In The COURT OF APPEALS OF The STATE OF MISSISSIPPI

JOSEPH HENRY — APPELLANT

VS.

CASE NO. 2007-CP-01435-COA

STATE OF MISSISSIPPI — APPELLEE(S)

RE-PLY BRIEF FOR APPELLANT

JOSEPH HENRY #07912
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ORAL ARGUMENT NOT REQUESTED

PRO "SE PRISONER RE-PLY BRIEF

in The COURT OF APPEALS OF The STATE OF mississippi

Joseph Henry — APPELLANT
VS. — CASE NO. 2007-CP-01435-COA
STATE OF mississippi — APPELLEE(S)

CERTIFICATE OF INTERESTED PERSONS

The undersigned APPELLANT, PRO"se, CERTIFIES THAT The Following LISTED PERSONS HAVE AN INTEREST IN The OUTCOME OF This CASE. The REPRESENTATIONS ARE MADE IN ORDER THAT The justices OF This HONORABLE COURT MAY EVALUATE possible DISQUALIFICATION OR RECUSAL.

1. Joseph Henry, APPELLANT, PRO"se.
2. HONORABLE Jim Hood, AND STAFF, ATTORNEY GENERAL.
3. HONORABLE ROGER T. CLARK, CIRCUIT COURT Judge.
4. HONORABLE RICHARD J. SMITH JR, ASSISTANT DISTRICT ATTORNEY.

RESPECTFULLY SUBMITTED, This The ____ DAY OF ____, 2008

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February 2008

Ms. Betty W. Sephton
Office of The Clerk
P.O. Box 249
Jackson, MS 39205

RE: Joseph Henry vs. State of Mississippi
Case no. 2007-CP-01435-COA

Dear Court Clerk

Please Find Enclosed Herewith is Appellant Re-ply Brief" To Be Docketed And Filed in The Above styled cause. To Be Prepared For The Court. Appellant Has Enclosed A Self-Addressed Envelope That This Court Clerk would FORWARD A Filed "Heading STAMPED COPY OF Appellant Re-ply Brief" upon your Recipient of such. Thank You

Respectfully submitt

Joseph Henry #07912
Pro se

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STATEMENT OF THE ISSUES

This Appeal Brief calls upon this Court of Appeals to decide some serious Federal and State Constitutional Questions on the Issues. They are as follows:

ISSUE ONE

Whether "Errors affecting Fundamental Constitutional Rights, such as the Right to a Legal Sentence, may be excepted from Procedural Bars (Time Limitation - Under Mississippi Rules of Civil Procedure (MRCP) - six months to file a MRCP Rule 60 (b) Motion) which would otherwise prevent their Consideration?

A. Whether, "The Right to be 'Free' from an Illegal Sentence is a Fundamental Right as Required for Post-Conviction Relief?"

ISSUE TWO

Whether the Trial Court Comitted Error in improperly Sentencing Henry as a Habitual Offender Under Section 99-19-81, where at Henry's Sentencing Hearing, the State failed / Refused to offer <u>any</u> Conclusively Evidence and properly prove beyond a reasonable doubt that Henry was, in Fact, A Twice Convicted Felon?

A. Whether the Mississippi Double Jeopardy Clause Precludes the State from having a Second Chance to establish Henry's Habitual Offender Status, where there was no Evidence offered at Henry's Sentencing Hearing by the State to support a Habitual Offender Conviction/Sentence?

ISSUE THREE

Whether the Trial Court erred in failing to conduct an evidentiary hearing before Denying Henry's Rule 60 (b) Motion, as being Six Months Time Barred Under MRCP, where Henry's Rule 60 (b) Motion contained issues (Illegal Sentence and Ineffective Assistance of Counsel) of fact mixed with issues of Law?

ISSUE FOUR

Whether, when a Pro Se' Appellant offers Substantial Proof (Trial Court Plea Hearing Records) of his claim that he is Legally Innocence of being Sentence as an Habitual Offender, and if he is deprived of an opportunity to be heard on the 'Merits', would the 'Action' run afoul of the Due Process and Equal Protection Clause of the U.S. Constitution, and would this 'Action' Result in a Fundamental Miscarriage of Justice?

STATEMENT OF INCARCERATION

The Appellant is incarcerated in the Mississippi Department of Corrections and is being presently housed in the Kemper-Neshoba County Regional Correctional Facility (KNRCF) at Dekalb, MS, in service of prison terms imposed as a Result of Conviction and Sentence had and imposed by the trial Court. Appellant has been continuously confined in Regards to such Sentence since date of Conviction and imposition by the trial Court.

STATEMENT OF THE CASE
THE COURSE OF THE PROCEEDINGS

Joseph Henry was indicted on August 30, 2002, in the Circuit

Court of Harrison County, MS, for the offense of Sell or Transfer of Cocaine, a Schedule II Controlled Substance, to Dianne Evans. Also, in the same indictment, Henry was presented as an Habitual Criminal, subject to be Sentence, Pursuant to Section 99-19-81, MCA of 1972. (Circuit Court Clerk's Records, here-in-after, CR-19,20). Appellant Henry Subsequently entered an Guilty Plea to such charge and was Sentenced on March 6, 2006, to a term of Ten (10) years in the Custody of the Mississippi Department of Corrections to be served day for day without hope of parole, under section 99-19-81, MCA of 1972. (CR. 25-26).

Appellant subsequently filed a "Motion For Evidentiary Hearing of Counsel's Ineffectiveness at Sentecing," on or about April 4, 2006. (CR.-79: This Motion is not listed at all in the Court Clerk's Records, 'Civil Filing Sheet', but the Motion is Listed in Appellant's Rule 60 (b) Motion, as a 'Excert Records' [CR. 73-143]).

Appellant further filed a "Notice of Appeal," on or about April 6, 2006. (CR.-78: This "Notice of Appeal" Motion is, also, not Listed at all in the Court Clerk's Records, 'Civil Filing Sheet' on this present Appeal, but the 'Notice of Appeal' Motion is listed in Appellant's Rule 60 (b) Motion, as a 'Excert Records' [CR. 73-143]). (CR.-83)

Appellant further filed a "Motion For Reconsideration of Sentence," on or about June 5, 2006. (CR.-80: This Motion is also not listed at all in the Court Clerks Records, 'Civil Filing Sheet' on the present Appeal, but the Motion is listed in Appellant's Rule 60 (b) Motion, as a 'Excert Records' [CR. 73-143].

Appellant submits that the Circuit Court Judge Clark, denied his "Motion for Reconsideration of Sentence," on July 11, 2006. (CR.-82) Also, Judge Clark, issued an Order, on July 11, 2006 which Denied Appellant, Joseph Henry, Leave to Appeal In Forma Pauperis in Cause No. B2401-2003-00707. (CR.-81: These two (2) Orders are not Listed in the Court Clerk's 'Civil Filing Sheet' in the present Appeal).

On August 14, 2006, Appellant was issued his Case No. 2006-TS-0068-COA, in the Mississippi Court of Appeals, which said Court of Appeals docketed the Cause but stated, "the Appellant has Substantially failed to Prosecute this Appeal," by not paying the filing fee to the Lower Court Clerk. (CR. 83-84)

Appellant submits that, while his Sentence of ten (10) years, as an Habitual Offender was on Appeal in the Mississippi Court of Appeals in Case No. 2006-TS-00688-COA, Appellant filed a "Motion For Post Conviction Relief (CR. 5-10) and a "Motion For Evidentary Hearing of Counsel's Ineffectiveness at Both The Plea and At Sentencing' (CR. 11-18), on August 24, 2006, in the Harrison Co. Circuit Court in Cause No. B-2401-03-00707.

Appellant further states that on September 27, 2006, Circuit Court Judge Roger T. Clark, issued an Order, Denying, Appellant, Henry's, 'Post Conviction Relief; (CR. 27-28) Also, on September 27, 2006, Circuit Court Judge Clark, issued another Order Denying Appellant, Henry's 'Motion For Evidentiary Hearing of Counsel's Ineffectiveness at Both The Plea and Sentencing" (CR. 29-30).

Appellant did not Appeal these two (2) Denials by Judge Clark within the 30 days Appeal Process because 1) his Illegal Sentence of ten (10) years, as an Habitual Offender was still on Appeal and 2) Appellant was seeking to get his Plea Hearing Transcripts and Motion To Withdraw Transcripts from the Harrison Co. Court Reporter that this New Evidence (Transcripts) would Manifest the proof for his Relief in his Case, but this process was taking an unusally extended amount of time. (Over an Six-Months Period, as shown by these Clerk's Records). (CR. 73-143).

On 10-19-06, Hon. Gayle Parker, Harrison Co. Circuit Clerk, forwarded Appellant, Joseph Henry, a Response to his Requested Letter pertaining to the Cost of his Appeal, which said Response by this Clerk stated that " The Costs you paid for your Appeal was $249.00. (Balance 0). (CR. 85).

