

COPY

IN THE COURT OF APPEALS THE STATE OF MISSISSIPPI

JAMES EARL SPENCER

APPELLANT

V. No. 2007 - CP - 1667 - CoA

FILED

APR 04 2008

STATE OF MISSISSIPPI

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

APPELLEE

REPLY BRIEF

Comes now petitioner responding to the "Brief for The APPELLEE,"

RESPONDING to the "Statement of Facts" on the Brief
for Appellee:

On line 7-9 of page 4 it states that petitioner acknow-

ledged that he was pleading as a "§ 99-19-81 habitual offender." As petitioner asserted in his brief he never entertained a plea hearing. The plea hearing transcript presented in this cause is fabricated.

Petitioner did not appear at the Lowndes County Courthouse on May 17, 2004 for a plea hearing. Petitioner was brought from Lowndes County Jail to the Courthouse on May 17, 2004 to be sentenced for the crime of burglary. The petitioner upon hearing the judge announce his purpose, informed the judge and his attorney that he did not want to plea. The judge asserted that there would be a hearing held to determine if the petitioner would be allowed to attend a trial. The judge further stated to petitioner, "you're going to regret this day."

Since the date of August 17, 2004, the date petitioner was sentenced he sought his records from the Lowndes County Court, yet did not avail. Why? Because the records lacked plea hearing transcript. Petitioner

did not receive the records until August 15, 2009, three (3) year later, two (2) days before petitioner's deadline to file for "post-Conviction" relief." Over the course of the three (3) years it took for petitioner to receive his records, petitioner sent several relatives to the Lowndes County Court Clerk seeking his records in this cause, his baby's mother, his mother, his father, his brother and others. yet to no avail. Spencer continuously sent motions to the court, yet did not avail. The court clerk repeated the same thing on each occasion: "Please be advised that your petition for production of records, or for other post-conviction relief, or other motions petitions or request has been filed in the above referenced action; such matters or placed on the post judgment motions and actions docket to be considered by the judge at the next term of circuit court." For proof see the appended exhibits: exhibit #3, #8, #9, #10, #11, #A, and #B.

The Lowndes County Court officers delayed submitting

petitioner's records with the hope that petitioner would give up his quest for obtaining his records. After realizing there plot would not succeed they fabricated a plea transcript. Not only did they fabricate the said transcript, but, they deliberately gave him the records short of the time needed to properly fashion a post-conviction motion (two days before the deadline).

Page 4 line 14-16 asserts petitioner was also present at his guilty plea hearing when his counsel stated that he was pleading guilty as an "habitual offender." This only serves to disclose the attorney was insufficient and working with the State.

In petitioner's fabricate plea transcript Judge Howard asked the petitioner, "... you understand that I must sentence you to not less than three nor more than twenty five years in the Department of Corrections and a ten thousand dollar (\$10,000) fine on this burglary of a dwell-

ing?" Mr. Michael Farrow (the petitioner's attorney) voluntarily asserts, "your honor, this will be habitual offender." The petitioner's attorney states this before the judge or the attorney for the state states ~~it~~. As a fact the issue of petitioner being an habitual offender was not an element of the situation until the attorney for the petitioner established it. Such a fact should disclose the insufficiency of the attorney. If the attorney was acting in petitioner's full interest he would have tried to avoid such an element instead of delivering it into existence. See page 7 line 29, page 8 1-7

Page 4, line 16-17 it states that petitioner admits at his sentencing hearing that he had "four" prior felony convictions. Petitioner has not raised an issue contending that he does not meet the criteria of the habitual offender's standards, petitioner has contended that he was not properly informed that he was being charged as an

habitual offender. The Brief For The Appellee discloses on page 4, line three that petitioner plea hearing supposedly took place on May 17, 2004. on page 15 of the Brief in line three (3) it is manifested that a motion to ~~admend~~ amend petitioner's indictment ~~was~~ not filed until May 18, 2004, a day after the petitioner's plea hearing is alleged to have been conducted. By the law of the United States ~~and~~ the law of Mississippi the proper notice of any element of a crime is an indictment. Nothing else will serve as a provider of the right to be notified by indictment. Bullock v. State, 391 So 2d 601, 606 (Miss. 1980) petitioner had a right to be notified he would be pleading as an habitual offender, — The amendment to add habitual offender was after the alleged plea hearing.

