Date: 4-19-07

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FROM: Anthony Berryhill # 78551
S.M.C.I.-II, D-2, Bed 69
P.O. Box 1419
Leakesville, Ms. 39451

RE: Brief for the Appellant
CAUSE NO: 2007-CP-00243

Dear Clerk,

Please find enclosed the original and three (3) copies of Brief for the Appellant, plus Exhibits for filing in your usual manner.

Thank You for Your time and assistance in this matter.

cc. Jim Hood
Attorney General

Sincerely,
Anthony Berryhill # 78551
Anthony Berryhill # 78551

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## DISCUSSION ON PROCEDURAL BARS

"There are certain exceptions carved out to procedural bars where there is a question that a party's fundamental rights have been violated." Sneed v. State, 722 So. 2d 1255, 1257 (P7.)(Miss. 1998). "The right to be free from an **illegal sentence** has been found to be **fundamental**." Id. In Ivy v. State, 731 So. 2d 601, 603 (P13.) (Miss. 1999), the Mississippi Supreme Court reiterated its former ruling that "errors affecting the fundamental constitutional rights, such as the right to a legal sentence, may be excepted from procedural bars which would otherwise prevent their consideration." Ivy, 731 So. 2d at 603 (P13)(citing Luckett v. State, 582 So. 2d 428, 430 (Miss. 1991)). See also Smith v. State, 477 So. 2d 2d 191, 195-96 (Miss. 1985). Moreover, regardless of whether Berryhill's guilty plea was knowingly entered, he is nevertheless entitled to relief as no court may adjudge and sentence a defendant beyond its statutory authority to do so. See Luckett v. State, 582 So. 2d 428 (Miss. 1991)(stating that a sentence beyond the statutory preseription is a fundamental violation of due process); Lanier v. State, 635 So. 2d 813, 816 (Miss. 1994)(noting that a sentence beyond the statutory prescription is unenforceable as it violates public policy; this is so even where the unauthorized sentence arises out of a contract between defendant and State.)(citing Ward v. State, 708 So. 2d 11; 1998 Miss. LEXIS 4.) "Despite the untimely assertion of this issue, we find that a purported judgment of conviction for a felony not charged in the indictment affects fundamental rights of the defendant that may not be waived or subjected to a procedural bar. Sneed v. State, 722 So. 2d 1255, 1257 (P11)(Miss. 1998)(citing Davidson v. State, 850 So. 2d 158, 160; 2003 Miss. App. LEXIS 493, 6, 7 (P8.-P9.). "By statute and under long-established precedent, the movant in a post-conviction relief motion must make some reasonable demonstration of the actual existence of evidence that, if shown satisfactorily at a hearing, would indicate an entitlement to relief. Miss. Code Ann. §99-39-5 (1)(e)(Rev. 2000); McClendon v. State, 539 So. 2d 1375, 1377 (Miss. 1989); Walker v. State, 791 So. 2d 885, 887 (P2)(Miss. Ct. App. 2001).

citing Davidson v. State, 850 So. 2d 158, 159-60; 2003 Miss. App. LEXIS 493, 3-4 (P5). "Outside the constitutional realm, the law is settled that with only two exceptions, the entry of a knowing and voluntary guilty plea waives all other defects or insufficiencies in the indictment." Jefferson v. State, 556 So. 2d 1016, 1019 (Miss. 1989). A plea of guilty does not waive (1) the failure of the indictment to charge a criminal offense or, more specifically, to charge an essential element of a criminal offense, and a plea of guilty does not waive (2) subject matter jurisdiction. Id. Conerly v. State, 607 So. 2d 1153, 1156 (Miss. 1992). "Fuselier falls under the first exception, "failure of the indictment to charge a criminal offense." "Fuselier was never indicted for burglary. When it was suggested that Fuselier could be found convicted of two crimes when he was only indicted for one, both the district attorney and defense counsel were appropriately skeptical", "The trial court erred in allowing Fuselier to plead guilty to two separate crimes when he was only charged with one." Fuselier v. State, 654 So. 2d 519, 522; 1995 Miss. LEXIS 222, 8-9. Berryhill was never indicted for simple murder and furthermore the indictment erroneously **alleges separate incidents** in the habitual offender portion, while the indictment attached hereto of the prior charges shows one incident. The sentence as a habitual offender is illegal and unenforceable, "In Ivy, the court recognized that the lower court wrongfully dismissed Ivy's petition for post-conviction relief because the lower court **overlooked** the fact that, due to allegations of an **illegal sentence**, the petition **was not** subject to the time-bar. Ivy, 731 So. 2d at 604 (P14). Additionally, in Stevenson v. State, 674 So. 2d 501, 505 (Miss. 1996), the Mississippi Supreme Court held that "even though an imposed sentence is otherwise barred, an **un**enforceable sentence is nevertheless plain error and capable of being addressed. See Grubb v. State, 584 So. 2d 786, 789 (Miss. 1991); Luckett, 582 So. 2d at 430; Smith, 477 So. 2d at 195-96.

"[A] factual basis is an 'essential part of the constitutionally valid and enforceable decision to plead guilty.' This factual basis cannot simply be implied from the fact that the defendant entered a plea of guilty." Austin v. State, 734 So.2d 234, 236; 1999 Miss. App. LEXIS 20, 4 (P7). No factual basis was ever established in Berryhill and furthermore, the precise elements of murder applicable to Berryhill's actions, as stated in several statutes, i.e. Miss. Code Ann. §§ 97-3-19, 97-3-17, 97-3-15, were not discussed. Further, nothing contained within the record, including the order which reduced the charge to **'simple murder'** and the order which accepted Berryhill's guilty plea, listed the elements of **'simple murder'** or the applicable statute. And, none of the murder statutes to include Miss. Code Ann. § 97-3-19, § 97-3-17 or § 97-3-15 provides the wording, language or term 'simple murder'. "The failure to charge a crime cognized under Mississippi law is plain error." Mitchell v. State, 788 So.2d 853 (P9) (Miss. Ct. App. 2001), (citing White v. State, 851 So.2d 400, 406; 2003 Miss. App. LEXIS 671, 14-15 (P15). "As the trial court noted below in its bench opinion, only a grand jury can advise a defendant of what he is to be charged with." Stirone v. United States, 361 U.S. 212, 218, 4 L. Ed. 2d 252, 80 S. Ct. 270 (1960) ("The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.") 41 Am. Jur. 2d Indictments and Informations § 1 (1995) ("An indictment can be made only by a grand jury, and no court or prosecutor can make, alter, or amend an indictment returned by a grand jury."). Berryhill **was not** indicted for **"simple murder"** by a grand jury, . . . **therefore, Berryhill is being held under an illegal and unconstitutional sentence, which requires a reversal.**

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANTHONY BERRYHILL — PETITIONER/APPELLANT

VS. — CAUSE NO. 2007-CP-00243

STATE OF MISSISSIPPI — RESPONDENT/APPELLEE

## BRIEF FOR THE APPELLANT

COMES NOW, ANTHONY BERRYHILL, Petitioner/Appellant, Pro Se and files this his BRIEF FOR THE APPELLANT and in support thereof would show this Honorable Court the following, to wit;

## I.

## STATEMENT OF THE CASE

ANTHONY BERRYHILL, hereinafter 'Petitioner', 'Appellant' or 'Berryhill' was indicted by the Grand Jury of Prentiss County, Mississippi in Cause No. CR94-352 for the crime of capital murder and burglary of an occupied and inhabited dwelling, in Count I, attempt to kidnap, in Count II and possession of a firearm by a convicted felon, in Count III as a habitual offender. Prior to the plea proceedings of February 14, 1995, they heard Defense Counsel's "Motion to Quash and/or Demur" to the Grand Jury indictment allegedly written March 1, 1994.

The Trial Court granted the Motion to Quash and/or Demur as to burglary of an occupied dwelling in Count I, attempt to kidnap in Count II and possession of a firearm by a convicted felon in Count III then remained a short recess was taken and when Petitioner returned his Counsel requested that he plea guilty to 'simple murder', within approximately ten (10) minutes, thereafter Petitioner entered a plea of guilty and was sentenced as a habitual offender to life without parole. Feeling aggrieved Petitioner appeals his conviction and sentence.

## II.

## SUMMARY ARGUMENT

Petitioner argues that he was not advised by the Trial Court of the essential elements of **simple murder opposed to capital murder** in the **original indictment**, no factual basis was established for the Trial Court to except Petitioner's plea of guilty. The State as well as the Grand Jury indicted wholly fails regarding the habitual offender status. Petitioner was convicted in one (1) proceeding in the Circuit Court of Prentiss County, Mississippi regarding Count I and II of Cause Number 10,039 and Cause Number 11,917 which involved the Burglary of a Vehicle, Grand Larceny and 3rd Degree Arson of the same vehicle on February 19, 1992. Petitioner was given one (1) sentence of fifteen (15) years with eight (8) years suspended and seven (7) years to serve in the custody of the Mississippi Department of

Corrections, thereafter Petitioner was sentenced to five (5) years with three (3) years suspended and two (2) years to serve in Cause Number 8,955 which was run concurrent to the above cause. Petitioner was released on parole after serving twenty-one (21) months on all of the above cause numbers.

Petitioner was not advised of his right to a fast and speedy trial by his Counsel, Petitioner was arrested on **January 21, 1994** and did not **stand** before the Circuit Court of Prentiss County, Mississippi until February 14, 1995.

## III.
## ARGUMENT

1. There was no factual basis for the plea after reducing the charge from **capital murder to simple murder** which requires vacation of the conviction and sentence in the interest of justice and State and Federal Constitional right to a valid and enforceable decision to plead guilty.

Honorable Frank A. Russell, Circuit Court Judge begins the plea proceedings with the following statement; (T. 2/L. 1-10);

> "THE COURT : Mr. Berryhill, you have indicated, through your attorneys, that you desire to enter a plea of guilty to a charge of simple murder as opposed to capital murder in Count I of this indictment. Before accepting your plea the law requires that I question you concerning your understanding of these proceedings, the charge against you and the consequences of your entry of a plea of guilty to this charge."

Honorable Frank A. Russell, Circuit Court Judge continues at (T. 5/L.12-15) to state the offense;

> Q: Let me make sure you understand the charge. The indictment alleges that in Prentiss County, Mississippi, on the 21st day of January, 1994, that you did willfully, unlawfully and feloniously and with deliberate design kill and murder Kathy D. Cummings, a human being.

At no time during the proceedings does the Honorable Frank A. Russell, Circuit Court Judge mention that **simple murder** lacks the use of an underlying felony, nor does the Honorable Frank A. Russell mention that the underlying felony was **quashed** by Defense Counsel's Motion to Quash and/or Demur.

Petitioner finds the same conduct in the Circuit Court of Monroe County, Mississippi, in the same Circuit Court District, by the same Circuit Court Judge, Honorable Frank A. Russell on August 2, 1993 in the case and guilty plea proceedings of William Lavell Austin in Monroe County, Mississippi cause number CR92-068; Austin v. State, 734 So. 2d 234, 235, 236; 1999 Miss. App. LEXIS 20, 3-6, (P4.-P10.)

> P4. On August 2, 1993, a guilty plea and sentencing hearing was held. The following colloquy, in pertinent part, was held between the court and Austin:
>
> Q: William Lavell Austin?
>
> A: Yes, sir.

Q: Mr. Austin, the Court has before it an agreed motion to reduce the charge in cause number CR92-068 in the Circuit Court of Monroe County, Mississippi. You were indicted and charged with murder. The motion moves the Court to reduce the charge from murder to manslaughter. An order will be entered reducing that charge. You have indicated that you desire to plead guilty to that reduced charge of manslaughter. Is that correct?

A: Yes, sir.

Q: Mr. Austin, you were originally charged with murder. That charge has been reduced to manslaughter. The reduction takes away the element of aforethought. The indictment alleges that on the 31st of January, 1991, in Monroe County, Mississippi, you killed Ashley Ford, a human being. The indictment originally alleged that it was with malice aforethought. That element has been removed. So it is now a manslaughter charge that you killed this individual without authority of law, but without malice aforethought. Do you understand that charge?

A: Yes, sir.

Q: Did you do it? Did you commit that offense?

A: Yes, sir.

Q: Do you understand the maximum sentence the court may impose upon you is a term of 20 years on this manslaughter plea, a fine in the amount of ten thousand dollars, court cost and restitution, if any? Do you understand that?

A: Yes, sir.

PS: After asking further questions, the trial court accepted the plea and sentenced Austin to serve a term of twenty years.

P6. Austin contends that the trial court did not have a factual basis upon which to accept his guilty plea.

P7. "[A] factual basis is an 'essential part of the constitutionally valid and enforceable decision to plead guilty.' This factual basis cannot simply be implied from the fact that the defendant entered a plea of guilty. Rather, there must be an evidentiary foundation in the record which is 'sufficiently specific to allow the court to determine that the defendant's conduct was within the ambit of that defined as criminal.' Unless courts are satisfied that such a factual basis exists, they are admonished not to enter judgment on a plea of guilty." Lott v. State, 597 So. 2d 627, 628 (Miss. 1992). (citation ommitted).

P8. Further, "[a] factual showing does not fail merely because it does not flesh out details which might be brought forth at trial." Gaskin v. State, 618 So. 2d 103, 106 (Miss. 1993). "Rules of evidence may be relaxed at plea hearings. Fair inference favorable to guilt may facilitate the finding. In the end... there must but enough that the court may say with confidence the prosecution could prove the accused guilty of the crime charged, that the defendant's conduct was within the ambit of that defined as criminal. That factual basis may be formed by any facts presented before the court or otherwise in the record before the court." Id.

P9. A review of the guilty plea transcripts reveals that the trial court did not inquire of Austin regarding the factual circumstances surrounding his plea of guilty to manslaughter. The trial court inquired whether Austin, in fact, committed the crime, to which Austin responded positively. However, no factual basis was otherwise established upon which the court could place the defendant's conduct "within the ambit of that defined as criminal." Gaskin, 618 So. 2d at 106.

