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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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SUPREME COURT
COURT OF APPEALS

SAMMIE LEE JOHNSON — APPELLANT

VS. — NO:_____

STATE OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned pro se, litigent 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

1. State of Mississippi

2 Sammie Lee Johnson

THIS 3 day of August 2009.

Sammie Johnson

Sammie Lee Johnson #58463
Unit-29-F-Bldg.
Parchman, Ms 38738

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SAMMIE LEE JOHNSON — APPELLANT

V — CAUSE NO:_____

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

COME NOW,. Petitioner Sammie Lee Johnson proceeding pro se. and respectfully files this his appeals brief pursuant to the Uniform Post-Conviction Collateral Relief Act Mississippi code Ann. §99-39-5(2) and §99-39-21(3) and as good and sufficient reason your petitioner states the following to wit:

Petitioner is a resident of the Mississippi Department of Correction in the custody of Christopher Epps et al serving a natural life sentence. The sentence is illegal for the crime of Capitol Murder in violation of statute 97-3-19(2)(d) of the Miss. code ann. (1972).

The state violated petitioner,s constitutional right to a fair trial and or plea agreement and also denied petitioner Due-Process of law, When the state sentenced petitioner to a natural life sentence pursuant to a guilty plea. Where petitioner did not waive his indictment and the trial Judge sat as the sole sentencing body, and sentenced petitioner to serve the reminder of his natural life in the custody of the aMississippi Department of Corrections, without the petitioners punishment being affixed by a Jury.

This Brief is also based on Newly Discovered Evidence. the evidence submitted is a signed and sworn affidavit, By the man who actually commited the crime of Murder. Who is willing to swear to. and testify to the fact that the petitioner did not commit the crime for which he was erroneously charged with. and that he Darryl Swanier did in fact murder one Bobby Mcgroger.. and that the petitioner did not nor doe,s now kow anything about the murder, nor did petitioner hire him Darryl Swanier to commit the murder.

Mr. Swanier is willing and ready to testify in any Court proceeding or evidentiary hearing conducted by any Court. The evidence if it had been submitted at the time of the petitioner,s trial or plea.

agreement hearing would undoubtably actually adversely affected the outcome of his conviction and sentence.

The evidence submitted was not reasonablly discoverable at the time of petitioner,s plea agreement hearing. Which is of such that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction and sentence. The evidence would have exonerated the petitioner. Applicant Johnson has previously file post-conviction collateral relief proceeding in this case. Absent of the newly discovered evidence. This appeal is successive and based upon Illegal sentence and Newly Discovered Evidence and Ineffective assistance of trial counsel.

This application is also based upon the United States Supreme Court,s decision in Apprendi V. New Jersey, 530 U.S. 466 S. CT... 2348 S. CT. (2000).

Applicant Johnson states that in the decision of the U.S. Supreme Court in Apprendi which constitutes evidence unquestionably showing that applicant was denied Due-Process of law in the Court imposing sentence upon him which exceeded that of the statutory maximum for the specific crime involved, without any evidence of facts which increased the sentence not being submitted to a jury and proven beyond a reasonable doubt. The question is asked. Who per formed the repersentation in the trial Court ? Such claims and facts in support are set forth in this brief. Applicant Johnson believes that he should be allowed to persent his claim of illegal sentence to this respected Court absent of any prejudice. along with additional claims which are also contained herein.

More-over. under unique circumstances presented in this case and the clearly convincing evidence contained in the recoreds well as in this brief applicant Johnson respectfully submits that there can be no dispute that relief is warrented i this case.

Applicant Johnson would state that all additional facts and claims in support of this his appeal are stated as best as he can not being trained in the science of the law.

ARGUMENT

A STANDARD OF REVIEW

A petition for post-conviction relief should be reviewed under the preponderance of the evidence standard " Miss Code § 99-39-23(7) (Supp.2001). If the petitioner establishes by the preponderance of the evidence that he is entitled to post-conviction relief, then such relief should be granted McClendon V. State 539 so. 2d 1375-1378 (Miss. 1989).

In McClendon for instance, the petitioner who had been convicted for the offense of Rape and incarcerated for such crime, was told by another inmate that a third prisoner had confessed to comitting the same crime for which McClendon had been convicted Id at 1376, therefore, The petitioner McClendon obtained an affidavit from the inmate who had heard the confession and presented that affidavit in support of his petition for post-conviction Id at 1376-77 under these circumstances the trial Court in McClendon denied the petitioner requested relief while errorneously applying the clear and convincing standard of proof to the evidence presented by the petitioner Id at 1377-78 on Appeal, The Court reversed and remanded the petitioner,s case for further proceedings, And directed the trial Court to apply the correct "Preponderance of the evidence standard in evaluating the petitioner,s request for relief Id at 1378. In the case at bar the claims are almost the same. There was not a third prisoner. The man who actually comitted the murder is confessing responsibility for comitting the murder.

The preponderance of the evidence standard of review remains the same. In evaluating the request. That the petitioner Sammie Lee John son,s claims should by law be reviewed and adjusticated according to the proper standard. The preponderance of the evidence standard.

(B). SUMMARY JUDGMENT MAY BE GRANTED BY THE SUPREME COURT IN A - U.P.C.C.R.A. CASE

The procedure for requesting for and obtaining post-conviction relief are set forth in miss code ann. §99-39-1 et seq. (Supp. 2001). Petitioner seeking post-conviction relief are generally categorized as "Quasi-Criminal,s in the law in fact for amny purposes the (Miss issippi Supreme Court). Treats them as such. Milam V. State 578 so 2d 272,273 N/1 (Miss. 1991). However hte term of the act specifically

authorizes reliance on the Mississippi rules of civil procedure for some proceedings such as summary judgments under rule 56 Id at 273 N/1 see Miss. Sup. Ct. rule 22 (Recognizing procedure set forth in Miss. code ann. §99-39-1 et. seq. (Supp. 2001) for post-conviction relief.

