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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CP-00917-COA

BENNIE LACEY

VS.

STATE OF MISSISSIPPI

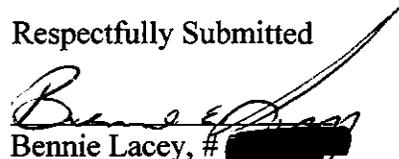
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APPELLANT

APPELLEE

BRIEF OF APPELLANT

Respectfully Submitted



Bennie Lacey, # [REDACTED]

Delta Correctional Facility
3800 County R. 540
Greenwood, MS 38930

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VS.

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APPELLEE

CERTIFICATE OF INTERESTED PERSONS

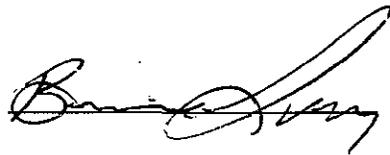
The undersigned Pro Se Appellant certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this court may evaluate possible disqualification or recusal:

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U.S Constitution:

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Art. 3, Sec. 26

Art. 3, Sec. 2

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41-29-147

99-19-81

STATEMENTS OF ISSUES

- I. Ineffective assistance of counsel during the habitual offender sentencing hearing
- II. Appellant's present habitual sentence is invalid because of an un-counseled and unconstitutional prior conviction.
- III. Appellant's current sentence as a habitual offender is an illegal sentence and exempt from procedural bars.
- IV. Trial court abused it's discretion by applying procedural bars to deny relief on appellant's post conviction motion.

STATEMENT OF CASE

Appellant file a post-conviction motion under Mississippi Code Ann. Section 99-39-5 (1) (I) (Rev. 2000) into the Circuit Court of Wayne County, Mississippi attacking the habitual offender portion of his sentence for the sale of a controlled substance, cocaine in Cause No. 8343.

On the 8th day of May 2008, the Circuit Court of Wayne County, Mississippi entered an order denying Appellant's post-conviction motion on procedural ground being Cause No. CV-2008-54-B. This appeal stems from the Circuit Court of Wayne County, Mississippi denial of post-conviction relief. See. Exhibit (A)

SUMMARY OF THE ARGUMENT

Appellant Bennie Lacey, (hereinafter known as appellant), was convicted in a jury trial on the charge of sale of cocaine. Upon his conviction, the state sought to prove that appellant was a subsequent drug offender pursuant to Mississippi Code Ann. Section 41-29-147, and as a habitual offender pursuant to Mississippi Code Ann. Section 99-19-81. The trial court scheduled a hearing for the determination whether appellant was eligible for enhanced sentencing.

Appellant was represented at his trial on the principal charge and at the enhancement portion of the trial by the Honorable Mark S. Howard, (hereinafter known as trial counsel). See Exhibit (B)

During the enhancement proceeding, the state produced documents that was purported to be evidence that appellant previously had been convicted twice before in the state of Mississippi, and actually served a year or more on each conviction. The state did offer two indictments, one from 1980 for the charge of burglary/grand larceny , with an order of revocation on the charge, being Cause No. 7754. See Exhibit. (D)

Trial counsel raised no objections of the State's proffer of these documents. This was

deficient performance on the part of trial counsel, because of the fact that trial counsel had failed to investigate these documents on the supposedly prior convictions. If trial counsel would have done the required proper investigation of these prior convictions, it would have been found that the indictment in Cause No. 7754, sale of a controlled substance, was a formal charging of two persons, Adam Lacey and, a Bandigo Lacey.

Nowhere in the indictment in Cause No. 7754, did it show that Bennie Lacey, the appellant, had been indicted by the Grand Jury. Also, it would have been discovered, that someone, either in 1984, or in 1991, had taken a felt tip pen and added two AKA's to the indictment, one for a "Bendo", and the other for a "Benny E. Lacey". See Exhibit (D). Because of this, it should have raised some concern for trial counsel. As the evidence in a sentencing phase of a bifurcated trial under the habitual offender statute, the state had the same burden of proof as to the habitual offender portion of the indictment as it has on the principal charge. So that, this would have created a reasonable doubt in the trial court's mind on the validity of the indictment in Cause No 7754. See Exhibit (D).

This was clearly deficient performance on the part of trial counsel as, it denied Appellant of his due process right to have the State prove him guilty beyond a reasonable doubt of being a habitual offender. Because of the fact that trial counsel's failure to raise objection to this indictment did allow into evidence of what appears to have been a fabricated indictment, and not one returned by a Grand Jury against Bennie Lacey. This deficient performance of trial counsel did prejudice Appellant, as it did relieve the State of its duty to prove that the Bennie Lacey in the present offense, is actually the same person who was previously convicted in the prior offense.

The State understood its own deficiency in this area, and did call Marvin Farrior, sheriff

in Wayne County to the stand to testify on the part of the State that Appellant had actually spent time on both of the prior convictions in his jail. Though the sheriff admitted that he remembered Appellant being in his jail during this time on the previous convictions, he could not remember the exact date, or how much time the appellant was serving.

This deficient performance of trial counsel has caused Appellant to be prejudiced, as it has so undermined the proper functioning of the adversarial process that the sentencing phase of the bifurcated trial on the habitual offender portion of the indictment cannot be relied on as having produced a just result. Also, this deficient performance of trial counsel has undermined the correctness of the sentencing hearing.

Appellant has been denied his due process rights to the effective assistance of counsel by the fact that he failed to put the State to its burden of proof on the prior conviction for the sale of a controlled substance in Cause No. 7754. If trial counsel would have directed that court's attention to the alteration of the indictment to include the two A.K.A.'s, then the State would have had the burden to explain and prove that the indictment was actually returned by the Grand Jury. See. Exhibit (D)

It would have also raised a presumption that Appellant was not actually the so-called "Bandigo" that had been charged in the indictment. This would have tested the State's proof of the prior conviction, so that more likely than not, the trial court would have rejected out of hand the State's evidence. In doing so, the trial court would not have adjudicated Appellant as a habitual offender. Appellant has been prejudiced by the deficient performance of his trial counsel.

Appellant's prior conviction in Cause No. 7754, sale of a controlled substance, is invalid because Appellant was denied the effective assistance of counsel. Appellant had been arrested for a violation of the conditions of his probation on his conviction for burglary/Grand Larceny in

Cause No. 7528. The Honorable Stanford Young was appointed by the trial court to represent Appellant. See Exhibit ©.

Attorney Stanford Young came to the Wayne County Jail to question Appellant concerning Appellant's up-coming revocation hearing. During the discussion, he told Appellant that he should plead guilty to the charges in the revocation petition, as the court was going to violate him anyway because of his association with Adam Lacey. Appellant agreed to this advice of his attorney, and agreed to plead guilty to the revocation. Attorney Young presented a petition that he did tell Appellant that he needed to sign for the purpose of the revocation hearing. Appellant signed the printed form. See Exhibit (E) (F) (G) (H).

On the 19th day of January, 1984, Appellant appeared in the Circuit Court of Wayne County, Mississippi, in what had been portrayed to Appellant as a revocation hearing. Appellant plead guilty to the revocation petition and the trial court did revoke his suspended sentence of two years. See Exhibit. (E) (F) (G) (H).

Nothing was ever said to Appellant by his attorney or the trial court that the plea he was giving, being a plea of guilty to the charge for the sale of a controlled substance in Cause No. 7754. The Honorable Stanford Young, who did represent Appellant at the revocation hearing, gave appellant the impression that he was pleading to a revocation violation. See Exhibit (E) (F) (G) (H).

During the revocation hearing, the trial court never question Appellant if he understood the charges against him, not did that court inquire if he understood what rights he was waiving by the entry of his plea. Also, Appellant did not understand that he was pleading guilty to another criminal charge, as Appellant had not been presented an indictment, and was ignorant to what his actual charge was. Neither did the trial court inform him of any charge, other than he was

pleading guilty to a revocation violation.

This was a constructive denial of counsel in violation of the Sixth Amendment to the United States Constitution, and Article 3, section 26 of the Mississippi Constitution. Appellant's counsel never presented an indictment to Appellant. If Appellant would have been presented with an indictment, he would have pointed out to his counsel that the purported indictment that was supposedly returned by the grand jury on the 10th day of January 1984, charged that Adam Lacey/Bandigo Lacey was charged with selling a quantity of phentermine. A schedule IV controlled substance on the 22nd day of February 1984. Also, Appellant would have contested the charging, as he never had the nickname "Bandigo", and would have had his attorney to raise objections. See Exhibit (D)

The indictment was so defective in its charging, that Appellant's counsel was deficient in not filing a demurral to it. Neither did it charge Bennie Lacey, the Appellant with a crime, but rather "Bandigo Lacey", and later someone supplied two A.K.A.'s "Beno" and "Benny Lacey". So, it cannot be said that evidence was presented to the Grand Jury to formally charge Appellant with a crime. But, the evidence was to the contrary as, the indictment appeared to be fabricated. See Exhibit (D).

The indictment was also defective, as it charged a crime that had not been committed at the time it was returned by the grand jury. Appellant's attorney was clearly deficient in allowing the State to proceed against him on this fraudulent charge.

Attorney Stanford Young in his representation of Appellant, was so deficient, that in essence Appellant was totally denied any assistance from counsel. This was clearly a constructive denial of his right to counsel, so that the State obtained a criminal conviction in violation of due process. This has unconstitutionally deprived Appellant of his liberty, making the conviction

void.

Because of the fact that Appellant's prior conviction in Cause No.7754 is constitutionally infirm, then it is indicative that it was improperly used as evidence to prove that Appellant was eligible for habitual offender status. Because of this fact, his current sentence of thirty years as a habitual offender is in violation of due process.

The United States Constitution guaranteed through te Fourteenth Amendment due process and equal protection. Mississippi also by article 3, section 14 of the Mississippi Constitution recognizes this same fundamental principle. So that, citizens of the State of Mississippi may not be deprived of constitutional rights without due process of law, and that due process requires reasonable advance notice and a meaningful opportunity to be heard.

Due Process also guarantees a criminal defendant who is convicted of a crime the fundamental right to a legal sentence. From an analysis of the indictment in Cause No. 7754, could not to be said to give Appellant fair notice and how the state obtained a conviction for this crime by subterfuge, so that, Appellant has been denied his fundamental right to due process. See Exhibit (D)

Appellant asserts that to use this invalid conviction to enhance his present sentence as an habitual offender, has subjected him to an illegal sentence in violation to his fundamental right to due process. Since Appellant is suffering from a sentence enhancement that violates his fundamental due process right to a legal sentence, these issues are exempt from any procedural bars that would otherwise preclude review of his claims.

Appellant raise these issues in the Circuit Court of Wayne County, pursuant to Mississippi Code Ann. Section 99-39-5 (1) (I) (Rev. 2000). The trial court failed to address the issues raised by Appellant in his post-conviction by applying two procedural bars, sections 99-

39-5 (2); 99-39-23 (6). This was clearly an abuse of discretion on the part of the trial court, as the right to a legal sentence involves a due process claim which is fundamental and exempt from procedural bars. See Exhibit (A).

The trial court should have reached te merits of Appellant's claims, regardless of the three-year limitation period for post-conviction relief, due to the fact of the right to be free from an illegal sentence is fundamental. It was clear from Appellant's motion and the annexed that he was laboring under an illegal habitual offender sentence, so that this claim was exempt from the time bar of section 99-39-5 (2).

