

COPY

IN THE SUPREME COURT OF THE STATE OF MISS.
CAUSE NO. 2007-CP-01875-COA

FILED

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SUPREME COURT
COURT OF APPEALS

GARY L. STALLWORTH

APPELLANT

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STATE OF MISSISSIPPI

RESPONDENT

APPEAL FOR THE CIRCUIT COURT OF HARRISON
COUNTY OF THE STATE OF MISSISSIPPI

151 Gary L. Stallworth

GARY L. STALLWORTH #105773

S.M.C.#2, C-2, B-ZONE

P.O BOX 1419

LEAKESVILLE, MS 39451

IN THE SUPREME COURT OF THE STATE OF MISS.

GARY L. STALLWORTH

APPELLANT

vs.

CAUSE NO* 2007-CP-01875-COA

STATE OF MISSISSIPPI

RESPONDENT

BRIEF FOR APPELLANT

Comes now, GARY L. STALLWORTH*102773, PROSE APPELLANT, WITHOUT THE BENEFIT OF COUNSEL, AND FILES HIS APPELLANT BRIEF TO THE FOLLOWING:

PROCEDURAL HISTORY

THAT ON OR ABOUT 5-24-02, APPELLANT ROBBED MRS. KAREN MARTE ROBERTS, OF WHICH SHE WAS EMPLOYED AT HOLLYHART TOWN EXPRESS IN BYL-OR, MS. THEREAFTER, APPELLANT WAS INDICTED BY THE GRAND JURY OF THIS SAID COUNTY ON OR ABOUT 5-27-03, ON THE CHARGE OF ROBBERY IN VIOLATION OF MISS. CODE ANN. §§ 97-3-73, AND AS A HABITUALLY OFFENDER UNDER THE MISS. CODE ANN. 99-19-81.

NEVERTHELESS, APPELLANT WAS APPOINTED THE
HON. JAY FOSTER TO REPRESENT HIM.

UPON AFRICE OF TRIAL COUNSEL, APPELLANT
PLED GUILTY TO ROBBERY AND WAS TO RECEIVE
MINIMAL SENTENCE BETWEEN 3 TO 5 YEARS

IN EXCHANGE FOR THE APPELLANT TO ASSIST
THE STATES PROSECUTOR. FINALLY, THE APPELLA-
NT TESTIFIED IN 1 MURDER CASE FOR THE
ASSISTANT DISTRICT ATTORNEY LARRY BOURG-
TOUS. APPELLANT ALSO GAVE HELPFUL RECORD-
ING STATEMENTS TO LAW ENFORCEMENT AUTHO-
RITIES INVESTIGATING OTHER CRIMES, INCL-
UDING BUT NOT LIMITED TO SOME MURDER
CASE.

FURTHERMORE, APPELLANT TESTIFIED IN THE
CASE OF STATE v. GAY, IN 19004, AND WAS ESSE-
NTIAL TO THE PROSECUTION CASE.

"ALTHOUGH, THE APPELLANT FULFILL HIS PORT-
ION OF THE PLEA AGREEMENT."

HOWEVER, ON OR ABOUT 3-16-04, APPELLANT
BELIEVING TO BE UNDER A PLEA-BARGAIN AGRE-
EMENT, ENTERED A PLEA OF GUILTY TO THE CRIM-
INAL OFFENSE OF "SIMPLE ROBBERY," IN THE
HARRISBURG COUNTY CIRCUIT COURT.

RECORDS WAS ULTIMATELY HEINEL.
WITHOUT THE BENEFIT OF COUNSEL,
REQUESTED DOCUMENTS AND RECORDS, APPELLANT
SOUGHT RELIEF BY SUBMITTING A PETITION
FOR WRIT OF HABEAS CORPUS IN THE CIR-
CUIT COURT OF HARRISON COUNTY IN MS.
THE APPELLANT'S WRIT WAS ULTIMATELY
HEINEL.
THEREAFTER, APPELLANT FILED A NOTICE
OF APPEAL WITH THE STATE COURT ON OR
ABOUT 10-19-07, ALONG WITH A MOTION FOR
LEAVE TO PROCEED IN FORMA PAUPERIS.
HOWEVER, THE APPELLANT WAS GRANTED
LEAVE TO PROCEED WITH HIS APPEAL IN FOR-
MA PAUPERIS ON OR ABOUT 10-29-07.

Argument

Basis of this Brief

This Brief of Appellant's arose from a guilty plea which was based on advice of trial counsel was not voluntary, knowing and intelligently made as required by the constitutions of the United States and the state of Mississippi. Appellants conviction and current incarceration are in violation of its Amendment due process right and the state of Mississippi constitution.

Furthermore, Appellant has a right to rise by way of appeal errors not raised at sentencing or during motion for new trial where the errors affect his fundamental rights. Bush v. State, 667 So. 2d 96, 98 (Miss. 1996). Based on the above premises, this court has jurisdiction to entertain this Brief. Martin v. State, 556 So. 2d 357, 359 (Miss. 1990).

