IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-KA-01139-SCT

GABRIEL McDOWELL
a/k/a Gary McDowell — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Gabriel McDowell

THIS 26th day of November, 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Gabriel McDowell

By: _____
George T. Holmes, Staff Attorney

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STATEMENT OF THE CASE

This appeal proceeds from a U. S. District Court ordered resentencing hearing of Gabriel McDowell by the Circuit Court of Hancock County, Mississippi, June 18, 2008, resulting in a Miss. Code Ann. § 99-19-83 (Rev. 2000) sentence of life without parole for McDowell's 1999 drug sale conviction.[1] McDowell is presently incarcerated with the Mississippi Department of Corrections.

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[1] Pursuant to *Baldwin v. State,* 732 So.2d 236, 246 (¶36) (Miss. 1999), the Court is asked to take judicial notice of its records from McDowell's previous proceedings before the Court relevant to this appeal and referenced throughout this brief and the accompanying record excerpts as follows:

1. Initial Appeal: *McDowell v. State*, 807 So. 2d 413 (Miss. 2001), (Miss. Sup. Ct No. 2000-KA-00521)
2. First PCR: *McDowell v. State,* (Miss. Sup. Ct. No. 2002-M-0073)
3. Second PCR: *McDowell v. State*, 917 So. 2d 801 (Miss. Ct App. 2005) (Miss. Sup. Ct. No. 2003-CP-02306)

FACTS

In 1998 McDowell was indicted as an habitual offender under MCA § 99-19-83 (1972) for sale of cocaine. [T. 7; R. E. 7]. McDowell was convicted in 1999 and sentenced to 30 years without parole as an habitual offender even though the statute, on its face, required a life without parole sentence. *Id.* and [Sup Ct. No. 2000-KA-00521 Trans. pp. 539-40; R. E. 11, 13].

The apparent discrepancy regarding the length of sentence was pointed out to the trial court by the state during McDowell's initial sentencing hearing in 1999, but the trial court pronounced the sentence nonetheless, questioning the constitutional proportionality of a life sentence without parole under the facts of the case. [Sup Ct. No. 2000-KA-00521 Trans. pp. 539-40; R.E. 11, 13]. The trial court said, "I decline to impose the enhancement portion of the indictment since I do have some concerns about the constitutionality of doing both enhancement as well as the habitual portion." *Id.*

The 1999 conviction was appealed and affirmed in *McDowell v. State*, 807 So. 2d 413 (Miss. 2001), (No. 2000-KA-00521) decided October 31, 2001. No sentencing issues were raised in McDowell's initial appeal.

In May of 2002, McDowell filed a post conviction collateral relief petition which raised several issues including a claim of insufficient proof of habitual offender status. *McDowell v. State*, 917 So. 2d. 801, 802 (Miss. Ct. App. 2005). The Supreme Court, in case number 2002-M-00733, ruled all of the issues, except an issue about sentencing,

were procedurally barred and ordered a resentencing hearing stating that the record appeared to indicate that McDowell's only sentencing option was a life sentence without parole under MCA § 99-19-83. 917 So. 2d. 803, [2002-M-00733, Order 10-17-02; R. E. 15]. The stated purpose of the first ordered resentencing hearing was "for the limited purpose of determining whether the petitioner had been previously convicted of two felonies, one being a crime of violence, and whether the petitioner may be properly sentenced as an habitual offender under Miss. Code Ann. § 99-19-83 (Rev. 2000)." *Id.*

Subsequently, at McDowell's first resentencing hearing, conducted by the trial court on November 22, 2002, McDowell requested appointment of counsel which was denied by the trial court stating that the proceedings were under the post conviction collateral relief statute and that counsel was not required. *McDowell v. Mississippi*, 552 F. Supp.2d 602, 606 (S. D. Miss.2008). The trial court, referencing the state's proof propounded at the initial sentencing hearing, found that McDowell had two prior felonies one of which was violent. *Id.* At this point of the resentencing hearing, the trial court interpreted the Mississippi Supreme Court's October 4, 2002, order to require a a life sentence without parole and that such sentence was the trial court's only option. [T. 14].

McDowell sought to have the November 22, 2002 resentencing reviewed under petition for mandamus instead of direct appeal, complaining of the basis for the resentencing, double jeopardy and lack of counsel. 917 So. 2d 802, [2002-M-00733]. The Supreme Court declined "to review McDowell's allegations or his sentence absent a

direct appeal." *Id.*

McDowell then filed a second petition for post conviction collateral relief addressed by the Mississippi Court of Appeals in *McDowell v. State,* 917 So. 2d 801 (Miss. 2006), [Miss. Sup. Ct. No. 2003-CP-02306]. McDowell raised insufficient proof of habitual offender status, double jeopardy and denial of counsel as a due process violation. *Id.* The Court of Appeals found lack of jurisdiction prevented it from addressing the petition citing an order denying review by the Supreme Court. 917 So. 2d 803.

