

**COPY**

**IN THE SUPREME COURT OF MISSISSIPPI**

2009-CP-977

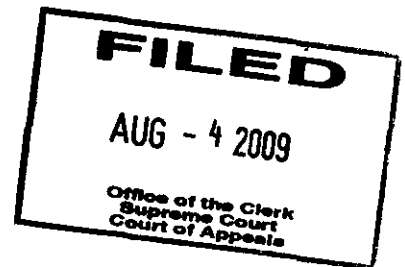
**KURT D. MIDDLETON**

**V**

**STATE OF MISSISSIPPI**

**NO. 2004-210-CD**

**NO. C.V.2009-70-CD**



**APPEAL FROM CIRCUIT COURT OF DE SOTO CTY, MISSISSIPPI**

**BRIEF FOR APPELLANT**

**Kurt D. Middleton  
Pro Se Appellant  
CMCF/C-1/A/19  
P.O. Box 88550  
Pearl, MS 39208**

**Oral Argument not requested**

**CERTIFICATE OF INTERESTED PERSONS**

**Kurt D. Middleton**

**V.**

**State of Mississippi**

**No. 2004-210-CD**

**No. C.V.2009-70-CD**

The Petitioner, Pro-Se, Certifies that the following listed persons have interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

**Kurt D. Middleton,  
Appellant**

**Honorable Jim Hood  
Attorney General, State of Mississippi**

**Honorable Dale K. Thompson  
District Attorney, De Soto County, Mississippi**



**Kurt D. Middleton  
Pro-Se, Petitioner**

## **TABLE OF CONTENTS**

<b>CERTIFICATE OF INTERESTED PERSONS.....</b>	<b>i</b>
<b>TABLE OF CONTENTS.....</b>	<b>ii</b>
<b>TABLE OF AUTHORITIES.....</b>	<b>iii</b>
<b>STATEMENT OF ISSUES.....</b>	<b>1</b>
<b>STATEMENT OF THE CASE.....</b>	<b>1</b>
<b>SUMMARY OF THE ARGUMENT.....</b>	<b>2</b>
<b>ARGUMENT.....</b>	<b>3-11</b>
<b>CERTIFICATE OF SERVICE.....</b>	<b>12</b>

## **TABLE OF AUTHORITIES**

### **CONSTITUTIONS**

<b>United States Constitution Amendment V.....</b>	<b>10</b>
<b>United States Constitution Amendment VI.....</b>	<b>11</b>
<b>United States Constitution Amendment XIV.....</b>	<b>11</b>
<b>Mississippi Constitution Article 3 22 (1890).....</b>	<b>10</b>

### **RULES**

<b>Mississippi Uniform Rules of Circuit &amp; County Court Practice 11.03.....</b>	<b>3</b>
--	----------

### **CODES**

<b>Mississippi Code ANN. Section 99-19-81.....</b>	<b>8,9</b>
--	------------

### **CASES**

<b>1. SIDNEY DON SEELY vs. STATE 451 So.2d 213; (Miss.1984).....</b>	<b>3,8.</b>
<b>2. PHILLIPS vs. STATE 421 So.2d476 (MISS. 1982).....</b>	<b>8</b>
<b>3. PACE vs. STATE 407 So.2d530 (MISS. 1981).....</b>	<b>9</b>
<b>.4.MALONE vs. STATE 406 So.2d37 (MISS. 1981).....</b>	<b>9</b>
<b>5.(MISS. 198 BAKER vs. STATE 394 So.2d1376 1).....</b>	<b>9</b>
<b>6. HEWLETT vs. STATE 607 So.2d1097 (MISS. 1992).....</b>	<b>9</b>
<b>7. PITTMAN vs. STATE 570 So.2d1205 (MISS. 1990).....</b>	<b>9</b>
<b>8. COX (a.k.a. RANDY E.WHITE) vs. STATE 586 So.2d761 (MISS. 1991).....</b>	<b>10</b>
<b>9. L.ED.2d435(U APPRENDI JR. vs. N.J. 530 U.S.466;120S.CT.2348;147 S 2000).....</b>	<b>11</b>

### **STATEMENT OF ISSUES**

1. The court erred in not conducting a Bifurcated Trial to establish Petitioner as a Habitual Criminal.
2. The court erred in not proving Beyond a Reasonable Doubt each element of the Habitual Offender Status.

