IN The Supreme Court OF Mississippi

COPY

Donald Edwards — Petitioner

-VS-

State OF Mississippi — Respondent

Cause NO. 2007-KA-0076
C-106-0230

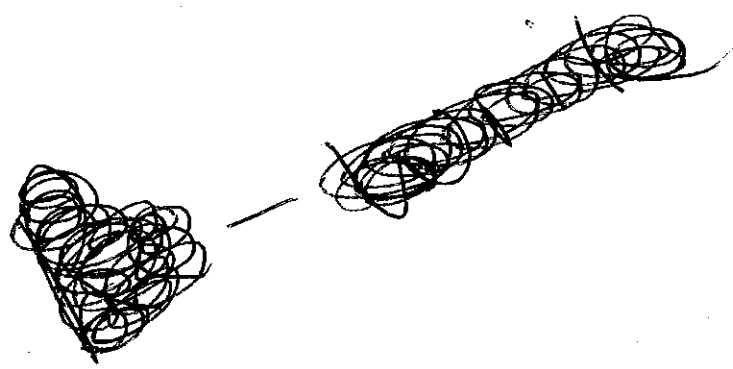
Date: 1-16-08

FILED
JAN 11 2008
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Brief of The Appellant

Come Now the Petition Donald Edwards Pro Se in Forma Pauperies in the above styled and number Cause Pursuant to the 5, 6 and 14 amendment to the United State Constiution and Art 3 Sec 14 Art 3. sec 16 and Art 27 OF the Mississippi Constiution and move this Court for an Appeal and in Support thereOF would Show the Following to writ:.

The Conviction and Sentence was inposed in Violation of the Constiution of the United State + Mississippi Respond to Forrest County Circuit Court Dimissal and to Show InEffective ASSistance OF Counsel.



IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI
TWELFTH JUDICIAL DISTRICT

DONALD RAY EDWARDS, M.D.O.C. #29647 — **PLAINTIFF**

VERSUS — **CAUSE NO. CI06-0230**

STATE OF MISSISSIPPI — **DEFENDANT**

FILED

MAY 2 9 2007

FORREST COUNTY CIRCUIT CLERK

OPINION AND ORDER

BEFORE THE COURT is Plaintiff's, Donald Ray Edwards (hereinafter "Edwards"), Petition for Writ of Habeas Corpus for Post-Conviction Relief which this Court is treating as a Motion for Post-Conviction Collateral Relief. The Court, having reviewed the complete file, all materials proffered by Edwards and all relevant law, finds that it is plainly evident that Edwards is not entitled to any relief. It is, therefore, **SUMMARILY DISMISSED**, pursuant to Miss. Code Ann. §99-39-11(2) (Rev. 2000) for the following reasons, to-wit:

Background

On January 30, 2006, Edwards executed a sworn Wavier of Indictment expressly waiving formal indictment for the crime of Burglary, a copy is hereby attached to this Opinion and Order. Also, on January 30, 2006, Edwards executed a sworn "Petition to Enter Plea of Guilty" wherein he stated that he wished to plead guilty to the crime of Burglary. The Petition also contained the following statement: "I desire to plead guilty to the charge of Burglary and request the Court to accept my plea of guilty to this charge or

A

EXHIBIT A-5

charges." On that same date, January 30, 2006, Edwards was sentenced to a term of seven (7) years in the custody of the Mississippi Department of Corrections, with said sentence to be served without the benefit of probation, parole or any form of early release, as required by Miss. Code Ann. §99-19-81 (1972).

Edwards now contends that the sentence imposed was in violation of the Constitution of the United States and the State of Mississippi. He states that the trial court cannot amend an indictment so as to change the charge and criminal statute made in the indictment to another crime, accept by the action of grand jury. Edwards whole sixty (60) page petition attacks his indictment.

Law and Analysis

Mississippi Code Annotated section 99-39-11(2) (Rev. 2000) states: "If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified." In support of his motion, Edwards only attached as exhibits a copy of his original indictment, Order of Conviction, Criminal Information making Edwards a habitual offender and his Order of Conviction. A guilty plea waives all non-jurisdictional rights or defects. *Anderson v. State*, 577 So.2d 390, 391 (Miss. 1991). Edwards has not offered any evidence via affidavits or transcripts to support any of his allegations that his rights were violated. Therefore, it is plainly evident that Edwards is not entitled to any relief.

However, this Court will address his issue of the indictment briefly.

> No person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or the military when in actual service, or by leave of court for misdemeanor in office *or where a defendant represented by counsel by sworn statement waives indictment*; but the legislature, in cases not punishable by death or by imprisonment in the penitentiary, may dispense with inquest of the grand jury, and may authorize prosecutions before justice court judges, or such other inferior court or courts as may be established, and the proceedings in such cases shall be regulated by law. Miss. Const. Art. III, § 27(1890) (emphasis added).

The law is settled on this point. It has long been the rule that the Mississippi Constitution requires an indictment before the prosecution for felonies unless one of the noted exceptions exist. *Quick v. State*, 569 So. 2d 1197, 1199 (Miss. 1990) (citing *State v. Sansome*, 133 Miss. 428, 97 So. 753 (1923)). The fact that Edwards had executed a Waiver of Indictment makes his allegations meritless.

IT IS THEREFORE ORDERED AND ADJUDGED that Plaintiff's, Donald Ray Edwards, Petition for Writ of Habeas Corpus which this Court is treating as a Motion for Post-Conviction Collateral Relief is hereby **SUMMARILY DISMISSED** pursuant to Miss. Code Ann. §99-39-11(2) (Rev. 2000).

IT IS FURTHER ORDERED AND ADJUDGED that the Forrest County Circuit Clerk's Office shall mail a copy of the Court's Order to Edwards by certified, first class U. S. Mail, return receipt requested.

SO ORDERED AND ADJUDGED this the 25th day of May, A. D., 2007.

CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

FILED

JAN 30 2006

VS.

CAUSE NO.: 06-024 CR

Donald Ray Edwards

Lou Ellen Adams
FORREST COUNTY CIRCUIT CLERK

WAIVER OF INDICTMENT

COMES NOW, Donald Ray Edwards, Defendant in the above styled and numbered matter, who having been by me first duly sworn, on his/her oath, presents and says the following, to-wit:

I.

That my full name is Donald Ray Edwards, and I am 43 years of age. (DOB: 11-20-62).

II.

That I understand I stand charged by Criminal Information dated 01-30-06, with the crime of Burglary, an Indictable offense; that said Criminal Information alleges said crime to have been committed on the 1-17-05.

III.

That I am represented by counsel, Honorable Guy Polk Pearson, a duly licensed and practicing Attorney of the State of Mississippi; that he/she has advised me of my rights in the premises; and that I freely and voluntarily executing this Waiver with his/her approval and consent, and upon his/her advice.

IV.

That I understand that I am entitled to have this matter presented to a lawfully constituted jury of this county for a determination of whether an Indictment should be returned against me herein; that I hereby expressly waive that right and agree to proceed by information on oath of the District Attorney, or his Assistant, instead of by Indictment.

V.

That I understand that I am waiving none of my constitutional rights other than as set forth herein, and specifically, only the right to be proceeded against by information rather than Indictment.

L Donald Edwards
DEFENDANT

SWORN TO AND SUBSCRIBED before me on this the 30 day of January A.D., 2006.

Lou Ellen Adams by:
Nickie Graham, DC
NOTARY PUBLIC

My Commission Expires:
1-6-08

APPROVED AND READ:

Attorney for Defendant

Supreme Court of Mississippi

~~Circuit Court of Forrest County Mississippi~~

~~Fourth Judicial District~~

Opinion and Order

The Court Summarily Dismissed Motion For Post-Conviction Collateral Relief. The Court dismiss on the Ground:

1) Executed a Sworn Wavier of Indictment expressly waiving Formal indictment For the Crime of Burglary.

the Court did not See me Sign the Waive. Nor did I Donald Edwards Sign Waive of Indictment in the Present of notary Public. Nor did I Sign in the Persent of My Attorney. It was the investigater For the Forrest County Public Defender officer. MR. Derick Minner.

For My Attorney to have Sworn to her Siging that Waiver was and is A lie and A [redacted] Violation

By MR Edwards been trick into Signing that Waiver don't mean that he was waiving the Right NOT to be indicted. MR Edwards could have Just wanted to waived his Right to A trial by Jury. or Self —— incrimination.

Q How Could A Person be indicted For one Charge and Plea Guilty to another without been Re-indicted ?

That's the Case here MR Edwards was indicted On and For the Charge OF Robbery and Pleaed Guilty to Burglary and was never indicted For Burglary. Two Separate Crimes.

[redacted] The Reason the Circuit Court Dismiss Petition Post-Conviction: IS because Sign waiver of indictment on the Day of Signing Plea Bargin, MS Gay Polk-Payton Head Counse of the Forrest County Public Defender's office. "Was Not!" their nor was any other ASSistant Counsel. It was the investigater for the Forrest County Public Defender's OFFice. MR. Derick Minn who told me "Just to Sign these Papers" he didnt explain any thing. Really it was MY Counsel Job to explain and make Sure I Donald Edwards Sign the Papers?.

In exhibit-E Page 1. MS Payton stated that She had MR Jone MR Minor, + MS. maniscalo Present with her going over my case. She never Say that all of them was Present Signing the Plea Bargin. [HN6] It is an indictment by a grand Jury that give a Court Jurisdiction of a Felony charge and without an indictment the Court has no Jurisdiction to Proceed in a Felony case. Petition was indicted for Robbery: But was Sentence For burglary.

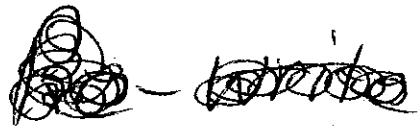
Lobbery is not! a lesser included offense of Burglary!. eally their wasnt ever a Plea Bargin?.

Guilty Plea operates to waive the defendants Privilege against Self ncrimination. the Right to confront + Cross-examine the Prosecution's witnesses. the Right to a Jury trial. [redacted] to Charge an riminal offense an essential element of a Criminal offense is no waived and a Guilty Plea dose not waive Subject matter Jurisdictic

One of the Reason that the Circuit Court and The D.A got a Sworn Guilty Plea is; Defense Counsel didnt want to go to Trial. (2) In order For the Plea bargaining to be accepted their must be an open Confession For the record in Court. (3) The only other Choice was life or less Tim Just like the Circuit Court Sentenced + Convicted Me to 7 Years, they also was going to Give me life if I would'nt have went to trial with the Defense Counsel I had.

The Black Law Dictionary defines an "Information" as; An accusation in the nature of an Indictment; from which it differs only in being Presented by a Competent Public officer on his oath of office, instead of Grand Jury on their oath a written accusation by a Public Prosecutor without the intervention of a Grand Jury.

The Forrest County Court, The Prosecuting Attorney along with my Defendant's Counsel, Just wanted a Fast way to Sentence + Convicte me. All (3) Knew that Burglary is not a lesser included offense of Simple Robbery, therefore I Should have been Re-Indicted, OR been Charge with A "Misdemeanor" "Shoplifting".



An indictment is merely an accusation or Charge OF Crime.... It is the Formal Presentation of the Charge against the accused.

State Constitution mandates that waiver of Indictment be in writing, that it be Signed by defendant, and that defendant Sign it in open Court McKinney's Const. Art. 1 People v. Torres, 175 Misc. 2d 903 671 N.Y.S. 2d 922 (Sup 1998)

The Constitution.....

Said: It may be noted in passing that the language OF the Pertinent Part of the amendment is that:

'NO Person Shall be held to answer' -- Not that 'NO Court Shall hold any Person to answer', as would likely have been the language had the Provision been intended to be a limitation on the Jurisdiction OR the Power of the Court instead of a Privilege For the Protection OF the individual.

Defendant had no Right under Statute to waive Prosecution by indictment and Plead guilty to information Charging Class A Felony of Criminal Burglary [redacted]. and Plea to information was therefore nullity and Jeopardy did not attach so as to bar Subsequent Prosecution for same offense. People v. Alfano 75 A.D. 2d 584, 426 N.Y.S. 2d 572 (2d Dept 1980)

[redacted]

The Reason why the Forrest County D.A didnt Ask For a Re-Indicted is: [redacted]

1, He Knew that he Could get the Forrest County Public Defender officer to trick Me MR Edwards into Signing A waiver of Indictement and to Plea Guilty to A Crime he never did.

2. He Knew that the Grand Jury would not Return A indictement For Burglary after getten them to indicted MR Edwards For Robbery.

3. He Knew that trying to Prove Burglary wasnt going to work. because I did not do A Burglary nor Robbery.
It was A misdemeanor Shoplifting.

