TABLE OF CONTENTS

2007-CA-01792

COA-T

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT REGARDING ORAL ARGUMENT

As noted in Appellant's opening Brief, this case involves Bowen's ten year prison sentence based on his conviction for passing a fraudulent check in the amount of $250. This case presents important issues regarding the validity of Appellant's sentence, as the applicable statute prescribes a less severe penalty for crimes involving less than $500, and the voluntariness of Appellant's guilty plea, since he was incorrectly advised of the minimum possible sentence prior to his plea.

Oral argument should be granted to discuss these crucial issues.

REPLY ARGUMENT I.

BOWEN IS NOT PROCEDURALLY BARRED FROM RAISING THE ILLEGALITY OF HIS SENTENCE.

The State first argues that Bowen is procedurally barred from raising the illegality of his sentence in this Court, since he did not raise it during his sentencing hearing. This argument is incorrect.

The Mississippi Uniform Post-Conviction Collateral Relief Act expressly provides that it is the appropriate vehicle by which an inmate may attack an illegal sentence. MISS. CODE ANN. § 99-39-5(1)(a). Section 99-39-21 of the Act provides as follows:

> Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.

MISS. CODE ANN. § 99-39-21(1). However, this section is inapplicable where the accused did not have a meaningful prior opportunity present such objections. *Perkins v. State*, 487 So. 2d 791, 793 (Miss. 1986); *King v. Thigpen*, 441 So.2d 1365, 1368-69 (Miss.1983); *Smith v. State*, 434 So.2d 212, 218-19 (Miss.1983); *Read v. State*, 430 So.2d 832, 841 (Miss.1983). In such instances, the issues are appropriately raised in a petition for post conviction relief. *See id.*

Bowen pled guilty to the crime in this case; he did not have a "trial and/or direct appeal" as contemplated by section 99-39-21. (*See* R. p. 13). Rather, Bowen challenged the validity of his sentence via post-conviction relief, as is expressly allowed by the Uniform Post-Conviction Collateral Relief Act. It is undisputed that Bowen raised the issue of the illegality of his sentence in his first (and only) Petition for Post-Conviction Relief and in argument to the Trial Court.

(*See, e.g.*, R. p. 3, T. p. 5). In oral argument to the Trial Court on the Petition, Bowen's counsel summarized his arguments:

> There are two arguments we're making in that regard. First of all, we contend that when the amount is less than $500, the person is not subject to the two to ten years, but rather is subject to zero to six [months].
>
> However, even if the person is subject to the two to ten, it's clear that at the very least, the circuit court had discretion to sentence under the lesser provision.

(T. p. 5).

Bowen timely and correctly preserved the issue of the illegality of his sentence by raising it expressly in his post-conviction relief petition and arguing it to the Trial Court during the post-conviction proceedings.

Of course, Bowen did not raise the issue of the validity of his sentence at his sentencing hearing because he did not know the sentence was invalid at the time. As discussed in Bowen's principal Brief, both his attorney and the Trial Court repeatedly advised him that the minimum sentence for his crime was two years and the maximum was ten years.[1] Bowen did not, and could not have known that these representations were incorrect at the time. Bowen timely raised the issue in a petition for post-conviction relief, as he was authorized to do by the Post-Conviction Collateral Relief Act. Accordingly, since Bowen could not have raised the issue at the sentencing hearing, and properly raised the issue in this proceeding, his failure to do so was no waiver.

Next, even if Bowen's failure to raise the issue regarding the validity of his sentence at the sentencing hearing could be construed to be a waiver, exceptions to the doctrine would apply in Bowen's case. First, the Mississippi Supreme Court has held that hat "errors affecting fundamental constitutional rights, ***such as the right to a legal sentence***, may be excepted from

[1] It is for this reason, as discussed below, that Bowen's guilty plea was likewise involuntary since Bowen was incorrectly advised of the minimum possible sentence.

procedural bars which would otherwise prevent their consideration." *Ivy v. State*, 731 So. 2d 601, 603 (Miss. 1999) (emphasis added). In this case, Bowen is attacking an illegal sentence. Further, Bowen had no meaningful opportunity to raise the issue prior to his petition for post-conviction relief because of the incorrect sentencing information he received from his trial counsel and the Trial Court. Thus, any bar from section 99-39-21(1) is inapplicable in this case.