The act specifically provides:

(1). If the motion is not dismissed at a pervious stage of the proceeding, The judge after the answer is filed and discovery if any is completed, shall upon review of the records, determin whether an evidentiary hearing is not required, The judge shall make such dispositions of the motion as justic shall require.

(2). The Court may grant a motion by either party for summary judgment when it appears from the records that there is not a genuine material fact and the movant is entitled to judgment as a matter of law.

Miss. code ann. §99-39-19 (Supp. 1993);

The act further rpovides that if the conviction has already been affirmed on direct appeal. Miss. code ann. §99-39-7 (Supp. 2001). The Supreme Court is empowered to grant the application, motion, exhabits, The prior records and the State,s response together with any exhabit submitted therewith. The Court may grant or deny any and all relief requested in the attached motion, Miss. code ann. §99-39-2' (6) and(7) (Supp. 2001): Although the case at bar is not exact as the case of McClendon Applicant Johnson asserts that the preponderance of the evidence standard applies in this case and in this Court. even on a claim of ineffective assistance of counsel, to grant summary judgment under the post-conviction relief statute Milam, Supra.

In Mayers V. State 583 so 2d 174 (Miss. 1991). The Court explained that "Well pleaded allegations of the complaint (For post-conviction relief) shall be taken as true...Id at 176 "Under these circumstances it cannot be idsputed that appellant relief is warrented in this case. Because the records will demonstrate that applicant Johnson was denied Due-Process of law and the U.S. Supreme Court,s decision in..... Apprendi V. Newjersey 530 U.S. 466, 120 S. CT. 2348 (2000). and..... Blakely V. Washington 542 U.S. S.CT. (2004). requires that relief be granted in this case.

CONCLUSION

Wherefore, these premises considered, applicant Johnson prays that this Court will grant this his appeals motion and reverse the lower Courts decision, and remand his case back to the lower Court for correction or in the alternative be granted a new trial.
Johnson would also request that an evidentiary hearing be conducted in this case and that any and all other relief that this respected Court deems just and proper under the facts presented herein and according to the laws and constitution of the State of Mississippi and the United States of America.

Respectfully Submitted,

Sammie Johnson

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO.

SAMMIE LEE JOHNSON — PETITIONER

V.

STATE OF MISSISSIPPI — RESPONDENT

APPEAL BRIEF

COME NOW, your petitioner, Sammie Lee Johnson, pro se, and files this his motion appealing the decision of the lower Court of Marshall County Mississippi, To this respected Court to vacate and set aside sentence and conviction pursuant to Miss. code ann. §99-39-21(3) and §99-39-5(2) of the uniform post-conviction collateral relief act. and would state the following facts to wit:

IDENTITY OF THESE PROCEEDINGS

Your petitioner have previously filed for post-conviction in this case, The first initial filing was on the 28th day of July 2003, "But" was impeeded from filing by the Circuit Clerk of Marshall County Circuit Court. Which deliberately cause me to have to file numorus legal pleadings to various Courts to try and get the assistance of any Judge to issue an order to the Marshall County Circuit Clerk directing her to place my case on the Court record sheet as being filed.

Inquisitions waer made and my legal pleadings were finally ruled on in the northern district Court of mississppi, "But" by this time the one year tolling grace period had expired pursuant to the (AEDPA), Antiterriosm effective death penalty act, of 1996. resulting in the Circuit Court of Marshall County, erroneously applying the time bar statute §2244(d) Cuasing none of the meritorous valid claims to be addressed on the merits, Which caused petitioner to be denied Due-Proces of law procedural and substantial. Petitioner was also denied Equal protection of the law as well as being denied a fair plea agreement hearing by being threatned and coerced to plead guilty to a charge that i,am actually innocent of,. The new discovered evidence if viewed in light most favorable

to the petitioner would undoubtfully exonerate the petitioner of the charges that he is now serving a natural life sentence for.

CONTINUING FACTS

CLEAR NAD CONVINCING EVIDENCE

Your petitioner submits a sworn affidavit under the penalty of purjury and introduced as newly discovered evidence, "Evidence that if viewed in light most favorable to the eptitioner would undoubtfully exonerate him of the charge he is now unlawfully serving a natural life sentence without the possibility of parole for.

On the 2/14/06 Petitioner filed his appeal,s Brief to the Mississippi Supreme Court. Petitioner discovered evidence that should exonerate him of the charge of murder.

On the 1/3/2007 ppetitioner filed a motion to the Misissippi Supreme Court requesting premission to amend his appeals brief so that he could introduce hte sworn affidavit as evidence in support of his claim in his brief the affidvait was sworn to and signed on the 11/28/2006 (See copy of attached exhabit), the motion to amend was filed pursuant to rule (15)(d) Civil rules of appellate procedure Petitioner used in his motion to amend authorities in support of his attempt to introduce his newly discovered evidence. Petitioner could not have obtained this evidence no sooner than he did. Because there was no way that petitioner could contact the man who willingly confessed to the murder that petitioner Johnson is presently charged with.