Also, the trial court should have reached the merits of Appellant's post-conviction regardless of the fact that it was a successive motion. Correction of an improper sentence is a fundamental right and cannot by the motion being successive. Errors affection fundamental rights may be excepted form procedural bars.

The trial court clearly abused its discretion in applying procedural bars to deny relief on Appellant's post-conviction motion. In doing so, has deny Appellant his fundamental right to a legal sentence.

ARGUMENT

I.

INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE HABITUAL OFFENDER

SENTENCING HEARING

Appellant was convicted in a jury trial, and because the state was seeking enhanced punishment as a subsequent drug offender pursuant to Mississippi Code Ann. Section 41-29-147, and as a habitual offender pursuant to Mississippi Code Ann. Section 99-19-81. A hearing was held pursuant to Rule 6.04, Mississippi Uniform Criminal Rules of Circuit Court Practice (1972).

(Now Rule 11.03, Uniform Rules of Circuit and County Court Practices) See Exhibit (B).

During the enhancement sentencing proceedings, the state produced some documents that were purported to be evidence that Appellant had been previously convicted twice before, and that he also had actually served a year or more on these two prior felony convictions. The sentencing court before accepting these documents into evidence, asked trial counsel, (who by the way, had for the first time during the sentencing hearing had viewed these documents), if trial counsel wished to raise objections to the State's presentation of these documents? Of the which, trial counsel answered: "No objections, your Honor." Tr. 306 See Exhibit (I)

This was clearly deficient performance of trial counsel, as he had failed to investigate the prior charges and prepare a defense prior to the bifurcated trial on the enhanced sentencing. It has long been held in the Courts of Mississippi that, in bifurcated trial on eligibility for enhanced punishment, a defendant has the same rights as in the principal trial. The Mississippi Supreme Court mandated in the case of Seely v. State, 451 So.2d 213 (Miss.1984), where that Court held:

"The State has the same burden of proof as to the habitual offender portion of the indictment as it has on the principal charge. The defendant also has the same rights at both stages of trial..... We wish to leave no doubt that a bifurcated trial means a full two-phase trial prior to any finding that the defendant is an habitual offender and subject to enhanced punishment." (451 So.2d at 215)

Appellant had to defend himself against these charges by the State, and the State had the burden of proof on the habitual portion of the indictment so, it was imperative that his counsel investigate these allegedly prior offenses so that a defense could be presented to these charges. But, Appellant's trial counsel had done no preparation for the bifurcated trial, and in not doing so, there was no way to put the State's evidence on these prior alleged convictions to the test.

This was not sound strategy on the part of trial counsel. The Mississippi Supreme Court held that:

“While attorneys will be granted wide discretion as to trial strategy, choosing defenses and calling witnesses, a certain amount of investigation and preparation is required.”

Davis v. State, 743 So.2d 326, 329 (Miss.1999).

If trial counsel would have investigated these alleged prior convictions, he would have discovered that the indictment in Cause No. 7754, did appear to have been altered. The indictment did not appear to have been returned by the grand jury against Bennie Lacey, the appellant. Rather, it did charge on Adam Lacey/Bandigo Lacey with the offense. See Exhibit (D)

Since Mississippi Courts follow the general rule that an identity between the name in a document and the name of the defendant creates a presumption that the two people are in fact identical, trial counsel should have objected to the names in the indictment. See, Course v. State, 461 So.2d 770, 771 (Miss.1984).

Because of the fact that the prosecution must show and prove that the records of the prior convictions are accurate, and that the defendant that is sought to be so sentenced, is indeed the person who was previously convicted. See on, Phillips v. State, 421 So.2d 476 (Miss.1982). Trial counsel should have tested the State’s evidence on this point as, it would have created a reasonable doubt that the appellant had never been indicted on this charge. This is so, because of the fact that the indictment, it did appear that this indictment had been altered by someone who had wrote in two A.K.A.’s, “Bendo” and “Benny E. Lacey”.

Article 3, Section 27 of the Mississippi Constitution guarantees the right to only be tried by indictment. If trial counsel would have properly investigated the indictment in Cause No. 7754, which had been offered as proof of a prior conviction, he would have discovered that there

is no record in the Wayne County Justice Court that Bennie E. Lacey had ever been charged in this offense. See Exhibit (J-K).

Clearly this would have shown that any conviction and sentence that may have been had on this defective indictment, and what appears on it face to be a fabricated indictment, would have been an illegal conviction and sentence. See *State v. Berryhill*, 703 So.2d 250, 253 (Miss.1997). This deficient performance of trial counsel denied appellant of his due process right to hold the State to its burden of proof on any evidence presented on the habitual offender portion of the indictment. Trial counsel's failure to investigate the alleged prior convictions to hold the State to its burden of proof, so undermined the proper function of the adversarial process that the bifurcated trial cannot be relied on as having produced a just result. See *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

The Mississippi Supreme Court put forth the test that should be used to judge a claim of ineffective assistance of counsel: "(1) a deficiency of counsel's performance that is (2) sufficient to constitute prejudice." *Walker v. State*, 703 So.2d 266 (Miss.1997); *Triplett v. State*, 579 So.2d 555 (Miss.1991). Under this test, it is clearly apparent that the deficient performance of Appellant's trial counsel, allowed the State to present inadequate evidence, without objection in the bifurcated trial. Appellant has been prejudiced by his trial counsel's failure to hold the State to its burden of proof. Thus causing Appellant to be adjudicated as an habitual offender.

Under the well-established standard, "there is a reasonable probability but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466, 694 (1984).

Appellant has met the two-prong test that was enunciated supra, so that his counsel was

not acting in the capacity as counsel that is guaranteed by the Sixth Amendment of the United States Constitution, and his comparable rights in Article 3, Section 26 to the Mississippi Constitution. Appellant's trial counsel failed to hold the State to its burden of proof on the habitual portion of the indictment. This did deny Appellant of his due process right to effective representation at the bifurcated trial.

If trial counsel would have held the State to its burden of proof on the alleged prior conviction in Cause No. 7754, it is more likely than not, that the trial court would have rejected the State's proof as inadequate to prove that Appellant was an habitual offender. Thus the outcome would have been different, because of the fact that the trial could not have adjudicated Appellant as an habitual offender. See on United States v. Franks, 230 F.3d 811, 815 (5th Cir. 2000).

II.

APPELLANT'S PRESENT HABITUAL SENTENCE IS INVALID BECAUSE OF AN UN-COUNSELED AND UNCONSTITUTIONAL PRIOR CONVICTION

Appellant's prior conviction in Cause No. 7754, sale of a controlled substance, is invalid, because he was denied his right to the effective assistance of counsel. Trial counsel did mislead Appellant on the nature of the proceedings of which he had entered his plea of guilty. The appellant was lead to believe that he was going to a revocation hearing when, in fact, Appellant was pleading guilty to the charge in Cause No. 7754. See Exhibit (D).

It has long been held that in a guilty plea context, that a defendant has the right to the effective assistance of counsel. See McMann v. Richardson, 397 U.S. 759, 771 (1970). Clearly from the facts set forth infra, appellant was in essence, totally denied any assistance of counsel in the entry of his plea of guilty.

Trial counsel did not tell the appellant that he was entering a plea of guilty to the charge of sale of a controlled substance. But rather, that he was pleading to the revocation of his sentence on burglary and larceny. A revocation hearing is totally different from a hearing on a plea of guilty. In the context of the guilty plea hearing. A defendant is informed by the trial court of the rights that the plea waives, the nature and consequences of the act he contemplates, and any other relevant facts and circumstances before the defendant is allowed to enter his plea. See Vittitoe v. State, 556 So.2d 1062 (Miss. 1990).

In the case subjudice, the trial court did not inform Appellant what was actually happening, that in the revocation hearing he was pleading guilty to a whole new charge, and not just pleading to the revocation charge. Neither did the trial court inform the appellant that by the entry of his plea that, he was waiving his basic fundamental constitutional rights. Neither did the trial court inform appellant of the charge that he was entering a plea of guilty on. See Exhibit (E) (F).

By the trial court's failure to inform Appellant of the rights that he was waiving by pleading guilty, then there was not an affirmative expression that the appellant had waived those rights. See Horton v. State, 584 So.2d 764 (Miss.1991).

Furthermore, since Appellant had not been presented with an indictment, he did not know the elements of the charge to which he was pleading guilty. This was one of the constituent requirements that had to be determined in making the pleas of guilty. This caused any plea of guilty to be so constitutionally infirm, that Appellant had been denied his right to due process. Since the trial court failed to make a record of the proceedings, it cannot be said that the appellant's pleas was within the perimeter of the constitution. See Wilson v. State, 577 So.2d 394 (Miss. 1991).

Clearly this was a constructive denial of counsel as defined by the United States Supreme Court in Cuyler v. Sullivan, 446 U.S. 335 (1980). It cannot be said that Appellant had counsel at all. If counsel was acting as counsel as guaranteed by the Sixth Amendment, he would have presented his client a copy of the indictment, that being this Appellant. If trial counsel would have done so, Appellant would have pointed out to counsel, that he had never been known as "Bandigo", so that the indictment did not properly charge his. Also, that the indictment, was purported to have been returned on January 10, 1984, a month or more after the indictment was returned by the grand jury.

The indictment was fatally defective in the charging, so that Appellant's trial counsel was deficient in failing to file a demurral to the indictment. Of the which, Appellant would have requested that his counsel to do so, had he had an opportunity to view the indictment.

Appellant's trial counsel was so deficient in the prior conviction, that it was a structural defect on the par within which the trial proceeds and involved basic protections without which a criminal trial cannot reliably serve its function. This was a constructive denial of counsel, and was in violation of the Sixth Amendment to the United States Constitution, as well as his comparable rights pursuant to Article 3, Section 26 of the Mississippi Constitution.

This structural defect in the context of the guilty plea in Cause No. 7754, was the denial of effective assistance of counsel. So that, the Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel. See Evitts v. Lucey, 469 U.S. 387, 396 (1985).

Because of the structural defect in the prior conviction, the State obtained a criminal conviction in violation of due process, and has in reality unconstitutionally deprived appellant of his liberty, thus making the un-counseled prior conviction void.

Because the unconstitutional prior conviction in Cause No. 7754 was used as evidence to prove Appellant guilty as a habitual offender in his present conviction, he is in “custody” and that prior conviction is open to collateral attack. He was convicted in the prior proceeding in violation of Gideon v. Wainwright, 372 U.S. 335 (1963), so that his prior is subject to collateral proceedings. See Nichols v. U.S., 511 U.S. 738, 765 (1994); Also, Allen v. Collins, 924 F.2d **, 89 (5th Cir. 1991).

Appellant’s current sentence as a habitual offender is in violation of due process, because of a constitutionally infirm prior conviction. So that, his sentence of 30 years as a habitual offender pursuant to Section 99-19-81 of the Mississippi Code, should be vacated as a matter of law.

Appellant should be re-sentenced to 30 years as a non-habitual offender, eligible for parole and good-time credits. That the Court should find that the sentencing court was in error using the unconstitutional prior conviction to enhance his present conviction in Cause No. 8343. See Lay v. State, 310 So.2d 908 (Miss.1975); Also, Usry v. State, 378 So.2d 635, (Miss. 1979).

III.

