IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CP-02192-COA

WILLIE ROSS — APPELLANT

VS.

STATE OF MISSISSIPPI — RESPONDENT

REPLY BRIEF FOR APPELLANT

BY: Willie Ross

Willie Ross, #K3947
CMCF
P. O. Box 88550
Pearl, MS 39208

ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CP-02192-COA

WILLIE ROSS MOVANT/APPELLANT

VS.

STATE OF MISSISSIPPI RESPONDENT

The State of Mississippi has filed its brief in this case and has failed to refute Appellant's claims that:

ISSUE ONE

The court exceeded its authority in imposing habitual enhanced sentence, which included a penalty not authorized by the normal sentencing provisions for the offense of burglary of a dwelling as a non-habitual offender, without allowing a jury of Appellant's peers to determine whether Appellant was, in fact, the type of habitual offender within the means which warranted and necessitated an enhanced sentence and whether prosecution met all required elements to prove habitual status where the enhancement of the sentence caused the sentence to exceed the statutory mandated limits of punishment. And whether trial court improperly sentenced to Appellant to an enhanced sentence, without parole, outside the normal sentencing limits under the statute which he was convicted under, without a jury having been permitted to determine enhancement eligibility but where court, setting without jury, arbitrarily imposed enhanced punishment without impaneling a jury to determine such issues.

ISSUE TWO:

That habitual portion of the sentence imposed upon Appellant is legal or constitutes a denial of due process of law, under the 5th and 14th Amendments to the United States

Constitution and the Constitution of the State of Mississippi where the sentencing order was filed approximately two (2) days before the trial court signed such order.

ISSUE THREE:

That trial court erred in failing to conduct an evidentiary hearing before denying post conviction relief.

The State of Mississippi did not refute in its brief that at the time of the filinf of the Brief for Appellant, Appellant was incarcerated and housed in the Mississippi Department of Corrections and assigned to the Kemper-Neshoba County Correctional Facility in Dekalb, Mississippi, in service of the prison term imposed and that Appellant has been continuously confined in regards to such sentence since date of conviction and imposition of sentence by trial court..

The state's brief effectively admits that Willie Ross, was indicted on February 24, 2000, in the Circuit Court of Lowndes County, Mississippi under the multiple count indictment for burglary. (R. 35)

On May 23, 2002, after Appellant had negotiated entered into an agreement with the prosecution to plead guilty to 25 years as a non-habitual offender, the prosecution, on the same day and minutes after the agreed recommendation, filed a motion to amend the indictment to charge habitual status under Miss. Code Ann. §99-19-81. **This information was thereafter changed in the plea agreement recommendation petition after it was actually signed. (R. 41)**[1] The trial court subsequently granted the amendment. Following the plea, the Appellant was sentenced to a term of 25 years without parole as a habitual offender. In rendering such sentence

[1] There has been no showing by the state that the Petition to Enter Plea of Guilty did not actually contained 25 years MDOC before it was amended to add additional portion after the state filed the Motion to Amend the Indictment and after Ross had actually entered into the plea recommendation with the state.

the trial court never sought to convene a jury to determine proof of the elements required for habitual status.No jury heard or determined an facts regarding the enhancement of the sentence evidence. The order Amending the indictment was never filed until after Appellant was actually sentenced as a habitual offender on May 23, 2002. The clerk filed the sentencing order on May 23, 2002. The trial court signed the sentencing order on May 25, 2002. The proceedings in this case are illegal.

REPLY ARGUMENT

ISSUE ONE

The Brief filed by the State fails to demonstrate that the trial court did not erred in imposing habitual offender enhanced sentence.

As the brief for Appellant initially asserts that the statute in which Appellant was indicted and sentenced under, Miss. Code Ann. §97-17-23[2] allowed that a defendant may be sentenced to a term of not less than three (3) years no more than twenty-five (25) years upon conviction. This sentence mandate statute contains no provisions for enhancement. Enhancement of such sentence would therefore be an additional and separate penalty. Here the trial court applied enhancement under a separate statute, Miss. Code Ann. §99-19-81,[3] without seeking the approval of a jury of Petitioner's peers as to the elements applied to warrant enhancement of such sentence and the statutory limit.

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[2] *§ 97-17-23. Burglary; breaking and entering inhabited dwelling. Every person who shall be convicted of breaking and entering the dwelling house or inner door of such dwelling house of another, whether armed with a deadly weapon or not, and whether there shall be at the time some human being in such dwelling house or not, with intent to commit some crime therein, shall be punished by imprisonment in the Penitentiary not less than three (3) years nor more than twenty-five (25) years.*

[3] *§ 99-19-81. Sentencing of habitual criminals to maximum term of imprisonment. Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.*

i) Intervening Decisions by United States Court

Appellant would submit that on March 28, 2000, the Supreme Court of the United States decided the case of Apprendi v. New Jersey, 530 U.S. 466, 120 s.ct. 2348 (2000). Where the court rendered a decision on the issue of use of prior convictions to increase penalty beyond that which is prescribed as the statutory maximum. The issue which the court faced in Apprendi was whether such an increase must be presented to and determined by a jury. The Apprendi court established that it should. The court found as follow on such issues:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed Jones. Other that the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U. S., at 252-253, 119 S. Ct. 1215 (opinion of STEVENS, J.); see aJ id, at 253, 119 S. Ct. 1215 (opinion of SCALIA, J.).

The Supreme Court of the United States, in fact, found that such a fact as proof of prior conviction must be established by proof beyond reasonable doubt and must, as a matter of law, be submitted to a jury.[4] While the Apprendi court noted that the principle dissent would reject the court's rule in Apprendi as being "meaningless formalism," because it can conceive of hypothetical statutes that would comply with the rule and achieve the same result as the New Jersey statute, the court

found that core concerns animating the jury and burden-of-proof requirements are absent from such a scheme.[5] The similarity in the Mississippi habitual offender scheme and the New

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[4] *Mississippi requires that habitual status be proven beyond reasonable doubt.* Sort v. State, *929 So.2d 420 (Miss. App. 2006).*

[5] The principal dissent would reject the Court's rule as a "meaningless formalism," because it can conceive of hypothetical statutes that would comply with the rule and achieve the same result as the New Jersey statute. *Post*, at 17–20. While a State could, hypothetically, undertake to revise its entire criminal code in the manner the dissent suggests, *post*, at 18— extending all statutory maximum sentences to, for example, 50 years and giving judges guided discretion as to a few specially selected factors within that range— this possibility seems remote. Among other reasons, structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose *every* defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime. This is as it should be. Our rule ensures that a State is obliged "to make its choices concerning the substantive content of its criminal laws with full