4. Provides that once a defendant Charged with A noncapital Felony offense, in A Criminal Proceeding Commenced by Complaint. informs the trial Court that he intends to Plead guilty. the district Attorney will File an information which Shall be made Under Oath of the district Attorney OR A witness, and shall accuse the defendant with the Same specificity as Required in An indictment with the Same offense is Charged.

5. I was told that the indictement mean that the D.A have enough evidence to Conviction me. MS Gay Payton MY Counsel told me that I Knew nothing about A

Argument

INEffective Assistance of Counsel

From the Frist Day that Peitition Donald Ray Edwards was arrested his Counsel MS. Gay L. Polk- Payton PD. Showed ineffective assistance of Counsel:

1) MR Edwards was arrested on 7-18-05. He didn't see an Counsel until 9-21-05 then it was assistant P.D See Exhibit -(B)- Page(1.) Complaint(1).

2) MR Edwards wrote to the Mississippi Bar numerous of time trying to get MS. Gay Payton to Communicate with him. She is the head Counsel for the Public - Defender OFFice of Forrest County. See Exhibit's A, B, C, D, and E.

3) MS Payton Coerced MR Edwards into Entry a Plea of Guilty For a Crime he did not Committe! that was UNProFessional and UNEthical of MS. Payton. When a defendant is RePeesented by Counsel in the Plea Process and Pleads Guilty on the Advice OF his Counsel the Voluntariness of the Plea depends on whether "Counsel Advice" was within the Range of Competence demanded of Attorneys in Criminal Case. MS Payton Use Fear tacted. Hill v Lockhart 474 us 52 [1253] L Ed 106 S Ct 366 54 US L W 4006 4007 (1985) Quoting MC Mann V Richardson 397 us 759 90 Ct 1441 1449 25 L Ed 2d 763 (1970) IN Hill the Court stated:

Next Page Please

that the Standard For determining the EFFectiveness OF Counsel in a Guilty Plea Proceeding is the two-Prong test set Forth by the Court in Strickland v. Wash. 466 US 668 104 S Ct 2052. 80 L Ed 2d 674 (1984).

IF MS Payton wouldn't have use Fear tacted, Frightened testimony: Such as "She Can't win the Case", "The Court is going to give You MR. Edward A life Sentenced," "we dont need to go to trial" "YOU are A Habitual OFFender" "The Indictement is enough to Convicted YOU"

MS. Payton Should have not! let me waive My Right's to be Indicted For Burglary When She new that; I was al[redacted] Ready indicted For Robbery.

The Crime OF Burglary is A Indicted Crime, Not! A Misdemeanor. theirFore I. MR Edwards Should have been Re-Indicted.

The Fact that the Forrest County Public Defender OFFice, help, [redacted] work With the Forrest Coundty District Attorney OFFice Convicted Peittion For A Crime he never Committed and Sentence him For a Charge he never been Indicted by the Grand Jury. Should entitled him to habeas CorPus Relief: His DisCharge From M.D.O.C. A.S.P...

IN representing a Criminal defendant, Counsel owes the Client a duty of loyalty, A duty to avoid conflicts of interest, a duty to advocate the defendant's Cause, a duty to Consult with the defendant on important decisions, A duty to Keep defendant informed of important developments in the Course of the Prosecution and a duty to bring to bear Such Skill and Knowledge as will render the trial a Reliable adversarial testing Process.

MS. Gay Payton did none of the above. She Just wanted me sentenced & Convicted. So She Can move on to the Next defendant.

MS Gay Payton told me that the D.A and that the indictement itself was an enough to Conviction me. Misslead Defendant.

Exhibit - A

THE MISSISSIPPI BAR
Post Office Box 2168
Jackson, Mississippi 39225-2168
Telephone (601) 948-4471
Fax (601) 355-8635
E-Mail info@msbar.org
Website www.msbar.org

October 31, 2005

Mr. Donald Edwards
Forrest County Regional Jail
316 Forrest Street
Hattiesburg, MS 39401

Dear Mr. Edwards:

Your Request for Assistance has been received and carefully reviewed by the Consumer Assistance Program of The Mississippi Bar. For your information, merely sending a letter or request to The Mississippi Bar does not mean that you have filed a bar complaint.

After examining your information, it is the determination of the Consumer Assistance Program that this matter is a communication situation between a client and an attorney. By copy of this letter to Ms. Gay Polk-Payton and/or Mr. William Ferrell, I am requesting that your attorney contact you immediately and provide you in writing with any information you may require regarding your case.

If I do not hear from you regarding this matter within 30 days from the date of this letter, then I will consider this matter to be concluded as far as the Consumer Assistance Program is concerned, and I will permanently close this file and the contents will be destroyed.

If you have any questions regarding this letter, please do not hesitate to contact me on my direct line at (601) 948-2344.

Sincerely,

ROBERT GLEN WADDLE, *Director*
Consumer Assistance Program

RGW
cc: William Ferrell, Esq.
Gay Polk-Payton, Esq.

YOUR DOCUMENTS ARE LOCATED IN FILE NO. 05-1276 OF THE CONSUMER ASSISTANCE PROGRAM FILES

Rec. 11-21-05

Exhibit - B

THE MISSISSIPPI BAR

Post Office Box 2168
Jackson, Mississippi 39225-2168
Telephone (601) 948-4471
Fax (601) 355-8635
E-Mail info@msbar.org
Website www.msbar.org

November 17, 2005

Mr. Donald Edwards
Forrest County Regional Jail
316 Forrest Street
Hattiesburg, MS 39401

Dear Mr. Edwards:

Your bar "home made" complaint form has been received and reviewed. In response to your complaint form, the Office of the General Counsel of The Mississippi Bar does not accept copies of bar complaint forms or "home made" forms for filing. Your created form has been referred to the Consumer Assistance Program for further action.

In response to your information, it appears that you are seeking either one or both of the attorneys previously listed to communicate with you regarding your case. By copy of this letter, I am specifically requesting that Ms. Gay Polk-Payton or Mr. William Ferrell contact you regarding this matter promptly. If neither attorney communicates with you within 7 business days, contact my office immediately for further action.

If I do not hear from you regarding this matter within 30 days from the date of this letter, then I will consider this matter to be concluded as far as the Consumer Assistance Program is concerned, and I will permanently close this file and the contents will be destroyed.

If you have any questions regarding this letter, please do not hesitate to contact me on my direct line at (601) 948-2344.

Sincerely,

ROBERT GLEN WADDLE, *Director*
Consumer Assistance Program

RGW
cc: Gay Polk-Payton, Esq.
William Ferrell, Esq.

YOUR DOCUMENTS ARE LOCATED IN FILE NO. 05-1276 OF THE CONSUMER ASSISTANCE PROGRAM FILES

Re-Spond
To Exhibit - B

The Office of the

Forrest County Public Defender
Gay L. Polk-Payton
POST OFFICE BOX 849
HATTIESBURG, MS 39403-0849
Phone 601-545-6122
Fax 601-544-2182

Jonathan Farris
Assistant Public Defender

William Ferrell
Assistant Public Defender

November 21, 2005

Mr. Donald Edwards
316 Forrest Street
Hattiesburg, Mississippi 39401

Dear Mr. Edwards:

Please be advised that I have read your letters and I understand your impatience with the system. However, the DA's office has not given me any indication that they will reduce the offer to resolve your case. We have provided you with your discovery packet and your current offer is still 15 years with 10 years to serve. If the offer changes, I will definitely let you know, but right now, it remains the same.

I have filed a motion to reduce your bond and it will be heard as soon as the Court allows. However, because your bond is $25,000 and you are indicted as a habitual offender under §99-19-81, it is unlikely that he will reduce your bond.

Take care and be blessed.

Sincerely,

Gay L. Polk-Payton

GLPP/s

111

Exhibit — C

THE MISSISSIPPI BAR

Post Office Box 2168
Jackson, Mississippi 39225-2168
Telephone (601) 948-4471
Fax (601) 355-8635
E-Mail info@msbar.org
Website www.msbar.org

January 6, 2006

Mr. Donald Edwards
Forrest County Regional Jail
316 Forrest Street
Hattiesburg, MS 39401732

Dear Mr. Edwards:

Your Request for Assistance has been received and carefully reviewed by the Consumer Assistance Program of The Mississippi Bar. For your information, merely sending a letter or request to The Mississippi Bar does not mean that you have filed a bar complaint.

After examining your information, it is the determination of the Consumer Assistance Program that this matter is a communication situation between a client and an attorney. By copy of this letter to Mr. William Ferrell and Ms. Gay Polk-Payton, I am requesting that your attorney contact you immediately and provide you in writing with any information you may require regarding your case.

If I do not hear from you regarding this matter within 30 days from the date of this letter, then I will consider this matter to be concluded as far as the Consumer Assistance Program is concerned, and I will permanently close this file and the contents will be destroyed.

If you have any questions regarding this letter, please do not hesitate to contact me on my direct line at (601) 948-2344.

Sincerely,

ROBERT GLEN WADDLE, *Director*
Consumer Assistance Program

RGW
cc: William Ferrell, Esq.
Gay Polk-Payton, Esq.

YOUR DOCUMENTS ARE LOCATED IN FILE NO. 06-12 OF THE CONSUMER ASSISTANCE PROGRAM FILES

Exhibit C

REQUEST FOR ASSISTANCE

The Mississippi Bar
Consumer Assistance Program

Post Office Box 2168
Jackson, Mississippi 39225-2168
(601) 948-4471

06-12
1-20-06

1. My Name: Donald Edwards Daytime Telephone Number: N/A
2. My Address: 316 Forrest St
Hattiesburg, MS. 39401
3. I wish The Mississippi Bar to consider this request for assistance with regard to the following lawyer(s):
Name: Gay L. Polk-Payton, + MR William Ferrell Telephone Number: (601) 545-6122
Address: post office Box 849 Forrest County Public Defender office
Hattiesburg, MS. 39403-0849
4. Is this your own lawyer? Yes X No ____[1]: (see below)
5. Have you talked with the lawyer(s) named about the subject of this request? Yes ____ No ____[2] (see below) Not to the Fullest
6. I request assistance with regard to this lawyer because (Provide detailed statement of facts, including dates and places.):
This Designated Complaint area is not large enough.
Please see and Consider the attached pages.
7. I want the following assistance:
I want a Fair and Just Investigation. Represented and prepared the properly way a case should. MS, payton and william Ferrell File a motion For Dismissal on the grounds of insufficient evidence that was obtained through the Hattiesburg Police Department before my Trial Date, so I can get on with my life, and out of this Jail. 3-13-06 Trial Date. (See Attached page)
8. Have you requested assistance or complained about this lawyer before? Yes X No ___ If "yes," please tell when and why.
mplaint #1 9-21-05 with MR Ferrell. 11-1-05 MS Payton Complaint #4 (See Attached Page)
9. Are you willing to give evidence under oath about this matter? Yes ✓ No ___ If "no," please explain why.
10. Has any person lost any money, property, or other thing of value as a result of the events described above?
Yes ____ No X If "yes," please explain. ____

Donald Edwards 1-16-06
Signature

Jason T. Lee
Witness (This form DOES NOT have to be notarized.)

Donald Edwards 1-16-06
Print Name

Please use additional sheets to complete any numbered paragraph if the space provided is not sufficient.

NOTICE: I understand that it may be necessary to act promptly to protect my rights and that commencement of a civil action may be required to preserve my rights. I acknowledge my understanding that the completion of this form does not constitute commencement of a civil action and that The Mississippi Bar will not commence any such action. I acknowledge it is my responsibility to seek and obtain any necessary legal advice with respect to this matter.

NOTICE: I UNDERSTAND THAT INFORMATION I SEND MAY BE USED TO ASSIST ME BUT MAY NOT BE CONFIDENTIAL.

[1] If you are submitting this Request for Assistance on behalf of or for another person, please give that person's name, address and daytime telephone number and explain why you are acting for that person.

[2] If not, please tell us why not. If yes, please provide the facts in No. 6 & 7.

EX-[redacted] C

1-16-06

(2)

I'm filing this complaint on the behalf of Im not been properly represented to the fullest by my attorney or from the Forrest County public Defender office. Gay L. polk-payton, + William Ferrell.

omplaint (1), I was arrested on 7-18-05 and Charge with simple Robbery. On 9-21-05 Mr William Ferrel Call me down to see him about my case, and to show me the plea offering that the D.A. Office offer me. if I plead guilty. At the same time he told me that he was going to hold off on my preleminary hearing. Mr. Ferrell never Contacted me back, so I never did get to have my preleminary.

omplaint (2), The Investigater for the Forrest County public Defender Office, never investigated my Case, nor did he ever asked me; Donald Edwards what happen, or took a statement from me, Donald Edwards.
P.D Investigater Derick Minner, should have did his job, that way the defense Attorney would be better prepared. If Mr, Minner would have done a properly investigation, he would have seen that Ms. Lois Hawley (victim) statement about her hitting the suspect, was not right, and why wasn't the suspect Checked for

omplaint (3) On 7-29-05 Detective Franklin Lee #20164 talked with the Forrest County public Defenders Office to set up a interview with Donald Edwards, but was unable to do so, and the F.C.P.D.O. never did Contacte Detective Lee back. wounder why didn't mr. Lee, ever get Contacted back?. here it is 6th months after mr. Lee tryed to Contacte the F.C.P.D.O.

