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. William Brent Bowen, Appellant
2. Forest Algood, District Attorney
3. Jim Hood, Attorney General
4. R. Shane McLaughlin and Nicole H. McLaughlin attorneys for Appellant

R. Shane McLaughlin
Attorney of record for Appellant

2007-CA-01792
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This case involves Appellant'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.

STATEMENT OF THE ISSUES

1. Whether Bowen's ten year sentence for uttering a forgery is invalid, since the amount involved in the crime was only $250 and the statute provides for misdemeanor penalties when the value involved is less than $500.
2. Whether Bowen's guilty plea was involuntary since Bowen was incorrectly advised of the minimum sentence which the Trial Court could have imposed.

STATEMENT OF THE CASE

Appellant William Brent Bowen ("Bowen") filed a Petition for Post-Conviction Relief on February 1, 2007. (R. p. 6). The Trial Court heard argument on the issues raised in the Petition on May 14, 2007. (T. p. 1).

The Trial Court entered an Order denying the Petition for Post-Conviction Relief on September 5, 2007. (R. p. 33-34). Bowen timely appealed the Trial Court's decision. (R. p. 35).

STATEMENT OF FACTS

Appellant William Brent Bowen was indicted on a single count of uttering a forgery, in violation of Miss. Code Ann. § 97-21-59, on August 11, 2006. (R. p. 18). The indictment alleged that Bowen presented a forged check to Kerry Perrigin on June 9, 2006, in the amount of $250. (R. p. 18-19). The subject instrument depicts that it is made out in the amount of $250. (R. p. 19).

Bowen was appointed counsel to defend against the charge. (*See* R. p. 6, 13). Bowen, through his counsel, filed a Petition to Enter a Guilty Plea on November 20, 2006. (Exhibit A, hearing of May 14, 2007). The Petition to Enter a Guilty Plea, signed by both Bowen and his counsel, provided as follows:

> 8. I know that if I plead "GUILTY" to this charge, the possible sentence is:
>
> the minimum sentence is: 2 years no fine
> the maximum sentence is: 10 years $10,000 fine.

(*Id.*). The Petition to Enter a Guilty Plea provided that the State would recommend Bowen be sentenced to ten years incarceration with five years suspended and five years probation. (*Id.*).

The Court held a plea-colloquy with Bowen on November 20, 2006. (Exhibit B, hearing of May 14, 2007). During the plea-colloquy the following interchange took place between the Court and Bowen:

> Q (BY THE COURT): If you did go to trial on this case and if the State was able to convince all 12 jurors of your guilt beyond a reasonable doubt, the jury could find you guilty. ***And for this crime, I could give you anywhere from two years in prison up to ten years in prison and I could fine you up to $10,000. Do you understand that?***
>
> A: Yes, sir.

(*Id.* p. 5) (emphasis added). Similarly, later in the plea-colloquy, the Court reiterated:

Q (BY THE COURT): ***As I've said, for this crime, I could give you anywhere from two to ten years in prison and up to a $10,000 fine.*** You understand that?

A: Yes, sir.

Q: After I've advised you of all of your constitutional rights and the minimum and maximum sentences and fines and the elements of the offense, how do you plead to the charge of uttering forgery?

A: Guilty, Your Honor.

(*Id.* p. 7) (emphasis added).

The Court accepted Bowen's guilty plea following the plea-colloquy by Order entered on November 20, 2006. (R. p. 17). The Court sentenced Bowen to a term of ten years in the custody of the Mississippi Department of Corrections. (R. p. 15). The Court suspended the ten year sentence based on Bowen complying with certain conditions. (*Id.*).

The State of Mississippi subsequently petitioned the Court to revoke the suspension of Bowen's sentence. (*See* R. p. 4). The Court found that Bowen had violated the terms of the suspended sentence, and rescinded the suspension of the sentence by Order on February 6, 2007. (R. p. 5). Bowen was ordered to serve the entirety of the ten year sentence. (R. 4-5).

Bowen filed his Petition for Post-Conviction Relief on February 1, 2007, shortly before his suspended sentence was revoked. (R. p. 6-12). As discussed fully below, Bowen claimed that his sentence was invalid under Miss. Code Ann. § 97-21-33, as he should have been sentenced under the misdemeanor portion of the statute since his crime involved less than $500. (R. p. 7). Bowen also sought to withdraw his guilty plea by claiming, in the alternative, that it was not knowingly, intelligently and voluntarily entered since he was incorrectly advised of the minimum sentence he faced. (*Id.*). The Trial Court found that Bowen was correctly advised of the minimum and maximum sentences, and that Bowen was properly sentenced to a term of ten years. (R. p. 33). Bowen appeals from this decision.

