U.S. 277, 292, 103 S.Ct. 3001, 3011, 77 L.Ed.2d 637 (1983) set out three factors for courts to consider when conducting a proportionality analysis. The criteria are:

(1) the gravity of the offense and the harshness of the penalty;

(2) the sentences imposed on other criminals in the same jurisdiction; and

(3) the sentences imposed for commission of the same crime in other

jurisdictions. In *Solem*, the Court held a life sentence without parole to be unconstitutional for the crime of writing a $100 bad check on a nonexistent bank account, even though the defendant had been convicted of six prior felonies including three for burglary. *Id.*

The Mississippi Supreme Court has consistently applied *Solem* in reviewing the imposition of habitual sentences. The case of *Clowers v. State*, 522 So.2d 762, 764 (Miss.1988) is a good example. In *Clowers*, the defendant was an habitual offender with a new conviction of forging a $250 check. As an habitual offender, Clowers was subject to the mandatory maximum sentence of fifteen years without parole. *Id.* The trial court imposed a sentence of less than fifteen years on the grounds that the mandatory maximum sentence would be disproportionate to the crime. *Id.*

The *Clowers* court affirmed the trial court acknowledging that "a criminal sentence [even though habitual] must not be disproportionate to the crime for which the defendant is being sentenced." *Id.* at 765. Also, even thought a trial judge may lack the usually discretion in sentencing an habitual offender, "does not necessarily mean the prescribed sentence meets federal constitutional proportionality requirements." *Id.* See also *Hoops v. State*, 681 So.2d 521, 538 (Miss. 1996).

In *Oby v. State*, 827 So.2d 731 (Miss. Ct. App. 2002), where a violent habitual drug dealer's life sentence was affirmed as being proportionate, the Court reiterated the important point that in a *Solem* review, a "correct proportionality analysis for a habitual offender sentence does not consider the present offense alone, but within the habitual offender statute." In other words, a reviewing court, and the trial court, should review an offender's past offenses together with the present offense.

In *McGruder v. Puckett*, 954 F.2d 313, 317 (5th Cir.1992), the court recognized the aforesaid *Solem* three part test be applied "when a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality." The violent habitual defendant in *McGruder* was sentenced to life imprisonment after his last offense of auto burglary. McGruder's prior convictions were armed robbery, burglary, escape, and auto burglary, and the Fifth Circuit held that McGruder's life sentence was not grossly disproportionate to his current offense. The *McGruder* court made it clear that an habitual sentence analysis is based on the sentence rendered in response to the severity of the current offense taking the prior offenses into consideration secondarily.

Hawkins' criminal record is not nearly as bad as McGruder's. His

triggering offense was merely breaking a car window. This final crime for Hawkins was for an attempt, not even a completed crime.

In *Rummel v. Estelle*, 445 U.S. 263, 267 100 S.Ct. 1133, 1136 63 L.Ed.2d 382 (1980) the defendant had two prior felonies of credit card fraud and uttering a forgery, and was convicted of a third felony of false pretenses. Rummell was sentenced to life in prison, a mandatory recidivist sentence for non-violent offenders. The Court held that Rummel's sentence was not unconstitutionally disproportionate to the offense "even though the total loss from the three felonies was less than $250", in part because he was eligible for parole after twelve (12) years. In Hawkins' case, there is no hope for parole.

In *Bell v. State* 769 So.2d 247, 251-52 (Miss. Ct. App. 2000), a drug dealer was tried and sentenced as a non-violent habitual offender. The trial judge reviewed Bell's prior convictions and afforded Bell the opportunity to present mitigating evidence. According to the court in *Bell,* the trial judge is required to justify on the record any sentence that appears harsh or severe for the charge. Citing *Davis v. State*, 724 So. 2d 342 ¶10, (Miss. 1998), the *Bell* Court recognized that, "[i]n essence, the Mississippi Supreme Court set forth a requirement that the trial judge justify any sentence that appears harsh or severe for the charge." *Bell,* 769 So. 2d at 252 .

The previous convictions of Bell were acknowledged by the trial judge at the sentencing hearing prior to Bell receiving his habitual sentence. The *Bell* court "considered the gravity of the offense with the harshness of the sentence before imposing the thirty year sentence" which was a proper use of "the broad discretionary authority granted to it." Bell's sentence was not seen as disproportionate so no further review under *Solem* was conducted. *Id.*

In the present case, trial counsel requested a proportionality review. [T. 100]. In reply, the trial court advised that it had no discretion, did not perform any analysis, and did not give Hawkins an opportunity to present mitigating circumstances. [T. 101].

