IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SHELBY PARHAM — APPELLANT

VS. — NO. 2009-CP-01276-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR APPELLANT

BY: Shelby Parham

Shelby Ray Parham, #72268
Unit 29-C, MSP
Parchman, MS 38738

ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF

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SHELBY PARHAM **APPELLANT**

VS. **NO. 2009-CP-01276-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

1. **Shelby Ray Parham, Appellant pro se.**
2. **Honorable Jim Hood and staff, Attorney General**
3. **Honorable James Kitchens, Jr. , Circuit Court Judge**
4. **Honorable Forrest Allgood, District Attorney**

Respectfully Submitted,

BY: 

Shelby Ray Parham, #72268
Unit 29-C, MSP
Parchman, MS 38738

Appellant

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SHELBY PARHAM **APPELLANT**

VS. **NO. 2009-CP-01276-COA**

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STATEMENT OF CASE

Shelby Parham was indicted by the Lee County Grand Jury on April 9, 2004 for the offense of uttering forgery. The six count indictment alleged that Count 2 occurred on October 27, 2002 in Clay County, Mississippi.

Shelby Parham appeared and entered a plea of guilty after the state had sought to amend the indictment to charge under Miss. Code Ann Sec. 99-19-83 and subsequently asked to change that amendment to charge under Miss. Code Ann. Sec. 99-19-81. The state alleged no new information in regards to it's second amendment request.

Appellant Parham was sentenced, as a habitual offender, by the Court. There was no jury permitted to determine Appellant's habitual status and the state only proceeded under one count of the indictment during such proceedings.

Appellant Parham's attorney did not object to the amendment to the indictment and never presented any information regarding the matter.

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections at Parchman, Mississippi, in service of a mandatory prison term imposed as a direct result of the conviction and sentence under attack in this case. Appellant has been continuously confined in regards to such sentence since date he was sent following the conviction and imposition by the trial court.

STATEMENT OF ISSUES

ISSUE ONE

Whether Appellant Parham was denied due process of law where the state illegally amended the indictment to charge habitual offender language without providing the information needed for such habitual status which thereby denied Parham due process of law and created plain error which cannot be subject the 3 year bar under Miss. Code Ann. Sec. 99-39-5.

ISSUE TWO

Whether Appellant Parham was denied due process of law where the trial court, without the approval of the jury, imposed a mandatory habitual sentence which included a penalty which would in excess of that which would be available under the normal statutory sentencing guideline and limitation for the offense of uttering forgery and where the trial court imposed such enhancement without

allowing a jury to make the final determination of such enhanced penalty. Such actions caused petitioner to suffer a violation of his 5th and 14th Amendment rights under the United States Constitution as well as the Constitution of the State of Mississippi where trial court disregarded the fundamental constitutional rights of the petitioner by ignoring the law as dictated by the United States Supreme Court in Apprendi v. New Jersey, 530 U. S. 466, 120 S. Ct. 2348 (2000); Blakely v. Washington, 542 U. S. ____, ____ S. Ct. ____ (2004), Parham has been sentenced to an illegal term of imprisonment under the provisions of an unconstitutional procedure carried out by the trial court. Such action by the trial court constituted a fundamental constitutional violation which resulted in an illegal sentence and an exception to the three (3) year bar under Miss. Code Ann. §99-39-5.

ARGUMENT

ISSUE ONE

Whether Appellant Parham was denied due process of law where the state illegally amended the indictment to charge habitual offender language without providing the information needed for such habitual status which thereby denied Parham due process of law and created plain error which cannot be subject the 3 year bar under Miss. Code Ann. Sec. 99-39-5.

An indictment is "[a]n accusation in writing found and presented by a grand jury, . . . charging that a person therein named ***has done some act, or been guilty***

of some omission. . . ." Black's Law Dictionary 772 (6th ed. 1990) (emphasis added). Feazell v. State, ____ So. 2d ____ (Miss. 2000) (**NO. 1998-KA-01799-SCT).**

Shelby Ray Parham was initially indicted by the Clay County, Mississippi Grand Jury on April 9, 2004, in Cause Number 8567. The indictment did not charge Parham as a habitual offender under either of the habitual offender statutes of the State of Mississippi.

The state filed a motion to amend the indictment to charge Parham under the habitual offender statute of Miss. Code Ann. §99-19-83. However, the trial court never ruled upon such motion and on the date of the actual plea and sentencing the state asked to proceed under Miss. Code Ann. §99-19-81. See Transcript attached hereto.

The trial court never entered an order allowing the indictment to be amended but advised the prosecution that: "You may proceed on the 99-19-81 which we commonly call the little habitual." See Transcript, pp. 3.

RULE 7.09 AMENDMENT OF INDICTMENTS

> All indictments may be amended as to form but not as to the substance of the offense charged. Indictments may also be amended to charge the defendant as an habitual offender or to elevate the level of the offense where the offense is one which is subject to enhanced punishment for subsequent offenses and the amendment is to assert prior offenses justifying such enhancement (e.g., driving under the influence, Miss. Code Ann. § 63-11-30). Amendment

This rule allows the indictment to be amended to elevate the charge but the key information or requirement for this amendment is that the amendment must

assert prior offenses justifying such enhancement. The instant case did not qualify for an amendment under this rule since the motion to amend the indictment never actually set forth the required information under Miss. Code Ann. §99-19-81. The rule requires that the amendment assert prior offense justifying the amendment. Thus, the oral motion made by the state to amend did not assert prior offenses to qualify for enhancement. Rule 7.09 should not have been used as the vehicle to allow the state a second bite of the apple to accomplish on that second bite what it either did not or could not proceed on under the initial motion. No new or different prior charges were quoted in support of the second amendment. The prosecution was fully aware of the contents of any statute which it proceeded under in the second amendment at the time it proceeded before the Court.. The language of the initial amendment could and should have been used under Miss. Code Ann. §99-19-81 if the state desired to seek such punishment. This Court should not allow the state an unfair second bite which was allowed at the hearing on the plea. Williams v. State, 507 So.2d 50 (Miss. 1987).

The Supreme Court of Mississippi has made clear in Burrell v. State, 726 So.2d 160, 162 (Miss. 1998), which provides that:

> ¶ 3. Burrell's third and seventh assignments of error, in which Burrell challenges the State's amendment of his indictment to habitual offender status without first being submitted to the grand jury and the constitutionality of Uniform Circuit and County Court Rule 7.09, which allows amendments to indictments, will be combined as well. Burrell's original indictment charged him with the sale of cocaine in violation of Miss.Code Ann. § 41-29-139, subject to enhanced penalty under § 41-29-142 because

> the sale occurred within 1500 feet of a public school. Burrell's indictment was amended pursuant to Rule 7.09, which authorizes amendments to indictments to indict the defendant as an habitual offender under Miss.Code Ann. § 99-19-83. The State's action was clearly authorized by Rule 7.09.
>
> [2] ¶ 4. Burrell claims 7.09 is unconstitutional because it allows substantive changes to the indictment without action by the grand jury. As recognized in Griffin v. State, 584 So.2d 1274, 1275 (Miss.1991), only the grand jury can make amendments to the substance of the offense charged. Rule 7.09 clearly does not authorize amendment to the substance of the offense charged. Although 7.09 does authorize amendments to charge the defendant as an habitual offender under§ 99-19-83, this Court held in Nathan v. State, 552 So.2d 99, 106-07 (Miss.1989) that § 99-19-83 only affects sentencing and does not affect the substance of the offense charged. Both assignments fail.

Burrell v. State, 726 So.2d 160 (Miss. 1998)

Clearly, under Burrell, Rule 7.09 allows an indictment to be amended to charge a defendant under Miss. Code Ann. §99-19-83 but this case do not state that the indictment can be amended under this rule to elevate the charge from Miss. Code Ann. § 99-19-83 to Miss. Code Ann. § 99-19-81 without citing new and different factual information or charges. Under Burrell, the amendment should not be allowed. This Court should vacate the amendment and void the habitual portion of the sentence rendered upon petitioner. should require that the original indictment be reinstated.