APPELLANT’S CURRENT SENTENCE AS A HABITUAL OFFENDER IS AN ILLEGAL SENTENCE AND EXEMPT FROM PROCEDURAL BARS

The United States Constitution guarantees through the Fourteenth Amendment due process and equal protection. The State of Mississippi also by Article 3, Section 14 of the Mississippi Constitution recognizes this same fundamental principle. The Mississippi Supreme Court has long held that a defendant has a fundamental due process right to a legal sentence. See, Lockett v. State, 582 So.2d 428 (Miss. 1991). The Mississippi Supreme Court has also held that the trial court should also entertain a motion for post-conviction relief in which a petitioner claims he was

illegally sentenced, regardless of three year limitation period for post-conviction relief, as the right to be free from an illegal sentence is a fundamental right and is excepted from procedural bars. See, Ethridge v. State, 800 So.2d 1221 (Miss.2001).

Appellant's post-conviction motion raises the claim that his current sentence as a habitual offender is an illegal sentence, because of the fact that the State used an un-counseled prior guilty plea conviction to enhance his current sentence.

Appellant also has shown that he has a fundamental right to be free from an illegal sentence. See, Alexander v. State, 879 So.2d 512, 514 (Miss.Ct. App.2004). Accordingly, the procedural bars of the Post-Conviction Collateral Relief Act do not prohibit consideration of his claim of an illegal sentence. See, Graves v. State, 822 So.2d 1089, 1091 (Miss.Ct.App.2002).

The issues that the appellant did raise in his post-conviction motion, requires that this court should reverse the trial court's denial of his motion and remand back to that court for an evidentiary hearing. See, Washington v. State, 620 So.2d 966, 967 (Miss.1993). Or in the alternative, remand Appellant's case back to the trial court for the correction of an improper illegal sentence. See, Sneed v. State, 722 So.2d 1257 (Miss.1998).

IV.

TRIAL COURT ABUSED ITS DISCRETION BY APPLYING PROCEDURAL BARS TO DENY RELIEF ON APPELLANT'S POST CONVICTION MOTION

Appellant had raised his claims of ineffective assistance of counsel and illegal sentence in the Circuit Court of Wayne County, pursuant to Mississippi Code Ann. Section 99-39-5 (2) and the successive writ bar of Section 99-39-23 (6) to deny relief of Appellant's post-conviction motion. See Exhibit (A).

This was an abuse of discretion on the part of the trial court in the failure to reach the

merits of Appellant's claims. The Mississippi Supreme Court has held that the three-year limitation period for moving for post-conviction relief is irrelevant if a fundamental constitutional right is involved. See, Carter v. State, 726 So.2d 195 (Miss.1998). That same court went on to hold that the right to a legal sentence is fundamental. See Lucket v. State, 582 So.2d 428 (Miss.1991). So that, the trial court did error in applying the time bar of section 99-39-5 (2).

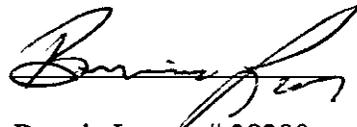
It goes without saying that trial court also abused its discretion by applying the successive writ bar of 99-39-5 (6) to deny the appellant's post-conviction motion. As it has been held by the Mississippi Supreme Court and the court of Appeals of the State of Mississippi that the question of an illegal sentence must be addressed even if the post-conviction motion is successive. See, Smith v. State, 477 So.2d 191, 195-96 (Miss.1985); Lyle v. State, 756 So.2d 1 (Miss.Ct.App.1999).

The trial court used the wrong rule of law in the denial of the appellant's post-conviction motion. Appellant has shown by the preponderance of the evidence that his trial counsel was ineffective, and because of that ineffectiveness he is laboring under an illegal habitual offender sentence. So that the trial court abused its discretion in its failure to reach the merits of Appellant's post-conviction motion.

CONCLUSION

Wherefor premises considered, Appellant moves this court to reverse and remand this cause back to the Circuit Court of Wayne County, Mississippi for an evidentiary hearing on his claim of the ineffective assistance of counsel and the illegal sentence. And, for what other relief the court deems just and proper.

Respectfully submitted this the 12 day of July, 2008.



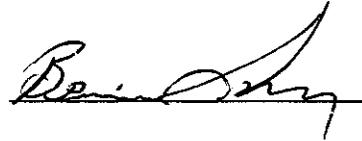
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3800 County R. 540
Greenwood, MS 38930

CERTIFICATE OF SERVICE

This is to certify, that I, Bennie Lacey, Appellant, have caused to be delivered this day, via United States Postal Service, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to the below listed person:

Honorable Jim Hood
Attorney General
P.O. Box 220
Jackson, MS 39205-0220

This the 12 day of July, 2008.

A handwritten signature in black ink, appearing to read "Bennie Lacey", written over a horizontal line.

Bennie Lacey, Pro Se

STATE OF MISSISSIPPI)
)
)-SS-
COUNTY OF LEFLORE)

"AFFIDAVIT OF OATH"

Personally appeared before me, the undersigned authority in and for the aforesaid jurisdiction, Bennie E. Lacey, who after first being duly sworn, did state under oath as follows:

- 1) I, Bennie E. Lacey, do hereby affirm that I am a citizen of the State of Mississippi, and do hereby state that the information contained in the foregoing Civil Action is true and correct. I state these facts under the penalty of perjury.

- 2) I bring this action in good faith and I believe that I am entitled to the relief, which I seek, by same.

Bennie E. Lacey
AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME, THIS THE 12th DAY OF

Subscribed and sworn to before me in my presence, this 12th day of July, 2008, a Notary Public in and for the County of Holmes State of Miss.

Augusta Anderson
(signature) Notary Public
My Commission Expires 9/9, 2011

MY COMMISSION EXPIRES



Augusta Anderson
NOTARY PUBLIC

IN THE CIRCUIT COURT OF WAYNE COUNTY
THE STATE OF MISSISSIPPI

BENNIE E. LACEY

*Filed for Record, this
the 8th day of May 2008
@ 9 AM.*

PETITIONER

VS.

CV-2008-54-B

STATE OF MISSISSIPPI

Jeff Harley

RESPONDENT

ORDER DENYING MOTION FOR POST-CONVICTION COLLATERAL RELIEF

THIS DAY came to be heard a Motion for Post-Conviction Collateral Relief filed on March 6, 2008, *pro se* by Bennie E. Lacey. Said Motion seeks to vacate the enhancement of his sentence as an habitual offender under §99-19-81, *Miss. Code Ann. (1972)*, as amended. Petitioner alleges in his motion ineffective assistance of counsel.

The Court having made a full examination of the Motion, together with all the files, records, transcripts and correspondence pursuant to §99-39-11, *Miss. Code Ann. (1972)*, as amended, is of the opinion that said Motion is not well-taken and that Petitioner is not entitled to the relief requested in his Motion for the following reasons:

Petitioner was found guilty of Sale of Cocaine by a Jury on April 9, 1991. Defendant was sentenced to serve thirty(30) years with the Mississippi Department of Corrections without the possibility of suspension, probation or parole under §99-19-81, *Miss. Code Ann. (1972)*, as amended, on April 12 1991. Petitioner appealed his conviction to the Mississippi Supreme Court and on February 17, 1994 the Mississippi Supreme Court affirmed his conviction of Sale of Cocaine, and affirmed his sentence as an habitual offender. On July 22, 1994, Petitioner filed a Motion for Post-Conviction Collateral Relief with the Supreme Court of Mississippi. On April 11, 1995 the Supreme Court denied Petitioner's Motion. On December 14, 2004 the Mississippi Supreme Court denied another Motion for Post-Conviction Collateral Relief which had been filed by the Petitioner.

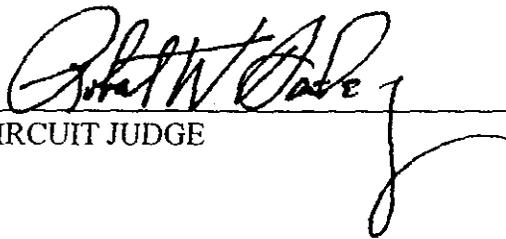
Petitioner is time barred pursuant to §99-39-5(2), *Miss. Code Ann. (1972)*, as amended. A motion for relief under this article shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi. Petitioner's conviction and sentence was affirmed by the Supreme Court on February 17, 1994.

Pursuant to §99-39-3 (2), *Miss. Code Ann. (1972)*, as amended, direct appeal shall be the principal means of reviewing all criminal sentences. Any issues regarding the legality of the Petitioner's sentence should have been raised during his direct appeal to the Mississippi Supreme Court and are not appropriate for a motion for post-conviction collateral relief.

Pursuant to §99-39-23(6), *Miss. Code Ann. (1972)*, as amended, Petitioner is barred from filing this his third or successive motion for post-conviction collateral relief.

The Court finds for the above stated reasons that the motion is without merit and should be dismissed. It is therefore ordered that the Petitioner's motion for post-conviction collateral relief is denied. The Court Administrator shall mail a copy of this order to the petitioner.

SO ORDERED this the 8th day of MAY, 2008.



CIRCUIT JUDGE

IN THE CIRCUIT COURT OF WAYNE COUNTY
THE STATE OF MISSISSIPPI

BENNIE E. LACEY

PETITIONER

VS.

CV-2008-54-B

STATE OF MISSISSIPPI

RESPONDENT

ORDER DENYING MOTION FOR POST-CONVICTION COLLATERAL RELIEF

THIS DAY came to be heard a Motion for Post-Conviction Collateral Relief filed on March 6, 2008, *pro se* by Bennie E. Lacey. Said Motion seeks to vacate the enhancement of his sentence as an habitual offender under §99-19-81, *Miss. Code Ann. (1972)*, as amended. Petitioner alleges in his motion ineffective assistance of counsel.

The Court having made a full examination of the Motion, together with all the files, records, transcripts and correspondence pursuant to §99-39-11, *Miss. Code Ann. (1972)*, as amended, is of the opinion that said Motion is not well-taken and that Petitioner is not entitled to the relief requested in his Motion for the following reasons:

Petitioner was found guilty of Sale of Cocaine by a Jury on April 9, 1991. Defendant was sentenced to serve thirty(30) years with the Mississippi Department of Corrections without the possibility of suspension, probation or parole under §99-19-81, *Miss. Code Ann. (1972)*, as amended, on April 12 1991. Petitioner appealed his conviction to the Mississippi Supreme Court and on February 17, 1994 the Mississippi Supreme Court affirmed his conviction of Sale of Cocaine, and affirmed his sentence as an habitual offender. On July 22, 1994, Petitioner filed a Motion for Post-Conviction Collateral Relief with the Supreme Court of Mississippi. On April 11, 1995 the Supreme Court denied Petitioner's Motion. On December 14, 2004 the Mississippi Supreme Court denied another Motion for Post-Conviction Collateral Relief which had been filed by the Petitioner.

Petitioner is time barred pursuant to §99-39-5(2), *Miss. Code Ann. (1972)*, as amended. 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. Petitioner's conviction and sentence was affirmed by the Supreme Court on February 17, 1994.

Pursuant to §99-39-3 (2), *Miss. Code Ann. (1972)*, as amended, direct appeal shall be the principal means of reviewing all criminal sentences. Any issues regarding the legality of the Petitioner's sentence should have been raised during his direct appeal to the Mississippi Supreme Court and are not appropriate for a motion for post-conviction collateral relief.

Pursuant to §99-39-23(6), *Miss. Code Ann. (1972)*, as amended, Petitioner is barred from filing this his third or successive motion for post-conviction collateral relief.

The Court finds for the above stated reasons that the motion is without merit and should be dismissed. It is therefore ordered that the Petitioner's motion for post-conviction collateral relief is denied. The Court Administrator shall mail a copy of this order to the petitioner.

