

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-CP-01176-COA

FREDERICK ALEXANDER

**FILED**

APPELLANT

V.

FEB 27 2007

STATE OF MISSISSIPPI

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COURT OF APPEALS

APPELLEE

**BRIEF FOR APPELLANT**

BY:

*Frederick Alexander*

Frederick Alexander, #67449

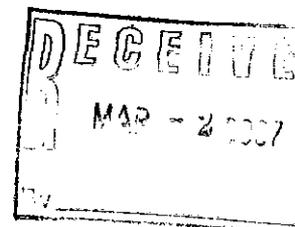
JFCF

279 Hwy 33

Fayette, MS 39069

**ORAL ARGUMENT NOT REQUESTED**

**PRO SE PRISONER BRIEF**



IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned Appellant, Frederick Alexander, certifies that the following listed persons have an interested in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Frederick Alexander, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable Lamar Pickard, Circuit Court Judge;
4. Honorable C. Martin Alexander, District Attorney.

Respectfully Submitted,

BY: Frederick Alexander

Frederick Alexander, #67449

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279 Hwy 33

Fayette, MS 39069

Appellant, pro se

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**STATEMENT OF ISSUES**

**ISSUE ONE**

Petitioner was denied fundamental due process law where the trial court never heard nor disposed of the motion for reconsideration filed in the trial court on January 14, 1997 and within 10 days of the date of judgment and imposition of sentence.

**ISSUE TWO**

The sentence imposed upon Petitioner was an excessive sentence when imposed upon a first time offender without any aggravating factual findings by the court.

**ISSUE THREE**

This court has jurisdiction to review the motion to reconsider on the merits where motion was filed in trial court on January 14, 1997; where trial court failed to rule upon motion; and where such failure to secure a ruling was ineffective assistance of counsel since Appellant was represented by counsel in the proceedings.

**STATEMENT OF INCARCERATION**

The Appellant is presently incarcerated in the Mississippi Department of Corrections in a maximum security unit, in service of the term imposed in this case. Appellant's constructive confinement in regards to the sentence at issue will continue indefinitely.

## STATEMENT OF CASE

On October 3, 1995, after being arrested and charged with the offense of unlawful sale of cocaine, Appellant was thereafter indicted for such offense. Following a jury trial Appellant was sentenced to a term of 30 years. Appellant, through counsel, subsequently filed motion to reconsider sentence. The trial court never heard nor disposed of such motion which remained pending until June 14, 2006, when the trial court denied Appellant's motion on the merits. Appellant's Appeal in this instance is proper where trial court never reached nor disposed of the timely filed motion to reconsider sentence and where court has now reached the merits of such motion and has not asserted any procedural bar.

## STANDARD OF REVIEW

In reviewing a trial court's decision to deny a motion for post-conviction relief the standard of review is clear. The trial court's denial will not be reversed absent a finding that the trial court's decision was clearly erroneous. Kirksey v. State, 728 So. 2d 565, 567 (Miss. 1999).

## SUMMARY OF ARGUMENT

The trial court erred in denying Appellant's motion to Reconsider sentence where court imposed maximum sentence of 30 years upon Appellant, as a first offender, and where court failed to dictate or provide any justification of such actions. The trial court failed to apply discretion. White v. State, 742 So.2d 1126 (Miss. 1999).

## ARGUMENT

### **ISSUE ONE**

**Petitioner was denied fundamental due process law where the trial court never heard nor disposed of the motion for reconsideration filed in the trial court on January 14, 1997 and within 10 days of the date of judgment and imposition of sentence.**

Appellant, through counsel, filed his motion to Reconsider sentence on January 14, 1997. (C.P. 007) The sentencing order and jury verdict was entered on January 6, 1997. (C.P. 006). The motion for Reconsideration therefore was filed within the time limit required by Rule 10.05 (6) of the Miss. Unif. Rule of Cty. and Cir. Court Practice which provides, in pertinent part, that:

A motion for a new trial must be made within ten days of the entry of judgment. The trial judge may hear and determine a motion for new trial at any time and in any court or judicial district within the trial judge's jurisdiction.

The court may, with the consent of the defendant, order a new trial of its own initiative before the entry of judgment and imposition of sentence.

The court, on motion of a defendant, may vacate judgment and dismiss the case without prejudice if the indictment or complaint did not charge an offense, or if the court was without jurisdiction, and bind the defendant over to the action of the grand jury, or take other proper steps regarding the defendant.

Appellant would assert that the post trial motion to Reconsider the sentence was tantamount to a motion for new trial and should have been disposed of accordingly. In any alternative, the post trial motion filed within 10 days of the verdict and sentencing actually placed the proceedings in abeyance until the post trial motion was finally ruled upon. Forkner v. State, 852 So.2d 604 (Miss. App. 2002).