Further, in this case, under the language of section 99-39-21 itself, as well as *Ivy* and its progeny, Bowen has not waived his right to challenge this illegal sentence. Bowen has undisputedly made a showing of "cause and actual prejudice" suffered because of the illegal sentence. Section 99-39-21 defines these terms as:

> The term "cause" as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.
>
> The term "actual prejudice" as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence.

MISS. CODE ANN. § 99-39-21(4)-(5).

Here, as discussed above, Bowen could not have discovered the defect in the sentence at the sentencing hearing, as he was misadvised as to the minimum and maximum sentences he faced. Further, it is undeniable that Bowen has suffered actual prejudice, as he was sentenced to a term of incarceration far longer than that allowed by the language of the subject statute. Accordingly, under the language of section 99-39-21, Bowen has likewise not waived his right to attack the illegality of his sentence.

Accordingly, Bowen is not barred from raising the issue of the illegality of his sentence. The State's argument in this regard is meritless.

REPLY ARGUMENT II.

THE MAXIMUM SENTENCE FOR BOWEN'S CRIME WAS SIX MONTHS IN JAIL AND A $1,000 FINE.

The State simply concludes that a ten year sentence is authorized by the language of the statute, regardless of the amount involved in the crime, relying solely on *Tate v. State*, 961 So. 2d 763, 766 (Miss. Ct. App. 2007). Bowen concedes that the *Tate* decision stated that a Trial Court has discretion to sentence an offender as either a felon or misdemeanant where the amount involved is less than $500.[2] However, Bowen respectfully contends that the *Tate* decision was wrongly decided and should be over-ruled in this respect.

The State makes no response to Bowen's arguments regarding the text of section 97-21-33. The State does not respond to the fact that the statute provides that where the amount involved is less than $500 the defendant may be sentenced to "not more than" six months in jail "in lieu of" the felony sentence.

To adopt the State's interpretation that the statute allows Bowen's ten year sentence requires reading the phrases "not more than" and "in lieu of" completely out of the statute. The plain language of the statute says that offenders such as Bowen should be punished by not more than six months in jail. The legislative intent in this regard is obvious. The Legislature intended to punish persons whose crimes involved paltry sums much less severely than crimes involving significant amounts. The legislature recognized, reasonably, that a person who forges an instrument for $5 should not be subject to the same term of incarceration as one who forges a $5 million instrument.

[2] As discussed in Argument III, and in Bowen's principal Brief, even if the State were correct in this regard, it concedes that the Court had discretion to sentence Bowen under the misdemeanor portion. Thus, Bowen was necessarily incorrectly informed of the minimum sentence he faced.

Such is the case in Bowen's instance. Bowen passed a forged instrument in the amount of $250. The statute provides that he was subject to "not more than" six months in jail in lieu of the other punishment provided by the statute. Accordingly, Bowen's sentence to ten years incarceration is invalid under the language of the statute.

Thus, the Trial Court erred in denying Bowen's Petition for Post Conviction Relief. This Court should reverse and render the Trial Court's decision on this basis.

REPLY ARGUMENT III

BOWEN'S PLEA WAS NOT KNOWING AND VOLUNTARY AND THE HARMLESS ERROR DOCTRINE IS INAPPLICABLE.

The State's own Brief ostensibly concedes that Bowen's plea was not entered knowingly and voluntarily. That is, the State concedes that in order to be voluntary the Defendant must be advised of the minimum and maximum penalties he faces. *White v. State*, 921 So. 2d 402, 405 (Miss. Ct. App. 2006). The State likewise concedes, as it must, that Bowen was advised that the minimum sentence he faced was two years incarceration. (Brf. of Appellee at 5; R. Exhibit A, hearing of May 14, 2007). Finally, the State further concedes that under the *Tate* decision, the Trial Court had discretion to sentence Bowen to a term of zero to six months in jail. (Brf. of Appellee at 4). Accordingly, by its own terms, the State's Brief admits that Bowen was incorrectly advised of the minimum sentence he faced by both his trial counsel and the Trial Court. Since the Trial Court *could have* sentenced Bowen to zero to six months in jail, the minimum sentence was not two years in prison, as Bowen was repeatedly told. Such incorrect advice regarding the possible sentencing range renders Bowen's guilty plea involuntary under well-established Mississippi law. *See, e.g., Vittitoe v. State*, 556 So. 2d 1062, 1064 (Miss. 1990).