STANDARD OF REVIEW

The standard of review applicable to questions of law decided on a petition for post-conviction relief is *de novo*. *Callins v. State*, 975 So. 2d 219 (Miss. 2008); *Lambert v. State*, 941 So. 2d 804, 807 (Miss. 2006).

This appeal presents pure issues of law. Accordingly, the Court reviews the Trial Court's decisions *de novo*.

SUMMARY OF THE ARGUMENTS

Bowen's sentence to ten years incarceration for passing a fraudulent check in the amount of $250 is invalid under Miss. Code Ann. § 97-21-33. Section 97-21-33 prescribes a misdemeanor penalty of not more than six months in jail for crimes involving less than $500. Further, even if section 97-21-33 allowed Bowen to be sentenced to either a felony or a misdemeanor, the Supreme Court's holding in *Johnson v. State*, 260 So. 2d 436, 441 (Miss. 1972), requires that Bowen be sentenced to the lesser of the two penalties. Accordingly, in any event, Bowen's sentence to ten years imprisonment for a $250 check is invalid under the statute. This Court should reverse the Trial Court's decision denying post-conviction relief and vacate Bowen's sentence.

Alternatively, even if Bowen could be permissibly sentenced under the felony provision of the statute, his guilty plea was nevertheless invalid since he was incorrectly advised of the minimum possible sentence prior to his plea. Bowen was advised by his trial counsel and the Trial Court that the minimum possible sentence was two years in prison. However, if the Trial Court had discretion to sentence Bowen under either the misdemeanor or felony provision, as this Court has previously held, then Bowen could have been sentenced to zero to six months in jail. Bowen being misadvised of the minimum possible sentence renders his guilty plea

involuntary under Mississippi law. Accordingly, on this alternative basis, this Court should reverse the Trial Court's decision.

ARGUMENT I.

BOWEN'S SENTENCE TO A TERM OF TEN YEARS IS INVALID SINCE THE VALUE INVOLVED IN THE CRIME WAS LESS THAN $500.

Bowen plead guilty to uttering a forgery under Miss. Code Ann. § 97-21-59. Section 97-21-59 provides that a person convicted of uttering a forgery "shall suffer the punishment herein provided for forgery." MISS. CODE ANN. § 97-21-59. Miss. Code Ann. § 97-21-33 provides the punishment for forgery. The statute provides as follows:

> Persons convicted of forgery shall be punished by imprisonment in the Penitentiary for a term of not less than two (2) years nor more than ten (10) years, or by a fine of not more than Ten Thousand Dollars ($10,000.00), or both; provided, ***however, that when the amount of value involved is less than Five Hundred Dollars ($500.00) in lieu of the punishment above provided for, the person convicted may be punished by imprisonment in the county jail for a term of not more than six (6) months, or by a fine of not more than One Thousand Dollars ($1,000.00), or both, within the discretion of the court.***

MISS. CODE ANN. § 97-21-33. (emphasis added).[1]

The Mississippi Supreme Court has held that "[i]t is bedrock law in Mississippi that criminal statutes are to be strictly construed against the State and liberally in favor of the accused." *Coleman v. State*, 947 So. 2d 878, 881 (Miss. 2006) citing *McLamb v. State,* 456 So.2d 743, 745 (Miss. 1984)). Thus, any ambiguities concerning a criminal statute must be resolved in favor of lenity. *See, e.g., Anderson v. State*, 288 So. 2d 852, 855 (Miss. 1974). *See also Busic v. U.S.*, 446 U.S. 398, 406, 100 S. Ct. 1747, 1753, 64 L. Ed. 2d 381 (1980).

[1] Miss. Code Ann. § 97-21-33 was amended effective on July 1, 2003. The amendment reduced the maximum sentence to ten (10) years and increased the monetary value in the section from $100 to $500. The Amendment to section 97-21-33 was effective well prior to the offense charged in this case (June 9, 2006) and prior to sentencing. Accordingly, the amended version of the statute applies to Bowen's sentence.

First, under the plain language of the statute, the maximum penalty for uttering a forgery in an amount of less than $500 is six months imprisonment and a $1,000 fine. The statute provides that

> however, that when the amount of value involved is less than Five Hundred Dollars ($500.00) in lieu of the punishment above provided for, the person convicted may be punished by imprisonment in the county jail for a term of not more than six (6) months, or by a fine of not more than One Thousand Dollars ($1,000.00), or both, within the discretion of the court.