On September 29, 2006, Appellant received Notice from the Mississippi Court of Appeals informing him that his Case had been docketed and assigned case number 2006-KP-00688-COA. Also, the Court Clerk informed Appellant that he had "forty (40) days of the date of this Letter," to file his Brief in this Case. (CR. 86)

On October 26, 2006, Appellant filed a Motion For Extension of Time, to file his Appeal Brief (CR. 87). Appellant had file a Petition For An Order To Receive Guilty Plea Transcripts," (CR. 88), pursuant to the Recent Case, White v. State, 867 So. 2d 1047, 1049 (Miss. Ct. App. 2004), in hopes that these Plea Hearing Transcripts could 'shade' some light on his 'Illegal Sentence' in Cause No. B2401-2003-707. Further, Appellant had to file another Motion For Extension of Time, to this Court in Case No. 2006-KP-0068-COA, (CR. 89), because Appellant had not receive any response from the Harrison Co. Circuit Court on his Petition for an Order To Receive his Guilty Plea Transcripts, thereby, this Court of Appeals Granted Appellant the Extension of Time Until December 19, 2006, but stated to Appellant, "No Further extension of Time will be Granted." (CR. 90).

Appellant submits that because he could not receive any Response from the Circuit Court about a Copy of his Plea Hearing Transcript, and to staying diligently in seeking Relief in his Case, Appellant had to write an Request to the Circuit Court Reporter, Ms. Patricia L. Bodin, where on January 10, 2007, Ms. Bodin (CSR), responsed back to Appellant's Request, to pay the Cost for a Copy of his Plea Hearing Transcript, by saying that "A Transcript of the plea hearing of 3/6/06 will cost $60.00." (CR. 91)

Appellant further submits that this Newly Discovered Evidence Plea Hearing Transcripts, would have to be presented and filed back in the Harrison Co. Circuit Court before being presented to to this Court of Appeals in Case No. 2006-KP-00688-COA, thereby, Appellant had to Voluntary Dismiss his Appeal in this Cause,

pursuant to MRAP Rule 42(b), because of the holding in this Court in Gray v. State, 819 So. 2d 542 (N.3) (Miss. Ct. App. 2001). (CR. 92). This Court of Appeals Granted by an Order Appellant's Motion to Voluntary Dismiss his Appeal on January 17, 2007 (CR. 93), and the Mandate from this Order was issued on January 18, 2007. (CR. 94).

Appellant states that he forwarded to the Harrison Co. Circuit Court Reporter, Ms Bodin, a $60.00 Money Order from the Kemper-Neshoba Regional Correctional Facility (KNRCF) to pay for a Certified Copy of his March 6, 2006, Plea Hearing Transcript, which said Certified Transcript consisted of 23 Pages at $3.00 per page. (CR. 95). On or about March 11, 2007, Appellant received his Certified Copy of his March 6, 2006, Plea Hearing Transcript. (CR. 96-118)

Appellant submits that his trial Counsel Mr. Robert H. Koon, on November 8, 2005, filed a "Motion To Withdraw as Attorney of Record for Defendant," because Appellant had filed a Request for Assistance against Mr. Koon with the Mississippi Bar, where Appellant stated to the MB, "Mr. Koon is providing him with inadequated Representation." (CR. 136-138) Thereby, on December 5, 2005, a "Motion Hearing" was held in the Harrison Co. Circuit Court before the Hon. Jerry O. Terry, Circuit Judge. (CR 120-131) Further, the Circuit Court Judge Terry, on December 5, 2005, issued an Order Sustaining Motion To Withdraw as Attorney of Record and set Appellant's trial on February 6, 2006. (CR. 134)

Appellant states that he wrote two (2) Letters (one on 2/1/07 and one on 2/14/07) to Ms. Cheryl E. Sablich, Harrison Co. Circuit Court Reporter, Requesting a Certified Copy of the December 5, 2005, 'Motion To Withdraw Hearing', and on February 26, 2007, Ms Cheryl E. Sablich, CSR, Responded back to Appellant by stating, "An estimate for transcribing the hearing on December 5, 2005, is $55.00. Upon Receipt of a Money Order in that amount, I will place it in line for transcription." (See

Exhibit-AZ in this Appeal Brief). Appellant further states that on April 13, 2007, he received an Response from Ms Sablich, CSR, which said Response stated, "I am in receipt of your letter dated April 14, 2007 and your letter and check dated March 15, 2007. Appellant was inquiring, why it was taking so long for him to receive this Transcript.) Official Court Reporters are afforded 60 days to complete transcripts which would calculate my time out to around May 15, 2007. I have other transcripts in front of this one." (See Exhibit-BZ, in this Appeal Brief).

Appellant submits that on April 23, 2007, Ms Cheryl E. Sablich, CSR, forwarded a 'Statement of Fees' to Appellant which said 'Statement' stated, "Original Transcript" of the December 5, 2005, 'Motion Hearing', consists of 12 pages at $3.50 per page. (CR 119) Therefore, Appellant received the certified copy of the 'Motion Hearing' Transcript (CR. 120-131), on or about April 29, 2007.

Appellant submits that on or about June 27, 2007, only two months after he had received this Newly Discovered Evidence [The March 6, 2006, Plea Hearing Transcripts and the December 5, 2005 'Motion To Withdraw' Transcripts], he filed a "Motion For Relief From Order Pursuant To FRCP Rule 60(b)," back into the Harrison Co. Circuit Court in Cause No. B2401-2003-707 and A2401-2006-00309, where this trial Court could have the <u>first</u> opportunity to determine the validity (The True) of this Newly Discovered Evidence. (CR 33-72 and Excerpt Records CR. 73-143).

Appellant states that on July 5, 2007, Circuit Court Judge Roger T. Clark, Denied Appellant's Rule 60(b) Motion by stating: "The Order denying Henry's petition for Post-Conviction Relief was entered on or about September 27, 2006. Henry did not file this Rule 60(b) Motion until July 2, 2007, well after six-month time limit." Thereby, this Judge Clark, had Denied Appellant's Rule 60(b) Motion as being Procedural Time Barred Pursuant to MRCP 60(b) ("The Motion shall be made within

a reasonable time, and for Reason (1), (2) and (3) not more than six months after the entered of Judgment, also, this Judge Clark did not make any written findings or Conclusion of Law on the Merits (issues) in Appellant's Rule 60(b) Motion. (CR. 144-145)

Appellant submits that on or about July 14, 2007, he filed an 'Motion For Reconsideration Pursuant To MRCP Rule 52(b)', where Appellant stated that "the Circuit Court Judge Clark's written findings on the Time Limitation or Procedural Bar of Appellant's Rule 60(b) Motion, was correct but Judge Clark failed to make any written findings and Conclusions of Law on Petitioner's Fundamental Miscarriage of Justice; Issue of being Legally Factually (Prima Facie) Innocence of being Sentence as an Habitual Offender, as shown by the Newly Discovered Evidence Plea Hearing Transcripts (CR 96-118) and Motion Hearing To Withdraw Transcripts (CR 120-131). Thereby, this Rule 52(b) Motion was filed to enable this Appellante Court to obtain a correct understanding of the factual issues determined by the Trial Court as a basis for the the Conclusions of Law and Judgment entered thereon but as this Court will find on or about August 24, 2007 (CR.166), the Circuit Judge Clark, Denied, Appellant's Rule 60(b) Motion Claims (Illegal Sentence).

Appellant submits that from this Denial, on or about July 24, 2007, he filed a Notice of Appeal, Designation of Records and Application for Informa Pauperis (CR. 156-165), in the Harrison Co. Circuit Court in Cause No. A2401-2006-00309. Thereby, on August 31, 2007, Circuit Court Judge Clark issued an Order to Grant Appellant Leave To Appeal Informa Pauperis in the Mississippi Court of Appeals. (CR.167)

Appellant further states that on August 31, 2007, Circuit Court Judge Clark, issued an Order to Grant in Part, the Requested Records and Transcripts. (CR.168). Thereby, the Grand Total Fees for these Records and Transcripts on the Appeal in this Cause is

#427.40. (CR. 171-172).

STANDARD OF REVIEW

In reviewing a trial Court's decision to deny a Motion for Post-Conviction Relief the Standard of Review is Clear. The Trial Court's denial will not be Reversed absent a finding that the trial Court's decision was clearly erroneous. Kirksey v. State, 728 So. 2d 565, 567 (Miss. 1999).

