

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

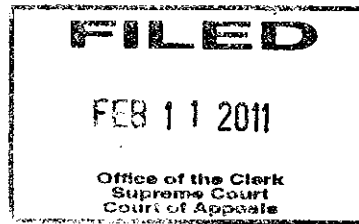
NO. 2010-CP-01078-SCT

DANIEL ZACHARY ROSS

APPELLANT

V.

STATE OF MISSISSIPPI



APPELLEE

**BRIEF FOR APPELLANT**

BY: Daniel Ross  
Daniel Zachary Ross, #132320  
WGCF  
P. O. Box 389  
Walnut Grove, MS 39189

**ORAL ARGUMENT NOT REQUESTED**

**PRO SE PRISONER BRIEF**

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS .....	3
STATEMENT OF ISSUES .....	4-5
STATEMENT OF INCARCERATION .....	5
STATEMENT OF CASE .....	5
STANDARD OF REVIEW .....	6-7
SUMMARY OF ARGUMENT .....	7
ARGUMENT .....	7-14
ISSUE ONE .....	7-10
ISSUE TWO .....	10-14
CONCLUSION .....	14
CERTIFICATE OF SERVICE .....	15

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2010-CP-01078-SCT

DANIEL ZACHARY ROSS

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned Appellant, Daniel Zachary Ross, certifies that the following listed persons have an interested in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Daniel Zachary Ross, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable James L. Robinson, Circuit Court Judge.
4. Honorable John R. Young, Assistant District Attorney.

Respectfully Submitted,

BY: Daniel Ross  
Daniel Zachary Ross, #132320  
WGCF  
P. O. Box 389  
Walnut Grove, MS 39189

Appellant

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2010-CP-01078-SCT

DANIEL ZACHARY ROSS

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

**STATEMENT OF ISSUES**

**ISSUE ONE:**

Petitioner Ross was denied due process of law and subjected to a fundamental constitutional violation where trial court imposed sentence for armed robbery offense and specified that such sentence was imposed pursuant to Miss. Code Ann. §47-7-3(d)(ii) and where such sentence should have been imposed pursuant to Miss. Code Ann. §47-7-3(d)(i) where the indictment charge Ross under Miss. Code Ann. §97-3-79 and not under Miss. Code Ann. §97-3-115 or any other statute related to carjacking. The imposition and sentencing for armed robbery under Miss. Code Ann. §47-7-3(d)(ii) therefore constitutes plain error and a fundamental constitutional violation when such error has the effect of shifting the length of sentence to be served from the first 10 years of sentence to be served without the ability to accumulate earned time to the complete sentence being served without the ability to accumulate earned time.

## ISSUE TWO:

Petitioner suffered a denial of due process of law where co-defendant who was charged with same offense and crime was allowed to be convicted and sentenced severe term for the same acts as the co-defendant. The disparity in the sentence imposed upon Petitioner and the sentence imposed upon co-defendants was unconstitutional and in violation of the 5th and 14th Amendment to the United States Constitution.

## **STATEMENT OF INCARCERATION**

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections and assigned to the Walnut Grove Correctional Facility in Walnut Grove, Mississippi, in service of a prison term imposed. Appellant has been continuously confined in regards to such sentence since date of conviction and imposition of sentence by trial court..

## **STATEMENT OF CASE**

Appellant Ross presents his post conviction motion upon the following facts which are within his personal knowledge:

On April 24, 2007 during the May 2007 Term of the Grand Jury of Lee County, Mississippi, and indictment was filed against Daniel Jeremy Lamb, Daniel Zachary Ross, Stefan R. Edwards and James Steven Peden charging one count of

armed robbery and one count of conspiracy to commit the crime of armed robbery.

The indictment was filed under Cause No. FR-07-293.

Daniel Ross was represented by Honorable Will Bristow in such cases and was convicted, by plea of guilty, on September 4, 2007.

The trial court imposed a sentence total 30 years, 18 years suspended and 12 years to serve, for armed robbery.

The Court did not reference the no parole provision in the imposition of the sentence of the sentence.

The indictment filed in this case was filed under Miss. Code Ann. §97-3-79 which apply to armed robbery or attempted armed robbery through the display of a firearm.

The indictment referenced that all defendants were equally culpable and did not make any different allegations against either defendant.

Appellant was sentenced to 30 years for the same offense and culpability in the crime as Daniel Lamb who was sentenced to two years non-mandatory.