"Only his bare admission of guilt [can] be said to bear on a factual basis for [Austin's] plea." Id.

P10. This Court must review the record as a whole to determine whether a factual basis existed to support the plea. Id. In Gaskin, the record contained affidavits and a signed guilty plea petition which established a factual basis to support that defendant's crime of murder and armed robbery. Unlike Gaskin, nothing contained in the record in the instant case provides similar support for acceptance of Austin's guilty plea.

Certainly the Austin court had much more before it, than the Court in the instant case, Judge Russell admits to "an agreed motion to reduce the charge" in Austin and does question Austin regarding [sic] "Did you do it?" "Did you commit that offense?" A: Yes, sir." But as previously stated, Petitioner argues that none of the above occurred, Petitioner was not advised that the **capital portion** being **quashed** as to the underlying offenses was what lead to him being eligible to plea to '**simple murder**' and it is clearly noted that neither the State, the Trial Court Judge nor defense counsel made any mention during the entire proceeding regarding 'what happen to' or 'where' the remaining counts in the Grand Jury indictment stood. It is obvious however that a reading of **State v. Berryhill, 703 So. 2d 250; 1997 Miss. LEXIS 532** will reveal the Petitioner's argument, otherwise the record is somewhat silent except for few words and/or comments made by the State, and/or the District Attorney, Hon. John M. Young as he expresses his dislike for the ruling of the Honorable Frank A.

Russell, Circuit Court Judge at (T.13/L.12-18);

> MR. YOUNG: "Your Honor, the only thing we have is that feeling aggrieved by the previous ruling of the Court taking out the death penalty. We would advise the Court that we do intend to ask leave of the Court to perfect and file our appeal to the Mississippi Supreme Court to rule on that issue."

This is the first and only indication of the Court's granting of the Motion to Quash and/or Demur which lead to **State v. Berryhill, 703 So. 2d 250; 1997 Miss. LEXIS** which was affirmed. Petitioner was never advised during the entire proceeding that two(2) counts of the indictment remained. And, Petitioner was also never advised that he may be subject to prosecution on the remaining counts of attempted kidnapping and possession of a firearm by a convicted felon.

And, while Judge Russell does inform Petitioner that he is pleading guilty to '**simple murder**' **as opposed to** '**capital murder**' **at (T.2/L. 1-12)**, Judge Russell makes no attempt to establish the precise elements of '**simple murder**' applicable to Petitioner's actions, as stated in several statutes, i.e., Miss. Code Ann. Sections 97-3-21, 97-3-19, 97-3-17, 97-3-15, were not discussed, Judge Russell simply repeated the indictments wording for 'capital murder', leaving off the underlying felony offense of occupied and inhabited dwelling; and making no mention whatsoever of Count II and Count III which he obviously knew remained.

Petitioner in his argument refers back to Austin, 734 So. 2d 234, 237; 1999 Miss. App. LEXIS 20, 7-8 (P.12);

> P12. "A review of the record also reveals that the trial court failed to fully inform Austin of the elements of manslaughter and the minimum sentence to be served. This Court agrees that manslaughter lacks the crucial element of malice aforethought. Taylor v. State, 452 So. 2d 441, 443 (Miss. 1984). Austin was informed of this by the trial court. However, the precise elements of manslaughter applicable to Austin's actions, as stated in several statutes, i.e., Miss. Code Ann. §§ 97-3-17(b), 97-3-27, 97-3-29, 97-7-31, were not discussed. Further, nothing contained within the record, including the order which reduced the charge to manslaughter and the order which accepted Austin's guilty plea, listed the elements of manslaughter or the applicable statute. Id. at 237.

The mistakes committed by the Trial Court Judge in Austin are grave, and the **Honorable Frank A. Russell**, Circuit Court Judge did **commit** the same grave mistakes in the instant case. Interestingly enough, there is a pattern of conduct that must be addressed by the Court of Appeals of the State of Mississippi concerning **Judge Russell** apparently lack of knowing and voluntary guilty plea requires automatic reversal. Petitioner as well as Austin suffered the same during the plea proceedings by the same Circuit Court Judge, Honorable Frank A. Russell. Petitioner can only refer to Mississippi Commission on **Judicial Performance v. Russell, 691 So. 2d 929 (Miss. 1997)** and the words of the Mississippi Supreme Court;

> "In essence, Judge Russell calls upon this Court to define the limits of the circuit judge's authority. We did so in Griffin v. State, 565 So. 2d 545 (Miss. 1990) where we held that '[a] court can only act as specifically authorized by either the Constitution or by Statute.' Id at 547"

Petitioner's guilty plea is constitutionally invalid in no lesser form than that of Austin, the Circuit Court Judge failed, [sic] "[A] factual basis is an 'essential part of the constitutionally valid and enforceable decision to plead guilty". Austin, Id. at 235.

Consequently, Petitioner cannot plea guilty to 'simple murder' which is not found under any cognizable statute or law of this State. As seen in White v. State, 851 So. 2d 400, 406; 2003 Miss. App. LEXIS 671, 14-15 (P. 15);

> P15. I believe the pivotal issue before this Court is whether the indictment against White actually charged a crime cognizable under the laws of this state. While White has not specifically raised this as an issue, this Court, pursuant to M.R.A.P. 28(a)(3), "may at its option notice a plain error not identified or distinctly specified." The failure to charge a crime cognizable under Mississippi law is such a plain error. Mitchell v. State, 788 So. 2d 853 (P9) (Miss. Ct. App. 2001). This issue is one of law and is reviewed de novo by this Court. Hall v. State, 785 So. 2d 302 (P7) (Miss. Ct. App. 2001). Id. at 406.

The term **'simple murder'** is not found in M.C.A. §97-3-15, §97-3-17, §97-3-19 or §97-3-21, therefore it is not a crime. Petitioner's sentence and conviction should be vacated and set-aside consistent with Austin.

2. There was insufficient proof submitted at the plea proceedings by the State and in the grand jury indictment that Berryhill had been previously convicted twice for felonies "upon charges separately brought and arising out of separate incidents at different times."

Petitioner argues that the State's proof of his prior convictions during the plea proceedings was insufficient, the State made no attempt to submit to the Trial Court where it obtained its proof of prior convictions, when the prior convictions came under the scurtiny of Defense Counsel, the following exchange was had at (T.7/L.19-29),(T.8/L.1-29),(T.9/L.1-4); in open court;

THE COURT: The Court determines then that you have met the requirements to qualify for sentencing under the provisions of section 99-19-81 of the Miss. Code of 1972 as amended, finding that you have previously, before today's date and before the alleged date of the crime to which you are offering your plea, been convicted four times and at least two or more of those convictions arose out of separate incidents and that you received sentences in excess of 1 year in the custody of the Mississippi Dept. of Corrections on each. Were any of those sentences suspended before you actually went to serve your time?

MR. WINDSOR: Your Honor, it was a combined plea agreement, as I understand it from the Defendant, among the three counties and a certain number of years in the Alcorn/Prentiss County cases were retired to the file and two years, I believe, of the Marshall County charge was suspended. He actually did -- went to the penitentiary on those charges.

THE COURT: Very Well.

MR. POUNDS: That's not correct, Your Honor. If I may address the Court?

THE COURT: Yes, sir.

MR. POUNDS: Cause Number 10,039, as is set forth in the indictment, the Defendant, Mark Berryhill, was given a seven year sentence in Count I. In Count II, Your Honor, the Defendant, Mark Berryhill, was given a five year sentence, and that sentence was <u>stacked or run consecutive</u>, on top, Your Honor, and <u>suspended</u>. But it was <u>not run concurrent</u>, it was <u>stacked</u> and the Marshall County case, Your Honor, was run concurrent and he got three years there in Cause No. 8,995, and then the Alcorn County case, 11,917, Your Honor, he was ordered to serve a term of three years in the Dept. of Corrections, and it was <u>run consecutive</u> with Count I and <u>consecutive</u> with Count II in Prentiss County, Your Honor. That cause was

stacked on top and suspended. (end quote).

Here, the State's claim is not supported by any evidence before the Court, the State, Assistant District Attorney, Honorable James S. Pounds, doesnot introduce certified copies from the Circuit Clerk's Office regarding the prior convictions in question, nor does the Honorable James S. Pounds attempt to use an M.D.O.C. (pen-pac) to prove his allegations, when said allegations came under scruting of Defense Counsel the Honorable James S. Pounds responds only to the prior convictions (T. 8/L. 17-18) [sic]"as set forth in the indictment."

Petitioner, therefore, is left to invade the province of the Grand Jury indictment and the Court's subject matter juriction to convict the Petitioner pursuant to the habitual offender portion of the indictment. Petitioner argues that on Count I and II of Cause Number 10,039 in Prentiss County, Mississippi and in Cause Number 11,917 in Alcorn County, Mississippi that he plead guilty and received one fifteen (15) year sentence, with eight (8) years suspended and seven (7) years to serve in the custody of the Mississippi Dept. of Corrections. And, in Cause Number 8,995 in Marshall County, Mississippi that he plead guilty to a sentence of five (5) years, with three (3) years suspended and two (2) years to serve run concurrent to the Alcorn/Prentiss County, Mississippi causes. Petitioner served twenty-one (21) months and was released on parole. While the State's allegations are far from the truth and easily determined to be deception solely on the facts; (1) if the Petitioner had been given consecutive sentences he would not have been able to have committed the alleged crime that he is currently challenging, and (2) if all sentences

were suspended, this alone means that Petitioner's Counsel was correct. Consequently, the Court erred sentencing Petitioner as a habitual offender, without requiring proof of the prior convictions.

> "The Mississippi Supreme Court's 'long-standing admonition has warned against the tendency to routinely allow the State not to produce some documentation of prior offenses and for the Trial Court to perfunctorily find the defendant an habitual offender..." Seely v. State, 451 So. 2d 213, 218 (Miss. 1984) see e.g., Vince v. State, 844 So. 2d 510 (Miss. Ct. App. 2003).

Moreover, Judge Russell should have known during his reading of the habitual portion of the grand jury indictment fails on its face to meet the requirements of Rule 11.03 of the Uniform Rules of Circuit and County Court Practice, which provides;

> "In cases involving enhanced punishment for subsequent offenses under state statutes:
>
> 1. The indictment must include both the principle charge and a charge of previous convictions. The indictment must allege with particularity the nature or description of the offense constituting the previous convictions, the state or federal jurisdiction of any previous conviction, and the date of judgment. The indictment shall not be read to the jury.
> 2. Separate trials shall be held on the principle charge and on the charge of previous convictions. In the trial on the principle charge, the previous convictions will not be mentioned by the state or the court except as provided by the Mississippi Rules of Evidence.

3. If the defendant is convicted or enters a plea of guilty on the principal charge, a hearing before the court without a jury will then be conducted on the previous convictions."

(end quote).

Having stated the above rule, Rule 11.03 the Petitioner will now invade the province of Court, State and indictment, In order to impose a sentence under Miss. Code Ann. § 99-19-81, the proof must show the Petitioner had been previously convicted twice for felonies "upon charges separately brought and arising out of separate incidents at different times." the Court never alleges the above, the State never alleges the above and the indictment never alleges the above, the Court and State during the proceedings never claims the prior convictions and/or charges separately brought and arising out of separate incidents at different times, Petitioner was arrested and charged with Prentiss County, Ms. Cause No. 10,039 and Alcorn County, Ms. Cause No. 11,917 which arose out of the same incident at the same time and Petitioner plead guilty to all three (3) counts above as clearly seen in the indictment on February 19, 1992. The indictment fails in the same manner. Evenso, the Court nor State alleges the date in which the previous or prior crimes charged were allegedly committed nor does the indictment, the entire portion of the indictment charging Petitioner as an habitual offender is vague and fails on its face. Riddle v. State, 413 So. 2d 737, 738; 1982 Miss. LEXIS 1941, 2.

"All that is required is that accused be 'properly' indicted as a habitual offender, that the Prosecution prove the prior offenses by competent evidence, and that the defendant be given a reasonable opportunity to challenge the prosecution's proof." Keyes v. State, 549 So. 2d 949 (Miss. 1989).

Petitioner argues that the State, Court and indictment did not properly acquaint him with the nature of the accusations brought against him insofar as the habitual offender portion, the Mississippi Supreme Court stated in Vince v. State, 844 So. 2d 510, 516-517, 2003 Miss. LEXIS 383, 16 (P19. - P20.);

" The Court found the language fatally defective as not supplying the necessary particularity to properly charge prior convictions. Id at 930. Equally as important to the case no before us, the supreme court specifically held that "the defects in the indictment were not waived even though Lay failed to demur to the defective indictment." Id.
(P20.) "Because the defect in the indictment in this case was so fundamental and because of the importance to the criminal process of a properly drawn indictment that fully acquaints the defendant with the nature of the accusations brought against him, we note the matter as plain error and conclude that it requires us to reverse Vince's sentence insofar as he was sentenced as a habitual offender." Ubry v. State, 378 So. 2d 635, 639 (Miss. 1979). see e.g., Lay v. State, 310 So. 2d 908 (Miss. 1975).

Petitioner further argues that his plea of guilty to the principle charge does not preclude his attack on the province of Court, State and indictment in reference to the habitual offender as clearly noted in Willie v. State, 738 So. 2d 217; 1999 Miss. LEXIS 163,

> P9. "Where the State is precluded by the United State Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." Menna v. New York, 423 U.S. 61, 62, 46 L.Ed. 2d 195, 96 S.Ct. 241 (1975); Blackledge v. Perry, 417 U.S. 21, 30, 40 L.Ed 2d 628, 94 S.Ct. 2098 (1974).
>
> P11. in relevant part" See Mallock v. State, 732 So. 2d 168, 168, 1999 Miss. LEXIS 50, 6-7, 1999 WL 33900, at 2-3 (Miss. Jan. 28, 1999)( quoting Menna and Broce, and noting that the State may not accomplish through a guilty plea that which it could not have accomplished through trial). See also Ballenger v. State, 667 So. 2d 1242, 1265 (Miss. 1995)(a "defendant is entitled to the same constitutional guarantees at the sentencing phase as at the guilt phase).
>
> P12. in relevant part; "This Court has held that, "under our practice, if enhanced punishment is sought, the indictment or affidavit must include both the principle charge and a charge of previous convictions and both charges proved before punishment may be enhanced." Bell v. State, 335 So. 2d 1106, 1108 (Miss. 1978); Lay v. State, 310 So. 2d 908, 910 (Miss. 1975).

