

IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2008-CT-00074-SCT

ROBERT H. JACKSON

PETITIONER

V.

STATE OF MISSISSIPPI

RESPONDENT

SUPPLEMENTAL BRIEF OF ROBERT H. JACKSON

Appealed from the Circuit County of Warren County

On Writ of *Certiorari* to the Court of Appeals of Mississippi

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rule 28 of the Mississippi Rules of Appellate Procedure, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal.

1. The Honorable Isadore W. Patrick, Jr.
Judge, Warren County Circuit Court
2. John R. Henry, Esq.
Office of the Attorney General
3. Robert H. Jackson
Petitioner
4. Will Bardwell
Counsel for the Petitioner
5. David Neil McCarty
Counsel for the Petitioner

RESPECTFULLY SUBMITTED,



Will Bardwell
Attorney for Robert H. Jackson

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STATEMENT REQUESTING ORAL ARGUMENT

Comes now the undersigned attorney and submits, pursuant to Rule 34 of the Mississippi Rules of Appellate Procedure, this concise statement of the reasons that oral argument will be helpful to the Court.

This case began with a guilty plea more than 30 years ago. Since that time, this case has developed a lengthy procedural history. The petitioner briefed this matter at length while proceeding *pro se*, but given the multitude of issues presented for the Court's review in the instant Petition for *Certiorari*, one has a difficult time perceiving which issue(s) has piqued the Court's interest. The Court would benefit from the opportunity to review, with the petitioner's attorney, the issue(s) toward which the writ has been issued. However, given the prohibition on oral argument under which *certiorari* cases typically operate, *see* M.R.A.P. 17(i), this Court first would be required to suspend its rules, pursuant to Rule 2(c) of the Mississippi Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED,



Will Bardwell
Attorney for Robert H. Jackson

I.

STATEMENT OF THE ISSUES

Without waiving any question addressed by any *pro se* brief or petition submitted prior to the Court's grant of *certiorari* in this case, the petitioner reiterates the following issues for purposes of supplemental briefing.

- A. The Court of Appeals erred by failing to adhere to the ruling handed down by this Court in *Berryhill v. State*.
- B. The doctrine of *res judicata* does not bar review of Jackson's *Berryhill* claim.

II.

STATEMENT OF THE CASE

Thirty years ago, on June 4, 1979, Josephine Todd was murdered during the burglary of her home. *See Jackson v. State*, 506 So. 2d 994 (Miss. 1987) ("*Jackson P*"). Robert H. Jackson was indicted for the crime in Warren County. *Id.* Charged as a habitual offender, and at the direction of his court-appointed attorneys, he pled guilty. *Id.*

Yet the plea was botched. Jackson said that he was told he could get the charge reduced to manslaughter if he pled, and that is the only reason he considered it, the only reason he agreed to it in the face of a capital crime. *Id.* Family members swore to this; even his attorney agreed. *Id.* Protesting that he was misled, and that his attorneys did not adequately investigate his previous crimes — none of which are in the record — he filed a *pro se* appeal to vacate his guilty plea. *Id.* In 1987, almost a decade after the crime, a unanimous Mississippi Supreme Court agreed with Jackson that his claim was *not* procedurally barred, as the State had argued, and reversed and remanded his cause back to Warren County "for development of the facts of [his] substantive claim, either through review of the transcript of the guilty plea, if sufficient, or through an evidentiary hearing." *Id.* at 995.

After that point, the record is silent. Jackson continued to represent himself through the appellate process *pro se*, and the next two opinions on his life contain only one word: “Affirmed.” See *Jackson v. State*, 568 So. 2d 1212 (Miss. 1990); *Jackson v. State*, 665 So. 2d 1356 (Miss. 1995).

This year, the Court of Appeals cobbled together the procedural bar that the Supreme Court dismissed over two decades ago in *Jackson I*. Despite the fact that Jackson has *never* had post-conviction relief — and has only attempted to *seek* it, not exhausting PCR itself — the State has somehow again resurrected the argument of procedural bar.

III.

SUMMARY OF ARGUMENT

This Court should grant the petitioner’s request for relief for two reasons.