### **STANDARD OF REVIEW**

The correct standard of review in this appeal is the de novo standard where Appellant has appealed his plea of guilty denial of post conviction relief by the trial court.

In the instant case the law dictates that the sentence of law where timeliness of sentence caused it to be fundamentally unfair and clearly an abuse of discretion.

### **SUMMARY OF ARGUMENT**

The sentence imposed upon Appellant is fundamentally unfair where trial court imposed a less severe term upon the co-defendant and where the co-defendant was an actual participant in the armed robbery, had an extensive criminal record, and where Appellant was not. The disparity in the sentencing was violative of Appellant's rights to due process and equal protection.

### **MEMORANDUM OF LAW AND ARGUMENT IN SUPPORT OF CLAIMS**

#### **1) *The Illegal Sentence under Miss. Code Ann. §47-7-3(d)(ii)***

The manner and statute in which the Court imposed the sentence upon petitioner for armed robbery under has the effect of making Ross sentence mandatory since Miss. Code Ann. §47-7-3(d)(ii)<sup>1</sup> actually deprives the parole

---

<sup>1</sup> (1) Every prisoner who has been convicted of any offense against the State of Mississippi, and is confined in the execution of a judgment of such conviction in the Mississippi Department of Corrections for a definite term or terms of one (1) year or over, or for the term of his or her natural life, whose record of conduct shows that such prisoner has observed the rules of the department, and who has served not less than one-fourth (1/4) of the total of such term or terms for which such prisoner was sentenced, or, if sentenced to serve a term or terms of thirty (30) years or more, or, if sentenced for the term of the natural life of such prisoner, has served not less than ten (10) years of such life sentence, may be released on parole as hereinafter provided, except that:

(d)(ii) No person shall be eligible for parole who shall, on or after October 1, 1994, be convicted of robbery, attempted robbery or carjacking as provided in Section et seq., through the display of a firearm or drive-by shooting as provided in Section . The provisions of this subparagraph (d)(ii) shall also apply to any person who shall commit robbery, attempted robbery, carjacking or a drive-by shooting on or after October 1, 1994, through the display of a deadly weapon;

board of the jurisdiction to consider or release a defendant on parole and prohibits the department of corrections from granting earned time. Further, if a defendant is not eligible for parole then he cannot be eligible for earned time accumulation. Cooper v. State, 439 So.2d 1277 (Miss. 1983). Petitioner Ross would assert to this Court that the sentence for armed robbery in this instance should have been imposed under the provisions of Miss. Code Ann. §47-7-3(d)(i) which provides that:

(d)(i) No person shall be eligible for parole who shall, on or after January 1, 1977, be convicted of robbery or attempted robbery through the display of a firearm until he shall have served ten (10) years if sentenced to a term or terms of more than ten (10) years or if sentenced for the term of the natural life of such person. If such person is sentenced to a term or terms of ten (10) years or less, then such person shall not be eligible for parole. The provisions of this paragraph (d) shall also apply to any person who shall commit robbery or attempted robbery on or after July 1, 1982, through the display of a deadly weapon. This subparagraph (d)(i) shall not apply to persons convicted after September 30, 1994;

Appellant's sentence constitutes an illegal sentence which violates the 5th and 14th Amendments to the United States Constitution where the Trial Court exceeded it's sentencing authority when the Court imposed a sentence of 12 years to serve under the mandatory no parole statute where the sentence should have been imposed under the 10 year mandatory provisions contained under Miss. Code Ann. §47-7-3(d)(i). The indictment clearly demonstrates that the indictment was returned under Miss. Code Ann. §97-3-79 which should require that the sentence be imposed under the parole provisions of Miss. Code Ann. §47-7-3(d)(i). The



law is clear that where there are two statutes which apply then the statute which apply the most lenient punishment should apply.

A general principle is well established that when facts constituting a criminal offense may fall within either of two or more statutes or there is substantial doubt as to which applies, the statute imposing the lesser punishment shall be applied. In *Grillis v. State*, , (1944), this Court, through Justice Griffith, stated:

The case, then, is one for the application of the rule that when the facts which constitute a criminal offense may fall under either of two statutes, or when there is substantial doubt as to which of the two is to be applied, the case will be referred to the statute which imposes the lesser punishment. See cases cited 24 C.J.S., Criminal Law § 1979, p. 1193 under Note 75. And under the attempt statute Section 793, Code 1930, Section 2017, Code 1942, no greater punishment may be administered than that prescribed for the actual commission of the offense attempted.