Page 4, line 21-22 of Brief For The Appellee, the brief states prior to sentencing with notice to Spencer, Spencer's indictment was amended to reflect his habitual offender status

Under M.C.A. § 99-9-81, what benefit does an indictment serve after a trial or plea hearing has already been exhausted? Not any. The only way for the indictment which was executed after the petitioner alleged plea hearing could be of any benefit to petitioner would be that the State offer the petitioner an opportunity to withdraw the plea. The State did not. As a fact the petitioner filed a request to withdraw the alleged plea. The State rejected the request. On page 5, lines 16-17 the attorney in his brief for the Appellee continues to try to justify the State's failure to form and deliver an indictment to petitioner notifying him properly that he was being charged as an habitual offender by asserting that the order to amend was approved before petitioner's sentencing. ■

The hearing in which the element of guilt materialized is what is essential concerning an indictment. Not the date of the sentencing. The indictment was not amend-

ed as habitual offender until after the guilt came into existence.

Responding to "Summary of The Argument" of Brief for The Appellee.

On page 6, line 6-7 the State asserts: "These documents reflect that Spencer understood the twenty five years maximum sentence for a M.C.A. § 99-1981 habitual offender. Nowhere in the alleged transcript will it disclose that Spencer was aware that an habitual offender sentence is mandatory. To notify petitioner that ~~his time~~ ~~is~~ mandatory is the only avenue to fully notify the petitioner ~~of the~~ maximum of his sentence, not by saying his sentence is twenty-five years. *Vittitoe v. State of Mississippi*, 356 So. 2d 1062 (Miss. 1990), conviction and sentence based on guilty plea must be re-

versed when defendant was not aware of mandatory sentence, at time of plea. Notice this Court here in Vittitoe clearly expresses, "at time of plea," not at the time of sentencing as the State keep trying to use to justify the failure to even serve or approve the element of the habitual offender status before the alleged plea.

The State does allege in the fabricated plea transcript that petitioner was notified of the fact of pleading as an habitual offender (which does not meet the requirement that such notice be served by the presentation of an indictment). Notwithstanding the said fact, but, consider this: The State can not produce records, documents, paper, etc. that will disclose petitioner was aware of his twenty-five years being mandatory.

On page 6 line 8-9 the State asserts that petitioner stated and/or admitted that he had not been promise any-

thing in exchange of his guilt plea. However, the State contradicts such in 14-15 of page 6 by stating: "He also acknowledged that as a result of a plea agreement with the prosecution, an additional robbery charge was to be dismissed."

Responding to the "Argument" on the Brief for the Appellee:

Page 8, Line 1-3 declares that petitioner claimed in his plea he was involuntarily under a plea, that he was not properly advised, given a proper hearing or shown to be been and habitual offender,

Spencer was not properly advised for the reason(s) to follow: He was not notified that his sentence would be mandatory; nor was he properly advised that the court only had a right to sentence him in accords to what was

on his indictment at the time the alleged plea was supposedly executed. (The plea allegedly took place on May 17, 2008 the alleged amendment is alleged to have been approved on August 17, 2008.)

Spencer has not in any of his contentions contended that he was not given a hearing properly or shown to have been an habitual offender. Spencer's claim has been that he have not been properly indicted as an habitual offender.

The state asserts in Bold letters at the top of page 8: The records reflects a voluntary plea and a valid Amendment of Spencer's indictment to reflect his habitual offender status. Rule 7.09 does allow an amendment of indictment, but only at the proper time. What benefit is to be achieved from elements which became effective after trial or a hearing where the results of such has occurred already. Only one thing will rescue the late element from being a prejudice element to the offender. The State would have

to expunge the prior finding of guilt; therefore, granting a new trial or hearing to allow the amended element to be considered before a guilty finding or guilty plea.

The State applied *Myers v. State* on page 8. *Myers* asserts a plea is deemed "voluntary and intelligent" only where the defendant is advised concerning the nature of the charge against him and the consequences of the plea.

Petitioner was advised of the nature of the charge but not the consequences. Petitioner was not advised that his sentence would be mandatory, this fact alone defeat the mandating of the rule (8.04 4b) order that an offender be advised of the consequences. Not one record in this cause will disclose anyone advising petitioner of the fact that a habitual offender sentence is mandatory, *Vittitor v. State* asserts: Conviction and sentence must be reversed when defendant was not aware of mandatory sentence, Vittitor fur-

ther established that advising a defendant that a sentence is mandatory is a requirement of the maximum and minimum of Rule 8.04. — The trial court must make records showing that the defendant is advised of maximum and minimum of sentence, *Alexander v. State*, 605 So. 2d, 1170 (Miss. 1992) and *Robert v. State* 820 So. 2d 790 (Miss. 2002)

on page 9, lines 9-10 the State asserts a statement that is unsupported by records (a lie) by asserting: Spencer stated he understood the twenty-five years maximum sentence for a conviction for burglary as a habitual offender could only result in one sentence, twenty five years without parole. This court will not find the words without parole in any of the alleged records.

on page 10 line 3-4 the State asserts petitioner acknowledged knowing that an additional pending burglary