APPELLANTS GUILTY PLEA TO THE CHARGE OF ROBBERY WAS NOT KNOWINGLY AND INTELLIGENTLY MADE DUE TO THE INEFFECTIVE ASSISTANCE OF HIS TRIAL COUNSEL.

THE STANFORD OF REVIEW FOR A CLAIM

OF INEFFECTIVE ASSISTANCE OF COUNSEL IS A TWO-PART TEST: THE PETITIONER IS REQUIRED TO PROVE, UNDER THE TOTALITY OF CIRCUMSTANCES, THAT (1) HIS ATTORNEY'S PERFORMANCE WAS DEFICIENT AND (2) THE DEFICIENCY (REPEATED) THE PETITIONER OF FAIR TRIAL OR THAT HE WAS PREJUDICED AS MISSTAFFED, 660 S.D. 961, 965 9MSS. 1985); STRICKLAND II. WASHINGTON, 466 U.S. 668, 687 (1984).

THE BURDEN OF DEMONSTRATING THAT THE TWO-PART CONDITIONS EXIST REST ON THE PETITIONER WHO FACES THE STRONG PRESUMPTION THAT COUNSEL'S PERFORMANCE FALLS WITHIN THE BROAD SPECTRUM OF REASONABLE PROFESSIONAL ASSISTANCE. PEACOCK II, STATE,

783 S.D. 963, 966 (MSS. 2000).

THE APPROPRIATE REMEDY WHERE THE COURT FINDS THAT A COUNSEL WAS INEFFECTIVE IS TO SET ASIDE THE CONVICTION

AND SENTENCE AND ORDER A NEW TRIAL.

Gaston v. State, 817 So.2d 613, 616 (Miss. 2000)

The court before which a post-conv.

action motion is brought has a duty

to reverse where the petitioner recently

been inaccurate or erroneous information

regarding his decision to plead guilty,

although it will not require attorney

to meet impossible standard to foresee

the future trend in the law when

adjusting clients. KENNEDY v. STATE, 711

So.2d 873, 876 (Miss. 1998). A counsel is not

ineffective for failing to accurately

inform the defendant on the position

of the law in adjusting him to plead

guilty when the legal basis of his

advice has not been settled or (settled)

upon at the time. Id. at 876-7

The court is mandated to hold an out-

standing hearing if the guilty plea hear-

ing does not reflect that the petition-

er was advised concerning the rights

of which he allegedly claim ignorance

Roberts v. State, 626 So.2d 747, 751 (Miss. 1993).

A guilty plea is legally involuntary

ANY SUBJECT TO COLLATERAL ATTACK WHERE IT WAS BASED ON THE MISTAKEN ADVICE OF THE COUNSEL. SUCH MISTAKEN ADVICE MAY UPPHOLD THE GUILTY PLEA. MYERS v. STATE, 583 So.2d 174, 177 (Miss. 1991). IN THE WORDS OF THE MISSISSIPPI SUPREME COURT IN MYERS, GUYTON BAKER v. STATE, 358 So.2d 401, 403 (Miss. 1978):

IF, AS ALLEGED, APPELLANTS PLEADED GUILTY UNDER THE MISTAKEN ADVICE THAT THEY COULD BE SUBJECTED TO CAPITAL PUNISHMENT IF CONVICTED AT TRIAL, THIS THEN, IS A FACTOR WHICH MAY MAKE APPROPRIATE A COLLATERAL ATTACK... SUCH ALLEGATION, IF TRUE, INDICATES THAT DEFENDANTS WERE NOT FULLY AWARE OF THE IMPLICATIONS OF THEIR PLEA NOR OF THE TRUE CONSEQUENCE OF A TRIAL BY JURY. SUCH A CIRCUM- STANCE, IF PROPERLY PLEADED AND SUP- PORTED BY SUFFICIENT FACTS MAKES OUT A CASE WHERE RELIEF MAY BE APPROP-

RATE.

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IN THE CASE AT BAR, TURNING PRE-TRIAL
THE APPELLANT (FORMER) ITS TRIAL ATT-
ORNEY JAY FOSTER THAT HE OBTAIN SOME
VALUABLE INFORMATION REGARDING TWO MUR-
DER CASE THAT THE DISTRICT ATTORNEY'S
OFFICE MAYBE INTEREST IN FOR AN EXCH-
ANGE FOR A PLEA BARGAIN. NEVERTHELESS,
THE APPELLANT EXPLAINED IN SPECIFICALLY

RETAIL REGARDING TO THE TWO MURDER TO
ITS TRIAL ATTORNEY. THEREAFTER, A MEET-
ING WAS CONDUCTED, WHEREAS THE APP-
ELLANT GAVE A TAPE, ET AL STATEMENT
TO THE DISTRICT ATTORNEY OFFICE TO
THE TWO MURDER IN THE PRESENT OF
ITS TRIAL COUNSEL (T.M. JAMES), THE

APPELLANT'S TRIAL ATTORNEY AND THE
DISTRICT ATTORNEY'S OFFICE CAME TO

TERM WITH A PLEA AGREEMENT, THAT

APPELLANT PLEA GUILTY TO SIMPLE ROBBERY

AND HE WILL RECEIVE THE MATH-
AL SENTENCE BETWEEN 3 TO 5 YEARS IN

EXCHANGE FOR HIS COOPERATION WITH THE
DISTRICT ATTORNEY'S OFFICE REGARDING TO

THE TWO MURDER.