First, and most importantly, the merits of Jackson’s argument clearly reveal a constitutional violation. His 1979 indictment was drafted in the same fundamentally insufficient fashion as was that which drew this Court’s reversal in *Berryhill* nearly 20 years later. The indictment for which Jackson was brought to answer charged Jackson with capital murder, the underlying offense being burglary; however, the allegation of burglary went unsupported by any allegation of an underlying crime. As the *Berryhill* Court held without dissent, this renders such an indictment constitutionally insufficient.

Second, this Court should reach the merits of Jackson’s *Berryhill* claim because *res judicata* does not bar review. Jackson has not received an on-the-merits adjudication of his insufficiency-of-the-indictment argument in the post-*Berryhill* era. Therefore, all pre-*Berryhill* encounters between Jackson and this Court are irrelevant to the instant proceedings.

Furthermore, courts have observed that *res judicata* should be cast aside when a valid

argument implicating due process is presented. Likewise, courts have held that reliance on *res judicata* should be avoided when earlier adjudications rested on procedural bars. This case presents both features. Jackson's contention that his indictment was fundamentally insufficient directly implicates his right to due process, and this Court's 2002 dismissal of his claim explicitly relied on the incorrect belief that his claim was procedurally barred. Therefore, in this case, *res judicata* should be forsaken, and the merits of Jackson's *Berryhill* claim should be evaluated.

Therefore, this Court should reverse the Court of Appeals and grant Jackson's request to seek post-conviction relief in the trial court.

IV.

STANDARD OF REVIEW

The issues discussed in this supplemental brief present pure questions of law. They should, therefore, be reviewed *de novo*. *Brown v. State*, 731 So. 2d 595, ¶6 (Miss. 1999).

V.

ARGUMENT

A. THE COURT OF APPEALS ERRED BY FAILING TO ADHERE TO THE RULING HANDED DOWN BY THIS COURT IN *STATE V. BERRYHILL*.

The most important point that can be made regarding the instant case is this: if the Court reaches the merits of this case, then Robert Jackson's conviction must be reversed, because it was constitutionally flawed.

There is absolutely no room for doubt that the indictment under which Jackson pled guilty in 1979 was fundamentally defective. In 1997, in a ruling handed down without dissent, this Court "h[e]ld that capital murder indictments that are predicated on burglary are required to state the underlying offense to the burglary." *State v. Berryhill*, 703 So. 2d 250, ¶23 (Miss.

1997). This holding necessarily flows from the Fourteenth Amendment's due-process incorporation to the States of the Sixth Amendment's command that criminal defendants "be informed of the nature and cause of the accusation" to which they are held to account. *See also Russell v. United States*, 369 U.S. 749, 761 (1962) (observing that questions regarding the sufficiency of an indictment implicate the Fifth Amendment's guarantee of due process). The *Berryhill* Court concluded that fundamental fairness demands that a defendant be "entitled to know the alleged underlying crime in order to be able to adequately defend himself." *Berryhill*, 703 So. 2d 250 at ¶26.

The indictment presented against Jackson in 1979, offered to the Court as part of the record in the instant case, read in pertinent part (with emphasis added):

The Grand Jurors of the State of Mississippi, elected, summoned, empaneled, sworn and charged to inquire in and for the body of Warren County, State of Mississippi, at the term aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present that ROBERT H. JACKSON late of the County aforesaid on the 4th day of June A.D., 1979 with force and arms, in the County aforesaid, and within the jurisdiction of this Court, did feloniously, wilfully, and of his malice aforethought kill and murder Josephine Todd, a human being, with or without the design of the said Robert H. Jackson to affect the death of the said Josephine Todd, *at a time when the said Robert H. Jackson was then engaged in the commission of the crime of Burglary of the dwelling house of the said Josephine Todd*, contrary to the provisions of Section 97-3-19(2)(e) of the Mississippi Code of 1979, as amended.

Jackson's indictment plainly offered burglary as the underlying crime to the allegation of capital murder, but just as plainly, the indictment failed to allege any crime to shoulder the charge of burglary. Under the rule of *Berryhill*, this indictment was fundamentally inadequate and, therefore, drawn with an unconstitutional lack of specificity.

