IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALBERT JOINER, JR. — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

NUMBER 2009-CA-00222-COA

# BRIEF OF APPELLANT

## APPEAL

## CIRCUIT COURT, LAFAYETTE COUNTY

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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**ALBERT JOINER, JR.** **APPELLANT**

**VS.**

**STATE OF MISSISSIPPI**

## CERTIFICATE OF INTERESTED PERSONS

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The undersigned counsel of record for ALBERT JOINER, JR., Appellant herein 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 disqualification or recusal.

Hon. Andrew K. Howorth
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Listed victim of an assault charged against Appellant
Cause LK2007-133 (Companion Case)

Albert Joiner, Jr.
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( Appellant, Formerly a resident of Oxford, Lafayette County)

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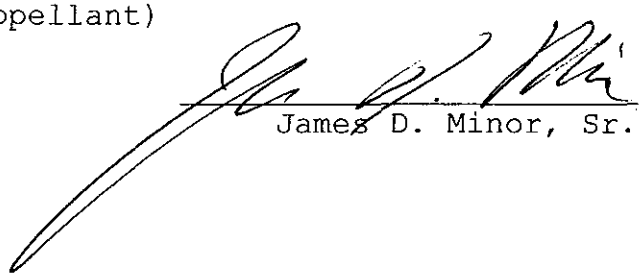

James D. Minor, Sr.

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## STATEMENT OF THE ISSUES

I. Whether Albert Joiner, Jr. was properly charged under Mississippi's Habitual offender Statute;

II. Whether Albert Joiner, Jr. was properly sentenced under Mississippi's Habitual offender Statute;

III. Whether Albert Joiner, Jr. was denied the effective assistance of Counsel

**STATEMENT OF THE CASE**

The Grand Jury of Lafayette County in its October 2007 term or prior thereto, returned a two count indictment against Appellant charging him with Count I,"Felony Flight", Miss. Code Ann. §97-9-72, as amended and Count II, "Felon in Possession of Deadly Weapon"(Excerpts page 3. Miss. Code Ann. 1972 § 97-37-5, as amended as a habitual offender. The Appellant signed a petition to enter a plea of guilty on October 18, 2007. The petition was to enter a plea to "Felony Flight" (Excerpts page 5). The Court accepted Appellant's plea of guilty to the charge pursuant to § 99-19-81, Mississippi Code Annotated of 1972, as amended. Appellant was sentenced to a term of four (4) years in an institution to be designated by the Mississippi Department of Corrections (Excerpts page 26). This sentence was to run consecutive to an additional charge for "Strong Arm Robbery" entered and accepted at the same time.

On or about the 21st of May, 2008, the Petitioner, pro se filed a petition for post-conviction collateral relief in the Circuit Court of Lafayette County (Excerpts page 27) challenging and moving the Court to vacate and set aside the invalid habitual offender portion of his sentence in this case based on the following grounds:

> The court erred in sentencing Petitioner as a habitual offender in Cause Number LK-07-399 upon his plea of guilty to Count One of indictment charging him with

felony flight. Where he was not indicted as a habitual offender pursuant to MCA 99-19-81.

Count II of the Indictment that had charged him as a habitual offender was dismissed as a part of the plea bargain.

## SUMMARY OF THE ARGUMENT

**I. Whether Albert Joiner, Jr. was properly charged under Mississippi's Habitual offender Statute**

Appellant was charged in a two-count indictment. The first count was for felony flight and did not allege his being a habitual offender. The second count was for the possession of a deadly weapon, a butcher knife. This count charged Appellant to be a habitual offender without stating which habitual statute. Apparently in plea negotiations the second count was dismissed and Appellant was to plead guilty to being a habitual offender pursuant to Miss. Code Ann. § 99-99-81 in Count I.

Appellant could not be sentenced as a habitual because the count to which he pled made no reference to his being a habitual offender. This was a plain error.

**II. Whether Albert Joiner, Jr. was properly sentenced under Mississippi's Habitual offender Statute**

Assuming that the indictment properly charged the Appellant as a habitual offender, there was no documentation or evidence submitted as to the existence of any prior conviction. This sentence was pursuant to a plea agreement but Appellant was never questioned about his alleged convictions.