Jersey habitual sentencing scheme requires that Apprendi be applied to this case. The New Jersey statutes which were at issue in Apprendi provides:

> *2C:39-4. Possession of weapons for unlawful purposes a. Firearms. Any person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree. b. Explosives. Any person who has in his possession or carries any explosive substance with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree. c. Destructive devices. Any person who has in his possession any destructive device with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree. d. Other weapons. Any person who has in his possession any weapon, except a firearm, with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the third degree. e. Imitation firearms. Any person who has in his possession an imitation firearm under circumstances that would lead an observer to reasonably believe that it is possessed for an unlawful purpose is guilty of a crime of the fourth degree. Amended 1979, c. 179, § 3; 1989, c. 120, § 2.*
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> *2C:43-6. Sentence of imprisonment for crime; ordinary terms; mandatory terms a. Except as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment, as follows: (1) In the case of a crime of the first degree, for a specific term of years which shall be fixed by the court and shall be between 10 years and 20 years; (2) In the case of a crime of the second degree, for a specific term of years which shall be fixed by the court and shall be between five years and 10 years; (3) In the case of a crime of the third degree, for a specific term of years which shall be fixed by the court and shall be between three years and five years; (4) In the case of a crime of the fourth degree, for a specific term which shall be fixed by the court and shall not exceed 18 months. b. As part of a sentence for any crime, where the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors, as set forth in subsections a. and b. of , the court may fix a minimum term not to exceed one-half of the term set pursuant to subsection a., or one-half of the term set pursuant to a maximum period of incarceration for a crime set forth in any statute other than this code, during which the defendant shall not be eligible for parole; provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole. c. A person who has been convicted under a. of possession of a firearm with intent to use it against the person of another, or of a crime under any of the following sections: , , b., , a., a., , , ,*

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awareness of the consequence, unable to mask substantive policy choices" of exposing all who are convicted to the maximum sentence it provides. Patterson v. New York, 432 U. S., at 228–229, n. 13 (Powell, J., dissenting). So exposed, "[t]he political check on potentially harsh legislative action is then more likely to operate." *Ibid.* In all events, if such an extensive revision of the State's entire criminal code were enacted for the purpose the dissent suggests, or if New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not, *post*, at 20), we would be required to question whether the revision was constitutional under this Court's prior decisions. See Patterson, 432 U. S., at 210; Mullaney v. Wilbur, 421 U. S. 684, 698–702. Finally, the principal dissent ignores the distinction the Court has often recognized, see, *e.g.*, Martin v. Ohio, 480 U. S. 228 (1987), between facts in aggravation of punishment and facts in mitigation. See *post*, at 19–20. If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the Judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. See *supra*, at 16–17. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

who, while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a firearm as defined in f., shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole. The minimum terms established by this section shall not prevent the court from imposing presumptive terms of imprisonment pursuant to f. (1) except in cases of crimes of the fourth degree. A person who has been convicted of an offense enumerated by this subsection and who used or possessed a firearm during its commission, attempted commission or flight therefrom and who has been previously convicted of an offense involving the use or possession of a firearm as defined in d., shall be sentenced by the court to an extended term as authorized by c., notwithstanding that extended terms are ordinarily discretionary with the court. d. The court shall not impose a mandatory sentence pursuant to subsection c. of this section, c. or d., unless the ground therefor has been established at a hearing. At the hearing, which may occur at the time of sentencing, the prosecutor shall establish by a preponderance of the evidence that the weapon used or possessed was a firearm. In making its finding, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and any other relevant information. e. A person convicted of a third or subsequent offense involving State taxes under N.J.S. , N.J.S. , any other provision of this code, or under any of the provisions of Title 54 of the Revised Statutes, or Title 54A of the New Jersey Statutes, as amended and supplemented, shall be sentenced to a term of imprisonment by the court. This shall not preclude an application for and imposition of an extended term of imprisonment under N.J.S. if the provisions of that section are applicable to the offender. f. A person convicted of manufacturing, distributing, dispensing or possessing with intent to distribute any dangerous substance or controlled substance analog under N.J.S. , of maintaining or operating a controlled dangerous substance production facility under N.J.S. , of employing a juvenile in a drug distribution scheme under N.J.S. , leader of a narcotics trafficking network under N.J.S. , or of distributing, dispensing or possessing with intent to distribute on or near school property or buses under section 1 of P.L. 1987, c. 101 (C.), who has been previously convicted of manufacturing, distributing, dispensing or possessing with intent to distribute a controlled dangerous substance or controlled substance analog, shall upon application of the prosecuting attorney be sentenced by the court to an extended term as authorized by subsection c. of N.J.S. , notwithstanding that extended terms are ordinarily discretionary with the court. The term of imprisonment shall, except as may be provided in N.J.S. , include the imposition of a minimum term. The minimum term shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater, not less than seven years if the person is convicted of a violation of N.J.S. , or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole. The court shall not impose an extended term pursuant to this subsection unless the ground therefor has been established at a hearing. At the hearing, which may occur at the time of sentencing, the prosecutor shall establish the ground therefor by a preponderance of the evidence. In making its finding, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and any other relevant information. For the purpose of this subsection, a previous conviction exists where the actor has at any time been convicted under chapter 35 of this title or Title 24 of the Revised Statutes or under any similar statute of the United States, this State, or any other state for an offense that is substantially equivalent to N.J.S. , N.J.S. , N.J.S. , N.J.S. or section 1 of P.L. 1987, c. 101 (C.). g. Any person who has been convicted

under subsection a. of N.J.S. of possessing a machine gun or assault firearm with intent to use it against the person of another, or of a crime under any of the following sections: N.J.S. , N.J.S. , N.J.S. b., N.J.S. , N.J.S. a., N.J.S. a., N.J.S. , N.J.S. , N.J.S. , N.J.S. , who, while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a machine gun or assault firearm shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at 10 years for a crime of the first or second degree, five years for a crime of the third degree, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole. The minimum terms established by this section shall not prevent the court from imposing presumptive terms of imprisonment pursuant to paragraph (1) of subsection f. of N.J.S. for crimes of the first degree. A person who has been convicted of an offense enumerated in this subsection and who used or possessed a machine gun or assault firearm during its commission, attempted commission or flight therefrom and who has been previously convicted of an offense involving the use or possession of any firearm as defined in subsection d. of N.J.S. , shall be sentenced by the court to an extended term as authorized by subsection d. of N.J.S. , notwithstanding that extended terms are ordinarily discretionary with the court. h. The court shall not impose a mandatory sentence pursuant to subsection g. of this section, subsections d. of N.J.S. or N.J.S. , unless the ground therefor has been established at a hearing. At the hearing, which may occur at the time of sentencing, the prosecutor shall establish by a preponderance of the evidence that the weapon used or possessed was a machine gun or assault firearm. In making its finding, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and any other relevant information. i. A person who has been convicted under paragraph (6) of subsection b. of of causing bodily injury while eluding shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at, or between one-third and one-half of the sentence imposed by the court. The minimum term established by this subsection shall not prevent the court from imposing a presumptive term of imprisonment pursuant to paragraph (1) of subsection f. of . Amended 1979, c. 178, § 85; 1981, c. 31, § 1; 1981, c. 290, § 38; 1981, c. 569, § 1; 1982, c. 119, § 1; 1987, c. 76, § 35; 1987, c. 106, § 12; 1988, c. 44, § 13; 1990, c. 32, § 6; 1993, c. 219, § 6.

