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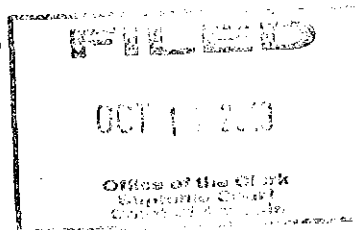
CASE NO. NO. 2010-CP-0327-COA

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DERRICK MITCHELL  
APPELLANT/DEFENDANT

VS.

STATE OF MISSISSIPPI  
APPELLEE/PLAINTIFF



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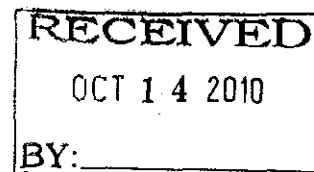
APPEAL FROM THE CIRCUIT COURT  
OF LAFAYETTE COUNTY, MISSISSIPPI

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APPELLANT'S REPLY BRIEF

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**APPELLANT'S REPLY BRIEF**

**STATEMENT OF CASE**

Mitchell would assert to this Court that the state's assertion that the plea transcript and the sentencing order is inconsistent with each other amounts to a confession of error by the state. Only the trial court may revise this record or make corrections which the trial court have not done. This Court should look at the record on it's face. Where the contents of the record is inconsistent then remand should be required. The state should not be allowed to revise the record, to it's self-serving purpose, at it's choosing. This Court should remand to the trial court for a hearing on that point since the present plea transcript, if the state is correct, should be void.

**A.**

The movant asserts that the trial court erred in failing to grant relief on his PCR Motion which was based on violations of both state and federal law claims, which were set out to the trial court and are asserted in this appeal as follows:

**ISSUE ONE**

The trial court erred in failing to find that the Habitual offender motion charging Mitchell as a habitual offender under Miss. Code Ann. 99-19-83, as well as the order which allowed the indictment to be amended, was defective and void where the order fail to allege or charge, and the state failed to introduce proof of, the element of the dates of the sentencing and judgment in the prior convictions. The motion and order also fail to allege the court in which such prior conviction imposed.

**ISSUE TWO**

The trial court erred in failing to find that Mitchell was subjected to ineffective assistance of counsel, at the time of the plea of guilty and during sentencing proceedings in the court, when his attorney allowed the motion to amend the indictment to be filed and allowing the court to enter

**B.**

The state has failed to refute Mitchell's issues presented in the Brief for Appellant. The State only argued that Mitchell's claims are procedurally alive since a plea of guilty was entered. In advancing this argument the state

overlooked and attempts to revamp and revise not only the record but the claims presented by Mitchell as well.

The claims presented by Mitchell reaches to constitutional status and is errors which affects fundamental constitutional rights which should be excepted from procedural bars that may otherwise prohibit their consideration. Lockett v. State \_\_\_ So.2d \_\_\_ (Miss. \_\_\_); Smith v. State, 477 So.2d 191, 195-96 (Miss. 1985). Mitchell's arguments regarding the substantive deficiencies set out in the post conviction motion and Brief for Appellant implicates fundamental constitutional rights to due process and constitutes exceptions from the procedural bars of the UPCCRA, "which would otherwise prohibit [their] consideration."

The issues advanced by Mitchell demonstrates that Mitchell's claims are constitutionally originated. The state has conceded that the record filed by the trial court is not proper. On the basis of their confession alone where Mitchell have been sentenced as a habitual offender, the case should be remanded. The record cannot be correct in one place and incorrect in the other. If the record shows that one judge sentenced Mitchell on a date different from the date which the state asserts the sentence was actually imposed and the transcript of the plea is void and incorrect then the plea is invalid where there is no written colloquy to support the plea. The Court of Appeals applied the law of Steen v. State, 873 So. 2d 155,161 (Miss. Ct. App. 2004), where the court authorizes itself to determine questions of a defective