THREE, THE APPELLANT TESTIFIED IN ONE MURDER CASE FOR THE ASSISTANT ATTORNEY LARRY BOURBON. APPELLANT ALSO GAVE HELPFUL RECORDING STATEMENTS TO LAW ENFORCEMENT WITH OTHERS INVESTIGATING OTHER CRIMES, INCLUDING BUT NOT LIMITED TO SOME MURDER CASE.

FURTHERMORE, APPELLANT TESTIFIED IN THE CASE OF STATE V. GAY, IN 1900, AND WAS ESSENTIAL TO THE PROSECUTORIAL CASE.

(T. 14)

"ALTHOUGH, APPELLANT ~~THE~~ FULL FILLS PORTION OF THE PLEA AGREEMENT."

HOWEVER, ON OR ABOUT 3-16-04, APPELLANT BELIEVING TO BE UNDER A PLEA-BARGAIN AGREEMENT, ENTERED A PLEA OF GUILTY TO THE CRIMINAL OFFENSE OF "SIMPLE ROBBERY" IN THE

HARTSON COUNTY CIRCUIT COURT. (T. 15)

THREE, JUDGE ALVAREZ WAS AWARE THAT

THE APPELLANT (W) ASSISTED THE ATTORNEY

ATTORNEY'S OFFICE, ET AL. BUT PRONOUNCED, NO

RECOMMENDATION WAS MADE BY THE ATTORNEY

(10)

APPELLANT TO A MAXIMUM TERM OF 15 YEARS
IMPRISON AS A HABITUALLY OFFENDER, UNDER
MJS. COE AM. 35 99-19-81, TO BE SERVED) HAS
FOR HIM, IN THE CUSTODY OF THE MJS. COE
PPF DEPARTMENT OF CORRECTIONS (T. 92)

THEREFORE, TRIAL COUNSEL FILE A MOTION
TO RECONSIDER WITHIN MEANS TO CORRECT
ITS INEFFECTIVE ASSISTANCE OF COUNSEL

(T. 94, 95)

THE SAYI MOTION TO RECONSIDER WAS

HEARD.

Issue II

THE CIRCUIT COURT (JUDGE ERRORE) IN
ILLEGALLY SENTENCING APPELLANT AS A HABIT-
TUAL OFFENDER UNDER MJS. COE 39-19-81

WITHOUT THE BENEFIT OF A PROPER AND
ADEQUATE BYFURCALED SENTENCING HEARING, AS
REQUIRED BY STATE STATUTE, MJS. COE 39-19-81
OF COURT, AND THE MJS. COE 39-19-81 SUPREME COURTS
CASE LAUS, BEFORE APPELLANT'S SENTENCE CAN BE
ENHANCED.

IN SEELEY V. STATE, 451 S.W.2D 13 (MIS. 1984), THE
MIS. SUPREME COURT JUSTICES ESTABLISHED
THAT THE JURY PROCESS REQUESTED FOR EXAMINEMENT
OF SENTENCE UNDER M.C.A. § 99-19-81, WHERE THE
COURT HELD IN (HND), "IN PROSECUTIONS UNDER
M.C.A. § 99-19-81 (SUPP. 1983) A BYFURCATED TRIAL
IS MANDATORY. RULE 6.04 UNIFORM CRIMINAL
RULES OF CIRCUIT COURT PRACTICE (MIS. SUPP.).

A CIRCUIT JUDGE IS TO SERVE AS THE FINAL
OF FACT IN DETERMINING WHETHER THE HABITUAL
OFFENDER PART OF THE JUDGMENT IS EST.
ABOLISHED BY THE REQUESTED DEGREE OF PROOF.
THE STATE HAS THE SAME BURDEN OF PROOF
AS TO THE HABITUAL OFFENDER PORTION OF THE
JUDGMENT AS IT HAS ON THE PRINCIPLE
CHARGE. THE APPELLANT ALSO HAS THE SAME
RIGHT AT BOTH STAGES OF TRIAL. THERE APPE.
ARS TO BE SOME TENANCY TO ROUTINELY ALLOW
THE STATE TO PRODUCE SOME DOCUMENTATION OF
PRIOR OFFENSES AND FOR THE TRIAL COURT TO PER
FUNCTIONALLY FIND THE APPELLANT AN HABITUAL
OFFENDER, THEN ROUTINELY PASS OUT THE SENTENCE

MANIFESTED BY § 99-19-81.

HOWEVER, THERE IS NO DOUBT THAT THE

REQUIREMENT OF A BYFURCATED TRIAL MEANS A FULL TWO PHASE TRIAL PRIOR TO ANY FINDING THAT A APPELLANT IS AN HABITUAL OFFENDER AND SUBJECT TO ENHANCED PUNISHMENT."

