IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GILBERT EWING — APPELLANT

VS. — NO. 2008-CP-0123-COA

STATE OF MISSISSIPPI — APPELLEE

APPELLANT'S REPLY BRIEF

GILBERT EWING
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PARCHMAN, MS 38738

APPELLANT, PRO SE

I.

As to appellant's Issue No. IV page 16 of appellant's brief the State response is that Ewing waived his right to a Dorect appeal as well as any appeal to this court in a Post-Conviction environment.

Contrary thereto appellant insist and maintain the purported waiver in this record of appellant's rights to a direct appeal --- as well as any appeal to this court in a Post-Conviction Environment is unenforceable and void. The State just says the petition Waiver waived Ewing's rights. The State does not address the Mis-identy in the waiver petition itself. i.e. the Indictment in this case stated Ewing "Attempted to Take the personal property of **Chiquita Scott,** but see the Waiver Petition[2] it says "attempt to take the personal property of **Erica Scott.** Again the State did not address the idem sonans See Johnson v. Estele, 704 F. 2d 232 (5th Cir 1983).

> [HN3]The rule of idem sonans means that names are the same that have the same sound or sound -- the same . . . Under Texas law a court of appeals will refrain from disturbing on appeal a jury or trial court determination that names in question are -- idem sonans unless evidence shows that the names - are patently incapable of being sounded the same - or that the accused was misled to his prejudice." Martin v. State, 541 S. W. 2d 605, 607 (Tex Cr. App. 1976).

According to this rule the names in question are not-- the same and constitutes a fatal varance, becaues these names do not have the same sound or sound the same.

II.

PROCEDURAL BAR

The State is absolutely correct in saying issues not raised at the trial court level may not be raised on appeal. This is correct only in the right contex. In the instant case this rule does not apply and

[2] See Also Miller v. The State, 53 Miss. 403 (Miss. 1876).

what the State is not saying in its argument is what the Court said in Morgan v. State, 793 So. 2d 615, *617 (Miss. 2001)

> ¶9. The Plain error rule is codified in Miss. R.Evd 103(d). It provides that nothing precludes the court from taking notice of plain error affecting the substantial rights of a defendant, even though they were not brought to the attention of the trial court. If a party persuades the court of the substantial injustice that would occur if the -- rule were not invoked, the court may invoke the rule. See **Edward v. Sears, Roebuck & Co.,** 512 F. 2d 267 (5th Cir. 1975) "Only an error so fundamental that it generates a miscarriage of justice rises to the level of plain error."

So it is more to consider than what the state is not sayingin its argument to the contrary issues are addressed by this court that have not been presented below. See (for persuasion) Wheeler v. State, 826 So. 2d 731 (Miss. 2002). in dealing with a Double Jeopardy claim - -the Mississippi Supreme Court stated;

> P25. Wheeler summarily states that he was subjected to double jeopardy by having to respond to two indictments. Although this argument was not raised in the preceedings below and no argument or authoritive support was given for the conclusive assignment of error, **we will** briefly address the merits since a substantial right is at issue. See R. App. P. 28(a)(3); **Fuselier v. State,** 654 So. 2d 519, 522 (Miss. 1995).

Appellant asserts as to all the issues presented in the original brief that were not presented in the preceedings below and no adequate argument or authoritative support given for the conclusive assigment of error cannot be dismissed without addressing the merits since appellant sincerely submits a substantial right is at issue in each of his assignment of error.

III.

The waiver petition of rights to appeal is invalid and --- unenforceable as having been shown, the guilty plea was not voluntarily,

knowingly, and intelligently entered as previously argued in addition Ewing never received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process. Henderson v. Morgan, 96 S. Ct 2253 (1976). Appellant has asserted and shown that the jury trial issues are not moot, since the Waiver petition of rights to appeal and Guilty plea are both invalid and unenforceable. So this court can determine who's brief while strong on law is excruiatingly weak on the application of the law to the facts.

IV.

JURY TRIAL & PLEA BARGAN TRANSCRIPTS

In the States brief [p. 5, 11-13] makes mention that the official record is imperfect because it does not contain a completed trial transcript or the plea-qualification transcript itself. Appellant agrees as the state recognize necessity of a remand or a correction of these deficiencies. Appellant agrees with the Appellee that the duty of insuring that the record contains sufficient evidence to support his assignments of error on appeal. However as noted by the record p. 176], Appellants brief p. 15] shows appellant has not failed in his duty or stated another way has not been negligent and has exercised dilligence in seeking to have the trial jury transcript and plea bargan transcript made a part of the record. In this case the Clerk of this court warned the lower court clerk with Sanctions to make these records apart of the record on appeal. The Appellant asserts he has a right to these appeals, a right to these records on appeal, and the right to assistance of counsel on appeal. These safeguards are guaranteed by the Constitution. See Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellant invoke these safeguards in the instant case and

request this court to rule on ths appeal as justice and law require so that a next reviewing court can say all the Appellant's rights were afforded and protected.[1]

Respectfully submitted,

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[1] The records requested in designation of records, (first appeal of right), assistance of counsel and evidentiary hearing. Taking into account that a pro se petitioner's meritorious complaint will not be lost because inartfully drafted.. Ward v. State, 944 So. 2d 908 (Miss. App. 2006). See, cases cited in Young v. State, for the premise that an evidentiary hearing regarding voluntariness to a guilty plea becomes necessary if the plea hearing fails to show that the petitioner was advised of the rights of which he allegedly asserts ignorance. With this standard in mind is Ewings arguments are to be addressed along with the transcripts which is of no fault of his own they are missing.

CERTIFICATE OF SERVICE

I, Gilbert Ewing, do hereby certify that I have this the 16th day of March, 2009 mailed a true and correct copy of the above foregoing Appellant's Reply to Appellee response brief to the Hon. Billy Gore, Asst. Att. General, POB 220 Jackson, Ms 39205, all by U.S. mail, first class postage prepaid.

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