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SUPREME COURT
COURT OF APPEALS

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CP-00977-COA

KURT D. MIDDLETON

V

STATE OF MISSISSIPPI

APPEAL FROM CIRCUIT COURT OF DE SOTO CTY, MISSISSIPPI

Amendment

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

NO. 2009-CP-00977-COA

KURT D. MIDDLETON

V

STATE OF MISSISSIPPI

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, Pro-se**

**Honorable Jim Hood,
Attorney for appellee**

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

A handwritten signature in black ink, appearing to be 'Kurt D. Middleton', with a stylized flourish at the end.

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

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
ASSIGNMENT OF ERRORS.....	1
STATEMENT OF THE CASE.....	2
PROCEDURAL HISTORY.....	2,3
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT	4-7
REQUESTED RELIEF.....	8
CONCLUSION.....	8
CERTIFICATE OF SERVICE.....	9

TABLE OF AUTHORITIES

CONSTITUTIONS

United States Constitution Amendment V.....	7
United States Constitution Amendment VI.....	7
United States Constitution Amendment XIV.....	7
Mississippi Constitution Article 3 22 (1890).....	6

RULES

Mississippi Uniform Rules of Circuit & County Court Practice 11.03.....	5
---	---

CODES

Mississippi Code ANN. Section 99-19-81.....	2,5,6
Mississippi Code ANN. Section 99-39-05.....	2

CASES

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

ASSIGNMENT OF ERRORS

1. The court erred in not conducting a Bifurcated Trial to establish Petitioner as a Habitual Criminal.

STATEMENT OF THE CASE

APPELLANT MIDDLETON, was arrested on or about October 17, 2003 on a charge of false pretense.

On or about July 28, 2008, Middleton pled guilty in De Soto County Circuit Court to uttering a forged instrument.

On this same date, Middleton was sentenced as a habitual criminal pursuant to **99-19-81 MISS. Code ANN.** without being given the benefit of a bifurcated hearing.

Middleton had been in the custody of the Mississippi Department of Corrections ever since July 28, 2008.

PROCEDURAL HISTORY

On July 28, 2008 Middleton pled guilty to uttering a forged instrument. On the same date Middleton was sentenced to such as a Habitual Criminal pursuant to **99-19-81 MISS. Code ANN.**

On November 10, 2008 Middleton filed a motion for post-conviction collateral relief per **MISS code ANN. 99-39-05.** He also filed an affidavit of poverty for leave to proceed in forma pauper is.

On February 25, 2009 the De Soto County Circuit Court ordered that Middleton is **GRANTED** to proceed in Forma Pauper is with said motion.

On March 31, 2009 Middleton filed a motion for appointment of counsel.

On April 13, 2009 Middleton filed a motion to amend his motion for Post Conv. Collateral relief.

On April 21, 2009 Middleton filed a petition for hearing on his motion for Post Conv. Collateral relief.

In or about May 2009 Middleton filed a writ of Mandamus to the Supreme Court of Mississippi.

On June 5, 2009 The De Soto County Circuit Court **Denied** Middleton's Post Conviction .Coll. Relief Motion and **Denied** his motion for appointment of counsel.

On June 24, 2009 The De Soto County Circuit Court **Denied** Middletons Petition for hearing.

On July 9, 2009 Middletons petition for writ of Mandamus was **Denied** by the Supreme Court of Mississippi.

On July 11, 2009 Middleton filed his notice of appeal, cert. Of compliance and designation of records to the Mississippi Supreme Court of Appeals.

On July 22, 2009 The De Soto County Circuit Court **Granted** Middletons leave to proceed on Appeal in forma pauper is.

On August 4, 2009 Middleton filed his appeal from the Circuit Court of De Soto County to the Supreme Court of Appeals.

On September 23, 2009 The Supreme Court gave notice to Middleton to show cause.

On October 2, 2009 Middleton filed his response to show cause motion.

On October 23, 2009 The Supreme Court of Mississippi Court of Appeals of the state of Mississippi notified Middleton of his case number and briefing scheduled on said appeal.

On November ¹⁹~~12~~, 2009 Middleton filed his appellant's brief.

SUMMARY OF ARGUMENT

1. An accused of the Habitual Statute has the right to a separate hearing to prove beyond a reasonable doubt that the records are accurate, meet the statutory requirements and that defendant was in fact the person who committed the offences.

ARGUMENT

1. The Court erred in not conducting a bifurcated trial to establish appellee as a Habitual Criminal.

It is illegal 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 criminal, 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 findings that this defendant is 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. See record excerpt , Appellant sentencing transcript.

In the petitioners case the state did exactly what the **Mississippi Supreme Court** has condemned in **SEELY**.

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. 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 defendant's 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 607 So.2d 1097 (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.

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 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 CONSTITUTION 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 & impose a greater sentence.” In **APPRENDI JR. vs. NEW JERSEY 530 U.S. 466** at [HN 5] “**U.S. CONSTITUTION AMEND XIV**, provides for the prescription of any deprivation of liberty without due process of law, and **U.S. CONSTITUTION 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 charges, beyond a reasonable doubt.

CONCLUSION

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.

For the above and forgoing reasons, Appellant requests this honorable court grant him his requested relief.

This 19 day of November, in the year of our Lord 2009.

Respectfully submits



Kurt D. Middleton
Appellant, Pro-Se

CERTIFICATE OF SERVICE

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

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Office of the Clerk of Courts
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Dated this 19 day of November, 2009


Kurt D. Middleton,
Pro-Se, Appellant