2C:44-3 Criteria for Sentence of Extended Term of Imprisonment. The court may, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime of the first, second or third degree to an extended term of imprisonment if it finds one or more of the grounds specified in subsection a., b., c., or f. of this section. If the grounds specified in subsection d. are found, and the person is being sentenced for commission of any of the offenses enumerated in N.J.S. c. or N.J.S. g., the court shall sentence the defendant to an extended term as required by N.J.S. c. or N.J.S. g., and application by the prosecutor shall not be required. The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime under N.J.S. or N.J.S. to an extended term of imprisonment if the grounds specified in subsection g. of this section are found. The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime to an extended term of imprisonment if the grounds specified in subsection h. of this section are found. The court shall, upon application of the prosecuting attorney, sentence a person to an extended term if the imposition of such term is required pursuant to the provisions of section 2 of P.L. 1994, c. 130 (C.). The finding of the court shall be incorporated in the record. a. The defendant has been convicted of a crime of the first, second or third degree and is a persistent offender. A persistent offender is a person who at the time of the commission of the

crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced. b. The defendant has been convicted of a crime of the first, second or third degree and is a professional criminal. A professional criminal is a person who committed a crime as part of a continuing criminal activity in concert with two or more persons, and the circumstances of the crime show he has knowingly devoted himself to criminal activity as a major source of livelihood. c. The defendant has been convicted of a crime of the first, second or third degree and committed the crime as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value the amount of which was unrelated to the proceeds of the crime or he procured the commission of the offense by payment or promise of payment of anything of pecuniary value. d. Second offender with a firearm. The defendant is at least 18 years of age and has been previously convicted of any of the following crimes: , , b., , a., a., , , , a., or has been previously convicted of an offense under Title 2A of the New Jersey Statutes or under any statute of the United States or any other state which is substantially equivalent to the offenses enumerated in this subsection and he used or possessed a firearm, as defined in f., in the course of committing or attempting to commit any of these crimes, including the immediate flight therefrom. e. (Deleted by amendment, P.L. 2001, c. 443). f. The defendant has been convicted of a crime under any of the following sections: N.J.S. , N.J.S. b., N.J.S. , N.J.S. a., N.J.S. a., N.J.S. , N.J.S. , N.J.S. b., N.J.S. , N.J.S. , and in the course of committing or attempting to commit the crime, including the immediate flight therefrom, the defendant used or was in possession of a stolen motor vehicle. g. The defendant has been convicted of a crime under N.J.S. or N.J.S. involving violence or the threat of violence and the victim of the crime was 16 years of age or less. For purposes of this subsection, a crime involves violence or the threat of violence if the victim sustains serious bodily injury as defined in subsection b. of N.J.S. , or the actor is armed with and uses a deadly weapon or threatens by word or gesture to use a deadly weapon as defined in subsection c. of N.J.S. , or threatens to inflict serious bodily injury. h. The crime was committed while the defendant was knowingly involved in criminal street gang related activity. A crime is committed while the defendant was involved in criminal street gang related activity if the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang. "Criminal street gang" means three or more persons associated in fact. Individuals are associated in fact if (1) they have in common a group name or identifying sign, symbol, tattoo or other physical marking, style of dress or use of hand signs or other indicia of association or common leadership, and (2) individually or in combination with other members of a criminal street gang, while engaging in gang related activity, have committed, conspired or attempted to commit, within the preceding three years, two or more offenses of robbery, car jacking, aggravated assault, assault, aggravated sexual assault, sexual assault, arson, burglary, kidnapping, extortion, or a violation of chapter 11, section 3, 4, 5, 6 or 7 of chapter 35 or chapter 39 of Title 2C of the New Jersey Statutes regardless of whether the prior offenses have resulted in convictions. The court shall not impose a sentence pursuant to this subsection unless the ground therefore has been established by a preponderance of the evidence established at a hearing, which may occur at the time of sentencing. In making its finding, the court shall take judicial notice of any testimony or information adduced at the trial, plea hearing or other court proceedings and also shall consider the presentence report and any other relevant information. Amended 1979, c. 178, § 95; 1981, c. 31, § 3; 1990, c. 32, § 8; 1990, c. 87, § 4; 1993, c. 132, § 2; 1994, c. 127, § 2; 1994, c. 130, §

4; 1995, c. 211, § 3; 1997, c. 120; 1999, c. 160, § 4; 2001, c. 443, § 8, eff. Jan. 11, 2002.