SO ORDERED this the ____ day of _____, 20__.

CIRCUIT JUDGE

I CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL

ROSE M. BINGHAM, Circuit Clerk
By U. Lopez D.C.

I N D I C T M E N T

SALE OF COCAINE
(MCA §41-29-139)

THE STATE OF MISSISSIPPI)
WAYNE COUNTY)

CIRCUIT COURT
JANUARY TERM A.D., 1991

The Grand Jury for the State of Mississippi, taken from the body of good and lawful men and women of Wayne County, in the State of Mississippi, elected, impaneled, sworn and charged to inquire in and for said county, in the State aforesaid, in the name and by the authority of the State of Mississippi upon their oaths present that:

BENNIE E. LACEY

in said County, on the 29th day of August, A. D., 1990, did wilfully, unlawfully, feloniously, and knowingly sell, barter, transfer, distribute or otherwise dispense or deliver, to Sgt. Stanley Wash of the Newton Police Department, a quantity of Cocaine, a Schedule II Controlled Substance, in exchange for One Forty Dollars (\$40.00) in U.S. Currency

(this defendant being previously convicted under the Mississippi Uniform Controlled Substance Act, the State is seeking enhanced sentencing pursuant to M.C.A. § 41-29-147, see attached exhibit "A" incorporated herein)

This defendant having been previously convicted in the Circuit Court of Wayne County, Mississippi, Cause No. 7528, of the crime of Burglary and Larceny, and sentenced to serve a term of three (3) years with one (1) year suspended, with the Mississippi Department of Corrections, on July 22, 1981, and in the Circuit Court of Wayne County, Mississippi, Cause No. 7754, on July 18, 1984, of Sale of Schedule IV Controlled Substance, and sentenced to serve a term of one (1) year with Mississippi Department of Corrections. (SEE ATTACHED EXHIBIT B INCORPORATED HEREIN)

in violation of Mississippi Code Annotated Section 41-29-139 MCA (1972), and contrary to the form of the statute in such cases made and provided, and against the peace and dignity of The State of Mississippi.

A TRUE BILL:

Bilbo Mitchell
BILBO MITCHELL, DISTRICT ATTORNEY

Elizabeth Lenthock
GRAND JURY FOREPERSON

WITNESSES' NAMES

Geoffrey Clark

CIRCUIT COURT NO. 8343

Exhibit B

Each of the said felony convictions being upon charges separately brought and arising out of separate incidents at different times, and upon each of the said convictions, the said Bennie E. Lacey, was sentenced to separate terms of one (1) or more in any state and/or federal penal institution, therefore coming under Section 99-19-81 of the Mississippi Code Annotated (Amended 1976), a Mississippi Habitual Criminal Statute and contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

A F F I D A V I T

Comes now Suzette Heathcock
Foreperson of the January, 1991, Wayne County Grand Jury, and
makes oath that this indictment presented to this Court was
concurring in by twelve (12) or more members of the Grand Jury and
that at least fifteen (15) were present during all deliberations.

Suzette Heathcock
FOREPERSON GRAND JURY

SWORN TO AND SUBSCRIBED before me this the 16 day of
January, 1991.

Margie Mosley
CIRCUIT CLERK

NO. 8343

Filed this the 16 day of
January, 1991.

Margie Mosley

By Margie Mosley D.C.

ORDER

This cause having come before the court this day for sentencing and the defendant appeared with counsel and the State appeared by the District Attorney; the Court heard all evidence and argument of the State and the defense finds that the defendant, having been convicted of Sale of Cocaine, has been proven, beyond a reasonable doubt, to be a habitual offender under 99-19-81 MCA.

It is therefore, ORDERED and ADJUDGED that the defendant, Bennie E. Lacey, is sentenced to serve thirty (30) years with the Mississippi Department of Corrections without possibility of suspension, probation or parole under section 99-19-81 MCA; further he is sentenced to pay a fine of \$1,000.00.

So ORDERED, this the 12th day of April, 1991.

Fred Wicker
CIRCUIT JUDGE

Naule S. Howard
Bella Mitchell

FILED
This 12 day of
April 19 91
Mrs. Margie G. Mosley
Clerk
By *Margie G. Mosley*

MINUTE BOOK
BOOK # 28
PAGE # 175

EXHIBIT B

THE STATE OF MISSISSIPPI

NO. 7528

C

To the Sheriff of Wayne County, Greeting:

WE COMMAND YOU to take the body of Bennie Everette Lacy

If to be found in your county, and him safely keep, so that you have his body before the Honorable, the Circuit Court of Wayne County, to be holden in and for said County, at the Court House thereof, in the

town of Waynesboro, on the Instanter Monday of July A. D. 1980,

then and there to answer unto the State of Mississippi, on a charge of Grand Larceny ✓

preferred by bill of indictment found and returned into the said court, at the July

Term, A. D. 1980, thereof, by the Grand Jury duly empan- elled and sworn at said term.

HEREIN FAIL NOT, and have then and there this writ, with the manner you have executed the same.

Given under my hand and seal of said Court affixed, and issued the

8th day of July A. D. 1980.

Frances Hartley Clerk.

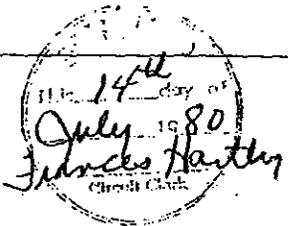
Bail the defendant in the sum of _____ Dollars,

with _____ sureties, in the sum of _____

_____ Dollars each.

_____ Clerk.

By _____ D. C.



THE STATE OF MISSISSIPPI, }
WAYNE County }

CIRCUIT COURT No. 7528

JULY Term A. D., 1980

The Grand Jurors for The State of Mississippi, taken from the body of good and lawful men and women of said County in The State of Mississippi, elected, impaneled, sworn, and charged to inquire in and for said County and State aforesaid, in the name and by the authority of The State of Mississippi, upon their oaths present: That BENNIE EVERETTE LACY

in said County and State on or about the 28th day of February, A. D., 1980

did then and there wilfully, unlawfully and feloniously take, steal and carry away

One 20-ton capacity Hein-Werner hydrolic jack, model 20-10-A

of the total value of \$ excess of \$100, the property of Charles Britton, Sr.

in violation of SECTION 97-23-19 Mississippi Code 1972 Annotated.

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of The State of Mississippi.

A TRUE BILL:

Effie L. Matthews
Foreman Grand Jury.

Charles W. Wright
District Attorney.

WITNESSES' NAMES
Marvin Farris

NO. 7528
Filed this the 8th day of July, 1980
Frances Hartley, Clerk
By _____, D. C.
Recorded 8th day of July, 1980
Frances Hartley, Clerk
By _____, D. C.

INDICTMENT

Exhibit

THE STATE OF MISSISSIPPI, }

CIRCUIT COURT

D

WAYNE County

JANUARY Term A. D., 1984

The Grand Jury for the State of Mississippi, taken from the body of good and lawful men and women of Wayne County, in the State of Mississippi, elected, impaneled, sworn and charged to inquire in and for said County, in the State aforesaid, in the name and by the authority of the State of Mississippi upon their oaths present:

That ADAM LACEY

BANDIGO LACEY aka Benda aka Benny E. Lacey

in said County, on the 22nd day of February, A. D., 1984 did wilfully, unlawfully, and feloniously sell a quantity of phentermine, a Schedule IV Controlled Substance, to Charlie McVey in consideration of the sum of seventy five dollars (\$75.00) in good and lawful currency of the United States of America

I CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL

ROSE M. BINGHAM, Circuit Clerk

By [Signature] D.C.

in violation of Mississippi Code Annotated Section 41-29-139 (1972), and contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

A TRUE BILL:

[Signature] CHARLES W. WRIGHT, JR., District Attorney.

[Signature] Foreman Grand Jury.

AFFIDAVIT

Comes now [Signature] Foreman of the January, 1984

Wayne County Grand Jury, and makes oath that this indictment presented to this Court was concurred in by twelve (12) or more members of the Grand Jury and that at least fifteen (15) were present during all deliberations.

[Signature] FOREMAN GRAND JURY

Sworn to and subscribed before me this the 10th day of January, 1984.

[Signature] CIRCUIT CLERK

WITNESSES' NAMES

- Charlie McVey
Mike Tyson
Joe Taylor
Jim Miles

NO. 7754

Filed this the 10th day of January 1984

[Signature] Clerk

By D. C.

IN THE CIRCUIT COURT OF Wayne COUNTY, MISSISSIPPI
10th JUDICIAL DISTRICT

STATE OF MISSISSIPPI

vs.

NO. 7754

Bennie Lacey

PETITION TO ENTER PLEA OF GUILTY

The defendant, after having been first duly sworn, on his/her oath represents and states unto the Court the following:

1. My full true name is: Bennie Lacey
 and I am also known as: Bennie
 and I request that all proceedings against me be had in my true name.

2. I am represented by a lawyer; his name is Stacy
Stacy

3. I wish to plead GUILTY to the charge(s) of Sale of Controlled Substance

4. I told my lawyer all the facts and circumstances known to me about the charges against me. I believe that my lawyer is fully informed on all such matters. My lawyer has counselled and advised me on the nature of each charge; on any and all lesser included charges; and on all possible defenses that I might have in this case.

5. I understand that I may plead "Not Guilty" to any offense charged against me. If I choose to plead "Not Guilty" the Constitution guarantees me:

- (a) the right to a speedy and public trial by jury,
- (b) the right to see, hear and face in open court all witnesses called to testify against me; and the right to cross-examine those witnesses,
- (c) the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in my favor,
- (d) the right to have the assistance of a lawyer at all stages of the proceedings,
- (e) the presumption of innocence, i.e. the State must prove beyond a reasonable doubt that I am guilty, and
- (f) the right to take the witness stand at my sole option; and, if I do not take the witness stand, I understand, at my option, the jury may be told that this shall not be held against me,
- (g) also, the right to appeal my case to the Mississippi Supreme Court, if I am convicted at a trial on the charge or charges in the indictment.

Knowing and understanding the Constitutional guarantees set forth in this paragraph, I hereby waive them and renew my desire to enter a plea of Guilty.

6. I also understand that if I plead "GUILTY", the Court may impose the same punishment as if I had pled "Not Guilty", stood trial and been convicted.

16. I further state that I wish to waive the reading of the indictment or information in open Court. I request the Court to enter my plea of "GUILTY" as set forth in paragraph 14. If not applicable, (check).

17. Habitual Criminal Paragraph. If not applicable, (check).

(Set forth the language of the appropriate Statute including punishment.)

Signed and sworn to by me, on this 18 day of July, 1984 with the full knowledge that every person who shall wilfully and corruptly swear, testify, or affirm falsely to any material matter under any oath, affirmation, or declaration legally administered in any matter, cause or proceeding pending in any court of law or equity shall upon conviction be punished by imprisonment in the penitentiary not exceeding Ten (10) years.

Bonnie Lacer
DEFENDANT

Witness

[Signature]
DEFENDANT'S ATTORNEY

Sworn to and subscribed before me this the 18 day of July, 1984.

Margie G. Mosley

Circuit Clerk
OFFICIAL TITLE

FILED

JUL 18 1984

MARGIE G. MOSLEY
CIRCUIT CLERK
WAYNE CO. MISS

[Signature]

CERTIFICATE OF COUNSEL

The undersigned, as lawyer and counsellor for the above defendant hereby certifies:

1. I have read and fully explained to the defendant the allegations contained in the indictment in this case.

2. To the best of my knowledge and belief the statements, representations and declarations made by the defendant in the foregoing petition are in all respects accurate and true.