↑7-29-05 + 1-16-06 ↑

omplaint (4) On 10-26-05 I Donald Edwards, was Indicted on the Charge of Simple Robbery, and On 11-1-05 I was set a trial date, I Donald Edwards, ask ms. payton could I see her after the trial setting was over, and she told me that she was Coming over to the Forrest County Jail to talk to me. here it is 1-16-06 and I haven't seen ms payton, or no one from the Forrest County public Defenders Office yet. I Donald Edwards, have requested to speak with ms payton on numerous of occassions. I went as far as writting the Mississippi Bar, and ms payton respond was with a letter. But I need to speak to ms payton face to face, so we can properly prepare my Chances of getten a fair trial. which is

↑3-13-06↑

omplaint (5) On 7-29-05 Detective Lee got a photo line up of me, Donald Edwards and four other black males closely resembling esch other. then Detective Lee took the

Ex-C

(4)

Part 2 of Complaint

(5), photo line up to (Ms Lois Hawley; the victim) Ms. Hawley picked; me Donald Edwards. my attorney; ms payton, me Donald Edwards, nor anyone from the F.C.P.D.O. was present for the photo line up, or to witness this line up. Me, Donald Edwards and the 4 others guys aren't the same age nor the same "WT".

I want following Assistance:

Fair and Just investigation, to be Represented and properly + [redacted] prepared my case the way it should be ms Payton and William Ferrell to file a motion for dismissal on the grounds of insufficient evidence that was obtained through the Hattiesburg Police Department. Before my trial date, so I can get on with my life and get out of this jailhouse. trial date 3-13-06

Thank you + God Bless.

Sincerely

Donald Edwards

1-16-06

Exhibit – D

THE MISSISSIPPI BAR

Post Office Box 2168
Jackson, Mississippi 39225-2168
Telephone (601) 948-4471
Fax (601) 355-8635
E-Mail info@msbar.org
Website www.msbar.org

January 20, 2006

Mr. Donald Edwards
Forrest County Regional Jail
316 Forrest Street
Hattiesburg, MS 39401

Dear Mr. Edwards:

Your Request for Assistance has been received and reviewed. In response to your Request, I am mailing all of your original documents back to you. You previously demanded to file bar complaints against Mr. William Ferrell and Ms. Gay Polk-Payton. Bar complaint forms were sent to you on January 13, 2006. If you seek to file a complaint against the attorneys, ***you must follow the instructions in the brochure and on the complaint form***.

Nothing in any of the documents you have submitted to this office indicates in any way an ethical violation of the Rules of Professional Conduct. Your complaints appear to be extremely premature as you have not entered a guilty plea nor have you gone to trial. You have, however, been provided with the complaint forms to file. You should know that filing a bar complaint will not remove the attorneys from your case as only a Circuit Court Judge can assign another attorney to you. Further, filing a bar complaint will not, in any way, resolve your criminal case.

By copy of this letter, I am notifying Mr. William Ferrell and Ms. Gay Polk-Payton of your contact with this office.

If I do not hear from you regarding this matter within 30 days from the date of this letter, then I will consider this matter to be concluded as far as the Consumer Assistance Program is concerned, and I will permanently close this file and the contents will be destroyed.

If you have any questions regarding this letter, please do not hesitate to contact me on my direct line at (601) 948-2344.

Sincerely,

ROBERT GLEN WADDLE, *Director*
Consumer Assistance Program

RGW
cc: William Ferrell, Esq; Gay Polk-Payton, Esq.
YOUR DOCUMENTS ARE LOCATED IN FILE NO. 06-12
OF THE CONSUMER ASSISTANCE PROGRAM FILES

Exhibit — E

THE MISSISSIPPI BAR

Office of General Counsel
Adam B. Kilgore
General Counsel
Gwen G. Combs
Deputy General Counsel
James R. Clark
Assistant General Counsel

Post Office Box 2168
Jackson, Mississippi 39225-2168
Telephone: (601) 948-0568
Fax: (601) 355-8635
E-mail: msbar@msbar.org
Website: www.msbar.org

March 15, 2006

Gay Polk-Payton
Post Office Box 849
Hattiesburg, Mississippi 39403-0949

Re: Docket No.: 05-282-2

Dear Mr. Polk-Payton:

Enclosed is a copy of the complaint filed against you by **Donald Edwards**.

Copies of such complaint are being forwarded to a subcommittee of the Committee on Professional Responsibility of The Mississippi Bar for their initial review.

Because of the nature of this complaint and the allegations contained therein, no response is requested or due from you at this time. You will be notified within twenty (20) days if the full committee desires your response to the complaint. However, should you desire to respond prior to being requested to do same, you may submit your response to this office along with any supporting documentation for the subcommittee's consideration.

Again, no response is due from you at this time. You will be notified if a response is requested. Should you have any questions with regard to the contents of this letter, please do not hesitate to contact me.

Sincerely,

Jim Clark
Deputy General Counsel

JRC/sl
Enclosures
xc: Chairman of the Committee on Professional Responsibility
Sub-Committee B Professional Responsibility
Complainant

Exhibit – E

The Office of the

Forrest County Public Defender
Gay L. Polk-Payton
POST OFFICE BOX 849
HATTIESBURG, MS 39403-0849
Phone 601-545-6122
Fax 601-544-2182

Jonathan Farris
Assistant Public Defender

William Ferrell
Assistant Public Defender

February 15, 2006

Mr. Adam Kilgore
General Counsel
Mississippi Bar Association
P.O. Box 2168
Jackson, Mississippi 39225-2168

RE: Docket Number: 05-236-2

Dear Mr. Kilgore:

Thank you for your letter of February 10, 2006 regarding Donald Ray Edwards.

When Mr. Edwards was arrested, he was charged with robbery because the victim in the case said that the doors of the store were locked and she was outside near the gas pumps when Mr. Edwards entered the store. She further alleged that there was a confrontation between the two of them when he was in the process of stealing beer from the store and for that reason, he was charged with Robbery. She identified him from a line up and recalled portions of his tag number, leading to his arrest. I have included a copy of his packet of discovery for your review and marked it as Exhibit "A" to this letter. However, because she said that she did not think that he wanted to hurt her and because she said the door was locked when he entered it, I was able to negotiate with the Forrest/Perry County District Attorney's Office to have the charge reduced to Burglary. We proceeded on Criminal Information (Exhibit "B") and the DA entered an order passing the Robbery Indictment to the Inactive Files. I have attached a copy of the Circuit Court Docket showing these event sequences and marked them as Exhibits "C" and "D."

Mr. Edwards is not being truthful when alleges that there was no one present to witness me going over his case with him. To the contrary, the Honorable Rex Jones, my investigator (Derick Minor) and my intern (Christina Maniscalco) were present when I discussed this case with Mr. Edwards and at no time did I coerce him into lying. I did what I do each time I prepare a client for a plea and I explain to them the way the judge will ask the questions because sometimes, they do not understand the questions the way that they are posed to them. E.g. "Do you realize you are waiving any right to object to the composition of the grand jury that indicted you or the petit jury that would try you?" Most of my clients don't know what a petit jury is until I explain it to them.

NO where we all talked about my charge been reduced to Burglary

Exhibit - E

Mr. Edwards was indicted as a habitual offender under §99-19-81 for robbery and was facing 15 years day for day. I negotiated a deal on a lesser charge so that he would get less time. Both the Robbery or Burglary theories of the case were true. When I presented this offer to him, he readily accepted it. I have attached a copy of his plea petition and order of conviction and marked them as Exhibits "E" and "F" to this letter. The judge asked him on the record, "Are you satisfied with the services of your attorney?" Mr. Edwards answered, "Yes, sir." Has she promised you anything or threatened you in order to get you to plead guilty?" Mr. Edwards answered on the record, "No, sir." If I had done something questionable, he could have told the judge at the time of his plea.

Mr. Edwards told me that he would write to the bar and let you know that he wanted to retract the complaints that he made about me and now, I get a bar complaint from him alleging that I coerced him into lying. That is absolutely NOT TRUE. I would never do that.

I thank you for your attention to this letter and hope that it meets the requirements of adequacy in explanation. If it does not and you need any further information, please feel free to contact me.

Sincerely,

Gay L. Polk-Payton

Enclosures

CERTIFICATE OF SERVICE

I certify that I have this day delivered by hand delivery a true and correct copy of the foregoing document to the complaining party, Donald Ray Edwards, MDOC #29647 Central Mississippi Correctional Facility Post Office Box 88550 Pearl, Mississippi 39208.

This the 15th day of February, 2006.

Gay L. Polk-Payton, MSB #10349

HATTIESBURG POLICE DEPARTM

ORIGINAL	NARRATIVE FORM	INCIDENT NUMBER 2005086582
CONNECTED INCIDENTS	1. TYPE INCIDENT SIMPLE ROBBERY	2. DATE OF THIS REPORT 7/29/05
	3. SUSPECT/VICTIM NAME DONALD RAY EDWARDS	4. DATE OF ORIGINAL REPORT 7/17/05

NARRATIVE OR INCIDENT

INVESTIGATION ON THE INCIDENT THAT OCCURED AT 1400 HARDY STREET.

DETECTIVE LEE FIRST GOT A PHOTO LINE PRODUCED BY FORREST COUNTY CRIME SCENE TECH DENISE RUPLE. THE PHOTO LINE UP PRODUCED BY USING THE PHOTO OF THE SUSPECT DONALD RAY EDWARDS AND FOUR OTHER BLACK MALES CLOSELY RESEMBLING EACH OTHER. DETECTIVE LEE THEN WENT TO 1400 HARDY STREET AND TALK TO THE MANAGER WHO ADVISED THAT THE CLERK INVOLVED IN THE SIMPLE ROBBERY WAS NOT WORKING BUT WAS AT HOME AT 108A S18TH AVE.

DETECTIVE LEE THEN TOOK THE PHOTO LINE UP TO LOIS HAWLEY. HAWLEY PICKED THE NUMBER TWO PHOTO. HAWLEY STATED THAT SHE WAS NINETY PERCENT SURE IT WAS NUMBER TWO. THE NUMBER TWO PHOTO WAS A PICTURE OF DONALD RAY EDWARDS. DETECTIVE LEE THEN GOT A STATEMENT FROM HAWLEY ON THE EVENTS THAT HAPPENED THAT NIGHT, A COPY OF THE STATEMENT WAS INCLUDED IN THE CASE FILE.

ON JULY 29, 2005 DETECTIVE LEE THEN BEGAN TO GATHER COPIES OF THE ARREST REPORT AND THE CONSENT TO SEARCH THE SUSPECT SIGNED. DETECTIVE LEE ALSO PUT THE PHOTO LINE UP IN THE CASE FILE AS WELL AS THE VICTIM' STATEMENT. DETECTIVE LEE WAS UNABLE TO GET A STATEMENT FROM DONALD RAY EDWARDS. DETECTIVE LEE TALKED WITH THE FORREST COUNTY PUBLIC DEFENDERS OFFICE TO SET UP A INTERVIEW WITH DONALD RAY EDWARDS BUT WAS NEVER CONTACTED BACK.

REPORTING OFFICER: 20164 LEE, FRANKLIN 20164 FL D/I	DIVISION: DETECTIVES
DISPOSITION DATE: 7/29/05	INCIDENT DISPOSITION: CLEARED ADULT ARREST
REVIEWING SUPERVISOR:	ENTERED BY: 20164 LEE, FRANKLIN 20164

ATTIESBURG POLICE DEPARTM

ORIGINAL	NARRATIVE FORM	INCIDENT NUMBER 2005086582
CONNECTED INCIDENTS	1. TYPE INCIDENT SIMPLE ROBBERY	2. DATE OF THIS REPORT 7/29/05
	3. SUSPECT/VICTIM NAME DONALD RAY EDWARDS	4. DATE OF ORIGINAL REPORT 7/17/05

NARRATIVE OR INCIDENT

ON JULY 17, 2005 OFFICER ZACHERY ROBINSON RESPONDED TO 1400 HARDY STREET IN REFERENCE TO A SIMPLE ROBBERY. UPON ARRIVAL OFFICER ROBINSON SPOKE WITH STORE CLERK, LOIS HAWLEY. HAWLEY STATED THAT SHE WAS OUTSIDE OF THE STORE CHECKING THE GAS PUMPS WHEN SHE NOTICED A BLACK MALE (BRAIDED HAIR, 5'08, 145 POUNDS) OPEN THE FRONT DOOR AND WALK IN. HAWLEY STATED THAT THE DOOR WAS LOCKED BUT THE SUBJECT SOMEHOW MADE ENTRY. HAWLEY THEN STATED SHE WENT INSIDE AND THE BLACK MALE STATED TO HER, "BACK UP, YOU DON'T WANT TO GET HURT." Before HAWLEY STATED THAT HE GRABBED ONE TWENTY FOUR PACK OF BUDWEISER CANS AND A TWELVE PACK OF BUDLIGHT BOTTLES AND WALKED OUT OF THE STORE. HAWLEY STATED THAT SHE ATTEMPTED TO STOP THE SUSPECT BUT WAS UNABLE TO DO SO. HAWLEY STATED SHE BEGAN TO USE THE GASOLINE MEASURING Lie STICK TO HIT THE SUBJECT. HAWLEY STATED THE SUBJECT GOT INTO A WHITE PONTIAC BONNEVILLE (PRIMER ON THE DOORS, TAG NUMBER 129 Wrong FHT, NO RECORD FOR THE TAG NUMBER) AND DROVE OFF. THE STORE DID HAVE A VIDEO CAMERA BUT IT HAD RUN OUT OF TAPE AND THEREFORE IT DID NOT RECORD THE INCIDENT.