In the instant Case, well-settled Law dictates that the trial Court's decision was clearly erroneous since the trial Court failed/Refused to address the Substantial and Meritorious Claims made in the petition, i.e., the Records (Newly Discovered Evidence-Plea Hearing Transcripts and Motion To Withdraw Hearing Transcripts) clearly demonstrates that the State at Henry's Plea and Sentencing Hearing failed to produce any sufficient Evidences (As the Applicate Law Requires) at the Hearing, by testimonies or Certified Records, which would have proved beyond a Reasonable doubt that Henry was indeed "Convicted twice previously of any State felony or Federal Crime upon charges separately brought and arising out of separate incidents at different times," where the trial Court upheld the State's Recommendation by sentencing Henry to a term of Ten (10) years as an Habitual Offender. Vince v. State, 844 So. 2d 510, 517 (P22) (Miss. Ct. App. 2003); Short v. State, 929 So. 2d 420, 426 (P15) (Miss. Ct. App. 2006).

Further, in the instant Case, well-settled Law dictates that the trial Court's decision to Procedural Bar Henry's Rule 60(b) Motion (A Six-Months Limitation to file under MRCP), was clearly erroneous where the Records demonstrates that Henry, was challenging a Illegal/Improper Sentence, thereby, under the Applicate Mississippi Law, Errors affecting Fundamental Constitutional Rights, such as the Right to a Legal Sentence, may be excepted from Pro-

cedural Bars which would otherwise Prevent their consideration. Ivy v. State, 731 So. 2d 601 (Miss. 1999); Weaver v. State, 785 So. 2d 1085 (Miss. 2001); Chancellor v. State, 809 So. 2d 700 (Miss. 2001).

Lastly, in reviewing this Appeal, from the trial Court's decision not to allow the true Facts underlying Henry's claims to be adequately developed in the trial Court's proceeding, this Mississippi Court of Appeals must consider, the benefit of Case Law concerned with the judiciary handling of, and disposition of Complaints and pleadings filed by Pro Se' prisioners. As early as the year 1948: In Price v. Johnson, 68 S.Ct. 1049, 334 U.S. 266 (U.S. Cal. 1948) the United State's Supreme Court held that:

> "it was enough if the prisoner (Henry) presented an allegation and supporting facts which if borne out of proof, would entitle him to Relief. Prisoner (Henry) are often unlearned in the Law and unfamiliar with the complicated Rules of Pleadings. Since they (Henry) act so often as their own Counsel in Habeas Corpus (Post-Conviction Motion or Rule 60(b) Motion) proceedings, we cannot impose on them the same high standards of Legal art which we might place on the members of the Legal Profession. Especially is this true in a Case like this where the imposition of those standards would have a prejudicial effect on the prisoners (Henry) inartistically drawn Petition."

See also Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733 (1964); Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594 (1972), ("Pro Se' prisoner's complaint must be liberally construed."); Cramer v. Skinner, 931 F. 2d 1020 (5th Cir. 1991) and McFadden v. State, 542 So. 2d 871, 874 (Miss. 1989), ("Courts must accept Pro Se' prisoner's allegations in pleadings as

true, and not samarily dismiss them. Prisoners (Henry) Complaint should not be dismissed because inartfully drafted.)

STATEMENT OF FACTS RELEVANT TO ISSUES

On November 15, 2002, Appellant, Joseph Henry, was arrested for the Crime of Sale/Delivery Crack Cocaine by the Harrison County Sheriff Department and the Arresting Officer was Ricky Dedeaux (MS Bureau of Narcotics, Gulfport, MS). (See Exhibit-CZ, attached to this Appeal Brief). [Note: Appellant had Requested in his "Designation of Records" (CR 159-160) that his Arrest Warrant, Affidavits and Investigation Report be made part of the Appeal Records but Circuit Judge Roger T. Clark, on August 31, 2007, issued an Order (CR. 168) to Granted in Part, Appellant's "Designation of Records" Request, thereby, Appellant was Denied his Request for the Arrest Warrant, Affidavits and Investigation Report to be made part of his Appeal Records and this Action by Judge Clark Reflect a true sign of 'Abuse of Discretion' (Bias to Pro Se' filing).]

On September, 2003, Joseph Henry, was Indicted in Cause No. B2401-2003-707 by the first Judicial District, Harrison County, Grand Jurors of the State of Mississippi, for the Crime of Sell or Transfer Cocaine, a Schedule II Controlled Substance, to Dianne Evans, ... Also, this same Grand Jurors, further presented, that Joseph Henry, was a habitual Criminal who was subject to being sentence as such Pursuant to Section 99-19-81, Miss: Code of 1972, as amended. (CR. 19-20) On December 5, 2005, a Motion Hearing was held in Cause No. B2401-03-707, where Attorney for Joseph Henry, Mr. Robert H. Koon, had filed a Motion To Withdraw as Counsel of Records. (CR. 120-131) This Hearing will Reveal that Henry and Mr. Koon, were having some indifferents in his Case and Henry had filed a complaint to the Mississippi Bar by stating that Mr. Koon have not done his Job with Regards to his Case. And at this Hearing, Mr. Koon, did acknowledge

that Henry did indeed have some issues that needed to be presented to the Court in his Case in the event Henry's goes to trial. (CR. 123) The Court Ruled at this Hearing that Mr. Koon would continue to Represent Henry in this Cause because Henry had previous been Granted by the Court to have his first attorney, Mr. Michael Hester, dismissed as Counsel of Records in his Case. (CR. 122) Furthermore, at this Hearing Circuit Court Judge Jerry O. Terry, as for Henry's Habitual Offender Status, "As long as the State produces a Copy of the Pen Pack from the State Penitentiary or the Convictions themselves from the Records here in the Courthouse, that's Sufficient as long as there's two priors." (CR. 130) The District Attorney's Office, Mr. Richard J. Smith, Jr., was advised by the Court of the Applicate Law to Prove beyond a Reasonable doubt that Henry should be sentenced as an Habitual Offender (CR. 120-131).

On March 6, 2006, Appellant being represented by Lawyer, Mr. Robert H. Koon, had signed a 'Petition To Enter Plea of Guilty' for the Crime of Tranfer of Controlled Substance, Section 41-29-139 (a)(1), Miss. Code of 1972, as amended; Habitual Offender Section 99-19-81, Miss. Code of 1972, as amended. Thereby, the District Attorney Office would have had to make a Recommendation to the Court that Joseph Henry be sentenced to ten (10) years, plus, the July 12, 1995, Burglary of a Dwelling by the Circuit Court of Hancock Co., MS, prior crime used in Henry's indictment, as one of his prior convictions to establish his Habitual Offender status, was expunged from being used in determining his Habitual Offender Status (CR 21-24) because this prior crime had been Ordered to be Reversed and Remanded for a New Trial. (CR. 142).

On March 6, 2006, in the Circuit Court of Harrison Co. MS, in Cause No. B2401-03-707, a Guilty Plea Hearing was held, with Henry being represented by Attorney Mr. Robert H. Koon and the State being represented by the Hon. Richard J. Smith, Jr., Assi-

stant District Attorney, before the Hon. Roger T. Clark, Circuit Court Judge. (CR. 96-118) At this Plea Hearing, Judge Clark, after advising Henry of all his Constitutional Rights, determined that Henry's Plea was a Free and a Voluntary Plea, thereby, the Court Stated, "In Cause Number 03-707, Mr. Henry, I accept your plea and find you guilty of Transfer of a Controlled Substance." (CR 108-109)

At the Sentencing proceedings of this Plea Hearing, the Court had Stated: "All right State, what do you have to say to Mr. Henry?" And the Ass. District Atty., Mr. Smith stated: "Your Honor, the State would recommend ten years to serve without the hope of parole."

THE COURT: With what?

MR. SMITH: Ten years to serve without the hope or possibility of parole.

THE COURT: He is a Habitual Offender?

MR. SMITH: Yes, Your Honor.
(CR. 115)

The Court, then proceeded by stating: "All right. In Cause Number 03-707, Mr. Henry, I hereby sentence you to the custody of the Mississippi Department of Corrections for a term of ten years, with no chance of probation or parole. (CR. 116-117)

The State Assistance District Attorney, Mr. Richard J. Smith, Jr., at these Sentencing proceedings of this Plea Hearing, did not Produce any Copies of Evidence of the Pen Pack from the State Penitentiary and did not produce any copies of Henry's prior Convictions from the Records in the courthouse (CR. 96-118),

that said prior Convictions would prove, beyond a reasonable doubt that Henry should be sentenced as an Habitual Offender.

SUMMARY OF THE ARGUMENT

The Appellant filed an Motion For Post-Conviction Relief, he alleged that his sentence was incorrect and he request that his Sentence be Reduce, also, he stated that the case should be sent back to the trial Court for Re-Sentencing but in his PC Motion, Appellant, Henry, did not present a Copy of his Plea Hearing Transcripts to substantial his claims, because the Circuit Court Clerk had failed to provide or Assist Henry in obtaining a Certified Copy of these Transcripts, thereby, when the trial Court issued an Order to Deny Appellant's PC Motion by stating, "Accordingly, pursuant to, Miss. Code Ann. ee 99-19-81, this Court is without authority to reduce Henry's Sentence," the written findings by the trial Court was correct but the Court made the written findings without the Plea Hearing Transcripts.