The Supreme Court of Mississippi has consistently and regularly held that a second bite of the apply should not be allowed or permitted in no case where the defense or the prosecution has had one opportunity to present the issue during the first bite. Sanders v. State, 440 So.2d 278, 287 (Miss. 1983); Shaw v. State, 702 So. 2d 386, 388 (Miss. 1997); Thomas v. State, 517 So.2d 1285, 1290 (Miss.

1987); Read v. State, 430 So.2d 832, 840 (Miss. 1983). This Court should find that the amendment in this case constitutes a second bite of the apple for the state and should not be allowed.

While the defense counsel for Parham attempted to waive this violation by the state during the plea proceedings, such waiver cannot stand where there is a plain error. Shelby Ray Parham has been denied due process of law in this instance and the claim set out here constitutes fundamental plain error.

In the Order denying the post conviction relief motion the trial court found that "(A) Rule 6.04 hearing was conducted to determine the Petitioner's habitual offender status and as a consequence of this hearing, an order was entered to reflect an amendment to the indictment stating the Petitioner's habitual offender pursuant to Sec. 99-19-83 MCA. As part of the later plea bargain agreement, the petitioner was allowed to plead guilty pursuant to Sec. 99-19-81 MCA, the "lesser" habitual offender statute an agreement to which all parties consented." (R. 060)

In the instant case the record do not support this finding. There is no record of any Rule 6.04 hearing in the trial court. There is no order amending the indictment. While Appellant did plead guilty to the Sec. 99-19-81 provisions, this plea was made at the same time the state moved to amend the indictment, not a part of a "later" plea bargain as the Court indicate.

The trial court, at the outset of the Order denying the PCR, indicate that the Court had "reviewed the record of the proceedings in the trial court, the sentencing order, and the pleadings contained within the Petitioner's post conviction civil file." (R. 060) However, the majority of the documents which the trial court quoted as having been reviewed are not within the record. Appellant designated every part of the post conviction record in the designation of record on appeal. Certainly the record which the trial court reviewed should have been made a part of the record on appeal in it's completeness. How else could this Court review the claims on appeal. Appellant designated the record on appeal. (R. 062)

It is clear that the record on appeal fail to support the trial court's finding and this should require a reversal and an evidentiary hearing. The record contains no written order allowing the indictment to be amended.

This Court should further find that the amendment to indictment was improper where it allowed the state a second bite of the apple. The state indicted under Sec. 99-19-83. When it discovered it could not present adequate proof under such statute the state resorted to Sec. 99-19-81 and enlisted the trial court to assist in affording the state a second bite of the apple. This Court should reject such action and reverse and remand this case to the trial court.

ISSUE TWO

Whether Appellant Parham was denied due process of law where the trial court, without the approval of the jury, imposed a mandatory habitual sentence which included a penalty which would in excess of that which would be available under the normal statutory sentencing guideline and limitation for the offense of uttering forgery and where the trial court imposed such enhancement without allowing a jury to make the final determination of such enhanced penalty. Such actions caused petitioner to suffer a violation of his 5th and 14th Amendment rights under the United States Constitution as well as the Constitution of the State of Mississippi where trial court disregarded the fundamental constitutional rights of the petitioner by ignoring the law as dictated by the United States Supreme Court in Apprendi v. New Jersey, 530 U. S. 466, 120 S. Ct. 2348 (2000); Blakely v. Washington, 542 U. S. ____, ____ S. Ct. ____ (2004), Parham has been sentenced to an illegal term of imprisonment under the provisions of an unconstitutional procedure carried out by the trial court. Such action by the trial court constituted a fundamental constitutional violation which resulted in an illegal sentence and an exception to the three (3) year bar under Miss. Code Ann. §99-39-5.

A.

Intervening Decisions by United States Supreme Court

Petitioner would submit that on March 28, 2000, the Supreme court of the United States decided the case of Apprendi v. New Jersey; 530 U.S. 466, 120 S.Ct. 2348 (2000). Where the court rendered a decision o the issue of use of prior convictions to increase penalty for crime beyond prescribed as the statutory maximum. The issue which the court faced in Apprendi was whether such an increase must be presented to and determined by a jury. The Apprendi court established that it should. The court found as follow on such issues:

In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed Jones. Other that the fact of a prior conviction, any fact that increases the penalty for a crime beyond **2363 the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U. S., at 252-253, 119 S. Ct. 1215 (opinion of STEVENS, J.); see a] id, at 253, 119 S. Ct. 1215 (opinion of SCALIA, J.).

The court, in fact, found that such a fact as proof of prior conviction must be established by proof beyond reasonable doubt and must, as a matter of law, be submitted to a jury. While the Apprendi court noted that the principle dissent would reject the court's rule in Apprendi as being "meaningless formalism," because it can conceive of hypothetical statutes that would comply with the rule and achieve the same result as the New Jersey statute, the court found that core concerns animating the jury and burden-of-proof requirements are absent from such a scheme.[1]

[1]The principal dissent would reject the Court's rule as a "meaningless formalism," because it can conceive of hypothetical statutes that would comply with the rule and achieve the same result as the New Jersey statute. *Post*, at 17–20. While a State

The similarity in the Mississippi habitual offender scheme and the New Jersey habitual sentencing scheme requires that Apprendi be applied to this case. The New Jersey statutes which were at issue in Apprendi provides:

> *2C:39-4. Possession of weapons for unlawful purposes a. Firearms. Any person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree. b. Explosives. Any person who has in his possession or carries any explosive substance with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree. c. Destructive devices. Any person who has in his possession any destructive device with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree. d. Other weapons. Any person who has in his possession any weapon, except a firearm, with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the third degree. e. Imitation firearms. Any person who has in his possession an imitation firearm under circumstances that would lead an observer to reasonably believe that it is possessed for an unlawful purpose is guilty of a crime of the fourth degree. Amended 1979, c. 179, § 3; 1989, c. 120, § 2.*

could, hypothetically, undertake to revise its entire criminal code in the manner the dissent suggests, *post*, at 18— extending all statutory maximum sentences to, for example, 50 years and giving judges guided discretion as to a few specially selected factors within that range— this possibility seems remote. Among other reasons, structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose *every* defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime. This is as it should be. Our rule ensures that a State is obliged "to make its choices concerning the substantive content of its criminal laws with full awareness of the consequence, unable to mask substantive policy choices" of exposing all who are convicted to the maximum sentence it provides. *Patterson* v. *New York*, 432 U. S., at 228–229, n. 13 (Powell, J., dissenting). So exposed, "[t]he political check on potentially harsh legislative action is then more likely to operate." *Ibid.* In all events, if such an extensive revision of the State's entire criminal code were enacted for the purpose the dissent suggests, or if New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not, *post*, at 20), we would be required to question whether the revision was constitutional under this Court's prior decisions. See *Patterson*, 432 U. S., at 210; *Mullaney* v. *Wilbur*, 421 U. S. 684, 698–702. Finally, the principal dissent ignores the distinction the Court has often recognized, see, *e.g.*, *Martin* v. *Ohio*, 480 U. S. 228 (1987), between facts in aggravation of punishment and facts in mitigation. See *post*, at 19–20. If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the Judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. See *supra*, at 16–17. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