2C:43-7 Sentence of imprisonment for crime; extended terms. a. In the cases designated in section , a person who has been convicted of a crime may be sentenced, and in the cases designated in subsection e. of section 2 of P.L. 1994, c. 130 (C.), in subsection b. of section 2 of P.L. 1995, c. 126 (C.) and in the cases designated in section 1 of P.L. 1997, c. 410 (C.), a person who has been convicted of a crime shall be sentenced, to an extended term of imprisonment, as follows: (1) In case of aggravated manslaughter sentenced under subsection c. of N.J.S. ; or kidnapping when sentenced as a crime of the first degree under paragraph (1) of subsection c. of ; or aggravated sexual assault if the person is eligible for an extended term pursuant to the provisions of subsection g. of N.J.S. for a specific term of years which shall be between 30 years and life imprisonment; (2) Except for the crime of murder and except as provided in paragraph (1) of this subsection, in the case of a crime of the first degree, for a specific term of years which shall be fixed by the court and shall be between 20 years and life imprisonment; (3) In the case of a crime of the second degree, for a term which shall be fixed by the court between 10 and 20 years; (4) In the case of a crime of the third degree, for a term which shall be fixed by the court between five and 10 years; (5) In the case of a crime of the fourth degree pursuant to c, g and d for a term of five years, and in the case of a crime of the fourth degree pursuant to any other provision of law for a term which shall be fixed by the court between three and five years; (6) In the case of the crime of murder, for a specific term of years which shall be fixed by the court between 35 years and life imprisonment, of which the defendant shall serve 35 years before being eligible for parole; (7) In the case of kidnapping under paragraph (2) of subsection c. of , for a specific term of years which shall be fixed by the court between 30 years and life imprisonment, of which the defendant shall serve 30 years before being eligible for parole. b. As part of a sentence for an extended term and notwithstanding the provisions of , the court may fix a minimum term not to exceed one-half of the term set pursuant to subsection a. during which the defendant shall not be eligible for parole or a term of 25 years during which time the defendant shall not be eligible for parole where the sentence imposed was life imprisonment; provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole. c. In the case of a person sentenced to an extended term pursuant to c, f and dd, the court shall impose a sentence within the ranges permitted by a. (2), (3), (4) or (5) according to the degree or nature of the crime for which the defendant is being sentenced, which sentence shall include a minimum term which shall, except as may be specifically provided by N.J.S. f, be fixed at or between one-third and one-half of the sentence imposed by the court or five years, whichever is greater, during which the defendant shall not be eligible for parole. Where the sentence imposed is life imprisonment, the court shall impose a minimum term of 25 years during which the defendant shall not be eligible for parole, except that where the term of life imprisonment is imposed on a person convicted for a violation of N.J.S. , the term of parole ineligibility shall be 30 years. d. In the case of a person sentenced to an extended term pursuant to N.J.S. g, the court shall impose a sentence within the ranges permitted by N.J.S. a. (2), (3), (4) or (5) according to the degree or nature of the crime for which the defendant is being sentenced, which sentence shall include a minimum term which shall be fixed at 15 years for a crime of the first or second degree, eight years for a crime of the third degree, or five years for a crime of the fourth degree during which the defendant shall not be eligible for parole. Where the sentence imposed is life imprisonment, the court shall impose a minimum term of 25 years during which the defendant shall not be eligible for parole, except that where the term of life imprisonment is imposed on a person convicted of a violation of N.J.S. , the term of parole eligibility shall be 30 years. Amended 1979, c. 178, § 86;

1981, c. 31, § 2; 1982, c. 111, § 2; 1986, c. 172, § 3; 1987, c. 106, § 13; 1988, c. 44, § 14; 1990, c. 32, § 7; 1990, c. 87, § 3; 1994, c. 127, § 1; 1994, c. 130, § 3; 1995, c. 126, § 3; 1997, c. 410, § 2; 2001, c. 443, § 6; 2003, c. 267, § 4.

The Mississippi habitual offender enhancement scheme in which Willie Ross was sentenced under provides:

> *§ 99-19-81. Sentencing of habitual criminals to maximum term of imprisonment. Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.*

Miss. Code Ann. §99-19-81.

The record demonstrates that Willie Ross was sentenced under the Mississippi habitual sentencing scheme set out here which scheme, just as the New Jersey scheme set out above, makes no provisions to allow or require a jury to determine the facts associated with the eligibility for a increase penalty beyond that which is prescribed in the original sentencing mandate statute which the offense is punishable thereunder. This issue must be decided here in regards to this claim where it is an issue which the Court has been reluctant to face.

Willie Ross' sentence totals 25 years without parole, as a habitual offender, without any eligibility for parole or [6] early release.[7]

Apprendi clearly creates and defines that a jury should assess any facts associated with habitual enhanced sentencing where the penalty is increased.

In Blakely v. Washington, 542 U.S. 296 (2004), a most recent decision where the Supreme Court of the United States expanded upon the rule set out in Apprendi, the court again evaluated the rule which it applied in Apprendi. The court stated the following language:

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[6] Parole distinguishes release on supervision before expiration of the sentence. Any person sentenced as non habitual are eligible for parole.

[7] Early release distinguishes earned time or other on prison credits which could be used to diminish the sentence.

> This case requires us to apply the rule we expressed in Apprendi v. New Jersey, 530 U. S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure §87, p. 55 (2d ed. 1872).5 These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing; we compiled the relevant authorities in Apprendi, see 530 U. S., at 476–483, 489–490, n. 15; id., at 501–518 (THOMAS, J., concurring), and need not repeat them here.6 Apprendi involved a New Jersey hate-crime statute that
> authorized a 20-year sentence, despite the usual 10-year maximum, if the judge found the crime to have been committed " 'with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" Id., at 468–469 (quoting N. J. Stat. Ann. §2C:44–3(e) (West Supp. 1999–2000)). In Ring v. Arizona, 536 U. S. 584, 592–593, and n. 1 (2002), we applied Apprendi to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors. In each case, we concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. Apprendi, supra, at 491–497; Ring, supra, at 603–609.

The intervening decisions by United States Supreme court, which are quoted here, are clearly pertinent to this case. Since the relief requested herein is based upon intervening decisions by the United States Supreme Court, which is sanctioned by Miss. Code Ann. §99-39-5 (2) as being sufficient to provide an exception to the procedural bars which would otherwise be applicable to prevent a post conviction motion filed in conflict with such bars from being heard on it's merits This post conviction relief motion should have been heard by the trial court on it's merits as a matter of law.[8] The intervening decisions which requires a finding by a

[8] A motion for relief under this article shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction. *Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence* or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction.

jury on enhancement of the sentence are Apprendi v. New Jersey, 530 U.S. 466, 120 S. ct. 2348 (2003); Blakely v. Washington, 542 U.S. S. Ct. 296 (2004).

ii) Retroactive Application of Apprendi and Blakely

The Mississippi Supreme Court, in Hall v. Hilbun, 466 So. 2d 856, 875-76 (Miss. 1985), held that judicially enunciated rules of law are applied retroactively. The Hall v. Hilbun court held that:

> It is a general rule that judicially enunciated rules of law are applied retroactively. Legislation applies prospectively only, and we are not thought to be in the business of legislating. Rather, our function is to decide cases justly in accordance with sound legal principles which of necessity must be formulated, articulated and applied consistent with the facts of the case.
>
> Keyes v. Guy Bailey Homes, Inc., 439 So.2d 670 (Miss. 1983), abolishing the requirement of privity of contract in home construction contracts applied retroactively; Tideway Oil Programs, Inc. v. Serio, 431 So.2d 454 (Miss.1983), providing that punitive damages may be recovered in chancery court was applied retroactively; McDaniel v. State, 356 So.2d 1151 (Miss.1978) overruling cases which allowed voluntary intoxication as a defense to a crime applied retroactively.
>
> The general rule applied universally in this country in federal and state courts is simply put in Jones v. Thigpen, 741 F.2d 805 (5th Cir.1984).
>
> "Judicial decisions ordinarily apply retroactively. See Robinson v. Neil, 409 U.S. 505, 507-08, 93 S.Ct. 876, 877-78, 35 L.Ed.2d 29 (1973). 'Indeed, a legal system based on precedent has a built-in presumption of retroactivity. Solem v. Stumes, --- U.S. ----, ----, 104 S.Ct. 1338, 1341, 79 L.Ed.2d 579 (1984)."
> --741 F.2d at 810.
>
> Even Pruett v. City of Rosedale, 421 So.2d 1046 (Miss.1982), was held to apply retroactively to that case.
>
> We note that other states, when shedding the "locality rule", have done so in a routine manner by simply adopting the new rule and applying it in a normal (retroactive) fashion without fanfare. See Zills v. Brown, 382 So.2d 528, 532 (Ala.1980) applying this new rule retroactively in Drs. Lane, Bryant, Eubanks & Dulaney v. Otts, 412 So.2d 254, 256-8 (Ala.1982) and May v. Moore, 424 So.2d 596, 597-601 (Ala.1982); Jenkins v. Parrish, 627 P.2d 533, 537 n. 1 (Utah 1981) (rule to be applied retroactively); Orcutt v. Miller, 95 Nev. 408, 595 P.2d 1191, 1194-95 (1979) (new rule routinely applied); Ardoin v. Hartford Accident & Indemnity Co., 360 So.2d 1331, 1339 n. 22 (La.1978) (overruling Percle v. St. Paul Fire & Marine Insurance Co., 349 So.2d 1289, 1303 (La.Ct.App.1977), which had held abandonment of locality rule to be prospective only); Bruni v. Tatsumi, 46 Ohio St.2d 127, 134-35, 346 N.E.2d 673, 679 (1976) (new rule routinely applied); Kronke v. Danielson, 108 Ariz. 400, 403, 499 P.2d 156, 159 (1972) (same); Wiggins v. Piver, 276 N.C. 134, 141, 171 S.E.2d 393, 397-98 (1970) (same); Naccarato v. Grob, 384 Mich. 248, 253-54, 180 N.W.2d 788, 791 (1970) (same); Brune v. Belinkoff, 354 Mass. 102,

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Miss. Code Ann. §99-39-5(2), Motion for relief; grounds; limitations.

108-09, 235 N.E.2d 793, 798 (1968) (same). Even when acknowledging the issue to be one of first impression, one court applied the new rule routinely with no hint of prospective-only application. Morrison v. MacNamara, 407 A.2d 555, 562 (D.C.1979).

The only case we have found in which a court chose to make the abolition of the "locality rule" prospective only is Shier v. Freedman, 58 Wis.2d 269, 283 n. 2, 206 N.W.2d 166, 174 n. 2 (1973). See also, Cukrowski v. Mount Sinai Hospital, Inc., 67 Wis.2d 487, 501-02, 227 N.W.2d 95, 102-03 (1975). The merit in the Wisconsin approach is not apparent.

- It is clear from Mississippi law that the decisions rendered by the United States Supreme Court in Apprendi and Blakely should be applied to the case at bar retroactively since these decisions are judicially enunciated rules of law as opposed to Legislation.[9]

iii) The Sentence Imposed in this Case is Illegal Under the Judicially Enunciated Rules Defined in Apprendi and Blakely

In Apprendi v. New Jersey, the United States Supreme Court held that any fact that subjects a defendant to a longer sentence than that "prescribed by the legislature," or the "statutory limit[]," must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt. 530 U.S. 466, 481-82 (2000). This holding conformed to "the principle by which history determined what facts were elements" of crimes – namely, any "fact . . . legally essential to the punishment to be inflicted." Harris v. United States, 536 U.S. 545, 561 (2002) (quoting United States v. Reese, 92 U.S. 214, 232 (1876) (Clifford, J., dissenting)); see also Apprendi, 530 U.S. at 502 ("common law understanding" was that "a fact that is by law the basis for imposing or increasing punishment is an element"); 1 J. Bishop, New Criminal Procedure 50 (2d ed. 1872) ("whatever in law is essential to the punishment sought to be inflicted" is an element).

The United State Supreme Court reaffirmed the Apprendi rule in Ring v. Arizona, 536 U.S. 584 (2002), in which it invalidated Arizona's method for finding "aggravating facts" that

[9] *The United State Supreme Court recently decided Burton v. Stewart, ___ U.S. ___ (2007) (No. 05-9222) where the court had before it the issue of whether Apprendi and Blakely applies retro actively on collateral review. The court did not decide the issue but held that district court had no jurisdiction over case where Burton did not seek or obtain authorization from the court of Apprendi to file his second or successive petition for writ of habeas corpus.*

subjected offenders to the death penalty. Any fact that a state deems necessary for an increase in a defendant's punishment, the United States Supreme Court made clear, must be proved according to the procedures mandated by Apprendi. Ring, 536 U.S. at 588-59.

Mississippi habitual offender enhancement statutory scheme for finding and sentencing a defendant to an enhanced sentence has exactly the same infirmities as the Arizona scheme which the United States Supreme Court invalidated in Ring. Miss. Code Ann. §§99-19-81 and Miss. Code Ann §§99-19-83. As the United States Supreme Court has made clear in Ring, "The reasons for imposing an exceptional and enhanced sentence cannot include the factors inherent in the offense . . . ."; vacating exceptional sentence on this basis. In other words, just as in the Arizona scheme, the presence of an aggravating fact beyond the elements of the principle crime of conviction subjects the defendant to more severe punishment than otherwise is legally permissible. A court, rather than a jury, may find such a fact. And unlike even the aggravating facts necessary in Ring, aggravators, or reasons for enhancement, in the Mississippi habitual scheme are determined under the "beyond reasonable doubt" standard. Other states require proof only "by a preponderance of the evidence," instead of beyond a reasonable doubt. Wash. Rev. Code § 9.94A.370(2); Gore, 143 Wn.2d at 315.

In Appellant's particular case, Mississippi Code Ann §99-19-81 subjected him to a presumptive sentencing range of the remainder of his life in prison. The United States Supreme Court has made clear in Apprendi v. New Jersey and again in Blakely v. Washington, that under this sentencing range a jury should have been allowed to make the determination of whether Appellant should be sentenced to an enhanced punishment as a habitual offender. Yet Appellant's sentencing court found, without a jury, that Appellant was a habitual offender and

should be sentenced to an enhancement of the sentence imposed to consist of not being eligible for parole or early release. The enhancement removed any hope of early release.