THEN IN 1987, THE MISSISSIPPI SUPREME COURT JUSTICES, FOLLOWING IT'S OWN RULING FROM SEELY V. STATE, 451 SO. 2D 913 (MISS. 1984), REVERSED THE SENTENCE IN YOUNG V. STATE, 507 SO. 2D 48 (MISS. 1987), FOR THE CIRCUIT COURT JUDGE'S FAILURE TO HOLD A PROPER AND ADEQUATE BYFURCATED SENTENCING HEARING. THE JUSTICES FOUND THAT THE SENTENCE UNDER M.C.A. § 99-19-81 WAS NOT SUPPORTED BY PROPER EVIDENCE, AND APPELLANT HAD BEEN DENIED HIS RIGHT TO A FULL TWO-PHASE TRIAL, (HEARING). ALSO, IN THE SENTENCING PHASE, A PROPER FOUNDATION WAS NOT LAYED FOR THE ADMISS-ION OF EVIDENCE.

IN YOUNG V. STATE, THE JUSTICES HELD ".... THE TRIAL JUDGE CONSIDERED EVIDENCE NOT PROPERLY BEFORE HIM AND CONDUCTED A SENTENCING HEARING OF INSUFFICIENT SCOPE, AT THE BEGINNING OF THE HEARING, DEFENSE MOVED TO EXCLUDE THE STATE'S DOCUMENTS BECAUSE NO FOUNDATION HAD BEEN LAYED FOR THEM. IN OVERRULING THIS MOTION, (13)

THE TRIAL JUDGE USED LANGUAGE CLEARLY SHOWING THAT HE WAS RELYING ON EVIDENCE INTRODUCED IN THE TRIAL FOR TWO HAYS AND NOT ONLY HIS ATTORNEY ADMITS IT ON NOTICE, BUT THE APPELLANT HIMSELF TESTIFIED UNDER OATH THAT HE WAS IN FACT CONVICTED OF THESE OFFENSES."

"..... CERTAINLY, NO TWO-PHASE TRIAL OCCURRED. THE STATE INTRODUCED THE DOCUMENTS TO PROVE PRIOR CONVICTION AND THAT WAS THAT. THIS IS THE EPITOME OF THE ERROR AGAINST WHICH THE SEELY COURT PROTESTED." (EMPHASIS ADDED).

IN THE CASE AT BAR, THE BIFURCATED TRIAL (HEARING), WAS SO INFIRM THAT IT CAN NOT SURVIVE UNDER MISSISSIPPI SUPREME COURT JUSTICE'S HOLDINGS OF SEELY AND YOUNG.

INDEED, THE TRIAL COURT JUDGE ASKED THE STATE TO PRODUCE THE PEN-PACK, OF THE TWO PRIOR CONVICTIONS, WITHOUT ANY FOUNDATION BEING LAYED BY THE STATE FOR THEIR INTRODUCTION INTO EVIDENCE, NO TESTIMONY WAS GIVEN AS TO WHAT DOCUMENTS WERE CONTAINED WITHIN THE PEN-PACK WHICH THE JUDGE ENTERED AS EVIDENCE, THE JUDGE SIMPLY ACTED

AS PROSECUTOR, OBTAINED THE EVIDENCE HE REQUIRED, THEN REVERTED BACK INTO HIS ROLE AS JUDGE AND DETERMINE THE APPELLANT WAS A HABITUALLY OFFENDER. (T. 3, 4, 5, 6)

ISSUE III

EXCEPTIONAL CIRCUMSTANCE

THE CIRCUIT COURT JUDGE ERRORED IN DENYING THE INTELLIGENT APPELLANT THE REQUEST FOR DOCUMENTS AND RECORDS, IN LIGHT OF HIS ROLE AS ARBITRATOR OF THE APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL. THE DUTY TO ENSURE THE COMPLETE RECORDEATION OF THE CASE ALSO RESTS WITH THE COURT. U.S. v. GARNER, 581 F.2d 481 (5th CIR. 1978), THE TRIAL JUDGE HAS A DUTY TO SEE THAT REPORTEDLY MAKES A TRUE, COMPLETE AND ACCURATE RECORD OF ALL PROCEEDINGS. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO TRIAL JUDGE SECTION 2.5 (1972). SECONDLY, THE MISSISSIPPI SUPREME COURT UNDER ITS SUPERVISORY POWERS HAS DIRECTED THE TRIAL COURTS TO REQUIRE AS A MINIMUM, A RECORDING OF