2C:43-6. Sentence of imprisonment for crime; ordinary terms; mandatory terms a. Except as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment, as follows: (1) In the case of a crime of the first degree, for a specific term of years which shall be fixed by the court and shall be between 10 years and 20 years; (2) In the case of a crime of the second degree, for a specific term of years which shall be fixed by the court and shall be between five years and 10 years; (3) In the case of a crime of the third degree, for a specific term of years which shall be fixed by the court and shall be between three years and five years; (4) In the case of a crime of the fourth degree, for a specific term which shall be fixed by the court and shall not exceed 18 months. b. As part of a sentence for any crime, where the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors, as set forth in subsections a. and b. of , the court may fix a minimum term not to exceed one-half of the term set pursuant to subsection a., or one-half of the term set pursuant to a maximum period of incarceration for a crime set forth in any statute other than this code, during which the defendant shall not be eligible for parole; provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole. c. A person who has been convicted under a. of possession of a firearm with intent to use it against the person of another, or of a crime under any of the following sections: , , b., , a., a., , , , who, while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a firearm as defined in f., shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole. The minimum terms established by this section shall not prevent the court from imposing presumptive terms of imprisonment pursuant to f. (1) except in cases of crimes of the fourth degree. A person who has been convicted of an offense enumerated by this subsection and who used or possessed a firearm during its commission, attempted commission or flight therefrom and who has been previously convicted of an offense involving the use or possession of a firearm as defined in d., shall be sentenced by the court to an extended term as authorized by c., notwithstanding that extended terms are ordinarily discretionary with the court. d. The court shall not impose a mandatory sentence pursuant to subsection c. of this section, c. or d., unless the ground therefor has been established at a hearing. At the hearing, which may occur at the time of sentencing, the prosecutor shall establish by a preponderance of the evidence that the weapon used or possessed was

a firearm. In making its finding, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and any other relevant information. e. A person convicted of a third or subsequent offense involving State taxes under N.J.S. , N.J.S. , any other provision of this code, or under any of the provisions of Title 54 of the Revised Statutes, or Title 54A of the New Jersey Statutes, as amended and supplemented, shall be sentenced to a term of imprisonment by the court. This shall not preclude an application for and imposition of an extended term of imprisonment under N.J.S. if the provisions of that section are applicable to the offender. f. A person convicted of manufacturing, distributing, dispensing or possessing with intent to distribute any dangerous substance or controlled substance analog under N.J.S. , of maintaining or operating a controlled dangerous substance production facility under N.J.S. , of employing a juvenile in a drug distribution scheme under N.J.S. , leader of a narcotics trafficking network under N.J.S. , or of distributing, dispensing or possessing with intent to distribute on or near school property or buses under section 1 of P.L. 1987, c. 101 (C.), who has been previously convicted of manufacturing, distributing, dispensing or possessing with intent to distribute a controlled dangerous substance or controlled substance analog, shall upon application of the prosecuting attorney be sentenced by the court to an extended term as authorized by subsection c. of N.J.S. , notwithstanding that extended terms are ordinarily discretionary with the court. The term of imprisonment shall, except as may be provided in N.J.S. , include the imposition of a minimum term. The minimum term shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater, not less than seven years if the person is convicted of a violation of N.J.S. , or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole. The court shall not impose an extended term pursuant to this subsection unless the ground therefor has been established at a hearing. At the hearing, which may occur at the time of sentencing, the prosecutor shall establish the ground therefor by a preponderance of the evidence. In making its finding, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and any other relevant information. For the purpose of this subsection, a previous conviction exists where the actor has at any time been convicted under chapter 35 of this title or Title 24 of the Revised Statutes or under any similar statute of the United States, this State, or any other state for an offense that is substantially equivalent to N.J.S. , N.J.S. , N.J.S. , N.J.S. or section 1 of P.L. 1987, c. 101 (C.). g. Any person who has been convicted under

subsection a. of N.J.S. of possessing a machine gun or assault firearm with intent to use it against the person of another, or of a crime under any of the following sections: N.J.S. , N.J.S. , N.J.S. b., N.J.S. , N.J.S. a., N.J.S. a., N.J.S. , N.J.S. , N.J.S. , N.J.S. , who, while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a machine gun or assault firearm shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at 10 years for a crime of the first or second degree, five years for a crime of the third degree, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole. The minimum terms established by this section shall not prevent the court from imposing presumptive terms of imprisonment pursuant to paragraph (1) of subsection f. of N.J.S. for crimes of the first degree. A person who has been convicted of an offense enumerated in this subsection and who used or possessed a machine gun or assault firearm during its commission, attempted commission or flight therefrom and who has been previously convicted of an offense involving the use or possession of any firearm as defined in subsection d. of N.J.S. , shall be sentenced by the court to an extended term as authorized by subsection d. of N.J.S. , notwithstanding that extended terms are ordinarily discretionary with the court. h. The court shall not impose a mandatory sentence pursuant to subsection g. of this section, subsections d. of N.J.S. or N.J.S. , unless the ground therefor has been established at a hearing. At the hearing, which may occur at the time of sentencing, the prosecutor shall establish by a preponderance of the evidence that the weapon used or possessed was a machine gun or assault firearm. In making its finding, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and any other relevant information. i. A person who has been convicted under paragraph (6) of subsection b. of of causing bodily injury while eluding shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at, or between one-third and one-half of the sentence imposed by the court. The minimum term established by this subsection shall not prevent the court from imposing a presumptive term of imprisonment pursuant to paragraph (1) of subsection f. of . Amended 1979, c. 178, § 85; 1981, c. 31, § 1; 1981, c. 290, § 38; 1981, c. 569, § 1; 1982, c. 119, § 1; 1987, c. 76, § 35; 1987, c. 106, § 12; 1988, c. 44, § 13; 1990, c. 32, § 6; 1993, c. 219, § 6.

2C:44-3 Criteria for Sentence of Extended Term of Imprisonment. The court may, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime of the first, second or third

degree to an extended term of imprisonment if it finds one or more of the grounds specified in subsection a., b., c., or f. of this section. If the grounds specified in subsection d. are found, and the person is being sentenced for commission of any of the offenses enumerated in N.J.S. c. or N.J.S. g., the court shall sentence the defendant to an extended term as required by N.J.S. c. or N.J.S. g., and application by the prosecutor shall not be required. The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime under N.J.S. or N.J.S. to an extended term of imprisonment if the grounds specified in subsection g. of this section are found. The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime to an extended term of imprisonment if the grounds specified in subsection h. of this section are found. The court shall, upon application of the prosecuting attorney, sentence a person to an extended term if the imposition of such term is required pursuant to the provisions of section 2 of P.L. 1994, c. 130 (C.). The finding of the court shall be incorporated in the record. a. The defendant has been convicted of a crime of the first, second or third degree and is a persistent offender. A persistent offender is a person who at the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced. b. The defendant has been convicted of a crime of the first, second or third degree and is a professional criminal. A professional criminal is a person who committed a crime as part of a continuing criminal activity in concert with two or more persons, and the circumstances of the crime show he has knowingly devoted himself to criminal activity as a major source of livelihood. c. The defendant has been convicted of a crime of the first, second or third degree and committed the crime as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value the amount of which was unrelated to the proceeds of the crime or he procured the commission of the offense by payment or promise of payment of anything of pecuniary value. d. Second offender with a firearm. The defendant is at least 18 years of age and has been previously convicted of any of the following crimes: , , b., , a., a., , , , a., or has been previously convicted of an offense under Title 2A of the New Jersey Statutes or under any statute of the United States or any other state which is substantially equivalent to the offenses enumerated in this subsection and he used or possessed a firearm, as defined in f., in the course of committing or attempting to commit any of these crimes, including the immediate flight therefrom. e. (Deleted by