Appellant continued to be diligent in obtaining Relif in his Case, by making several Request to the Harrison Co. Circuit Clerk's Office and to the Circuit Court Reporter, to obtain a Certified Copy of his Plea Hearing Transcripts, inthat, these Transcripts may shade some light in his Case. Appellant did, finally, receive a Certified Copy of his Plea Hearing Transcripts, where these Transcripts, where these Transcripts Revealed that the Trial Court had indeed committed 'Plain Error' Legally, in improperly Sentencina Henry, as an Habitual Offender, Under Section 99-19-81, MCA of 1972, as amended, where at Henry's Sentencing Hearing, the State failed / Refused to Conclusively and properly, in accordance with the Applicate Law, Present the Evidence (a Certified Pen Pack from the Mississippi State Penitentiary or Certified Copies of the Circuit Clerk's Records) to prove beyond a Reason-

able doubt that Henry was, in fact, A Twice Convicted Felon.

After discovery this Prima Facie, 'Error', committed by the trial Court, in these transcripts, Appellant filed an Rule 60 (b) Motion back in the trial Court to give that trial Court the first opportunity, in accordance to the Applicate Law, in determine the validity of this Newly Discovered Evidence (Plea Hearing Transcripts); Also, in this Rule 60(b) Motion, Appellant, announced that he was Legally, Factually Innocence of being Sentence as an Habitual Offender.

The Appellant was denied Due Process of Law by the trial Court when in its written findings, after Review of his Rule 60(b) Motion, where the trial Court used an six month time Limitation (Procedural Bar) under MRCP Rule 60 (b) (1), (2) and (3), to Deny Appellant's Rule 60(b) Motion. Further, Appellant had announced a Fundamental Miscarriage of Justice, thereby, under the Applicate Law. Appellant should not have been subject to a six months Statute of Limitation or Procedural Bar. The Trial Court should have at Least Granted Appellant an Evidentiary Hearing, as requested, to give him an in-Court opportunity to prove his Claims/Grounds.

ARGUMENT

ISSUE: ONE

WHETHER ERRORS AFFECTING FUNDAMENTAL CONSTITUTIONAL RIGHTS, SUCH AS THE RIGHT TO A LEGAL SENTENCE, MAY BE EXCEPTED FROM PROCEDURAL BARS WHICH WOULD OTHERWISE PREVENT THIER CONSIDERATION?

Appellant submits that after finally receiving a Certified Copy of his Plea Hearing Transcripts, he discovered in these New Re-

cords that the State had failed / Refused at this Plea Hearing during the Sentencing Phase, to Provide or Produce any Sufficent Evidence (Pen Pack Records from the Mississippi State Penitentiary or Circuit Court Clerk's Records from the County Court house) in-accordance with the Applicate Law, to prove beyond a reasonable doubt that Appellant had indeed been "convicted twice previously of any State Felony of Federal Crime upon charges separtely brought and arising out of separate incidents at different times," pursuant to MCA § 99-19-81, where also, in these New Records, the trial Court had upheld the States Recommendation by Sentencing Appellant to a term of Ten (10) years as an Habitual Offender. (CR. 96-118)

Appellant states that after discovering this Prima Facie, 'Error,' in these Transcripts, committed by the State and the trial Court Judge, Appellant filed a Rule 60(b) Motion (CR. 33-72 and 73-143) back in the trial Court to give that trial Court the first opportunity, in accordance to the Applicate Law, in determine the validity of this Newly Discovered Evidence (Plea Hearing Transcript), where in the Rule 60(b) Motion, Appellant moved the Court for Reconsideration of the Court's Order Denying him Relief. (CR. 27-28 and CR 29-30).

Further, in this Case, well-settled Law dictates that the trial Court's decision to Procedural Bar Appellant's Rule 60(b) Motion (Six-Months Time Limitation to file under MRCP) (CR. 144-145), was clearly erroneous, where the Records of the Rule 60(b) Motion, Reflects that Appellant was challenging a Illegal / Improper Sentence, thereby, under the Applicate Law, "Errors affecting Fundamental Constitutional Rights, such as the Right to a Legal Sentence, maybe excepted from Procedural Bars which would otherwise Prevent their Consideration." Weaver v. State, 785 So. 2d 1085 (Miss. 2001); Chancellor v. State, 809 So. 2d 700 (Miss. 2001) (The Right to be Free from an illegal sentence is a Fundamental Right as required for Post-Conviction Relief.)

Appellant further submits that after receiving the Order from

the trial Court to Deny his Rule 60 (b) Motion, as Time Barred, Appellant then, filed a MRCP Rule 52 (b) Motion (CR. 147-155) and announced to this trial Court that the Court Judge Clark had failed to consider Appellant's Rule 60 (b) Claims / Grounds of being Legally Factually Innocence of being sentence as an Habitual Offender, under MCA ¢¢ 99-19-81, which said Illegal Sentence had resulted in a Fundamental Miscarriage of Justice. Sawyer v. Whitley, 505 U.S. 333, 339-42, 112 S. Ct. 2514, 2519-20 (1992); Smith v. Collins, 977 F. 2d 951, 959 (5th Cir. 1992); Meadows v. State, 828 So. 2d 858 (Miss. 2002). Also, in this Rule 52 (b) Motion, which was filed by Appellant to enable this Appellant Court of Appeals to obtain a Correct understanding of the Factual issues determined by the trial Court as a basis for the Conclusions of Law and Judgment entered thereon, Appellant announced the Case, Ivy v. State, 731 So. 2d 601 (Miss. 1999), where, the Mississippi Supreme Court had stated:

> "Petition for Post-Conviction Relief, claiming Life imprisonment imposed by judge pursuant to guilty Plea was illegal sentence for Capital Murder, alleged an error affecting Fundamental Constitutional Rights, and thus was not subject to three years Statute of Limitations in Post-Conviction Relief Act." Ivy, supra.

Thereby, Appellant stated that if Ivy was not subject to a three years Statute of Limitations or Procedural Bar for an alleged Error (Illegal Sentence) affecting Fundamental Constitutional Right, surely it would also be Lawful that Appellant not be subject to a six months Statve of Limitation or Procedural Bar for also, an alleged Error (Legally Factual Innocence / Illegal Sentence - Miscarrage of Justice) affecting his Fundamental

Constitutional Rights. Ivy v. State, Weaver v. State, Chancellor v. State, supra.

Appellant states that this trial Court, again, Refused to make additional Written Findings and Conclusions of Law to enable this Court of Appeals to obtain a Correct understanding of the Factual issues of the Court's Judgment, where the trial Court Denied Appellant's Rule 52(b) Motion, by only stating: "This Court..... finds the Motion (Rule 52(b) is not well taken and should be denied." (CR. 166).

In this Case, this Mississippi Court of Appeals must answer the following Question: Whether, "The Right to be 'Free' from an Illegal/Improper Sentence is a Fundamental Right and would such Fundamental Right be subject to a Six Months Statute of Limitation or Procedural Bar, as required for Post-Conviction Relief?

Furthermore, this Appeals Court should recognize that the merits of the Case inevitably come into the picture when a Rule 60(b) Motion is considered. In exercising it's discretion under Rule 60(b), this Appeals Court must look, to whether the party seeking Relief has a potentially meritorious claim or defense. U.S. v. Parcel of Land With Bldg. App. and Imp, 928 F. 2d at 5 (1st Cir. 1991). It is clear that the trial Court abused it discretion.

The determinations made by the Harrison Co. (State) Post-Conviction trial Court, in the intial PC-Motion were made on insufficient and inadequate Records. Clark v. Blackburn, 619 F. 2d 431, 434 (5th Cir. 1980). Appellant Henry claimed this Fact in his Rule 60(b) Motion. (CR. 33-73 and 73-143)

Because of the Precedent in the Ivy case, this Court of Appeals in reviewing Henry's Claim is required to open the gates and Rule on the Merits of Henry's following Claims. Ivy v. State, Weaver v. State, Chancellor v. State, supra; Smith v. State, 725 So. 2d 922, 927 (Miss. 1998); Miss. Const. Art. III 27; 5th and 14th Amendments.

ISSUE: TWO

WHETHER THE TRIAL COURT COMMITTED ERROR IN IMPROPERLY SENTENCING HENRY AS A HABITUAL OFFENDER UNDER SECTION 99-19-81, WHERE AT HENRY'S SENTENCING HEARING, THE STATE FAILED/REFUSED TO OFFER ANY CONCLUSIVELY EVIDENCE AND PROPERLY PROVE BEYOND A REASONABLE DOUBT THAT HENRY WAS, IN FACT, A TWICE CONVICTED FELON?

