

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2008-KA-01295-COA**

HOWARD MONTEVILLE NEAL

APPELLANT

v.

THE STATE OF MISSISSIPPI

APPELLEE

**APPEAL FROM THE CIRCUIT COURT
OF LAMAR COUNTY, MISSISSIPPI**

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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REPLY ARGUMENT

Howard Neal's death sentence was properly vacated by the trial court as it was uncontested by the State that Neal is mentally retarded under the diagnostic standards set forth by the Mississippi Supreme Court. However, it was improper to impose a new sentence of life without parole because that punishment was not authorized at the time of Appellant's crime or conviction. This court should correct that error.

I. The State Concedes that Section 97-3-21 Does Not Support Appellant's Sentence of Life Without Parole.

The State's response brief brushes aside the issue of application of Section 97-3-21 to the Appellant's sentence. This is not surprising: if that legislation applied to Appellant at the time of his original sentence, then it is clear Appellant could one day become eligible for parole. Any other conclusion would violate Appellant's *ex post facto* rights. So the State simply ignores the point.

II. Section 99-19-107 Does Not Validly Apply to Appellant.

While conceding life with possibility of parole is appropriate for Appellant under Section 97-3-21, the State erroneously contends that Section 99-19-107 applies and deprives Appellant of any possibility of eligibility for parole.

The State is wrong when it argues that Appellant's construction of Section 99-19-107 "leads to an absurd result." The only real absurdity lies in the State's overblown proclamation that "[t]here is no good reason to suppose, and none is

argued, that the legislature somehow saw a difference in result in terms of re-sentencing in consequence of a class by class invalidation of the death penalty versus a wholesale invalidation of it.” State’s Br. at p. 8. This is followed immediately by the erroneous proposition that “[t]here is no good reason to suppose the reasons that gave rise to the enactment of Section 99-19-107 would not be equally applicable to classes of individuals otherwise subject to the death penalty as well as the death penalty itself.” *Id.*

The “good reason” the State willfully overlooks is that “...it is only reasonable to conclude that this statute was intended to be used in case of a wholesale invalidation of the death penalty, whether through federal or state means.” *Abram v. State*, 606 So. 2d 1015, 1039 (Miss. 1992) (emphasis added). *See also Foster v. State*, 961 So. 2d 670, 673 (Miss. 2007) (Diaz, J. dissenting).

Section 99-19-107 does not say it applies if the death penalty is invalidated on constitutional grounds as to an individual such as Appellant. At best, its meaning is ambiguous as made evident by the fact that the Mississippi Supreme Court said it meant one thing in *Abram* and then something else in *Foster*. As a consequence, the Court should resort to its legislative history, which is clear in this case. *Clark v. State ex rel. Mississippi State Medical Ass’n*, 381 So. 2d 1046, 1048 (Miss. 1980). The Mississippi legislature only intended that Section 99-19-107 apply if the state’s death penalty scheme is wholly invalidated.

When Section 99-19-107 was passed in 1977, the United States Supreme Court had never invalidated the death penalty for a class of persons. Neither had the Mississippi Supreme Court. Now, in hindsight, the State claims that the legislature somehow predicted courts may take a “gradualist,” piecemeal approach to invalidation of the death penalty for certain individuals. But the State knows that was not the case in 1977. *See Evans v. Boyle Flying Service, Inc.*, 680 So. 2d 821, 825 (Miss. 1996) (“Unthought of results must be avoided if possible” in construing statutes).