amendment, P.L. 2001, c. 443). f. The defendant has been convicted of a crime under any of the following sections: N.J.S. , N.J.S. b., N.J.S. , N.J.S. a., N.J.S. a., N.J.S. , N.J.S. , N.J.S. b., N.J.S. , N.J.S. , and in the course of committing or attempting to commit the crime, including the immediate flight therefrom, the defendant used or was in possession of a stolen motor vehicle. g. The defendant has been convicted of a crime under N.J.S. or N.J.S. involving violence or the threat of violence and the victim of the crime was 16 years of age or less. For purposes of this subsection, a crime involves violence or the threat of violence if the victim sustains serious bodily injury as defined in subsection b. of N.J.S. , or the actor is armed with and uses a deadly weapon or threatens by word or gesture to use a deadly weapon as defined in subsection c. of N.J.S. , or threatens to inflict serious bodily injury. h. The crime was committed while the defendant was knowingly involved in criminal street gang related activity. A crime is committed while the defendant was involved in criminal street gang related activity if the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang. "Criminal street gang" means three or more persons associated in fact. Individuals are associated in fact if (1) they have in common a group name or identifying sign, symbol, tattoo or other physical marking, style of dress or use of hand signs or other indicia of association or common leadership, and (2) individually or in combination with other members of a criminal street gang, while engaging in gang related activity, have committed, conspired or attempted to commit, within the preceding three years, two or more offenses of robbery, carjacking, aggravated assault, assault, aggravated sexual assault, sexual assault, arson, burglary, kidnapping, extortion, or a violation of chapter 11, section 3, 4, 5, 6 or 7 of chapter 35 or chapter 39 of Title 2C of the New Jersey Statutes regardless of whether the prior offenses have resulted in convictions. The court shall not impose a sentence pursuant to this subsection unless the ground therefore has been established by a preponderance of the evidence established at a hearing, which may occur at the time of sentencing. In making its finding, the court shall take judicial notice of any testimony or information adduced at the trial, plea hearing or other court proceedings and also shall consider the presentence report and any other relevant information. Amended 1979, c. 178, § 95; 1981, c. 31, § 3; 1990, c. 32, § 8; 1990, c. 87, § 4; 1993, c. 132, § 2; 1994, c. 127, § 2; 1994, c. 130, § 4; 1995, c. 211, § 3; 1997, c. 120; 1999, c. 160, § 4; 2001, c. 443, § 8, eff. Jan. 11, 2002.

2C:43-7 Sentence of imprisonment for crime; extended terms. a. In the cases designated in section , a person who has been convicted of a crime may be sentenced, and in the cases designated in subsection e. of section 2 of P.L. 1994, c. 130 (C.), in subsection b. of section 2 of P.L. 1995, c. 126 (C.) and in the cases designated in section 1 of P.L. 1997,

c. 410 (C.), a person who has been convicted of a crime shall be sentenced, to an extended term of imprisonment, as follows: (1) In case of aggravated manslaughter sentenced under subsection c. of N.J.S. ; or kidnapping when sentenced as a crime of the first degree under paragraph (1) of subsection c. of ; or aggravated sexual assault if the person is eligible for an extended term pursuant to the provisions of subsection g. of N.J.S. for a specific term of years which shall be between 30 years and life imprisonment; (2) Except for the crime of murder and except as provided in paragraph (1) of this subsection, in the case of a crime of the first degree, for a specific term of years which shall be fixed by the court and shall be between 20 years and life imprisonment; (3) In the case of a crime of the second degree, for a term which shall be fixed by the court between 10 and 20 years; (4) In the case of a crime of the third degree, for a term which shall be fixed by the court between five and 10 years; (5) In the case of a crime of the fourth degree pursuant to c, g and d for a term of five years, and in the case of a crime of the fourth degree pursuant to any other provision of law for a term which shall be fixed by the court between three and five years; (6) In the case of the crime of murder, for a specific term of years which shall be fixed by the court between 35 years and life imprisonment, of which the defendant shall serve 35 years before being eligible for parole; (7) In the case of kidnapping under paragraph (2) of subsection c. of , for a specific term of years which shall be fixed by the court between 30 years and life imprisonment, of which the defendant shall serve 30 years before being eligible for parole. b. As part of a sentence for an extended term and notwithstanding the provisions of , the court may fix a minimum term not to exceed one-half of the term set pursuant to subsection a. during which the defendant shall not be eligible for parole or a term of 25 years during which time the defendant shall not be eligible for parole where the sentence imposed was life imprisonment; provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole. c. In the case of a person sentenced to an extended term pursuant to c, f and dd, the court shall impose a sentence within the ranges permitted by a. (2), (3), (4) or (5) according to the degree or nature of the crime for which the defendant is being sentenced, which sentence shall include a minimum term which shall, except as may be specifically provided by N.J.S. f, be fixed at or between one-third and one-half of the sentence imposed by the court or five years, whichever is greater, during which the defendant shall not be eligible for parole. Where the sentence imposed is life imprisonment, the court shall impose a minimum term of 25 years during which the defendant shall not be eligible for parole, except that where the term of life imprisonment is imposed on a person convicted for a violation of N.J.S. , the term of parole ineligibility shall be 30 years. d. In the case of a

person sentenced to an extended term pursuant to N.J.S. g, the court shall impose a sentence within the ranges permitted by N.J.S. a. (2), (3), (4) or (5) according to the degree or nature of the crime for which the defendant is being sentenced, which sentence shall include a minimum term which shall be fixed at 15 years for a crime of the first or second degree, eight years for a crime of the third degree, or five years for a crime of the fourth degree during which the defendant shall not be eligible for parole. Where the sentence imposed is life imprisonment, the court shall impose a minimum term of 25 years during which the defendant shall not be eligible for parole, except that where the term of life imprisonment is imposed on a person convicted of a violation of N.J.S. , the term of parole eligibility shall be 30 years. Amended 1979, c. 178, § 86; 1981, c. 31, § 2; 1982, c. 111, § 2; 1986, c. 172, § 3; 1987, c. 106, § 13; 1988, c. 44, § 14; 1990, c. 32, § 7; 1990, c. 87, § 3; 1994, c. 127, § 1; 1994, c. 130, § 3; 1995, c. 126, § 3; 1997, c. 410, § 2; 2001, c. 443, § 6; 2003, c. 267, § 4.

The Mississippi habitual offender enhancement scheme in which Parham was sentenced under provides:

> 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.

Miss. Code Ann. §99-19-81.

Parham was sentenced under this Mississippi habitual sentencing scheme set out here, which scheme, just as the New Jersey scheme set out above, makes no provisions to allow or require a jury to determine the facts associated with the eligibility for an increase in penalty beyond that which is prescribed in the original statute which the offense is punishable by.[2]

[2]The initial statutes would have punished Parham to a term of ten years for uttering forgery. Such sentence would not have been subjected to no parole or early release.

Shelby Parham's sentence totals 10 years imprisonment, as a habitual offender, without any eligibility for parole or [3] early release.[4]

Apprendi clearly creates and defines that a jury should evaluate and determine any facts associated with habitual enhanced sentencing where the penalty is increased.

In Blakely v. Washington, 542 U.S. (2004), a most recent decision where the Supreme Court of the United States expanded upon the rule set out in Apprendi, the court again evaluated the rule which it applied in Apprendi. The court stated the following language:

> This case requires us to apply the rule we expressed in Apprendi v. New Jersey, 530 U. S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure §87, p. 55 (2d ed. 1872).5 These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing; we compiled the relevant authorities in Apprendi, see 530 U. S., at 476–483, 489–490, n. 15; id., at 501–518 (THOMAS, J.,concurring), and need not repeat them here. Apprendi involved a New Jersey hate-crime statute that authorized a 20-year sentence, despite the usual 10-year maximum, if the judge found the crime to have been committed " 'with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" Id., at 468–469 (quoting N. J. Stat. Ann. §2C:44–3(e) (West Supp. 1999–2000)). In Ring v. Arizona, 536 U. S. 584, 592–593, and n. 1 (2002), we applied Apprendi to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors. In each case, we concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. Apprendi, supra, at 491–497; Ring, supra, at 603–609.