According to Black's Law Dictionary, the phrase "in lieu of" means "[i]nstead of or in place of." BLACK'S LAW DICTIONARY, 791 (17th Ed. 1999). Thus, the statute provides that instead of being sentenced under the felony portion, when the amount is less than $500, the defendant may be sentenced to "not more than" six months in jail, a $1,000 fine or both.

The final phrase, "within the discretion of the court" clearly refers to whether the court imposes the jail sentence, the fine or both the jail sentence and the fine. This construction is compelled by the words "not more than six (6) months" in the statute. To find otherwise, that the court merely has discretion under which portion of the statute to sentence in cases involving less than $500, would read these words out of the statute. Of course, "[a]ll words and phrases contained in the statutes are used according to their common and ordinary acceptation and meaning." MISS. CODE ANN. § 1-3-65. The phrase "not more than" means just what it says – that a person convicted of uttering a forgery in an amount less than $500 can be punished by "not more than" six months in jail. Thus, Bowen's ten year sentence is invalid on the face of the statute.

As the State will argue, the statute uses the permissive "may" instead of the mandatory "shall" as to which provision applies to crimes involving less than $500. However, this usage of the word "may," when read in conjunction with the entire statute, refers to whether the trial court

imposes any punishment at all, since the statute sets no minimum jail sentence or fine for cases involving less than $500. Again, such a reading of the term is compelled when the statute is read as a whole.

Mississippi Appellate Courts have previously held the trial court has discretion as to which provision of the statute to sentence a defendant under. *See Burt v. State*, 493 So. 2d 1325, 1330 (Miss. 1986) (affirming sentence of then-maximum fifteen years to habitual offender for $35 check); *Tate v. State*, 961 So. 2d 763, 766 (Miss. Ct. App. 2007) (affirming maximum sentence of 10 years for $349.08 check). However, even if the "may" language does bestow such discretion on the trial court, such discretion is in conflict with the phrase "not more than." Accordingly, at a minimum, the statute becomes susceptible to two meanings and is therefore ambiguous. As repeatedly explained by Mississippi Courts, the ambiguous statute must then be construed in favor of the accused. Thus, even employing such reasoning, the statute should nevertheless be construed to make the six month jail sentence the maximum period of incarceration in cases involving less than $500.

Next, even if the statute did authorize a trial court to sentence the accused under either the felony or misdemeanor provision, and disregarding any ambiguity, the trial court would nevertheless be compelled to sentence the offender to the lesser penalty under established Mississippi law. *See Johnson v. State*, 260 So. 2d 436, 441 (Miss. 1972). In *Johnson*, the defendant was convicted of possession of LSD. *Johnson*, 260 So. 2d at 437. One section of the applicable statute made the crime a felony subject to four years imprisonment, while another section made defendant's possession a misdemeanor. *Id.* at 438-39. The *Johnson* Court held that since defendant's conduct could be punished by either section of the statute, the lesser punishment must be imposed. *Id.*

The Court in *Johnson* followed the analysis of *Grillis v. State*, 17 So. 2d 525, 527 (1944), which reasoned:

> The case, then, is one for the application of the rule that when the facts which constitute a criminal offense may fall under either of two statutes, or when there is substantial doubt as to which of the two is to be applied, the case will be referred to the statute which imposes the lesser punishment. See cases cited 24 C.J.S. Criminal Law § 1979, p. 1193, under Note 75. And under the attempt statute Section 793, Code 1930, Section 2017, Code 1942, no greater punishment may be administered than that prescribed for the actual commission of the offense attempted

See also Worthy v. State, 308 So. 2d 921, 923 (Miss. 1975) (setting aside sentence and remanding for resentencing based on *Johnson*); *Cf. Royalty v. McAdory*, 278 So. 2d 464, 468 (Miss. 1973) (extending reasoning of *Johnson* to construe re-sentencing in favor of defendant).

Based on *Grillis*, the Court in *Johnson* held that since the defendant could have been sentenced as either a felon or misdemeanant, the lesser sentence had to be imposed. *Johnson*, 260 So. 2d at 438-39. Accordingly, the Court in *Johnson* reversed defendant's conviction and remanded for appropriate re-sentencing as a misdemeanor. *Id.* at 439.

If this Court concludes that section 97-21-33 allows a person convicted of uttering a forgery in an amount of less than $500 to be sentenced under either the felony or misdemeanor provisions, then this case would present the same issue as addressed in *Johnson*. As explained in *Johnson*, and in *Grillis* before, the lesser of the two possible sentences must be imposed in such an instance.