Next, McDowell filed a 28 U. S. C. §2254 *habeas corpus* proceeding in federal court claiming, among other things, denial of counsel at the November 22, 2002, resentencing hearing. *McDowell v. Mississippi*, 552 F. Supp.2d 602 (S. D. Miss.2008). The U. S. District Court found that indeed McDowell was entitled to counsel at the November 22, 2002 resentencing hearing, and the refusal was a denial of due process entitling McDowell to a second resentencing hearing in the trial court, with counsel. 552 F. Supp. 2d at 610. The U. S. District Court found McDowell's other issues, including sufficiency of proof habitual offender status and double jeopardy, moot. 552 F. Supp. 2d at 604.

The subject of this current appeal is the second resentencing hearing which occurred in June 18, 2008 on remand from the federal *habeas corpus* decision. At the June 2008 resentencing, McDowell, with counsel this time, raised his double jeopardy

argument, and again the trial court, incorporating its prior rulings, made all prior sentencing matters a part of the record, and again resentenced McDowell to life without parole under MCA §99-19-83. [T. 20, R. E. 10]. This time, however, the trial judge felt that the federal court order required him to sentence McDowell to the same sentence, where previously, he felt compelled to do so by the Mississippi Supreme Court October 4, 2002, order. [T. 16].

SUMMARY OF THE ARGUMENT

McDowell's sentence of life without parole constitutes double jeopardy.

ARGUMENT

ISSUE NO. 1: WHETHER RE-SENTENCING APPELLANT TO A GREATER TERM CONSTITUTES DOUBLE JEOPARDY?

In *Leonard v. State*, 271 So.2d 445, 447 (Miss.1973), the court ruled that "once a circuit or county court exercises its option to impose a definite sentence it cannot subsequently set that sentence aside and impose a greater sentence." *Leonard* involved an increase of sentence following a revocation of parole, an area in which a trial court's authority is set by statute. See also *Lambert v. State*, 904 So.2d 1150, 1152-53 (¶¶ 8-9) (Miss. Ct. App.2004).

The principle against resentencing a defendant to a greater sentence has a broad

constitutional basis. In *Ethridge v. State*, 800 So.2d 1221, 1224-25(¶¶ 10-11, 17) (Miss. Ct. App.2001), the defendant was initially sentenced to two seven-year sentences to serve concurrently. He asked the trial court to reconsider. The trial court obliged and re-sentenced Ethridge to two concurrent thirty-year sentences, suspended, subject to a period of house arrest and extended probation. *Id.* Thereafter, Ethridge violated the terms of the suspended sentence and the trial court revoked twenty four (24) years which Ethridge was ordered to serve. *Id.* The Court of Appeals, citing *Leonard, supra*, found that increasing Ethridge's punishment at resentencing violated his "right to be free from double jeopardy" under the Fifth Amendment to the United States Constitution and Article 3 §22 of the Mississippi Constitution of 1890.

A distinction should be made between corrections of sentences and re-sentencing. Corrections of sentences, or reinstatement of original sentences which result in increases, have been determined not to result in double jeopardy. In *Harvey v. State,* 919 So.2d 282 (Miss. App. 2005), the sentencing order left out a suspension of part of the sentenced. When Harvey violated his parole and received a revocation of the suspended sentence, the Court of Appeals "found that this was consistent with and mainly a correction of the originally misrecorded sentence, all within a trial court's discretion to correct errors, and did not constitute a resentencing."

Harvey was not actually re-sentenced, the sentencing order, did not contain the pronounced sentence of the trial court according to the transcript. *Id.* Harvey's

"increase" was a mere document correction. The *Harvey* court said, "[w]here it clearly appears that the judgment as entered is not the sentence which the law ought to have pronounced upon the facts as established by the record, the court acts upon the presumption that the error is a clerical misprision rather than a judicial blunder and sets the judgment entry right by an amendment nunc pro tunc."*Id.*

As for McDowell's case, the presumption of "clerical misprision" should not apply. The trial court was made aware of the indictment being under MCA §99-19-83 at the initial sentencing hearing, but said, "I decline to impose the enhancement portion of the indictment since I do have some concerns about the constitutionality of doing both enhancement as well as the habitual portion." [Sup Ct. No. 2000-KA-00521 Trans. pp 539-40; R. E. 11].