[3] Parole distinguishes release on supervision before expiration of the sentence. A person sentenced as non habitual are eligible for parole.

[4] Early release distinguishes earned time or other on prison credits which could be used to diminish the sentence.

The intervening decisions by U.S. Supreme court which are quoted here are clearly pertinent to this case. Since the relief requested herein is based upon intervening decisions by the United States Supreme Court, which is sanctioned by Miss. Code Ann. §99-39-5 (2) as being sufficient to provide an exception to the three year time limitation which would otherwise be applicable to prevent a post conviction motion filed after that period from being heard on it's merits, this post conviction relief motion should be heard by this court as a matter of law.[5] The intervening decisions which enhancement of the sentence imposed petitioner. Apprendi v. New Jersey, 530 U.S. 466, 120 S. ct. 2348 (2003); Blakely v. Washington, **542** U.S. 296 (2004).

[5]A motion for relief under this article shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction. *Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence* or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction.

Miss. Code Ann. §99-39-5(2), Motion for relief; grounds; limitations.

B.

Retroactive Application of Apprendi and Blakely

The Supreme Court, in Hall v. Hilbun, 466 So. 2d 856, 875-76 (Miss. 1985), held that judicially enunciated rules of law are applied retroactively. The Hall v. Hilbun count held that:

> It is a general rule that judicially enunciated rules of law are applied retroactively. Legislation applies prospectively only, and we are not thought to be in the business of legislating. Rather, our function is to decide cases justly in accordance with sound legal principles which of necessity must be formulated, articulated and applied consistent with the facts of the case.
>
> Keyes v. Guy Bailey Homes, Inc., 439 So.2d 670 (Miss. 1983), abolishing the requirement of privity of contract in home construction contracts applied retroactively; Tideway Oil Programs, Inc. v. Serio, 431 So.2d 454 (Miss. 1983), providing that punitive damages may be recovered in chancery court was applied retroactively; McDaniel v. State, 356 So.2d 1151 (Miss.1978) overruling cases which allowed voluntary intoxication as a defense to a crime applied retroactively.
>
> The general rule applied universally in this country in federal and state courts is simply put in Jones v. Thigpen, 741 F.2d 805 (5th Cir.1984).
>
> "Judicial decisions ordinarily apply retroactively. See Robinson v. Neil, 409 U.S. 505, 507-08, 93 S. Ct. 876, 877-78, 35 L.Ed.2d 29 (1973). 'Indeed, a legal system based on precedent has a built-in presumption of retroactivity. Solem v. Stumes, --- U.S. ----, ----, 104 S.Ct. 1338, 1341, 79 L.Ed.2d 579 (1984)."
> --741 F.2d at 810.
>
> Even Pruett v. City of Rosedale, 421 So.2d 1046 (Miss.1982), was held to apply retroactively to that case.
>
> We note that other states, when shedding the "locality rule", have done so in a routine manner by simply adopting the new rule and applying it in a normal (retroactive) fashion without fanfare. See Zills v. Brown, 382 So.2d 528, 532 (Ala.1980) applying this new rule retroactively in Drs. Lane, Bryant, Eubanks & Dulaney v. Otts, 412 So.2d 254, 256-8 (Ala.1982) and May v. Moore, 424 So.2d 596, 597-601 (Ala.1982); Jenkins v. Parrish, 627 P.2d 533, 537 n. 1 (Utah 1981) (rule to be applied retroactively); Orcutt v. Miller, 95 Nev. 408, 595 P.2d 1191, 1194-95 (1979) (new rule routinely applied); Ardoin v. Hartford Accident & Indemnity Co., 360 So.2d 1331, 1339 n. 22 (La.1978) (overruling Percle v. St. Paul Fire & Marine Insurance Co., 349 So.2d 1289, 1303 (La.Ct.App.1977), which had held abandonment of locality rule to be prospective only); Bruni v. Tatsumi, 46 Ohio St.2d 127, 134-35, 346 N.E.2d 673, 679 (1976) (new rule routinely applied); Kronke v. Danielson, 108 Ariz. 400, 403, 499 P.2d 156, 159 (1972) (same); Wiggins v. Piver, 276 N.C. 134, 141, 171 S.E.2d 393, 397-98 (1970) (same); Naccarato v. Grob, 384 Mich. 248, 253-54, 180 N.W.2d 788, 791 (1970) (same); Brune v. Belinkoff, 354 Mass. 102, 108-09, 235 N.E.2d 793, 798 (1968) (same). Even when acknowledging the issue to be one of first impression, one court applied the new rule routinely with no hint of prospective-only application. Morrison v. MacNamara, 407 A.2d 555, 562 (D.C.1979).

The only case we have found in which a court chose to make the abolition of the "locality rule" prospective only is Shier v. Freedman, 58 Wis.2d 269, 283 n. 2, 206 N.W.2d 166, 174 n. 2 (1973). See also, Cukrowski v. Mount Sinai Hospital, Inc., 67 Wis.2d 487, 501-02, 227 N.W.2d 95, 102-03 (1975). The merit in the Wisconsin approach is not apparent.

It is clear from Mississippi law that the decisions rendered by the United States Supreme Court in Apprendi and Blakely should be applied to the case at bar retroactively since these are judicially enunciated rules of law as opposed to Legislation.

C.

The Sentence Imposed in this Case is Illegal Under the Judicially Enunciated Rules Defined in Apprendi and Blakely

In Apprendi v. New Jersey, the United States Supreme Court held that any fact that subjects a defendant to a longer sentence than that "prescribed by the legislature," or the "statutory limit[]," must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt. 530 U.S. 466, 481-82 (2000). This holding conformed to "the principle by which history determined what facts were elements" of crimes – namely, any "fact . . . legally essential to the punishment to be inflicted." Harris v. United States, 536 U.S. 545, 561 (2002) (quoting United States v. Reese, 92 U.S. 214, 232 (1876) (Clifford, J., dissenting)); see also Apprendi, 530 U.S. at 502 ("common law understanding" was that "a fact that is by law the basis for imposing or increasing punishment is an element"); 1 J. Bishop, New Criminal Procedure 50 (2d ed. 1872) ("whatever in law is essential to the punishment sought to be inflicted" is an element).

The United State Supreme Court reaffirmed the Apprendi rule in Ring v. Arizona, 536 U.S. 584 (2002), in which it invalidated Arizona's method for

finding "aggravating facts" that subjected offenders to the death penalty. Any fact that a state deems necessary for an increase in a defendant's punishment, the United States Supreme Court made clear, must be proved according to the procedures mandated by Apprendi. Ring, 536 U.S. at 588-59.

Mississippi habitual offender enhancement statutory scheme for finding and sentencing a defendant to an enhanced sentence has exactly the same infirmities as the Arizona scheme which the United States Supreme Court invalidated in Ring. Miss. Code Ann. §§99-19-81 and Miss. Code Ann §§99-19-83. As the United States Supreme Court has made clear in Ring, "The reasons for imposing an exceptional and enhanced sentence cannot include the factors inherent in the offense . . . ."; vacating exceptional sentence on this basis. In other words, just as in the Arizona scheme, the presence of an aggravating fact beyond the elements of the principle crime of conviction subjects the defendant to more severe punishment than otherwise is legally permissible. A court, rather than a jury, may find such a fact. And unlike even the aggravating facts necessary in Ring, aggravators, or reasons for enhancement, in the Mississippi habitual scheme are determined under the "beyond reasonable doubt" standard.[6] Other states

[6] At the bifurcated hearing required under the recidivist statutes, the State must prove, beyond a reasonable doubt, that the defendant meets the requirements for sentencing as a habitual offender. Bandy v. State, 495 So.2d 486 (Miss. 1986) The defendant has the right to be heard at this hearing. Seely v. State, 451 So.2d 213, 215 (Miss. 1984).

require proof only "by a preponderance of the evidence," instead of beyond a reasonable doubt. Wash. Rev. Code § 9.94A.370(2); Gore, 143 Wn.2d at 315.