LT. SHANE TUCKER ALSO CONTRIBUTED TO THE INVESTIGATION BY BEING CONTACTED BY OFFICER ROBINSON. LT. TUCKER HAD BEEN INVESTIGATING SEVERAL SHOPLIFTINGS THAT HAVE OCCURIED AT JUNIOR FOOD MART STORES IN THE CITY OF HATTIESBURG INVOLVING THE THEFT OF BEER. LT. TUCKER SPOKE WITH OFFICER

REPORTING OFFICER: 20164 LEE, FRANKLIN 20164 FL DM	DIVISION: DETECTIVES
DISPOSITION DATE: 7/29/05	INCIDENT DISPOSITION: CLEARED ADULT ARREST
REVIEWING SUPERVISOR:	ENTERED BY: 20164 LEE, FRANKLIN 20164

vs Payton
I-20-06
seen me

DEREK R. ARRINGTON
ASSISTANT DISTRICT ATTORNEY

PATRICIA W. BURCHELL
ASSISTANT DISTRICT ATTORNEY

DECARLO C. HOOD
ASSISTANT DISTRICT ATTORNEY

BEN L. SAUCIER
ASSISTANT DISTRICT ATTORNEY

JAMES R. KELLY
CRIMINAL INVESTIGATOR

KEITH OUBRE
CRIMINAL INVESTIGATOR

JON MARK WEATHERS
District Attorney
Twelfth Circuit Court District

P. O. BOX 166
HATTIESBURG, MS 39403-0166
TELEPHONE (601) 545-1551
FAX (601) 545-6097
WWW.FORRESTPERRYDA.COM

GAIL M. PARKERSON
VICTIM ASSISTANCE COORDINATOR

BARBARA BERKE
PRE-TRIAL DIVERSION COORDINATOR

PAT LEONARD
WORTHLESS CHECK UNIT COORDINATOR

BILLY C. SCRUGGS
TOMMY DAVIS
COMMUNITY SERVICE, RESTITUTION AND WORK PROGRAM

PAM S. TAPP
GRAND JURY COORDINATOR

1-18, 2006

Honorable PD

VIA FACSIMILE: _____

Re: State vs. DONALD RAY EDWARDS, Cause No. 05-598CR
SET FOR TRIAL _____, 2006 _____ TERM
CHARGE (S): Robbery - HAbitual Offender 99-19-81

Dear PD:

After reviewing the above file(s), the State of Mississippi is prepared to make the following recommendation under the sentencing guidelines adopted by District Attorney, Jon Mark Weathers, as to sentencing upon entry of a plea of guilty by your client:

15 yrs, 8 to serve; 5 yrs PRSP
HAbitual

100 Life sentencing

In addition to the recommendation, your client will be assessed a fine of $ 1000.00, court costs, lab fees of $250.00 PD, and an assessment of $100.00 payable to the Mississippi Crime Victims' Fund.

This offer is based on the understanding that your client has _____ felony convictions. If there are more prior felonies, or if your client has any other current charges in this or any other jurisdiction, this offer is void. PLEASE NOTE: Nolo Contendre and Alford v. North Carolina pleas will not be accepted.

This recommendation is valid until 1-25-06, and the plea must be done in court before the same date. **If the recommendation is not accepted prior to the expiration date,** the offer is withdrawn.

DeCarlo Hood
Assistant District Attorney

I, the undersigned Defendant, do hereby acknowledge that my attorney has communicated the State's offer to me on the _____ day of _____, 200___.

_____ **Defendant**

Accept Date: _____ **Reject Date:** _____ _____ **Attorney for Defendant**

Certificate OF Service

This is to certify that I Donald Edwards #29647 have this day and date of mailing. Via United State mail Postage Pre-Paid a true and Correct Copy of the Foregoing and Attached to the Following:

-ou Adams
Circuit Court Clerk
P.O. Box Draw 992
N'burg. MS 39403

Betty Sephton
Supreme Court Clerk
P.O. Box 249
Jackson. MS 39205

MR. Hood

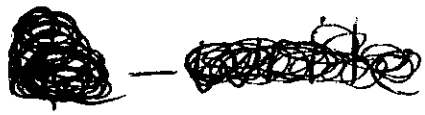
Jon Weathers
District Attorney
P.O. Box 166
N'burg. MS. 39403

This the 16 day of Jan 2007

Respectfully Submitt

/s/ Donald R. Edwards
#29647

State OF Mississippi
County OF Green

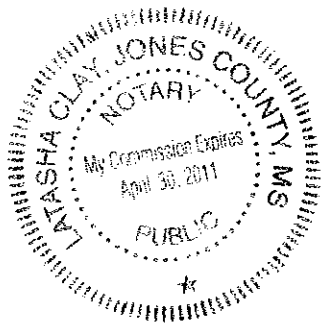


Personally Appeared before me, the Undersigned in and For said Jurisdiction, the name Petitioner, Who after first being by me duly Sworn, Stated on oath that the statements set Forth above and foregoing are true and Correct as therein stated.

Sworn to and Subscribed before me this the

16th day OF Jan 2007

Donald Ray Edwards #29647
Donald Ray Edwards #29647



Notary Public

Conclusion

State of Mississippi have Estabished that the people of Mississippi have ordained that they not be Prosecuted for felonies except upon the indictment by a grand Jury. It has been the law since 1858.

Art. 3. Sec. 27 of the Mississippi Constitution requires an indictment before the Prosecution for felonies. excepts in cases arising in the land or Naval forces, or the military when in actual Service. State V. Sansome. 133 Miss. 428. 97 So 753 (1923).

This appellee cannot invoke or plead the Constitution in this particular. because he has not been proceeded against by Complaint under oath. but on the contray he has been indicted for a Criminal offense.

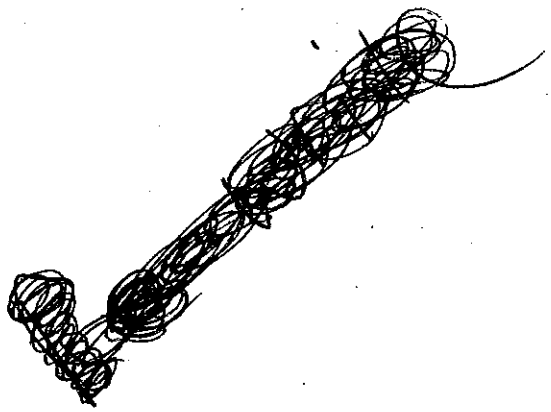
In The Supreme Court of Mississippi

Donald Edwards

-vs-

The State of Mississippi

Date: 1-16-08



Petitioner

Cause No. 2007-TS-00760

C-106-0230

Respondent

Relief

IN Relief Petitioner ask that he be discharge.

Reversed to the lower Court for determination and discharge. OR A Fine for A: "Misdemeanor Shoplifting"

Respectfully Submitted,

Donald R Edwards #29647
Petitioner

C106-0230

Donald Ray Edwards #29647
SMCI - 11
P.O. Box 1419
Leakesville, Ms. 39451

[Appendix]

Date: 7-18-06

FILED

OCT 27 2006

Lou Ellen Adams
FORREST COUNTY CIRCUIT CLERK

Lou Ellen Adams
Circuit Clerk
P.O. Draw 992
Hattiesburg, Ms. 39403

Re: In re Donald Ray Edwards, Cause No. ~~[illegible]~~ Petition for Writ of Habeas Corpus for Post-Conviction Relief.

Dear Clerk:

Enclosed for filing please find the original plus the necessary copies of Petitioner/Appellant Motion entitled "Petition for Writ of Habeas Corpus for Post-Conviction Relief, pursuant to U.C.R.C.C.P. Rule 8.07. I have enclosed the necessary copies on the persons as indicated in my certificate of service.

Thank you for your cooperation in aforesaid matter of concern.

Sincerely,

/S/ Donald Edwards
Donald Ray Edwards

ook at Page
)00000

In The Circuit Court Of Forrest County, Mississippi

Donald Ray Edwards — Petitioner

Versus

Cause No. ~~05-548~~ CF06-0230

FILED

State Of Mississippi — Respondent

OCT 27 2006

FORREST COUNTY CIRCUIT CLERK

Notice Of Motion

Comes Now, the Petitioner, Donald Ray Edwards, pro se, in the above styled and numbered cause and would bring on for hearing this his Writ of Habeas Corpus to be heard at a time and place to be set by this Honorable Court.

This the 18 day of July, 2006.

Respectfully Submitted,

Donald Edwards

Donald Ray Edwards

In The Circuit Court Of Forrest County, Mississippi

Donald Ray Edwards — Petitioner

CI06-0230

Versus — Cause No. ~~05-518~~

FILED

OCT 27 2006

Lyn Ellen Adams
FORREST COUNTY CIRCUIT CLERK

State Of Mississippi — Respondent

Petition For Writ Of Habeas Corpus For Post-Conviction Relief

Comes Now, the Petitioner, Donald Ray Edwards, pro se, in forma pauperis, in the above styled and numbered cause, pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Articles 3, §14, Art. 3, §26 and Art. 3, §27 of the Mississippi Constitution and moves this Court for an Appeal, and in support thereof would show the following, to-wit:

Statement Of The Facts

The conviction and the sentence was imposed in violation of the Constitution of the United States and Mississippi.

The appellant was indicted by the Grand Jury of the Twelfth Judicial District of Forrest County, Mississippi, on a charge of robbery. Before the trial began, the district attorney made a motion requesting the court to permit the State of Mississippi to amend the indictment so as to charge and sentence the appellant for the crime of burglary. The appellant counsel refused to object to this amendment upon the ground that the amendment substituted one charge for a new charge not contemplated by the grand jury, so that the court had no authority to change the charge by amendment. Counsel thereafter "coerced" appellant into pleading guilty as charged. The trial court sentenced the appellant to serve a term of seven (7) years in the state penitentiary for burglary.

Fatal Error

After an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself.[1] On the other hand, even at common law, one could be convicted of a lesser offense if the conviction were for a crime which in its nature constituted parts of the major offense charged, or is "necessarily included" in that with which the appellant is charged. The argument of the appellant that

an amendment to an indictment entered after the trial in vacation is a nullity. Hitt v. State, 217 Miss. 61, 63 So. 2d 665 (1953); Unger v. State, 42 Miss. 642 (1869).

Summary Of Trial Fatal Error

1. The declaration of article V of the Amendments to the Constitution, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," is jurisdictional; and no court of the United States has authority to try a appellant without indictment or presentment in such cases.

2. The indictment here referred to is the presentment to the

---

1. That the trial court cannot amend an indictment so as to change the charge and criminal statute made in the indictment to another crime, except by the action of the grand jury who returned the indictment. Vickery v. State, 215 So. 2d 432 (Miss. 1968); Woods v. State, 186 Miss. 463, 191 So. 283 (1939); Kemp v. State, 121 Miss. 580, 83 So. 744 (1920); Blumenberg v. State, 55 Miss. 528 (1878); Miller v. State, 53 Miss. 405 (1876); McGuire v. State, 35 Miss. 366 (1857).

proper court, under oath, by a grand jury, duly impaneled, of a charge describing an offense against the laws for which the party charged may be punished.

3. When this indictment is filed with the court no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a re-submission of the case to the grand jury. And the fact that the court may deem the change immaterial, as striking out surplus words, makes no difference. The instrument, as thus changed, is no longer the indictment of the grand jury which presented it.

4. Upon an indictment so changed the court can proceed no farther. There is nothing (in the language of the Constitution) which the appellant can "be held to answer." A trial on such indictment is void. There is nothing to try.

5. According to principles long settled in this court the appellant, who stands sentenced to the penitentiary on such trial, is entitled to his discharge.