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ALL FACTS OF A CRIMINAL TRIAL. DORROUGH
N. STATE, 437 S. 2^D 35, 37 (MISS. 1983); THIRDLY,
THERE IS A PRESUMPTION OF PREJUDICE WHICH
ARISES WHEN THE INTELIGENT IS DENIED THE
RIGHT TO A FREE TRANSCRIPT, OF U.S. N. SELWA,
559 F. 2^D 1303, 1306 (5TH CIR. 1977). IN BRETT N.
NORTH CAROLINA, 404 U.S. 226, 227, 90 S. CT 431,
433, 30 L. ED 2^D 400 (1971) THE UNITED STATES
SUPREME COURT HELD THAT, A DEFENDANT WHO
CLAIMS THE RIGHT TO FREE TRANSCRIPT DOES
NOT BEAR THE BURDEN OF PROVING INADEQ-
UATE SUCH ALTERNATIVES AS MAY BE SUGGES-
TED BY THE STATE OR CONTURED UP BY A COURT
U.S. N. BRUMLEY, 520 F. 2^D 1068, 1080 (5TH CIR. 1977);
AND BRETT N. NORTH CAROLINA, 404 U.S. AT 230
(1971): FOURTH, IN THE FISHER N. STATE, 530 S.
2^D 990 (MISS. 1988), THE MISSISSIPPI SUPREME
COURT DISCUSSED A CLAIM THE BRETT REQUER-
ED A TRANSCRIPT OF PRIOR PROCEEDINGS TO
BE PROVIDED WHILE HOLDING THAT THERE IS
NO NEED TO PROVIDE A PRIOR TRANSCRIPT
FROM AN UNRELATED CASE. THE COURT HELD
THAT, THERE CAN BE NO DOUBT THAT THE STATE
MUST PROVIDE AN INTELIGENT WITH A TRANSCR-
<16>

"PT IS NEEDED" FISHER, 530 S. 2D AT 999 (BRETT, 404 U.S. AT 227).

IN THE CASE AT BAR, THE APPELLANT HAS IN FACT SUBMITTED HIS REQUEST FOR DOCUMENTS AND RECORDS TO THE LOWER COURT WITHIN MEANS TO DEVELOPE ON APPEAL THAT HIS TRIAL COUNSEL WAS INEFFECTIVE IN ADVISING HIM TO PLEAD GUILTY. (T. 26, 27, 28), "BUT WAS DENIED".

INDEED, THIS DENIAL BY THE LOWER COURT, MEETS THE CAUSE AND "ACTUAL PERJURY" STANDARDS SET FORTH IN WATKINS - GAT W. STAKES, 433 U.S. 72 (1977).

FINALLY, THE APPELLANT REQUEST THAT THESE CLAIMS BE CONSTRUED UNDER THE "PLAIN ERROR DOCTRINE" AND AS SUCH APPELLANT'S CLAIMS CAN NOT BE PROCEDURALLY BARRED, BUT MUST BE HEARD ON THEIR MERITS. IN GATES W. STATE, 904 S. 2D 216 (MISS. 2005), THE JUSTICES OF THE MISSISSIPPI COURT OF APPEALS HELD; WE DO AGREE THAT APPELLANT HAS THE RIGHT TO BE FREE FROM AN ILLEGAL SENTENCE AND THAT THE PROCEDURAL BARS UNDER THE ACT DO NOT APPLY WHEN THE SENTENCE COMPLAINED ABOUT

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TO ILLEGAL JULY 21, 1993, 731 S.W.2D 601, 603 (P.13)

(MAY 1999).

THE JUSTICES OF THE MISSISSIPPI COURT OF APPEALS IN STATE, FOLLOWING THE ESTABLISHED JUDICIAL PROCESS SET BY THE MISSISSIPPI SUPREME COURT IN JULY 21, 1993, CONCERNING THE PROSECUTORIAL BAR OF THE POST-CONVICTION ACT DOES NOT APPLY TO A CLAIM OF ILLEGAL SENTENCING.

THE MISSISSIPPI SUPREME COURT HAS HELD "THIS COURT FOLLOWS THE DOCTRINE OF 'STARE DECISIS' AND UNDER THIS DOCTRINE WE FOLLOW OUR FORMER DECISIONS, UNLESS SUCH DECISIONS ARE MANIFESTLY WRONG AND MISCHIEVOUS IN THEIR RESULTS" (WESTMORELAND V. STATE, 201 S.W.2D 497, 499 (MAY 1971)). AS SUCH, THE DOCTRINE OF "STARE DECISIS" REQUIRES THIS HONORABLE COURT TO APPLY THE "PLAIN ERROR DOCTRINE" TO THE CLAIMS OF ILLEGAL SENTENCING BY THE TRIAL COURT, AND THE INEFFECTIVE ASSISTANCE OF COUNSEL AND FOR THE COURT TO RULE ON THE MERITS OF APPELLANT'S CLAIMS WITHOUT APPLYING ANY PROSECUTORIAL BAR.

IF THE COURT WERE TO APPLY THE PROCE-
RAL BARS OF THE POST-COMPLETED ACT TO
APPELLANTS CLAIMS OF ILLEGAL SENTENCING,
IT WOULD CONSTITUTE AN "INDEPENDENT"
CONSTITUTIONAL VIOLATION OF APPELLANTS
RIGHTS TO AUE PROCESS AND EQUAL PROTECT-
ION OF LAW UNDER THE 14TH AMENDMENT
CLAUSE OF THE UNITED STATES CONSTITUTION.