This procedure constitutes a paradigmatic Apprendi violation. The court (rather than a jury) found certain facts by a preponderance (rather than beyond a reasonable doubt) that exposed Appellant to an increased sentence exceeding that prescribed by the Mississippi Legislature for the offenses which Appellant was charged and convicted. Apprendi itself, in fact, noted that increasing a sentence based on a "second mens rea requirement" without submitting the issue to a jury is a classic violation because "[t]he defendant's intent in committing a crime is perhaps as close as one might come to a core criminal offense 'element.'" 530 U.S. at 493. The trial court's finding that Appellant was a habitual offender and should be sentenced to an enhanced punishment, without a jury having made a determination of this fact, is a clear violation of Apprendi and Blakely. Despite the apparent clarity of the Apprendi infirmity in the State of Mississippi's exceptional habitual enhanced sentencing system, the Mississippi Supreme Court has ruled that the Constitution confers on accused no right of trial by jury on question of whether he is habitual offender. Keyes v. State, 549 So.2d 949 (Miss. 1989). While this was the view of the Mississippi Supreme Court prior to the intervening decisions in Apprendi and Blakley, this prior holding is directly contrary to what the United States Supreme Court has now ruled. The State of Washington, which is the same state in which the Blakley decision originated from, has held that factual determinations leading to exceptional sentences upward are more like the determination upheld in McMillan v. Pennsylvania, 477 U.S. 79 (1986), which dictated a mandatory minimum sentence, than those covered by Apprendi. Gore, 143 Wn.2d at 314. Neither justification withstood scrutiny.

Appellant, has been denied due process of law in sentencing where he was sentenced to an enhanced sentence, without parole, outside the normal sentencing limits under the statute which he was convicted under, without a jury having been permitted to determine enhancement eligibility but where court, setting without jury, arbitrarily imposed enhanced punishment without impaneling a jury to determine such issues. Such actions denied Appellant his constitutional right to due process in sentencing, in violation of the 5th and 14th Amendments to the United States Constitution. Appellant would assert that such claims are presented as being an exception under the Post Conviction Statute pursuant to the interviewing decisions rendered by the United States Supreme Court in Apprendi v. New Jersey, 530 U.S. 466, 120 s.ct. 2348 (2000); Blakely v. Washington, 542 U.S., 296, 124 s.ct. 2531 (2004). This claim should therefore be heard notwithstanding he three years bar which would otherwise prohibit consideration of such claim.

The Mississippi habitual offender statute cannot avoid the mandates of Apprendi simply by saying that the eligibility for a habitual sentence is based upon prior convictions which are not a charge but an enhancement procedure Constitutional protections, particularly in the context of Apprendi, do not turn based on where name tags are placed. As the United States Supreme Court recently explained:

> The dispositive question [under Apprendi] "is one not of form, but of effect." If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.

Ring, 536 U.S. at 602 (quoting Apprendi, 530 U.S. at 494) (emphasis added); see also Ring, 536 U.S. at 610 (Scalia, J., concurring) ("[A]ll facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense,

sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt."); Mullaney v. Wilbur, 421 U.S. 684, 698 (1975) (a state's "characteriz[ation]" of factors bearing on punishment does not control constitutional inquiry).

For this same reason, labeling makes no difference in determining whether a certain provision sets forth a "statutory maximum" for purposes of Apprendi. Rather, the dispositive question is a functional one: what is the maximum penalty to which the defendant is subject if punished "according to the statutes in which he was indicted under without applying the enhancement provision of Miss. Code Ann. §99-19-83 reflected in the jury verdict alone? " Apprendi, 530 U.S. at 483[10]; accord Ring, 536 U.S. at 597. That penalty in Mississippi – as in other states with similar guideline systems – is indisputably "the maximum sentence in the applicable grid box." . Miss. Code Ann. §97-17- 23; Miss. Code Ann. §99-19-81 (emphasis added). It does not matter that Mississippi uses the term "statutory maximum" to describe the longest permissible exceptional sentence instead of the longest permissible standard-range sentence.

In this regard as well, Mississippi's exceptional sentence enhancement procedure is just like the procedure which the United States Supreme Court invalidated in Ring. The Mississippi habitual sentencing enhancement statute "authorize[d] a maximum penalty of death . . . in a formal sense" because, as noted above, the sentence imposed upon Willie Ross constituted an enhanced sentence when the court removed parole or early release by imposing it under Miss Code Ann. §99-19-81. Had Willie Ross not been found to be eligible for sentence enhancement he would have served 50% of the twenty-five (25) years sentence even had the court imposed the full 25 year maximum. The United States Supreme Court has firmly held that Apprendi govern

[10]The defendant in Apprendi, like Appellant here, pled guilty to the underlying offense. See 530 U.S. at 469-70.

the procedures for finding such an aggravating factor because otherwise, "Apprendi would be reduced to a 'meaningless and formalistic' rule of statutory drafting." Id. at 604.[11]

Precisely the same analysis applies here. As the Ring Court itself explained, "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed fact finding necessary to increase a defendant's sentence by two years, but not the fact finding necessary to put him to death. We hold that the Sixth Amendment applies to both." 536 U.S. at 609 (emphasis added); see also id. at 607 ("We see no reason to differentiate capital crimes from all others in this regard."); Apprendi, 530 U.S. at 544-51 (O'Connor, J., dissenting) (recognizing that Apprendi rule applies to facts necessary to impose death penalty as well as to impose an additional term of years). Indeed, the non-capital nature of the heightened sentence here makes this case, if anything, easier than Ring. As Justice Scalia noted in Ring, there was some doubt there, in light of this Court's Eighth Amendment jurisprudence, as to whether the Arizona Legislature voluntarily had made the imposition of the death penalty dependent on the finding of an aggravating fact. See 536 U.S. at 610-12 (Scalia, J., concurring). But here, there is no question that the Mississippi Legislature voluntarily created a statutory scheme under which defendants' sentences cannot exceed the top of the standard range unless an aggravating fact is present, the habitual offender status of having been previously convicted and sentenced to one year or more on at least two prior separate occasions, Miss. Code Ann. §99-19-83.

In short, because Mississippi courts may not legally deviate upward from the top of the sentencing range dictated by a guilty verdict alone "unless those aggravating factors set out under

[11] Justice Thomas used similar reasoning in Apprendi itself in explaining that case's rule: "[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if a legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact – of whatever sort . . . – the core crime and the aggravating factor together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime" and must be submitted to the jury and proved beyond a reasonable doubt. 530 U.S. at 501 (Thomas, J., concurring) (emphasis added).

Miss. Code Ann. §99-19-81 are found to exist," Ring, 536 U.S. at 597, the procedures for finding such a factor must comply with Apprendi.

A.

The Exceptional Sentence Imposed Here Highlights the Practical and Structural Concerns Underlying Apprendi.