What is clear is that the trial court here was exercising its discretion under *Clowers v. State*, 522 So.2d 762, 763-65 (Miss.1988). In *Clowers*, the Mississippi Supreme Court affirmed a sentence imposed by a trial judge who found that a sentence of fifteen years without parole under Mississippi's habitual offender statute was disproportionate to Clowers' particular forgery conviction. *Id.* at 763. *Clowers* has been recognized as an "exception" to the rule." *Oby v. State*, 827 So.2d 731, 734(¶ 9) (Miss. App.2002). See also, *Bonner v. State*, 962 So.2d 606, 610-11 (¶ 17) (Miss. App. 2006).

Here, the trial court was merely exercising this well recognized discretionary authority. Therefore, under *Clowers*, McDowell's original sentence was legal. It was not

a "clerical misprision" nor "judicial blunder". As pointed out in Issue No. 2 below, either the Supreme Court did not have authority, at that juncture of the proceedings, to order a specific resentencing under *Harrigill v. State* 403 So.2d 867, 868-69 (Miss. 1981), or the trial court misinterpreted the Supreme Court's resentencing order.

In its holding, the *Ethridge* court, *supra*, was guided by *United States v. Benz*, 282 U.S. 304, 307-09, 51 S.Ct. 113, 114, 75 L.Ed. 354 (1931), where the United States Supreme Court recognized that "a punishment already partly suffered [should not be] increased." "[T]o increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'" (citations omitted).

Also, as pointed out in *Ethridge,* the principle that, once a defendant starts to serve his sentence, *I. e.*, suffer his punishment, that sentence cannot be increased lest the defendant be subjected double jeopardy. See also *U. S. v. Lopez*, 26 F.3d 512, 514 (5th Cir.1994). Since Ethridge was found to have begun his sentence, his increase was double jeopardy. 800 So.2d 1224-25(¶14).

At McDowell's second resentencing June 18, 2008, following the federal court remand, the trial court here refused to apply *Ethridge*, finding that McDowell had not begun serving his sentence as of 1999. [T. 19]. McDowell suggests this was error. McDowell was incarcerated at the time of his trial. The trial court had revoked

McDowell's bond by order entered October 8, 1999. [(R.19 from S. Ct # 2000-KA-00521) R. E. 18]. So, this is when McDowell began serving his sentence.

In *Feazell v. State,* 761 So.2d 140, 141-43 (Miss. 2000), the issue was whether Feazell was proven to have served a sentence of one year so that he could be adjudicated an habitual offender. Feazell challenged his indictment claiming not to have "served" the requisite period of "one year or more", on a manslaughter conviction. 761 So.2d 141-43.

The *Feazell* Court said:

> Computation of a year or more of service of a sentence for the purposes of § 99-19-83 requires the ascertainment of two matters: (a) the date on which the defendant began serving time on the second, predicate offense (beginning date); and (b) the event which must occur thereafter to provide the court with a certain date for purposes of computing length of service of the term of imprisonment (ending date).

The State contended that Feazell began serving his sentence when he "was arrested and jailed on the second, predicate felony offense, pending trial" on which he was "continuously jailed" from his arrest until his conviction, arguing "that time served for the purposes of § 99-19-83 is to be computed from that arrest date." 761 So.2d 141-43.

The *Feazell* court referred to *Magee v. State*, 542 So.2d 228, 236 (Miss.1989), in which the court found that the "total amount of time served" by a defendant is determined by adding together his time served in the county jail pending trial and his post-conviction incarceration time. This is perfectly consistent with Miss. Code Ann. § 99-19-23 (1972) which requires counting pre-conviction jail time as part of time served on a prisoner's

sentence, as follows:

> The number of days spent by a prisoner in incarceration in any municipal or county jail while awaiting trial on a criminal charge, or awaiting appeal to a higher court upon conviction, shall be applied on any sentence rendered by a court of law or on any sentence finally set after all avenues of appeal are exhausted. 761 So.2d 142.

The *Fezeall* court opined that the legislative intent of MCA § 99-19-23 (1972), was "to treat pre-trial jail time the same as it treats post-conviction incarceration time for the purposes of determining time served, and concluded that, "since a convict is entitled to full credit toward service of his sentence for the time he was jailed prior to trial, that time, logically, should also count as time served for purposes of § 99-19-83." 761 So.2d 141-43. If Fezeall began serving his sentence on the date of arrest, then so did McDowell. So, there is no distinction between *Ethridge* and McDowell's case and the trial court erred in finding this distinction. The end result is that the trial court should have applied *Leonard* and *Ethridge* and reinstated McDowell's thirty (30) year sentence.

ISSUE NO. 2: WHETHER THE TRIAL COURT WAS COMPELLED TO RE SENTENCE McDOWELL TO LIFE WITHOUT PAROLE?