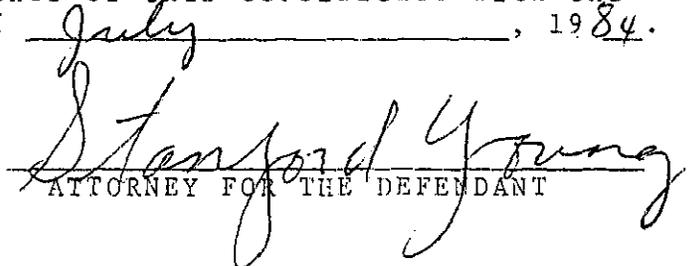
3. I have explained the maximum and minimum penalties for each count to the defendant, and consider him competent to understand the charges against him and the effect of his petition to enter a plea of guilty.

4. The plea of "GUILTY" offered by the defendant in this Petition accords with my understanding of the facts he related to me and is consistent with my advice to the defendant.

5. In my opinion the plea of "GUILTY" as offered by the defendant in this Petition is voluntarily and understandingly made. I recommend that the Court accept the plea of "GUILTY".

6. Having discussed this matter carefully with the defendant, I am satisfied, and I hereby certify, in my opinion, that he is mentally and physically competent; there is no mental or physical condition which would affect his understanding of these proceedings; further, I state that I have no reason to believe that he is presently operating under the influence of drugs or intoxicants. (Any exceptions to this should be stated by counsel on the record.)

Signed by me in the presence of the defendant above named and after full discussion of the contents of this certificate with the defendant, this the 13 day of July, 1984.


ATTORNEY FOR THE DEFENDANT

IN THE CIRCUIT COURT OF WAYNE COUNTY, MISSISSIPPI

THE STATE OF MISSISSIPPI

VERSUS

NO. 7528

BENNY LACEY

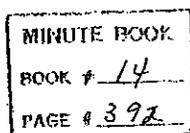
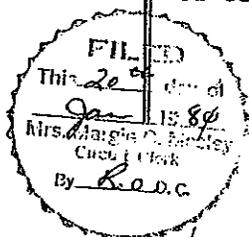
ORDER

This cause having come on for hearing this day, the Defendant, Benny Lacey, having been present together with his Attorney, Honorable Stanford Young, and the Defendant having offered to enter a plea of guilty to the charges in the Petition of Revocation, the Defendant having waived a formal revocation hearing, and the Court, questioned the Defendant to ascertain the voluntariness of said plea and to ascertain that the Defendant understood the consequences of said plea, and having asked the Defendant the following questions:

1. "At the present time, are you under the influence of any drugs or intoxicants?"; the Defendant replied: "No."
2. "Do you claim to now be or have ever suffered from any type of mental disease or disorder?"; the Defendant replied: "No."
3. "Have you read or had read to you this Petition in its entirety?"; the Defendant replied: "Yes."
4. "Does it accurately reflect all negotiations by way of plea bargaining, if any?"; the Defendant replied: "Yes."
5. "Do you completely understand the Petition?" the Defendant replied: "Yes."

IT IS THEREFORE, ORDERED AND ADJUDGED that the Defendant's plea of guilty to the charges in the Petition of Revocation, is accepted, and that the Defendant's suspended sentence is hereby revoked and the Court sentences the Defendant to serve a term of two (2) years with the Mississippi Department of Corrections located at Parchman, Mississippi.

SO ORDERED this the 19th day of January, 1984.



Stanford Young

CIRCUIT JUDGE

BENNY EVERETT LACY

NO. 7528

G

This day into open Court came the District Attorney who prosecutes for the State of Mississippi and came also Benny Everett Lacy in his own proper person and represented by counsel and was lawfully arraigned upon an indictment lawfully returned by the Grand Jury of Wayne County, said State, charging the said defendant with the crime of Burglary and Larceny ✓. And being duly advised of all his legal and constitutional rights in the premises and being further advised of the consequences of such a plea the defendant did then and there enter his plea of guilty to said indictment.

Therefore, for said offense and on said plea of guilty it is by the Court ORDERED and ADJUDGED that the said Benny Everett Lacy be and he is hereby sentenced to serve a term of 3 year(s) in the Mississippi Department of Corrections with 1 year(s) suspended and 3 year(s) on probation under the supervision of the Mississippi Department of Corrections. After the said Benny Everett Lacy has completed service of 2 year(s) in the Mississippi Department of Corrections and is honorably discharged therefrom because of the expiration of sentence, the said Benny Everett Lacy will be thereby remanded to the supervision of the Mississippi Department of Corrections to complete the suspended portion of this sentence under the jurisdiction of the Court.

It is the order of the Court that you shall comply with the following conditions of probation:

- (a) Defendant shall hereafter commit no offense against the laws of this or any state of the United States, or of the United States.
- (b) Obey all orders of the Court and the Probation Officer.
- (c) Avoid injurious or vicious habits, totally avoiding the use of barbiturates, narcotics, marijuana, or any habitual forming drugs.
- (d) Avoid persons and places of disreputable or harmful character and specifically avoid association with any person previously convicted of a crime, or presence at any location where a criminal act is being committed.
- (e) Report to the Probation Officer in person today and once a month beginning the month following this date, or as directed.
- (f) Permit the Probation Officer to visit you at home or elsewhere, without restrictions, reluctance, or delay.
- (g) Do not leave Wayne County without written permission of the Court and/or Probation Officer. Remain within the State of Mississippi unless authorized on proper application thereof.
- (h) Immediately notify the Probation Officer of any change in address, employment, marital status, or arrest.
- (i) Pay a fine of _____; pay restitution of _____; pay Court cost of \$35.00; pay Court appointed attorney fees of to be det.; all of such sum totaling _____. Such amount shall be payable in monthly installments of _____ each, beginning on or before the 10th of each month following today's date.
- (j) Pay a Probation supervision fee of \$10.00 per month, beginning on or before the 15th day of each month following today's date.
- (k) Report to the Probation Officer upon request, the source, nature, and amount of all income or money received.

(l) Support all dependants as required by law and conduct your-
ably at all times.

(m) Abstain from the use of alcohol in any form at any time.

(n) That I do; hereby waive extradition to the State of Mississippi fi
any jurisdiction in or outside the United States where I may be fou-
and also agree that I will not contest any effort by any jurisdiction
to return me to the State of MISSISSIPPI.

(o) And further, that he or she _____

You are hereby advised that under the law of this State, the Court shall
determine the terms and conditions of your probation, and may at any time dur-
ing the period of probation alter, modify, extend, terminate, or direct the
enforcement of the above sentence.

So orderd and adjudged, in open Court this the 22nd day of July, 1981.

Seab. Williamson
Circuit Judge

STATE OF MISSISSIPPI
COUNTY OF WAYNE

I, Francis Hartley, Clerk of the Circuit Court, said county and state,
hereby certify that the above and foregoing is a true and correct copy of the
order entered and recorded in the Minute Book 13 page 264 of the Circuit
Court of the said County in the above styled and numbered cause.

This the 22nd day of July, 1981.

Francis Hartley
Circuit Clerk of Wayne County

A certified copy of this order has been delivered to the Probationer, who
has been instructed regarding the same.

This the 8th day of November, 1982.

Don T. [Signature]
Probation Officer

I accept the above probation in
accordance with the terms thereof.

Bennie Lacey
Probationer

IN THE CIRCUIT COURT OF WAYNE COUNTY, MISSISSIPPI

July TERM, 1980

STATE OF MISSISSIPPI

VERSUS

NO. 7528

Bessie Everette Long

WAIVER OF ARRAIGNMENT AND
ENTRY OF PLEA

Comes now the Defendant, *Bessie Everette Long* in
open Court and acknowledges service of a copy of the
Indictment on a charge of *Grand Larceny*
and for plea to said charge said Defendant says that (he, she)
(is not guilty) (offers a plea of guilty).

WITNESS my signature this the *15th* day of *July*, 1980

Bessie E Long
DEFENDANT

John R. Hunt
ATTORNEY FOR DEFENDANT

Filed this *15th* day of

July, 1980,

Frances Hartley
CIRCUIT CLERK

IN THE CIRCUIT COURT OF WAYNE COUNTY, MISSISSIPPI
THE STATE OF MISSISSIPPI
VS. NO. 7528
BENNY E. LACY

O R D E R

This cause having come on for hearing this day, the defendant, Benny E. Lacy, has been present together with his attorney, and the defendant having pled guilty to the charge of Grand Larceny after questions from the Court concerning the consequences of such plea.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the defendant's plea of guilty to the charge of Grand Larceny is accepted, and that the sentencing is set for the 22nd day of July, 1980.

ORDERED AND ADJUDGED this the 21st day of July, 1980.

Lester F. Williamson
CIRCUIT JUDGE

THE STATE OF MISSISSIPPI

VERSUS

NO. 7754

BENNY E. LACEY

ORDER

This cause having come on for hearing this day, the Defendant, Benny E. Lacey, having been present together with his Attorney, Honorable Stanford Young, and the Defendant having offered to enter a plea of guilty to the charge of Sale Schedule IV Controlled Substance and the Court, having placed the Defendant under oath, questioned the Defendant to ascertain the voluntariness of said plea and to ascertain that the Defendant understood the consequences of said plea, offered by way of Petition to enter plea of guilty filed in this cause, and having asked the Defendant the following questions:

1. "At the present time, are you under the influence of any drugs or intoxicants?"; the Defendant replied: "No."
2. "Do you claim to now be or have ever suffered from any type of mental disease or disorder?"; the Defendant replied: "No."
3. "Have you read or had read to you this Petition in its entirety?"; the Defendant replied: "Yes."
4. "Does it accurately reflect all negotiations by way of plea bargaining, if any?"; the Defendant replied: "Yes."
5. "Do you completely understand the Petition?"; the Defendant replied: "Yes."

IT IS THEREFORE, ORDERED AND ADJUDGED that the Defendant's plea of guilty to the charge of Sale Schedule IV Controlled Substances accepted, and that the defendant be and he is hereby sentenced to serve a term of one (1) year with the Mississippi Department of Corrections located at Parchman, Mississippi: said sentence to run consecutive with any other sentence the defendant may be serving.

ORDERED AND ADJUDGED this the 18th day of July, 1984.

FILED

JUL 20 1984

MARGIE G. MOSLEY
CIRCUIT CLERK
WAYNE COUNTY, MISSISSIPPI

MINUTE BOOK
BOOK # 15
PAGE # 77

Leo F. Williamson
Circuit Judge

I CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL

Margie G. Mosley
MARGIE G. MOSLEY, Circuit Clerk

By Ruth D. ... D. C.

24 111

SENTENCING HEARING

Exhibit

I

1 FRIDAY, APRIL 12, 1991

2 BY THE COURT: The matter set this morning is a
 3 X(3) sentencing hearing in Cause Number 8343, the State versus Bennie
 4 E. Lacey. And Bennie E. Lacey is before the Court with his
 5 attorney, Mark Howard. The State of Mississippi is represented
 6 by the District Attorney, Bilbo Mitchell. The situation, as I
 7 recall, is this: A Jury returned a verdict of guilty in this
 8 matter against the defendant, the charge being sale of cocaine,
 9 and the question before the Court at the present is whether the
 10 defendant is to be adjudged a habitual criminal and sentenced
 11 under Section 99-19-81 and another enhanced punishment statute,
 12 and the number escapes my mind.

