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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

2009-KP-00048-^{COA}~~SGT~~

MICHAEL K. JOHNSON

FILED

APPELLANT

VS.

SEP 22 2009

STATE OF MISSISSIPPI

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COURT OF APPEALS

APPELLEE

REPLY BRIEF FOR APPELLANT

BY:

Michael Johnson

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2009-KP-00048-SCT

MICHAEL K. JOHNSON

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

APPELLANT'S REPLY BRIEF

The State of Mississippi has filed its brief in this case and has failed to refute Appellant's claims that:

- a.) The habitual portion of the indictment, charging appellant as a habitual offender under Miss. Code Ann. §99-19-83, is defective and void where the indictment fails to charge, and the state failed to introduce proof of the dates of the sentencing in the prior convictions.
- b.) Appellant was subjected to ineffective assistance of counsel at trial and during sentencing proceedings in the court, in violation of his 6th amendment rights to the United States Constitution and the Constitution of the State of Mississippi.
- c.) The trial court erred in overruling the Appellant's motion for a directed verdict.
- d.) The trial court erred in denying the appellant's motion for a new trial as the verdict was against the overwhelming weight of the evidence
- e.) The indictment is defective where it charged appellant under two different habitual statutes without specifying exactly which statute the prosecution would apply.
- f.) Appellant suffered cumulative error which deprived of him of his constitutional right to a fair trial in violation of the 5th and 14th Amendments to the United States Constitution.

The state's argument in opposition to the claims presented in this appeal are not on point. Initially, it should be pointed out that the facts provided by The brief of Appellant clearly demonstrates that Appellant is entitled to relief in regards to his petition.

The state initially indicted Appellant under dual habitual enhancement statutes without referring to either statute specifically but notified Appellant that the state was seeking 20 years. The trial court, following conviction, imposed the habitual sentence under the large habitual sentencing option in the form of a life sentence without any possibility of parole under each charge. Appellant initially asked the court to appoint new counsel to represent him during the proceedings where his present attorney had not only lied to Appellant but had only visited Appellant in jail one time between the time of the indictment and the time of the trial.

During the sentencing phase of the proceedings, defense counsel actually said nothing and made no objections or effort to defend Johnson. Further, the record will show that the state never set out the dates of the judgment of either of the prior convictions and quoted an incorrect sentencing date for the prior conviction which it set out in Cause No. 7941. Johnson was sentenced under a defective indictment. The indictment failed to comply with Rule 6.04 of the Miss. Unif. Rules of Cty. and Cir. Court Practice which requires that the indictment set forth the date of judgment in each prior conviction and an element of the proof required. The state failed to satisfy such requirement, which constitutes plain error and cannot be waived by a failure to object at trial. The state fully failed to rebut or refute the claims in it's brief.

The state asserted that the indictment itself proved Appellant's claims regarding the dual charging of habitual statutes to be a lie. Can the state charge Appellant under two habitual statutes and take it's choice at the end of the trial depending upon what it is able to prove. The state should not be able to take the position that if, for some reason, the proof fail to demonstrate

a habitual charge under the one habitual statute then Appellant is sentenced under the other. A defendant have a right to notice of what he is to defend against.

The Sixth Amendment guarantees defendants the right to be informed of the nature and cause of the accusation made against him. Courts have interpreted this provision to have two elements. First, a defendant must receive notice of any specific criminal accusations that the government has lodged against such defendant through an indictment, information, complaint, or other formal charge. Second, defendant may not be tried, convicted, or sentenced for a crime that materially varies from the crime set forth in the formal charge. If a defendant suffers prejudice or injury, such as a conviction, from a material variance between the formal charge and the proof offered at trial, the court should vacate the verdict and sentence.

The Sixth Amendment notice requirement reflects the efforts of the Founding Fathers to constitutionalize the common law concept of fundamental fairness that pervaded civil and criminal proceedings in England and the American colonies. Receiving notice of pending criminal charges in advance of trial permit the defendant to prepare a defense in accordance with the specific nature of the accusation. Defendants who are incarcerated by totalitarian governments are frequently not apprised of pending charges until the trial begins. By requiring substantial conformity between the criminal charges and the incriminating proof at trial, the Sixth Amendment eliminates any confusion as to the basis of a particular verdict, thereby decreasing the chances that a defendant will be tried later for the same offense in violation of protections.

Many appeals have focused on the issue of what constitutes a material variance. In Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960), the U.S. Supreme Court found a material variance between an indictment charging the defendant with illegal importing activities, and the trial evidence showing that the defendant had engaged in illegal

exporting activities. In United States v. Ford, 88 F.3d 1350 (4th Cir. 1996), the U.S. Court of Appeals for the Fourth Circuit found a material variance between an indictment charging the defendant with a single conspiracy, and the trial evidence demonstrating the existence of multiple conspiracies.

The state should have been specific in charging Johnson as a habitual. The law is clear that the state cannot throw two possible statutes out and take it's choice once a conviction and the evidence have been presented. Due process of law should prevent this. This very issue is the basis of this Court's decision in Beckham v. State, 556 So.2d 342 (Miss. 1990), which was decided adverse to the position of the state. If the state's theory was to suffice there would be no need to specify which statute a habitual enhancement was to be presented under and no need to amend the indictment. Appellant argues to this Court that the method used by the state in bringing the habitual charges against him, by use of dual habitual states, failed to provide Johnson with adequate notice of the penalty in which the state would seek. Said difference in the penalty was substantial where Section 99-19-81 allows a maximum sentence of 20 years, which is what the state initially announced it would seek, and where Section 99-19-83 carries a potential sentence of life imprisonment, which is the sentence which the state finally had imposed. Such substantial difference in the sentences constitutes prejudice to the Appellant which this Court should address.

The state argues that Appellant never raised the claim of the charge being one of shooting into a vehicle rather than aggravated assault. This is not correct. The state argues this but on the same note argues that defense counsel was not ineffective for failing to raise adequate issues in the trial court below. If the state argues that counsel never raised a potentially prevailing claim in

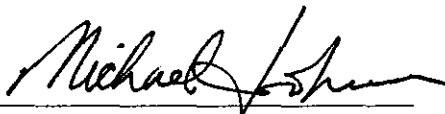
the trial court then the state actually demonstrates for Joihnson The state goes on to argue that defense counsel never requested an instruction of shooting into a motor vehicle.

This Court should find that the state has failed to refute the claims set out in the Appellant's Brief and should grant this appeal and reverse and remand the conviction and sentence to the trial court.

CONCLUSION

Johnson would respectfully ask this Court to reject the state's argument and find that Appellant suffered a violation of his constitutional rights for the reasons and authority cited herein. Appellant Johnson submits that the convictions and sentences imposed in this case should be reversed and rendered. In the alternative, Johnson's Convictions and sentences should be reversed to the trial court with instructions that a new trial be granted or that new sentencing be imposed consistent with the laws of the State of Mississippi as cited herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Michael Johnson, Appellant pro se, have this date delivered a true and correct copy of the above and foregoing Appellant's Reply Brief, to:

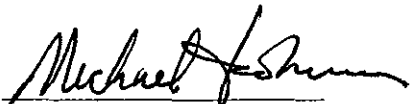
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Honorable Charles Webster
Circuit Court Judge
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This, the 22 day of September, 2009.

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