See Willie, 738 So. 2d 217, 219-220; 1999 Miss. LEXIS 163, 6-7 (P9., P11. and P12.)

"The state has acknowledged that the habitual offender statute, Mississippi Code Annotated section 99-19-81 (Supp. 1981), was inappropriately applied in the present case since there was insufficient proof that the defendant had been "convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times." In the present case, the only previous crimes shown to have been committed by Riddle were crimes which arose out of a single incident. Therefore, this Court must remand the present case for resentencing since the habitual offender statute was inappropriately applied."

Riddle v. State, 413 So. 2d 737, 738; 1982 Miss. LEXIS 1941, 2 Id.

Petitioner has clearly shown that the Court failed during the sentencing phase, and argues that he was [sic] "entitled to the same constitutional guarantees at the sentencing phase as at the guilt phase", Willie Id. at 219, that the State failed during the sentencing phase to [sic] "produce some documentation of prior offenses", Seely, Id. at 213., in fact, the Court and State never produced anything more than the reading of a 'bare bone' parcelly quashed indictment [sic] "not supplying the necessary particularity to properly charge prior convictions". Vince, Id. at 516-17., the Court and State further failed to quote or show during the entire colloquy [sic] "the defendant had been previously convicted twice for felonies "upon charges separately brought and arising out of separate incidents at different times." Nicolaou, Id. at 173; Riddle, Id. at 738. And, the indictment itself had already failed once and now fails twice, the first failure

requiring the underlying felony to be quashed, and the second failure has already been well stated, as[1] the indictment on its face **fails** to show the charges were **[sic] "separately brought"**; the indictment only indicates on Page four (4), number five (5) "Each of the above sentences arose out of separate incidents at different times."

Therefore, Petitioner's conviction and sentence as an habitual offender must be reversed on the grounds of 'plain error as discussed in Vince Id. at 516-17.

Likewise, as provided in DeBussi v. State, 453 So. 2d 1030 (Miss 1984);

> "The Mississippi Constitution of 1890, Article 3, § 22, the Double Jeopardy Clause, precludes the State from having a second chance to establish defendant's habitual offender status under this section, where no evidence had been admitted to support such a conviction apart from evidence erroneously admitted by the court."

The same applies in the instant case.

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[1] The Trial Court Judge knew or should have known that the entire indictment was fatally defective, and acted accordingly [sic] "by either the Constitution or by the statute." Russell Id. It is merely noteworthy, that the indictment that was defective from the very beginning, requiring the underlying felony to be

3. The Trial Court committed compound errors when it allowed Berryhill to plead guilty to **simple murder** for which he had not been indicted and Berryhill was not given accurate or adequate notice by the indictment of the charge of **simple murder** and the State also avoided the Constitutional requirement that a grand jury present Berryhill with criminal charges of **simple murder**, in violation of **Article III, § 27 of the Miss. Const. of 1890.**

Petitioner argues that after the principle charge (capital murder with the underlying offence of burglary of an occupied and inhabiting dwelling) **was quashed** by Defense Counsel's "Motion to Quash and/or Demur", the Petitioner was not **re-indicted** for '**simple murder**' and even the reading of the **quashed indictment** during the plea proceedings, shows failure to charge the **lesser** offense of '**simple murder** as opposed to **capital murder**.'

(T. 2/L. 1-10): THE COURT: Mr. Berryhill, you have indicated, through your attorneys, that you desire to enter a plea of guilty to a charge of '**simple murder**' as opposed to **capital murder** in Count I of this **indictment**. Before accepting your plea the law requires that I question you concerning your understanding of these proceedings, the charges against you and the consequences of your entry of a plea of guilty to this charge."

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① continued:
quashed by motion to quash and/or demur, the habitual offender portion failing, equally as interesting, the principle charge fails to end in the words, "against the peace and dignity of the State of Mississippi. The Mississippi Constitution states that "no person shall, for any indictable offense, be proceeded against criminally by **information...**" **Miss. Const. Art. III, § 27. Gray v. State, 819 So. 2d 542 (2001 Miss. App. LEXIS 497.**

Petitioner argues that from the above (T. 2/L.1-10) he was making a plea to the charge of simple murder, but, it is obvious that there was further error by the trial court when it started to read Count I of the indictment;

(T. 5/L.12-16); Q. "Let me make sure you understand the charge. The indictment alleges that in Prentiss County, Mississippi, on the 21st day of January, 1994, that you did willingfully, unlawfully and feloniously and with deliberate design kill and murder Kathy D. Cummings, a human being."

Here, the Petitioner cites several assignment of error for his argument; (1) The Honorable Frank A. Russell settles what the Petitioner already knows; "there was **no indictment** written for the charge of '**simple murder**'" as Judge Russell refers to [sic] "**simple murder** as **opposed** to **capital murder** in Count I of this indictment." (2) And, clearly from the above Petitioner was not advised of the elements of '**simple murder**' nor does the above inform the Petitioner of the nature of the accusations and charge that he is pleading guilty to, (**simple marder.**)

Petitioner cites for his argument **Gray v. State**, 819 So. 2d 542, 544; 2001 Miss. App. LEXIS 497, 3, 4, (P5., P6. and 7);

P5. A prisoner may file a motion for post-conviction relief if, among other things, a claim is made that "the conviction or the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of Mississippi." Miss. Code Ann. §99-39-5 (1)(a)(Rev. 2000). Most motions for post-conviction

relief filed after an original motion for post-conviction relief has been denied are barred for being **successive**. **Miss. Code Ann. §99-39-23(6)(Rev. 2000)**. However, "**errors** affecting fundamental constitutional rights may be excepted from **procedural bars** which would otherwise **prohibit** their **consideration**..." **Luckett v. State**, **582 So. 2d 428, 430 (Miss. 1991)**.

The constitutional issue here concerns the **indictment**.

P6. The Mississippi Constitution states that "no person shall, for any indictable offense, be proceeded against criminally by information...." MISS. CONST. art. III, § 27. There are several exceptions within this constitutional provision, none of which apply here. Gray argues that the indictment was fraudulent, as no grand jury was meeting at the time that this indictment was handed down. Therefore, Gray argues that his conviction and sentence are illegal as he was prosecuted without having been indicted as required by the Mississippi Constitution. **State v. Berryhill, 703 So. 2d 250, 258 (Miss. 1997)**.

P7. Gray raised his fundamental state constitutional right not to be tried for a felony without being indicted. Therefore, that claim **overcomes** the **successive motion bar**. There is still the question of whether enough was presented to justify something beyond summary dismissal.

Petitioner contends that Judge Russell gives the impression that he is reading from another indictment at (T. 2/L. 1-10) and gives the same impression at (T. 5/L. 12-16). But, this in fact is where Judge Russell fails when he reads and advises the Petitioner of the charge, [sic] "willfully, unlawfully and feloniously and 'with' deliberate design kill and murder."

Petitioner looks to the statute Mississippi Code Annotated Section 97-3-19 (2)(e) as charged in count I of the grand jury indictment;

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
> (e) When done 'with' or 'without' any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or non consensual unnatural intercourse with mankind, or in any attempt to commit such felonies;

Petitioner further looks to another subsection of Miss. Code Ann. Section **97-3-19 (3)**;

> (3) An indictment for murder or capital murder shall serve as notice to the defendant that the indictment may include any and all lesser included offenses thereof, including, but not limited to, manslaughter.

Judge Russell never gives any indication that Petitioner is being charged and is pleading guilty to (**simple murder**), nor does he indicate that the lesser offense would include 'with or without' any design to effect death. See (T. 5/L. 12-16).

Moreover, the Petitioner **was not indicted for 'simple murder'** neither by grand jury indictment nor an information filed pursuant to Article III, § 27. **The Lower Court preceeded beyond** its jurisdiction and that authorized by the Constitution.

Petitioner argues his claim concerning the failure to indict him for 'simple murder', can pass muster of any Appellate Court hereafter by citing for his argument State v. Berryhill, 703 So. 2d 250, 257-58; 1997 Miss. LEXIS, 23-24 (P30.-P32) and Gray v. State, 819 So. 2d 542, 544; 2001 Miss. App. LEXIS 497, 3-4 (P6.); As one supports the other and the Petitioner's argument, of no grand jury indictment for 'simple murder';

State v. Berryhill, 703 So. 2d 250, 257-58; 1997 Miss. LEXIS, 23-24 (P.30-P.32);

P30. in relevant part; "As the trial court noted below in its bench opinion, only a grand jury can advise a defendant of what he is charged with. Stirone v. United States, 361 U.S. 212, 218, 4 L.Ed. 2d 252, 80 S.Ct. 270 (1960) ("The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offense charge by a group of his fellow citizens acting independently of either prosecuting attorney or judge."); 41 Am. Jur. 2d **Indictments** and **Information** § 1 (1995) ("An indictment can be made only by a grand jury, and no court or prosecutor can make, alter, or amend an indictment returned by a grand jury.")

P31. in relevant part; "The rule that absent waiver only a grand jury can charge a person with a crime such as burglary is found explicitly in the Fifth Amendment of the United States Constitution in cases of infamous crimes, and in Article 3, § 27 of the Mississippi Constitution, State v. Sansome, 133 Miss. 428, 97 So. 753 (1923) (holding Article 3, § 27 to require indictments for all felonies)."

P32. "That rule is the basis of the law governing amendment of indictments. It is hornbook law that a prosecutor has no power to alter the substance of an indictment, either through amendment or variance of the proof at trial without the concurrence of the grand jury." 41 Am. Jur. 2d Indictments and Informations § 168-69 (1995). See also, e.g., Quick v. State, 569 So. 2d 1197 (Miss. 1990). Id.

**Gray v. State, 819 So. 2d 542, 544; 2001** Miss. App. LEXIS 497, 3-4 (P6.);

P6. "The Mississippi Constitution states that "no person shall, for any indictable offense, be proceeded **against criminally** by **information**...." **MISS. CONST. art. III, § 27.** There are several exceptions within this constitutional provision, none of which apply here. Gray argues that the indictment was fraudulent, as no grand jury was meeting at the time that this indictment was handed down. Therefore, Gray argues that his **conviction** and **sentence** are **illegal** as he was prosecuted without having been indicted as required by the **Mississippi Constitution**." **State v. Berryhill, 703 So. 2d 250, 258 (Miss. 1997).**

Black's Law Dictionary defines "subject matter jurisdiction" as," Jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things."

Based on the above, Petitioner argues that **the Lower Court and the State** acted without the **concurrence** of a grand jury and convicted Petitioner of a crime for which he had **never** been **indicted.**

Furthermore, the State's indictment was wholly defective from the very beginning as clearly noted by the Supreme Court of Mississippi in **State v. Berryhill, 703 So. 2d 250; 1997 Miss. LEXIS 532**, obviously the Supreme Court of Mississippi has '**exclusive jurisdiction**' over this issue due to its ruling. Even so, in the interest of justice, judicial economy and the reputation of the lower court it was presented to the lower court first.

Berryhill looks to the Supreme Court's ruling in **State v. Berryhill** and here clearly proves the State intentionally manufactured another indictment that has left the first indictment invisible in the record, the indictment presented to Berryhill while in jail by Assistant District Attorney James S. 'Jim' Pounds had the words 'capital murder' in bold letters and bore the case number CR94-352, which is the same cause number (CR94-352) which appears on the transcripts of the proceedings of **February 14, 1995** and is the same cause number (CR94-352) that appears on the sentencing order dated **February 14, 1995** and **filed February 14, 1995.** The second indictment bares the cause number CR94-008, and it clearly provides proper information concerning to whom the burglary and with intent to commit assault was perpetrated against, "Greg Harding and Denise Harding", the Supreme Court of Mississippi clearly noted that the first indictment and/or original indictment did not provide the names of these two (2) individuals in its entire context; **State v. Berryhill, 703 So. 2d 250, 257-58; 1997 Miss. LEXIS 532, 23 (P31);**

> P31. in relevant part; Indeed, the letter from the prosecutor advising that it intended to prove the burglary with intent to commit the assault does not even specify against whom the assault was to be perpetrated.

Petitioner herein, has argued his right to be indicted for an infamous crime '**simple murder**' instead of being convicted without a grand jury indictment, it is obvious that the State presented what was fraudulent to the Court, the Petitioner submits the above as '**plain error**' as stated in Foster v. State, 639 So. 2d 1263, 1289 (Miss. 1994);

> " the court held that a "defendant who fails to make a contemporaneous objection must rely on plain error to raise the assignment on appeal." Our courts have allowed the review of errors that were not first brought to the attention of the trial court, where the error affected substantial rights of the defendant. Grubb v. State, 584 So. 2d 786, 789 (Miss. 1991); Mitchell v. State, 788 So. 2d 853, 855 (P9)(Miss. Ct. App. 2001). The plain error doctrine includes the review of errors that " seriously affect [] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732, 123 L.Ed 2d 508, 113 S.Ct. 1770 (1993). quoting McGee v. State, 2005 Miss. App LEXIS 782, 10-11 (P13.).

Therefore, based on the above argument and attached evidence Petitioner's **conviction** and **sentence** should be **vacated** and **set-aside**.

4. The Trial Court failed to advise Berryhill of the consequences of the remaining counts in the grand jury indictment that had not been quashed by the Motion to Quash and/or Demur.
(6) The Trial Court failed to advise Berryhill of the essential elements of the crime of **simple murder** as **opposed** to the greater offense of **capital murder** charged in the grand jury indictment.

(c) **Both (a)** and **(b)** violates rule **8.04** of the Uniform Rules of Circuit and County Court Practice.