### **STATEMENT OF THE CASE**

The Appellant, Kurt D. Middleton, Appeals his conviction as a Habitual Offender by the De Soto County Circuit Court of Possession of a Forged Instrument & a sentence of Three (3) years in the custody of the M.D.O.C, without the benefit of Parole, Supervision or Reduction of Sentence.

**PERTINENT FACTS WILL BE REFERRED TO IN ARGUMENT.**

### **SUMMARY OF ARGUMENT**

- 1.) An accused of the Habitual Statute has the Right to a separate hearing to prove beyond a Reasonable Doubt their guilt.
- 2.) The State bears the Burden of Proving each element of Habitual Status, the same as any criminal proceeding.

## **ARGUMENT**

### **I & II**

It is alleged by the petitioner that the trial court failed to afford him of the due process requirements and the constitutional right to the equal protection of the laws as the procedure was conducted without a proper bifurcated sentencing hearing. **SEELY vs.STATE 451 So.2d 213 (MISS. 1984)**. The Mississippi Supreme Court held “The State has the same burden of proof as to the Habitual Offender portion of indictment as it has to the principle charge. There appears to be some tendency to routinely allow the state to produce some documentation of prior convictions and for the trial court to perfunctorily find the defendant a habitual offender, then routinely pass out the sentence mandated by **SECTION 99-19-81**. We wish to leave no doubt that a bifurcated trial means a full two phase trial prior to any finding that this defendant in a Habitual Offender & subject to enhanced punishment.” **SEELY vs. STATE 451 So.2d 213**.

Pursuant to the **UNIFORM RULES OF CIRCUIT & COUNTY COURT PRACTICE RULE 11.03(3)** states “If the Defendant is convicted or enters a plea of guilty on the principle of charge, a hearing before the court without a jury will then be conducted on the previous convictions.” As in this case , no hearing was conducted.

**Q.** By submitting this petition, your asking to enter a plea of guilty to 1 of the indictment, uttering a forged instrument as a habitual offender under 99-19-81; is that correct?

**A.** (By the defendant -Middleton) Correct.

**By the Court:** One moment . Let me find...whose case is this?

**Ms. Wilson:** Mine.

**By the Court:** Do you know the day we amended him?

**Ms. Wilson:** I'm looking.

(Pause in Proceeding)

**Ms. Wilson:** No sir, I don't.

(Pause in Proceeding)

**By the Court:** 7-27 of 05.

All right, Regarding Mr. Middleton, if the State would give a brief statement as to what you'd be able to show at a trial of his case, if his case did in fact go to trial.

**Ms Wilson:** If the Court would indulge me for just one minute.

**By the Court:** Yes, Ma'am

**Ms. Wilson:** Oh, you did find where we amended him?

**By the Court:** Yes, Ma'am

**Ms. Wilson:** Okay, I'm sorry.

If this matter were to go to trial, the State would be prepared to prove, beyond a reasonable doubt with credible and admissible evidence, in Count 1, that between the dates of October 22<sup>nd</sup> and November 17<sup>th</sup>, 2003, this Defendant, Kurt Middleton, did



willfully, unlawfully and feloniously utter or publish as true a forged instrument in writing, to wit, one car title belonging to Barbara Rolling for one 1995 Hyundai vehicle with the seller of Evie Williams with the date of the sale for 11-14-2003; and that Kurt Middleton intended to defraud Evie Williams and/or Barbara Rolling of services or money; and that the forged instrument was capable of effecting a fraud; and that this Defendant had been previously convicted of burglary in Case No. 85CF1060 in the Circuit Court, Branch 6 in Dane County, Wisconsin, and sentenced on February 3<sup>rd</sup>, 1987, to serve a term of ten years with credit for six days in the Wisconsin state prison; and that Kurt Middleton has been previously convicted of burglary in Case No. 86CF1072 in the Circuit Court, Branch 6 in Dane County, Wisconsin, and sentenced on February 3<sup>rd</sup>, 1987, to serve a term of five years probation in the custody of the Wisconsin Department of Health and Social Services consecutive to the prison term imposed in 85CF1060 and 86CF747; thereby, making Mr. Middleton a habitual offender under 99-19-81.