The Apprendi, Blakely, rule, of course, is more than a mechanical formula designed to separate criminal offense elements from other factual issues; it is the embodiment of "constitutional protections of surpassing importance." Apprendi, 530 U.S. at 476. Three aspects of the proceedings below demonstrate why it is vital that this Court hold firm the U.S. Supreme Court's ruling in Apprendi that any fact necessary to increase a defendant's sentences be alleged in advance and proven to a jury beyond a reasonable doubt.

First, the procedures that led to Petitioner's enhanced punishment underscore the need to require legislatures to treat every fact they deem essential to a given prison term with equal gravity. The United States Supreme Court explained in Apprendi that:

> New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentencing enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

530 U.S. at 476.

Mississippi has not followed this elementary principle here. The Mississippi Legislature threatened Willie Ross with certain pains if he committed a third felony after having been previously convicted, sentenced to, and served one year or more on the first two felonies. The Mississippi legislature sanctions felonies of other states as well as Mississippi and vouches for

any record of time served which another state may submit to Mississippi in regards to any such felony convictions in that foreign state. All this is accepted by Mississippi without the necessity of a jury having to determine the validity of such information and record of prior convictions and/or time served. Since the Legislature has designated these as aggravating factors in regards to enhancement, under Apprendi and Blakely, a jury should make this critical determination. To find otherwise would be to permit the Legislature, through mere labeling, to mandate increases in a defendant's sentence based on factual determinations that it has removed from the purview of the jury and that are not otherwise subject to the ordinary procedural protections governing statutory elements. In this case, in fact, Mississippi's system allowed the largest portion of Petitioner's sentence to turn on the factual finding that was subject to the slightest procedural protections: While the standard range for aggravated assault, for Willie Ross would be 20 years, this range would not per se include "without the possibility of parole or early release." The standard range was therefore deviated from by applying the enhancement statute of Mississippi Code Ann §99-19-81. Under the scheme which Willie Ross was sentenced, the trial judge, not a jury, was allowed to render a finding on the evidence of enhancement. Under Apprendi and Blakely this is illegal.

Apprendi holds that in such a situation – i.e., when "a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others" – "it necessarily follows that the defendant should not – at the moment the State is put to the proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached." 530 U.S. at 484. The Mississippi Legislature's exceptional habitual

sentencing scheme unconstitutionally deprived Willie Ross of these critical protections against an erroneous loss of liberty and an unwarranted additional stigma.[12]

Second, Appellant's sentencing proceedings underscore the unfairness in allowing a judge to make a finding necessary to increase a defendant's punishment by only a preponderance of the evidence. The Sixth Amendment right of the accused to have a jury of his peers determine "the truth of every accusation" is designed in part to guard against arbitrary, biased, or eccentric judicial decisions. Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (quoting 4 William Blackstone, Commentaries on the Laws of England *349 (1768)). The Due Process Clause similarly requires the prosecution to prove each element of a criminal offense beyond a reasonable doubt because "the interests of the defendant are of such magnitude" that they must be protected by a standard of proof "designed to exclude as nearly as possible the likelihood of an erroneous judgment." Addington v. Texas, 441 U.S. 418, 423 (1979); see also In re Winship, 397 U.S. 358, 363-64 (1970) (beyond a reasonable doubt standard is "a prime instrument for reducing the risk of convictions resting on factual error"). As this Court noted in Winship, "a person accused of a crime . . . would be at a serious disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." 397 U.S. at 363 (quotation and citation omitted); see also People v. Reese, 258 N.Y. 89, 101 (1932) (Cardozo, J.) ("The genius

[12]Because standard sentencing ranges in Mississippi, unlike those in the federal sentencing guidelines, are "prescribed by the legislature," Apprendi, 530 U.S. at 481, a decision invalidating Mississippi's procedures for imposing exceptional habitual enhanced sentences upward would not necessarily reflect the comparable provisions in the United States Sentencing Guidelines. The federal sentencing grid is promulgated by a Sentencing Commission that resides in the Judicial Branch. Accordingly, as United States Court noted in Mistretta v. United States, 488 U.S. 361 (1989), presumptive sentencing ranges under the federal guidelines are not legislative acts. Rather, they are "court rules" derived from "judicial rulemaking." Id. at 386 & 391. Apprendi's prohibition against exceeding the "statutory" maximum based on facts that were not submitted to the jury or proved beyond a reasonable doubt arguably pertains only sentencing limits set by legislatures. See Apprendi, 530 U.S. at 523 n.11 (Thomas, J., concurring) (noting the "unique status" of the federal guidelines in light of Mistretta); cf. supra at 3 n.2 (noting other differences between Washington and federal guidelines).

of our criminal law is violated when punishment is enhanced in the face of reasonable doubt as to the facts leading to the enhancement.") But that is exactly what happened here. Appellant was sentenced to more severe sentence of imprisonment, which amounted to an additional number of years of actual imprisonment on enhancement evidence which was not proven beyond a reasonable doubt. Enforcing the Apprendi rule here will prevent defendants such as Appellant from being blind sided by court-imposed sentences longer than they could have predicted from the facts charged in their indictments.

For the foregoing reasons, this Court should reverse the sentence imposed upon Willie Ross and hold that the procedures in the Mississippi habitual criminal sentencing Act is unconstitutional under the ruling by the United States Supreme Court in Apprendi and Blakely since such procedures fail to permit a jury to determine the factual evidence associated with the enhancement of the sentence.

The habitual portion of the sentence imposed upon Appellant is blatantly illegal and denied Appellant due process f law, under the 5th and 14t Amendment to the United States Constitution and the Constitution of the State of Mississippi where the sentencing order was filed approximately two (2) days before the trial court signed such order.

Appellant would assert that the sentencing order was filed in this case on May 23, 2002. However, the trial court did not sign such order until May 25, 2002. See Exhibit B, attached hereto. The sentencing order should be found to be invalid where it was not timely signed and executed to being signed by the trial judge. If the order accepting the plea of guilty is not a valid order then the plea of guilty should be invalid as a matter of law. Appellant should be allowed to plea amend or allowed to go to trial on the merits of his case.

Appellant would assert to this court that the sentencing order is a crucial document since it provides the force and authority to place and keep Appellant imprisoned for the duration of 25 years. Where this order has not been properly filed and duly executed the authority to maintain such imprisonment has been flawed. This court should not find such error to be harmless where it is fundamental that the sentencing order be properly prepared, worded, and filed. Here the order is not filed, dated and signed properly and constitutes plain error which should result in a new trial unless Appellant waives such.

The state's brief do not address nor refute the issues presented in the Brief for Appellant and again presented for this Court here.

ISSUE TWO:

The state's brief also never refute the point made by Appellan's brief that the habitual portion of the sentence imposed upon Appellant is illlegal or constitutes a denial of due process of law, under the 5th and 14th Amendments to the United States Constitution and the Constitution of the State of Mississippi where the sentencing order was filed approximately two (2) days before the trial court signed such order.