The affidavit speaks for itself, during the pre-trial proceedings i kepted on repeatedly telling my Court appointed Attorney i was in fact innonence, and did not know anything about the murder that i had been charge with, "BUT" i was repeatedly threatened and told that i was going to get the death penalty if i did not confess. My family members was threatened and i was told that members of my family would be locked up and sent to prison and that i would die by Lethel injection if i did not confess.

The law clearly states in U.S. V. Sacerio Supra the Court held as followed:

The goverment must prove that the defendant were guilty beyond a reasonable doubt not merely that they could have been guilty. (See United States V. Littrell 574 F. 2d 828,832 (5th cir. 1978), reviewing the evidence and the inference there from, in the light most favorable to support the verdict, We cannot say that no innonence inference remain. United State V. Gutirrez, 559 F. 2d 1278, 1281 N.5 (5th cir.1977). Although some of the circumstances are suspicious, mere suspicion cannot support a verdict of guilty (See United States V. Jackson, 700 F. 2d 181,185 (5th cir.) cert denied, 464 U.S. 842,104 S. CT. 139 78 L. ed. 2d 132 (1983).

United States V. Palacios, 566 F. 2d 1359,1365 (5th cir. 1977): Clearly the Circuit Court of Marshall County failed to meet the reasonable doubt standard in petitioner,s first post-conviction pleading thus allowing the conviction and sentence to stand under a much lessar standard of proof.

This Court should review the newly discovered evidence in light mosr favorable to the petitioner, and upon a factual determination of hte merits out-lined in this appeal,s brief and grant relief requested and remand the case back to the lower Court for an evidentiary hearing and in the alternative grant a new trial.

STATEMENT OF THE CASE

Petitioner Sammie Lee Johnson, was indicted on or about the 4/22/2002 along with two other co-defendents, on a multi count indictment for the crime of capitol Murder. In count #1 under Miss. code annotated §97-3-19(2)(d), and in count #2 and count #3" for accessory after the fact. under Mississippi code annotated §97-1-5. Petitioner entered a plea of guilty to the charge of capitol murder on or about..... 8/19/2002 Unknowingly, Unintelligently and Involuntarily. Petitioner was sentenced to serve a term of life without the possibility of parole in violation of §97-3-19(2)(d) of the Miss. code ann.(1972). in cause no. MK-2002-132.

STANDARD OF REVIEW

In reviewing a trial Court,s decision to deny a motion for post-conviction relief, The standard of review is clear "The trial Court decision was clearly erroneous Kirksey V. State 728 so 2d 565, 567 (Miss. 1999). In the instent case well settled law demonstrates that the trial court imopsed a three year time bar under §99-39-5(2), of the mississippi code when no such bar is applicable to a fundamental unconstitutional illegal sentence claim. Ivy V. State 731 so 2d 601 (Miss. 1999) Allen V. State 440 so 2d 544, (Miss, 1983) Steveson V. State, 674 so 2d 501 (Miss. 1996).

SUMMARY OF THE ARGUMENT

Petitioner Johnson submit,s that the Supreme Court Justices as well as the trial Court,s Judge erred in denying petitioner,s motion for post-conviction collateral relief motion to vacate and set aside sentences and conviction,. Where such conviction and sentence was entered by a plea of guilty, The said sentence is illegal as well as the conviction reason (1) Because the sworn affidavit should exonerate the petitioner of his current conviction and sentence. (and) (2). Because petitioner,s Court appointed trial counsel Honorable Kent Smith stood by as a perfunctionary stand by while allowing petitioner to pled guilty to the charges on a defective indictment and to pled guilty to an illegal SENTENCE AND CONVICTION a sentence of natural life, without the possibility of parole absent a recommendation by an empanneled jury.
also the lower Court Judge erred in accepting petitioner,s plea of guilty without first determining whether there was a factual basis for his plea. Contrary to rule 3.03(2) of the uniform Ct. Court practice and Borkin V. Alabama, 395 U.S. 238 (1996).

Petitioner Johnson was also denied effective assistance of trial counsel before and during the guilty plea proceedings, where trial counsel induced petitioner into pleading guilty based upon threats and coercement and misrepersentetion of the law and the States,s evidence against him. petitioner has been sentenced to an illegal sentence and the trial Court was therefore incorrect in dismissing such claims absent a factual determination on the merits alleged in his application.

and on the basis of the time bar. Ivy V. State, 731 so 2d 601 (Miss.1991), Allen V. State, 440 so 2d 544.

ARGUMENT

ISSUE ONE

Petitioner,s claims are not procedurally Barred. "Mississippi code annotated §99-39-21(6) requires petitioner to allege in his motion such facts as are necessary to demontsrate that his claims are not rpocedurally barred under that section, Petitioner states that his conviction and sentence is otherwise subject to collateral attack where trial Cuort and the state of mississippi during the criminal proceeding violated petitioner,s constitutional rights under the (5th),(6th), (8th) and (14th) amendment to the United States constitution and under hte constitution of the state of mississippi.

Petitioner,s claims are not barred for the following reasons post-conviction are for the purpose of bringing to the trial Courts attention facts not known at the time of judgment Smith V. States, 477 so 2d 191,195 (Mis.1985), see also Miss. code annoteted section §99-39-5 Petitioner,s claims are based upon facts not known to the trial Court and not rpesented in the records. (The Newly Dsicovered evidence), The sworn affidavit is not a part of the trial Courts-records as well as the other claims accordingly these claims were not capable of determination at the time of petitioner,s conviction. petitioner states that the claims presented are properly litigated via post- conviction proceedings.