6. Appellant intends to rais on appeal the following Mississippi Constitution Art. 6, § 169 of 1890, guaranteed by the Constitution of Mississippi.

When this indictment was filed with the Court no change could be made in the body of the instrument by order of the Court, or by the prosecuting attorney, without a resubmission of the case to the grand jury. And the fact that the Court may deem the change immaterial, as altering the charging terms, makes no difference. The instrument, as thus changed, is no longer the indictment of the grand jury which presented it. Upon an indictment so changed the Court can proceed no further. There is nothing (in the language of the Constitution) which the * Appellant can "be held to answer." A trial on such indictment is void. There is nothing to try.

If there is nothing before the Court which the appellant, in the language of the Constitution, can be "held to answer," he is then entitled to be discharged so far as the offence originally presented to the Court by the indictment is concerned. The power of the Court to proceed to try the appellant is as much arrested as if the indictment had been dismissed or a "nolle prosequi" had been entered. There was nothing before the Court on which it could hear evidence or pronounce sentence.

The right to have the grand jury make the charge on its own judgment is a substantial right

which cannot be taken away with or without Court amendment. Yet because of the Court's admission of evidence and under its charge this might have been the basis upon which the trial Court convicted and sentenced appellant. If so, he was convicted and sentenced on a charge the grand jury never made against him. This was "fatal error."

Question Presented

1. Whether an appeal is a means of reviewing the judgment of a Circuit Court, simply upon the ground of error in its proceedings; but if it shall appear that the Circuit Court had no jurisdiction to render the judgment which it gave, and under which the appellant is held a prisoner, it is within the power and it will be the duty of the Court to order his discharge.

2. A party can only be tried upon an indictment as found by a grand jury, and especially upon all its language found in the charging part of that instrument.

3. A trial court cannot amend an indictment so as to change the charge made in the indictment to another

crime, except by the action of the grand jury who returned the indictment.

4. If there is nothing before the court which the appellant can be "held to answer," he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the appellant is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered.

5. An indictment should state that a defendant commits an offense on a specific day and year, but it is unnecessary to prove, in any case, the precise day and year, except where the time enters into the nature of the offense. But if the indictment lay the offense to have been committed on an impossible day, or on a future day, the objection is as fatal as if no time at all had been entered. Nor are indictments within the operation of the statutes of jeofails, and cannot be amended; being the finding of a jury upon oath, the court cannot amend without the concurrence of the grand jury by whom the bill is found.

6. An indictment found by a grand jury is indispensable to the power of the court to try a defendant for the

crime with which he was charged.

7. According to principles long settled in the courts in Mississippi the prisoner, who stands sentenced to the penitentiary on such trial, is entitled to his discharge.

8. Whether the court will find that appellant's rights to due process of the law was violated because he were clearly convicted of an offense for which he were not charged, in the charging indictment returned by the grand jury.

9. Whether the State failing in its attempt on first trial to provide sufficiently authenticated proof of two convictions, for habitual offender sentencing purposes, State was barred from perfecting its evidence through successive attempts. Code 1972, §99-19-81; Const. Art. 3, §22.

Argument

1. It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never indicted, as it would be to convict him upon a charge that was never made by the grand jury.

No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issue raised by the charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. In re Oliver, 333 U.S. 257, 273. Aff, as the State Supreme Court held, defendants were charged with a violation of § 97-3-73, it is doubtful both that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; it is certain that he were not tried for or found guilty of it. It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made against him by the grand jury.[2] De Jonge v. Oregon, 299 U.S. 353, 362.

On the other hand, even at common law, one could be convicted of a lesser offense if the conviction were for a

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2. The Court are constrained to hold that the appellant have been denied safeguards guaranteed by due process of law -- safeguards essential to liberty in a government dedicated to justice under law.

crime which in its nature constituted parts of the major offense charged, or is "necessarily included" in that with which the prisoner is charged.[3] See 42 C.J.S. Indictments and Informations §§ 271 to 295 inclusive, at 1297-1326 (1944). An amendment to an indictment may not be made unless the court shall consider such variance "not material to the merits of the case, and if the defendant cannot be prejudiced thereby in his defense on the merits". Gillespie v. State, 221 Miss. 116, 118, 72 So. 2d 245-246 (1954

In this state, the Mississippi Legislature has enacted a statute on constituent offense, in the Mississippi Code in the

---

3. "On an indictment for any offense the jury may find the defendant guilty of the offense charged, or of any attempt to commit the same offense, or may find him guilty of an inferior offense, or other offense, the commission of which is necessarily included in the offense with which he is charged in the indictment, whether the same be a felony or misdemeanor, without any additional count in the indictment for that purpose."

§ 2523, Miss. Code 1942 Ann. (1956).

following language:

> "On an indictment for any offense the jury or courts may find the defendant guilty of the offense as charged, or of any attempt to commit the same offense, or may find him guilty of an inferior offense, or other offense, the commission of which is necessarily included in the offense with which he is charged in the indictment, whether the same be a felony or misdemeanor, without any additional count in the indictment for that purpose."

Appellant appeal for "discharge" should be granted; because, although the charge of "burglary" is not a constituent part of the charge of "robbery," the indictment actually charged robbery. There is no indictment in the record showing a charge of burglary returned by the grand jury to sustain the "corpus delicti".

"If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a pre-

requisite to a defendant's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." 121 U.S. 1, 16.

It has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself. In the present case, the "Forrest County Circuit Court" ordered that some specific and relevant allegations the grand jury had charged be stricken from the indictment so that appellant may be thereafter, charged with the crime of burglary, so that he might be convicted without proof of those particular allegations. In citing Ex Parte Bain, 121 U.S. 1, 30 L.Ed. 849, 7 S.Ct. 781 (1887). The Court went on to Hold in Bain:

> "that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney..." 121 U.S. 1, 13

The Bain case, which have never been disapproved, stands for the rule that a Court cannot permit a defendant to be tried on charges that are not made in the indictment against

him. See also United States v. Norris, 281 U.S. 619, 622; Clyatt v. United States, 197 U.S. 207, 219, 220. Yet in this case, the court did permit that in this case. And it cannot be said with certainty that with a new basis for charging - added, Edward was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging of "burglary" here is neither trivial, useless, nor innocuous. While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the appellant's (defendant's) substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. Compare Berger v. United States, 295 U.S. 78. 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. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for burglary which the grand jury did not charge.

The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment. Here, as in the

---

4. "Yet the institution [the grand jury] was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the case mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial." Ex parte Bain, 121 U.S. 1, 11. See also Costello v. United States, 350 U.S. 359, 362, 363, n. 6.

Bain and Stirone case, the trial court cannot know whether the grand jury would have included in its indictment a criminal statutes under §§ 97-17-33 and 99-19-81. Yet because of the court's admission of evidence and under its charge this might have been the basis upon which the trial judge sentenced defendant (appellant). If so, he was convicted on a charge the grand jury never made against him. This was fatal error. Cf. Cole v. Arkansas, 333 U.S. at 201, 68 S. Ct. at 648; De Jonge v. Oregon, 299 U.S. 353. See also

Constructive Amendment

The question which this court has to deals with, and specific the fact that Edwards was forced to defend against a charge of felony-burglary that was not brought by the grand jury in the indictment. There are two main issues with respect to this question: (1) whether there was a constructive amendment to the indictment, and (2) whether, if there was a constructive amendment, it violated Edwards constitutional rights under the Fourteenth Amendment in this state court, as opposed to federal court, trial.

Under the Fifth Amendment's provision that no person shall be held to answer for a capital crime unless on the indictment of a grand jury, it has been the

rule that after an indictment has been returned its charges may not be broadened except by the grand jury itself. Stirone v. United States, 361 U.S. 212, 4 L. Ed. 2d 252, 80 S. Ct. 270 (1960); Ex Parte Bain, 121 U.S. 1, 30 L. Ed. 849, 7 S. Ct. 781 (1887). See Russell v. United States, 369 U.S. 749, 770, 8 L. Ed. 2d 240, 82 S. Ct. 1038 (1962); United States v. Norris, 281 U.S. 619, 622, 74 L. Ed. 1076, 50 S. Ct. 424 (1930). In 1887, the U.S. Supreme Court in Bain, supra, 121 U.S. at 9-10, held that a defendant could only be tried upon the indictment as found by the grand jury and that language in the charging part could not be changed without rendering the indictment invalid. In Stirone, supra, 361 U.S. at 217, the Supreme Court stated in Bain "stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." This rule has been reaffirmed recently several times in this Circuit (U.S. Court of Appeals for the Sixth Circuit), citing Watson v. Jago, 558 F.2d 330 (6th Cir. 1977). See also United States v. Mavilli, 534 F.2d 1197, 1201 (6th Cir. 1976); United States v. Pandilidis, 524 F.2d 644 (6th Cir. 1975), cert. denied, 424 U.S. 933, 47 L. Ed. 2d 340, 96 S. Ct. 1146 (1976). Although the language in Bain is broad, it has been recognized that Bain and Stirone do not prevent federal courts from changing an indictment as to matters of form or surplusage. Russell v. United States, supra, 369 U.S. at 770; United States v. Hall, 536 F.2d 313, 319 (10th Cir., 1976);

United States v. Dawson, 516 F.2d 796, 801 (9th Cir.), cert. denied, 423 U.S. 855, 46 L.Ed.2d 80, 96 S.Ct. 104 (1975); Stewart v. United States, 395 F.2d 484, 487-89 (8th Cir. 1968); United States v. Trichtman, 421 F.2d 1019, 1021 (6th Cir.), cert. denied, 400 U.S. 849, 27 L.Ed.2d 86, 91 S.Ct. 39 (1970); United States v. Heath, 512 F.2d 66 (5th Cir. 1975)

Stirone v. United States, supra, 361 U.S. 212, involved a "constructive" amendment. Under Stirone, the question to be asked in identifying a constructive amendment is whether there has been a modification at trial in the elements of the crime charged. United States v. Somers, supra, 496 F.2d at 744; United States v. De Casalcante, supra, 440 F.2d at 1272; United States v. Silverman, 430 F.2d 106, 111 (2d Cir. 1970), cert. denied, 402 U.S. 953, 29 L.Ed.2d 123, 91 S.Ct. 1619 (1971). Such a modification would result in a constructive amendment. Of course if a different crime was added to the charges against which the defendant had to meet, there would have been a constructive amendment.

Applying this test to the present case, there is clearly a constructive amendment made to the indictment if Edwards is correct in stating that felony burglary was added to the charge against which Edwards had to defend at the state trial. Under Mississippi law, a burglary conviction cannot be sustained under an indictment charging burglary.

The Mississippi Supreme Court in Jones v. State, 279 So. 2d 656 (Miss. 1973).

The question that the present case poses is whether, under the facts of this case, burglary was added by the prosecuting attorney through his bill of Criminal Information to the charge against which Edwards had to defend.

1. The trial court thus permitted a constructive amendment and then, upon request of the prosecution, permitted a withdrawal of the indictment submitted by the grand jury, substituted the returned indictment, for the prosecuting attorney submitted "Criminal information," the effect was "simply to remove what basically and normally would have been of the indictment." The Forrest County Grand Jury had not charge Edwards with burglary in the indictment. McGuire v. State, 35 Miss. 366 (1857); Gillespie v. State, 221 Miss. 116, 118, 72 So. 2d 245, 246 (1954).

Reasons for Granting the Writ

Because the law of a constructive amendment has developed in the context of federal court trials and the Fifth Amendment, it must be determined whether Edwards constitutional rights under the Fourteenth Amendment were violated in his state court trial. The problem stems from

the fact that the rule against amendments contained in Ex Parte Bain, supra, 121 U.S. 1, and Stirone v. United States, 361 U.S. 212, rests on the Fifth Amendment's guarantee of a grand jury indictment before a person can be held to answer for a capital crime. Ex Parte Bain, supra, 121 U.S. at 10, 13, made clear the Fifth Amendment basis for the rule:

> If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.
>
> ... After the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held

that changes can be made by the Consent or the order of the Court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as then changed, the restriction which the Constitution places upon the power of the Court, in regard to the prerequisite of an indictment, in reality no longer exists.

In this state, the legislature has previous enacted a statute on Constituent offenses. Section 2523, Mississippi Code 1942 Annotated (1956) is in the following language:

"On an indictment for any offense the jury may find the defendant guilty of the offense as charged, or for any attempt to commit the same offense, or may find him guilty of an inferior offense, or other offense, the commission of which is necessarily included in the offense with which he is charged in the indictment, whether the same be a felony or misdemeanor, without any additional count in the indictment for that purpose."
§2523, Miss. Code 1942 Ann. (1956).