Since the Recent Cases, Vince v. State, 844 So. 2d 510, 517 (P. 22) (Miss. Ct. App. 2003); Short v. State, 929 So. 2d 420, 426 (P15) (Miss. Ct. App. 2006), the Mississippi Supreme Court holds that the State has the burden to prove the defendent's (Henry's) habitual offender Status beyond a reasonable doubt by Producing Sufficient Evidence that the defendant (Henry) was "convicted twice previously of any State Felony or Federal crime upon charges separately brought and arising out of separate incidents at different times" and "for which the defendant (Henry) was sentenced to separate terms of at Least one year's imprisonment.

In this Case, the indictment indicated that Appellant Henry had four (4) prior felony Convictions in the Circuit Court of Hancock County with Sentences over one year's imprisonment, but one of these prior convictions had been overturned by the Supreme Court (CR. 142); and therefore, this Conviction was expunged. But this did not change Appellant (Henry's) Habitual Status because he still had three other prior felony Convictions, announced in his indictment. (CR. 139-141)

Appellant submits that the Records (Newly Discovered Evidence Plea Hearing Transcripts [CR. 96-118] announced in Appellant's Rule 60(b) Motion [CR.-33-73 and 73-143] clearly reveals that no proof of any of these prior felony convictions, announced in his indictment (CR 19-20), were introduced as an exhibit or even mentioned

during his Sentencing Hearing.

The Harrison Co. Circuit Court had the burden, under the Applicate Law, to prove Appellant's habitual Offender statues beyond a reasonable doubt by producing Sufficient Evidence at Appellant's Sentencing Hearing that the Appellant Henry was "Convicted Twice previously of any State Felony or Federal crime upon charges separately brought and arising out of separate incidents at different times" and "For which Appellant Henry was sentenced to separate terms of at least one years imprisonment. Vince v. State, 844 So. 2d 510, 517 (P.22) (Miss. Ct. App. 2003). The best evidence of a a prior conviction is a certified Copy of the Judgment of Conviction, Id. at 518 (P.25), which said Certified Copy is not stated in the Records. (CR. 96-118). However, the State is not limited to that form of Proof of prior convictions. The Mississippi Supreme Court has previously held that Certified Copies of Pen-Packs (CR. 129-130), as stated at this Motion Hearing by Circuit Court Judge Jerry O. Terry) Revealing Appellant's prior sentences were sufficient to enable the trial Court to impose enhanced Sentencing, under Section 99-19-81. Frazier v. State, 907 So. 2d 985, 991 (P16) (Miss. Ct. App 2005), but, as stated above the State Ass. District Attorney, Hon. Richard J. Smith, Jr., failed to produce any sufficient evidence to verify Appellant's Habitual Status. (CR. 115-117).

Appellant states that this Mississippi Court of Appeals will affirm an enhanced Sentence, under "99-19-81, "ONLY" if the trial Court's basis for imposing the sentence appears in the Record (Plea Hearing Transcripts) on Appeal. Vince, 844 So. 2d at 517 (P.22). In Vince, the sole evidence of Vince's habitual Offender Status apparent from the appellate Record was a transcript excerpt, in which the prosecutor informed the trial Court of an NCIC Report listing Vince's various prior convictions and Sentences. Id. at (P.21). The NCIC Report itself was not admitted as an exhibit at trial or made apart

of the Appellate Records. Id. at (P.22). Thereby, finding that the State failed to sustain it's burden of proof of the prior Convictions beyond a reasonable doubt, this Mississippi Court of Appeals affirmed Vince's Conviction but vacated his Sentence and Remanded for Resentencing, also, this COA in Vince, quoted the Mississippi Supreme Court's Warning in Seely v. State, 451 So. 2d 213, 215 (Miss. 1985), which stated:

> "against the tendency to Routinely allow the State to produce some documentation of prior offenses and for the trial Courts to perfunctorily find the defendant (Henry) an Habitual Offender." Vince, Id. at (P.21).

Appellant submits that these appellate Records (CR. 96-118) of his Sentencing Hearing Clearly (Prima Facie) Reveals that the State did not produce any evidence, whether sufficient or insufficient, to permit the Harrison Co. Circuit Court's finding beyond a reasonable doubt that Appellant had been "Convicted twice previously of any State Felony or Federal crime upon charges separately brought and arising out of separate incidents at different times" and for which Appellant was Sentenced to separate terms of at least one year's imprisonment. MCA ¢99-19-81 (Rev. 2000). Short v. State, Supra. De Bussi v. State, 453 So. 2d 1030, 1033 (Miss. 1984).

Further, Records in the trial Court (Newly Discovered Evidence) (CR. 120-131) Clearly (Prima Facie) Reveals that the State was forewarned by the trial Court Judge Jerry O. Terry, at an 'Motion Hearing' held on December 5, 2005, three (3) months early, before Appellant Henry's Sentencing Hearing held on March 6, 2006, where Judge Terry stated, that if the State (Ass. District Atto. Hon. Smith) was to prove Henry's habitual Offender Status:

THE COURT: "That's Correct. As long as the State produces a Copy of the pen pack from the State Penitentiary or the Convictions themselves from the Records here in the courthouse, that's sufficient as long as there two priors." (CR. 130)

Thereby, the State failed, as shown above, to produce on the Records this Pen Pack from the State Penitentiary or any other sufficient evidence to prove Henry's Habitual Offender Status. Short v. State, Vince v. State, DeBussi v. State, supra; MCA §99-19-81 (Rev. 2000).

Further, it was "Plain Error" (Prima Facie) for the trial Court Judge to find Appellant Henry an Habitual Offender without any sufficient evidence presented by the State. Grubb v. State, 584 So. 2d 786, 789 (Miss. 1991) (The Plain Error Doctrine has been construed to include anything that "seriously affects the Fairness, Integrity or Public Reputation of Judicial Proceedings"....."); Porter v. State, 749 So. 2d 250, 260-61 (P.36) (Miss. 1999) (quoting U.S. v. Olando, 507 U.S. 725, 732-35, 113 S. Ct. 1770 (1993).

The Mississippi Supreme Court defined "Plain Error" as error that affects the Substantive Rights (Right to a legal Sentence in this Case) of a defendant (Henry). Grubb v. State, supra. Mississippi Rule of Evidence 103(d) authorizes this Court of Appeals to address "Plain Errors" affecting Substantial Rights although they were not brought to the attention of the Court. According to the Mississippi Supreme Court, the reviewing Court (COA) may address issues as 'Plain Errors;' When the Records are Clear (Prima Facie) that the Trial Court has impacted upon a Fundamental State and Federal Constitutional Right (The Right to a Legal Sentence in this Case) of the defendant (Henry)." Berry v. State, 728 So. 2d 568, 571 (Miss. 1999) (quoting Sanders v. State, 678 So. 2d 663, 670 (Miss. 1996). This "Plain Error" Rule 'Re-

flects a policy to administer the Applicate Law Fairly and Justly and to protect Henry "when (1) he has failed to protect his Appeal and (2) when his substantial Rights (Right to a Legal Sentence) are affected. MCA §§99-19-81 (Rev. 2000); MS Art. III 14, 22, 23 & 27; 5th & 14th Amendments.

Therefore, this Mississippi Court of Appeals must determine whether there was an Error that was some deviation from a Legal Rule (M.R.E. 103(d), cmt., MCA §§99-19-81 (Rev. 2000), whether that Error was Plain, Clear or Obvious (CR. 96-118 and CR. 120-131), and whether the Error was prejudicial in its effect upon the outcome of Appellant's Sentencing Hearing Proceedings. Simpson v. State, 785 So. 2d 1121 (Miss. 2001).

In Conclusion of this Ground/Claim, because of the Applicate Law, under MCA §§99-19-81 (Rev. 2000), this Court of Appeals should should vacate Henry's Sentence "insofar as it purported to Sentence him as a Habitual Offender" and Remand for the sole purpose of Resentencing Henry. Vince v. State; Short v. State; DeBussi v. State; Simpson v. State; Berry v. State; MCA §§99-19-81 (Rev. 2000); MS Art. III 14, 22, 23, & 27; 5th and 14th Amendments.

A.

WHETHER THE MISSISSIPPI DOUBLE JEOPARDY CLAUSE PRECLUDES THE STATE FROM HAVING A SECOND CHANCE TO ESTABLISH HENRY'S HABITUAL OFFENDER STATUS, WHERE THERE WAS NO SUFFICIENT EVIDENCE OFFERED TO SUPPORT SUCH SENTENCE?