Petitioner argues that his plea of guilty is involuntary as a matter of law. The Trial Court erred when it failed to advise the Petitioner of the consequences of the remaining two (2) counts, Count II, attempted kidnapping and Count III, possession of a firearm by a convicted felon that had not been quashed by the Motion to Quash and/or Demur. Equally as important, the Trial Court further **erred** in failing to advise Petitioner of the consequences he would suffer if the State succeeded with it's appeal of the capital portion of the indictment.

**State v. Berryhill, 703 So. 2d 250, 252; 1997 Miss. LEXIS 532, 4 (n 2) (PS)**, clearly reveals that Count II, attempted kidnapping was still procedurally alive after Berryhill had plead guilty to **'simple murder'**;

> n2. "Count II of the <u>original indictment</u> charged Berryhill with an <u>attempted kidnaping</u>. That count was <u>later severed</u>, and Berryhill presently alleges that the State never did respond to his requests about which kidnaping statute the State intended to travel under for this charge."

Petitioner submits that the "attempted kidnaping" was not severed prior to the plea proceedings or as the record reveals, the "attempted kidnaping" in Count II and the "possession of a firearm by a convicted felon" in Count III was not severed during the plea proceedings

of **February 14, 1995** and no motions were presented prior to the proceedings, other than Defense Counsel's Motion to Quash and/or Demur.

Further, the Petitioner submits that during the proceedings the State did in fact make it's intentions known, but the Petitioner was not advised of the consequences after the State made it's intentions known;

(T. 13/L. 12-18); MR. YOUNG: "Your Honor, the only thing we have is that feeling aggrieved by the previous ruling of the Court taking out the death penalty. We would advise the Court that we do intent or ask leave of the Court to perfect and appeal to the Mississippi Supreme Court to rule on that issue."

Petitioner contends that the entire plea colloquy was then and there **'void'** as the State made it's intentions known, that the Petitioner had still not escaped the 'death penalty', by agreeing to plea guilty to 'simple murder'. No adjudication of Count II and Count III of the original indictment was made, nor did the Court advise Petitioner of any additional consequences regarding a 'conviction' on the remaining two(2) counts of the indictment, this in addition to the State's appeal of the quashal of the 'death penalty' portion of the indictment added additional consequences that the Petitioner was never advised of. It is further duely noted the Petitioner was **misadvised** by the Trial Court regarding the **habitual offender** portion of the **indictment** during the sentencing phase.

"In Turner v. State, 864 So. 2d 288;291, 2003 Miss. App. LEXIS 679, 4 (P7), the Court of Appeals of the State of Mississippi stated; "A guilty plea must be made voluntarily in order to satisfy the defendant's constitutional rights." Taylor v. State, 682 So. 2d 359, 362 (Miss. 1996). "It is essential that an accused have knowledge of the critical elements of the charge against him, that he fully understands the charge, and what might happen to him in the sentencing phase as a result of having entered the plea of guilty." Reeder v. State, 783 So. 2d 711, 717 (¶20)(Miss. 2001)(citing Smith v. State, 636 So. 2d 1220, 1225 (Miss. 1994).

Futher, "A plea of guilty entered by one fully aware of the direct consequence, including the actual value of any commitments made to him by the court, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business. (e.g., bribes)." Williams v. State, 752 So. 2d 410, 412 (¶4)(Miss. Ct. App. 1999)(citing Brady v. U.S., 397 U.S. 742, 755, 25 L.Ed. 2d 747, 90 S.Ct. 1463 (1970)).

Petitioner was clearly not advised of the remaining two (2) counts in the grand jury indictment and as previously stated these two (2) counts were part of the capital murder indictment at present date Petitioner has still not been advised of any adjudication of Count II and Count III. Furthermore, it is obvious that the State's intentions were improper as will be clearly shown to every Appellate Court hereafter.

The State waited until Petitioner had entered his plea of guilty and the Court had excepted his plea allegedly to 'simple murder' before it challenged the Court's ruling that quashed the underlying offense and the 'death penalty' which proves that the State's alleged plea agreement was 'improper'.

> P10. As the Supreme Court stated in Brady v. U.S., 397 U.S. 742, 748, 25 L.Ed. 2d 747, 90 S.Ct. 1463 (1970): "The plea is more than an admission [in open court that the defendant committed the acts charged in the indictment]; it is the defendant's consent that judgment of conviction may be entered without a trial--a waiver of his rights to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.
>
> P11 In Wilson v. State, 577 So. 2d 394, 396-97 (Miss. 1991), the supreme court held that "a guilty plea must be made voluntarily in order to satisfy the defendant's constitutional rights." A plea is considered voluntary if the defendant knows the elements in the charge against him, including an understanding of the charge, the effect of the plea, and the possible sentence. Taylor v. State, 682 So. 2d 359, 362 (Miss. 1996). There should be a complete record of the plea to ensure the defendant's plea was voluntary." Id.

Quoting Tobias v. State, 724 So. 2d 972, 974; 1998 Miss. App. LEXIS 1050, 4-5, (P10.-P11.)

Moreover, Petitioner has previously argued that the Trial Court Judge failed to establish a factual basis for the

plea of guilty, never advising the Petitioner of the essential elements of 'simple murder' as opposed to 'capital murder'. See e.g., Austin v. State, 734 So. 2d 234, 235, 236; 1999 Miss. App. LEXIS 20, 3-6, (P4. - P10.). Id.. This fact combined with the fact that the Trial Court Judge, Court and State failed to properly advise Petitioner of the direct consequences of the two (2) remaining counts in the grand jury indictment rendered Petitioner's plea involuntary.

> " Where a plea of guilty is involuntary any judgment of conviction entered thereon is subject to collateral attack." Sanders v. State, 440 So. 2d 278, 283 (Miss. 1983). "A defendant may withdraw his guilty plea, if he proves by a preponderence of the evidence that his plea was made involuntary." Schmitt v. State, 560 So. 2d 148, 151 (Miss. 1990) (citing Leatherwood v. State, 539 So. 2d 1378, 1381 n.4 (Miss. 1989)). "A plea is deemed 'voluntary and intelligent' only where the defendant is advised concerning the nature of the charge against him and the consequences of the plea." Alexander v. State, 605 So. 2d 1170, 1172 (Miss. 1992) (citing Wilson v. State, 577 So. 2d 394, 396-97 (Miss. 1991).

Evenso, Petitioner relies on another stated fact as a standard for guilty pleas and the sentence thereof;

> " In King v. State, 857 So. 2d 702, 732 (P108) (Miss. 2003), our supreme court ruled that pleading guilty is reason to support receiving a lesser sentence".

Petitioner further asserts that the Trial Court Judge further erred in advising him correctly, concerning the habitual offender portion of the indictment and as a result Petitioner was not properly advised, Petitioner was sentenced to one (1) fifteen (15) year sentence with eight (8) years suspended and seven (7) years to serve, on Cause Number 10,039 Count I and II in Prentiss County, Mississippi and Cause Number 11,917 in Alcorn County, Mississippi was one (1)

incident, arising out of one (1) event as the result of taking Burglary, larceny and arson of one (1) vehicle. The Marshall County cause number 8,995 was run concurrent to the above Prentiss/Alcorn charges and as previously argued Petitioner served twenty-one **(21) months** on all counts and was released on parole and ninety-one (91) days later, Petitioner allegedly committed the instant crime on **Jan. 21st, 1994**. None of the above convictions or sentences were consecutive and/or stacked, clearly argued, if the State's accusations were true during the plea proceedings and in the alleged indictment Petitioner would have obviously still been in the penitentiary when the instant crime was to have allegedly been committed on January 21st, 1994. Consequently, Petitioner's conviction and sentence as an habitual offender is illegal. see e.g., Riddle v. State, 413 So. 2d 737, 738; 1982 Miss. LEXIS 1941, 2 Id. Moreover, the habitual offender sentence is justified and excepted from the time limitations of Mississippi Code Annotated § **99-39-5 (2)**, "**Errors** affecting **fundamental constitutional rights** may be excepted **from procedural bars** which would otherwise prohibit their consideration", and this case discloses a denial of due process in sentencing. See Strath v. State, 477 So. 2d 191, 195-196 (Miss. 1985); Stevenson v. State, 674 So. 2d 501, 503 (Miss. 1996); Grubb v. State, 584 So. 2d 786, 789 (Miss. 1991); Smith v. State, So. 2d 191, 195-196 (Miss. 1985). Find that said sentence upon this Petitioner was imposed without authority of law, the Petitioner's case must be remanded for proceedings consistent with Riddle Id at 737-738.

The habitual offender portion of the Petitioner's plea was in fact a consequence of his sentence. The State produced no documentation whatsoever in support of it's accusation that the Petitioner was in fact a habitual offender, no certified copies of indictments, judgements or sentencing orders, no authenticated copies of M.D.O.C. pen-pac's, nothing whatsoever after Defense Counsel made a meaningless attempt to correct the State.

> In **Vittitoe v. State**, 556 So. 2d 1062, **the Mississippi Supreme Court stated**: [b]efore a person may plead guilty to a felony he must be informed of his rights, the nature and consequences of the act he contemplates, and any relevant facts and circumstances, and thereafter, voluntarily enter the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L. Ed. 2d 274 (1969). The question necessarily involves issues of fact. Sanders v. State, 440 So. 2d 278, 283 (Miss. 1983). Over the years the law has provided a number of criteria for judging charges of involuntariness, such as the quality of the advise of counsel. Leatherwood v. State, 539 So. 2d 1378, 1388 (Miss. 1989). Vittitoe, 556 So. 2d at 1063, see also Myers v. State, 583 So. 2d 174 (Miss. 1991); Wilson v. State, 577 So. 2d 394 (Miss. 1991). Furthermore, a **sentence** and **conviction** based upon a guilty plea where a defendant was not aware of a mandatory minimum sentence at the time of the plea can be reversed. Alexander v. State, 605 So. 2d 1170, 1172 (Miss. 1992), (citing Vittitoe v. State, 556 So. 2d 1062 (Miss. 1990). In Alexander, this Court reversed and remanded the defendant's case for an evidentiary hearing to be held on the question of ineffective assistance of counsel, and whether the defendant's guilty plea was made voluntarily and intelligently. Alexander, 605 So. 2d at 1171-1172.

Petitioner find a pattern of Judge Russell mis-advising Defendants in plea proceedings, Petitioner will duely request that any Appellate Court hereafter to take 'judicial notice' of this fact, based on his own proceedings, Austin v. State, 734 So. 2d 234, 235, 236; 1999 Miss. App. LEXIS 20, 3-6, (P4.-P10.), **Mississippi Commission on Judicial Performance v. Frank A. Russell, 691 So. 2d 929; 1997 Miss. LEXIS 35**, involving Royce Kemp, Kemp v. State, 352 So. 2d 446 (Miss. 1977), who was sentenced to life on October 12, 1976, by the Honorable Neal Biggers, Kemp was paroled and remained free on parole until May 2, 1990, when he violated parole by using alcohol and was in possession of firearm in violation of Miss. Code Ann. § 97-37-5 (1972). Despite revocation by the Parole Board, Judge Russell entered an order on May 18, 1990 which suspended the remainder of Kemp's sentenced and release him from jail. Chester Shook pled guilty two counts of possession of a controlled substance with intent to distribute on November 12, 1993. **Judge Russell** sentenced Shook to four years on one count and two years on the other charge, to run concurrently. On May 9, 1994, **Judge Russell** entered a nunc pro tunc order suspending Shook's sentence. Jeffrey Bonds pled guilty to burglary in 1990 and was sentenced to serve seven years on April 3, 1990 by the Honorable Thomas J. Gardner, III. Bonds was placed RID program and after successful completion of that program was placed on probation on September 7, 1990, Three (3) years later, on August 17, 1993, **Judge Russell** revoked Bond's probation after Bonds was arrested on two (2) additional counts of

burglary. On January 10, 1994, Bonds pled guilty and Judge Russell sentenced Bonds to serve three years on each count. Judge Russell ordered a consecutive sentence to the original seven (7) year sentence, resulting in a total sentence of ten (10) years. On April 7, 1994, Judge Russell entered a nunc pro tunc order to correct the January 10, 1994 order to reflect that Judge Russell was "reserving judicial review for a period of 180 days." On April 7, 1994, the same day, Judge Russell entered an order vacating Bonds' sentences, including the original sentence on which Bonds had been sentenced by the Honorable Thomas J. Gardner, III. Bonds was placed on probation by Judge Russell. Robert Daniel Parham, On December 1, 1992, Robert Parham pled guilty to manslaughter for the 1990 death of his girlfriend. On January 8, 1993, Judge Russell sentenced Parham to twenty (20) years in the penitentiary with ten (10) years suspended. On June 2, 1994, Parham was denied parole. However, on July 19, 1994, Judge Russell, sua sponte, entered an order releasing Parham from the penitentiary and placing him on supervised probation. 691 So.2d 929, 932, 933, 934; 1997 Miss. LEXIS 35, 4-12, Id.

Petitioner looks to the time-lines involved in the above cases, Royce Kemp, May 2, 1990 - May 18, 1990, Chester Shook, November 12, 1993 - May 9, 1994, Jeffrey Bonds, April 3, 1990 - April 7, 1994, Robert Daniel Parham, December 1, 1992 - July 19, 1994, and then, there is the Petitioner's case, charged on January 21, 1994 and was before Judge Russell on February 14, 1995. Surely, before the Petitioner can enter a plea of guilty to an infamous crime, such as 'simple

murder', Petitioner must against all odds have a 'competent' 'judicial source' to except such a plea. It is obvious and clear from the above that this was 'simply not the case'. And, it did not end here, Judge Russell heard the case of Austin v. State, on February 7, 1997, (DENIAL OF POST-CONVICTION RELIEF REVERSED; GUILTY PLEA VACATED; REMANDED FOR TRIAL.) 734 So. 2d 234; 1999 Miss. App. LEXIS 20. Up until present date the Court of Appeals of the State of Mississippi is still hearing cases heard by Judge Russell in GARNER v. STATE, 2006 WL 329851 (Miss. Ct. App. 2006), at paragraph seven (¶7); of the disposition of 9/27/2005, No. 2004-CP-00468-COA;

> ¶7. "Garner's contention that the trial court erroneously informed him regarding parole is more problematic. After informing Garner that the State recommended a sentence of twenty years on each count, the trial judge asked Garner, "Do you also understand that you won't be eligible for any release, due to the face that this involved the use of a deadly weapon, for at least the first ten years of this sentence?" To this Garner responded in the affirmative.
>
> ¶16." THE JUDGMENT OF THE CIRCUIT COURT OF MONROE COUNTY DISMISSING THE MOTION FOR POST-CONVICTION RELIEF IS REVERSED AND REMANDED FOR A HEARING. ALL COSTS OF THIS APPEAL ARE ASSERTED TO MONROE COUNTY."

