



IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

2008-KP-1920-COA

FREDERICK GRIM

**FILED**

APPELLANT

VS.

STATE OF MISSISSIPPI

**DEC 30 2009**  
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**SUPREME COURT**  
**COURT OF APPEALS**

APPELLEE

**REPLY BRIEF FOR APPELLANT**

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Parchman MS 38738

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**APPELLANT'S REPLY BRIEF**

The State of Mississippi has filed its brief in this case and has failed to refute Appellant's claims that:

a.) The habitual portion of the indictment, charging Appellant as a habitual offender under Miss. Code Ann. §99-19-83, is defective and void where the indictment fails to charge, and the state failed to introduce proof of the dates of the sentencing in the prior convictions.

The state argues that this claim should not be granted because counsel never objected at trial. The state's failure to prove the habitual status by providing sufficient compliance with Rule 11.03 of the Miss. Rules of Cir. and Cty. Court Practice. Even a plea of guilty would not waive such a plain error. Ard v. State, 403 So. 2d 875 (Miss. 1981). The Court have held this claim to be fundamental. Ormoud v. State, 599 So. 2d 951, 963 (Miss. 1992)

The state continues to point out the date of conviction on those prior convictions. The rule clearly require that the dates of sentencing be set out and alleged in the indictment. The dates of conviction and dates of sentencing are not the same dates.

The state points out the correct standard of the law in pointing to the Court's decision that a conviction is not final until the defendant is properly sentenced, Lang v. State, 238 Miss. at 680, 119 So. 2d 608, this argument supports Appellant's claim here where the indictment filed in this case do not assert the dates of judgment, but sets out the dates of conviction. If the dates of

the sentencing is sufficient, as the state correctly argues, then such an argument constitute an admission by the state of the claim where the indictment does not contain sentencing as the law requires. This court should grant relief on this claim and reverse and remand for resentencing.

b.) Appellant was subjected to ineffective assistance of counsel at trial and during sentencing proceedings in the court, in violation of his 6th amendment rights to the United States Constitution and the Constitution of the State of Mississippi.

c.) The trial court erred in overruling the Appellant's motion for a directed verdict.

d.) The trial court erred in denying the Appellant's motion for a new trial as the verdict was against the overwhelming weight of the evidence

e.) The indictment is defective where it charged appellant under two different habitual statutes without specifying exactly which statute the prosecution would apply.

f.) Appellant suffered cumulative error which deprived of him of his constitutional right to a fair trial in violation of the 5th and 14th Amendments to the United States Constitution.

The state's argument in opposition to the claims presented in this appeal are not on point. Initially, it should be pointed out that the facts provided by The brief of Appellant clearly demonstrates that Appellant is entitled to relief in regards to the claims presented.

Grim did not receive effective assistance of counsel. Even the state's brief bolsters this fact when the state points out that defense counsel procedurally defaulted on objecting to a plain error such as the indictment failing to set out a date of sentencing on the prior convictions which the state cited to make Grim a habitual offender.

During the sentencing phase of the proceedings, defense counsel actually said nothing and made no objections or effort to defend Grim. Further, the record will show that the state never set out the dates of the judgment of either of the prior convictions. The indictment

therefore was not in compliance with Rule 11.03. Grim was sentenced under a defective indictment. The indictment failed to comply with Rule 6.04 or Rule 11.03 of the Miss. Unif. Rules of Cty. and Cir. Court Practice which requires that the indictment set forth the date of judgment in each prior conviction and an element of the proof required. The state failed to satisfy such requirement, which constitutes plain error and cannot be waived by a failure to object at trial. The state fully failed to rebut or refute the claims in it's brief and even admitted them while asserting that defense counsel was not ineffective in this gross representation causing a life sentence to be imposed.

The Sixth Amendment guarantees defendants the right to be informed of the nature and cause of the accusation made against him. Courts have interpreted this provision to have two elements. First, a defendant must receive notice of any specific criminal accusations that the government has lodged against such defendant through an indictment, information, complaint, or other formal charge. Second, defendant may not be tried, convicted, or sentenced for a crime that materially varies from the crime set forth in the formal charge. If a defendant suffers prejudice or injury, such as a conviction, from a material variance between the formal charge and the proof offered at trial, the court should vacate the verdict and sentence.

The Sixth Amendment notice requirement reflects the efforts of the Founding Fathers to constitutionalize the common law concept of fundamental fairness that pervaded civil and criminal proceedings in England and the American colonies. Receiving notice of pending criminal charges in advance of trial permit the defendant to prepare a defense in accordance with the specific nature of the accusation. Defendants who are incarcerated by totalitarian governments are frequently not apprised of pending charges until the trial begins. By requiring substantial conformity between the criminal charges and the incriminating proof at trial, the Sixth

governments are frequently not apprised of pending charges until the trial begins. By requiring substantial conformity between the criminal charges and the incriminating proof at trial, the Sixth Amendment eliminates any confusion as to the basis of a particular verdict, thereby decreasing the chances that a defendant will be tried later for the same offense in violation of protections.

Many appeals have focused on the issue of what constitutes a material variance. In Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960), the U.S. Supreme Court found a material variance between an indictment charging the defendant with illegal importing activities, and the trial evidence showing that the defendant had engaged in illegal exporting activities. In United States v. Ford, 88 F.3d 1350 (4th Cir. 1996), the U.S. Court of Appeals for the Fourth Circuit found a material variance between an indictment charging the defendant with a single conspiracy, and the trial evidence demonstrating the existence of multiple conspiracies.

The state should have been specific in charging Grim as a habitual. The law is clear that the state cannot fail to properly indict and argue that it do not matter because defense counsel waived it when he failed to name it. Due process of law should prevent this. This very issue is the basis of this Court's decision in Beckham v. State, 556 So.2d 342 (Miss. 1990), which was decided adverse to the position of the state. If the state's theory was to suffice there would be no need to specify any dates but wait and see if anyone objects. Appellant argues to this Court that the method used by the state in bringing the habitual charges against him, by failing to cite dates, failed to provide Grim with adequate notice of the dates he was required to defend against.

This Court should find that the state has failed to refute the claims set out in the Appellant's Brief and should grant this appeal and reverse and remand the conviction and sentence to the trial court.

### CONCLUSION

Grim would respectfully ask this Court to reject the state's argument and find that Appellant suffered a violation of his constitutional rights for the reasons and authority cited herein. Appellant Grim submits that the convictions and sentences imposed in this case should be reversed and rendered. In the alternative, Grim's Convictions and sentences should be reversed to the trial court with instructions that a new trial be granted or that new sentencing be imposed consistent with the laws of the State of Mississippi as cited herein.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

This is to certify that I, Frederick Grim, Appellant pro se, have this date delivered a true and correct copy of the above and foregoing Appellant's Reply Brief, to:

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Honorable Albert B. Smith  
Circuit Court Judge  
P. O. Box 998  
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This, the 30 day of December 2009.

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