More important to Edwards petition for an appeal and his discharge, is the fact that an amendment to an indictment in certain cases can implicate rights under the United States Constitution which are applicable to the states, such as fair notice of criminal charges, double jeopardy, and effective assistance of Counsel. See Neely v. Cabana, 764 F.2d 1173 (5th Cir. 1985); United States ex rel. Wojtycha v. Hopkins, supra, 517 F.2d 425. The Court in United States v. Pandilidis, supra, 524 F.2d at 648, recognized that:

> . . . the rules governing the content of indictments, variances and amendments are designed to protect three important rights; the right under the Sixth Amendment to fair notice of the criminal charge one will be required to meet, the right under the Fifth Amendment not to be placed twice in jeopardy for the same offense, and the right granted by the Fifth Amendment, and sometimes by statute, not to be held to answer for certain crimes except upon a presentment of indictment returned by a grand jury.

There is no question that the Fourteenth Amendment

encompasses the right to fair notice of criminal charges. The Supreme Court in In re Oliver, 333 U.S. 257, 273, 92 L. Ed. 682, 68 S. Ct. 499 (1948), in dealing with the Due Process Clause of the Fourteenth Amendment, stated that:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense - a right to his day in court - are basic in our system of jurisprudence....

Likewise, in Cole v. Arkansas, 333 U.S. 196, 201, 92 L. Ed. 644, 68 S. Ct. 514 (1948), the Supreme Court declared that:

> No principle of procedural due process is more clearly established than that of notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

To allow the prosecution to amend or substitute the indictment at trial so as to enable the prosecution to seek a conviction on a charge not brought by the

grand jury unquestionably constituted a denial of due process by not giving Edwards fair notice of criminal charges to be brought against him. See De Jonge v. Oregon, 299 U.S. 353, 362, 57 S. Ct. 255, 81 L. Ed. 2d 278 (1937). As a matter of law, Edwards was prejudiced by constructive (substitute) amendment. See Stirone v. United States, supra, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252; United States v. De Cavalcante, supra, 440 F.2d 1264; Gaither v. United States, supra, 134 U.S. App. D.C. 154, 413 F.2d 1061. The fact that the charge to the court (criminal information) only included burglary according to the "criminal information" could not cure the prejudice to Edwards.[5]

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5. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Strickland, supra, 466 U.S. at , 104 S. Ct. at 2064; Id. at 690, 104 S. Ct. at 2066; Id. at , 104 S. Ct. at 2069. To allow the prosecution to either amend or substitute the indictment at trial so as to enable the prosecution to seek a conviction on a charge not brought by the grand jury unquestionably constitute a denial of due process by not giving appellant fair notice of criminal charges to be brought against him.

Whether the State has the Right to a Second Chance at Proving the Habitual Offender Status of Edwards as Opposed to Edwards right not to be Twice Placed in Jeopardy

2. The question now becomes "whether the State has the right to a second chance at proving the [Habitual Offender] status of Edwards as opposed to Edward's right not to be twice placed in jeopardy." DeBussi, 453 So. 2d at 1032. Miss. Const. art 3, §22 (1890). Aycox v. State, 440 So. 2d 246, 258 (Miss. 1983) (applying double jeopardy to capital sentencing proceeding).

In DeBussi, the Mississippi Supreme Court held that re-prosecution of an Habitual offender was barred where there was not sufficient evidence to support a conviction apart from the evidence erroneously admitted by the trial judge. Although the State "could possibly cure" this error "if it were given a second opportunity," "the essence of the double jeopardy prohibition is to limit the State to one fair opportunity to offer what proof it could assemble." DeBussy, 453 So. 2d at 1034.

The Habitual offender portion of this sentence must be vacated for reason of the insufficiency of the evidence (amended or substituted charge) to support the finding apart

from the evidence erroneously admitted by the trial court. Failing in its attempt on the first trial, Miss. Const. art. 3, § 22 bars the State from perfecting its evidence through successive attempts. Tibbs v. Florida, 457 U.S. 31, 41, 102 S. Ct. 2211, 2217, 72 L. Ed. 2d 652 (1982).

Order Of Conviction

3. On October 14, 2005, in Cause No. 05-598, the Grand Jury returned an indictment for robbery is under Code 1972, §97-3-73 and Section 99-19-81. On January 30, 2006, was convicted on a criminal information submitted by Jon Mark Weathers, District Attorney of the Twelfth Judicial Court District. Said Criminal Information was presented to the court on the above date, that being 1-30-06, the date of conviction and sentencing. Edwards file this writ, to vacate judgment and for discharg. The grounds are (1) the criminal information is fatally defective, in that it does not charge an assault; (2) because it does not charge an intent to rob or steal; (3) because it does not allege a larceny; (4) because it does not charge that the person robbed was "put in fear"; (5) because it does not charge that the taking was "against the will."

1. A person sentenced to imprisonment for an infamous crime, without having been presented or indicted by a grand

jury, as required by the Fifth Amendment of the Constitution, is entitled to be discharged.

2. A crime punishable by imprisonment for a term of years is an infamous crime, within the provision of the Fifth Amendment of the Constitution, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

Deciding nothing beyond what is required by the facts of the case before this Court, its judgment is that a crime punishable by imprisonment for a term of years is an infamous crime, within the meaning of the Fifth Amendment of the Constitution; and that the Circuit Court, in holding Edwards to answer for such a crime (indictable offense), and sentencing him to such imprisonment without indictment or presentment by a grand jury, exceeded its jurisdiction, and he is therefore entitled to be discharged.

It is well settled by a series of decisions that this Court, having no jurisdiction of criminal cases by writ of habeas corpus, cannot discharge a person imprisoned under the sentence of a Circuit or District Court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence. Ex Parte Watkins, 3 Pet. 193, and 7

Pet. 568; Ex parte Lange, 18 Wall. 163; Ex parte Parks, 93 U.S. 18; Ex parte Siebold, 100 U.S. 371; Ex parte Curtis, 106 U.S. 371; Ex parte Carll, 106 U.S. 521; Ex parte Yarbrough, 110 U.S. 651; Ex parte Crouch, 112 U.S. 178; Ex parte Bigelow, 113 U.S. 328.

But if the crime of which Edwards was accused was an infamous crime, within the meaning of the Fifth Amendment of the Constitution, no court of the United States had jurisdiction to try or punish him, except upon presentment or indictment by a grand jury.

The question is whether the crime is one for which the statutes §97-3-73 authorize the court to award an infamous punishment §97-17-33, not whether the punishment ultimately awarded is an infamous one. When Edwards is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury.

This was an "Criminal information" on section § 97-17-33, for the offense of burglary, punishable by imprisonment not more than 7 years. The Circuit Judge certified that upon the determination of a plea to the jurisdiction, the "court did not question being

whether the Circuit Court could proceed by information instead of indictment to try Edwards charged under section 97-3-73 of the statutes with the violation thereof; that is to say, whether the offenses declared in said section are infamous crimes to be prosecuted solely through indictment pursuant to Article V of the Amendments to the Constitution of the United States: 114 U.S. 417, 5 S. Ct. 935, 29 L. Ed. 89 (1885).

3. In so far as it concerns the merits of this case, the language of the indictment is that the defendant did willfully, unlawfully, and feloniously take, steal, and carry away the personal property of Jr. Food Mart, to-wit: one 24 pack of Budweiser and one 12 pack of Budlight beer, from the person and/or presence of the said Lois Hawley's, against her will, by putting the said Lois Hawley in fear of immediate injury to her person.

4. Thereafter, the said Lois Hawley "recant" her statement, because there was no evidence that Edwards made threats nor used weapons to effectuate robbery, that the door was left unlock and she had given consent while checking the gas measures. Thereafter, the prosecuting attorney and defense counsel "negotiate" to have the charge reduced to Burglary, without resubmitting the indictment to the grand jury who returned the indictment in Cause No. 05-598. Edwards

should have be charged with "petty larceny".

"Technical law is good law under proper circumstances, but not where it shocks common sense. One cannot "unlawfully, feloniously, forcibly, and violently" rob and steal from the person of another where consent is given, without its being against her will; and here it cannot be said that, though that is an infallible argument that it was not against the will, still it is not perfectly charged.

Conclusion

No authority has been cited either in the U.S. Supreme Court, Federal Circuits, nor the states courts in the American courts which sustains the right of a Court to amend any part of the body of an indictment without reassembling the grand jury, unless by virtue of a statute." This is a case in which an amendment could not be allowed, even with the consent of the defendant."

"It is assumed," that the judge who presided in the Circuit Court at the time the change was made in this indictment, says that the court allowed section 97-3-73 to be stricken out as it then read, by allowing such change to be made. The defendant (Edwards) could only be tried upon the indictment as found by such grand jury, and especially upon all its language

found in the charging part of that instrument. And how can it be said that, the principle charge stricken out, it is the indictment which was found by the grand jury? If it lies within the province of a court to change the charging part of an indictment to suit its or the prosecuting attorney own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to Edwards trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed of its constitution laws, as there can be no amendment of an indictment by the court, the proper course is for the grand jury to return a new indictment.

Edwards rights to due process of the laws was violated because he were clearly convicted of an offense for which he were not charged against him. This was fatal error. As a matter of law, Edwards was prejudiced by the constructive amendment. According to principles long settled in this state, a prisoner, who stands sentenced to the penitentiary on such trial, is entitled to his discharge by writ of habeas corpus, post-conviction or appeal of errors.

Respectfully submitted,

/S/ Donald Edwards

Donald Ray Edwards

State Of Mississippi

County Of Green

Personally Appeared Before Me, the undersigned in and for said jurisdiction, the within named Appellant, who, after first being by me duly sworn, stated on oath that the statements set forth in the above and foregoing are true and correct as therein stated.

Sworn To And Subscribed Before me, this the 18 day of July, 2006.

NOTARY PUBLIC STATE OF MISSISSIPPI AT LARGE
MY COMMISSION EXPIRES: June 2, 2010
BONDED THRU NOTARY PUBLIC UNDERWRITERS

LAURA STEWART NOTARY PUBLIC GREENE COUNTY, MS

Laura Stewart

Notary Public

In The Circuit Court Of Forrest County, Mississippi

FILED

OCT 27 2006

Joe Ellen Adams
FORREST COUNTY CIRCUIT CLERK

Donald Ray Edwards — Appellant

Versus

Cause No. ~~05-378~~ CIEC-0230

State Of Mississippi — Appellee

Application To Proceed In Forma Pauperis

I, Donald Ray Edwards, an inmate within the Mississippi Department of Corrections, request this Honorable Court to allow me to proceed without pre-payment of costs and declare that I am unable to pay the fees and am entitled to proceed as a Pauper. In support thereof, I would show the following, to-wit:

1. I received income, if any, in the amount of $ Ø per week / month / year.

2. I have the amount of $ Ø in a checking and/or savings account located at _____.

3. List all other assets such as real estate, bonds, notes, etc.

a. None

b None

c. None

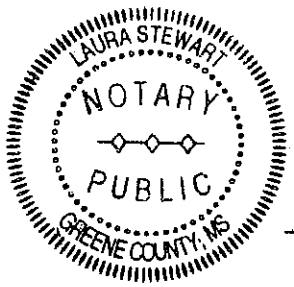
/s/ Donald Edwards
Affiant

State Of Mississippi

County Of Green

Personally Appeared Before Me, the undersigned authority in and for said jurisdiction, the within named Petitioner, who, after first being by me duly sworn, stated on oath that the statements set forth in the above and foregoing are true and correct as therein stated.

Subscribed To And Sworn Before me, this the 18 day of July, 2006.



Laura Stewart
Notary Public

NOTARY PUBLIC STATE OF MISSISSIPPI AT LARGE
MY COMMISSION EXPIRES: June 2, 2030
BONDED THRU NOTARY PUBLIC UNDERWRITERS

State Of Mississippi

County Of Green

Affidavit Of Poverty

Personally Appeared Before Me, the undersigned in and for the aforesaid jurisdiction Donald Ray Edwards, MDOC# 29647, who, being first duly sworn on his oath, does depose and sayeth:

I, Donald Ray Edwards, do solemnly swear that I am a citizen of the State of Mississippi, and because of my poverty I am not able to pay the sum in the suit; Notice of Appeal, which I am (or has been commenced), about to commence, and that, to the best of my belief, I am entitled to the redress which I seek by such suit.

Donald Edwards

Affiamant

Subscribed And Sworn To Before Me, this the 18 day of July, 2006.

LAURA STEWART
NOTARY
PUBLIC
GREENE COUNTY, MS

NOTARY PUBLIC STATE OF MISSISSIPPI AT LARGE
MY COMMISSION EXPIRES: June 2, 2010
BONDED THRU NOTARY PUBLIC UNDERWRITERS

Laura Stewart

My Commission Expires

Notary Public

Certificate Of Service

This is to certify that I, Donald Ray Edwards, M.D.O.C. #29647, have this day and date mailed, via United States Mail, postage pre-paid, a true and correct copy of my Notice of Appeal and Appeal of Error to the following persons:

Office of the Clerk
P.O. Drawer 992
Hattiesburg, Ms. 39403

Office of the District Attorney
P.O. Box 166
Hattiesburg, Ms. 39403

This the 18 day of July, 2006.

