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DOCKET NO.: 2006-CA-00950

SUPREME COURT OF MISSISSIPPI

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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SUPREME COURT
COURT OF APPEALS

ARMON ANDRE RANDALL
APPELLANT

VERSUS

STATE OF MISSISSIPPI
APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI SECOND JUDICIAL DISTRICT

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT IS REQUESTED

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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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Robert H. Walker, U.S. Magistrate Judge/former Harrison County Circuit Court Judge, original Trial/Sentencing Judge.

2. Honorable Roger T. Clark, Harrison County Circuit Court Judge, Sentencing Judge

3. State of Mississippi, Appellee

4. Jim Hood, Attorney for the Appellee/Attorney General for the State of Mississippi
   Jeffery A. Klingfuss, Special Attorney General;
   Justin Hayden, Attorney General Intern

5. Cono Caranna, District Attorney for Harrison County, Mississippi

6. John H. Whitfield, Attorney for the Appellant

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Oral Argument Requested

COMES NOW, the Appellant, in the above styled and numbered appeal, by and through his counsel of record who files this his Reply Brief in Response to the Brief of the Appellee. In support of the same, the Appellant avers, states and gives notice of the following:

I. INTRODUCTION

1. The State of Mississippi in its brief raised two issues. The first was whether the Appellant's claim was time barred by the three (3) year statute of limitation generally applicable to such claims. Second, the State of Mississippi raised the issue of whether the trial court erred in denying the Appellant's Motion of Post Conviction Collateral Relief (hereinafter referred to as PCCR). The

Appellant submits the following short reply in response to the Appellee's brief to ensure the issues are properly framed for this Honorable Court's consideration.

II. ISSUES PRESENTED

2. The issues presented as set forth in the Appellant's and the Appellee's principal briefs are concisely the issues that need to be resolved by this Honorable Court. No further expansion is necessary here.

III. THE STATEMENT OF THE CASE

3. The Appellant, Mr. Armon Randall, appeals to this Honorable Court requesting that this Court overrule and reverse the trial court's denial of his PCCR motion. Furthermore, Mr. Randall, the Appellant, requests that this Court, after consideration herein, render a judgment granting the relief he has requested, that is, to vacate the underlying sentence of life without parole as the same exceeded the authority vested in the sentencing judge on the date the alleged crime is said to have taken place, October 28, 1993, or simply strike the surplus language from the sentencing judgment of May 9, 2002. If the sentencing judge lacked the authority to impose such a sentence on the aforementioned date, he certainly lack the authority to impose such a sentence on May 9, 2002, even though there had been a substantive change in the law.

IV. THE STATEMENT OF FACTS

4. The facts are undisputed in this action. The Appellant adopts the factual statement set forth in his principal brief, which the Appellee does not dispute in the recitation of facts contained in its brief.

V. THE SUMMARY OF THE REPLY ARGUMENT

5. The Reply argument will be very brief. Therefore, it would be redundant and a waste of the Court's time to restate the same here.

VI. STANDARD OF REVIEW

6. The Appellant agrees with the Appellee that the applicable standard of review is that of "clearly erroneous" or "abuse of discretion". An appellate court should not disturb a trial court's decision to deny a PCCR motion unless the same constitutes an abuse of discretion or is clearly erroneous. ***Twillie v. State,*** 892 So.2d 187, 189 (Miss. 2004).

7. Furthermore, as it relates to issues of law presented for appellate review, the appellate court shall review the same *de novo*. ***Felder v. State,*** 876 S.2d 372, 373 (Miss. 2004)*;* ***Brown v. State,*** 731 So.2d 595, 598 (Miss. 1999). With this standard in mind, the Appellant submits this matter for the Court's consideration with the following clarifications and additional arguments.

VII. ARGUMENT OF APPELLANT

A. THE APPELLANT'S CLAIM IS NOT TIME BARRED.

8. The Appellant's motion for PCCR is not time barred. This Court has held time and time again that trial court decisions that affect **fundamental constitutional rights** are excepted from the procedural bars that would otherwise prohibit their consideration. ***Kennedy v. State,*** 732 So.2d 184,196-87 (Miss. 1999); ***Luckett v. State,*** 582 So.2d 428, 430 (Miss. 1991). In his appeal, Mr. Randall alleges that the sentencing judge imposed a sentence that exceeded the sentencing judge's authority. If this Court agrees, then the sentence imposed was an illegal sentence. This Court has held that the imposition of an illegal sentence constitutes a violation of one's fundamental

constitutional rights. ***Ivy v. State,*** 731 So.2d 601, 603 (Miss. 1999); ***Sneed v. State,*** 722 So.2d 1255 (Miss. 1998). The Appellee concedes as much in section one of its brief. Consequently, the first issue raised by the Appellee is wholly without merit.