Typically, a valid plea of guilty waives all non-jurisdictional objections to an indictment. *Brooks v. State*, 573 So. 2d 1350, 1352-53 (Miss. 1990). The Court nevertheless should reach the merits of Jackson's case. As this Court recognized in *Berryhill*, an indictment drafted with

unconstitutional insufficiency leaves a defendant uninformed of what, exactly, he is accused of having done illegally and, therefore, uncertain of how to defend himself. *Berryhill*, 703 So. 2d 250 at ¶26. Such a vague allegation incentivizes a guilty plea, which frequently is accompanied by the comfortably certain, albeit not guaranteed, reduced sentencing recommendation of the prosecution. This is particularly true in the case of an indictment for capital murder, where a plea of guilty often means the difference between life in prison and a stroll to the gallows. Moreover, this Court has previously acknowledged that Jackson did not knowingly and voluntarily plead guilty, which even his attorney admitted. *Jackson I*, 506 So. 2d 994. Jackson made the decision to plead guilty nearly 20 years before this Court decided *Berryhill*; it cannot fairly be said that Jackson waived an assignment of error that would not be recognized emphatically for nearly two decades to come.

Allowing a defendant to preserve *Berryhill* challenges to an indictment's sufficiency, despite entering a guilty plea, would allow a defendant to avail himself of a favorable sentencing recommendation while keeping available a limited assertion of his fundamental constitutional rights. Declining to recognize a *Berryhill* exception would station a defendant between a perverse rock and a hard place: agree to spend life in prison despite the State's failure to allege a criminal act with constitutionally required specificity, or risk pain of death to preserve the possibility of relief on appeal. Recognizing a *Berryhill* exception to the general waiver rule would relieve defendants of the necessity to play appellate Russian Roulette.

B. THE DOCTRINE OF *RES JUDICATA* DOES NOT BAR REVIEW OF JACKSON'S *BERRYHILL* CLAIM.

"[T]he primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions" *United States v. Nixon*, 418 U.S. 683, 707 (1974). That interest can be fulfilled best in this case by foregoing application of the doctrine of *res judicata* and reaching the

merits of this case.

“When applying *res judicata* to bar causes of action that were not before the court in the prior action, due process of law and the interest of justice require cautious restraint. Restraint is particularly warranted when the prior action was dismissed on procedural grounds.” *Kearns v. General Motors Corp.*, 94 F.3d 1553, 1556 (Fed. Cir. 1996).

Although this Court has applied *res judicata* liberally in post-conviction proceedings, it should be guided by the Federal Circuit’s approach in this case. First, as is discussed in Section V-A, *supra*, Jackson’s contention that his indictment failed to meet the requirements enunciated by this Court in *State v. Berryhill*, 703 So. 2d 250 (Miss. 1997), directly implicates the guarantees of due process enumerated by the Fifth and Fourteenth Amendments to the Constitution.

Second, this Court’s only previous post-*Berryhill* treatment of Jackson’s cause ended in a determination that any petition for post-conviction relief was procedurally barred as a successive writ. This conclusion appears to be incorrect; Jackson does not appear to have been afforded an on-the-merits evaluation of his sufficiency-of-the-indictment argument in the post-*Berryhill* era. It is hornbook law that *res judicata* is properly applied only when the subject matter of a claim has been addressed squarely in a previous litigation. *Riley v. Moreland*, 537 So. 2d 1348, 1354 (Miss. 1989). Because Jackson’s *Berryhill* claim has not received such attention, and because the merits of Jackson’s *Berryhill* claim entitle him to relief, the Court should decline to apply a procedural bar in this case.

VI.

CONCLUSION

Because Jackson’s asserts a deprivation of due process, and because his *Berryhill* claim


has not received an on-the-merits evaluation, Jackson is not barred by the doctrine of *res judicata*. Furthermore, under this Court's holding in *Berryhill*, the indictment leveled against Jackson in 1979 cannot pass constitutional muster, and his guilty plea thereunder should not amount to a waiver of that objection.

Therefore, this Court should reverse the Court of Appeals' decision and remand Jackson's case to Warren County Circuit Court with instructions to proceed with post-conviction proceedings.

RESPECTFULLY SUBMITTED this TWENTY-EIGHTH day of December 2009,

ROBERT H. JACKSON

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he has, on this day, served a true and correct copy of this *Supplemental Brief of Appellant* via United States Postal Service first-class mail, postage prepaid, on the foregoing interested parties:

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