The Habitual Offender Sentencing Hearing, like the Capital Crimes Sentencing Hearing, is itself a Separate trial on eligibility for a harsher Sentence, in accordings to Uniform Rules of Circuit and County Court Practice (URCCCP) Rule 11.03(3), and therefore Constitutes Jeopardy. Cooper v. State, 631 S.W. 2d 508, 513-14 (Tex. Crim. App. 1982); People v. Quintana, 634 P. 2d 413, 419 (Colo.

1981); State v. Hennings, 100 Wash. 2d 379, 670 P.2d 256, 260 (Wash. 1983); DeBussi v. State, 453 So. 2d 1030, 1033 (Miss. 1984).

The Harrison Co. Circuit Court was required to prove beyond a Reasonable doubt at this seprate trial, Henry's guilty with addictional facts (Two (2) Prior Felony Convictions) which justified the harsher Sentence sought to be imposed, under MCA ee 99-19-81. Wheat v. State, 420 So. 2d 229, 241 (Miss. 1982); Wilson v. State, 345 So. 2d 957, 960 (Miss. 1981); where the trial Records are Clear (Prima Facie) that the State failed to produce these additional Facts. (CR. 96-118) Thus, the question for this Mississippi Court of Appeals is, whether double jeopardy would prohibit Resentencing where no sufficient evidence was offered to support the Sentence/Conviction apart from the inadmissable evidence or in the instant Case, "NO EVIDENCE"?

Mississippi Law requires the discharge or Resentencing of the defendant (Henry) in Cases where there is no sufficient evidence to support the Sentence/Conviction apart from the evidence erroneously admitted or not admitted at all by the trial Court (CR. 96-118) Canning v. State, 226 So. 2d 747, 754 (Miss. 1969); Barton v. State, 328 So. 2d 353, 354 (Miss. 1976); DeBussi v. State, 453 So. 2d 1030, 1034 (Miss. 1984); Vince v. State, 844 So. 2d 510, 517 (P.22) (Miss. Ct. App. 2003). NOTED: "These Cases are stated in their 'entirety' in Appellant's Rule 60 (b) Motion." (CR. 53-54).

Therefore, it follows from these Cases that Reversing Appellant's Habitual Sentence under MCA ee 99-19-81 (Rev. 2000), for a trial Court 'Error' in violation of URCCCP Rule 11.03 (3), where the State failed to offer or produce any proof - A Pen Pack from the State Penitentiary or any evidence from the courthouse Clerk's Records, on the Records of Appellant's prior felony Convictions (CR. 96-118 and CR. 120-131) would require that the Habitual Offender portion of Appellants Sentence be vacted and this Case be Remand for Resentencing. Further, the essence of of the double Jeopardy Prohibition

is to Limit the State to one fair opportunity to offer what proof it could assemble. The double jeopardy clause, as stated in Tibbs v. Florida, 457 U.S. 31, 41, 102 S. Ct. 2211 (1982).

> "... prevents the State from having it's trial strategies and perfecting its evidence through successive attempts at Conviction or 'Sentencing.' Repeated Prosecutorial Sallies would unfairly burden the defendant (Henry) and create a Risk of Conviction or 'Sentencing' through sheer governmental (State) perseverance.

Furthermore, pursuant to Ellis v. State, 520 So. 2d 495 (Miss. 1988) and Short v. State, 924 So. 2d 420, 427 (Miss. 2006), the Double Jeopardy Clause of the Mississippi Constitution of 1890, prohibits the introduction of any new evidence on Remand to establish Appellant Henry's Habitual Offender Status. Jones v. Thigpen, 741 F. 2d 805, 814 (5th Cir. 1984); Clark v. Maggio, 737 F. 2d 471 (5th Cir. 1984).

ISSUE THREE

WHETHER THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN EVIDENTIARY HEARING BEFORE DENYING APPELLANT'S RULE 60 (b) MOTION, AS BEING SIX-MONTHS TIME BARRED, WHERE APPELLANT'S RULE 60 (b) MOTION CONTAINED ISSUES (ILLEGAL SENTENCE AND INEFFECTIVE ASSISTANCE OF COUNSEL) OF FACT, MIXED WITH ISSUES OF LAW?

To establish a claim of ineffective assistance of counsel, Appellant must demonstrate (1) a deficieny of his Counsel's performance, that is (2) sufficient to constitute prejudice to his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); Enmund v. Florida, 458 U.S. 782, 786, 102 S. Ct. 3368 (1982); Reddix v.

Thigpen, 728 F.2d 705, 710 (5th Cir. 1984)

In deciding whether Appellant's Counsel (Mr. Robert Koon) Rendered ineffective assistance during sentencing, this Court of Appeals must examine the totality of circumstances surrounding this Case. For (1) Newly Discovered Evidence - Plea Hearing [Sentencing Phase] Transcripts and (2) Motion Hearing Transcript [Held Three (3) Months before Appellant's Plea Hearing], where these two (2) Transcripts Records of evidence were discovered months after the filing of Appellant's Post- Conviction Relief Motion (Appellant, by the exercise of due diligence, was finally allowed to receive this evidence), thereby, these Records became Newly Discovered Evidence. (CR. 96-118 and CR. 120-131). White v. State, 867 So. 2d 1027, 1049 (Miss. 2004); Clark v. Blackburn, 619 F. 2d 431, 434 (5th Cir. 1980).

Appellant faces a "strong but Rebuttable presumption that his Counsel (Mr. Koon) Conduct falls within a broad range of reasonable professional assistance." To overcome this presumption, Appellant must show "that there is a reasonable probability that, but for Counsel's unprofessional Error (After Appellant had been sentenced as an Habitual Offender, Defense Counsel failed to Motion the Court to vacate Appellant's Habitual Offender status for sentencing because the State had failed to produce any sufficient evidence on the Records, to prove beyond a reasonable doubt that Appellant was indeed, as Stated above, an Habitual Offender, under MCA ee 99-19-81 (Rev. 2000), the result of the Sentencing proceedings would have been different. "A Reasonable probability is a probability sufficient to undermine the confidence of the outcome." The Records sent up to this Court of Appeals from the trial Court (CR. 4-173) do not contain a Certified Pen Pack from the State Penitentiary or any certified documents from the Harrison Co. Courthouse to prove beyond a reasonable doubt that Appellant was a twice prior convicted felon, thereby, this unfound Sufficient Evidence was a reasonable probability to undermine the confidence of the outcome of Appellant's

Sentencing Hearing. Strickland v. Washington, Supra; Anderson v. Johnson, 338 F. 3d 382, 391-92 (5th Cir. 2003).

The purpose of the Sixth Amendment guarantee of Counsel is to ensure that a defendant (Henry) has the assistance necessary to justify reliance on the outcome of the trial Court Proceeding (Sentencing Phase in this Case). Accordly, deficiencies in Counsel's performance must be Prejudicial to the defense in Order to Constitute ineffective assistance of Counsel, under the Constitution. Strickland, 466 U.S. at 692. The Newly Discovered Evidence - Plea Hearing Transcripts (CR. 96-118), Reveals that at Appellant's Sentencing Proceedings the State had 'only' recommended to the Trial Court as follows:

> THE COURT: All right, State, what do you have to say to Mr. Henry?
>
> MR. SMITH: Your Honor, the State would recommend ten years to serve without the hope of parole.
>
> THE COURT: With What?
>
> MR. SMITH: Ten years to serve without the hope or possibility of parole.
>
> THE COURT: He is a habitual offender?
>
> MR. SMITH: Yes, Your Honor. (CR. 115)

Then the State rested it's case without producing any sufficient evidence to prove Appellant's Habitual Offender Status in sentencing at that point, thereby, at that point defense Counsel Mr. Koon, should have Motion to the Trial Court to vacate Appellant's

Habitual Offender portion of his Sentence which would have legally and Plainly change the outcome of the proceeding. Strickland, supra; United States v. Cronic, 466 U.S. 648, 659 N. 25, 104 S. Ct. 2039 (1984); Anderson v. Johnson, supra. Because the State had Erred, under MCA §99-19-81 (Rev. 2000), by not spreading on the Records the Sufficient Evidence (A Pen Pack from the State Penitentiary or the Certified Records of Convictions at the County Courthouse), demonstracting that Appellant had indeed been previously Convicted of two or more Prior Felony Convictions. (CR. 115-117). Vince v. State, Short v. State, DeBussi v. State, supra.

Appellant states that these Records are Clear (Prima Facie), he did not Receive Meaningful assistance in meeting the forces of the State, where defense Counsel's failure, after sentencing, did not Constitute Due Process of Law and Equal Protection of Law. Strickland, supra; Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932).