13 BY MR. MITCHELL: 41-29-147

14 BY THE COURT: All right. What says the State as to the
 15 matter before the Court?

16 BY MR. MITCHELL: Your Honor, before I call my first
 17 witness, I would like to introduce two certified copies of the
 18 X(18) pertinent information concerning the prior convictions. I have
 19 X(19) got Mr. Howard looking at them right now, Your Honor.

20 Your Honor, these two documents that I'm asking to be
 21 entered into evidence would show to the Court that Bennie Lacey
 22 was convicted in 1980 of burglary and larceny, and that he was
 23 represented in that cause by John Gun, a local attorney here,
 24 and that he was later revoked on that charge, and on his
 25 X(25) revocation hearing was represented by Mr. Stanford Young, also a
 26 local attorney here.

27 BY THE COURT: He was placed on probation.

28 BY MR. MITCHELL: Originally placed on probation and then
 29 had that sentence revoked, Your Honor. Yes, sir. And when he

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MARVIN FARRIOR, Direct

① was revoked, he was sentenced to serve a term of two years with
2 the Mississippi Department of Corrections.

3 The second exhibit which I'm introducing shows that Mr.
4 Bennie E. Lacey was convicted on February 22nd, 1984, for sale
5 of a schedule four controlled substance under the controlled
6 substances laws of the State of Mississippi, and that he was
7 represented by Mr. Stanford Young on that case, and he was
8 sentenced to serve a term of one year with the Mississippi
9 Department of Corrections.

10 BY THE COURT: All right. Any objection to these
11 exhibits being introduced into evidence?

12 BY MR. HOWARD: No objection, Your Honor.

13 BY THE COURT: Very well, let's do it then.

14 (WHEREUPON, THE ABOVE-MENTIONED INDICTMENTS IN CAUSE NOS.
15 7528 AND 7754 WERE RECEIVED AND MARKED INTO EVIDENCE AS
16 EXHIBIT NOS. 8 AND 9.)

17 BY MR. MITCHELL: Your Honor, the State would call Marvin
18 Farrior.

19 SHERIFF MARVIN FARRIOR

20 was called as a witness on behalf of the State of
21 Mississippi, and after having been first duly sworn, testified
22 as follows:

23 DIRECT EXAMINATION BY MR. MITCHELL:

24 Q. What's your name?

25 A. Marvin M. Farrior.

26 Q. And your occupation?

27 A. Sheriff of Wayne County, Mississippi.

28 Q. How long have you been Sheriff in Wayne County?

29 A. Going on twenty four years.

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MARVIN FARRIOR, Direct

1 Q. All right, sir. Do you know Bennie E. Lacey?

2 A. I do.

3 Q. Do you see him in the courtroom today?

4 A. Yes, I do.

5 Q. Would you point him out?

6 A. He is sitting beside Mr. Howard.

7 BY MR. MITCHELL: May the record reflect he
8 pointed to the defendant?

9 BY THE COURT: Yes, sir, the record will so
10 reflect.

11 Q. The case that we just tried and got a conviction
12 on, 8343, against Bennie E. Lacey, is this the man we were
13 trying that you just identified?

14 A. Yes, it is.

15 Q. Are you familiar with Cases No. 7528 and 7754 where
16 a Bennie Lacey was convicted, first of burglary and larceny, and
17 then, in the other case, of sale of a schedule four drug?

18 A. Yes, sir.

19 Q. Okay. And is that the same Bennie Lacey that you
20 pointed out in the courtroom today?

21 A. Yes, it is.

22 Q. Sheriff, on the two prior cases, 7528 and 7754, do
23 you actually have memory of Mr. Bennie Lacey serving those
24 sentences?

25 A. Yes.

26 Q. Okay. And do you remember whether all of those
27 sentences were served in the Wayne County jail or part of them
28 were served at Parchman?

29 A. Part was served here and part was served at

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STATE RESTS/DEFENSE RESTS

1 BY THE COURT: Very well.

2 BY MR. HOWARD: That's all we have, Your
3 Honor.

4 BY THE COURT: Anything else?

5 BY MR. MITCHELL: No, sir.

6 BY THE COURT: All right, sir. You may step
7 down.

8 BY MR. MITCHELL: Your Honor, the State's
9 ready to rest, unless you want me to argue my
10 position now. Would you rather me wait for that?

11 BY THE COURT: Now, the Sheriff was
12 testifying about 7528 or both of them?

13 BY MR. MITCHELL: Both of them.

14 BY THE COURT: All right.

15 BY MR. MITCHELL: He remembers each of them.

16 BY THE COURT: All right. The cross
17 examination had to do with just one of them.

18 BY MR. MITCHELL: And the State rests,
19 except for argument, and I assume you want me to do
20 argument after the defense gets through.

21 BY THE COURT: Yes, sir.

22 BY MR. MITCHELL: All right. The State
23 rests.

24 BY THE COURT: What says the defendant?

25+ BY MR. HOWARD: The defense has no witnesses
26 to call, Your Honor. We rest.

27 BY THE COURT: All right. I will hear
28 argument.

29 BY MR. MITCHELL: Your Honor, the question in this case

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MARVIN FARRIOR, Cross

1 Parchman.

2 Q. All right. But you have memory of those sentences
3 being served?

4 A. Yes, sir.

5 BY MR. MITCHELL: Judge, that's all I have of
6 this witness.

7 BY THE COURT: Mr. Howard?

8 CROSS EXAMINATION BY MR. HOWARD:

9 Q. Sheriff Farrior, regarding the case 7528, was the
10 defendant sentenced to a -- excuse me -- did he obtain a
11 suspended sentence in that case?

12 A. I believe it was to begin with, and I think it was
13 revoked.

14 Q. And then, when did he serve time with you?

15 A. I will have to go look in the book to see exactly
16 what time it was. I can go down and check in the book and tell
17 you exactly what days.

18 Q. Do you recall whether it was over one year or not?

19 A. He served more than a year, at least a year, but I
20 don't think he served it all here. I will have to go look, once
21 again, to be positive, but it was -- part time was served here
22 because he was a trustee for me, and then part time was served
23 at Parchman.

24 Q. Okay. And when his suspended sentence was revoked,
25 do you recall what he was sentenced to?

26 A. I think it was the original sentence, but I don't
27 recall exactly what -- two or three years; I'm not for sure.

28 BY MR. HOWARD: Court's indulgence just a
29 minute, please.

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1 is what discretion the Court has today. Section 99-19-81 of the
2 Mississippi Code requires the Court -- when someone is indicted
3 under that statute, which is the habitual offender statute, and
4 found guilty of it -- requires the Court to give the maximum
5 sentence allowed by law. The reason this case is unusual is
6 that the defendant has also been indicted and convicted under
7 Section 41-29-147, which is the enhanced drug statute. This
8 means that without the enhanced drug statute, the sentence of
9 this Court would have to be thirty years without parole. But
10 since it's enhanced, the statute -- the enhancement statute says
11 it can be sixty years without parole. So, the question is
12 whether the Court can choose either thirty or sixty, or whether
13 the Court has to choose sixty without parole. I would like to
14 point out some cases to the Court -- I believe you have two
15 cases before you that were submitted earlier. At this time I
16 would like to point out to the Court Woods v. State, which is
17 393 So. 2d 1319 at page 1325.

18 BY THE COURT: Now, that's not one of those you gave me.

19 BY MR. MITCHELL: No, sir. It's the one I was looking
20 for the book, and I'm fixing to give it to you as soon as I tell
21 you.

22 BY THE COURT: Just a moment, now. Actually, that's
23 fine, but I really wanted the two sections -- the two books of
24 the Code a few minutes ago.

25 BY MR. MITCHELL: All right. I'm sorry. Let me go see
26 if I can find it for you, Judge.

27 BY THE COURT: Okay.

28 BY MR. MITCHELL: I'm sure they're sitting back in
29 chambers.

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1 (WHEREUPON, A BRIEF RECESS WAS TAKEN WHILE MR. MITCHELL
2 RETRIEVED THE LAW BOOKS.)

3 BY MR. MITCHELL: Woods v. State, Your Honor, says: It
4 appears that the lower court, in imposing the life sentence for
5 each of the convictions for armed robbery and kidnapping, was
6 considering that sentence as the maximum term of imprisonment
7 prescribed by law for such felonies as set out in the above
8 quoted statute. In this court's opinion, the maximum term
9 provided for in the statute is the maximum term that may be
10 given by the trial judge.

11 BY THE COURT: Excuse me just a second, Mr. Mitchell.

12 BY MR. MITCHELL: Yes, sir?

13 BY THE COURT: Give me that citation again. In trying to
14 make sure I had the Code out here, I didn't get the Woods case.

15 BY MR. MITCHELL: Woods v. State, 393 So. 2d 1319 at page
16 1325. And this statute is dealing just with the habitual
17 offender statute, but what it says -- the words I wanted this
18 Court to hear, it says: In this court's opinion, the maximum
19 term provided for in the statute is the maximum term that may
20 be --

21 BY THE COURT: I haven't got to it yet.

22 BY MR. MITCHELL: I don't think you have that.

23 BY THE COURT: 383?

24 BY MR. MITCHELL: I've got it. I'm looking at it right
25 here; this is the book.

26 BY THE COURT: Oh, that's the book? Okay.

27 BY MR. MITCHELL: And what I wanted to call to your
28 attention is: In the Court's opinion, the maximum term provided
29 for in the statute is the maximum term that may be given by the

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1 trial judge. And that's what our point is, the words "may be
2 given". In this court, the maximum term that may be given by
3 the Court is sixty years without parole, and the Woods case says
4 that under the habitual offender statute, the judge can give the
5 maximum sentence that may be given.

6 BY THE COURT: In other words, you are saying thirty
7 years?

8 BY MR. MITCHELL: No, I'm saying sixty years.

9 BY THE COURT: You are saying thirty years under the
10 habitual criminal statute?

11 BY MR. MITCHELL: The habitual criminal statute, under
12 the Woods case, says the maximum sentence that may be given by
13 the judge. And the maximum sentence in this case that may be
14 given by the judge is sixty years, because the sentence can be
15 doubled under the enhancement statute.

16 BY THE COURT: All right, I understand you.

17 BY MR. MITCHELL: Okay. I'd also like to point out
18 Harris v. State, which I think you have a copy of that case.

19 BY THE COURT: I have that.

20 BY MR. MITCHELL: It says the sentencing court has no
21 discretion to impose less than maximum sentence on a habitual
22 offender previously convicted of four other sentences for which
23 he has served separate terms of one year or more. Sentencing
24 under Mississippi Code Annotated, 99-19-81, which is the
25 habitual offender statute, is not discretionary. If a defendant
26 is a repeat offender falling under the provisions of 99-19-81,
27 the trial judge --

28 BY THE COURT: Where are you reading from?

29 BY MR. MITCHELL: On page 651, Your Honor.

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1 BY THE COURT: All right.

2 BY MR. MITCHELL: In the last paragraph of the case,
3 middle of the paragraph.

4 BY THE COURT: All right.

5 BY MR. MITCHELL: Starting with the word "Sentencing"
6 under Mississippi Code Annotated, 99-19-81, is not
7 discretionary. If a defendant is a repeat offender falling
8 within the provisions of Mississippi Code, 99-19-81, the trial
9 judge has no alternative but to sentence him under the said
10 statute.