Read V. State, so 2d (Miss. 1983), Where tyhese claims have never been argued or presented to any Court on the basis of the federal constitution, Additionally, these claims are claims which must be heard in the intrest of justice and pursuant to the inherent powers of this Court. In the words of chief Justice Rwhnquist, it would be patently false to say that our Habeas Corpus Jurispondence cast a blind eye toward innonence. This same statement holds true for this states Supreme Court: To say however that the Court has abandon procedural constraints altogether, is to make quite different assertion, for even wrongly convicted or sentenced must assert their innonence through the proper technical channels, at times the Supreme Court has appeared to elevitate form over substance, Barring defendants whose procedural defaults were minor.

Or even inadvertent from aserting apperently meritorious constitutional claims. (Fn. 2.) Faced with a simialr situation, however the Court of appeals for the fourth Circuit of the United state V. Maybeck, (Fn 3) Rejected such bar. The Maybeck case presented the Court with the question of whether a non Capitol federal defendent, having procedurally defaulted by failig to raise a challenge to the sentencing at the sentencing hearig or through direct appeal. Might nevertheless assert a claim in a collateral proceeding, even without showing cause for default or rpejudice flowing from the aleged error. (Fn. 4) The Court unanimously held that although the appeal was governed by the Brady Rule, (Fn.5), The defendant could properly assert his claim under the actual inonence exception(Fn.6), To hte cause and prejuudice standard, effectively excusing the defendent,s default.
CARVED IN THE SAND: ACTUAL INNONENCE IN THE UNITED STATES V. MAYBECK, 73 N.C.L. rev. 2388 petitioner submits this to the Court that he is actually innonence of his conviction and sentence and has a constitutional right to be free from an illegal conviction and sentence.
The Mississippi Supreme Court has held that procedural bars will not pervent consideration of issues on the merits, where errora at trial affected fundamental constitutional rights Gallon V. State, 469 so 2d 2247,2248 (Miss. 1985) Citing Brook V. State 46 so. 2d 97 (Miss. 1950); The claims raised in this motion implicates fundamental rights despite the fact that three years has elapsed with which it would be normally proper to file this his motion. The cases of Grubbs V. State, 584 so 2d 786,789 (Miss.1991). Smith V. State, 477 so 2d 191,195-196 (Miss.1995) And Luckett V. State, 482 so 2d 428,430 (Miss.1991). permits this Court to address the imposition of an unlawful sentence as it were plain error involving a fundamental constitutional right not withstanding a procedural bar. The cause of GRUBB,LUCKETT AND SMITH supra means that even though an imposed sentence is otherwise barred an unenforceable sentence is envertheless plain error capable of being addressed Steverson V. State 674 so 2d 501,503 (Miss.) coupled with the Supreme Court decision of ..... Lanier V. State, 635 so 2d 813,821 (Miss.1994) and Patterson V. State 660.669 (Miss.1995). case law requires thaat the apprent bar be disregarded in Steverson. The Mississippi Supreme stated in it,s conclusion however this Court envertheless finds that steverson can

not be barred from challenging a sentence that we find being unenforceable from the very beginning. Contracts contrary to public polocy are unenforceable as not being authorized by law Hertz commercial leasing V. Morrison 567 so 2d 834 (Miss. 1995).

This Court is required to hear evidence on eptitioner,s claims of illegal sentence for his conviction for Capitol Murder, an illegal sentence is not subject to applicable statute of limitation §99-39-5(2) see Weaver v. State 785 so 2d 1085, errors affecting fundamental constitutional rights as the right to a elgal sentence may be excepted from procedural bars which would otherwise pervent their consideration Luckett V. State, 582 so 2d 428,430 (Miss. 1991). In Ivy V. State 731 so 2d 601,602 (Miss. 1998) Ivy succiently states the rule as to petitions regarding illegal sentencing, although the petitioner filed his petition after the applicable statute of limitation had expired. Because of the negligent acts of the Circuit Clerk of Marshall County. Petitiona alleging an illegal sentence are not subject to the time bars where there is a question that the party,s fundamental right to be free from an illegal sentence has been found to be fundamental. id. Ivy V. State 731 so 2d 601(1991). The Mississippi Supreme Court re-inerated it,s forma ruling that errors affecting fundamental rights, such as the right to a legal sentence may be excepted from procedural bars which would otherwise pervent their consideration.

Ivy 731.so 2d at 603 (Citing Luckett V. State 582 so 2d 428,430(1991). Petitioner states that his sentence and conviction is otherwise subject to collateral attack here the trial Court and the State of Mississippi, during the guilty plea and sentencing rpoceeding violated petitioner,s Constitutional rights under the (5th),(6th) (8th) and (14th) Aemndment to the United States Constitution, and under the constitution of the State of Mississippi.

and by the state Courts actions of giving the petitioner an invalid sentence he was not qualified to receive. the sentence of natural Life imprisonment without the possibility of parole on a guilty plea. for the crime of Capitol Murder in the Circuit Court of Marshall County Mississippi in cause no. MK-2002-132.

Petitioner submits that the improper inducement and a illegal sentence with petitioner being actually innonence of the crime the sentence and conviction should unlease any procedural bars,

that otherwise may be raised U.S. V. Maybeck, 23 F 3d 888 The petitioner respectfully request that this Court would adopt the language of justic Franforter in Brown V. Allen, 344 U.S. 398. 73 S. Ct. 397 414 (1953) and not look the other way ignoring this essential truth by raising a procedural bar. The meritorious claims are not stiffled by discriminating generalities. The complexities of our federlism and the working of a scheme of goverment, involving the interplay of two(2) goverments,one of which is subject to limitation enforceable "But" The other are not to be escaped by rigid rules, Which by avoiding some abuses generate others.

petitioner has a constitutional right to have his claims heard on the merits due to the illegal sentence of life imprisonment without the possibility of parole under state statute §97-3-19(2)(d), The sentence is illegal, and contrary to public polocy unauthorized by the law and unenforceable in violation of the Mississippi Statute §97-3-19(2)(d).