Accordingly, even if the statute authorized Bowen to be sentenced under the felony provision, the Trial Court should have nevertheless sentenced him under the misdemeanor penalty. The Trial Court should have granted the Petition for Post-Conviction Relief and re-

sentenced Bowen under the misdemeanor provision. This Court should reverse the Trial Court's decision, and render a decision vacating Bowen's sentence.[2]

ARGUMENT II.

BOWEN'S GUILTY PLEA WAS NOT KNOWING AND VOLUNTARY SINCE HE WAS INCORRECTLY ADVISED OF THE MINIMUM SENTENCE PRIOR TO HIS PLEA.

Alternatively, even if Bowen could have been properly sentenced under the felony provision of section 97-21-33, his guilty plea should nevertheless be set aside since he was incorrectly advised of the minimum sentence he faced.

As mentioned above, this Court has construed section 97-21-33 to mean that a trial court has discretion in whether to sentence a person convicted of uttering a forgery under the felony portion (two years to ten years) or under the misdemeanor provision (zero to six months). *Tate,* 961 So. 2d at 766. In *Tate*, a defendant appealed a ten year sentence for uttering a forged check in the amount of $349.08. *Tate*, 961 So. 2d at 764. The Court quoted section 97-21-33 and held that "[t]he statute clearly states that the imposition of the sentence is left to the discretion of the trial court." *Id.* at 767.

Pursuant to the Court's reasoning in *Tate*, the Trial Court in this case had the discretion to impose either a felony or misdemeanor sentence. Thus, the Trial Court could have sentenced Bowen to a term of six (6) months or less in jail, since the amount of the forged instrument was only $250.

Since the Trial Court at least had discretion to sentence Bowen to a term of "not more than six months" the minimum sentence Bowen faced was zero days in jail, and the maximum he

[2] It would be unnecessary to remand to the Trial Court for re-sentencing since Bowen has already served more than six months incarceration. Accordingly, Bowen should be discharged. *See, e.g., Royalty v. McAdory*, 278 So. 2d 464, 469 (Miss. 1973) (ordering defendant discharged where he had already served maximum sentence).

faced was ten years in prison. Thus, if the *Tate* decision is correct, there can be no doubt that the Trial Court could have sentenced Bowen to six (6) months or less in jail.

Accordingly, Bowen was necessarily incorrectly advised of the minimum sentence he faced prior to pleading guilty to the crime of uttering a forgery. The Record reflects three separate occasions on which Bowen was incorrectly advised that the minimum sentence he faced was two (2) years imprisonment. Bowen was first advised this by his Court-appointed trial counsel, as evidenced by the Petition to Enter a Guilty Plea. (Exhibit A, hearing of May 14, 2007). Bowen was advised twice by the Trial Court judge during the plea-colloquy that the minimum sentence was two years imprisonment. (Exhibit B, hearing of May 14, 2007, pp. 5, 7). Bowen was never correctly advised that the minimum sentence for his crime, since it involved less than $500, could include no period of imprisonment or only six months in jail.

The Mississippi Supreme Court has held that "guilty pleas made with ignorance of a minimum or mandatory minimum sentence are unenforceable." *Vittitoe v. State*, 556 So. 2d 1062, 1064 (Miss. 1990). Thus, the Court in *Vittitoe* held that where an accused is not advised of the minimum and maximum penalties an offense carries a guilty plea is "involuntary as a matter of law." *Vittitoe*, 556 So. 2d at 1065.

The Court has employed a "harmless error" test for cases where a trial court fails to inform the accused of maximum and minimum sentences. *Ward v. State*, 708 So. 2d 11, 16 n.7 (Miss. 1998). In such cases, the Court has held that the error is harmless when the accused is apprised of the correct maximum and minimum sentences from another source. *See Bronson v. State*, 786 So. 2d 1083, 1085 (Miss. Ct. App. 2001). Further, the Court has ruled that only where it can be said "beyond a reasonable doubt that the failure to advise an accused of a minimum

played no role in the decision of the accused to plead, such failure is not fatal to the sentence." *Sykes v. State*, 624 So. 2d 500, 502 (Miss. 1993).

The Court has noted a distinction in cases where the accused is not simply ***uninformed*** as to the minimum possible sentence, but rather is ***misinformed***. *Bronson v. State*, 786 So. 2d 1083, 1087 (Miss. Ct. App. 2001) (noting difference where accused "was literally misinformed and misled, not just deprived of the pertinent information"). In *Bronson*, the accused pled guilty to armed robbery. *Bronson*, 786 So. 2d at 1084. The Petition to Enter Guilty Plea contained an incorrect minimum sentence of zero years, when the minimum for the offense was actually three years. *Id.* at 1085. The Court found that, while the trial judge's failure to inform the accused of the minimum sentence, standing alone, might have been insufficient to invalidate the sentence, the misinformation supplied to the accused warranted setting aside the guilty plea. *Id.* at 1088.