11 BY MR. MITCHELL: Now, the main case that's going to
12 point to what we have here is Jones v. State, which the Court
13 also has a copy of, and it's cited at 523 So. 2d 957, a 1988
14 Mississippi case. I'd like to call the Court's attention to
15 page 959 of that opinion. Under Section 2, there on the
16 right-hand side of the page, it says: Mississippi Code
17 Annotated -- this is in the second paragraph.

18 BY THE COURT: I've got it.

19 BY MR. MITCHELL: Mississippi Code Annotated, Section
20 41-29-147, provides as follows: Any person convicted of a
21 second or subsequent offense under the Controlled Substances Act
22 may be imprisoned for a term up to twice the term otherwise
23 authorized, fined an amount up to twice that otherwise
24 authorized or both. And then, if you will look down to the
25 bottom paragraph on the page: Every person convicted in this
26 state of a felony who shall have been convicted twice previously
27 of any felony or federal crime upon charges separately brought
28 and arising out of separate incidents at different times and who
29 shall have been sentenced to separate terms of one year or more

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1 in any state and/or federal penal institution, whether in this
2 state or elsewhere, shall be sentenced to the maximum term of
3 imprisonment prescribed for such felony, and such sentence shall
4 not be reduced or suspended nor shall such person be eligible
5 for parole or probation. Now, in this case, the Jones case, the
6 trial court sentenced Jones to sixty years under the same
7 circumstances that we have here. He was a habitual offender,
8 and he was also an enhanced under the drug laws. On page 960 of
9 the opinion, at the bottom of the right-hand column, the last
10 paragraph on the page, it starts with the number five in
11 italics.

12 BY THE COURT: Yes, sir.

13 BY MR. MITCHELL: Next, Jones claims that application of
14 the two different enhancement statutes constitutes double
15 jeopardy and violates constitutional prohibitions against cruel
16 and unusual punishment. The Kentucky Supreme Court considered a
17 similar argument and concluded that application of both the
18 general habitual offender statute and the specific enhanced
19 statute for drug conviction constituted neither double jeopardy
20 nor cruel and unusual punishment. We agree that under current
21 statutes double enhancement is proper, provided it meets the
22 test in Solem v. Helm, which is a United States Supreme Court
23 case. Judge, taking all these cases together and looking at
24 them with the Woods case that says under the habitual offender
25 statute the maximum sentence should be given and that is the
26 maximum sentence that may be given by the court. The State of
27 Mississippi feels that the Judge has no alternative but to
28 sentence him to sixty years without parole.

29 BY THE COURT: Mr. Howard?

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1 BY MR. HOWARD: Your Honor, we feel that the State should
2 be allowed to proceed under only one of the additional time
3 statutes, whether the enhanced penalty or the habitual offender.
4 The State is using one prior conviction, the sale of drug
5 conviction, to enhance the penalty; also using that exact same
6 conviction to try to apply the habitual offender statute. The
7 defendant has only been convicted of two prior felonies. Your
8 Honor, I believe the Jones case that Mr. Mitchell just quoted to
9 you involved four separate prior felonies. Each one of those,
10 of course -- none of those prior felonies were ever used twice,
11 no cumulative effect whether to apply to the enhanced penalty
12 statute or the habitual offender statute, Your Honor. And we
13 would submit that the State can only use the prior conviction of
14 sale of cocaine under only -- must make their selection under
15 which one to proceed, either the habitual offender or the
16 enhanced penalty. They cannot use that one prior conviction to
17 make both of these statutes applicable on the defendant. And,
18 Your Honor, we'd point out that sixty years is certainly -- a
19 sentence of sixty years without the possibility of probation or
20 parole would certainly exceed this defendant's life expectancy,
21 and that would certainly constitute, we would say, habitual
22 cruel and inhuman treatment. Again, we state that the State
23 must choose under one or the other -- the habitual offender
24 statute or the enhanced punishment statute -- to proceed, and it
25 is improper for it to proceed and ask for punishment under both
26 statutes since the one prior sale of controlled substance is
27 being used to enhance as well as to establish habitual offender.

28 BY THE COURT: Anything further on the part of the State?

29 BY MR. MITCHELL: No, sir, Your Honor. Well, one more

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1 thing I would like to call to the attention of the Court.
2 Osborne v. State, 404 So. 2d 545. And I believe the Court's
3 been aware of that, but it's like Jones states that when you're
4 using enhancement statutes that one can be used for -- I mean,
5 the same case can be -- the same conviction can be used to do
6 two different things. Like here it's used to enhance and it's
7 used as part of the habitual, which Jones allows. Osborne also
8 allows that, and Osborne was a case where a conviction enhanced
9 a misdemeanor to a felony and that same conviction was also used
10 in the habitual to give the maximum sentence for that.

11 BY THE COURT: Mr. Howard?

12 BY MR. HOWARD: Yes, sir.

13 BY THE COURT: Before I go back and review these cases,
14 can you differentiate between Jones v. State and the case
15 presently before the Court? Have you studied it?

16 BY MR. HOWARD: Was that Osborne v. State?

17 BY THE COURT: No, sir. Jones v. State.

18 BY MR. HOWARD: Differentiate Jones from --

19 BY THE COURT: From the present --

20 BY MR. HOWARD: No, sir, other than --

21 BY THE COURT: Have you read it?

22 BY MR. HOWARD: No, sir, I have not. But it's my
23 understanding of it there were four prior felonies involved in
24 that case, not just two. And we would certainly say that that
25 would make a difference as to, like I say, the prior sale of
26 controlled substance in this case being used in -- to make the
27 habitual offender paragraph applicable as well as the enhanced
28 punishment applicable, and we would state that that's improper,
29 Your Honor, which it does amount to basically double jeopardy.

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1 BY THE COURT: Speaking to the District Attorney, is it
2 your understanding that that's the same argument that was used
3 in Jones v. State?

4 BY MR. MITCHELL: Yes, from reading the cases. They
5 basically argued double jeopardy and cruel and unusual
6 punishment.

7 BY THE COURT: Well, we'll be in recess for ten minutes.
8 I'm going to look at these cases.

9 (WHEREUPON, A RECESS WAS TAKEN AT 9:50.)

10 BY MR. HOWARD: Your Honor, may we have some time to
11 argue further just for a brief moment?

12 BY THE COURT: Yes, sir. All right. The Court will come
13 to order, and counsel for the defendant has asked for an
14 opportunity to make additional argument.

15 BY MR. HOWARD: Your Honor, what we feel we have here is
16 Mr. Lacey's prior conviction for sale of controlled substance --
17 the one in Case 7754 in 1984, Your Honor. That case -- that
18 charge was also used, Your Honor, in revoking his probation on a
19 prior felony charge, 7528, the burglary and larceny conviction
20 for which he was placed on probation. This sale of controlled
21 substance, 7754, caused a revocation of his probation in that
22 case. Your Honor, we would state that this basically would
23 constitute triple jeopardy. They're using the same sale of
24 controlled substance to revoke his probation on the previous
25 felony, also trying to use that same sale of controlled
26 substance to enhance the penalty under the instant case, as well
27 as trying to use that same sale of controlled substance to
28 establish the defendant as a habitual offender. We would state
29 that that would be improper. In the Jones case previously

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1 referred to by the State, in that case -- there were nineteen,
2 as opposed to four which I previously mentioned -- there were
3 nineteen prior convictions listed in the indictment arising out
4 of at least nine different incidents, Your Honor. They did not,
5 in that case, ever use the same prior felony to constitute the
6 enhancement as well as the habitual offender, Your Honor. We
7 state that using the same previous felony to make both of those
8 statutes applicable is improper and would constitute double
9 jeopardy to my client.

10 BY THE COURT: Anything further?

11 BY MR. HOWARD: No, sir.

12 BY MR. MITCHELL: No, sir.

13 BY THE COURT: The Court finds, of course, that it has
14 received documentary evidence presented by the State that the
15 defendant in this case was convicted in the Circuit Court of
16 Wayne County in (1980) of burglary and larceny. That was in Cause
17 Number (7528). And the sentence was suspended and the sentencing
18 revoked, and he served more than a year in the custody of the
19 State Department of Corrections in that case. That was a
20 felony, of course. And that he was later convicted in the
21 Circuit Court of Wayne County in (1984) February 22nd, of the
22 sale of a schedule four drug and served more than a year for
23 that offense. And that these convictions arose out of separate
24 incidents at separate times and resulted in separate sentences
25 of more than a year, and that the State has met the burden of
26 proof required by Section 99-19-81 to establish that the
27 defendant is a habitual criminal.

28 Having indicated that, the question has been presented to
29 the Court whether the Court has any discretion in whether to use

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1 both statutes -- that is the habitual criminal statute,
2 99-19-81, and the enhanced punishment statute having to do with
3 subsequent drug offenses, that being Section 41-29-147. The
4 attorneys have made persuasive arguments, and counsel for the
5 State has presented a case of Jones v. State which gives the
6 Court some problem in deciding the matter. And, based on that,
7 the counsel for the State has argued to the Court that it has no
8 discretion, no alternative but to sentence the defendant to a
9 term of sixty years. The habitual criminal statute -- there's
10 no doubt about the fact that it mandates sentencing the
11 defendant to the maximum term of imprisonment prescribed for
12 that particular felony, and that would be thirty years. And
13 argues further that under the statute having to do with a
14 subsequent offense under the Controlled Substances Act, that the
15 Court is required to place or can sentence a person to thirty
16 years under that statute. And that being true, the Court is
17 mandated to sentence the defendant to a term of sixty years in
18 the custody of the State Department of Corrections.

19 The Jones case says, without question, relative to the
20 question of whether use of both statutes to enhance a single
21 sentence is proper. The judge in that particular case did that,
22 and the Supreme Court affirmed the action of the court. So, if
23 the Court here were to do that, I have no question but what it
24 probably would be affirmed by the Supreme Court. Although the
25 Supreme Court in Jones v. State did suggest that the legislature
26 address this matter, it did affirm the action of the Circuit
27 Court in using both statutes to enhance the single sentence.

28 And that's a question before the Court presently. It's
29 no question that the Court can do it, the question is whether

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1 the Court must do it. I don't have much doubt but that had I
2 been sitting in the Jones case I probably would have done the
3 same thing the judge did then. After all, there were nineteen
4 prior convictions, at least nine different incidents involved.
5 However, I'm going to and do hereby hold that although this
6 Court would be allowed to use both statutes to enhance this
7 single sentence, that it is proper that under the Jones case
8 that this Court is not mandated to do it. And I'm going to
9 ~~enhance his punishment only under 99-19-81.~~ Now, in some cases,
10 enhanced punishment piled upon enhanced punishment certainly
11 might be merited. If I were sentencing somebody who had
12 committed nineteen previous offenses, nine different incidents,
13 then I probably might think it was merited. If I were
14 sentencing a drug King Pen who had a fleet of Cadillacs, a
15 mansion and several thousand acres of land, things of that
16 nature, I, no doubt, would do that. This defendant hardly meets
17 that standard. I'm not sure -- is that appointed counsel?

18 BY MR. HOWARD: Yes, sir.

19 BY THE COURT: I believe the testimony was he didn't have
20 a car; evidently he is not a violent person, the Sheriff made
21 him a trustee one time; no weapons have been involved in any of
22 this; and it seems to me that thirty years without parole is a
23 rather stiff sentence. Twenty nine, now -- I believe I recall
24 from the testimony -- he would be fifty nine when he gets out.
25 I doubt if he would be any menace to society after the passing
26 of that time and at that age. Sixty years he'd be '89 -- seems
27 to me that a sixty-year sentence would be out of proportion to
28 the offense committed. After all, if he were found guilty of
29 premeditated murder, he would be eligible for parole in not too

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1 many years.