THE NEXT TWO ISSUES ARE ADDRESSED TOGETHER

ISSUE TWO AND THREE

Whether petitioner was denied fundamental Due-Process of law where petitioner,s trial counsel failed to object to petitioenr being sentenced to an illegal sentence, and where the trial Court failed to address the issues of petitioner,s claims of ineffective assistance of counsel where petitioner trial counsel misinformed petitioner of the eliments of the charge that was alleged against him. By threatening petitioner with the Death Penalty if petitioner did not pled guilty. and allowing petitioner to pled guilty on a defective indictment. which caused petitioner to be denied a fair trial and or plea agreement hearing which was afforded to the petitioner under the (5th)(6th),(8th) and the (14th) Amendment to the United States Constitution, Which guarantees any person in the United States to be properly indicted for a crime, Capitol or Non Capitol a fair and inpartial trial and pled agreement hearing.

ISSSUIE THREEE #3

whether petitioner trial counsel was ineffective during and before the plea agreement hearing, and was also ineffective when he allowed petitioner to be sentenced on a defective indictment. Counsel for petitioner was ineffective in his failure to inform petitioner of his constitutional and fundamental rights of the United States constitution and the constitution of the State of Mississippi before and during the plea agreement hearing.

The right to competent assistance of counsel is fundamental to a fair trial or fair plea. Thr crucial role of counsel has been described by the United State Supreme Court.

If charged with a crime (The layman) is incapable, generally of determining for himself whether the indictment is good or bad. he is unfamilier with the rules of evidence, left without the aid of counsel he may be put on trial without a rpoper charge, and convicted upon improper evidence, or evidence irrelevent to the issue or otherwise admissable, He lacks both the skill and knowledge adequate to prepair his defense, even though he have a perfect one. he requires the guiding hand of counsel at every step in hte proceeding against him Powell V. Alabama, 287 U.S. 45,68,69 (1932).

Johnson challenge to the ineffectiveness of his trial counsel muust be ajudged under the two part test set forth in Strickland V.WA-shington 466 U.S. 668 (1954). In strickland The United State Supreme Court set forth a two part test which a petitioner must establish to prove ineffective assistance of counsel, and (2) Counsel defic-ient performance so prejudice the defense that there is reasonable probablity that but for counsel unprofessional errors the results of the proceedings would have been different Id at 687-88 694. The second prejudice requirement is based on the reasoning that error by counsel even if unprofessionaliy unreasonable, does not warrent setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.

id at 691 with regard to guilty pleas, The first prong of the Strickland test is a Re-statement of the standard of attorney com-petence set forth in Tollet V. Henderson, 411 U.S. 256 (1973), and Mcmann V. Richardson 39 U.S. 759 (1970). where as here (Petitioner)

is repersented by counsel during the plea process and enters his plea soly upon the advice of counsel, The voluntariness of the plea depends on whether counsel,s advice was within the range of competen ce demanded of attorney,s in criminal cases Hill V. Lockhart. 474 U.S. 52,56 (1988). in the guilty plea contex prejudice occures if there is a reasonable probablity that "But" for counsel,s errors the petitioner would not have pled guilty and would have insisted on going to trial. United States V. Smith, 844 F. 2d 203,209 (5th cir. 1988): This Court,s past ruling indicated the focus of the prejudice inquiry is on the plea proceeding itself. And the prejudice inquiry should rightfully have been limited to a prediction of the plea process only Leatherwood V State, 539 so 2d 1378 (Miss. 1989).
It is not enought for the state to argue that the evidence against petitioner was so strong a guilty verdict was assured, this argument has been addressed by the Court where it said, the danger of the state,s argument is that it compels a holding a defendent can never be prejudice in entering his guilty plea upon erroneous advice of counsel so long as there is overwhelming evidence of guilth, and no reasonable likelyhood of aquittal. as this case pointedly demonstrates however the inquiry is not always whether the defendent voluntarily and intelligently forewent the quantum of sacred constitutuonal rights to which he was entitled in the absence of guilty plea the Courts then concluded, (A)) prejudice test which focuses on the outcome of the plea process itself,i without regard to the estimated outcome of the trial on guilt.. repersents the only logical extention of pre-Strickland sixth amendment of jurisprudence id at 1387 in turni to the first prong of the Strickland test. it is clear petitioner did not receive advice from counsel that fell within the range of competence of attorney in criminal cases. Counsel for petitioner never advised him that he could get life without parole if he pled guilty to the crime of Capitol Murder.
Neither did counsel for petitioner object to petitioner being sentenced according to a faulty indictment, Counsel for petitioner never did explain the eliments of the crime that was alleged against him. This Court has dealt with a number of cases where criminals defendants did not go to trial. ebcause of an attorney,s incorrect advice in Leatherwood the defendant was advised to and did plead guilty to Capitol Murder primary reliance on counsel,s advice.

that the guilty plea would prohabit the state from presenting any evidence concerning the details of the murder during the sentencing hearing id. at 1381,1382. This advice was inaccurate per Coleman V. State 378 so 2d 640 (1979) Therefore counsel,s performance in this regard was adjudged to have been deficient Leatherwood 539 so 2d at 1383 Another criminal defendant plead guilty to murder after he was aquitted of the death penalty in his first Capitol murder trial Odom V. State, 483 so 2d 343 (Miss.1986) in that case a jury convicted Odom of capitol murder and sentenced him to life imprisonment.