Furthermore, GARNER still has one (1) appeal pending in the Court of Appeals of the State of Mississippi in Cause Number 2005-CP-01520-COA also heard by Judge Russell.

This, among all other issues above shows the Petitioner's plea is certainly at question, if Petitioner would have known that he was

still facing the 'death penalty' at the time he entered his plea he would have never pled guilty to life without parole, and opted for trial by jury. Petitioner was not advised that the State could not bring back the death penalty, at no time during the proceedings against him was he advised of this fact. Petitioner in fact was told by his Counsel that the State could in fact bring back the 'death penalty' if he did not plea to 'simple murder'. Petitioner did not learn otherwise until he found the cite number to **State v. Berryhill, 703 So. 2d 250, 1997 Miss. LEXIS 532** and learned further that he had been decieved by the **State** and **Defense Counsel.**

> P10. "We hold that Miss. Code Ann. 99-35-103 includes instances such as these, where the trial court has quashed a portion of the indictment. The trial court's quashal was in fact the final judgment on the capital murder charge, in that the judicial labor was at an end" with regard to that charge." State v. Burrill, 312 So. 2d 1, 3 (Miss. 1975)(quoting Statcoff v. Dezen, 72 So. 2d 800, 801 (Fla. 1954)).
>
> Id at 253, 6-7 (P10.).

Petitioner would have proceeded to trial if he would have known the above, especially given the fact that he could received nothing more than life or less under heat of passion manslaughter after the Court discovered it was being decieved concerning the habitual offender portion of the indictment as above and previously stated.

Petitioner should be allowed to foreclose on the issue that he was not advised. That if he did not plea guilty to **'simple murder'** that he would face the 'death penalty'. Clearly from the Record, the Petitioner pled guilty on February 14, 1995 and **State v. Berryhill, 703 So. 2d 250; 1997 Miss. LEXIS 532** was not decided until October 23, 1997, and until that point Petitioner was lead to believe that he would and could still face the 'death penalty' by the States' appeal at the end of the plea proceedings, (T. 13/L.12-18), if Berryhill had known the truth, he would have proceeded in an earlier state forum. The Mississippi Supreme Court stated in Puckett v. State, 834 So. 2d 676, 678 (Miss. 2002);

> (When a party is **prohibited** from exercising right to proceed by circumstances clearly beyond his control, and due process and **fundamental** fairness issues are present, relief is **justified**).

Or as plainly stated in another case from the same Circuit Court District in Cedric Bell v. State of Mississippi, 759 So. 2d 1111, 1999 WL 549450 (Miss.); Bell, 759 So. 2d at 1114 (¶14);

> ¶14. "Pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act a petitioner is entitled to an in-court opportunity to prove his claims if the claims are procedurally alive, substantially showing a denial of a state or federal right." Washington v. State, 620 So. 2d 966, 967-68 (Miss. 1993) (internal citations ommitted). This court has further held, "[U]nder the holding in Alexander v. State, 605 So. 2d 1170, 1172 (Miss. 1992), an evidentiary hearing is necessary if the

plea hearing 'does not reflect that [the petitioner] was advised concerning the rights of which he allegedly claims ignorance!" Roland v. State, 666 So. 2d 747, 751 (Miss. 1995).

Petitioner's guilty plea was and still is **involuntary** as a matter of **law**, as the entire proceedings against him are replete with overwhelming error. It cannot be said with any degree of confidence that Petitioner's plea to simple murder was entered knowingly and voluntarily. And as stated over and over the Court and State gave no indication to the Petitioner that the 'death penalty' and/or 'capital portion' could not be brought back if the Petitioner opted to go to trial. In fact, Defense Counsel quickly informed the Petitioner after the Motion to **Quash** and/or Demur **was granted** that he had no other choice but to plea guilty to 'simple murder' or he 'WOULD' be faced with the 'death penalty' at trial if opted for trial by jury.

Any Appellate Court hereafter should be able to determine the facts, "Why would the Petitioner plea guilty to life without parole?" and find the answer simple. To avoid the 'death penalty' that due to his ignorance and threats by the State Petitioner thought could still be used if he attempted to go to trial. With all of the above errors applying **Rule 8.04** is useless, there is no need to continue what answers itself.

The **errors** of **Judge Russell** and the Circuit Court of Alcorn County, Mississippi are fatal to the interest of **justice** and Petitioner's **conviction** and **sentence** should be **vacated** and

set-aside.

5. Did Berryhill receive Ineffective Assistance of Counsel due to all of the errors raised and further for his Counsel's failure to advise him of speedy trial violation that he was unaware of when he agreed to plead guilty.

Petitioner's Counsel did in fact file a Motion to Quash and/or Demur and that motion was **granted** by the Court.

Petitioner's complaint regarding his Counsel performance is in regards to what occurred after the motion was granted and Counsel advised him that if he did not plea guilty to '**simple murder**' immediately before the State had an opportunity to appeal the Court's decision he would be facing the death penalty again. Furthermore, Defense Counsel never advised the Petitioner that he was still subject to prosecution on the remaining two (2) counts of the 'original' or the 'manufactured' indictment CR94-008 or CR94-352, 'take your pick', even so, the Petitioner clearly points out that Defense Counsel allowed him to be sentenced as an habitual offender, after the Petitioner clearly advised Counsel he was not an habitual offender before the proceedings and Counsel then informed Petitioner that he would inform the Court that he was not an habitual offender.

Counsel's performance speaks for itself and Counsel's failures prejudiced the Petitioner, prior to the proceeding Counsel informed Berryhill that he would not receive more

than twenty (20) years for 'simple murder'; just to agree with the Court's questions, that they had an agreement with the State, that the Motion to Quash and/or Demur would not be challenged by the State if Petitioner pled guilty to 'simple murder'.

> "The standard of review for ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 687-96, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), which has been adopted by the **Mississippi Supreme Court**. Eakes v. State, 665 So.2d 852, 872 (Miss. 1995). A defendant must show his attorney's performance was deficient, and the deficiency was so substantial as to deprive the defendant of a fair trial. Id. We require the defendant prove both elements. Brown v. State, 626 So. 2d 114, 115 (Miss. 1993); Wilcher v. State, 479 So.2d 710, 713 (Miss. 1985). In any case presenting an ineffective assistance of counsel claim, the performance inquiry is whether counsel's assistance was reasonable considering all the circumstances. Foster v. State, 687 So.2d 1124, 1129 (Miss. 1996). This is measured by a totality of the circumstances, and thus, the **Court must look at counsel's overall performance**. Taylor, 682 So.2d at 363 (Miss. 1996). There is no constitutional right to errorless counsel; Foster, 687 So.2d at 1130." Judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689."
>
> "There is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. To overcome this presumption, "the defendant must show that there is a reasonable proability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable proability is a probability sufficient to undermine confidence in the outcome." Schmitt v. State, 560 So.2d 148, 154 (quoting Strickland, 466 U.S. at 694.

Here it is clear where Counsel fails and where Counsel's performance is deficient and how it prejudiced the Petitioner, Counsel made no attempt to request a continuance to obtain the proper documentation to prove that Petitioner **was not a habitual offender**, instead, Counsel allowed the State to deceive the Court and to do so without the **State** producing one piece of **documentation**, **no pen-pac**, **no certified** copies of any **judgments** were **introduce**, as a result the Petitioner was **erroneously convicted** and **sentenced** as an **habitual offender**, to life without parole. Counsel clearly mis advised Petitioner concerning his sentence and that he would not be sentenced as an habitual offender, and made a reckless attempt to **correct** the State's **erroneous information**.

> Thomas v. State, 881 So. 2d 912, 918, (¶18), 2004 WL 1191930, 5 (Miss. App.), "Allegations of ineffective assistance of counsel must be made with specifically and detail." Garner v. State, 864 So. 2d 1005, 1008 (¶13)(Miss. C.App. 2004). "[I]n order to establish that failure to investigate a line of defense constituted ineffective assistance, a petitioner must show that knowledge of the uninvestigated evidence would have caused counsel to vary his course." King v. State, 503 So. 2d 271, 275 (Miss. 1987).

Counsel for the Petitioner made an unsupported response to the States' **interpretation** that he was an **habitual offender**, this one attempt was reckless to whether the Petitioner would be sentenced to life or life without parole; (T. 8/L. 4-12);

MR. WINDSOR: Your Honor, it was a combined plea agreement, as I understand it from the Defendant, among the three counties and that a certain number of years in the Alcorn/Prentiss County cases were retired to the files and two years, I believe, of the Marshall County charge was suspended. He actually did--went to the penitentiary on these charges.

Petitioner had told Counsel, that, he received one (1) sentence in the Alcorn/Prentiss County fifteen (15) years with eight (8) years suspended and **seven (7) years to serve** in the Mississippi Department of Corrections this was on cause numbers **10,039** Counts I and II in Prentiss County, Mississippi and Alcorn County, Mississippi cause number **11,917**. Petitioner allegedly burglarized, stole and burned a 1979 K-5 Blazer which was **all one (1) event**. ('Burglary of a Vehicle, Grand Larceny, 3rd Degree Arson') 'same day, same incident at the same time.' These charges were brought at the same time and the Petitioner was convicted of these charges on the same day February **19, 1992**. Thereafter, Petitioner received five (5) years with two (2) years suspended and three (3) years to serve in Marshall County, Mississippi cause number **8,955**. Petitioner served twenty-one (21) **months** on all of the above charges and was released on parole. Counsel as well as the Court (Judge Russell) knew or should have known that the state's representations were 'fraudulent' as he "Assistant District Attorney, Honorable James S. Pounds" used words that contradicted themselves in a less than professional manner, 'stacked or consecutive, on top, Your Honor, and suspended.' (T.8/L.17-29), (T.9/L.1-4).

Obviously, the State failed but the Court (**Judge Russell**) allowed the State purposely misrepresent the **prior convictions** without requesting the **State** to **produce** a **pin-pac** or certified orders of judgments. Evenso, the answer is found in Riddle Id. and De Bussi Id. Counsel failed the Petitioner, with his deficient performance in obtaining an **M.D.O.C. pen-pac** or certified orders of judgments, this error prejudiced the Petitioner and if Counsel would have investigated the Petitioner's claims the outcome would have been different, Petitioner would not be serving an illegal sentence as an habitual offender. It is obvious that a violation of Rule 4.06 exist here also pertaining to pre-trial discovery by the State, Rule 4.06 of the Uniform Criminal Rules of Circuit Court Practice reads in pertinent part, as follows;

> "The prosecution shall disclose to each defendant or to his attorney, and permit him to inspect, copy, test, and photograph upon request and without further order the following:
>
> (3) Copy of the criminal record of the defendant, if proposed to be used to impeach;
>
> Upon a showing of materiality to the preparation of the defense, the court may require such other discovery to defense counsel as justice may require.

Petitioner is not privy as to "Why his Counsel did not have a copy of the record of his prior convictions on the day of trial February 14, 1995 after the jury had been selected and trial was to begin?" Apparently, the State had not produced this record, if the State

had given Defense Counsel what was required by **Rule 4.06**, then Counsel wouldn't have had to rely on the unsupported accusations of the Petitioner. However, before the Court (**Judge Russell**) could except the **hearsay** of the State or Defense Counsel his duty also is found under Rule 4.06 of the Uniform Criminal Rules of Circuit Court Practice: "[sic] Upon a showing of 'materiality' to the preparation of the defense, the court may require such other discovery to defense counsel as justice may require." The Court (Judge Russell) however excepted the hearsay of the State without fulfilling the above and/or the requirement of Rule 4.06. But, as previously stated Defense Counsel did not have the proper discovery before him and did nothing to obtain it.

> "There is no question that the defendant is entitled to a basic defense. Triplett v. State, 666 So. 2d 1356 (Miss. 1995). As to what a basic defense may entail, the language from the Triplett Court is instructive: "Basic defense in this case required complete investigation to ascertain every material fact about this case, favorable and unfavorable. It required familiarity with the scene, and setting. It required through his own resources and process of the court learning the name of, and interviewing every possible eyewitness, and getting statements from each. It required prior trial learning all information held by the state available to the defense through pre-trial discovery motion."
>
> Triplett, 666 So. 2d at 1361.

Defense Counsel failed to secure proper discovery of the Petitioner's prior convictions, the Court **(Judge Russell)** did not request any evidence to be **produced** to **prove** the State's **prior convictions.**

There was a 'total breakdown' of the adversial system in the case at bar. When determining if both prongs of Strickland test have been met, deficient performance and resulting prejudice from those deficiencies, this Court must look to the totality of the circumstances. Moody v. State, 644 So. 2d 451, 456 (Miss. 1994).

Petitioner can also argue that he was not advised by his Counsel of a possible speedy trial violation prior to pleading guilty. Petitioner was arrested and charged on January 21, 1994 and did not stand before the Court until February **14, 1995** to be coerced into a guilty plea by his Counsel under the threat of the death penalty being brought back against him.

> "The rule in Mississippi is that a delay of more than eight months from arrest to trial is presumptively prejudicial under constitutional consideration." See Jenkins v. State, 607 So. 2d 1137, 1138-39 (Miss. 1992), Smith v. State, 550 So. 2d 406, 408 (Miss. 1989), quoting McVeay v. State, 754 So. 2d at 489 (¶12) (Miss. Ct. App. 1999).