As discussed above, pursuant to *Tate*, Bowen was misinformed as to the minimum sentence he faced. Because Bowen was misinformed that the minimum sentence was two years, rather than zero years, his sentence was not knowing, intelligent and voluntary. Accordingly, Bowen's guilty plea should have been set-aside by the Trial Court.

The State did not contend before the Trial Court, and cannot seriously contend now, that the misinformation provided to Bowen amounts to "harmless error." First of all, as noted by the Court in *Bronson*, an accused being actively misinformed, rather than merely uninformed, does not amount to harmless error. Just as in *Bronson*, Bowen was repeatedly misinformed of the minimum sentence he faced and there is no evidence in the Record that Bowen was ever correctly apprised of the minimum sentence from any other source. Accordingly, just as the Court found in *Bronson*, Bowen's sentence was not knowing and voluntary, and should be set-aside.

Next, notwithstanding *Bronson*, Bowen being misinformed that he faced a minimum sentence of two years cannot be said to have been "harmless error" in any event. Any criminal defendant would rely on instruction from his counsel and the Trial Court as to the minimum possible sentence in deciding whether to plead guilty to a crime. Obviously, 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. Likewise, a defendant would be less induced to plead guilty where the recommendation is further from the minimum sentence. In this case, because of the incorrect information provided to Bowen, he was not able to appreciate the disparity between the State's recommendation (ten years) and the minimum sentence (zero to six months in jail). Bowen was clearly under a serious misapprehension because he was misinformed of the minimum possible sentence.

Bowen was obviously prejudiced by the misinformation he received regarding the minimum possible sentence. Employing the reasoning of *Sykes*, it cannot be said "beyond a reasonable doubt" that the misinformation provided to Bowen played no role in his decision to plead guilty. To the contrary, information concerning the minimum possible sentence would be considered by any defendant in making a decision to plead guilty to a crime.

Accordingly, since Bowen was incorrectly informed of the minimum sentence he faced, his guilty plea was not voluntary, knowing or intelligent. The error was far from harmless in this case. Thus, Bowen's guilty plea should be set-aside and his plea of not-guilty reinstated. This Court should reverse the Trial Court's decision in this regard.

CONCLUSION

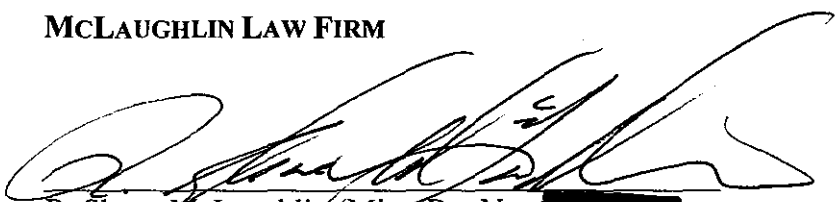
Bowen could not be permissibly sentenced to ten years imprisonment for a $250 check under section 97-21-33. The statute makes six months in jail the maximum penalty for crimes

involving less than $500. Further, even if the statute were not so construed, Bowen should have been sentenced to the misdemeanor penalties in accord with the Supreme Court's holding in *Johnson*. If the Court finds this issue dispositive, the Court should reverse the Trial Court's decision, and should render a decision vacating Bowen's sentence.

Alternatively, even if Bowen could be permissibly sentenced as a felon under the statute, his guilty plea was involuntary since he was incorrectly advised that the minimum possible sentence was two years imprisonment. Under any circumstances, the minimum penalty was clearly zero to six months in jail, while the maximum penalty may have been ten years imprisonment. Since Bowen was incorrectly advised of the minimum penalty, his guilty plea was involuntary. Should the Court reach this issue, the Court should reverse the Trial Court's decision, and remand to the trial Court to allow Bowen to withdraw his guilty plea.

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

MCLAUGHLIN LAW FIRM

By: 

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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 **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:

Jim Hood
Attorney General
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Hon. James T. Kitchens
Circuit Judge
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Columbus, MS 39703-1387

This the 14th day of April, 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 **Brief of Appellant** by mailing the original of said document and three (3) copies thereof via United States Mail, to the following:

Ms. Betty W. Sephton
Supreme Court Clerk
P.O. Box 249
Jackson, MS 38295-0248

This, the 14th day of April, 2008.

R. Shane McLaughlin