FOOTNOTE: THE SUPREME COURT OF MASSACHUSETTS
HAS REPEATEDLY HELD THAT [WE] WILL
NOT CONSIDER MATTERS WHICH ARE
OUTSIDE THE RECORD AND MUST CON-
TAIN [OURSELVES] TO WHAT ACTUALLY
DOES APPEAR IN THE RECORD. MELBYA
STATE, 688 S. 907, 730 (MASS. 1992).
"WE CAN NOT NEGATE AN ISSUE BASED
ON ASSERTIONS IN THE BRIEFS ALONE;
RATHER, ISSUES MUST BE PROVEN BY
THE RECORD). TH AT 730

DISCUSSION OF LAW

APPELLANT ASSERTS THAT, AS HERE, HE IS A PRISONER PROCEEDING PRO SE, AND THAT THIS COURT SHOULD TAKE THAT FACT INTO ACCOUNT AND IN THIS COURT'S DISCRETION, CREDIT NOT THE SO WELL PLEADED ALLEGATIONS TO THE EXTENT THAT APPELLANT'S MEREYOROUS ISSUES NOT BE LOST BECAUSE IT IS INARTFULLY DRAFTED. SEE: HAYNES v. KERNER, 404 U.S. 519, 520 (1970); SANDERS v. STATE, 440 So. 2d 278, 283 N.I. (MISS. 1983)

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, THE APPELLANT HEREBY PRAYS THAT THIS HON. COURT WILL REVERSE THE LOWER COURT DECISION AND REMAND BACK FOR FURTHER PROCEEDING AND IN THE INTEREST OF JUSTICE.

LEAKESVILLE, MS 39451

P.O. BOX 1419

S.M.C.T., C-3, B-ZONE

GARY L. STALLWORTH 103773

Gary L. Stallworth

None THIS THE 13 DATE OF Feb 2008

JACKSON, MS 39205

P.O. BOX 220

ATTORNEY GENERAL

JACKSON, MS 39205

P.O. BOX 249

CLERK OF COURT

WILLIE, MS 39451 TO THE FOLLOWING:

ANY CORRECT COPIES OF THE BRIEF FOR APPEL-
LANT, VIA THROUGH FURNISH LEGAL ASSIST-
ANCE PROGRAM, S.M.C.T., P.O. BOX 1419, LEAKES-
VILLE, MS 39451 TO THE FOLLOWING:

CERTIFICATE OF SERVICE

I, GARY L. STALLWORTH, DO HEREBY CERTIFY

THAT I HAVE CAUSED TO BE MAILED A TRUE

AND CORRECT COPIES OF THE BRIEF FOR APPEL-

LANT, VIA THROUGH FURNISH LEGAL ASSIST-

ANCE PROGRAM, S.M.C.T., P.O. BOX 1419, LEAKES-

VILLE, MS 39451 TO THE FOLLOWING:

1 IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
2 SECOND JUDICIAL DISTRICT
3
4

5 STATE OF MISSISSIPPI

6 VERSUS

NO. 2003-182

7 GARY LAMONT STALLWORTH

DEFENDANT

8
9 -----
10 THE FOLLOWING IS A TRUE AND CORRECT TRANSCRIPT OF THE
11 SENTENCING HEARING HAD IN THE ABOVE STYLED AND NUMBERED
12 CAUSE BEFORE THE HONORABLE KOSTA N. VLAHOS, CIRCUIT
13 COURT JUDGE OF THE SECOND CIRCUIT COURT DISTRICT OF THE
14 STATE OF MISSISSIPPI, ON THE 16TH DAY OF MARCH, 2004.
15 -----

16 APPEARANCES:

17 PRESENT AND REPRESENTING THE STATE:

18 HONORABLE BETH MCFADYEN
19 Assistant District Attorney
20 P.O. Box 1180
 Gulfport, MS 39507

21 PRESENT AND REPRESENTING THE DEFENDANT:

22 HONORABLE JAMES R. FOSTER
23 Attorney at Law
 1019 Legion Lane
24 Ocean Springs, MS 39564
25

1 THE COURT: We're before the court at
2 this time by virtue of an order dated
3 February 13th, 2004. Mr. Stallworth pled
4 guilty to robbery. I adjudicated him to be
5 guilty. I ordered a presentence report to be
6 done and reset it for March 15th. And we
7 weren't able to reach it yesterday, and then
8 specifically I put down, "The Court did not
9 review the habitual portion of the indictment
10 when the defendant pled. The Court needs to
11 review at sentencing." I need to go ahead
12 and make that determination at this time that
13 he is an habitual offender, is that correct,
14 Mrs. McFadyen?

15 MRS. MCFADYEN: Yes, Your Honor.

16 THE COURT: Mr. Stallworth, raise your
17 right hand and take the oath.

18 (DEFENDANT SWORN IN.)

19 THE COURT: Mr. Stallworth, again how
20 old are you?

21 MR. STALLWORTH: Thirty-three years old.

22 THE COURT: Mr. Stallworth, do you admit
23 or deny -- I'm conducting the sentencing
24 hearing right now, particularly a
25 determination as to whether or not the

1 allegations of the petition in 2003-182 can
2 be established. Do you have the pen-pack?