2 This is not important, but I just happened to read in the
3 paper this morning, The Clarion Ledger, that Kent McDaniel, the
4 Assistant U.S. Attorney, was stating that anybody in Federal
5 Court, his court, was going to get fifteen years for drug
6 offenses in which a gun was used, and the editorial writer was
7 bemoaning the fact that Mississippi Legislature wouldn't enact
8 laws requiring harsher penalties for drug and gun offenses.
9 Actually, I believe ours compares favorably with the federal
10 statutes as far as that's concerned. A possible sixty years
11 without parole seems adequate to me.

12 At any rate, to wind things up, I hereby find, as I did a
13 few minutes ago, about the previous convictions in the Wayne
14 County Circuit Court, and based on that he is adjudged to be a
15 habitual criminal, and he should receive enhanced punishment as
16 prescribed by Section 99-18-91.

17 BY MR. MITCHELL: Judge, that's 99-19-81.

18 BY THE COURT: What did I say?

19 BY MR. MITCHELL: 18.

20 BY THE COURT: Is it 19?

21 BY MR. MITCHELL: Yes, sir.

22 BY THE COURT: 99-19-81?

23 BY MR. MITCHELL: Yes, sir.

24 BY THE COURT: All right. So, Bennie E. Lacey, if you
25 will come around, I will finish passing sentence on you.
26 Anything you would like to say before I wind this up?

27 BY DEFENDANT LACEY: Only one thing I can say, Your
28 Honor, I will leave it up to the good Lord.

29 BY THE COURT: All right. It is the order and judgment

CINDY C. GIBSON, CIRCUIT COURT REPORTER

SENTENCE OF THE COURT

1 of this Court that you be and you are hereby sentenced to serve
2 a term of thirty years in the custody of the Mississippi
3 Department of Corrections, and such sentence shall not be
4 reduced or suspended nor shall you be eligible for parole or
5 probation. You are presently remanded to the custody of the
6 Sheriff for transportation to whatever penal facility might be
7 prescribed. All right.

8 BY MR. MITCHELL: Your Honor, will there be a fine or
9 court costs ordered? I think there's a minimum fine in the
10 statute.

11 BY THE COURT: Is there a minimum fine?

12 BY MR. MITCHELL: Yes, sir. A thousand dollar minimum
13 fine.

14 BY THE COURT: All right. If there's a minimum fine,
15 will assess it. I don't know what his financial condition will
16 be at the age of fifty nine, but, at any rate, that is the
17 sentence.

18 BY MR. HOWARD: One thousand dollar fine?

19 BY THE COURT: Yes, sir. Very well. You are remanded
20 the custody of the Sheriff.

21 BY THE COURT: All right. The Court will be in recess
22 for ten minutes until I can get the counsel together for a ci
23 matter.

24 (WHEREUPON, THE HEARING WAS ADJOURNED.)

25
26
27
28
29

* * * * *

STATE OF MISSISSIPPI

COUNTY OF LAUDERDALE

COURT REPORTER'S CERTIFICATE

I, Cindy Campbell Gibson, Official Court Reporter for the Tenth Circuit Court District of Mississippi, do hereby certify that to the best of my skill and ability, I have reported the proceedings had and done in the trial of STATE OF MISSISSIPPI VS. BENNIE E. LACEY, being No. 8343, on the docket of the Circuit Clerk of Wayne County, Mississippi, and that the above and foregoing 322 pages contain a full, true and correct transcription of my stenographic notes and/or electronic tape recording taken in said proceedings.

This is to further certify that I have this date hand delivered the original and one certified copy of said transcript to Mrs. Margie Mosley, Circuit Clerk of Wayne County, at the Wayne County Courthouse, Waynesboro, Mississippi, on this date.

I do further certify that my certificate annexed hereto applies only to the original and one certified copy of this transcript. The undersigned assumes no responsibility for the accuracy of any reproduced copies not made under my control or direction.

This the 2nd day of August, 1991.

Cindy Campbell Gibson
CINDY CAMPBELL GIBSON
Official Court Reporter

COURT REPORTER'S FEE: \$646.00

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WAYNESBORO, MS 39367

January, 28, 2008

Mr. Bennie E. Lacey # 38390
D.C.F. 3800 County Rd. 540
Greenwood, MS 38930

Re: Request for Records dated Jan. 23, 2008
Wayne County Case # 7754

FILED

JAN 29 2008

ROSE M. BINGHAM
CIRCUIT CLERK
WAYNE CO., MISS.

BY RMB

Dear Mr. Lacey:

In your letter, you requested the following:

1. The minutes of the Court, wherein the Grand Jury was impaneled and duly sworn.

Answer: In 1984 such records were not made and maintained, therefore, they are not available to be furnished to you.

2. The affidavit that was presented to the Justice Court Judges and the Uniform Justice Court Criminal Record.

Answer: These records obviously are not kept by the Office of the Circuit Clerk and should therefore be requested to the Justice Court.

If you should have any questions regarding this matter, please feel free to contact us.

Sincerely,

Rose M. Bingham

Rose M. Bingham

AFTER FIVE DAYS RETURN TO
ROSE M. BINGHAM
Circuit Clerk, Wayne County
P. O. BOX 428
WAYNESBORO, MISSISSIPPI 39367



UNITED STATES POSTAGE
02 1P
000417599
MAILED FROM

*Mr. Bennie E. Lacey # 38390
D.C.F. 3800 County Rd 540
Greenwood MS 38930*

AFTER FIVE DAYS RETURN TO
ROSE M. BINGHAM
Circuit Clerk, Wayne County
P. O. BOX 428
WAYNESBORO, MISSISSIPPI 39367



Mr. Bennie E. Lacey # 38390
D.C.F. 3800 County Rd 540
Greenwood, MS 38930

Delta Correctional Facility, _____
3800 County Road 540
Greenwood, Mississippi 38930

Date: _____

Circuit Court _____, Clerk
Rose M. Bingham, Tenth _____
Judicial District, Courthouse
P.O. BOX 428 Waynesboro, Ms 39367

RE: Transcribing of Requested Records for purchasing pursuant to Miss. Code Ann. § 25-61-1, et seq. [Mississippi Public Records Act of 1983].

Wayne _____ County Court Cause Number 7754/7528 :

Dear Clerk:

I am writing this letter to you and the personnel of your office as an official request for the following records in regard to the cuase of Bennie Lacey v. State, Cause # 7754/7528.

These records that I wish to purchase are enlisted as follows, to wit:

1. THE MINUTES OF THE COURT, WHEREIN THE GRAND JURY WAS IMPPAELED AND DULY SWORN,
2. THE AFFIDAVIT THAT WERE PRESENTED TO THE JUSTICE COURT JUDGES,
3. AND THE UNIFORM JUSTICE COURT CRIMINAL RECORD.

Please have these records ready within 24 hours after receiving the transcribing fee for the purchase of said records, as I am having this letter of request **hand-delivered** by a personal "courier" who shall also purchase the requested records once you have read this letter of request.

I need these records expeditiously, and ask that you have them ready for the same "courier" to pick up the following day pursuant to Miss. Code Ann. § 25-61-5(1).

Please do not fail in complying with this request, as I am more than willing to proceed in a civil action if denied access to these records. Please take notice that MCA §§ 25-61-13 and 25-61-15 compel you and/or the personnel of your office to provide these records or face civil libility and accountability.

Your cooperation in promptly complying with this request will be greatly appreciated. If you need any further data of information, please do not hesitate to contact me at your earliest convenience.

CERTIFICATE OF SERVICE

This is to certify that I, the undersigned, have this day and date mailed, via United States Mail, postage pre-paid, a true and correct copy of the foregoing and attached instruments to the following:

ROSE M BINGHAM, CLERK

TENTH JUDICIAL DISTRICT

COURTHOUSE P.O. BOX 428

WAYNESBORO, MS 39367

This the 23 day of JAN, 2008.

BENNIE E. LACEY
PETITIONER
MDOC# 38390

Address

D.C.F. 3800 COUNTY RD. 540 GREENWOOD, MS
Address

1st Bennie E. Lacey

WAYNE COUNTY JUSTICE COURT

WAYNE COUNTY COURT HOUSE
WAYNESBORO, MISSISSIPPI 39367
735-3118

Exhibit

K

JUDGE CHARLES BRITTON
POST 1

GEORGIA VAUGHN
CLERK

JUDGE JANE HUTTO
POST 2

February 1, 2008

Bennie E. Lacey
MDOC # 38390

In regards to your request of January 23, 2008,
It appears this matter went directly
to the Grand Jury in 1984. We have no
records of this in Justice Court of Wayne County.

Thank you,
Georgia Vaughn
Clerk

AFTER FIVE DAYS RETURN TO
WAYNE COUNTY JUSTICE COURT
810 CHICKASAWHAY STREET • SUITE C
WAYNESBORO, MISSISSIPPI 39367

HATTIESBURG MS 394

05 FEB 2008 PM 1 T

LET US DARE TO SPEAK,
THINK, SPEAK AND
John Adams, 1789
power of the people

41 use

Bennie E. Lacy # 38390
Unit E. D.C.F. 3800
County Road 540
Greenwood, Ms 38930

3893038930



Delta Correctional Facility, _____
3800 County Road 540
Greenwood, Mississippi 38930

DATE. 1/23/08

Justice Court _____, Clerk of Wayne County
810 Chickasawhay St.
Waynesboro, Ms 39367

RE: Transcribing of Requested Records for purchasing pursuant to Miss. Code Ann. § 25-61-1, et seq. [Mississippi Public Records Act of 1983].

Wayne County Court Cause Number 7754 :

Dear Clerk:

I am writing this letter to you and the personnel of your office as an official request for the following records in regard to the cause of Bennie Lacy v. State, Cause # 7754.

These records that I wish to purchase are enlisted as follows, to wit:

1. The Minutes of the Court. wherein the Grand jury was impaneled and duly sworn.
2. The Affidavit that were Presented to the justice Court judges. and the uniform justice Court Criminal Record.

Please have these records ready within 24 hours after receiving the transcribing fee for the purchase of said records, as I am having this letter of request **hand-delivered** by a personal "courier" who shall also purchase the requested records once you have read this letter of request.

I need these records expeditiously, and ask that you have them ready for the same "courier" to pick up the following day pursuant to Miss. Code Ann. § 25-61-5(1).

Please do not fail in complying with this request, as I am more than willing to proceed in a civil action if denied access to these records. Please take notice that MCA §§ 25-61-13 and 25-61-15 compel you and/or the personnel of your office to provide these records or face civil liability and accountability.

Your cooperation in promptly complying with this request will be greatly appreciated. If you need any further data of information, please do not hesitate to contact me at your earliest convenience.

CERTIFICATE OF SERVICE

This is to certify that I, the undersigned, have this day and date mailed, via United States Mail, postage pre-paid, a true and correct copy of the foregoing and attached instruments to the following:

Justice Court Clerk of
the tenth judicial district
of Wayne County, Ms
810 Chickasawhay St.
Waynesboro, Ms 39367

This the 23 day of January, 2008.

Bennie E. Lacey
PETITIONER
MDOC# 38390

D.C.F. 3800 County Rd 540
Address

Greenwood. Ms 38930
Address

1st Bennie E. Lacey