Petitioner was **five (5) months** approximately passed the eight **(8) months** required by the constitution of the State of Mississippi, and was never advised of this by his Counsel before he was ask to plea guilty to **simple murder.**

The Court of Appeals of the State of Mississippi went on to say in McVeay, 754 So. 2d at 489 (¶11) (Miss. Ct. App. 1999);

> "The first issue to be resolved is whether a defense attorney's failure to counsel his client regarding the availability of this potential speedy trial bar to prosecution would constitute ineffective assistance." We determine that it would. "If counsel's failure to move for a speedy trial discharge is the is the result of actual incompetence on the attorney's part and results in prejudice to the defense, defendant is entitled to a new trial." People v. Stanley, 266 Ill. App. 3d 307, 204 Ill. Dec. 605, 641 N.E. 2d 1224, 1227 (1994).
>
> see, e.g., Nelson v. Hargett, 989 F. 2d 847 (5th Cir. 1993).

Petitioner suffered countless violations other than his right to a speedy trial, these violations are clearly noteable through this entire brief. Petitioner has only brought to this Court's attention those that most prejudiced his case, the rest is now pointed out to the Appellate Court hereafter under Miss. Sup. Ct. R. 28(a)(3) and Miss. Rule Evid. 103(b).

> " In Kimmelman v. Morrison, 477 U.S. 365, 378, 91 L.Ed. 2d 305, 106 S.Ct. 2574 (1986), the United **States Supreme Court stated**: A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's performance. c.f. Powell v. Alabama, 287 U.S. 45 at 69, 53 S.Ct. 55 at 64, 77 L.Ed. 158; consequently, a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness

claim until he begins collateral review proceedings . . . Kimmelman, 477 U.S. at 378.

Thus, **Berryhill** is **entitled** to an **evidentiary hearing**, on whether he suffered Ineffective Assistance of Counsel and whether he relied on **erroneous** advice of counsel concerning the State bringing back the death penalty if he attempted to proceed to trial and did not immediately plea to **'simple murder'**. Furthermore, Berryhill is entitled to an evidentiary hearing regarding Counsel's failure to defend the **erroneous** information concerning the habitual offender portion of the indictment. **Berryhill** cites Ward v. State, 708 So. 2d 11, 14-15; 1998 Miss. LEXIS 4, 9-10, (P19);

> "Effective assistance of counsel contemplates counsel's familiarity with the law that controls his client's case. See Strickland v. Washington, 466 U.S. 668, 689, 80 L.Ed. 2d 674, 104 S.Ct. 2052 (1984) (noting that counsel has a duty to bring to bear such skill and knowledge as will render the trial reliable); see also Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974) (stating that a lawyer who is not familiar with the facts and law relevant to the client's case cannot meet the constitutionally required level of effective assistance of counsel in the course of entering a guilty plea as analyzed under a test identical to the first prong of the Strickland analysis); Leatherwood v. State, 473 So. 2d 964, 969 (Miss. 1985) (explaining that the basic duties of criminal defense attorneys include the duty to advocate the defendant's case; remanding for consideration of claim of ineffectiveness where the defendant alleged that his attorney did not know the relevant law."

Therefore, this Court has the option to address Berryhill's claim of ineffective assistance of counsel and then remand for an evidentiary hearing.

Date: 4-19-07



Respectfully Submitted,
Anthony Berryhill 78551

## Conclusion

The tendency to place legalisms above the interest of society and the tendency among district attorneys and one circuit court judge to place their interpretation of the laws of the State of Mississippi and the United States Constitution above the understood goals of justice are the kind of individuals who feed themselves on careerism and flatters themselves with unjust superficial success until even the basic tacit interest of the greater structure are undermined by their corruption. 'Is justice served when the prosecutor and trial court judge will commit any and every violation of the constitution and laws of this state just to sustain an **illegal conviction**?' Or is it the fact that this State does not pride itself on what is legally obtainable.

Berryhill 'had' a **fundamental** constitutional right as an alleged criminal defendant to constitutional safeguards from a vindictive Assistant District Attorney who became angry with Berryhill's Counsel after successfully challenging the capital portion of the Grand Jury indictment, even then, when the State had failed at its own indictment did the Assistant District Attorney twist Berryhill's prior convictions to suit his desires, instead of what the Constitution and law prescribes.

Berryhill along with this State's judicial system falls to the scrutiny of the courts of greater jurisdiction and the justice's who preside therein. The Attorney General's Office knowingly and willingly supports wrongful and **illegal** proceedings as well as the convictions and sentences rendered thereto, never admitting wrong the Special Assistants twist the **errors** committed to please their desires and cover the District Attorneys **ever error**.

The writer herein has seen countless horror stories and is unmistakenly reminded of the words of Justice Dickinson in Chase v. State, 873 So.2d 1013, 1018 ; 2004 Miss. LEXIS 548, 9 (P14.)(n.6); "There can be no doubt that the legal profession in general, and trial counsel (plaintiff and defense) and the judiciary in particular, have come under serious attack in Mississippi and, really, the entire country, in the last decade. Many, claiming they see lack of integrity and honor, have lost confidence in the system itself. This Court accepts its share of the blame for failing to require strict and faithful compliance with the ethical and professional responsibilites of those entrusted with the privilege of practicing law and serving in judicial office."

"The counsel and trial judges involved in several recent cases were placed on notice that, following a short warning period, that will change. This Court will begin strictly enforcing the obligations of fidelity to the law and commitment to the oath, when practicing law and serving in the judiciary. We take this opportunity to serve notice that the warning period will soon end." Id. at 1018.

The errors in Berryhill occurred within the 'last decade' spoken of by Justice Dickinson, this Court has to go no further than Mississippi Commission on Judicial Performance v. Russell, 691 So. 2d 929 (Miss. 1997), Berryhill stood before Circuit Court Judge Frank A. Russell during the same timeline, February 14, 1995 as those cases that formed the basis for the above ruling. Circuit Court Judge Frank A. Russell sat by and allowed Assistant District Attorney, Honorable James S. 'Jim' Pounds to use deception at (T.7/L.19-29), (T.8/L.1-29), (T.9/L.1-4), the motive for this deception is deep seated and personal between Assistant District Attorney James S. 'Jim' Pounds and Berryhill, who made it a point to make repeated trips to the jail to threaten Berryhill. Assistant District Attorney James S. 'Jim' Pounds made a promise to the victim's family that Berryhill would not escape the death penalty. And after Berryhill's Counsel successfully presented and was granted a Motion to Quash and/or Demur on the capital portion of the indictment because of defects attributed to the District Attorney's Office, Assistant District Attorney, James S. 'Jim' Pounds could no longer fulfill his first promise of death and then resorted to deception and/or 'bald face lies,' which he is known for, to illegally sentence Berryhill as a habitual offender pursuant to an original defective capital murder indictment that had been quashed due to errors committed by his (Pound's) office.

Berryhill's family contacted five (5) attorneys in the First Circuit Court Judicial District for representation when he began this appeal and quickly found out that his freedom depended on how much money he had to entice a judge or district attorney into a proper ruling and that his freedom did not depend on whether the laws of this State and the United States had been enforced and applied. Obviously it did not matter to these attorneys of the First Circuit Court Judicial District whether Berryhill's constitutional rights had been violated, but 'for the right amount of money' the laws of this State would now be properly applied, without a time bar, without a procedural bar and without a successive writ bar. At present date the shadows still remain despite the words of Justice Dickinson in Chase and in remaining this State's integrity goes up in smoke.

In 2005, once again, the State of Mississippi out of fifty (50) states was named number one as having the most corrupt judicial system by the NAACP and the ACLU and while this State may quickly contend that this writer and Berryhill are just complaining because of their color, this is simply not true, the writer as well as Berryhill are both white.

While the Attorney General's Office may also frown at the writer's allegations

it should remember the words of Justice John Paul Stevens of the Supreme Court of the United States when in discussion of his views of Attorney General Jim Hood in reference to a Union County, Ms. capital mueder case (Howell) that was publicized for the whole state to see in a Jackson, Ms. newspaper, the Clarion Ledger, (verbatim), "Hood -- who suffers from an identity crisis at least with Justice John Paul Stevens, who called him General Cox and General Scott before eventually getting it right at the end - was peppered with questions about how the capital punishment law worked." (end quote).

Sadly enough, this is how this State's judicial system and our Attorney General is perceived to the Justice's of the Court's of higher jurisdiction (an identity crisis), and unfortunately it does not end here. The United States Court of Appeals for the Fifth Circuit cites its distaste also, "Petitioner has served five years trying to get a fair hearing and further State exhaustion would only do him irreparable harm and it would be futile to subject Petitioner to the prejudice of the Courts of Mississippi." Shelton v. Heard, 696 F.2d 1127 (5th Cir. 1983).

The recent comments of Tupelo, Mississippi Attorney Jim Waide publicized by the Associated Press concerning Circuit Court Judge, Honorable Jim Kitchens are a little misplaced, certainly, Attorney Jim Waide should have per se 'swept his own porch before taking his broom into another circuit court district', apparently Judge Kitchens has not been disciplined for any wrongs by the Mississippi Commission on Judicial Performance as Judge Frank A. Russell, and furthermore, the First Circuit Court Judicial District is still suffering from the errors of Judge Frank A. Russell in Garner v. State, 2006 WL 329851 (Miss. Ct. App. 2006) while Attorney Jim Waide works side by side with now Attorney Frank A. Russell in Tupelo, Mississippi.

Consequently, Attorney Jim Waide was one (1) of the five (5) attorneys contacted by Berryhill's family when this appeal began.

The outlook is grim, Berryhill suffered countless constitutional violations and the quest for appellate review continues. Berryhill was told that if he plead guilty he would receive a life sentence. And it is duely noted at (T. 2/L. 1-10), that the Honorable Frank A. Russell said nothing about Berryhill pleading guilty as an habitual offender. Berryhill was pleading guilty to a lesser included offense, which was the basis for his plea, but, due to deception and vindictiveness of the Assistant District Attorney, Berryhill received no lesser sentence than he would have at trial. Even though, Berryhill's Counsel had advised him that the death penalty could be brought back if he did not plea guilty, Counsel's belief was not answered until State v. Berryhill, 703 So. 2d 250 (Miss. 1997), where this Court answered the question that the death

penalty could not be brought back. Even so, it is also duely noted that two (2) counts remained in the indictment at no time during the proceedings was Berryhill advised of the actual consequence if he were to be convicted of the remaining counts of the indictment.

To allow this conviction to stand sends a message, that the words spoken by Justice Dickinson in Chase means nothing.

Date: 4-19-07

Respectfully Submitted,

Anthony Berryhill

## Certificate of Service

This is to certify that I, Anthony Berryhill # 78551, have this day and date caused to be mailed, via U.S. Postal Service, postage prepaid, a true and correct copy of Brief for the Appellant, plus exhibits to the following persons:

Honorable Betty W. Sephton, Clerk
Court of Appeals of State of Mississippi
Post Office Box 249
Jackson, Mississippi 39205-0249

Honorable Jim Hood
Office of Attorney General
Post Office Box 220
Jackson, Mississippi 39205-0220

Date: 4-19-07

Respectfully Submitted,

Anthony Berryhill 78551

Anthony Berryhill # 78551
S.M.C.I.-II, D-2, Bed 69
P.O. Box 1419
Leakesville, Ms. 39451

Exhibits
(1)

IN THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI

FEBRUARY TERM, 1995

STATE OF MISSISSIPPI

VS. CAUSE NO. CR94-352

ANTHONY MARK BERRYHILL AKA "MOP"

ORDER

Came on this cause this day for hearing, the Defendant being before the Court in person and with his Attorney RONALD WINDSOR & TERRY WOOD. Said Defendant being before the Court on a charge of MURDER, and to said charge the Defendant, ANTHONY MARK BERRYHILL AKA, enters a plea of guilty as charged, said plea is accepted by the Court, the Court finding that said plea is voluntarily and understandingly entered by the Defendant.

IT IS, THEREFORE, Ordered and Adjudged by the Court that the Defendant be and is hereby sentenced to life without parole in a facility designated by the Mississippi Department of Corrections. Defendant is sentenced under SEC 99-19-81, Mississippi Code, 1972, as amended. Therefore, said sentence shall not be reduced or suspended nor shall he be eligible for parole or probation. Defendant is remanded to the custody of the **

ORDERED AND ADJUDGED IN OPEN COURT, this the 14th day of February, 1995.

** Prentiss County Sheriff to await transportation to said facility.

Tommy C. Thomas
CIRCUIT JUDGE

FILED
TIME ____ P.M.
FEB 14 1995
MARY FAYE GWIN
CIRCUIT CLERK
D.C.

Exhibits
(1) of (2)

INDICTMENT

THE STATE OF MISSISSIPPI
PRENTISS COUNTY

CIRCUIT COURT
OCTOBER TERM, 1991
CAUSE NO. 10,039

The Grand Jurors for the State of Mississippi, taken from the body of good and lawful men and women of PRENTISS COUNTY, in the State of Mississippi, elected, impaneled, sworn and charged to inquire in and for said County and State aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present: That

GREG HENRY, MICHAEL TRACY VICK, SCOTTY WAYNE THOMPSON, AND MARK ANTHONY BERRYHILL

in said County and State on the 12th day of January, A.D., 1991,

COUNT I: did wilfully, feloniously and burglariously break and enter a certain automobile, one 1978 Chevrolet Blazer, Vehicle Identification Number CKL188F152708, owned and occupied by Rusty McCoy with the felonious and burglarious intent to take, steal and carry away the goods, chattels and personal property of the said Rusty McCoy, in said automobile being kept for use, sale or storage;

COUNT II: in said County and State on the 12th day of January, A.D., 1991

did wilfully, unlawfully and feloniously take, steal and carry away one 1978 Chevrolet Blazer, Vehicle Identification Number CKL188F152708, of a value of $100.00 and more, good and lawful money of the United States, the property of Rusty McCoy, with the intent to permanently deprive the said Rusty McCoy of said automobile;

COUNT III: in said County and State on the 12th day of January, A.D., 1991

did wilfully, unlawfully and feloniously take, steal and carry away one tool box, one socket set, one set of screw drivers, one set of box wrenches, one tape measure, jumper cables, gear pullers, one

Exhibits
(2)

tire, one Workman's Choice tool box with assorted tools, one tool pouch, two pairs of work boots, one pair of coveralls, one sweatshirt, one hunting vest containing gun shells, one CB radio, one AM/FM cassette radio, one case of cassette tapes, and two fishing rods, all of a value of $100.00 and more, good and lawful money of the United States, the property of Rusty McCoy, with the intent to permanently deprive the said Rusty McCoy of said items;

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Mississippi.

