

DOCKET NO.: 2006-CA-00950

SUPREME COURT OF MISSISSIPPI

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

**ARMON ANDRE RANDALL
APPELLANT**

VERSUS

STATE OF MISSISSIPPI
APPELLEE

FILED

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SUPREME COURT
COURT OF APPEALS

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

BRIEF OF APPELLANT

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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
5. Cono Caramma, District Attorney for Harrison County, Mississippi
6. John H. Whitfield, Attorney for the Appellant



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STATEMENT OF ISSUE FOR REVIEW

I. ISSUE PRESENTED

Can a trial court judge, sitting with out a jury, impose a sentence of life without parole upon accepting a plea of guilty in a capital murder case when the trial court failed to obtain a waiver of the defendant's (in this case the Appellant) right against the *ex post facto* application of a change in the law which creates a harsher sentence than that which existed at the time the alleged crime is said to have occurred?

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**ON APPEAL FROM THE CIRCUIT COURT
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BRIEF OF APPELLANT

Comes Now, the Appellant, Mr. Armon Andre Randall, in the above styled and numbered action by and through his attorney of record and files this his appeal from a denial of his Motion for Post Conviction Collateral Relief to Vacate and Set Aside Conviction and Sentence (PCCR). In support of his appeal, the Appellant would state, aver and give notice of the following:

I. BRIEF STATEMENT OF THE CASE

1. The aforementioned PCCR motion was heard by the Honorable Roger T. Clark, Circuit Court Judge for the Second Circuit Court District of Mississippi. After considering the evidence and case law presented at an evidentiary hearing hereon, the Circuit Court entered an order denying the Appellant's motion on November 3, 2006. On November 29, 2006, the Appellant filed his notice

of appeal and designation of record. He also filed his Rule 11 pleadings as required by this Honorable Court. It is from this decision that the Appellant appeals to this Honorable Court.

II. STATEMENT OF THE RELEVANT FACTS

2. The Appellant, Mr. Armon Andre Randall, has suffered a violation of his 5th and 14th Amendments rights under the United States Constitution as well as the corresponding provisions of the Constitution of the State of Mississippi wherein he has been sentenced to a term of life without parole by a trial court, sitting without a jury, for an offense that did not carry such a sentence at the time the alleged crime was committed. The sentence therefore constitutes an illegal sentence violative of the Appellant's fundamental constitutional rights.

3. A Harrison County grand jury initially returned an indictment against the Appellant, Mr. Armon Andre Randall, on the charge of capital murder May 28, 1997. The event giving rise to the alleged facts and circumstances leading to the charge set forth in the indictment was said to have occurred on or about October 28, 1993. The applicable law under which Mr. Randall was charged and indicted, Mississippi Code Section 97-3-19, (1972, as amended), was amended July 1, 1994, some nine (9) months after the alleged conduct is said to have taken place.

4. Mr. Randal initially went to trial and was found guilty and sentenced to death. This initial sentence was later overturned and reversed in its entirety and remanded for a new trial by the Supreme Court of Mississippi in *Randall v. State of Mississippi*, 806 So.2d 185 (Miss. 2001). Subsequently the trial court, former Circuit Court Judge Robert H. Walker, entertained and accepted a plea of guilty from Mr. Randall. Without inquiring on the record (or otherwise) as to a waiver of Mr. Randall's right against the application of a change in the law *ex post facto*, Judge Walker accepted Mr. Randall's plea of guilty and sentenced him to a term of incarceration in the custody of the Mississippi Department of Corrections of life without parole. Important in the factual outline

herein set forth for your consideration is that at the time former Circuit Court Judge Robert H. Walker imposed such the sentence, the judge was sitting without a jury and Mr. Randall had not been indicted as a habitual offender. During the plea, Judge Walker concluded that since the prosecution was waiving the death penalty and there had been a change in the law, the only sentence he could impose was that of life without parole. Again, the record is devoid of a waiver of the *ex post facto* application of the law to Mr. Randall.

5. Judge Walker's decision was erroneous, and the effect of the same was to deprive Mr. Armon Andre Randall of his constitutional right against the *ex post facto* application of a change in the law occurring after the alleged commission of the said crime was complete. Consequently, this Honorable Court should simply enter a minute entry reversing Judge Walker's sentence and setting the same aside and thereafter enter a judgment re-sentencing Mr. Randall to life with the possibility of parole which is what the law required at the time the alleged crime is said to have occurred.

III. ISSUE PRESENTED

6. Can a trial court judge, sitting with out a jury, impose a sentence of life without parole upon accepting a plea of guilty in a capital murder case when the trial court failed to obtain a waiver of the defendant's (in this case the Appellant) right against the *ex post facto* application of a change in the law which creates a harsher sentence than that which existed at the time the alleged crime is said to have occurred?

IV. ANSWER TO ISSUE PRESENTED

7. The obvious answer is, NO! The trial court cannot impose a sentence more harsh than the law allowed at the time the alleged criminal conduct is said to have occurred without first obtaining a knowing, intelligent and voluntary waiver of the individual's right against the *ex post facto*

application of the new law. Any sentence which attempts to impose such a sentence without a waiver of one's constitutional rights is illegal and void as a matter of law.