The trial Court granted Odom a new trial but he instead entered a guilty plea to simple murder because his attorney advised him he faced the death penalty again upon re-trial. the Court remanded the case for a full hearing on the issue of whether Odom had been incorrectly advised he could receive the death penalty upon re-trial. id at 344 it should be noted that Odom,s case came ebfore the Court again in Odom V, State 498 so 2d (Miss. 1986). In that case the primary issue was the timing of the case upon which Odom relied, and whether it applied to his case id at 333.

Counsel performance was held to be lacking in Dunn V. Reed, 309 so 2d 516 (Miss. 1975): in that case the defendant plead guilty to manslaughter and two counts of Arson. receiving sentences of twenty three (23) and three (3) tears respectively Dunn claimed his attorney incorrectly advised him he could be given the death penalty for the charges despite the recent decision in Furman V. Georgia, 408 U.S. 238 (1972): Dunnn claimed that if he had been advised that he did not face the death penalty he would not have entered the plea. This Court declared these allegations, if true were sufficient to require the issurance of a writ of coram nobis and the case was remanded for an evidentiary hearing Dunn. 309 so 2d at 517,518.

Counsel,s performance was also held to be deficient in Nelson V. State 626 so 2d 121 (Miss.1993). in that case the Court remanded for an evidentiary hearing where the defendant claimed he plead guilty ebcause he feared the imposition of a $10.000 dollar fine. which the statute did not authorize, But the trial Court advised him he could receive. The Court held:(Nelson was lead to believe that the potential punishment was more than it was.

We reconize that it is unlikely that the prospect of a substantial fine plays much of a role in the decision to enter a guilty plea. when lengthy incarceration is also in the offering nevertheless, Nelson states under oath that had he known that there was no prospect of a fine he would not have entered the plea of guilty. there was no contrary evidence Nelson apparently accepted a plea bargin based on inaccurate information, id at 126, This is the same point in this case at bar.

The crux of all the before mentioned cited cases is that an attorney,s performance is deficient when he advises his client that the client faces a greater penalty than the law allows. each of the defendants in Leatherwood Odom Dunn and Nelson accepted plea bargins because they feared a greater penalty than the law allowed this is the exact same circumstance in Petitioner Johnson,s case. where the petitioner feared that he would receive the death penalty if he had gone to trial and been convicted.

Johnson.s Court appointed attorney on the charge of murder was honorable KENT SMITH, and he told me that if i did not plead guilty that it was certain that i would get the death penalty if convicted being ignorant of the law I was afread of being sentenced to death.

This is the only reason that i entered a plea of guilty at the erroneous advice of my Court appointed attorney, After i had plead guilty i was sentenced to a term of life imprisonment without the possibility of parole. in cause no; MK-2000-132.

My Court appointed never did inform me that if i plead guilty i would get sentenced to a natural life sentence. nor did he make a motion to correct his misinformation "But" left petitioner to make an uninformed decision between accepting a plea bargin or going to trial and facing the death penalty, This was a chance the petitioner was not willing to take.

Failing in this regard fell short of an objective standard of attorney competence, Petitioner Johnson has therefore established the first prong of the Strickland test for ineffective assistance of counsel.

Johnson must prove prejudice in order to be successful in the guilty plea contex, If there is a reasonable probablity that but for counsel,s errors the petitioner would not have plead guilty and would have insisted on going to trial.

United States V. Smith 844 F 2d at 209 Leatherwood 539 so 2d at 1366 it is very clear from the minutes of the plea agreement hearing that but for the erroneous advice and lack of proper advice by petitioner,s trial counsel, Petitioner difinately would not have plead guilty.

I Sammie Lee Johnson was afread of being convicted and sentenced to the death penalty. if my attorney had properly advised me of the correct sentence i could have received absent of the jury affixing the sentence, I would have been in a stronger position and would have either gone to trial or demanded a better plea bargin (R.E. 14 and 15):

Whether Johnson may have done worse by going to trial does not change the outcome of his current position, He is not required to prove that the outcome of a trial would have been different or better than the plea bargin he accepted. He is only required to prove but for the erroneous advice of his counsel he would have not plead guilty.

Johnson will also show counsel,s deficient performance concerning the defective indictment, Petitioner was illegally sentenced as a result of.. Petitioner states that he was indicted as an accessory after the fact to murder for Hire. in violation of section §97-3-19 (2)(d). Petitioner entered into a plea of guilty for capitol murder the trial Judge then sentenced him to life imprisonment, without the possibility of parole. however under the amended statute of §97-3-21 only a jury could impose a sentence of death or life in prison, without parole, the statute restricts the trial judge sentencing authority to life imprisonment as the punishment for a plea of guilty. (Trial without Jury). for capitol Murder, therefore trial judge imposition of a life sentence without parole is erroneous

During plea proceedings, the trial judge did not require the prosecutor to make a showing as to what evidence or facts the state could prove to show that a murder had been comitted and that petitioner was an accessory to or after the fact. uniform rule of Circuit Court practice rule 3.03 (2) States that before the trial Court may accept a plea for guilty the Court must determin that there is a factual basis for the plea. The record reflects that the Court did not make no finding of facts in this case before accepting petitioner,s plea of guilty..

prior to hte trial my state appointed attorney honorable KENT SMITH. told me that i should plead guilty to save (Shamella) an alledged co-defendent, so that i could avoid gettig the death penalty. because the states witness one Darryl Swanier, was in fact gong to testify for the state that i hired him to commit the murder for me. for &3.00.00 dollars and some cocain based upon that information i entered my involuntary plea. i learned a long time later that this was not true, SEE SUPPORTING SWORN AFFIDAVIT OF DARRYL SWANIER. had i known that this information that my Court appointed attorney informed me of Was not true I would have definately insisted on going to trial. because this was the only supposed evidence that the state had against me. a fabricated story concocked by the prosecutor and my Court appointed attorney, a statement by a previously convicted felon. Trial counsel misrepersentation and lieing about such fabricated facts constitutes deficient performance..