This court should hold that where the motion to reconsider sentence was filed within the required time under the post trial require motion rule 5.16 as well as under the post conviction relief Act of Miss. Code Ann. §99-39-5, this court should find that the motion was not time barred and should be heard on the merits by this court as it was heard by the trial court. This court should reject any motion that Appellant waived the right to proceed on his motion since the record here discloses that Appellant was not aware of the motion to Reconsider sentence having

not been heard since Appellant was represented by counsel. This court should reverse the trial court's order and direct that the trial court conduct a hearing on the motion.

## ISSUE TWO

**The sentence imposed upon Petitioner was excessive upon a first time offender without any aggravation facts.**

Appellant would assert to this court that the decision by the trial court to impose a sentence of 30 years imprisonment constitutes an excessive sentence, denial of due process in sentencing, and failure of the court to apply discretion.

Moreover, the sentence imposed upon Appellant by the trial court was extensively disproportionate to the offense and to the act that Appellant was a first time offender accused of selling a small quantity of drugs.

The law is clear that a sentence which is "grossly disproportionate" to the crime committed is subject to attack on Eight Amendment grounds Wallace v. State, 607 So.2d 1184, 1188 (Miss. 1992). This court should evaluate the sentence imposed upon Appellant under the proportionality test set out by the court in Solem v. Helm, 463 U.S. 277, 292 (1983). The Supreme Court has adopted test in numerous instances. Stromas v. State 618 So.2d 116, 122-123 (Miss. 1993); Wallace v. State, 607 So.2d 1184, 1188 (Miss. 1992); Fleming v. State, 604 So.2d 280, 302-03 (Miss. 1992); Jones v. State, 523 So.2d 957, 961 (Miss. 1988), Clower v. State, 522 S0.2d 762, 764 (Miss. 1988); Presley v. State, 474 So.2d 612, 618-19 (Miss. 1985).

In Tower v. State, 837 So.2d 221 (Miss. App. 2003), the court rendered a decision in a case similar to the case now before the court.

In Towner, the defendant contended that his sentence was disproportionate to the crime and was in violation of the Eight Amendment of the United States Constitution. Towner also

asserted, which the Court found to be true, that the trial judge made a motion asking for authority to review the sentence as he may have been too harsh. As previously acknowledged in this brief, a sentence that does not exceed the maximum period allowed by statute will not be disturbed on appeal. Wallace v. State, 607 So.2d 1184, 1188 (Miss. 1992). Generally, the imposition of a sentence is within the discretion of the trial court, and appellate courts will not review the sentence, if it is within the limits prescribed by statute. Reynolds v. State, 585 So.2d 753, 756 (Miss. 1991). “A court’s proportionality analysis (of a sentence) under the Eight Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdiction.” Solem v. Helm, 463 U.S. 277, 291 (1983) (writ of habeas corpus). The Appellate Court looks for guidance to the cases of White v. State, 742 So.2d 1126, 1135 (¶32) (Miss. 1999), and Davis v. State, 724 So.2d 342, 346 (¶17) (Miss. 1998), both of which involved the imposition of a maximum sentence of a first offender convicted of the sale of one rock of cocaine. In each case the Mississippi Supreme Court remanded for a review of the sentence. Although the amount of contraband sold by Appellant Alexander was less than the amount sold by Towner, Davis, or White, and the first time offender status was the same, Appellant Alexander has been sentenced to a term of 30 years with no justification or analysis of such severe sentence by the trial court. In Towner, the trial judge acknowledged he may have been too harsh, and the prosecuting district attorney stated he has no objection to a re-sentencing hearing. The Court of Appeals remanded the Towner case to the trial court. The same action by the Court should be taken in this case.

Following the return of the verdict of the jury the court imposed the sentence upon Appellant in the following Manner.

THE COURT: Bring the defendant around, please, sir.

MR. Frederick Alexander, you have been found guilty by a jury of your peers for the offense of the unlawful sale of cocaine. Are you prepared for sentence at this time?

THE DEFENDANT: No.

THE COURT: Sir?

THE DEFENDANT: I don't know.

THE COURT: Mr. Moran? Is there anything you wish to say prior to the Court sentencing?

THE DEFENDANT: Ain't nothing I can say.

THE COURT: Mr. Moran?

MR. MORAN: The only thing I'd like to say, your Honor, is that I know the jury has found him guilty, but I would like to ask the Court to have mercy on him and to consider his age and that *he is a first offender*.

THE COURT: All right. Mr. Alexander, for the offense of unlawful sale of cocaine, I hereby sentence you to serve 30 years in the custody of the Mississippi Department of Corrections. That will be the order of the Court. I'll remand you in the custody of the Mississippi Department of Corrections.