V. ARGUMENT AND DISCUSSION OF APPLICABLE AUTHORITIES

A. The *ex post facto* application of Sections 97-3-19, 97-3-21, 99-19-101 and 47-7-3, Mississippi Code, (1972, as amended) to an alleged course of criminal conduct that was completed prior to the passage and effective dates of applicability of such statutes is substantively unconstitutional.

8. The United States Constitution forbids both the federal and state governments from enacting any *ex post facto* law. *U.S. Constitution*. Art. I, Sections 9 and 10. Therefore, Judge Walker's sentence of the Appellant herein, Mr. Armon Andre Randall, is illegal and void as it constitutes and *ex post facto* application of a change in the law which increased the penalty or punishment after the alleged crime had occurred and was fully completed. The United States Supreme Court resolved this issue many years ago when it held that a law which "aggravates a crime or makes it greater than it was, when committed" or a "law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed" would allow is an *ex post facto* law. *Calder v. Bull*, 3 U.S. 386, 390, 1 L.Ed. 648, 650 (1798). The underlying public policy to such a prohibition on the application of a new legislative enactment on past behavior is clear. Simply put, it is fundamentally unfair to apply, retroactively to a person's conduct, a law of greater severity than the law in effect at the time of his or her conduct.

9. All persons are entitled to fair warning of the consequences of their conduct. LaFave & Scott, *Handbook on Criminal Law*, Section 12, 1972. Failure of the legislature to afford persons of notice and a fair warning of the consequences of their conduct violates all notions of fundamental fair play and constitutional due process and equality under the law as the same is required before any criminal law can take effect. Otherwise, perfectly legal conduct today can be criminalized tomorrow without fair warning, notice, due process or equality under the law. This Court is called upon to

protect all persons against such abuses of power by the legislative branch of government, and Mr. Randall is likewise entitled to such protections and this Honorable Court should reverse the trial court's sentence herein and render a judgment imposing the only sentence a trial judge could impose sitting without a jury, life with the possibility of parole.

10. There are differences between how the Court should analyze and evaluate the *ex post facto* application of substantive changes in the law as opposed to those changes considered merely procedural in nature. *Id.* The test espoused by the United States Supreme Court is as follows: "a procedural change which does not injuriously affect a substantial right to which the accused was entitled as of the time of his offense is not *ex post facto* though it is retroactive; but it is otherwise if it does deprive him of a substantial right. *Kring v. Missouri*, 107 U.S. 221 27 L.Ed. 506 (1883). In the case at bar, the Appellant's rights have been substantively effected. Therefore, the Court should carefully scrutinize the trial judge's imposition of a sentence that could not have been imposed on the day the alleged crime is said to have occurred. The sentence of life without the possibility of parole is illegal, void and violates the substantive rights of Mr. Randall. This Honorable Court should reverse the trial court's sentence herein as violating a substantive constitutional right of the Appellant and render a judgment imposing the only sentence the trial judge could have imposed at the time the alleged crime is said to have occurred sitting without a jury, that is, life in prison with the possibility of parole.

11. Should the Court rule favorably upon the Appellant's appeal, there need not be a concern about the opening of the flood gates. There are a finite number of cases that will be impacted and each must rise or fall on its merits and factual circumstances. However, the facts as applied to Mr. Randall's case mandates a reversal of the sentence imposed by the trial court.

B. The sentence imposed upon the Appellant constitutes an illegal sentence since it exceeded the trial court's statutory authority regarding the length and type of sentence the court could impose (at the time the alleged crime was

committed), sitting without a jury and without obtaining a knowing, intelligent and voluntary waiver of the Appellant's right against the imposition of an *ex post facto* law that increased the penalty of the crime for which he was convicted.

12. Prior to the July 1, 1994 amendments to Mississippi's capital murder statutes, a defendant could not enter into a voluntary plea agreement, in an effort to avoid the death penalty, where the agreed upon penalty was life without the possibility of parole. *Lanier v. State*, 635 So.2d 813, 819 (Miss. 1994). The Court, in evaluating plea agreements such as this, held that such an agreement violated public policy, given that the sentencing statutes did not provide for the sentence of life in prison without parole. *Id.* However, it is worth noting that in cases decided after the enactment of the 1994 amendments, the Mississippi Supreme Court concluded that a defendant could, upon a valid waiver of his *ex post facto* rights, enter a plea agreement to a sentence of life in prison without parole under the new sentencing statute. [Emphasis added] *Willie v. State*, 738 So.2d 217, 220 (Miss. 1999); *Stevenson v. State*, 674 So.2d 501, 506 (Miss. 1996). The Court went on to say in more specificity:

Implicit in these decisions is the notion that *ex post facto* ramifications exist, when such defendants agree to plead to life in prison without parole under the new sentencing statute. That is, upon the entry of a valid plea under the statutes in effect at the time of Willie's crime, Willie could only have been sentenced by the trial judge to life in prison. Sentencing Willie to life in prison without parole under the new statute, would, therefore, be harsher than the only option for sentencing in such plea situations. Thus, if Willie chooses to plead guilty on remand, the trial judge may sentence him to life in prison. However, if Willie agrees to a sentence of life in prison without parole, the trial judge should take care to ascertain that Willie has validly waived his *ex post facto* rights—before accepting the plea agreement.