B. THE SENTENCE IMPOSED BY THE SENTENCING JUDGE EXCEEDED THE LEGAL AUTHORITY VESTED IN SUCH JUDGE AND CONSEQUENTLY CONSTITUTES AN ILLEGAL SENTENCE.

9. A sentencing judge cannot impose a sentence for which he or she has no legal authority. Only a jury, after a sentencing hearing, can impose life without parole for those cases that "falls within the gap between the two laws." ***Rubenstein v. State,*** 941 So.2d 735, 790 (Miss. 2006). This is done when the jury rejects both the imposition of the death penalty and life with the possibility of parole. A judge, sitting alone, can only impose life in "gap" cases. Although the amended version of Section 97-3-21 of the Mississippi Code applies to "any case in which pre-trial, trial or resentencing proceedings take place after July 1, 1994," this did not foreclose the fact that a jury hearing one of these "gap" cases was to be allowed to consider straight life (that is with the possibility of parole) as a potential sentencing option. See, ***Rubenstein***, at 793; ***West v. State,*** 725 So.2d 872, 877 (Miss. 1998). The sentencing judge in the case *sub judice* was without the legal authority, sitting alone, to impose a sentence of life without parole. The additional wording, "without parole" is merely surplusage. He could not have imposed such a sentence on the day this alleged crime is said to have occurred. Therefore, the sentencing judge, even after receiving Mr. Randall's plea of guilty should have imposed a sentence of life or convened a sentencing jury to decide whether life without parole was a more appropriate sentence. This he did not do. Therefore, the sentence imposed was illegal and unconstitutional.

10. All of the cases cited by the Appellee are easily distinguishable. In a nut shell, they were cases in which the "gap"cases were presented to a jury and the defendant therein requested the instruction of life without parole or simple life as a strategic tactic to try and circumvent the imposition of the death penalty. Mr. Randall was neither tried by a jury nor did he request the imposition of life without parole. The sentencing judge did not have the legal authority to impose a penalty, sitting alone, that he could not have imposed on the day the crime for which Mr. Randall convicted is said to have occurred.

11. Trial courts should not be asked to engage in interpreting statutes unnecessarily and dictating to the Mississippi Department of Corrections how it is to apply the applicable Mississippi statutes concerning the release of persons, on parole or otherwise, convicted of criminal violations. ***Mitchell v. State,*** 561 So2d 1037, 1039 (Miss. 1990). This is the responsibility of the Parole Board and not the sentencing court. ***Cochran v. State,*** 2006-CP-01364-COA, at para. 9 (Decided July 24, 2007).

12. After arguing that the Appellant's claim is time barred and that the sentencing judge had the legal authority to impose the sentence given to Mr. Randall, the Appellee, the State of Mississippi, then argues that regardless of the legality of the sentence the effect is the same in light of Section 47-7-3(1)(f). This type of reasoning is nonsense and contrary to the well established case law of this State. Sentencing courts should impose sentences for which they are legally authorized without further commentary or use of unnecessary surplus language in the sentencing judgment. ***Gardner v. State,*** 514 So.2d 292, 294 (Miss. 1994); ***Norwood v. State,*** 846 So.2d 1048, 1050 (para. 3) (Miss. Ct. App. 2003). The sentencing judge was limited in his sentencing authority and the sentence imposed was illegal, resulting and an unconstitutional deprivation of the rights, privileges and immunities of Mr. Armon Randall, the Appellant herein.

VIII. CONCLUSION

13. In conclusion, the Appellant prays that upon due consideration of the facts and the law as it applies thereto that this Honorable Court will overrule and reverse the lower court's decision denying his motion for relief pursuant to the Mississippi Post Conviction Collateral Relief Act. Furthermore, the Appellant prays and requests that this Honorable Court exercise its inherent judicial powers pursuant to the applicable standard of *de novo* review and render a judgment herein that simply strikes the surplusage from the sentencing judgment entered by the sentencing judge on May 9, 2002. Such relief will not result in any additional expense of human or financial resources to the State, the Judiciary, or the Appellant. Alternatively, the Appellate requests that after this Court sets aside the illegal sentencing judgment that the case be remanded and a sentencing jury convened to determine the Apellant's fate, life or life without parole.

RESPECTFULLY SUBMITTED, this the 8th day of August, 2007.

ARMON ANDRE RANDALL
THE APPELLANT

BY: _____
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CERTIFICATE OF SERVICE

I, John H. Whitfield, Attorney of Record for the Appellant, Armon Andre Randall, hereby certify that I have this date forwarded via U.S. Mail, a true and correct copy of the Reply Brief of Appellant to the following:

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SO CERTIFIED, this the 8 th day of August, 2007.

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