Trial counsel deficient performance was prejudice and deprived petitioner of the choice of trial by jury and induced him into pleading guilty.

Further trial counsel told petitioner to enter into an open plea absent a recommendation by the state saying that the judge may be lenient on me, and that the most that the judge could give me without a jury trial was a life sentence with parole. But contrary to what i was told the judge gave me a life sentence without the possibility of parole.

Johnson has meet the burden of proof on this question and has therefore satisfied the second prong of the Strickland test. The Court should find that Johnson received ineffective assistance of counsel and that the sentence of life imprisonment in cause no MK - 20002-132 be vacated or that the petitioner should be allowed to withdraw his guilty plea and receive a new trial in the Circuit Court of Marshall County.

ISSUE #4

Whether the trial Judge made fundamental error when he allowed petitioner to be repersented by only one defense attorney .

Petitioner states that it has been established by the U.S Supreme Court, That any defendant indicted for a crime of capitol Murder should be repersented by two defense attorneys for proper reper-

to obtain adequate case law to support this claim and as of this date i havent been able to find the case law i need the legal assistance technician here at parchman keep telling me that there is no case law available and that i should not keep requesting case law that does noe exists.

Petitioner further states that he was denied fundamental Due-= process of law where the trial judge premitted petitioner to enter a plea of guilty to the crime of capitol murder, Without convening a jury to determin the sentence where such action is required by law. The sentence imposed of life without the possibility of parole is therefore an illegal sentence under Mississippi law, where the trial Court failed to order a emntal evaluation of the defendant or to convene a jury to determin the sentence in this capitol murder case.

The trial Court allowed Johnson to enter a plea of guilty to a capitol crime and imposed a sentence of life without the possibility of parole, without convening a jury to consider the sentence which would be imposed.Dickerson V. State, 2002 Miss. 804,32 so 2d 881 (1947). "We do not say that the trial judge may not accept a plea of guilty in a capitol case "But if he dose he must see to it, first that the plea is entirely voluntary and that the defendant fully realizes and is competent to know the consequences of such plea. and second a competent and impartial jury must be impanneled and the material circumstances of the crime must be placed before the jurywith such fulness that the jury will be well advised on the issue whether they should adjudge the death sentence.

The law is clear that a sentence of death, life with parole, or life without parole may be imposed upon conviction of acpitol murder. shall be sentenced (A) to death (B) To imprisonment for life in the state penitentiary without parole, or (C) to imprisonment for life in the state epnitentiary with parole eligibility as provided in section 47-7-3 (1)(F).

A sentence of life without parole, just as a death sentence is within the sole province of a jury Irvin V State 228 so 2d 266,269 (Miss. 1969). In Yates V. State, 175 so 2d 617,253 (Miss 1965) The Court held that "The assignment that the Court should have sentenced the appellant to life rather than permitting the jury to fix ,

the punishment was answered in the case of Yates Supra, headnote #3 a reading of that part of that opinion will disclose that due-process governing said question.

The trial Court properly Johnson plea of guilty but arbitrarily imposed a sentence of life without parole. While the record discloses that the trial Court in conclusion with defense counsel and prosecution,, attemped to have defendant Johnson waive such a mandatory requirement,, The law does not allow such a waiver.

It is clear that Johnson was denied Due-process of law in sentencing and that such a claim is not and cannot be procedurally barred, where trial Court exceeded it,s authority.....

By setting as a sentencing body in a capitol murder prosecution the trial Court in violation of Miss. code ann. §1-3-4, permitted the plea of guilty to capitol murder to be entered upon information the statute is clear that such waiver connot suffice where the crime is heinous. A capitol offense must be heard by the grand jury and an indictment duly returned before prosecution may proceed.

ISSUE NO #5

Petitioner,s guilty plea was not knowing, intelligent nor voluntary

It flows from the before mentioned showing of ineffective assistance of counsel, That Johnson plea was not knowing, Intelligent and voluntary, as stated previously, Johnson entered a plea of guilty precisely because of the erroneous advice of his trial counsel that he would receive the death penalty, if he had gone to trial Johnson then threatened with the death penalty, and being told by trial counsel that the man who actually admitted to The murder was going to testify for the state that petitioner had hired him to commit Murder for money and narcotics, Petitioner could not have made a knowing, intelligent, and voluntary choice, regarding whether to plead guilty. The result is dictated by this Court,s prior decision in Leatherwood

Counsel,s performance in advising the plea fell below the range of competent demanded of attorney,s in criminal cases. and amounts therefore to deficient performance that compromised the intergrity of the plea process. rendering the plea involuntary Leatherwood 539 so 2d at 1387 see also Kennedy V. Maggio, 725 F. 2d 269, 23 (5th cir 1984).

A plea entered in reliance on the defendants attorney,s patently erroneous statement of the law in erlation to the facts, cannot be voluntary due to attorney,s ineffectiveness, see also Vittito V. State 556 so 2d F. 1062 (Miss. 1990). because Vittito was ignorant of the mandatory minimum sentence for the charge to which he was pleading and and stated that he would not, had he known this information, it cannot be said that his plea was voluntary and intelligently made. This being the case Vittito may of right withdraw his plea of guilty and enter a plea of not guilty. and be givem a new trial.