Filed and Recorded 24 day
of October, 1991
Travis Coy, Clerk
Mattie Perry, D.C.

Assistant District Attorney
A TRUE BILL
Foreman of the Grand Jury

(a)

EXHIBITS

INDICTMENT

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THE STATE OF MISSISSIPPI

PRENTISS COUNTY

CIRCUIT COURT

FEBRUARY TERM, 1994

CAUSE NO. CR94-008

The Grand Jurors for the State of Mississippi, taken from the body of good and lawful men and women of PRENTISS COUNTY, in the State of Mississippi, elected, impaneled, sworn and charged to inquire in and for said County and State aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present: That

ANTHONY MARK BERRYHILL AKA "MOP"

in said County and State on or about the 21st day of January, A.D., 1994,

COUNT I: did wilfully, unlawfully and feloniously, and with deliberate design kill and murder Cathy D. Cummings, a human being, while he, the said Anthony Mark Berryhill AKA "Mop", was engaged in the felony crime of Burglary of an Occupied and Inhabited Dwelling, belonging to Greg Harding and Denise Harding, in violation of Mississippi Code Annotated, Section 97-3-19 (2) (e);

COUNT II: in said County and State on or about the 21st day of January, A.D., 1994,

did wilfully, unlawfully and feloniously without lawful authority attempt to kidnap, or forcibly seize and confine Anthony Lee Cummings, a child under the age of ten (10), but the said Anthony

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Mark Berryhill, AKA "Mop", was then and there intercepted and failed in the commission of said offense;

COUNT III: in said County and State on or about the 21st day of January, A.D., 1994,

being a convicted felon, did wilfully, unlawfully and feloniously possess a firearm, to-wit: one 9mm pistol, wherein the said Mark Anthony Berryhill AKA "Mop", was previously convicted of:

(1) Burglary of a Vehicle on February 19, 1992, in Count one (1) of Cause Number 10,039, in the Circuit Court of Prentiss County, Mississippi, and was sentenced to a term of seven (7) years in the Mississippi Department of Corrections;

(2) Grand Larceny on February 19, 1992, in Count Two (2) of Cause Number 10,039, in the Circuit Court of Prentiss County, Mississippi, and was sentenced to five (5) years in the Mississippi Department of Corrections, suspended, to run Consecutive to Count One of Cause Number 10,039;

(3) 3rd Degree Arson on February 19,1992, in Cause Number 11,917, in the Circuit Court of Alcorn County, Mississippi, and was sentenced to three (3) years in the Mississippi Department of Corrections, suspended, and to run Consecutive to Counts One and Two of Cause Number 10,039 of the Circuit Court of Prentiss County, Mississippi;

(4) Grand Larceny on August 26, 1992, in Cause Number 8,955, in the Circuit Court of Marshall County, Mississippi, and was sentenced to five years, with 3 years suspended, to run concurrent with Prentiss County sentence;

in violation of Mississippi Code, Annotated, Section 97-37-5 (1)

Exhibits

(Mississippi 1993), as amended;

and upon conviction the said ANTHONY MARK BERRYHILL AKA "MOP" is hereby charged in Counts I, II, and III of this Indictment under Section 99-19-81, Mississippi Code, 1972, as amended, to be sentenced to the maximum term of imprisonment as prescribed for each felony and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation in that:

(1) ANTHONY MARK BERRYHILL AKA "MOP", having pled guilty in the Circuit Court of PRENTISS COUNTY, Mississippi, in Cause Number 10,039, to Burglary of a Vehicle (Count One), was sentenced on the 19th day of February, 1992, to serve a term of 7 years in a facility to be designated by the Department of Corrections of the State of Mississippi, and;

(2) ANTHONY MARK BERRYHILL AKA "MOP", having pled guilty in the Circuit Court of PRENTISS COUNTY, Mississippi, in Cause Number 10,039, to Grand Larceny (Count Two), was sentenced on the 19th day of February, 1992, to serve a term of 5 years in a facility to be designated by the Department of Corrections of the State of Mississippi, said sentence being suspended, to run Consecutive to Count One of Cause Number 10,039, and;

(3) ANTHONY MARK BERRYHILL AKA "MOP", having pled guilty in the Circuit Court of ALCORN COUNTY, Mississippi, in Cause Number 11,917, to 3rd Degree Arson, was sentenced on the 19th day of February, 1992, to serve a term of 3 years in a facility to be designated by the Department of Corrections of the State of Mississippi, suspended, said sentence to run Consecutive to Counts One and Two of Prentiss County Cause Number 10,039;

Exhibits

(4) ANTHONY MARK BERRYHILL AKA "MOP", having pled guilty in the Circuit Court of MARSHALL COUNTY, Mississippi, in Cause Number 8,955, to Grand Larceny, was sentenced on the 26th day of August, 1992, to serve a term of five years in a facility to be designated by the Department of Corrections of the State of Mississippi, with 3 years suspended, to run concurrent with the Prentiss County sentence;

(5) Each of the above sentences arose out of separate incidents at different times;

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Mississippi.

Filed and Recorded 1st day
of March, 1994
Mattie Berry, Clerk
_____, D.C.

Jim A Pounds
Assistant District Attorney
A TRUE BILL

Jay A Arthur
Foreman of the Grand Jury

Exhibits

IN THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI — PLAINTIFF

VERSUS — CAUSE NO. CR94-352

ANTHONY MARK BERRYHILL — DEFENDANT

**********

TRANSCRIPT OF THE PROCEEDINGS HAD AND DONE IN THE GUILTY PLEA AND SENTENCING IN THE ABOVE STYLED AND NUMBERED CAUSE, BEFORE THE HONORABLE FRANK A. RUSSELL, CIRCUIT JUDGE, ON THE 14TH DAY OF FEBRUARY, 1995, IN ALCORN COUNTY, MISSISSIPPI.

**********

APPEARANCES:

Present and Representing the State of Mississippi:

HONORABLE JOHN R. YOUNG
District Attorney
Post Office Box 212
Corinth, Mississippi 38834

HONORABLE JAMES S. POUNDS
Assistant District Attorney
Post Office Box 212
Corinth, Mississippi 38834

Present and Representing the Defendant:

HONORABLE JOHN RONALD WINDSOR
Attorney at Law
Post Office Box 172
Corinth, Mississippi 38834-4960

HONORABLE TERRY L. WOOD
Attorney at Law
Post Office Box 1257
Corinth, Mississippi 38834

FILED
TIME 2:26 P.M.
JUL 31 1995
MARY FAYE GWIN
CIRCUIT CLERK
D.C.

THE COURT: Mr. Berryhill, you have indicated, through your attorneys, that you desire to enter a plea of guilty to a charge of simple murder as opposed to capital murder in Count I of this indictment. Before accepting your plea the law requires that I question you concerning your understanding of these proceedings, the charges against you and the consequences of your entry of a plea of guilty to this charge. Before I ask you these questions, I want you to raise your right hand and be sworn.

(THE DEFENDANT WAS SWORN BY THE COURT.)

THE COURT: Very well. You do have the right to refuse to answer any question that I may ask you. Also I want you to feel free to talk to your attorneys at any time that you deem it necessary before you respond to my question. If you don't understand my question, please advise me, please tell me and I will restate it, because you cannot give me a truthful answer to a question you don't understand.

EXAMINATION BY THE COURT:

Q. First of all, I want you to state your full and proper name into the record.

A. Anthony Mark Berryhill.

Q. Mr. Berryhill, are you presently under the influence of any intoxicating liquor, drug, or other

Q. Do you also understand that by pleading guilty, you are waiving or giving up the requirement that the State of Mississippi prove this charge and each element of this crime charged beyond a reasonable doubt?

A. Yes, sir.

Q. Do you also understand that by answering the Court's questions, you are waiving or giving up your right to remain silent? That if you went to trial you could not be forced, or compelled, or made to testify, or to make any statement whatsoever concerning this charge unless you voluntarily elected to do so? Do understand that?

A. Yes, sir.

Q. Do you also understand that by pleading guilty, you are waiving or giving up your constitutional right to confront and to cross-examine the witnesses who would appear and testify against you and also you are waiving your right to challenge the make-up of the grand jury that indicted you? Do you understand that?

A. Yes, sir.

Q. Do you also understand that if you proceeded on to trial, you would have the right to cause the process of this court to issue, that is subpoenas, requiring the attendance of witnesses of your choosing to assist you at a trial of this cause and those subpoenas would issue at no cost to you? Do you understand that?

A. Yes, sir.

Q. Do you further understand that if you went to trial all 12 jurors would have to agree that the State met its burden of proof, that is, proved your guilt beyond a

reasonable doubt before you could be convicted? In other words, it would take a unanimous verdict of the jury to convict you. Do you understand that?

A. Yes, sir.

Q. Do you also understand that if you went to trial and you were convicted you would have the right to appeal your case to the Mississippi Supreme Court, but by pleading guilty you are waiving or giving up your right to appeal your case to the Mississippi Supreme Court? Do you understand that?

A. Yes, sir.

Q. Let me make sure you understand the charge. The indictment alleges that in Prentiss County, Mississippi, on the 21st day of January, 1994, that you did willfully, unlawfully and feloniously and with deliberate design kill and murder Kathy D. Cummings, a human being. Do you understand that charge?

A. Yes, sir.

Q. Did you in fact commit that offense? Did you do it?

A. Yes, sir.

Q. Now you're indicted as an alleged habitual offender, the indictment contains the proper wording. Do you understand if this Court determines that you do qualify to be sentenced under the provisions of Section 99-19-81 of the Mississippi Code as a habitual offender that you shall be sentenced to life in the custody of the Mississippi Department of Corrections without parole, without reduction, without suspension, etc.? Do you understand

that?

A. Yes, sir.

Q. The indictment alleges with respect to the habitual offender portion thereof that you pled guilty in the Circuit Court of Prentiss County, Mississippi, in Cause Number 10,039, to burglary of a vehicle, Count I, and you were sentenced on the 19th of February of 1992 to serve a term of seven years in a facility to be designated by the Mississippi Department of Corrections; is that correct?

A. Yes, sir.

Q. Did you, in fact, plead guilty to that felony charge, and were you, in fact, sentenced on that date in that cause number to serve that term of years in the custody of the Mississippi Department of Corrections?

A. Yes, sir.

Q. It also alleges that you pled guilty in the Circuit Court of Prentiss County, Mississippi, in Cause Number 10,039, the same cause to a charge of grand larceny in Count II of that indictment and you were sentenced on the 19th of February, 1992, to serve a term of five years in a facility to be designated by the Mississippi Department of Corrections. Was that, in fact, what occurred? Did you plead guilty to that charge on that date, in that county and state, in that cause number and were you sentenced to serve five years in the custody of the Mississippi Department of Corrections?

A. Yes, sir.

Q. It further alleges that you, in the Circuit Court of Alcorn County, Mississippi, in Cause Number

11,917, pled guilty to a charge of third degree arson on the 19th day of February of 1992, and you were sentenced to serve a term of three years in a facility to be designated by the Mississippi Department of Corrections. Do you understand that charge?

A. Yes, sir.

Q. Is it correct?

A. Yes, sir.

Q. It further alleges that you, Anthony Mark Berryhill, pled guilty in the Circuit Court of Marshall County, Mississippi, Cause Number 8,955, to a charge of grand larceny. You were sentenced on the 26th day of August, 1992, to serve a term of five years in a facility to be determined by the Mississippi Department of Corrections. Do you understand that allegation?

A. Yes, sir.

Q. Is it true and correct?

A. Yes, sir.

THE COURT: The Court determines then that you have met the requirements to qualify for sentencing under the provisions of Section 99-19-81 of the Mississippi Code of 1972 as amended, finding that you have previously, before today's date and before the alleged date of the crime to which you are offering your plea, been convicted four times and that at least two or more of those convictions arose out of separate incidents and that you received sentences in excess of 1 year in the custody of

the Mississippi Department of Corrections on each. Were any of those sentences suspended before you actually went to serve your time?

MR. WINDSOR: Your Honor, it was a combined plea agreement, as I understand it from the Defendant, among the three counties and that a certain number of years in the Alcorn/Prentiss County cases were retired to the file and two years, I believe, of the Marshall County charge was suspended. He actually did -- went to the penitentiary on those charges.

THE COURT: Very well.

MR. POUNDS: That's not correct, Your Honor. If I may address the Court?

THE COURT: Yes, sir.

MR. POUNDS: Cause Number 10,039, as is set forth in the indictment, the Defendant, Mark Berryhill, was given a seven year sentence in Count I. In Count II, Your Honor, the Defendant, Mark Berryhill, was given a five year sentence, and that sentence was stacked or run consecutive, on top, Your Honor, and suspended. But it was not run concurrent, it was stacked and the Marshall County case, Your Honor, was run concurrent and he got three years there in Cause Number 8,955, and then the Alcorn County case, 11,917, Your Honor, he was ordered to serve a term of three years in the

Department of Corrections, and it was run consecutive with Count I and consecutive with Count II in Prentiss County, Your Honor. That cause was also stacked on top and suspended.

THE COURT: Very well. The Court finds that you have met all of the requirements as set forth by the statute, Section 99-19-81, to be sentenced as a habitual offender. As to you attorneys representing Mr. Berryhill, have you discussed this charge carefully with your client, advised him of his constitutional rights and the consequences of his entry of a plea of guilty to this charge? Mr. Windsor?

MR. WINDSOR: Yes, sir.