Donald Edwards

Donald Ray Edwards #29647
SMCI - 2
P.O. Box 1419
Leakesville, Ms. 39451

INDICTMENT

ROBBERY: SECTION 97-3-73, MISSISSIPPI CODE OF 1972, AS AMENDED
HABITUAL OFFENDER: SECTION 99-19-81, MISSISSIPPI CODE OF 1972, AS AMENDED

STATE OF MISSISSIPPI

COUNTY OF FORREST

CIRCUIT COURT, JULY 2005 TERM, RECALLED OCTOBER 11, 2005

CAUSE NO. 05-598 CR

THE GRAND JURORS of the State of Mississippi, taken from the body of the good and lawful citizens of Forrest County, duly elected, empaneled, sworn, and charged to inquire in and for the said State, County and District, at the Term of Court aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present that:

DONALD RAY EDWARDS

in Forrest County, Mississippi, on or about July 17, 2005, did willfully, unlawfully, and feloniously take, steal, and carry away the personal property of Jr. Food Mart, to-wit: one 24 pack of Budweiser and one 12 pack of Bud Light beer, from the person and/or presence of the said Lois Hawley's, against her will, by putting the said Lois Hawley in fear of immediate in jury to her person, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

And we, the aforesaid GRAND JURORS, upon our oaths do further present, that he, the said **DONALD RAY EDWARDS**, is a habitual criminal who is subject to being sentenced as such pursuant to Section 99-19-81, Mississippi Code of 1972, as annotated and amended, in that he, the said **DONALD RAY EDWARDS**, has been convicted at least twice previously of felonies or federal crimes upon charges separately brought and arising out of separate incidents at different times and has been sentenced thereon to separate terms of imprisonment of one year or more, to-wit:

(1) On September 29, 1989, he, the said **DONALD RAY EDWARDS**, was convicted in the Circuit Court of Lamar County, Mississippi, in Cause No. 6281-1, of the felony of Burglary of Dwelling, and, on September 29, 1989, in said Court, was sentenced to a term of eight years in the custody of the Mississippi Department of Corrections; and [illegible]

(2) On October 20, 1989, he, the said **DONALD RAY EDWARDS**, was convicted in the Circuit Court of Forrest County, Mississippi, in Cause No. 13,848, of the felony of Burglary, and, on October 20, 1989, in said Court, was sentenced to a term of eight years in the custody of the Mississippi Department of Corrections; wrong → It was 4 years Look at order of Conviction ← Look

Exhibit – C

This making the Defendant, **DONALD RAY EDWARDS**, a Habitual Offender pursuant to Section 99-19-81 of the Mississippi Code of 1972, as annotated and amended, contrary to the form of the statute, in such cases made and provided, and against the peace and dignity of the State of Mississippi.

A TRUE BILL

Dale Hood
ASSISTANT DISTRICT ATTORNEY

Steve C Alan 000000
GRAND JURY FOREPERSON

Exhibit "A"

AFFIDAVIT

COMES NOW, SUSAN C. SLAUGHTER, Foreperson of the Grand Jury, and makes oath that this indictment presented to this Court was concurred in by twelve (12) or more members of the Grand Jury and that at least fifteen (15) members of the Grand Jury were present during all deliberations.

Susan C. Slaughter
GRAND JURY FOREPERSON

SWORN TO AND SUBSCRIBED BEFORE ME, this the 14 day of October, 2005.

LOU ELLEN ADAMS, CIRCUIT CLERK

BY: Nicki Buford, DEPUTY CLERK

000001

Circuit Court of Forrest County, Mississippi, in Cause No. 13,848, of the felony of Burglary, and, on October 20, 1989, in said Court, was sentenced to a term of four (4) years in the custody of the Mississippi Department of Corrections;

This making the Defendant, **DONALD RAY EDWARDS**, a Habitual Offender pursuant to Section 99-19-81 of the Mississippi Code of 1972, as annotated and amended, contrary to the form of the statute, in such cases made and provided, and against the peace and dignity of the State of Mississippi.

JON MARK WEATHERS, DISTRICT ATTORNEY

SWORN TO AND SUBSCRIBED BEFORE ME, on this the 30th day of January A.D., 2006.

Lou Ellen Adams by:
Nikki Graham D.C.
NOTARY PUBLIC

MY COMMISSION EXPIRES:

1-6-08

IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

FILED

JAN 30 2006

Sue Ellen Adams
FORREST COUNTY CIRCUIT CLERK

CAUSE NO. 06-024CR

STATE OF MISSISSIPPI

VERSUS

DONALD RAY EDWARDS, DEFENDANT

CRIMINAL INFORMATION

BEFORE ME, the undersigned authority for said County and State, Jon Mark Weathers, District Attorney of the Twelfth Judicial Court District, makes on oath, based upon information and belief, that **DONALD RAY EDWARDS** on July 17, 2005, in Hattiesburg, Forrest County, Mississippi, did unlawfully, wilfully, feloniously and burglariously break and enter a building owned or leased by Jr. Food Mart situated at 1400 Hardy Street, Hattiesburg, for the purpose of taking, stealing and carrying away the property of Jr. Food Mart situated therein and being kept therein for sale, in violation of Section 97-17-33 of the Mississippi Code of 1972, as amended.

Upon further information and belief, the aforesaid Jon Mark Weathers, District Attorney, asserts that he, the said **DONALD RAY EDWARDS**, is a habitual criminal who is subject to being sentenced as such pursuant to Section 99-19-81, Mississippi Code of 1972, as annotated and amended, in that he, the said **DONALD RAY EDWARDS**, has been convicted at least twice previously of felonies or federal crimes upon charges separately brought and arising out of separate incidents at different times and has been sentenced thereon to separate terms of imprisonment of one year or more, to-wit:

(1) On September 29, 1989, he, the said **DONALD RAY EDWARDS**, was convicted in the Circuit Court of Lamar County, Mississippi, in Cause No. 6281-1, of the felony of Burglary of Dwelling, and, on September 29, 1989, in said Court, was sentenced to a term of eight (8) years in the custody of the Mississippi Department of Corrections; and

(2) On October 20, 1989, he, the said **DONALD RAY EDWARDS**, was convicted in the

Exhibit "B"

IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VERSUS CAUSE NO. 06-024 CR

DONALD RAY EDWARDS, DEFENDANT

ORDER OF CONVICTION

THIS DAY INTO OPEN COURT came the District Attorney, who prosecutes for the State of Mississippi, and came also, **DONALD RAY EDWARDS**, personally and represented by counsel, Hon. Gay Polk-Payton, having been lawfully arraigned on a Criminal Information charging said Defendant with the crime of **BURGLARY**, in violation of MISS. CODE ANN.§ 97-17-33 (1972) wherein he is charged as an **HABITUAL OFFENDER under** MISS. CODE ANN.§ 99-19-81 (1972), and thereupon the said **DONALD RAY EDWARDS**, being duly advised of all his legal and constitutional rights in the premises, and being fully advised of the consequences of such plea, did then and there voluntarily enter a plea of guilty to the crime of Burglary as an Habitual Offender, which this Court FINDS was voluntarily, intelligently and freely made.

THEREFORE, after having considered the Defendant's prior convictions as set forth in the Pen-Pak introduced by the State as an exhibit does here FIND that the Defendant is a habitual offender as set forth in MISS. CODE ANN.§ 99-19-81 (1972), as amended, by virtue of his conviction of the following felonies:

1. Burglary of a Dwelling in the Circuit Court of Lamar County, Mississippi, in Cause No. 6281-1 on the 29th day of September, 1989, and sentenced to serve eight (8) years in the Mississippi Department of Corrections;
2. Burglary in the Circuit Court of Forrest County, Mississippi, in Cause No. 13,848 CR on the 20th day of October, 1989, and sentenced to serve a term of four (4) years Look

Exhibit "C"

in the Mississippi Department of Corrections.

THEREFORE, for said offense of **BURGLARY** and on said plea of guilty, it is by the Court ORDERED AND ADJUDGED that the said **DONALD RAY EDWARDS** be and he is hereby sentenced to serve a term of seven (7) years in the custody of the Mississippi Department of Corrections, **with said sentence to be served without the benefit of probation, parole or any form of early release, as required by MISS. CODE ANN.§ 99-19-81 (1972).**

IT IS FURTHER ORDERED AND ADJUDGED that said Defendant is hereby remanded into the custody of the Sheriff of Forrest County to await transportation to the Mississippi Department of Corrections.

SO ORDERED AND ADJUDGED on this the 30th day of January, 2006.

CIRCUIT JUDGE

STATE OF MISSISSIPPI

Defendant Information:

SSN: 427-15-3404
DOB: 11/20/62
SEX: M
RACE: B

In The Circuit Court Of Forrest County, Mississippi

Donald Ray Edwards — Appellant

Versus — Cause No. 05-598

State Of Mississippi — Appellee

Memorandum Of Law

Donald Ray Edwards #29647
SMCI - 11
P.O. Box 1419
Leakesville, Ms. 39451

Memorandum Of Law For Appellant

Appellant Donald Ray Edwards respectfully petition this Court for writ of habeas Corpus to review the order of the Circuit Court, violation of the Grand Jury Clause of the Fifth Amendment, the Due Process Clause of the Fourteenth Amendments of the U.S. Constitution, regarding his illegal conviction and sentence. An indictment for robbery, charging that defendant (appellant) on or about July 17, 2005, did willfully, unlawfully, and feloniously take, steal, and carry away the personal property of Jr. Food Mart. Said indictment in Cause No. 05-598 was returned and signed by the Grand Jury Foreperson and the Assistant District Attorney on October 14, 2005. That on January 30, 2006, this Honorable Court sentenced Edwards pursuant to a "Criminal Information", contending that the amendment and/or substitute of the indictment that he was under was fatal to the trial Court's jurisdiction to entertain the cause.

Question Presented

1. The declaration of article V of the Amendments to the Constitution, that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a

grand jury" is jurisdictional, and no Court of the United States has authority to try a prisoner without indictment or presentment in such cases.

2. The indictment here referred to is the presentation to the proper court, under oath, by a grand jury, duly impaneled, of a charge describing an offense against the laws for which the party charged may be punished.

3. When this indictment is filed with the court no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a resubmission of the case to the grand jury. And the fact that the court may deem the change immaterial, as striking out of surplus words, makes no difference. The instrument, as thus changed, is no longer the indictment of the grand jury which presented it.

4. Upon an indictment so changed the court can proceed no farther. There is nothing (in the language of the Constitution) which the prisoner can "be held to answer." A trial on such indictment is void. There is nothing to try.

5. According to principles long settled in this court the prisoner, who stands sentenced to the penitentiary on such trial, is entitled to his discharge by the court.

6. Notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, returned by the grand jury, if desired, is the constitutional right of every accused in a criminal proceeding in all courts, state and federal.

7. Where a state provides for appeals in criminal cases, on which questions under the Federal Constitution may be considered, the proceedings on such an appeal are a part of the process of law under which convictions must stand or fall under the due process clause.

8. The purpose of the requirement of the Fifth Amendment that a man be indicted by a 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; this purpose is defeated by a device or method which subjects the appellant to prosecution for an act which the grand jury did not charge.

Brief Answer

No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. In re Oliver, 333 U.S. 257, 273, and cases there cited. Clf, as the Forrest Circuit Court held, Edwards was charged with a violation of §97-3-73, it is doubtful both that the information fairly informed him of that charge and that he sought to defend himself against such a charge; it is certain that he were not tried for or found guilty of it. Clt is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. De Jonge v. Oregon, 299 U.S. 353, 362. According to principles long settled in this court the prisoner, who stands sentenced to the penitentiary on such trial, is entitled to his discharge by an appeal of Error or writ of Habeas Corpus.

The Bain case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. See United States v. Norris, 281 U.S.

grand jury did not charge. If so, Edwards was convicted on a charge the grand jury never made against him. This was fatal error. Cf. Cole v. Arkansas, 333 U.S. 196; De Jonge v. Oregon, 299 U.S. 353.

Statement Of Facts

Appellant Donald Ray Edwards was indicted by a Forrest County, Mississippi, grand jury for robbery under §97-3-73, of the Mississippi Code of 1972. Thereafter, he was tried on a criminal information, convicted and sentenced pursuant to §97-17-33, rather than the indictment so returned by the grand jury, clearly a violation of the U.S. Constitution Fifth, Sixth and Fourteenth Amendment:

a. It is as much a violation of due process to send an accused to prison following a conviction on a charge which he was never tried as it would be to convict him upon a charge that was never made nor returned by a grand jury by indictment.

b. To conform to due process of law, appellant was entitled to have the validity of his conviction and sentence appraised on consideration of the case as it was tried in violation of the fifth Amendment and as the issues

were determined in this trial court.