Likewise Johnson plea was not entered knowingly, intelligently and voluntarily, mnd his motion to vacate should be granted. Counsel also failed to advise petitioner that the guilty plea could be used against him for habitual enhancement. Counsel served as a perfunctionary stand by and allowed petitioner to unintelligently pled guilty to an illegal sentence.

Petitioner is not trained in the science of the law therefore this petition may not be so well pleadad or artfully drafted Logan V. State 2000, 71 so 2d 970.

Petitioner respectfully request that this Court view petitioner,s claim of illegal sentence and not knowing, intelligent and involuntary guilty plea on the merits of this his pleading. petitioner states that he is actually innocent of the charge for which he is serving time for ebcause of the ineffectivenesss of his trial counsel.

Johnson respectfully request that this Court view this his appeal brief and claim of illegal sentence according to the facts stated in this his brief and with the guidance of all the erlevent authorities presented herein and to reverse the capitol murder, conviction in cause no. MK-2002-132 and also vacate the snetence or in the alternative remand to the Circuit Court for an evidentiary hearing and a new trial.

THE COMULATIVE EFFECTS OF THE CLAIMS

Petitioer asserts that even in the event this honorable Court holds that each of the aforesaid claims faised, standing alone. does not constitute cause to grant relief, the comulative effects of each act deprived petitioner Johnson.

of his constitutional right to a fair trial, and plea as guaranteed to him underthe (6th) and (14th) Amendment to the United States constitution and artical 3 and section 14 and our Mississippi constitution Rainer V. State 473 so 2d 172,174 (Miss.1985), cited with approval in Fisher V. State 481 so 2d 283 (Miss.1985). it is one of the crowning glories of our law that, no matter how guilty one may be, no matter how strocious his crime, nor how certain his doom when brought to trial anywhere he shall nevertheless have the same fair and impartial trial accorded to the most innocent defendent those safeguards crystailized into the constitution and law of the land., as the results of centries of exprience, must be by the Court,s sacredly upheld as well as in the case of the guiltiest as of the most innocent defendant answering at hte bar of his country, and it ought to be a reflection always potent in the public mind, that where the crime is atrocious condemnation is sure, when all these safeguards are accorded the defendant, and therefore the more atrocious the crime, The less need is there for any infringment of these safeguards Tennison V State 79 Miss. 708,713 31 so 421,422 (1802) cited and quoted with approval in Johnson V. State supra.

The importance to which the honcrable Mississippi Supreme Court has jealously guarded an accused right to a fair trial and fair judicial process it further Reflected in Cruthird V. State so 2d 154 (Miss. 1941).

The storm of opposition brute force and hate which is sweeping across a large part of the universe has leveled to the ground the temple of justic in many countries and even in our own it has shaken and broken in places, yet we fervently hope that when the storm shall have spent it,s fury there will remain undisputed as one of hte fundamental pillers of that temple, the right of all men. whether rich or poor strong or weak guilty or innocent. to a fair trial, orderly and impartial trial in the Court,s of the land id at 146.

The case sub judice falls within the permeters of that described in Scarbrough V. State 3 so 2d 748 (Miss. 1948)..

This is not one of those cases for the application of the rule that a conviction will be affirmed unless it appears that another jury could reach a different verdict upon a proper trial then that returned on the forma one,

But rather it is a case where the constitutional right of an accused to a fair and impartial trial has been violated. where this is done, The defendant is entitled to another trial regardless to the fact that the evidence on the first trial have shown him to be guilty beyond every reasonable doubt. The law guarantees this to one accused of a crime and untill he has had a fair and impartial trial within the meaning of the constitution and the laws of the state he is not to be deprived of his liberty by a sentence in the state penitentiary, id at 750.

Since the right to a fair trial is fundamental and essential right under form of our goverment Johnson V. State, There shall be no procedural bar to these assignments of errors, Which collectively denied Sammie Lee Johnson his constitutional fundamental right to a fair trial. and or plea being raised for the first time in a post-conviction setting Gallion V. State 469 so 2d 1247 (Miss.1985),

Petitioner Johnson did not receive a fair trial in this case and for the reasons, outlined above he was unable to receive a fair trial and or plea. "The defense attorney and the trial Court acted incorrectly in allowing petitioner Johnson to plead guilty to an illegal sentence. This Court should grant this appeal and direct that the sentence and conviction be vacated and set aside or in the alternative a new trial be granted.

CONCLUSION

Petitioner Johnson submits that based on all the relevant authorities cited herein and in support of his brief, That this Court should vacate the conviction and sentence and set them both aside as being illegal and beyond the scope of authority to uphold by the Courts. petitioner further states that the circuit Court erred in dismissing petitioner,s claims soly on the time bar when §99-39-5(2) as well as constitutionally settle law excuses such claims as an illegal sentence from procedural bars.

Respectfully Submitted

Sammie Lee Johnson

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY, THat i Sammie L. Johnson have cause to be mailed through the internal mailing system a true and correct copy of the foregoing appellant,s brief to the mississippi Supreme court to the following persons.

Hon. Betty Sephton
Supreme Court Clerk
P.O.Box 249
Jackson Ms 39205-0249

Hon. Jim Hood
Attorney General
P.O. Box 220
Jackson, Ms. 39205

This the 3 day of August 09.

Sammie Johnson

Sammie Lee. Johnson# 58463
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