The record reflects and demonstrates that the Order of the trial Court imposing sentence was signed by the Circuit Court on May 25, 2002.[13] However, the filing date provided by the Circuit Clerk demonstrates the sentencing order to have been filed on May 23, 2002. (R. 36-38) The trial court evidentially signed the Order after it had actually been filed in the official record for two days and not before filing as the law requires. An order which takes away 25 mandatory years of a person life should be processed correctly and in accord with the riles of procedure and

[13]The record cannot lie. It speaks in plain and clear language. It cannot be legal for the sentencing order to have been filed by the Circuit Clerk two days before it was actually signed by the trial court. This is not procedure and violates the Mississippi Uniform Rules of Circuit and County Court Practice.

law which it is governed by. Such a plan and flagrant error should inure to the benefit of the defendant no matter when it is raised. The trial court attempted to cover up the error and not address it's own plain error by asserting that it was procedurally barred and time barred. (R. 64) The trial court did, however, allow Appellant to proceed with an appeal of the ruling in forma pauperis. (R. 71)

This Court should find that such an action constitute plain error and should be heard by the trial court, or by this Court, and the sentencing order voided. Appellant should therefore be allowed to plead anew since the original order accepting his plea constitutionally tainted. The trial court never addressed this claim.

ISSUE THREE:

Finally, the state never refuted the issue that the trial court erred in summarily dismissing the PCR motion without conducting an evidentiary hearing nor requiring the state to file an answer to the motion where record demonstrates that there was no criminal conviction of any crime, either before or after conviction, to warrant revocation of suspended sentence and that such revocation was based upon information and allegation by the state which was presented to the trial court.

The Trial Court's finding that the Petition should be summarily dismissed constitutes an abuse of decreation and should be reversed by this Honorable Court for an evidentiary hearing on the merits. Under the law where there is a question of fact the trial court should conduct an evidentiary hearing. Here there was questions of fact. Mainly, the question would be whether the state amended the indictment after the Appellant entered into the agreement top plead guilty for 25 years. If the state amended the indictment to habitual after the agreement and amended the agreement after it was initially signed, that constitutes questions of fact which should have been

hearing during an evidentiary hearing. This Court should remand this case to the trial court for evidentiary hearing on the merits.

The trial court should have actually conducted an evidentiary hearing without any entry of a ruling regarding the motion. The claims contained in the motion are well pleaded and concise. Appellant was entitled to develop additional facts, during a hearing, to support his motion. This Court is, once again, confronted with factual problems in this case which could have been fully and finally resolved in the trial court by an evidentiary hearing or, possibly, by development of fact and expansion of the record in conformance with Miss. Code Ann. §99-39-17 (Supp. 1992). In the present case the Appellant supported his complaint with specific affidavits from persons who had knowledge of specific facts which supported Appellant's claim that his plea of guilty was based upon an initial agreement that the state recommended 25 years in MDOC, as opposed to 25 years as a habitual offender, and that the agreement was amended after it was signed by Appellant. These statements constitute factual disputes which should have been revolved by a hearing. ***"While a transcript of the proceeding is essential, other offers of clear and convincing evidence which prove that the defendant entered a guilty plea voluntarily are sufficient. For example, where an evidentiary hearing has established that a defendant's guilty plea was entered voluntarily, the fact that a record was not made at the time the plea was entered will not be fatal."*** Wilson v. State, 577 So.2d 394 (Miss. 1991). In this case, the trial court never conducted an evidentiary hearing or examined the attachments to the Motion to verify that the claim of ineffective assistance of counsel was supported by factual disputed. The trial court failed to follow the mandatory requirements of the post conviction procedure Act when it failed to conduct a hearing and to require an answer from the State or examine the

evidence. This act sets out the following requirements § 99-39-11. Judicial examination of original motion; dismissal; filing answer.

(1) The original motion, together wit all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to who it is assigned.

(2) If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified.

(3) If the motion is not dismissed under subsection (2) of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

(4) This section shall not be applicable where an application for leave to proceed is granted by the Supreme Court under Section 99-39-27.

(5) Proceedings under this section shall be subject to the provisions of Section 99-19-42.

In the instant case now before the bar of this Court, the trial court never indicated that it had examined the record of the pleas and the law require that an evidentiary hearing be conducted in such an instance.

This Court has previously held that it is committed to the principle that a post-conviction collateral relief petition, which meets basic requirements, is sufficient to mandate an evidentiary hearing unless it appears beyond doubt that the Appellant can prove no set of facts in support of his claim which would entitle him to relief. Alexander v. State, 605 So.2d 1170, 1173 (Miss. 1992); Horton v. State, 584 So.2d 764, 768 (Miss. 1991); Wilson v. State, 577 So.2d 394, 397 (Miss. 1991); Myers v. State, 583 So.2d 174, 178 (Miss. 1991); Miller v. State, 578 So.2d 617 (Miss. 1991); Wright v. State, 577 So.2d 387 (Miss. 1991); Billiot v. State, 515 So.2d 1284 (Miss. 1987).

In tandem, with the allegations in the post-conviction relief motion being supported by the record, Appellant was entitled to an "in court opportunity to prove his claims." Neal v. State, 525 So.2d 1279, 1281 (Miss. 1987).

The trial court's decision not to grant an evidentiary hearing here forced another needless appeal upon an already overloaded and overtaxed appellate court. The trial court should have. at a minimum, granted an evidentiary hearing on the claims contained in the post-conviction relief motion. Relief beyond that point would have depended upon the developments at the evidentiary hearing. Neal v. State, 525 So.2d 1279, 1280-81 (Miss. 1987); Sanders v. State, 440 So.2d 278, 286 (Miss. 1983); Baker v. State, 358 So.2d 401 (Miss. 1978). This point is especially clear where there was no record transcript of the plea made or consulted in considering the post-conviction motion. Appellant made a substantial showing of the denial of his constitutional rights under states law., as demonstrated by the record, that the trial court accepted pleas and sentenced him without the least concern as to whether any of his witnesses desired to testify in mitigation of the sentence to be imposed. Appellant Ross would ask this Court to vacate the ruling of the trial court and remand this case to the trial court for an evidentiary hearing.

CONCLUSION

Appellant Ross respectfully submits that based on the authorities cited herein and in support of his initial brief, that this Court should reverse and remand the decision rendered by the trial court and remand to that court for additional proceedings in accord with law.

Respectfully submitted:

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CERTIFICATE OF SERVICE

This is to certify that I, Willie Ross, have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United States Postal service, first class postage prepaid, to: Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, MS 39205.

This, the 2, day of September, 2008.

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