THE COURT: Mr. Wood?

MR. WOOD: Yes, Your Honor.

THE COURT: Do you feel that this Defendant, your client, understands your advice and is entering his plea freely and voluntarily? Mr. Windsor?

MR. WINDSOR: Yes, sir, I do.

THE COURT: Mr. Wood?

MR. WOOD: Yes, Your Honor.

Q. Mr. Berryhill, are you satisfied with the legal services and advice of your attorneys?

A. Yes, sir.

Q. Do you feel that your attorneys have properly advised you before entering your plea and properly represented your best interest in your case?

A. Yes, sir.

Q. Do you know of anything that you desire to complain about your attorneys' representation of you? Any matter whatsoever?

A. None at all.

Q. You are completely satisfied?

A. Yes, sir.

Q. Very well. Mr. Berryhill, do you plead guilty or not guilty to this charge of murder as a habitual offender under the provisions of Section 99-19-81?

A. I plead guilty.

THE COURT: The Court finds that this Defendant has knowingly, understandingly, freely and voluntarily entered his plea of guilty to this charge, that there is factual basis for such plea and the plea of guilty is hereby accepted by the Court and the Court adjudges you guilty thereon, Mr. Berryhill. Yes, sir?

MR. YOUNG: Your Honor, I don't mean to interrupt, and I may have not been listening. Did you advise him of the minimum and maximum sentence he could receive for this?

THE COURT: Yes, sir. The minimum and maximum is the same, life without parole, as I indicated earlier. Do you understand that, Mr. Berryhill?

THE DEFENDANT: Yes, sir.

THE COURT: Yes, sir. Anything that you

desire to state to the Court before I impose sentence, Mr. Berryhill?

THE DEFENDANT: Yes, sir.

THE COURT: I will hear you.

THE DEFENDANT. I would like to apologize for what happened. I'm sorry for what happened. I wish I could take it all back. If I could I would. That's all I have to say.

THE COURT: Very well. Mr. Windsor, anything that you want to add?

MR. WINDSOR: Nothing further, Your Honor.

THE COURT: Mr. Wood?

MR. WOOD: No, Your Honor.

THE COURT: Mr. Berryhill, there is no excuse, or explanation that you can make, nothing you can do whatsoever to undo your terrible deed. No amount of money in the world can replace the victim, nothing whatsoever that this Court could do or you could do to correct a horrible situation that has been allowed to develop because, probably, in my opinion, your temper and your habits. You have been in trouble for years, committing crimes in several counties here in North Mississippi and you ultimately, back in January of 1994 committed probably the worse crime known to man, murder. Now, this Court is obliged to apply the law as this Court understands it. I don't like to see any criminal not face the music, whether it be

death or whatever. But I am obliged and obligated under my oath to see that if you are convicted, you are convicted -- and not only convicted, indicted, tried and convicted legally and fairly. The Court has been called upon to rule on a motion in this particular case that was not pleasant, but I did what I thought was legally correct. I am not in a popularity contest. I am obliged to apply the law and that's what I have done. You are a fortunate young man in one respect that you aren't facing death. However, on the other hand, you may not be so fortunate, because I don't know which is the better of the two choices, death or life without the hope of parole. The Court has no alternative but to impose one sentence on you, Mr. Berryhill. That is, the Court hereby sentences you to serve a term of life in the custody of the Mississippi Department of Corrections at a facility to be designated by that department. That sentence shall not be reduced, shall not be suspended. You shall not be eligible for parole or probation. All in accordance with the provisions of Section 99-19-81 of the Mississippi Code. It is the sentence of this Court that you die in the custody of the Mississippi Department of Corrections. Do you have any questions?

THE DEFENDANT: No, sir.

THE COURT: You will be in the custody of the Sheriff of Prentiss County, Mississippi, to await transportation to a facility to be designated by the Mississippi Department of Corrections. All right. Have a seat at counsel table. The sheriff is there to transport you. Anything further by the Defendant?

MR. WINDSOR: No, Your Honor.

THE COURT: By the State?

MR. YOUNG: Your Honor, the only thing we have is that feeling aggrieved by the previous ruling of the Court taking out the death penalty. We would advise the Court that we do intend or ask leave of the Court to perfect and file our appeal to the Mississippi Supreme Court to rule on that issue.

THE COURT: Very well. You are certainly entitled to do so and I welcome you doing the same if the law allows it. Okay. The Court will be in recess for about five minutes, and then I'll see the jury.

(RECESS)

COURT REPORTER'S CERTIFICATE

STATE OF MISSISSIPPI

COUNTY OF LEE

I, Regina D. Russell, Official Court Reporter for the First Judicial District, State of Mississippi, do hereby certify that to the best of my skill and ability I have reported the proceedings had and done in the guilty plea and sentencing in the case of STATE OF MISSISSIPPI VERSUS ANTHONY MARK BERRYHILL, being No. CR94-352 on the docket of the Circuit Court of the First Judicial District of Lee County, Mississippi, and that the foregoing 13 pages contain a true, full and correct transcript of my stenographic notes and tape taken in said proceedings.

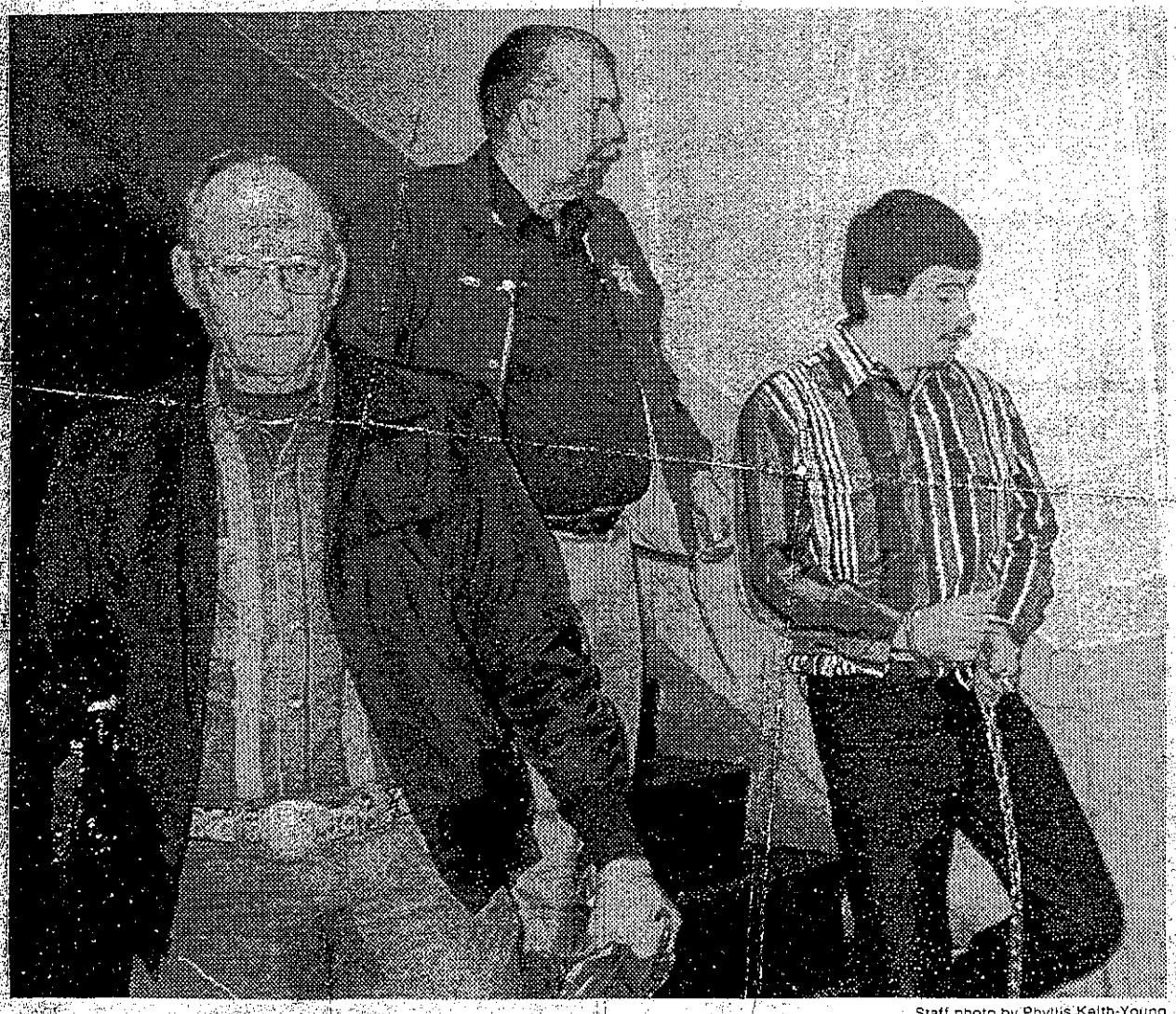
I do further certify that my certificate annexed hereto applies only to the original and certified transcript. The undersigned assumes no responsibility for the accuracy of any reproduced copies not made under my control or direction.

This the 30th day of July, 1995.

REGINA D. RUSSELL

Official Court Reporter

# Rienzi murder case ends on technicality



Staff photo by Phyllis Keith-Young

Above, a shackled Anthony Mark Berryhill leaves the Alcorn County Courthouse. Behind him is Prentiss County Deputy John Moore, foreground, Prentiss County Reserve Milton Bishop.

## No death penalty for Berryhill

BY PHYLLIS KEITH-YOUNG
Staff Writer

A ruling Tuesday by Circuit Court Judge Frank Russell may have saved Anthony Mark Berryhill from facing the death penalty under charges of capital murder, but in accordance with a life sentence as a habitual criminal, 27-year-old Berryhill will still spend the rest of his life in custody of the Mississippi Department of Corrections after entering a plea of guilty to a charge of murder.

The former Prentiss County resident was scheduled to stand trial in Alcorn County before a Lee County jury this week in connection with the Jan. 21, 1994 shooting death of his former girlfriend, 22-year-old Cathy D. Cummings of Rienzi. However, in court action Tuesday, appointed defense attorneys, Ronald Windsor and Terry Wood entered a motion prior to the start of the trial to have the charges of capital murder against Berryhill quashed due to a technicality in the wording of the indictment.

*'You committed the worst crime known to man.'*

**FRANK RUSSELL, CIRCUIT JUDGE**

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Citing that the indictment was not properly worded because it did not specify the underlying felony was burglary, Windsor and Woods made the request to Russell, who approved the motion after a recess for lunch.

"Actually the motion had been filed in May of last year and we brought it up a couple of other times and it just laid there, so I don't know what happened," Windsor commented after court. "The judge ruled what we think is proper law and what the law in the state of Mississippi is."

District Attorney Johnny Young and Assistant District Attorney Jim Pounds fought the motion and said they will appeal Russell's decision.

"The judge ruled that the indictment did not contain the right elements and our opinions are contrary," Young said. "We disagree with it and I will appeal it. The judge ruled the opposite of what the law said. We drew up the indictment the way the Supreme Court has approved before. The Supreme Court has never ruled the way that Judge Russell ruled today."

Backing his statements about Russell's action, Young provided the media with a 1984 State Supreme Court ruling where the

See BERRYHILL, Page 3A

# BERRYHILL

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court found that capital murder is the charge, not burglary and that the naming of the underlying felony of burglary or breaking and entering, is sufficient without specifying the reasons for the burglary.

"We are contemplating that what he done was improper," Young continued. "I felt like the jury should have been the one to decide if Berryhill should get life without parole."

Young said had the case been heard by a jury, the state was going to show that Berryhill broke into a residence to assault Cummings.

At the time of Cummings' death Prentiss County Sheriff's Department Investigator Randy Tolar reported that the incident took place at approximately 3:45 p.m. at the residence of a Prentiss County woman who babysat the couple's toddler son.

Tolar said Berryhill and Cummings both appeared at the residence about the same time when the two became involved in an altercation as Berryhill tried to take the child away from the house. As a result of the altercation, Berryhill broke into the residence and shot Cummings in the head, chest and leg with a 9 mm pistol. The brutal shooting was witnessed by several other children who were also staying at the residence. After the shooting, Cummings was transported to the Baptist Hospital in Booneville and then flown to the Elvis Presley Trauma Center in Memphis where she died early the next morning.

Berryhill, who had been released from prison approximately three months before the shooting, was arrested after Cummings death at his residence in Southaven on charges of capital murder, burglary of an occupied dwelling and possession of a firearm by a convicted felon.

Defense attorneys were able to have the firearm charge from the trial citing that it would be prejudicial for the jury to know that Berryhill was a convicted felon. Charges of kidnapping were severed by the state due to technical reasons, but both of the charges can still be tried.

At 2:15 p.m. Tuesday Berryhill admitted to Cummings death as a habitual criminal as family members of Cummings' cried openly.

"I would like to apologize for what happened. I am sorry for what happened," Berryhill said. "I wish I could take it all back and undo it. I wouldn't do it over again."

After court proceedings, Windsor said the shooting was done "in the heat of passion" and that his client was willing to plea guilty to murder, but not capital murder.

"He was relieved (with the judge's ruling)," Windsor said. "I don't think it met the threshold of capital murder. There are certain things that perhaps deserved the death penalty — the serial killers and when they kill little kids — to me is much more atrocious. This is a fit of passion. The proof would have shown that they sort of struggled at the door and he was trying to see his child and she was threatening that she was going to send him back to penitentary and he got mad and pulled his pistol and shot her."

Prior to sentencing Berryhill, Russell admonished the defendant.

"There is no excuse or explanation that you could do whatsoever to undo your terrible deed," Russell said. "Your temper and your habits are bad. You have been in trouble for years committing crimes in several counties, (but) in January 1994 you committed the worst crime known to man."

Russell then told Berryhill that he would spend the rest of his life in prison where he would die. He added that as a habitual offender the minimum and maximum sentence is life without parole, no reduction of his sentence and no suspended jail time.

Elements qualifying Berryhill as a habitual criminal to which he entered pleas of guilty included: a burglary of a vehicle, two grand larcenies and a charge of third degree arson.

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