Moreover, in recent cases, this Court has noted that similar *ex post facto* ramifications do not exist when such cases are remanded for consideration by a sentencing jury. That is, upon remand, sentencing juries are to be instructed on the options of life in prison, life in prison without parole, and death. See *West*, 725 So.2d at 880. Admittedly, this is a departure from the sentencing options pronounced in similar, earlier cases, which only allowed the jury to consider life in prison and death on remand. See *Stevenson*, 674 So.2d at 506.

However, allowing the sentencing jury to consider these three options takes into account the fact that "Miss. Code Ann. § 97-3-21 clearly and lawfully directed capital defendants whose pre-trial, trial or sentencing proceedings take place after July 1, 1994 to have their sentencing juries given the option of life without parole in addition to life with the possibility of parole and death...." *West*, 725 So.2d at 882. Furthermore, in such cases, the option of life in prison without parole is ameliorative, when compared to the sentence of death that the jury could have imposed. See *Id.* at 880; *Barnett v. State*, 725 So.2d 797, 801 (Miss.1998); *Tavares v. State*, 725 So.2d 803, 809 (Miss.1998). Thus, if this case is presented to a sentencing jury, then that jury should be instructed on all three options available under the amended statute: life in prison, life in prison without parole, and death.

Willie, at 220.

13. Thus, taking this language as provided by the Mississippi Supreme Court in *Willie* at face value, one can reach no other conclusion than the sentence imposed by the trial court herein exceeded the trial court's authority. At the evidentiary hearing on the Appellant's PCCR motion, the State conceded that the record of the Appellant's plea hearing did not contain any discussion of the Appellant having waived his right against the imposition of an *ex post facto* law increasing the sentence of the crime of which he was indicted. Again, the Appellant challenges the government show in the record where any such discussion took place and the Appellant waived the same during his plea hearing or at any other time. It does not exist. Consequently, this Honorable Court should reverse the trial court's sentence herein as violating a substantive constitutional right of the Appellant and render a judgment imposing the only sentence the trial judge could have imposed at the time the alleged crime is said to have occurred sitting without a jury, that is, life in prison with the possibility of parole.

14. The State will undoubtedly cite for the Court's consideration *Rubenstein v. State*, 941 So.2d 375 (Miss. 2006), as it did at the evidentiary hearing on the Appellant's PCCR motion. This case is of no consequence to the analysis herein.

15. In *Rubenstein*, the Court reversed the defendant's conviction because the trial court failed to give the jury the option of imposing life without parole as one of the three alternative

sentences it could impose in the case. The defendant in *Rubenstein* requested that the trial court so instruct the jury but the trial judge chose not to do so. By requesting that the jury be so instructed, the defendant in *Rubenstein* actually waived any objection he may have had to the application of the *ex post facto* 1994 amendments to the capital murder statute.

16. Again, there is no record whatsoever that Mr. Randall ever waived his right to the *ex post facto* application of the 1994 amendments nor was he ever questioned about the same. Therefore, this Honorable Court should reverse the trial court's sentence herein as having violated a substantive constitutional right of the Appellant and render a judgment imposing the only sentence the trial judge could have imposed, sitting without a jury, that is, life in prison with the possibility of parole. Any further judicial proceedings or litigation would be a waste of judicial resources that are already severely over taxed.

VI. CONCLUSION

17. Armon Andre Randall's sentence to life imprisonment without the possibility of parole is an illegal sentence void on its face. The trial court never obtained the necessary waiver this Court deemed necessary in *Willie*. Consequently, this Honorable Court should reverse the trial court's sentence herein as having violated a substantive constitutional right of the Appellant wherein the trial court imposed an *ex post facto* law which served to enhance the punishment or penalty for the crime so charged and render a judgment imposing the only sentence the trial judge could have imposed, sitting without a jury, at the time the alleged crime is said to have occurred and after accepting the Appellant's plea of guilty, that is, life in prison with the possibility of parole. No further proceedings are necessary in this instance as to remand this case would constitute a waste of judicial economy. This Court should simply reverse and render.

RESPECTFULLY SUBMITTED, this the 2nd day of May, 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 Brief
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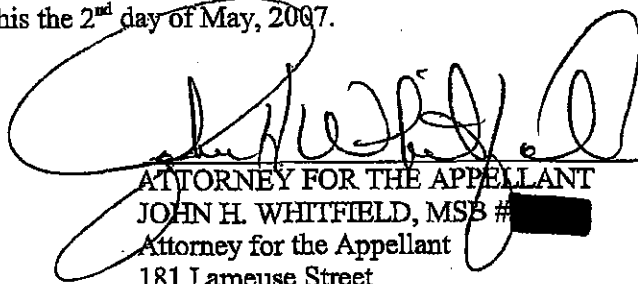
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