Indeed, as the State’s own Assistant Attorney General has explained, since that time courts have upheld Mississippi’s capital punishment scheme as a whole against all attacks. Marvin L. White, Jr., 4 THE ENCYCLOPEDIA OF MISSISSIPPI LAW § 27:1 (Jeffrey Jackson & Mary Miller, eds., Supp. 2008). And those attacks on the scheme as a whole is why Section 99-19-107 was included. Additionally, the only contemporary newspaper account available makes clear that the statute was passed in order to guard against a wholesale invalidation of the death penalty as well. Steve Cannizaro, *On Death Row: A Long Wait May Be Only Sure Thing*, THE CLARION-LEDGER, April 5, 1977, at A1 (copy attached to Appellant’s opening brief). *See State ex rel. Toledo Co. v. Clyde*, 668 N.E. 2d 498, 512 (Ohio 1996) (resorting to newspaper account to aid in legislative interpretation); *Yelle v. Bishop*, 55 Wash.2d 286, 291-92, 347 P.2d 1081 (Wash. 1959) (same).

Moreover, even if Appellant could be subject to the Supreme Court's re-interpretation of Section 99-19-107 as set forth in *Foster*, then it is constitutionally improper to retroactively impose that judicial construction of the statute on Appellant now. As the State concedes, the retroactive application of a change in a previous construction of a statute violates due process. *Bouie v. City of Columbia*, 378 U.S. 347, 353-354, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964); *Rogers v. Tennessee*, 532 U.S. 541, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001).

The Mississippi Supreme Court's change of construction of Section 99-19-107 in *Foster* does just that as applied to Appellant. From the moment the statute was passed in 1977, in 1982 when Appellant was convicted, and through the time that the Mississippi Supreme Court announced in *Abram* that Section 99-19-107 was not intended to be used on a "case-by-case" basis to impose a sentence of life without parole for individual offenders whom the death penalty cannot be applied for one specific unconstitutional reason or another. *Abram*, 606 So. 2d at 1039.

Applying the *Foster* interpretation of Section 99-19-107, instead of the statute's correct interpretation in *Abram* which was its meaning at the time of his conviction, violates Appellant's *ex post facto* and due process rights. The trial court's sentence of life without possibility of parole based upon Section 99-19-107 should therefore be reversed.

III. Appellant's Arguments are not Procedurally Barred.

The State's response asserts the Court should sidestep consideration of Appellant's arguments that application of Section 99-19-107 and its unconstitutional, if applied to Appellant, judicial expansion in *Foster v. State*. But none of Appellant's arguments are procedurally barred.

It is true that issues not raised at trial may not be presented on appeal. That includes a failure to object at trial as was the case in *Jones v. State*, 856 So. 2d 389, 392 (Miss. Ct. App. 2003), cited by the State here in its brief. However, the procedural bar the State is trying to hide behind "applies only to an issue never raised below, which is not the same as a different argument pertaining to the same issue." *Brown v. Thompson*, 927 So. 2d 733, 738 (Miss. 2006).

In this case, Appellant clearly raised the issue that Section 99-19-107 should not bar a re-sentence of life with possibility of parole. The issue was raised in the brief filed with the trial court. R. 199-200.

In sum, there is no procedural bar to Appellant's arguments here on appeal. The Court should reverse the trial court's sentencing order and instruct the trial court to re-sentence Appellant to life with possibility of parole.

CONCLUSION

Appellant should have been sentenced to life with possibility of parole after his death sentence was vacated. His original crime and conviction took place before the sentencing statutes included the option of life without parole.

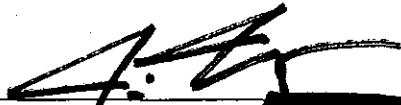
Imposition of life without parole on Appellant's re-sentencing violated his constitutional right to be free of an *ex post facto* application of the law.

Furthermore, the unjust result of life without parole is not justified by Section 99-19-107, a statute the legislature never intended to apply to Appellant and that would further deprive Appellant of due process and his right to be free from an *ex post facto* law. Appellant therefore respectfully requests that the Court vacate his sentence of life without parole and remand his case with instruction to the trial court to re-sentence Appellant to life with possibility of parole.

This the 9th day of June, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE


I do hereby certify that a true and correct copy of the Appellant's Reply Brief was served via U.S. Mail, properly addressed and postage prepaid, to the following persons:

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This the 9th day of June, 2009.


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