3 MRS. MCFADYEN: Yes, Your Honor, I do.

4 THE COURT: All right.

5 THE COURT: Have you seen those, Mr.
6 Foster?

7 MR. FOSTER: I have, Your Honor. In
8 fact, they're part of the presentence
9 investigation.

10 THE COURT: Did you want to go ahead and
11 mark these into the record at this time?

12 MRS. MCFADYEN: Yes, Your Honor.

13 THE COURT: Do you have any objections
14 to the admissibility of the pen-pack?

15 MR. FOSTER: No, Your Honor.

16 THE COURT: It may be marked into
17 evidence at this time.

18 (THE PEN-PACK WAS THEN MARKED AND
19 INTRODUCED INTO EVIDENCE AS STATE'S EXHIBIT
20 1.)

21 THE COURT: The Court is reviewing
22 State's Exhibit 1, March 16th, 2004,
23 admitted into evidence, and it establishes
24 beyond a reasonable doubt that Mr. Stallworth
25 was convicted in 92-10191(3), was convicted

1 of grand larceny in Jackson County in 1997.
2 It says he was sentenced to seven years, but
3 we all know that can't be true. I don't know
4 how you can be sentenced in grand larceny for
5 seven years, Mrs. McFadyen.

6 MRS. MCFADYEN: I agree.

7 THE COURT: It shows beyond a reasonable
8 doubt that he was convicted in cause number
9 92-406(2) of the offense of burglary of a
10 dwelling and was sentenced to a term of seven
11 years which was to run concurrent with the
12 grand larceny. I'm sure it's just a typo.
13 Does it have the court file. Does it have
14 the court order in here in the pen-pack? Did
15 either of y'all notice if it has a court
16 order in here?

17 MR. FOSTER: I did not see it in the
18 presentence investigative report.

19 MRS. MCFADYEN: I don't know, Judge.

20 THE COURT: The court order is in here,
21 and it says that he was sentenced to seven
22 years for grand larceny. Of course that's an
23 error. But you were placed on probation
24 originally, is that right, Mr. Stallworth?

25 MR. STALLWORTH: Yes, sir, on my

1 completion of drug and alcohol.

2 THE COURT: You violated your probation
3 and you were sent to the penitentiary?

4 MR. STALLWORTH: Yes, sir.

5 THE COURT: Do you remember what the
6 violation was for, what was the basis of the
7 violation? You don't remember?

8 MR. STALLWORTH: Not right off, sir.
9 Your Honor, it was dirty urine.

10 THE COURT: It shows that you were -- it
11 seems like the whole allegation is wrong. It
12 looks like he was convicted in November of
13 '92 instead of January?

14 MR. FOSTER: That is correct, Your
15 Honor. He was actually sentenced as well in
16 1992.

17 THE COURT: Was sentenced December 7th,
18 1992, and the State has got January 1st,
19 1997. Maybe that's the date that his
20 probation was revoked.

21 MR. FOSTER: Mr. Stallworth indicated
22 that it was 1995 when he was revoked,
23 specifically he believes January of 1995.

24 THE COURT: There's no question in your
25 mind that he was convicted of two previous

1 convictions and sentenced to one year or
2 more?

3 MR. FOSTER: Yes, sir, we discussed
4 that.

5 THE COURT: You understand that?

6 MR. STALLWORTH: Yes, sir.

7 THE COURT: The Court is going to apply
8 the statute of jeofailes and allow the
9 indictment to be amended to conform to the
10 proof that's before the court. So the Court
11 determines that he is an habitual offender.
12 Does the victim want to say anything before
13 the court?

14 MRS. MCFADYEN: Yes, Your Honor.

15 THE COURT: She can come forward at this
16 time and stand by you.

17 MRS. MCFADYEN: Ms. Karen Roberts of
18 Biloxi, Mississippi was the night auditor
19 working that night at the Holiday Express.
20 Stand right here. You have to talk real
21 loud. Tell them what your name is.

22 MS. ROBERTS: Karen Roberts.

23 THE COURT: Ms. Roberts, you were the
24 night auditor and the victim in this
25 particular robbery?

1 he did is absolutely horrendous to Ms.
2 Roberts and the situation. Having said that,
3 in mitigation of the sentence that Your Honor
4 is about to impose I would want to point out
5 to Your Honor that he gave not one but two
6 different recorded statements for two
7 different murders in Gulfport. In addition,
8 of course, I was present and available for
9 both of those statements. He further
10 testified --

11 THE COURT: Two straight murder trials?

12 MR. FOSTER: Yes, Your Honor.

13 THE COURT: Or two statements involving
14 the same defendant?

15 MR. FOSTER: Two different murders, Your
16 Honor, that he gave statements in. In
17 addition he also testified in a murder trial
18 involving Mr. Larry Bourgeois who is a
19 district attorney, as Your Honor knows, in
20 Gulfport. So certainly his actions were
21 horrendous. Having said that, those are the
22 positive things that I can say on his behalf
23 that he has, in fact, done recently.