The Records on this Appeal will also reflect that this defense Counsel (Mr. Koon), is the same Counsel that filed a Motion To Withdraw as Counsel of Records (CR. 136-137), where the Harrison Co. Circuit Court held an Hearing on December 5, 2005 (CR. 120-131), and decided by issuing an Order to Sustain Defense Counsel's Motion (CR. 134). Further, at this Motion Hearing, as shown in the Records, Appellant was forced by the Circuit Court Judge Jerry O. Terry, to keep Mr. Koon, as his Counsel of Records, after the Court had sustained Mr. Koon's Motion To Withdraw. Gideon v. Wainwright, supra. (Appellant was entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial or Sentencing Proceedings are fair); 5th, 6th, and 14th Amendments.

NOTED: This issue about Defense Counsel's Request to Withdraw is presented in Appellant's Rule 60 (b) Motion in it's entirety. (CR. 33-72 and CR. 73-143).

Therefore, in Sum, assessing the totality of the circumstances surrounding this Case, defense Counsel, Mr. Robert Koon, performance at Appellant's Sentencing Hearing from it's inception, Counsel's failure to Motion the trial Court to vacate Appellant's Habitual Offender Portion of his Sentence was plainly erroneous under the Applicate Law (URCCP 11.03 (3)) at the time and after the Sentence was given by the Court. In other words, Mr. Koon's performance at sentencing proceedings fell below the range of Compentence demanded of attorney's in criminal Cases by the Sixth Amendment, and amounts therefore, to 'deficient Performance'. Strickland, supra; Hill v. Lockhart, 474 U.S. 52 59, 106 S. Ct. 366 (1985); Craker v. McCotter, 805 F. 2d 538, 542 (5th Cir. 1986); Anderson v. Johnson, supra. Reynolds v. State, 521 So. 2d 914, 918 (Miss. 1988); Leatherwood v. State, 539 So. 2d 1378, 1387 (Miss. 1989).

In Conclusion of this Issue / Ground, if, this Court of Appeals was to Construed Appellant's Henry Pro Se' Appeal liberally, it is clear from the Appeal Records, Appellant contends that the facts underlying his claim were never adequately developed in the Trial Court. Where the Trial Court used a six-months Time Bar, under MRCP Rule 60 (b), to Deny Appellant from adequate developing his Claims, in that, Appellant, had presented a Fundamental Constitutional Claim (Improper Sentence), which such claim, under Applicate Law, is not subject to <u>any</u> Time Bar. The 11th Cir. addressed the requirements a Federal Habeas or PC Motion Considered Petitioner (Henry) must satisfy in order to obtan an Evidentiary Hearing based upon the fifth circumstance of Townsend - a claim that material facts were not adequately developed at a State Court Hearing (Appellant's Rule 60 (b) Motion - CR. 33-72 and CR. 73-143) in Thomas v. Zant, 697 F. 2d 977 (11th Cir. 1983). In Thomas, the 11th Cir. held:

> "that an evidentiary hearing is required if the petitioner (Henry) shows (1) that a fact pertaining

to his Federal (or State: MCA §§99-18-81 (Rev. 2000) and URCCP Rule 11.03 (3)) Constitutional Claim was not adequately developed at the State Court Hearing and that fact (The Trial Court not having Appellant's Plea Hearing Transcript in determining the Claims in Appellant's PC Motion) was crucial to a fair, rounded development of the material facts" (quoting Townsend) and (2) that failure to develop that material fact at the State Proceeding (PC-Motion and Rule 60 (b) Motion) was not attributable to Petitioner's (Henry's) inexcusable neglect or deliberate bypass."

Thomas, 697 F. 2d at 986. Cramer v. Skinner, 931 F. 2d 1020 (5th Cir. 1991); McFadden v. State, 542 So. 2d 871, 874 (Miss. 1989). This Court of Appeals should remand for an Evidentiary Hearing concerning the totality of these circumstances. Wiley v. Wainwright, 709 F. 2d 1412 (11th Cir. 1983); Guice v. Fortenberry, 661 F. 2d 496, 500 (5th Cir. 1981); Marshall v. State, 680 So. 2d 794 (Miss. 1996) (Petitions which meet basic requirements is sufficient to Mandate an Evidentiary Hearing).

ISSUE FOUR

WHETHER, WHEN A PRO SE' APPELLANT OFFERS SUBSTANTIAL PROOF OF HIS CLAIM THAT HE IS LEGALLY INNOCENCE OF BEING SENTENCE AS AN HABITUAL OFFENDER, AND IF HE IS DEPRIVED OF AN OPPORTUNITY TO BE HEARD ON THE MERITS, WOULD THIS ACTION RUN AFOUL OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION, AND WOULD THIS ACTION RESULT IN A FUNDAMENTAL MISCARRIAGE OF JUSTICE?

The Fifth Circuit Court of Appeals recognizes that the Merits of the Case inevitably come into the picture when a Rule 60 (b) Motion is considered. In exercising its discretion under Rule 60 (b), the trial Court was required to determine whether the party (Henry) seeking

Relief had a Potentially Meritorious Claim or defense. U.S. v. Parcel of Land with Bldg., App. and Imp., 928 F. 2d at 5 (1st Cir. 1991); Clark v. Blackburn, 619 F. 2d 431, 434 (5th Cir. 1980)

The determination made by the trial Court in Appellant's Original PC-Motion (CR. 11-18) was made on insufficient, incomplete and inadequate Records (No Plea Hearing Transcripts and no Motion Hearing Transcripts), where Appellant was forced to file his Original PC-Motion (CR. 11-18) before his one (1) year deadline under the AEDPA and his three (3) years deadline under the PC-Act. White v. State, 867 So. 2d 1047, 1049 (Miss. 2004). The Circuit Court Clerk would not assist Appellant in obtaining these Transcripts nor would Mr. Koon, Appellant's Trial Counsel assist him, as was shown in the attached Exhibits (CR. 73-143) in Appellant's Rule 60 (b) Motion. Clark v. Blackburn, supra. It was Appellant's duty to justify his arguments of 'Error' (Improperly / Illegally Sentence) in the Rule 60 (b) Motion with a proper Record (Plea Hearing Transcripts), which said arguments did not include just mere assertions in his brief, or the trial Court would have been considered Correct upon a Dismissal or Denial. American Fire Protection, Inc. v. Lewis, 653 So. 2d 1387, 1390 (Miss. 1995) The Material Facts alleged to exit by Appellant within the Motion must be proved and placed before the trial Court by a Record Certified as Required by Law; otherwise, the Courts Cannot know of their, existance. Phillips v. State, 421 So. 2d 476, 478 (Miss. 1982).

The target of Appellant's Rule 60 (b) Motion was filed that Appellant could be releived from the operation of the Order (CR. 29-30) Denying Appellant's Original Motion For Evidentiary Hearing of Counsel's Ineffectiveness at Sentencing (PC-Motion), where this Rule 60 (b) Motion contain Clearly (Prima Facie) Material Facts and Newly Discovered Evidence, (The finally reception of Appellant's Plea Hearing Transcripts (CR. 96-118) and The Hearing Motion Transcripts (CR. 120-131) [Both, Newly Discovered Evidence]) showing that Appellant's Sentence

as an Habitual Offender under the Applicable Law (URCCCP 11.03(3)) was indeed improperly / illegally imposed by the trial Court. These Appeal Records (CR. 4-173) reveals that at Appellant's Sentencing Hearing (CR. 115-118 - Newly Discovered Evidence), no proof of any of Appellant's alleged three (3) indicted (CR. 19-20) Prior Felony Convictions were introduced, as Exhibits or even mentioned at this Sentencing Hearing (CR. 115-118). Short v. State; Vince v. State, supra. This Rule 60 (b) Motion was first filed in the trial Court to give that Court the first opportunity to make written findings and Conclusions of Law in the determination of this Newly Discovered Evidence.

Appellant stated in the Rule 60 (b) Motion that he was Legally Factually Innocence of the Habitual Offender Sentence, under MCA §§ 99-19-81 (Rev. 2000) and under URCCCP Rule 11.03 (3), imposed upon him by the Trial Court. "In Order to be Legally Factual Innocence of a Non-Capital Sentence, Appellant must show that but for the Fundamental Constitutional Error (The State Failed / Refused to Conclusively and properly produce any evidence whatsoever at the Sentencing Hearing to prove beyond a reasonable doubt that Appellant was, infact, A Twice Convicted Prior Felon), he would not have been legally Eligiable for the Sentence he received!" Smith v. Collins, 977 F. 2d 951, 959 (5th Cir. 1992).