Charge was being returned to the prosecutor's files, on page 6, lines 14-15 The brief for the Appellee asserts that in exchange for a plea that a robbery charge was being dismissed. Which crime is it?

on page 11, line 3 the State Claims that petitioner claimed there was inadequate evidence that he was an habitual offender. This statement is false. Petitioner's Claims concerning habitual offender is that he was not properly indicted as an habitual offender, and that he was not advised of the maximum consequences of the habitual offenders status, by the failure to inform petitioner of the fact a habitual offender sentence is mandatory. A normal burglary conviction allows a offender to receive thirty day for each thirty day served under House bill 636 and House bill 686. An offender charged with a normal burglary offense can also receive eight-five percent early release supervision. petitioner should be

allowed to receive all of the said benefits, because the Court failed to indict him before the alleged plea hearing, and because the State failed to inform the petitioner that an habitual offender sentence would be mandatory (which would institute informing the petitioner of the maximum).

Petitioner admits he never read anything the attorney asked him to sign. Therefore, if it's any document concerning a plea agreement with his signature on it, it was obtained through trickery and deception (the attorney had to inform petitioner it was something else). An evaluation of Spencer's mind will disclose petitioner does not function as normal people does. The State claims petitioner completed the tenth grade, the statement is not true. Petitioner highest grade of completion is the 7th grade. Records from the Board of Education will support this fact.

This question should be "immensely" considered: - Why would the petitioner accept a plea for twenty-five (25) years, when that is all he could receive if he entertained a trial? (Twenty-five years is all the statute for Burglary allows). The petitioner would have to be incompetent of understanding such facts. The failure of petitioner's attorney to advise him of such would institute petitioner's attorney as being insufficient. The attorney is suppose to fully advise the client of all relevant facts. Instead of adequately advising petitioner, it is manifested throughout all records in this cause that the attorney (Mr. Farrow) was assisting the state; executing deliberate indifference toward his duties required by Mississippi's rules of Professional Conduct, to operate in the best interest of the petitioner.

— Last, notwithstanding anything else only withstanding this fact: This court will not see anywhere in any records of this cause where it discloses that the court ad-

vised petitioner that his sentence was mandatory. The law (Uniform Rules of Circuit and County Court Practice 8.04) institutes it must be recorded (in some form). This would have to be ~~did~~ to fulfill the requirement of Rule 8.04 which institute the state must notify the defendant of of the maximum, and to fulfill the standards and principles of this court which is delivered in Vittitoe. Vittitoe disclose and manifest to the fullest that to fulfill the requirement of rule 8.04, requiring that the state inform a defendant of the maximum in a plea can not be did if there is a mandatory sentence involve and the state fails to inform the defendant. The state in this cause has failed to meet the orders of rule 8.04

If not for any other reason, petitioner should be granted a new trial or the court should order the mandatory off petitioner's sentence for the fact petitioner was indicted as an habitual offender after the alleged plea hearing

CERTIFICATE OF SERVICE

This to Certify that on the below listed date VIA United States Postal Service, and prepaid postage I, James Spencer has forward a copy of this appended Reply Brief to the following:

Supreme Court of Appeals, Betty W. Septon, Clerk of
the Court, P.O. Box 249, Jackson, MS. 39205.

ms. 39205

This the 4th date of April, 2008

James Spence

Signature

and the fact the State failed to notify petitioner of the maximum of his alleged plea by failing to inform petitioner his sentence was mandatory,

This the 4th date of April, 2008

James Spenser

Signature

MAHALA N. (HALEY) SALAZAR
CIRCUIT CLERK
LOWNDES COUNTY
P. O. BOX 31
COLUMBUS, MISSISSIPPI 39703

Phone
(662) 329-5900

August 22, 2007

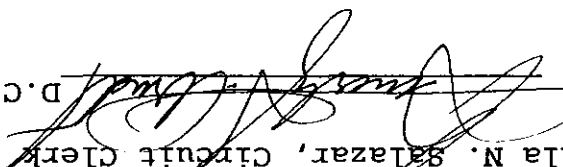
Mr. James Spencer, Pro Se
#75233
DCF D-Bldg.
3800 County Road #540
Greenwood MS 38930

Re: JAMES SPENCER
Versus
Civil Action Number: 2005-0016-CV1
STATE OF MISSISSIPPI

Dear Party of Record:

Please be advised that your petition for production of records, or for other post conviction relief, or other motion, petition or request has been filed in the above referenced action. Such matters are placed on the Post Judgment Motions and Actions Docket to be considered by the Judge at the next term of Circuit Court.

Sincerely Yours,

Mahala N. Salazar, Circuit Clerk
By: 
D.C.