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**III. Whether Albert Joiner, Jr. was denied the effective assistance of Counsel**

Appellant raises this argument but concedes that this argument would be moot if his grounds above stated are valid. However he alleges that his attorney should have objected to the failure to prove the existence of alleged past felonies. This performance was deficient and further if his plea constituted a waiver, the performance of his attorney did prejudice him. In addition there were plain errors present that may be addressed by this Court.

**ARGUMENT**

**I. Whether Albert Joiner, Jr. was properly charged under Mississippi's Habitual offender Statute;**

In his pro se petition for post conviction collateral relief the Appellant submitted as one of his grounds that:

> The court erred in sentencing Petitioner as a habitual offender in Cause Number LK-07-399 upon his plea of guilty to Count One of indictment charging him with felony flight. Where he was not indicted as a habitual offender pursuant to MCA 99-19-81.

In this case, Appellant, as defendant in the trial court was charged in a two-count indictment. In Count I he was charged with flight for fleeing officers who had probable cause to believe he had committed a crime and who made known their desire for Appellant to stop by visual and audible signals. Count II of the indictment charged the possession of a weapon, "to wit: a butcher knife, he Albert Joiner, Jr., had been previously convicted of the following felonies, to wit: …". There followed a recitation of five (5) alleged felonies.

On or about October 18, 2007 Appellant entered a guilty plea to Count I, the flight charge. That plea was accepted and the court sentenced him to four (4) years "in an institution to be designated by the Department of Corrections <u>also as a habitual offender</u>, …" (Plea transcript, page 14, Excerpts page 24). (emphasis added by Appellant)

In the plea proceeding the following exchange occurred:

BY THE COURT: Do you still want to go forward and plead guilty on these two counts?

A. Yes, sir.

(DEFENDANT CONFERS WITH COUNSEL)

BY MR. WALL: Your Honor, he's asking about Count 2 to the 399, your Honor, and I believe the prosecution has dismissed that.

BY MR. TROUT: We have dismissed it.

BY THE COURT: LK07-399 has two counts. The second count is felon in possession of a deadly weapon, that being the butcher knife that the prosecutor was referring to. And that's going to be dismissed. You've plead guilty in 399 only to Count 1, felony fleeing.

A. Thank you, sir.

BY THE COURT: Any other questions?

A. No sir.

(Plea transcript at pages 12-13 Excerpts 22)

The Uniform Circuit and County Court Rules, Rule 11.03 entitled "Enhancement of Punishment" provides in part:

1. The indictment must include both the principal charge and a charge of previous convictions. The indictment must allege with particularity the nature of description of the offenses constituting the previous convictions, the state or federal jurisdiction of any previous conviction, and date of judgment.

Appellant shows unto the Court that he could not have been sentenced as a habitual offender under Count I since that count made no reference to any habitual status nor had the indictment

been amended, Uniform Circuit and County Court Rules, Rule 7.09; *Adams v. State, 772 So. 2d 1010, (Miss. 2000).*

There was no charge under § 99-19-81 subsequent to the dismissal of Count II and there is no reference to that statute in Count I. This indictment would not have "fully notif[ied] the defendant of the nature and cause of the accusation". Mississippi Uniform Circuit and County Court Rules, Rule 7.06.

**II. Whether Albert Joiner, Jr. was properly sentenced under Mississippi's Habitual offender Statute;**

Assuming the validity of the indictment, the State would still have to set forth evidence of the prior convictions. In *Short v. State 420 So. 2d 929 (Miss. Ct.App. 2006),* the defendant claimed that the lower court had improperly sentenced him as a habitual offender. Here the criminal defendant, Appellant, was apparently sentenced under § 99-19-81 Miss Code Ann 1972 as amended which states:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

The burden of proof of all elements of a crime and habitual offender status is upon the State. In *Vince v. State, 844 So.2d 510, 518 (¶ 25) (Miss Ct. App 2003)* this court said, citing *McIlwain v State, 700 So. 2d 586, 589 (¶ 13) Miss 1997):*

> We have regularly upheld sentences under the habitual criminal statutes where the proof of prior convictions was made by certified copies of the judgments of conviction. *This accords with the basic principle that the best evidence of a conviction is the judgment of conviction.*

*Short, 844 So. 2d at 518 (¶ 25).* The Court went on to observe in that same paragraph that prosecutors would do well to not use "remote and less reliable methods of proof".