More specifically, the facts would show that this victim, Ms. Williams, left her car for repair at a place where this Defendant worked. She came back, and her car was gone. It was later found that the car had been sold by the Defendant to a Barbara Rolling, and he was questioned after being given Miranda, and he indicated that he had in fact changed the title information for the owner on the title and then sold the car without the owner's permission.

All this did occur in De Soto County, therefore, within the jurisdiction of this Court.

And at this time, I would ask that the certified priors be made exhibits for the purposes of the plea and sentence.

**By the Court:** Any objection, Mr Travis?

**By Mr. Travis:** No, Your Honor.

**By the Court:** Any objection, Mr Middleton?

**By the Defendant Middleton:** I'm sorry, I didn't hear what she said.

**By the Court:** She asked that the prior convictions that have been submitted as exhibits to amend your indictment now be made part of this hearing to establish you as a habitual offender. Do you have any objection to that?

**By the Defendant Middleton:** No, sir.

**By the Court:** Mr. Travis, are you satisfied... Well, first, I'll note for the record that those exhibits which have already been made part of the Court file as part of the order amending the indictment will likewise be incorporated by reference into both this plea and sentencing of Mr. Middleton.

Mr. Travis, are you satisfied the District Attorney's office could present credible evidence necessary to meet the applicable burden to get this matter to a jury if this case did in fact go to trial, including proof of jurisdiction and venue?

**By Mr. Travis:** Yes, your Honor.

**By the Court:** Have you had ample time to investigate, prepare and discuss this matter with you client?

**By Mr. Travis:** Yes, your Honor.

**By the Court:** Are you likewise satisfied they could prove the underlying convictions which establish Mr. Middleton as a Section 99-19-81 habitual offender?

**By Mr. Travis:** Yes, your Honor.

**By the Court:** Have you had ample time to investigate, prepare and discuss this matter with your client?

**By Mr. Travis:** I have, Your Honor.

**Q.** Mr. Middleton, do you understand and recall the events which bring you before this Court today?

**A.** (By the Defendant Middleton) The events?

**Q.** The events that bring you before this Court today, do you understand and recall those events?

**A.** (By the Defendant Middleton) Yes, sir.

**Q.** Do you have any disagreements with anything Ms. Wilson says she can prove at your trial if your case went to trial?

**A.** (By the Defendant Middleton) No, sir.

**Q.** Do you admit you've been convicted of the underlying felonies which establish you as a 99-19-81 habitual offender?

**A.** (By the Defendant Middleton) Unfortunately, I do, sir.

In the Petitioners case the State did exactly what the **Mississippi Supreme Court** has condemned in **SEELY**. The Prosecution offered two exhibits which were certified copies of judgements of convictions and no other evidence of proof to support the fact that the petitioner had in fact been sentenced to two (2) separate terms of one (1) year or more in any state or Federal Penal Institution or that a bifurcated hearing was conducted.

**MISSISSIPPI CODE ANN. SECTION 99-19-81** has statutory elements which require proof beyond a reasonable doubt before the defendant may be found to be a habitual offender:

**MISSISSIPPI CODE ANN. SECTION 99-19-81** states..."sentenced to separate teams of one year or more in any state or federal penal institution..."The petitioner would submit that since he did not serve one year or more and he in fact had probation on one charge, the states evidence is wholly inadequate because they never researched further or looked at the evidence correctly. The judgement of conviction clearly states, "Probation ordered" and the second states " sentenced to Wisconsin State Prisons" , had the state held a bifurcated hearing set out by the holding in **PHILLIPS vs. STATE 421 So.2d 476 (MISS. 1982)**, where the court held at a hearing conducted by the trial court for the determination of a Defendants habitual offender status, the prosecution must show and the trial court must determine that the records of prior convictions are accurate, that they satisfy the statutory requirements and that the Defendant sought to be so sentenced is in fact the person who has been previously convicted of such offences.