In the instant case, or the case at bar, Miss. Code Ann *§* 99-19-81 subjected Parham to a sentence of the remainder of his life in prison. The United States Supreme Court has made clear in Apprendi v. New Jersey and again in Blakely v. Washington, that under this sentencing range a jury should have been allowed to make the determination of whether Parham be adjudicated as a habitual offender and made the subject of the mandatory enhanced sentence. Yet petitioner's sentencing court found, without a jury, that petitioner was a habitual offender and should be sentenced to an enhanced term of imprisonment without any possibility of parole which require that Parham serve the complete term.

This procedure constitutes a paradigmatic Apprendi violation. The court (rather than a jury) found certain facts by a preponderance (rather than beyond a reasonable doubt) which exposed Petitioner to an increased sentence exceeding that prescribed by the Mississippi Legislature for the offenses which petitioner was charged and convicted.[7] Apprendi itself, in fact, noted that increasing a

[7]Petitioner was convicted in count 2 of a 6 count indictment of the OFFENSE OF UTTERING FORGERY. *Petitioner was additionally charged, BY AMENDMENT, in each count with being a habitual offender within the means of Miss. Code Ann. §99-19-813 without which the state would not have been able to pursue and secure habitual enhanced terms and deprive petitioner of the eligibility of parole and other credits which could have been obtained under good behavior while incarcerated on such sentences.* The 6 count indictment in this case derived from a single fusillade of events which occurred during a continued and unbroken chain of events. The State, AFTER INITIALLY SEEKING TO AMEND THE INDICTMENT UNDER Miss. Code Ann. *under §* 99-19-83, reverted to proceed under Miss. Code Ann. *under §* 99-19-81. The state was *allowed an additional bite of the apple to charge petitioner under §* 99-19-81 without the Court requiring the state to submit or amend the information which it sought to obtain the habitual sentence under. The initial submission was under Miss. Code Ann. *under §*

sentence based on a "second mens rea requirement" without submitting the issue to a jury is a classic violation because "[t]he defendant's intent in committing a crime is perhaps as close as one might come to a core criminal offense 'element.'" 530 U.S. at 493. The trial court's finding that Petitioner was a habitual offender and should be sentenced to an enhanced punishment, without a jury having made a determination of this fact, is a clear violation of Apprendi and Blakely. Despite the apparent clarity of the Apprendi infirmity in the State of Mississippi's exceptional habitual enhanced sentencing system, the Mississippi Supreme Court has ruled that the Constitution confers on accused no right of trial by jury on question of whether he is habitual offender. Keyes v. State, 549 So.2d 949 (Miss. 1989). While this was the view of the Mississippi Supreme Court prior to the intervening decisions in Apprendi and Blakley, this prior holding is directly contrary to what the United States Supreme Court has now ruled. The State of Washington, which is the same state in the Blakley decision originated from, has held that factual determinations leading to exceptional sentences upward are more like the determination upheld in McMillan v. Pennsylvania, 477 U.S. 79 (1986), which dictated a mandatory minimum sentence, than those covered by Apprendi, Gore, 143 Wn.2d at 314. Neither justification withstands scrutiny.

99-19-83, which statute require different information than *under §* 99-19-81.

D.

The Way in which the Mississippi habitual offender enhancement Sentence System Operates, Not the Labels It Uses, Is Dispositive.

The Mississippi habitual offender statute cannot avoid the mandates of Apprendi simply by saying that the eligibility for a habitual sentence is based upon prior convictions which is not a charge but an enhancement procedure Constitutional protections, particularly in the context of Apprendi, do not turn based on where name tags are placed. As the United States Supreme Court recently explained:

The dispositive question [under Apprendi] "is one not of form, but of effect." If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt. Ring, 536 U.S. at 602 (quoting Apprendi, 530 U.S. at 494) (emphasis added); see also Ring, 536 U.S. at 610 (Scalia, J., concurring) ("[A]ll facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt."); Mullaney v. Wilbur, 421 U.S. 684, 698 (1975) (a state's "characteriz[ation]" of factors bearing on punishment does not control constitutional inquiry).

For this same reason, labeling makes no difference in determining whether a certain provision sets forth a "statutory maximum" for purposes of Apprendi. Rather, the dispositive question is a functional one: what is the maximum penalty to which the defendant is subject if punished "according to the statutes in which he was indicted under without applying the enhancement provision of Miss. Code Ann. §99-19-81 reflected in the jury verdict alone" or the guilty plea alone? Apprendi, 530 U.S. at 4834; accord Ring, 536 U.S. at 597. That penalty in Mississippi – as in other states with similar guideline systems – is indisputably "the maximum sentence in the applicable grid box.") (emphasis added). Miss. Code Ann. §97-3-7; Miss. Code Ann. §97-37-5. It does not matter that Mississippi uses the term "statutory maximum" to describe the longest permissible exceptional sentence instead of the longest permissible standard-range sentence.

In this regard as well, Mississippi's exceptional habitual sentencing procedure is the same as the procedure that the Supreme Court invalidated in Ring. The Arizona first-degree felony murder statute "authorize[d] a maximum penalty of death . . . in a formal sense" because it noted that death was the maximum sentence available for that crime. 536 U.S. at 604 (quotation omitted); see also id. at 592. But "[b]ased solely on the jury's verdict finding [a defendant] guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. [citations omitted]. This was so because, in

Mississippi a life sentence for the offense of aggravated assault or possession of a firearm by a convicted felon may not legally be imposed . . . unless at least two aggravating factor is found to exist." Id. at 597 (quoting State v. Ring, 25 P.3d 1139, 1151 (Ariz. 2001)). The Court should therefore find that Apprendi govern the procedures for finding such an aggravating factor because otherwise, "Apprendi would be reduced to a 'meaningless and formalistic' rule of statutory drafting." Id. at 604.5 4 The defendant in Apprendi, like Petitioner here, pled guilty to the underlying offense. See 530 U.S. at 469-70. [8]

Precisely the same analysis applies here. As the Ring Court itself explained, "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." 536 U.S. at 609 (emphasis added); see also id. at 607 ("We see no reason to differentiate capital crimes from all others in this regard."); Apprendi, 530 U.S. at 544-51 (O'Connor, J., dissenting) (recognizing that Apprendi rule applies to facts necessary to impose death penalty as well as to impose an additional term of years). Indeed, the

[8]Justice Thomas used similar reasoning in Apprendi itself in explaining that case's rule: "[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if a legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact – of whatever sort . . . – the core crime and the aggravating factor together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime" and must be submitted to the jury and proved beyond a reasonable doubt. 530 U.S. at 501 (Thomas, J., concurring) (emphasis added).

noncapital nature of the heightened sentence here makes this case, if anything, easier than Ring. As Justice Scalia noted in Ring, there was some doubt there, in light of this Court's Eighth Amendment jurisprudence, as to whether the Arizona Legislature voluntarily had made the imposition of the death penalty dependent on the finding of an aggravating fact. See 536 U.S. at 610-12 (Scalia, J., concurring). But here, there is no question that the Mississippi Legislature voluntarily created a statutory scheme under which defendants' sentences cannot exceed the top of the standard range unless the habitual aggravating factors are present.

In short, because Mississippi courts may not legally deviate upward from the top of the sentencing range dictated by a guilty verdict alone "unless at least one aggravating factor is found to exist," Ring, 536 U.S. at 597, the procedures for finding such a factor must comply with Apprendi.

E.