The trial judge, at McDowell's first resentencing in February 2002, thought he was being ordered to render a life without parole sentence by the Mississippi Supreme Court notwithstanding the discretionary authority under *Clowers v. State*, 522 So.2d 762, 765 (Miss.1988) to the contrary. It is clear from the record of the June 18, 2008 hearing and the November 22, 2002 hearing that the trial court felt compelled to disregard its *Clowers*

authority, and to render a specific sentence. The trial court said at the June 2008 hearing, "I took it that the Supreme Court was saying that the trial court has no alternative but to sentence an individual to life without parole where the evidence is found that it was – he was indicted as a life habitual. And I have no alternatives, where I would have an alternative under *Clowers* or discretion under *Clowers* to take into consideration his charge as just a habitual, a little habitual." [T. 14]. Later the trial court said, "[i]t would appear to me that the Federal Court is requiring exercise in resentencing to the same sentence imposed by the Court in 2002 but with the assistance of counsel." [T. 16]. Subsequently, the trial court indicated that it "otherwise [had] authority under *Clowers* and the other decisions to deviate from the maximum." Yet the court felt compelled and said, "[b]ut I'm going to follow what I perceive to be the law regardless of what my personal feelings might be." [T. 17]. McDowell suggests the learned trial judge was mistaken in feeling compelled to render the life sentence.

The bar against double jeopardy also applies to the Supreme Court in these circumstances. So, contrary to the trial court's interpretation, the Mississippi Supreme Court could not, legally, order a specific greater sentence. As pointed out in *Ethridge*, *supra*, "even a reviewing court ... does not have the authority to simply review a case and make an arbitrary decision to amend the original sentence in any way. [citing] *Harrigill v. State*, 403 So.2d 867, 868-69 (Miss.1981). 'Any attempt to do so is a nullity. 800 So.2d 1225 (¶ 12).

In *Harrigill v. State* 403 So.2d 867, 868-69 (Miss. 1981), the Court recognized that, "once a case has been appealed from the circuit court to this Court, the circuit court loses jurisdiction to amend or modify its sentence. If the case is affirmed, the lower court is issued a mandate to perform purely ministerial acts in carrying out the original sentence. There is no authority in the circuit court, or indeed this Court, following the issuance of a mandate affirming the case, to modify a judgment and sentence theretofore imposed." *Id.* "It is only when the case is remanded for a new trial that the circuit court is again invested with discretionary authority with reference to that particular case." *Id.*

The facts of *Harrigill* are somewhat analogous. Harrigill was convicted under the false pretenses statute and was sentenced to three years. *Id.* The conviction was affirmed. *Harrigill v. State*, 381 So.2d 619 (Miss.1980).

Similarly to McDowell, next Harrigill filed a motion to modify his sentence in the circuit court. *Harrigill*, 403 So.2d at 868. The circuit court considered and denied the motion. *Id.* The *Harrigill* court determined that there was no way the sentence could be amended or modified by the trial court and that the motion should have been dismissed for lack of jurisdiction rather than considered and denied. *Id.*

Therefore, the trial court here could not, under the facts of this case, legally be required to render a greater sentence. Under *Harrigill, supra,* to do so would violate the prohibition against double jeopardy and would be a "nullity"; and, moreover, the trial court cannot be stripped of its sentencing discretion under *Clowers*, a discretion which the

under *Harrigill,* Supreme Court does not have. 403 So.2d at 869. See also, *Creel v. State,* 944 So.2d 891, 893-94, (¶6) (Miss.,2006). Of course the federal court did not require the trial court to do anything but provide counsel and a resentencing hearing. 552 F. Supp. 2d at 610.

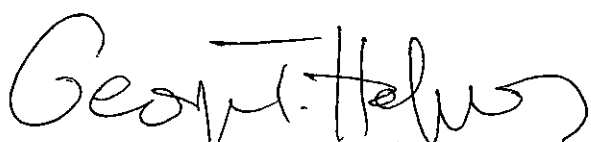
So, it is apparent that the trial court wanted to resentence McDowell to thirty (30) years again, but erroneously felt compelled to render a life sentence without parole. Under *Ethridge, supra*, the resentencing violated double jeopardy. Under *Harrigill, supra*, this resentencing to life without parole is a nullity.

CONCLUSION

McDowell respectfully requests to have his original thirty (30) year sentence reinstated.

Respectfully submitted,

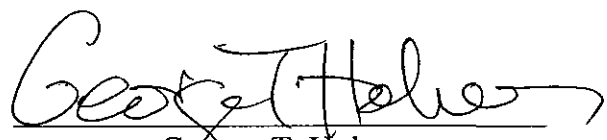
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Gabriel McDowell, Appellant

By: 

George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 26th day of November, 2008, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Jerry O. Terry, Circuit Judge, P. O. Box 1461, Gulfport, MS 39506-1461,and to Hon. Christopher Schmidt, Asst. Dist. Atty. , P. O. Box 1180, Gulfport MS 39502, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



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