In accordance with the decisions rendered by the court is White v. State, supra, and Davis v. State, supra, this court should find that the trial court should find that the trial judge erred in failing to enter some justification or factual explanation of why the court imposed a 30 year maximum sentence upon a first offender when the legislature has provided a wide range of possible sentences for those convicted of sale of cocaine. The trial court failed to apply the broad

discretionary authority in which the law allows. This court should vacate and remand the sentence imposed in this case.

### **ISSUE THREE**

**This court has jurisdiction to review the motion to reconsider on the merits where motion was filed in trial court on January 14, 1997; where trial court failed to rule upon motion; and where such failure to secure a ruling was ineffective assistance of counsel since Appellant was represented by counsel in the proceedings.**

As previously pointed out to the court, this court has the jurisdiction and authority to hear this case where the trial court reached the merits of the motion and the motion was timely filed in the trial court by counsel but not heard by the court promptly.

In denying the motion to Reconsider sentence the trial court has not asserted that the motion was either time barred nor procedurally barred. The trial court acknowledged that it was fully aware that Appellant was convicted by jury on January 6, 1997 and sentenced on to, 30 years on the same date (C.P. 008). The court's order denying the motion to Reconsider proceeds on to provide:

This Court having received correspondence from the individual Defendant herein, requesting a copy of the Order on the ruling of said Motion to Reconsider, does hereby find that upon conferring with the Clerk of this Court's Office, that an Order was never entered as to this pending Motion, and this Court being fully aware that this Motion was not brought on for hearing before this Court. The Defendant, Frederick Alexander's, counsel's failure to bring the motion to Reconsider for hearing, operates as a waiver of said motion "Our rule is that a party making a motion must "follow up that action by bringing it to the attention of the Judge and by requesting a hearing upon it." It "is the responsibility of the movant to obtain a ruling from the court on motions filed by him, and failure to do so constitutes a waiver or same." *Billiot v. State* 454 So.2d 445, 456 (Miss. 1984) (citing *Sharplin v. State*, 357 So.2d 940, 943 (Miss. 1978).

Therefore, this Court now finds that the motion to Reconsider filed with the Clerk of this Court on the date of January 14, 1997, is without merit, and should be denied.

The Order of the court denying such Motion demonstrates that defense counsel was ineffective in his representation of Appellant where counsel filed the motion but never sought to obtain a ruling. Such failures meets the deficiency Strickland and prejudice prongs of Strickland v. Washington, 466 U.S. 668 (1984). Under, the defendant must show 1) that counsel's performance was deficient, and 2) that the deficiency prejudiced the defendant. Leatherwood v. State, 743 So.2d 964, 968 (Miss. 1985).

In the instant case Appellant has demonstrated both prongs. Had the defense attorney pursued a ruling on the motion and even had such motion been denied by the trial court, it is evidenced by the rulings herein that the sentence would have been reversed on appeal. There would have been no way of avoiding a reversal under the law which is set out herein.

On Appeal in the instant case the claim of the sentence being disproportionate was never raised. It could not raised where the trial court had made no ruling on the motion pending there. In fact, Appellant's attorney on appeal raised on single issue "that his attorney was ineffective for failing to compel the prosecutor to identify the location of the confidential informant who assisted law enforcement officials in the purchase of \$300.00 worth of cocaine. (C.P. 009-0010). The Court of Appeals without a written opinion.

This court should find that this claim is procedurally alive and that it was the fault of the defense counsel, not the fault of Appellant, because the Motion to Reconsider sentence was not ruled upon. This court should reverse and remand for reconsideration of the sentence.

### CONCLUSION

Alexander respectfully submits that based on the authorities cited herein and in support of his brief, that this Court should vacate the sentence imposed as being disproportionate on the basis of the facts in the record. Appellant would urge this court to reverse and remand for reconsideration of the sentence.

Respectfully submitted:

Frederick Alexander, Appellant

BY: Frederick Alexander  
Frederick Alexander  
CMCF 3, #67449  
P. O. Box 88550  
Pearl, Ms 39208

Pro Se Inmate Pleading

**CERTIFICATE OF SERVICE**

This is to certify that I, Frederick Alexander, have this date served a true and correct copy of the above and foregoing Brief for Appellant by United States Postal Service, first class postage prepaid, to Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, Ms 39205; Honorable Lamar Pickard, Circuit Judge, P. O. Box 310, Hazlehurst, Ms 39083; Honorable Alexander C. Martin, District Attorney, P. O. Box 396, Port Gibson, Ms 39150.

This, the 27 day of February, 2007.

BY: Frederick Alexander  
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