/bsa

Exhibit # H

MAHALA N. (HALEY) SALAZAR
CIRCUIT CLERK
LOWNDES COUNTY
P. O. BOX 31
COLUMBUS, MISSISSIPPI 39703

Phone
(662) 329-5900

August 10, 2005

Mr. James Spencer, Pro Se
#75233
MWCF 503 South Main Street
Columbia MS 39429

Re: JAMES SPENCER
Versus
Civil Action Number: 2005-0016-CV1
STATE OF MISSISSIPPI

Dear Party of Record:

Please be advised that your petition for production of records, or for other post conviction relief, or other motion, petition or request has been filed in the above referenced action. Such matters are placed on the Post Judgment Motions and Actions Docket to be considered by the Judge at the next term of Circuit Court.

Sincerely yours,

Mahala N. Salazar, Circuit Clerk

By: Donna C. Beatty D.C.

/bsa

EXHIBIT B

MAHALA N. (HALEY) SALAZAR
CIRCUIT CLERK
LOWNDES COUNTY
P. O. BOX 31
COLUMBUS, MISSISSIPPI 39703

Phone
(662) 329-5900

March 22, 2007

Mr. James Spencer, Pro Se
#75233
DCF D-Bldg. A-Pod
3800 County Road #540
Greenwood MS 38930

Re: JAMES SPENCER
Versus
Civil Action Number: 2005-0016-CV1
STATE OF MISSISSIPPI

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Sincerely yours,

Mahala N. Salazar, Circuit Clerk

By: Donna C. Bratty D.C.

/bsa

MAHALA N. (HALEY) SALAZAR
CIRCUIT CLERK
LOWNDES COUNTY
P. O. BOX 31
COLUMBUS, MISSISSIPPI 39703

Phone
(662) 329-5900

February 4, 2005

Mr. James Spencer, Pro Se
#75233
MWCF 503 South Main Street
Columbia MS 39429

Re: JAMES SPENCER
Versus
Civil Action Number: 2005-0016-CV1
STATE OF MISSISSIPPI

Dear Party of Record:

Please be advised that your petition for production of records, or for other post conviction relief, or other motion, petition or request has been filed in the above referenced action. Such matters are placed on the Post Judgment Motions and Actions Docket to be considered by the Judge at the next term of Circuit Court.

Sincerely yours,

Mahala N. Salazar, Circuit Clerk

By: Donna C. Beatty, D.C.

/bsa

MAHALA N. (HALEY) SALAZAR
CIRCUIT CLERK
LOWNDES COUNTY
P. O. BOX 31
COLUMBUS, MISSISSIPPI 39703

Phone
(662) 329-5900

November 6, 2006

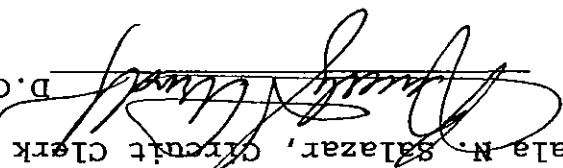
Mr. James Spencer, Pro Se
#75233
DCF D-A
3800 County Road #540
Greenwood
MS 38930

Re: JAMES SPENCER
Versus
Civil Action Number: 2005-0016-CV1
STATE OF MISSISSIPPI

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Sincerely yours,

Mahala N. Salazar, Circuit Clerk
By: 
D.C.

/bsa

MAHALA N. (HALEY) SALAZAR
CIRCUIT CLERK
LOWNDES COUNTY
P. O. BOX 31
COLUMBUS, MISSISSIPPI 39703

Phone
(662) 329-5900

July 11, 2007

Mr. James Spencer, Pro Se
#75233
DCF D-Bldg.
3800 County Road #540
Greenwood
MS 38930

Re: JAMES SPENCER
Versus Civil Action Number: 2005-0016-CV1
STATE OF MISSISSIPPI

Dear Party of Record:

Please be advised that your petition for production of records, or for other post conviction relief, or other motion, petition or request has been filed in the above referenced action. Such matters are placed on the post judgment Motions and Actions Docket to be considered by the Judge at the next term of Circuit Court.

Sincerely yours,

Mahala N. Salazar, Circuit Clerk

By: Donna C. Batty D.C.

/bsa

MAHALA N. (HALEY) SALAZAR
CIRCUIT CLERK
LOWNDES COUNTY
P. O. BOX 31
COLUMBUS, MISSISSIPPI 39703

Phone

(662) 329-5900

July 24, 2007

Mr. James Spencer, Pro Se

#75233

DCF D-Bldg.

3800 County Road #540

Greenwood MS 38930

Re: JAMES SPENCER
Versus
Civil Action Number: 2005-0016-CV1
STATE OF MISSISSIPPI

Dear Party of Record:

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Sincerely Yours,

Mahala N. Salazar, Circuit Clerk

By: Donna C. Burt D.C.

/bsa