This Court in *Vince V. State* went further saying that the State is not limited only to certified copies. Pen packs showing the defendant's prior convictions would also be sufficient, citing *Frazier v. State, 907 So.2d 985, 991 (¶ 16) (Miss. Ct. App. 2005).* In addition the defendant's in-court admission of prior felony convictions has been found sufficient to support the habitual offender status, citing *Sanders v.State, 786 So.2d 1078, 1082 (¶ 14) (Miss. ct. App. 2001).*

However, in *Evans v. State, 988 So. 2d 404 (Miss, Ct. App. 2008)* this court did observe that the defendant in that case had pled guilty and therefore a lesser degree of proof was required. This court said:

> The trial court must have before it "enough [evidence] that the court may say with confidence the prosecution

> could prove the accused guilty of the crime charged [.] *Corley v. State, 585 So.2d 765, 767 (Miss. 1991)*. Further, a defendant's own admission may suffice for the factual basis. Id.

988 So. 2d. at 406 (¶ 10). This Court also reproduced some of the plea Colloquy in that case:

> TRIAL COURT: Tell me what--you have several, three prior convictions, felony convictions that I am aware of. Are there more than that?
>
> EVANS: Yes sir.
>
> TRIAL COURT: How many total?
>
> EVANS: Your Honor, I really don't know, to be honest.
>
> TRIAL COURT: Do you have other felony charges pending other than what we're taking care of here today?
>
> EVANS: No Sir, this is it.

988 So. 2d. at 406 (¶ 11). This Court also then added that the trial court in that case then questioned the defendant as to whether each prior conviction charged in the indictment was true. He responded in the affirmative.

In the case presently before the Court the applicable portion of the plea colloquy reads as follows:

> TRIAL COURT: And in each of these two cases also are you telling me that you realize and understand that you qualify for habitual offender status and that you're gong to be sentenced, if the Court accepts your guilty plea, as what we call a lesser habitual offender which will mean that the time that you receive you will have to serve day-for-day? Dou you understand that?
>
> JOINER: Yes, Sir. (Plea transcript, page 7, Excerpts page 17)

A comparison of the pleas Colloquy here with the cited case shows that this case differs. There was no evidence given relative to Appellant's prior convictions. Additionally, the Appellant himself was never questioned about them specifically and individually and made no admissions. There is no evidence as to whether he was twice previously convicted, that the charges were separately brought and arising out of the separate incidents at different times or his sentences. In Short there was no proof presented consistent with the requirements of *Miss. Code Ann 1972 § 99-19-81 as amended.* Here the court could only make an educated guess as to the existence of the prior convictions and the sentences imposed.

**III. Whether Albert Joiner, Jr. was denied the effective assistance of Counsel**

In a companion case Appellant has alleged ineffective assistance of counsel. This claim was based upon his trial counsel's allowing the plea to go forward without proof or evidence of prior convictions to support enhanced punishment. Under *Vince v. State* cited above this Court's prior rulings make it clear that if his sentencing was flawed then his ineffective assistance of counsel claim is moot. This court in the *Vince State* case said:

> Our decision to reverse and render on the propriety of sentencing Vince as a habitual offender renders moot another aspect of Vince's claim that the received ineffective assistance of counsel. Vince argued in his brief that his attorney's failure to oppose the introduction of the NCIC report on hearsay grounds rendered counsel's performance ineffective when measured against the level of competency guarantee him by the Sixth Amendment. Having decided the question of sentencing as a habitual offender in Vince's favor on other grounds, we need not consider that claim on the merits.

*Vince v. State, 844 So.2d 510, 518 (¶ 26).*

However, to preserve this ground should any waiver of rights be found in the plea by Appellant he does show unto the Court that Appellant was sentenced as a habitual offender with insufficient evidence being presented to support the sentence therefor.