The present conviction are under a "Criminal information". Edwards urge that the criminal information charged him with violating §97-17-33 of the Mississippi Code of 1972, and that he were tried and convicted of violating §97-17-33. The indictment returned had charged and the evidence presented by the prosecuting attorney had shown that Edwards had violated §97-3-73 of the Miss. Code Ann. which describes an offense separate and distinct from the offense charged and described by the grand jury on the charge of robbery.

Discussion

Ever since Ex parte Bain, 121 U.S. 1, was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself. In the present case, the prosecuting attorney submitted evidence to the Forrest County, Mississippi, grand jury to have appellant (Edwards) indicted for robbery under §97-7-73, Mississippi Code of 1972, as amended, with Section 99-19-81; that on October 14, 2005, the grand jury of Forrest County, Mississippi returned said indictment as so charged. Thereafter, on January 30, 2006, the said

undersigned authority for said County and State, Jon Mark Weathers, District Attorney of the Twelfth Judicial Court District, submitted on his oath, a Substitute "Criminal Information" in violation of Section 97-17-33, Burglary, of the Mississippi Code of 1972, as amended. The Court went on to hold in Bain:

> "that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney..." 121 U.S. 1, 13.

That on the very (same) day the prosecuting attorney submitted to the Court his substituted charge, he was sworn thereafter convicted and sentenced in Cause No. 06-024CR to serve a term of seven (7) years in the custody of the Mississippi Department of Corrections. Compare Ford v. United States, 273 U.S. 593, 602; Gato v. Lane, 265 U.S. 393, 402. While there was a variance in the sense of a fatal variance between pleading and proof, that fatal variance have destroyed Edwards' substantial right to be tried only on charges presented in an indictment returned by a grand jury.

Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. Compare Berger v. United States, 295 U.S. 78. 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. Thus the basic protection the grand jury was designed to afford is defeated by a device or method (substitute) which subjects Edwards to prosecution for "burglary" which the grand jury did not charge. Ex parte Bain, supra, 121 U.S. at 1, 11; See also Costello v. United States, 350 U.S. 359, 362, 363, n.6; Cole v. Arkansas, 333 U.S. 196; De Jonge v. Oregon, 299 U.S. 353.

In the present case the question to be asked in identifying a 'constructive amendment' is whether there has been a "modification, at trial in the elements of the crime charged." It was certain, however, Edwards was not shown to be guilty of robbery. The trial court could not amend an indictment to change the charge to another crime, except by grand jury action. The trial judge sentenced Edwards for the charge of "burglary". This was fatal error. There is no way to determine whether or not the grand jury intended to issue an indictment for the charge of burglary. It is certain, however, that Edwards

Edwards was not shown to be guilty of robbery the charge returned in the indictment by the grand jury.

In this state, the legislature previously enacted a statute on constituent offense. Section 2523, Mississippi Code 1942 Annotated (1956) is in the following language:

> "On an indictment for any offense the jury may find the defendant guilty of the offense as charged, or of any attempt to commit the same offense, or may find him guilty of an inferior offense, or other offense, the commission of which is necessarily included in the offense with which he is charged in the indictment, whether the same be a felony or misdemeanor, without any additional count in the indictment for that purpose." §2523, Miss. Code 1942 Ann. (1956).

In Gaither v. United States, 134 U.S. App. D.C. 154, 413 F.2d 1061, 1071 (D.C. Cir. 1969), this definition of an amendment prohibited by Stirone and Bain, as opposed to the concept of a variance in proof from the indictment appears:

> An amendment of the indictment occurs when the charging terms of the indictment are altered,

either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. A variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.

The question that the present case poses is whether, under the facts of this case, "burglary" was effectively added to the charges against which appellant had to defend. United States v. Bryson, 483 F.2d 88, 96 (3d Cir. 1973); United States v. De Cavalcante, 440 F.2d 1264, 1271 (3d Cir. 1971); Gaither v. United States, supra, 413 F.2d at 1073. The present case involved a "material alteration" of the indictment thus returned by the grand jury.

There is no question that the Fourteenth Amendment encompasses the right to fair notice of criminal charges. The Supreme Court in In re Oliver, 333 U.S. 257, 273, 92 L.Ed. 682, 68 S.Ct. 499 (1948), in dealing with the Due Process Clause of the Fourteenth Amendment, stated that:

A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense - a right to his day in

Court - are basic in our system of jurisprudence . . . .

Likewise, in Cole v. Arkansas, 333 U.S. 196, 201, 92 L. Ed. 644, 68 S. Ct. 514 (1948), the Supreme Court declared that:

> No principle of procedural due process is more clearly established than that of notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Edwards assert, counsel did not advise him he was pleading to a new charge, which the grand jury did not return. The Supreme Court of Mississippi on August 15, 1979, approved the Mississippi Uniform Criminal Rules of Circuit Court Practice, on the request of the Circuit Judges Section of the Mississippi Judicial Conference. Rule 3.03,[1] among other things provides:

> "(3) Advice to the defendant
> When the defendant is arraigned and wishes to plead guilty to the offense charged, it is the duty of the trial court to address the defendant personally

and to inquire and determine:
A. That the accused is competent to understand the nature of the charge against him;
B. That the accused understands the nature and consequences of his plea, and the maximum and minimum penalties provided by law;
C. That the accused understands that by pleading guilty he waives his constitutional rights of trial by jury, the right to confront and cross-examine adverse witness, and the right against self-incrimination;"
(Emphasis added).

The matter is squarely before this court because the first two assignments of error are:

1) The indictment here referred to is the presentation to the proper court, by a grand jury, duly impaneled, of a charge describing an offense against the laws for which the party charged may be punished.

2) When this indictment is filed with the court no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without resubmission of the

case to the grand jury. And the fact that the court may deem the change immaterial, as striking out of surplus words, makes no difference. The instrument, as thus changed, is no longer the indictment of the grand jury which presented it.

Edwards raises his ineffective assistance of counsel claims in his petition for a writ of habeas corpus. Edwards contends that his attorney were ineffective for two reasons: (1) failing to move to suppress a "sub-

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1. The terms "voluntary" and "knowing" are frequently used interchangeably, although, strictly speaking, the terms embody different concepts. Compare 1A Charles Alan Wright, Federal Practice and Procedure § 172, 142-44 (3d ed. 1999)(stating a plea of guilty is not voluntary if it is induced by threats, misrepresentation, unfulfilled promises, or promises of an improper nature), with id. § 173, 171-73 (stating that a plea is not knowing unless, among other things, defendant understands "what the maximum possible penalty is, including any potential fine and the effect of any special parole or

stitute" the indictment of the "grand jury" a criminal information for "Burglary"; and (2) failing to inform the Court of the substituted Criminal information for the indictment returned by the grand jury. Edwards, believes, raises the issues in his petition for plain fatal error. United States v. Spires, 79 F.3d 464, 465 (5th Cir. 1996). Plain error is established when there is an error that is clear and obvious (substituted criminal information for cause #05-598), and that error affects substantial rights of Edwards. United States v. Cervenza, 74 F.3d 629, 631 (5th Cir. 1996). A plain error must be clear under current law at the time of trial. United States v. Olano, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777, 123 L.Ed.2d 508 (1993). On January 30, 2006, the Circuit Court of Forrest County, Mississippi, committed fatal error, to the trial court's jurisdiction to entertain the substitute (amended) cause of the prosecuting attorney. He claims that his guilty plea was unknowing and involuntary, as the circuit court did not properly advise him of the charge returned by the grand jury pursuant to Rule 2.05. Edwards argues that counsel "coercion" him to plea to the substitute charge of the prosecuting attorney for burglary, also see Rule 8.05.

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supervised released term").

Conclusion

The purpose of the requirement of the Fifth Amendment that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizen acting independently of either prosecuting attorney or judge; this purpose is defeated by a device or method which subjects the defendant to prosecution for act which the grand jury did not charge. When this indictment (Cause No. 05-398CR) is filed with the court no "substitute" can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a re-submission of the case to the grand jury. And the fact that the court may deem the change immaterial, as striking out of surplus words, makes no difference. The instrument, as thus changed, is no longer the indictment of the grand jury which presented it.

According to principles long settled by the courts in this state, the prisoner, who stands sentenced to the penitentiary on such trial, is entitled to his discharge and whatever the Court deem just and appropriate in the interest of justice.

Respectfully submitted,

/s/ Donald Edwards

Donald Ray Edwards

IN THE CIRCUIT COURT OF Forrest CO, MISSISSIPPI

Donald Edwards PLAINTIFF

vs. Cause No.: 05-598

STATE OF MISSISSIPPI DEFENDANT

AFFIDAVIT OF POVERTY TO ACCOMPANY MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* WITH MOTION FOR POST-CONVICTION COLLATERAL RELIEF

I, Donald Edwards, being first duly sworn, depose and say that I am the Plaintiff in this case; that, in support of my motion to proceed *in forma pauperis* and without being required to prepay fees and costs, I state that because of my poverty I am unable to pay the fees and costs of this proceeding.

I further swear that the responses which I have made to the question and instructions below relating to my ability to pay the fees and costs of prosecuting the present action are true.

1. State the place and mailing address of your incarceration.
S.M.C.I.-2 P.O. Box 1419 - D-1 - A-Zone - Bed-12
Leakesville MS 39451

2. In the past twelve months have you received any money from any of the following sources?
   b. Business, profession or other self- employment? _____
   c. Rent payments, interest or dividends? _____
   d. Pensions, annuities or life insurance payments? _____
   e. Disability or workers compensation payments? _____
   f. Gifts or inheritance? _____
   g. Any other sources (including prison account deposits)? NO

If the answer to any of the above is "Yes" describe each source of money and state the amount received from each during the past twelve months (Attach additional sheet if necessary).

_____

_____

3. Do you own any cash, checking or savings accounts (including funds in prison account)? NO.

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, automobiles, or other valuable property (excluding ordinary household furnishings)?

NO

a. If the answer is yes, describe the property and state its approximate value.

I understand that a false statement or answer to any question or instruction in this affidavit will subject me to penalties for perjury.

10-24-06
(Date)

Donald Edwards
(Signature of Applicant)

STATE OF MISSISSIPPI

COUNTY OF Greene.

SUBSCRIBED AND SWORN TO before me the 24 day of Oct, 20 06.

LAURA STEWART NOTARY PUBLIC GREENE COUNTY, MS

Laura Stewart
Notary Public

MY COMMISSION EXPIRES

NOTARY PUBLIC STATE OF MISSISSIPPI AT LARGE
MY COMMISSION EXPIRES: June 2, 2010
BONDED THRU NOTARY PUBLIC UNDERWRITERS

U-1
Bed 12

---- TO BE COMPLETED BY APPLICANT ----

AUTHORIZATION FOR RELEASE INSTITUTIONAL ACCOUNT INFORMATION AND PAYMENT OF THE FILING FEE

I, Donald Edwards 29647
(Name of Applicant) (Register Number)

authorize the Court and Clerk of the Court to obtain, from the agency having custody of my person, information about my institutional account, including balances, deposits and withdrawals. They may obtain my account information from the past six months and in the future until the filing fee is paid. I also authorize the agency having custody of my person to withdraw funds from my account and forward payments to the Clerk of Court, in accord with Section 47-5-76 of the Mississippi Code of 1972 Annotated.

Donald Edwards 10-10-06
(Signature of Plaintiff) (Date)

CERTIFICATE
(Prisoner Accounts Only)
TO BE COMPLETED BY AUTHORIZED OFFICER

I certify that the applicant named herein has the sum of $ -0- on account to his credit at the SMCI Institution where he is confined.

I further certify that the applicant has the following securities to his credit according to the records of said institution. _____

I further certify that applicant has received the following deposits over the last 6 months to his account.(date/amount)1 5/26 $30.02 2 ____ $ ____ 3 ____ $ ____ 4 ____ $ ____
5 ____ $ ____ 6 ____ $ ____ 7 ____ $ ____ 8 ____ $ ____ 9 ____ $ ____
10 ____ $ ____ 11 ____ $ ____ 12 ____ $ ____ 13 ____ $ ____ 14 ____ $ ____
15 ____ $ ____ 16 ____ $ ____ 17 ____ $ ____ 18 ____ $ ____ 19 ____ $ ____
20 ____ $ ____ 21 ____ $ ____ 22 ____ $ ____ 23 ____ $ ____ 24 ____ $ ____
25 ____ $ ____ 26 ____ $ ____ 27 ____ $ ____ 28 ____ $ ____ 29 ____ $ ____
30 ____ $ ____ 31 ____ $ ____ 32 ____ $ ____. (add sheet if necessary).

Ave m Deposit 429
Ave m Balance 109

(Authorized Officer of Institution)

10-18-06