See also **PACE vs. STATE 407 So.2d 530 (MISS. 1981); MALONE vs. STATE 406 So.2d37 (MISS. 1981); BAKER vs. STATE 394 So.2d 1376 (MISS. 1981).**

In **HEWLETT vs. STATE 607So.2d1097 (MISS. 1992)** at [HN 16] it states  
“At the hearing on whether or not a defendant is a habitual offender under **MISS. CODE ANN. SECTION 99-19-81(SUPP. 2008)**, the state bears the burden of proof beyond a reasonable doubt each element of habitual offender status.”

See also **PITTMAN vs. STATE 570 So.2D 1205, 1206 (MISS. 1990)**  
At no time did the Judge or District Attorney ask defendant any questions pertaining to his alleged habitual status. Petitioner was not told that a hearing was being conducted to determine if he was in fact habitual. No place in petitioners transcripts does it state that there was a bifurcated hearing.

In summary of the instant issue the petitioner would submit that the state has wholly failed to prove the habitual offender portion of the indictment with proof beyond a reasonable doubt and trial court erred in adjudging the petitioner as a habitual offender.

If in **MISS. CODE ANN. 99-19-81**, where it states “...one year or more in any state or federal penal institution ...” If it states this it should mean this. Why would it state that if it were not true? Since the petitioner has previously been place in jeopardy of the issue of enhanced offender status, the state should be prohibited from any attempts to retry the issues before the court.

**ELLIS vs. STATE 520 So.2d 495, 496 (MISS. 1985)** habitual offender sentencing hearing at the trial following the guilt phase constitutes being placed in jeopardy for purposes of the Constitutional Prohibition against being twice placed in jeopardy.

See **COX vs. STATE 586 So.2d 761 (MISS. 1988)** “State not permitted a second chance to prove the habitual offender status of a defendant where the habitual offender portion of the sentence had been vacated due to insufficiency of the evidence presented at trial”

See also **ARTICLE 3, SECTION 22 MISSISSIPPI CONSTITUTION OF 1890**. In **THOMAS C. ETHRIDGE, APPELLANT vs. STATE OF MISSISSIPPI 800 So.2d 1221 (MISS. APP. 2001)** at [HN 8] “as a general practice, a sentence, when imposed by a court of record, is within the power of the court during the session in which it is entered and may be amended at any time during such session, provided a punishment already is partly suffered be not increased. To increase the penalty is to subject the defendant to double punishment for the same offences 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 **US CONST. AMEND V**.”

In **LEONARD vs. STATE 271 So.2d 445,447 (MISS. 1973)** it states “once a circuit or county court exercises it’s option to impose a definite sentence, it cannot subsequently set [\*\*7] that sentence aside and impose a greater sentence.”

In **APPRENDI JR. vs. NEW JERSEY** 530 U.S. 466 at [HN 5] “U.S. CONST. AMEND XIV , provides for the prescription of any deprivation of liberty without due process of law, and U.S. CONST. AMEND VI, guarantees that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. Taken together, these rights indisputably entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.

The petitioner submits that the state has failed to prove beyond a reasonable doubt that he is a habitual offender because they did not have a bifurcated hearing to prove ‘All elements of the habitual status’.

Therefore the habitual offender portion of the petitioners sentence should be vacated with prejudice to the State of Mississippi.

**CERTIFICATE OF SERVICE**

I, Kurt D. Middleton, Petitioner, Pro Se, do hereby certify that on this date a true and correct copy of the "Brief for Appellant" was mailed to:

Honorable John Champion  
District Atty for De Soto County  
365 Losher St , Suite 210  
Hernando, MS 38632

Honorable Dale K. Thompson  
Clerk of Court for De Soto County  
2535 Hwy 51 South  
Hernando, MS 38632

Honorable Jim Hood  
Atty General  
State of Mississippi  
P.O. Box 220  
Jackson, MS 39205

Mississippi Supreme Court of Appeals  
C/O Ms. Betty Sephton  
Clerk of Courts  
P.O. Box 249  
Jackson, MS 39208

Dated this 4<sup>th</sup> of, August, 2009.

  
Kurt D. Middleton  
Pro Se Petitioner