A criminal defendant with charges of the nature faced by Appellant has a right to counsel as granted by the State and Federal constitutions. *Gideon v. Wainwright, 372 U. S. 335, 23 S. Ct 792, 91 L. Ed 2d 799 (1963); Argersinger v. Hamlin, 497 U. S. 25, 92 C. Ct. 2006, 32 L. Ed. 2d 530 (1972).*

Appellant here was appointed an attorney and later had retained counsel.[1] In 1984 the United States Supreme Court handed down a decision in the case of *Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).* This decision set forth the standards to be applied to judge the

[1] The Appellant had just recently retained counsel but is submitted that the time of hiring of counsel does not diminish the responsibilities of set forth for affective assistance on a point of law.

effectiveness of counsel. This test is a two pronged one adopted by this Court in *Alexander v. State, 605 So. 2d 1170, 1173 (Miss. 1992)* and several other cases. *Strickland* requires (1) the showing of the deficiency of counsel's performance and (2) that it was sufficient to constitute prejudice to the defendant. The burden of demonstrating that both prongs have been met falls upon the defendant. *Leatherwood v. State,473 So. @d 964,968 (Miss. 1984), reversed in part, affirmed in part 539 So. 2d 1378 (Miss. 1989).* There is a strong but rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance. *McQuarter v. State, 574 So. 2d 685, 687 (Miss. 1990).* Appellant here must also show that there is a reasonable probability that but for this counsels actions he would have received a different result in his sentencing before the trial court, *Nicolaou v. State, 612 So, 2d 1080, 1086 (Miss. 1992).*

The record before this Court shows that there was no evidence of the existence of the felonies as charged by the indictment nor any admission by Appellant to the existence and validity of the felonies alleged to have been committed. The record fails to show any objection to the proceedings below.

The Appellant has therefore shown that counsel should have seen to it that all elements of the crime or elements to support a sentence should have been shown by the State. Secondly, if

objection had been made Appellant could not have been sentenced as a habitual offender under the facts in the record. The facts show the ineffective assistance of counsel, *Strickland v. Washington, supra.*

Both the State, Article 3 Section 14 of the Mississippi Constitution and the United States Constitution Amendment 14, would guarantee the Appellant Due Process and the Equal Protection of the laws. The Court below erred in not setting aside the habitual designation in Appellant's sentence.

Counsel for Albert Joiner, Jr. did not object to the sentencing but such an omission by the lower court was plain error, *Gray v. State, 549 So.2d 1316 (Miss. 1989).* The omission was a "manifest Miscarriage of Justice" affecting "Substantive/fundamental rights", *Lawrence v. State, 928 So.2d 894, 897 (¶ 10) (Miss. Ct. App 2005).* In order for Appellant to prevail this court would need to find:

> (1) that there was error …; (2)that the error resulted in a manifest miscarriage of justice; and (3) that the error affected one of … [Joiner's] substantive or fundamental rights.

928 So. 2d at 897 (¶ 10). Albert Joiner would submit: (1) that failure to prove the prior convictions was error; (2) the failure created a miscarriage, a habitual sentence, without the factual basis; and (3) that Appellant's liberty

after serving his sentence is a substantive or fundamental right.

**CONCLUSION**

Because of the failure to include a charge in the indictment as a habitual offender and the failure to allege the conviction along with the failure to prove or to obtain admissions to the prior felonies alleged this case should be remanded for re-sentencing pursuant to *Ellis v. State, 520 So. 2d 595 (Miss. 1988)*. The State "has being given one fair opportunity to offer whatever proof it could assemble", *DeBussi v. State, 453 So. 2d 1030. 1033 (Miss. 1984) citing Burks v. United States, 437 U. S. 1, 15-16, 985 S. Ct. 2141, 2149, 57 L. Ed 2d 1 (1978)*. Furthermore, the State should therefore be prohibited from introducing any new evidence to establish Appellants status as a habitual offender, to do otherwise would be a violation of the Mississippi Constitution of 1890, Article 3, Section 22 and United States Constitution Amendment Five.

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CERTIFICATE OF SERVICE

I, James D. Minor, Sr., attorney for Appellant, Albert Joiner, Jr. certify that I have this day mailed a true and correct copy of Appellant's Brief in Case No. 2009-CA-00222-COA by United States Mail, postage prepaid, to the following person at the addresses listed:

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This 1st day of May, 2009

James D. Minor, Sr.