McMillan v. Pennsylvania's Analysis Regarding Mandatory Minimum Sentences Does Not Apply Here.

The Washington Supreme Court's reliance on McMillan v. Pennsylvania is equally unavailing. McMillan – which this Court reaffirmed after Apprendi in Harris v. United States, 536 U.S. 545 (2002) – held that a factual finding necessary to impose a "mandatory minimum" sentence need not be submitted to a jury or proved beyond a reasonable doubt. Thus, as the Washington Supreme

Court correctly noted, Apprendi does not apply to factual findings that merely dictate a certain sentence "within a range already available" to a sentencing court based on the elements of the offense of conviction. Gore, 143 Wn.2d 312 (quoting McMillan, 477 U.S. at 88). But the exceptional-sentence system at issue here, unlike a situation involving a mandatory minimum, leads to sentences that are not already available to sentencing courts. Under Washington statutory law, at the moment a defendant pleads or is found guilty of a crime, the standard range is the only sentencing range that is legally available to a Washington court. Wash. Rev. Code §§ 9.94A.120(1) & (2). Imposing an exceptional sentence upward is not an option unless and until a court finds an aggravating fact not encompassed in the elements of the underlying crime. Gore, 143 Wn.2d at 315. That being so, Washington's procedures for finding aggravating facts are covered by Apprendi, not McMillan. In Apprendi itself, in fact, this Court expressly "limit[ed] [McMillan's] holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury verdict." 530 U.S. at 487 n.13. The aggravating facts at issue here – as in all exceptional sentences upward in Washington – allow the "imposition of a sentence more severe than the statutory maximum for the offense established by the jury verdict." Id. They do not dictate any minimum sentence within an otherwise available range. In fact, the Washington Supreme Court's McMillan rationale

essentially repeats the same contention that the State of Arizona unsuccessfully advanced in Ring – namely, that a certain sentence is available to a sentencing court, regardless whether additional findings are necessary to impose it, so long as a provision of state law says that the sentence is a permissible punishment for the crime of conviction. But, as the Supreme Court explained in rejecting that argument: "The Arizona first-degree murder statute authorizes a maximum penalty of death only in the formal sense, . . . for it explicitly cross references the statutory provision requiring the finding of an aggravating circumstance before the imposition of the death penalty." Ring, 536 U.S. at 604 (internal quotations and citation omitted). The necessity of finding such additional facts, not any cross-referencing in the statutory scheme, controls the constitutional analysis. Id. Washington statutory law permitted a maximum sentence of 53 months for Petitioner's kidnapping offense, in the absence of aggravating facts not encompassed in his guilty plea. As such, the procedures for finding any such facts had to conform to the requirements of Apprendi. Washington law's "formal" permission to sentence Petitioner to more than 53 months if aggravating facts were found does not affect the result here.

F.

The Exceptional Sentence Imposed Here Highlights the Practical and Structural Concerns Underlying Apprendi.

The Apprendi rule, of course, is more than a mechanical formula designed to separate criminal offense elements from other factual issues; it is the embodiment of "constitutional protections of surpassing importance." Apprendi, 530 U.S. at 476. Three aspects of the proceedings below demonstrate why it is vital that the Court hold firm to an insistence that any fact necessary to increase a defendant's sentences be alleged in advance and proven to a jury beyond a reasonable doubt. First, the procedures that led to Petitioner's punishment underscore the need to require legislatures to treat every fact they deem essential to a given prison term with equal gravity. This Court explained in Apprendi that: New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentencing enhancement" to describe the latter surely does not provide a principled basis for treating them differently. 530 U.S. at 476. Washington did not follow this elementary principle here. In the Washingto case, the Washington

Legislature threatened the petitioner with certain pains if he kidnapped his wife; certain pains if he did so with a deadly weapon; and additional pains if he did so with deliberate cruelty. But the Washington courts permitted the latter issue to be treated differently simply because the Legislature has designated it an "aggravating factor" instead of an element or sentencing enhancement. This reasoning allows the Legislature, through mere labeling, to mandate increases in defendants' sentences based on factual determinations that it has removed from the purview of the jury and that are not otherwise subject to the ordinary procedural protections governing statutory elements. In this case, in fact, Washington's system allowed the largest portion of Petitioner's sentence to turn on the factual finding that was subject to the slightest procedural protections: While the standard range for second degree kidnapping was 13-17 months, and the deadly weapon enhancement was 36 months, the deliberate-cruelty upward deviation that the trial court imposed was 37 months. Legislatures, to be sure, have considerable discretion in defining crimes in the first instance – that is, in deciding which facts are essential to which kinds of punishment. But here, the Washington Legislature has decreed that the maximum sentence that it will permit for a defendant such as Petitioner committing the bare offense of second degree kidnapping with a deadly weapon is 53 months. Wash. Rev. Code §§9.94A.310 (1) & (3)(b); see also State v. Pascal, 108 Wn.2d 125, 137, 736 P.2d 1065 (1987)

("The presumptive sentences established for each crime represent the legislative judgment as to how these interests [protection of the public, the need for rehabilitation, and the need to make frugal use of the state's resources] shall best be accommodated.") (emphasis added); State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719 (1986) (Sentencing Reform Act allows courts sentencing discretion only within boundaries "given by the Legislature," which in the absence of aggravating or mitigating factors encompass only the standard range). The Legislature has decided in this case that the range of sentencing for aggravated assault in this state will be up to 30 year and the rang of sentencing for possession of a weapon by a convicted felon will be 3 years unless some additional habitual offender factors are present and proven.

Apprendi holds that in such a situation – i.e., when "a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others" – "it necessarily follows that the defendant should not – at the moment the State is put to the proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached." 530 U.S. at 484. The Washington Legislature's exceptional sentence system unconstitutionally deprived Petitioner of these critical protections against an erroneous loss of liberty and an unwarranted additional stigma.[9]

[9]Because standard sentencing ranges in Washington, unlike those in the federal sentencing guidelines, are "prescribed by the legislature," Apprendi, 530 U.S. at 481, a decision invalidating Washington's procedures for

Second, Petitioner's sentencing proceedings underscore the unfairness in allowing a judge to make a finding necessary to increase a defendant's punishment by only a preponderance of the evidence. The Sixth Amendment right of the accused to have a jury of his peers determine "the truth of every accusation" is designed in part to guard against arbitrary, biased, or eccentric judicial decisions. Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (quoting 4 William Blackstone, Commentaries on the Laws of England *349 (1768)). The Due Process Clause similarly requires the prosecution to prove each element of a criminal offense beyond a reasonable doubt because "the interests of the defendant are of such magnitude" that they must be protected by a standard of proof "designed to exclude as nearly as possible the likelihood of an erroneous judgment." Addington v. Texas, 441 U.S. 418, 423 (1979); see also In re Winship, 397 U.S. 358, 363-64 (1970) (beyond a reasonable doubt standard is "a prime instrument for reducing the risk of convictions resting on factual error"). As this Court noted in Winship, "a person accused of a crime . . . would be at a serious disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged

imposing exceptional sentences upward would not necessarily nullify the comparable provisions in the United States Sentencing Guidelines. The federal sentencing grid is promulgated by a Sentencing Commission that resides in the Judicial Branch. Accordingly, as this Court noted in Mistretta v. United States, 488 U.S. 361 (1989), presumptive sentencing ranges under the federal guidelines are not legislative acts. Rather, they are "court rules" derived from "judicial rulemaking." Id. at 386 & 391. Apprendi's prohibition against exceeding the "statutory" maximum based on facts that were not submitted to the jury or proved beyond a reasonable doubt arguably pertains only sentencing limits set by legislatures. See Apprendi, 530 U.S. at 523 n.11 (Thomas, J., concurring) (noting the "unique status" of the federal guidelines in light of Mistretta); cf. supra at 3 n.2 (noting other differences between Washington and federal guidelines).

guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." 397 U.S. at 363 (quotation and citation omitted); see also People v. Reese, 258 N.Y. 89, 101 (1932) (Cardozo, J.) ("The genius of our criminal law is violated when punishment is enhanced in the face of reasonable doubt as to the facts leading to the enhancement.") But that is exactly what happened here. Petitioner was sentenced to more than three additional years in prison on the basis of a factual finding (deliberate cruelty) that the trial judge practically conceded was proven beyond a reasonable doubt. Enforcing the Apprendi rule here will prevent defendants such as Petitioner from being blindsided by court-imposed sentences longer than they could have predicted from the facts charged in the indictment returned by the grand jury in such cases.