Thereby, these Appeal Records Clearly (Prima Facie) shows that the State was indeed forewarned by the Circuit Court Judge, what evidence must be produced to prove beyond a reasonable doubt that Appellant was a Habitual Offender. (CR. 129-130). "Under circumstances such as this, the principles of Procedural Bars, Comity and finality that inform the concept "Cause" and "Prejudice" must yeild to the imperative of Correcting a Fundamental unjust Sentence (incarceration). "quoting Engle v. Isaac, 456 U.S. at 135, 102 S.Ct. at 1575. A Failure of this Court of Appeals to consider the Merits in this Case will result in a Fundamental Miscarriage of Justice because these Appeal Records Clearly (Prima Facie) reveals that Appellant is

legally factually innocence of being sentence, as an habitual offender, under MCA "99-19-81 (Rev. 2000) Sawyer V. Whitley, 505 U.S. 333, 339-42, 112 S.Ct. 2514, 2519-20 (1992), Smith V. Collins, White V. State, supra, Meadows V. State, 828 So.2d 858 (Miss. 2002) Therefore, under the Due Process of Law and the Equal Protection clause of the Fifth and Fourtecnth Amendment, Appellant Request that this Mississippi Court of Appeals vacate His sentence insofar as the trial court purported to sentence Him as an Habitual offender, and this court of Appeals Remand For the sole purpose of Resentencing, as indeed this same Mississippi court of Appeals, did order in short V. State, and Vince V. State, supra, that these two offenders "cases" Be Remanded For the sole purpose of Resentencing."

Appellant would also pray that this court of Appeals would Grant an Evidentiary Hearing in accordance with the Idolding in Roland V. State, 666 So.2d 747, 757 (Miss. 1995) and Alexander V. State, 605 So.2d 1170, 1172 (Miss. 1992) and any other Relief this Honorable court deems just and proper.

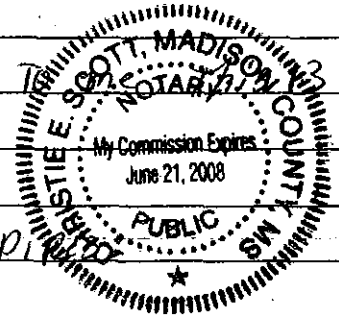
Conclusion

For the Reasons set Forth in the Proceeding Argument, the case must Be Reversed and Remanded For Resentencing

Respectfully submitted

Joseph Denny #07912

Sworn and subscribed To me, this 13 day of Feb, 2008



My Commission Expires: Notary Public

CERTIFICATE OF SERVICE

I, Joseph Henry #07912, do Hereby CERTIFY, That I Have this date mailed Via united STATES mail, postage prepaid, A True And CORRECT COPY OF MY APPELLANT Re-PLY BRIEF TO the PERSON(S) Listed Below:

Honorable BETTY W. Sephton
OFFICE OF the Clerk
P.O. BOX 249
JACKSON, MS 39205

Honorable Jim Hood
OFFICE OF the ATTY. General
P.O. BOX 220
JACKSON, MS 39205

This the 13th DAY OF FEBRUARY, 2008.

Joseph Henry

Joseph Henry #07912
CMCF, 3C-1 Bed #141
P.O. BOX 88550
PEARL, MS 39288

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOSEPH HENRY — APPELLANT

VS.

CASE NO. 2007-IS-01435-COA
-CP-

STATE OF MISSISSIPPI — APELLEE (S)

EXCERPTS

CIRCUIT COURT OF MISSISSIPPI

Exhibit-AZ

CHERYL E. SABLICH, CSR
OFFICIAL COURT REPORTER

SECOND CIRCUIT COURT DISTRICT
HANCOCK, HARRISON AND STONE COUNTIES

MAILING ADDRESS:
P.O. BOX 763
BILOXI, MISSISSIPPI 39533
OFFICE PHONE: 228-865-4184
FAX: (228) 865-4376

February 26, 2007

Mr. Joseph Henry #07912
KNRCF B-Zone Bed #48
300 Industrial Park Road
Dekalb, Mississippi 39328

Dear Mr. Henry:

I am in receipt of your letter dated 2-1-07 and a copy of a letter dated 2-19-07. I have record of a hearing that was held on December 5, 2005 on a Motion to Withdraw. I have no record of a hearing on January 11, 2006 in front of Judge Terry. An estimate for transcribing the hearing on December 5, 2005 is $55.00. Upon receipt of a money order in that amount, I will place it in line for transcription. Please send a copy of this letter along with the money order made payable to Cheryl E. Sablich to the above address.

Sincerely,

Cheryl E. Sablich

Cheryl E. Sablich, CSR
Official Court Reporter

CES

CIRCUIT COURT OF MISSISSIPPI

Exhibit - BZ

CHERYL E. SABLICH, CSR
OFFICIAL COURT REPORTER

SECOND CIRCUIT COURT DISTRICT
HANCOCK, HARRISON AND STONE COUNTIES

MAILING ADDRESS:
P.O. BOX 763
BILOXI, MISSISSIPPI 39533
OFFICE PHONE: 228-865-4184
FAX: (228) 865-4376

April 13, 2007

Mr. Joseph Henry #07912
KNRCF B-Zone Bed #48
300 Industrial Park Road
Dekalb, Mississippi 39328

Re: Transcript

Dear Mr. Henry:

I am in receipt of your letter dated April 4, 2007 and your letter and check dated March 15, 2007. Official Court Reporters are afforded 60 days to complete transcripts which would calculate my time out to around May 15, 2007. I have other transcripts in front of this one. If this does not meet your time limit, I'll be happy to return the check to you. Please advise me of your decision.

Sincerely,

Cheryl E. Sablich

Cheryl E. Sablich, CSR
Official Court Reporter

CES

Exhibit-CZ

Mississippi Department of Public Safety

Personal History Information Sheet

Case Number: B8-366-1-2002

Additional Cases:

1. **Name:** JOSEPH HENRY
2. **Alias(es):**
3. **Address:** 393 CHURCH AVENUE **City:** PASS CHRISTIAN **County:** HARRISON
   State: MISSISSIPPI **Zip:** 39571
   Prior Addresses:
4. **Telephone:** (228) 452-4943 **SSN:** 427-25-4098
5. **Spouse:**
   Spouse Address: **City:** **County:**
   Spouse State: MISSISSIPPI **Zip:**
   Spouse Phone:
6. **POB:** BAY ST LOUIS,MS
7. **DOB:** 9/11/1960 **DLN:** 427254098 **FBI:** **SID:**
8. **Race:** Black **Sex:** Male **Eyes:** Brown **Age Status:** Adult
9. **Height:** 67 **Weight:** 160 **Hair:** Black
10. **Glasses:** Unknown
11. **Caution:**
12. **Occupation:** MECHANIC
13. **Employer Name:** SELF-EMPLOYED
    Address: **City:** **County:**
    State: MISSISSIPPI **Zip:**
    Telephone: **Years Employed:**
14. **Years Education:**
15. **OLN:**
16. **S/M/T's:** TATTOO, LEFT ARM **Description:** "UH"
17. **Gang Member:** Unknown **Affiliation:**
18. ***Terrorist Member:*** *Unknown* **Affiliation:**
19. **County:** HARRISON **District:** Gulfport **Arresting Officer:** DEDEAUX, RICKY
20. **Charge(s):** Felony **Crime:** SALE/DELIVERY CRACK COCAINE
    Assoc #:
21. **Date of Arrest:** 11/15/2002
22. **Assoc./Remarks:** OFF: 08/30/2002
    02-007657 PC

COPY

000012 8/26/2003

EXHIBIT 22

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Office of the Clerk

Betty W. Sephton
Post Office Box 249
Jackson, Mississippi 39205-0249
Telephone: (601) 359-3694
Facsimile: (601) 359-2407

(Street Address)
450 High Street
Jackson, Mississippi 39201-1082

e-mail:sctclerk@mssc.state.ms.us

December 5, 2007

To: COUNSEL OF RECORD

NO.2007-CP-01435-COA -Joseph Henry v. State of Mississippi

This case has been docketed and assigned the above case number. Please use the above case number on all documents.

NOTICE OF BRIEFING SCHEDULE: Pursuant to MRAP 31, this is your notice that the record in the above styled and numbered appeal has been filed. Appellant's brief and record excerpts are due **within forty (40) days of the date of this letter.** Appellee's brief is due **within thirty(30) days after service of the brief of the appellant.** The appellant's reply brief is due **within fourteen(14) days after service of the brief of the appellee.**

DISMISSAL OF APPEAL: MRAP 2 allows the clerk to dismiss appeals, after notice, if deficiencies are not corrected. If the clerk has issued a deficiency notice pursuant to MRAP 2, motions for additional time will not be entertained.

APPEARANCE FORM: If an appearance form **has not** been filed, one must be submitted to this office **within thirty(30) days of the date of this letter. (Pro Se individuals are not required to submit an appearance form.)**

MRAP ON INTERNET: The Mississippi Rules of Appellate Procedure are on the court web site: http://www.mssc.state.ms.us.

Betty W. Sephton
CLERK

/ddr