The State's only argument in this regard is that the error was harmless. However, this argument is wholly meritless. The "harmless error" doctrine applies to instances where an

accused is not informed of the maximum and minimum sentences prior to a guilty plea. *Ward v. State*, 708 So. 2d 11, 16 n.7 (Miss. 1998). However, the doctrine is not equally applicable where the defendant is actively misinformed of the sentencing range. *Bronson v. State*, 786 So. 2d 1083, 1087 (Miss. Ct. App. 2001).

The State cites *Burnett v. State*, 831 So. 2d 1216, 1219 (Miss. Ct. App. 2002) and *Sykes v. State*, 624 So. 2d 500, 503 (Miss. 1993) for the proposition that a harmless error analysis applies to Bowen's plea. However, both *Burnett* and *Sykes* are completely distinguishable. In both *Burnett* and *Sykes*, the defendant was not informed of pertinent facts regarding the Trial Court's sentencing options. In neither case was the defendant actively misinformed of the sentencing range.

This case is much more analogous to *Bronson*. In *Bronson*, this Court reasoned as follows in finding a defendant's guilty plea involuntary:

> In the present case, Bronson also apparently intended to plead guilty from the start. However, his case differs from Smith in that Bronson was literally misinformed and misled, not just deprived of the pertinent information. This was a serious misunderstanding that affected Bronson's decision to plead guilty, rendering the plea not knowingly entered.

Bronson v. State, 786 So. 2d 1083, 1087 (Miss. Ct. App. 2001).

Just as the Defendant in *Bronson*, there can be no dispute that Bowen was "literally misinformed and misled, not just deprived of the pertinent information" regarding the minimum sentence he faced. Bowen was repeatedly told that the minimum sentence he faced was two years in prison. By the State's own admission this information was incorrect; the minimum sentence Bowen faced was zero to six months in jail.

It is incredible for the State to argue that being so egregiously misinformed of the minimum sentence would not have affected Bowen's decision to plead guilty. Obviously, had

Bowen been advised of the correct much less severe minimum sentence, he would have been less likely to plead guilty to a ten year prison sentence. It is beyond dispute that a criminal defendant is more induced to plead guilty to a crime when the recommended sentence is nearer to what he believes to be the minimum sentence. Conversely, a criminal defendant would be less inclined to plead guilty when the recommended sentence is further from the minimum sentence. Bowen was unable to properly consider this analysis since both the Trial Court and his trial counsel actively misinformed him of the minimum sentence he faced.

Just as the Court held in *Bronson*, the error is far from harmless when a criminal defendant is actively misinformed of the sentencing range he faces prior to a guilty plea, and when the guilty plea is tendered in ignorance of the true sentencing range. Obviously, it is manifestly unfair to repeatedly misinform a defendant of the sentencing range under the law where the Defendant relies on this information in deciding whether to plead guilty.

Bowen being misinformed of the correct sentencing range was not harmless error in this case. Accordingly, Bowen's Petition for Post-Conviction Relief should have been granted. The Trial Court's decision in this regard should be reversed.

CONCLUSION

Bowen's guilty plea was invalid, since he was sentenced in excess of the maximum permitted under the plain language of the statute, and alternatively, Bowen's plea was involuntarily since he was, in any event, incorrectly advised of the sentencing range prior to the plea.

Accordingly, the Trial Court erred in denying Bowen's Petition for Post-Conviction Relief and the decision should be reversed by this Court.

RESPECTFULLY SUBMITTED, this the 14th day of July, 2008.

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CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Reply Brief of Appellant** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

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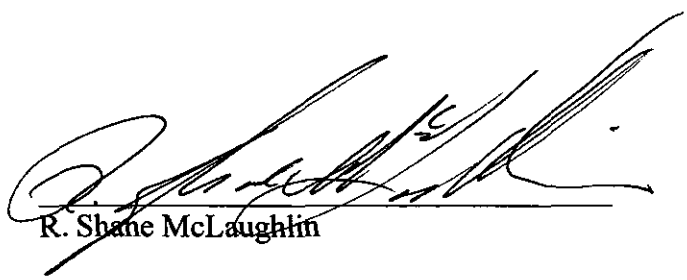
This the 14th day of July, 2008.



R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Reply Brief of Appellant** by mailing the original of said document and three (3) copies thereof via United States Mail, to the following:

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This, the 14th day of July, 2008.

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