

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

NO. 2008-CP-0731-COA

**COPY**

ROBERT STANLEY ROWLAND,

APPELLANT,

Versus

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SUPREME COURT  
COURT OF APPEALS

STATE OF MISSISSIPPI,

APPELLEE.

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REPLY BRIEF OF THE APPELLANT

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ROBERT STANLEY ROWLAND  
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## Table of Authority

Ethridge v. State, 800 So.2d 1221 (Miss. Ct. App.2001)	2.
Fuselier v. State, 654 So.2d 519 (Miss. 1995)	1.
Harris v. Oklahoma, 433 U.S. 682 (1977)	1.
Hoskins v. State, 934 So.2d 326 (Miss. Ct. App. 2006)	1.
Ivy v. State, 731 So.2d 601 (Miss. 1998)	2.
Kennedy v. State, 732 So.2d 184 (Miss. 1999)	2.
Matlock v. State, 732 So.2d 168 (Miss. 1999)	5.
Newell v. State, 754 So.2d 1261 (Miss. Ct. App. 1999)	6.
Menna v. New York, 423 U.S. 61 (1975)	5.
Pinkney v. State, 757 So.2d 297 (Miss. 2000)	4.

### State Statutes:

99-39-3(2)	6.
99-39-5	3.
99-39-5(1)(g)	3, 6.
99-39-5(2)	2.

Appellant Rowland offers his reply to the Statements and arguments in the Appellees' brief and does state and/or show unto this Honorable Court to-wit:

I.

As remarkable as it may seem the State of Mississippi (hereinafter "State") via the Honorable John R. Henry, Special Assistant Attorney General, has conceded that Appellant Rowland was convicted and sentenced for both capital murder and the underlying felony alleged in the indictments for capital murder. Appellee Brief at page 1.

The State also concedes that Fuselier v. State, 654 So.2d 519 (Miss. 1995) and Harris v. Oklahoma, 433 U.S. 682 (1977) holds that "one may not be sentenced both on capital murder and the underlying felony alleged in the indictment to elevate the homicide from murder to capital murder." Appellee Brief at page 3-4.

Therefore, the State has admitted that Rowlands' claim of a double jeopardy violation is meritorious, that the armed robbery convictions and sentences is invalid.

II.

The State's entire argument in this case is based on the charge that Rowlands' claim of the illegal sentences is barred. The State contends "[a] claim such as the one presented here cannot be addressed where it is presented in a successive motion in post-conviction relief." Appellee Brief at page 3.

The State overlooks the fact that Rowlands' claim of an illegal sentence cannot be time-barred according to Ivy v. State, 731 So.2d 601, 603 (P14)(Miss. 1998), nor successive-writ barred according to Kennedy v. State, 732 So.2d 184, 186 (P8)(Miss. 1999).

In Kennedy, he essentially contended that his life sentence for murder was an illegal sentence, and as such, was not subject to any type of procedural bar. The State countered that the trial court was correct in concluding that Kennedy's claim was time barred under §99-39-5(2). The State also contended that the trial court properly held Kennedy's motion barred by res judicata in that he had ample opportunity to present any and all claims with respect to his conviction in his numerous filings for post conviction relief. id, 732 So.2d at 186 (P7). There Kennedy had filed multiple petitions, approximately five (5), for collateral relief from September 19, 1978 until February, 1998. id at (P2-4). The Mississippi Supreme Court, per curiam, held that Kennedy was entitled to have his claim of an illegal sentence considered on the merits. id at (P8).

In the case at bar, like Kennedy, the State contends that Rowland's claim of an illegal sentence is barred from all consideration. However, just as the Supreme Court considered the merits in Kennedy, this Court must consider the merits in this case to ensure that Rowlands sentences are enforceable under the double jeopardy clauses. In fact, in Ethridge v State, this Court of Appeals considered a double jeopardy claim on the merits notwithstanding procedural bars. Ethridge, 800 So.2d 1221 (Miss. Ct. App. 2001). The Court found that since the claims

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were not properly addressed by the lower court, that the issues would be properly addressed by this Court. id, 800 So.2d at 1223-24 (P7-9). Like in Ethridge, this Court should consider the double jeopardy claim on the merits since the lower court did not address the merits.

### III.

In an obvious attempt to create a smoke screen, the State has attempted to mislead this Court as to the procedural ground of Rowlands' claim. The State throughout it's brief has constantly alleged and argued that Rowland has relied on the "intervening decision" exception in §99-39-5, MCA, to overcome the statute of limitation and the successive writ bar. Appellee Brief at page 3, ¶¶3,4; page 4, ¶¶2,3. Lets be clear, Rowland has never implied, muchless claimed, the "intervening decision" exception as the authority to overcome the procedural bars.