24 THE COURT: I do recall mentioning to
25 both of y'all that he was lucky that the

1 want you to understand that the Court
2 recognizes and appreciates the fact that you
3 did not require Ms. Roberts to take the stand
4 to in a more vivid manner, although she had
5 to relive it today, to be subjected to direct
6 and cross-examination. She would have been
7 -- she would have more vividly relived that
8 incident, and that speaks well of you, but
9 again what you did cries out for the maximum
10 in the case.

11 And for your crime in cause number
12 2003-182 you are hereby sentence today serve
13 15 years with the Mississippi Department of
14 Corrections. And this happened in 2002, and
15 the Grand Jury could technically look back at
16 it and decide whether to go with the
17 aggravated assault against you which would
18 have added a considerable length of time, but
19 I think because of your cooperation in the
20 two murder trials as well as your plea here
21 the State may have opted not to do that.
22 That will be the sentence of the court.
23 Fifteen years day-for-day without hope or
24 benefit of parole as an habitual offender.
25 That will be the ruling of the court. Good

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VERSUS

GARY STALLWORTH

FILED
MAR 17 2004

CAUSE NO.: B24020300182

GAYLE PARKER
CIRCUIT CLERK
BY *[Signature]* D.C.**DEFENDANT'S MOTION TO RECONSIDER**

The Defendant, files this Motion to Reconsider and states as follows:

1. The Defendant was sentenced to 15 years to serve by this Court.
2. The Defendant assisted the District Attorney's Office in not one but two different murder cases.
3. In fact, the Defendant has already testified in one murder case for Assistant District Attorney Larry Bourgeois.
4. In the other murder case, the Defendant gave a recorded statement to the officers investigating the case.
5. As such, the Defendant would respectfully request that this Court reconsider the sentence of 15 years to serve.

WHEREFORE PREMISES CONSIDERED, the Defendant respectfully request that this Court reconsider the sentence of 15 years to serve.

RESPECTFULLY SUBMITTED, this the 16 day of March, 2004.

BY:

[Signature]
Jay Foster

Certificate of Service

I certify that I have faxed a copy of the above to all counsel of record.

So certified, March 16, 2004.


Jay Foster

Law Office of Jay Foster
1019 Legion Lane
Ocean Springs, MS 39564
(228) 872-6000
(228) 875-6687 (fax)
email: jay@jayfosterlaw.com

LEGAL

Lucy L. Stallworth 102773
W.C.F. 2999
May 61 North
Woodville, MS 39669

Re: Kayle Parker
Circuit Court Clerk
P.O. Box 235
Biloxi, MS 39533

FILED
JAN 03 2007
GAYLE PARKER
CIRCUIT CLERK

Case # 03-0182

COPY

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Re: Request For Documents And Records Under Miss. Code 25-61-3
And 25-61-5, Miss. Records Act

Comes, Now, Lucy, and file this request into this office under the above statute. Petitioner request to you for the below listed documents. You have the listed documents and Records in your possession and you are entitled to send them to me upon my request. The miss. Records Act require you (14) working days to send them. Accordingly to Medberry v. Patterson, State a Federal District Court ordered that if a state prisoner should apply for an appeal from his state conviction, he should be provided with a transcript of trial record, or should be given a new trial, or should be discharged from custody. The federal court found that after the prisoner was convicted by a state court, and during his appeal from the conviction, he was indigent and therefore unable to obtain a transcript of the trial proceedings, and that the review which the prisoner was able to secure without a transcript was inadequate because alleged grounds of error required a transcript of the evidence for full consideration. Consequently, the court concluded that the prisoner "was denied his right to due process and equal protection under the Fourteenth

LEGAL 06

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Ray & Stallworth

Respectfully Submitted

Ray

comes now, Stallworth, and response to your letter. First of all with respect, I requested to your documents that are needed to correct and error that was made between my lawyer and the District Attorney and Judge. I requested accordingly to the Law under Miss. Code 95-61-3 and 95-61-5, that you was entitle to send any document that requested for, as I told you I was indigent and was not able to pay for them, you denied me accordingly to Barnes vs. Henderson 517 and 135TH Cir. 1975, you have violated my due process right. Accordingly to Medberry v. Patterson (1960, 188 F. Supp 557, a Federal District Court) ordered that if a state prisoner should apply for documents to correct a court error, you should provide documents. See: Simmons v. 804 F.2d 183, 1984. See State of New Hampshire v. Gelske, 109 N.H. 133 (1987), Denial of a transcript request on the basis of a defendant's inability to pay constitutes a violation of equal protection. See: Baxter v. Duckworth, 65 F.3d 555 (1995). See: Bonds v. Smith, 430 U.S. 817 (1977), I ask you to send any and all documents on case no. 32462-03-182 under Miss. Code 95-61-3 and 95-61-5. I am going through the chain of command. If I don't receive them from you in 14 days, I will take my next step in the court along with a lawsuit. The court have already rule in all requested

Response

Gayle Parker
Circuit Clerk
BY [Signature]

Case No. 32462-03-182

FILED
FEB 22 2007

Ray Stallworth

Jan 17, 2007

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