**indictment but this same standard should not apply where the indictment is absolutely void on the habitual issue.**

Appellant asserted in his brief that the habitual language was void. The question here will come to be whether the trial court actually had subject matter jurisdiction over the enhancement and to impose a habitual sentence where the indictment was defective in it's mandatory requirement to comply with Rule 11.03(1). If the indictment failed to meet this requirement then there was a lack of subject matter jurisdiction over the enhancement of the sentence and this claim would fall squarely under the state's second exception of the guilty plea having not waived the issue. While the state argues that since Section 99-19-81 and Section 99-19-83 cannot never qualify as a jurisdictional bracket because, as the state's theory advances, these are not criminal statutes but are only sentencing statutes. Under the state's theory sentencing statutes are immune from any subject matter jurisdiction. That exactly what the state is arguing. This argument makes little sense. Osborne v. State, 880 So.2d 1094, 1099 (Ct. App. Miss. 1004) does not support this theory. While this Court did hold in Osborne that "*Sections 99-19-81 and 99-19-83 of the Miss. Code Ann. are not criminal offenses and only affect sentencing. Further the indictment in the present case fully complied with the requirements of Rule 6.04 of the Mississippi Uniform Criminal Rules by listing the principal charge and the previous convictions with the required particularity. The indictment also complied with Rule 2.05 of the Mississippi Uniform Criminal Rules concerning the form of the indictment*", such finding by the Court never spoke upon whether the a guilty plea would waive a claim under these statutes by the classification of such statute as being a sentencing statute. Sentencing statutes may be subject to subject matter jurisdiction.

Mitchell has firmly asserted that the indictment which was used to charge him with the crimes was fatally defective because it did not include the dates of judgment for the prior convictions which was used to make up the habitual-offender status. Mitchell further demonstrated that the State failed to introduce any proof of the dates of the prior sentencing during the sentencing hearing in the trial court.

The state clearly overlooked and ignored this point that the indictment never asserted the dates of Judgment as the law requires. The indictment never asserted the correct date of judgment in the previous convictions.<sup>1</sup> The law requires that the indictment allege this as being the exact date and way Rule 11.03(1) directs and requires. Where the indictment fail to comply in this way then the attempt to charge habitual status is void.

Mitchell's defective indictment claim has merit. The state attempted to downplay the claim by noting that Mitchell entered a plea of guilty to the principle charge. That point is true, but, however, the state failed to note that Mitchell was represented by counsel at the time this case was before the trial court and that Mitchell have never had an independent opportunity to raise the claim himself. Would it have been proper for Mitchell to stand up in Court and interrupt the proceedings by asserting to the Court that he wanted to raise this issue when his attorney had decided not to do so? The Supreme Court have constantly and consistently refused to penalize a defendant who have never had an independent opportunity to raise a claim.

We expressly reject so much of the argument advanced by the State of Mississippi as would have us hold that the ineffective assistance of counsel issue is procedurally barred here because it was not properly raised or preserved in the

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<sup>1</sup> This information should not be written in riddle fashion but should be alleged in the indictment in plain language where it can be grasped by the Appellant to put him on notice of what he is charged with and allow him an opportunity to defend. This information should be sufficient if the indictment states other dates and expects the Appellant to put the pieces together or o substitute the dates. An Appellant who was facing a life sentence without parole, where the sentence was riding on those crucial dates, should not be expected to do the work of the state and hunt down the dates. The Court of Appeals should have reversed on this claim.

trial court. That argument is wrong because the Reads never had a meaningful opportunity to raise the issue in the court below.

In addition, that holding is completely at odds with the spirit of Brooks v. State, 209 Miss. 150, 46 So.2d 94 (1950). In Brooks, this Court, per Justice Percy M. Lee, recognized that “errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal.” [209 Miss. at 155, 46 So.2d at 97].

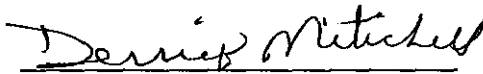
Read v. State, 430 So.2d 832, 836-837 (Miss. 1983).

The Court of Appeals is quick to ignore the spirit of the Read court where it found that a defendant represented by counsel should not be prevented, on appeal, from raising the issue for the very first time where the defendant is no longer represented by the same counsel or represented by himself. This Court, being the Court which created the spirit of Books, should follow the spirit of Read and Brooks.

### CONCLUSION

Derrick Mitchell would respectfully ask this Court to reject the State’s argument and find that Appellant suffered a violation of his constitutional rights to due process of law and this court should reverse and remand this case to the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Derrick Mitchell, 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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Attorney General  
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Jackson, MS 39205

This, the 11<sup>th</sup> day of October, 2010.

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