Applying the *Solemn* test here, it is clear that the gravity of breaking an automobile window is petty. In performing the two comparison aspects of the test, comparing Hawkins' sentence with sentences imposed on other criminals in Mississippi, and, comparing sentences imposed in other jurisdictions for commission of the same offense, is obvious that there is only one other sentence more harsh, death.

A comparison of other offenses in Mississippi where a non-habitual defendant can receive a life sentence: murder §97-3-19, rape §97-3-71, kidnaping (jury only) §97-3-53, armed robbery (jury only) §97-3-79.

A sampling of other crimes with non-life sentencing options is:

kidnaping, 1 to 30 years by court, Miss. Code Ann. §97-3-53
armed robbery, 3 to anything less than life , Miss. Code Ann. §97-3-79
first degree arson, 5 to 20 years, Miss. Code Ann. §97-17-1
receiving stolen goods, 10 year maximum, Miss. Code Ann. §97-17-70
house burglary, 3 to 25 years, Miss. Code Ann. §97-17-23
felon in possession of firearm, 3 year maximum, Miss. Code Ann. §97-37-5
Aggravated Assault, 20 year maximum, Miss. Code Ann. §97-3-7

A comparison of other jurisdictions for defendants similarly situated, namely a recidivists with one "violent" felony, and who commits a relatively minor property crime being sentenced to life without parole, leads to the conclusion that Mississippi is among the harshest.

In *Ewing v. California,* 538 U. S. 11, 28-29, 123 S.Ct. 1179, 1189, (2003), Ewing committed the crime of grand larceny after having been previously convicted of two violent felonies. Unlike Hawkins, Ewing would be eligible for parole after 25 years. In the present case, there was no completed crime, and Hawkins has only one prior violent offense, and yet there is absolutely no chance for parole. Hawkins will die in prison for breaking a car window. So, Mississippi is much worse than California, known for its harsh "three strikes law". See also *Lockyer v. Andrade,* 538 U.S. 63, 123 S.Ct. 1166 (2003) (lifelong habitual and much more extensive than Hawkins has a shot a parole.)

From *Rummell, supra,* it is clear that in Texas, Hawkins would have been

eligible for parole after 10-12 years if he had been convicted there. 445 U. S. at 267, 100 S. Ct. at 1136. There is a comprehensive comparison of recidivist sentencing statutes in *Ewing, supra,* attached as an appendix to Justice Breyer's dissent, which does not necessarily fit Hawkins' facts, but does show the very wide variations of treatment and the different approaches to habitual sentencing. 538 U. S. 60-61, 123 S.Ct. 1206-07

For example, Arkansas' habitual sentencing is partially based on the number of prior convictions along with their characteristics . Ark. Code Ann. § 5-4-501 (Supp.2007). Some state's have sentencing guidelines with comprehensive background considerations, see Tenn. Code Ann § 40-35-115. In Georgia, it takes two "serious violent" felonies for a sentence of life without parole. See, Ga. Code Ann., § 17-10-7. In Alabama, a repeat offender gets racheted up to a higher class felony depending on the nature of the present offense and number and nature of prior offenses. Ala. Code 1975 § 13A-5-9. Oklahoma repeat offenders have access to wide sentencing court discretion with 20 years to life at the worse end of their scheme. 21 Okl. St. Ann. § 51.1. Federally, simple robbery and attempted crimes cannot be the basis of a violent recidivist sentencing to life without parole. 18 U. S. C. §3559.

So, a *Solem* analysis leads to the legally sound conclusion that Hawkins'

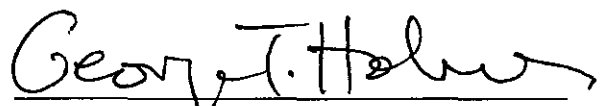
sentence is patently unconstitutionally disproportionate to his offense and should be vacated. If the Court does not reverse the conviction altogether, at a minimum, Hawkins' case should be remanded for resentencing to include a proportionality hearing which by denying, the trial court erred because it did not exercise a sufficient quantum of discretion as is required by *Bell, supra.*

CONCLUSION

Daryl Hawkins is entitled to have his convictions reversed with remand for a new trial or he is entitled to be resentenced.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Daryl Hawkins, Appellant

By: 

George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 28th day of November , 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Albert B. Smith, III, Circuit Judge, P. O. 478, Cleveland MS 38732, and to Hon. Brenda F. Mitchell, Off. Of D. A. , P. O. Box 848, Cleveland MS 38732, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

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