In the Petition filed in the lower court, Rowland based the courts' jurisdiction upon §99-39-5(1)(g), claiming that he was unlawfully held in custody under two (2) illegal sentences. SEE Petition for Post Conviction Collateral Relief at page 1, ¶1. In the Petition Rowland further asserted that the illegal sentences were not subject to any time or successive writ bar. (citations omitted). id at page 3, ¶v. In the Appellant Brief filed in this Court on page 5 through 6, Rowland continued to maintain the same legal position. So Rowland has no idea where the State come up with the "intervening decision" theory, but such is misplaced in this case.

The standard of review between these two exceptions calls for this Court to consider different legal questions. The illegal sentence exception claimed by Rowland requires this Court to determine whether or not the imposed sentences are lawful; not whether or not there is a subsequent decision which does actually adversely affect the outcome of the case. Thus, the Court should only consider whether the sentences are constitutionally valid under the Double Jeopardy Clause.

#### IV.

The State relying on Pinkney v. State, 757 So.2d 297, 299 (Miss. 2000), argues that a double jeopardy claim, like in this case, must be raised within the time provided by the statute of limitation. That the Pinkney court rejected the argument that it should consider the double jeopardy issue on account of the fact that the proscription against jeopardy is a fundamental right. Appellee Brief at page 5, ¶1.

Rowland pleads that Pinkney is both factually and legally distinguishable from this case. In Pinkney the double jeopardy claim was **not** made in the lower court, 757 So.2d at 299 (P6), unlike here. There Pinkney upon remand pled guilty to simple murder and burglary; unlike here, Rowland pled guilty to capital murder and the underlying felony. Although, the Pinkney court did indeed find the issue procedurally barred, the court still considered the merits of the illegal sentence claim, finding that "[d]ouble jeopardy [was] not implicated in [that] case." 757 So.2d at 299 (P10-12). Therefore, contrary to the position

of the State, Pinkney permits this Court to consider the double jeopardy claim. Pinkney is not an outright bar to consideration of a double jeopardy claim, claiming an illegal sentence. Moreover, the State has admitted that Rowland was subject to double jeopardy, hence Pinkney is distinguishable from Rowland.

V.

The State asserts that Rowland "may not be heard to raise such [double jeopardy claim] in post-conviction relief", citing Hoskins v. State, 934 So.2d 326, 330 (Miss. Ct. App. 2006).

Rowland submits, however, that the United States Supreme Court in Menna v. New York, 423 U.S. 61, 96 S.Ct. 241 (1975), in a per curiam opinion expressing the view of five of the eight members of the Court, held that where a State was precluded by the double jeopardy clause from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty. The Court clearly remarked:

"We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waiver a claim that - judged on its face - the charge is one which the State may not constitutionally prosecute." id, 423 U.S. at 62, footnote 2.

The Mississippi Supreme Court in Matlock v. State, 732 So.2d 168, 170 (Miss. 1999), followed the opinion of Menna.

The State in the case at bar, concedes that federal law under Harris v. Oklahoma, 433 U.S. 682 (1977) precluded the State from prosecuting Rowland for both capital murder and the underlying offense involved in the felony murder. Appellee

Brief at page 4, ¶2. "We [the State] consider it [Harris] to be directly on point." The State even admits that the Harris decision occurred two years prior to Rowlands' conviction, so the State of Mississippi knowingly permitted the lower court to unlawfully convict Rowland. Appellee Brief at page 4, ¶2.

According to Menna, Rowland can indeed raise the illegal sentence claim in a post conviction matter since under Harris the State was precluded from prosecuting Rowland under the double jeopardy clause. Moreover, Mississippi Statute 99-39-3(2) provides prisoners with a collateral relief procedure, limited in nature, to review those claims, questions, issues or errors which in practical reality could not be raised during the guilty plea proceedings. In this case, §99-39-5(1)(g) permitted Rowland to raise the claim of his unlawful sentences in a post conviction petition. Therefore, the State's argument based on Hoskins is misplaced in the context of this case.

Rowland asserts that if Hoskins is contrary to Menna, that Hoskins must be overruled as the State Court of Appeals does not have the authority to act contrary to the United States Supreme Court in Menna.

However, Hoskins is factually distinguishable from Rowland in that Hoskins did not make a double jeopardy argument in his brief to this court. Hoskins, 934 So.2d at 300 (P9). Hoskins asserted a double jeopardy claim in his issue statement, but he failed to make an argument in his brief. Under Newell v. State, 754 So.2d 1261, 1264-65 (P6)(Miss. Ct. App. 1999) the court need not address an issue if the appellant fails to make an argument.



CONCLUSION

The State has conceded the double jeopardy violation in this case under Harris and Fuselier, hence this Court must vacate the illegal convictions and sentences as the same is not subject to any procedural bar.

RESPECTFULLY SUBMITTED, the 11th day of September, 2008.

  
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CERTIFICATE OF SERVICE

This is to certify that I, Robert Stanley Rowland, have  
this day, mailed a true and correct copy of the foregoing  
Reply Brief via the Inmate Legal Assistance Program, to:

Hon. John R. Henry  
Spc. Asst. Atty. Gen.  
Post Office Box 249  
Jackson, MS 39205

This the 11th day of September, 2008.

  
\_\_\_\_\_  
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