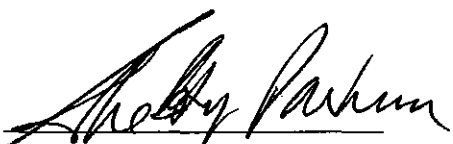
For the foregoing reasons, this Court should reverse the sentence imposed upon Shelby Ray Parham and hold that the procedures in Mississippi habitual criminal sentencing act is unconstitutional under the ruling by the United States Supreme Court in Apprendi and Blakely since such procedures fail to permit a jury to determine the evidence associated with the enhancement of the sentence imposed.

This Court should conduct an evidentiary hearing in regards to such claims and, if such claims are proven the Court should direct a new trial be held.

Appellant's trial attorney was grossly ineffective during the trial court proceedings. This Court should grant the motion and direct that the conviction and guilty sentence be set aside and that this case proceed to trial.

WHEREFORE THESE PREMISES CONSIDERED, Appellant Parham respectfully submits that based on the authorities cited herein and in support of his brief, that this Court should vacate the guilty plea, conviction and sentence imposed as well as the action taken by the trial court in regards to the post conviction relief motion. At the least, because of the state of the record and the reasons advanced by the trial court denying relief on an incomplete record, this Court should reverse and remand this case to the trial court for the purpose of completing the record on appeal or to conduct a hearing on that point.

Respectfully submitted,

BY: 

Shelby Ray Parham, #72268
Unit 29-C
MSP
Parchman, MS 38738

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Brief for Appellant, has been mailed to:

Honorable Jim Hood
P. O. Box 220
Jackson, MS 39205

Honorable James T. Kitchens, Jr.
Circuit Court Judge
P. O. Box 1387
Columbus, MS 39703

Forrest Allgood
District Attorney
P. O. Box 1044
Columbus, MS 39703

This, the 30 day of November, 2009.

Respectfully submitted,

BY: 

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MSP
Parchman, MS 38738

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-KA-00233-COA

MERLIN HARDISON **APPELLANT**

V.

STATE OF MISSISSIPPI **APPELLEE**

MOTION TO PLACE BRIEFING SCHEDULE IN ABEYANCE PENDING RULING ON APPELLANT'S MOTION TO DISMISS COUNSEL AND PROCEED PRO SE ON APPEAL

Comes Now the Appellant, Merlin Hardison, and moves this Honorable Court to stay the time schedule for filing Brief for Appellant, pending a ruling by the Court on Motion to Dismiss Counsel on Appeal **See Exhibit "A", attached hereto**. Appellant would show the following facts in support of this Motion.

I.

That Appellant was convicted in the Circuit Court of the First Judicial District of Hinds County, Mississippi for the offense of two counts of aggravated assault and armed robbery and sentenced to a term of 32 years imprisonment in the custody of the Mississippi Department of Corrections.

II.

That the Appellant previously filed a motion in this Court on November 9, 2009 requesting that the Court dismiss counsel and allow him to proceed with his appeal pro se or to retain counsel to represent him. Said motion continues to be pending on the docket of the court without a disposition. See Exhibit "A", attached hereto.

III.

Appellant subsequently mailed a second motion to the Court seeking the same action of dismissal of counsel which motion have not been docketed on the

IV.

Appellant would point out that the briefing schedule continues to run and that the brief is now due on November 25, 2009. Since Appellant have made the motion to dismiss counsel in this appeal, any brief which may be filed by counsel would be void where Appellant have made known to he Court that he desires to exercise his constitutional right to proceed with his appeal himself on direct review.

V.

Appellant would ask this court to place the briefing schedule in abeyance until this court may hear and determine the foregoing motion(s) to dismiss counsel and that the Court will allow an additional 30 days to permit Appellant to receive and review the record and file his brief on appeal to this Court.

These premises considered, Appellant prays that this motion will be granted and that an Order will issue from this Court staying the briefing schedule for filing the brief on appeal until 30 days following the decision by this court on motion to dismiss counsel.

Respectfully submitted,

BY: _____

Merlin Hardison, #120799
Unit 29-D, B-Zone
Parchman, MS 387

CERTIFICATE OF SERVICE

This is to certify that I, Merlin Hardison, have this day mailed, via day mailed, via U. S. Postal Service, first class postage prepaid, a true and correct copy of the above and foregoing, MOTION TO PLACE BRIEFING SCHEDULE IN ABEYANCE, by the United States Postal Service, first class postage prepaid, to Honorable Jim Hood, Attorney General, P.O. BOX 220, Jackson, MS 39205

ON THIS, the ___ day of November, 2009.

BY: _____

Merlin Hardison, #120799
Unit 29-D, B-Zone
Parchman, MS 387

Sworn Written Deposition
of Michael Johnson, Prison No. 123422

Michael Johnson hereby states the following facts under oath and in the presence of the Notary Public.

My name is Michael Johnson and I am now an inmate confined at the Wilkinson County Correctional Facility in Woodville, Mississippi. My Date of Birth is February 19, 1977.

On June 14, 2005, there was a crime committed in Ridgeland, Mississippi, where William Curtis Jones was robbed and shot. I was charged with this offense and did subsequently plead guilty to the crime.

After being arrested, and being placed in Jail awaiting trial, I was approached by my attorney, Catouche Body, and the Madison County, Mississippi, Assistant District Attorney from District Attorney David B. Clark's Office, who advised me that the Didtrict Attorney's Office needed me to testify against and to implicate Ferlando Esco as being the master mine behind this crime. The prosecutor and my attorney told me that if I implicated Esco, I

would get a 12 year sentence deal but if I failed to implicate Esco, I would be sentenced to 40 years for this offense.

I continued to tell Mr. Clark and Mr. Body that Ferlando Esco was not involved and that he was no place near the crime and knew nothing about it. Mr. Body told me it would be best that I followed the Assistant District Attorney's instructions and fully cooperate. I was subsequently moved to the Rankin County jail and held there pending trial.

On the weekend just before the week of the Esco trial the Assistant District came to the jail where I was being held and told me exactly what I would have to state and testify to when he called me to testify against Ferlando Esco.

I followed the Assistant District Attorney's instructions because I knew if I did not I would get the 40 years in which he had so specifically stated I would get.

The testimony provided by me against Ferlando Esco on the date of the trial in his case was totally incorrect. Esco was no

place near the crime and actually knew nothing about this crime and knew nothing about it at all.

I have not been promised anything to testify in this matter and there have been no threats made against me of any form in which I am aware of. I am giving this information because I want to tell the truth.

It was absolutely wrong that I went along with Mr. Body and the Assistant District Attorney trying to save myself. I am now telling the truth.

This, ____ day of November, 2009.

_____

Michael Johnson

STATE OF MISSISSIPPI
COUNTY OF WILKINSON

PERSONALLY APPEARED BEFORE ME, the undersigned authority, in and for the jurisdiction aforesaid, affiant Michael Johnson, who, being duly sworn on his oath, does depose and sayeth that those matters, facts, and information provided in the above and foregoing deposition is true and correct to the best of his knowledge and belief.

_____ _____

My Commission Expires Notary Public