There certainly is substantial doubt as to which of the above quoted sections is applicable. Under Section it is required to prove that the accused escaped from the Department of Corrections (penitentiary) or escaped from "custody" before confinement. While not clear, this custody seems to imply that it refers to the Department of Corrections. This implication is strengthened by the provisions of Section , which is confined to escape from a "jail."

Bourdeaux v. State, 412 So.2d 241, 243 (Miss. 1982).

Most recently in Pollard v. State, \_\_\_\_ So.2d \_\_\_\_ (Miss. App. 2006), the Court held that:

The Mississippi Supreme Court has held that "when facts constituting a criminal offense may fall within either of two or more statutes or there is substantial doubt as to which applies, the statute imposing the lesser punishment shall be applied." *Bourdeaux v. State*, 421 So.2d 241, 243, (Miss. 1982); see also *Grillis v. State*, 196 Miss. 576, 586, 17 So.2d 525, 527 (1944). Pollard argues that, because there is a substantial doubt as to which statute applies to his conduct, he should be subjected to the lesser punishment set forth in section 97-17-81.

In the instant case the law is clear that the trial court should have made reference to Miss. Code Ann. §47-7-3(d)(i) when Ross was sentence. However, the Court skipped over the appropriate sentencing statute and made reference to

Miss. Code Ann. §47-7-3(d)(ii). While there is a question which could arguably show that both or either statute could have been referenced in the armed robbery conviction, there is Mississippi law which would support that point that the statute which applied the lesser punishment should have been applied. Miss. Code Ann. §47-7-3(d)(i) Jenkins v. State, \_\_\_\_\_ So.2d \_\_\_\_\_ (Miss. 2002) (No. 2002-CT-00394-SCT; Miss. 10-14-2004).

Appellant Ross has been subjected to a denial of due process in his sentencing and this Court should grant the relief requested in this case and enter a correction of the sentence by making the sentencing order reference that Ross sentence is to be applied under Mississippi Code Ann. §47-7-3(d)(i) as the applicable statute to determine the eligibility of parole and earned time credits to such sentence.

2.

Petitioner suffered a denial of due process of law where the court accepted a plea of guilty and imposed a sentence for armed robbery and subsequently accepted a plea of simple robbery from co-defendant and imposed a lesser sentence where both defendants were charged with the same identical actions.

The trial court accepted a plea of guilty from defendant on a charge of armed robbery and imposed a sentence of 30 years, 18 years suspended and 12 years to serve.

Daniel Lamb, a co-defendant charged with the same offense by the indictment was allowed to enter a plea of guilty to a charge of simple robber, and conspiracy to commit a crime. Lamb was sentence by the court to a term of two years.

The petitioner would contend that the circuit court abused its discretion when it “sentenced two similarly situated and equally culpable co-defendants, wherein (the co-defendant) received a two year sentence and petitioner received a 30 year sentence with 12 of those years to actually serve in jail.” Both defendants were equally charged in the crime. Lamb entered a plea to a far lesser charge then the charge which petitioner was permitted to plead to. The two separate statutory offenses, robbery and armed robbery, carry abundantly different penalties.

The petitioner pleaded guilty to armed robbery as codified by Miss. Code Ann. §97-3-79, which provides:

§ 97-3-79. Robbery; use of deadly weapon. Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in ... SOURCES: Codes, 1942, §

2367; Laws, 1932, ch. 328; Laws, 1974, ch. 576, § 4, eff from and after passage (approved April 23, 1974).

Conversely, the co-defendant Lamb plea guilty to robbery as codified by Miss Code Ann. §97-3-73, which provides:

§ 97-3-73. Robbery; definition. Every person who shall feloniously take the personal property of another, in his presence or from his person and against his will, by violence to his person or by putting such person in fear of some immediate injury to his person, shall be guilty of robbery. ch. 64, art. 220; 1871, § 2674; 1880, § 2944; 1892, § 1284; Laws, 1906, § 1361; Hemingway's 1917, § 1097; Laws, 1930, § 1126; Laws, 1942, § 2362.

Here the trial court allowed Lamb to plead guilty to robbery and imposed a far lesser sentence than that which the court imposed upon petitioner where both defendants were equally culpable and where both were charged in the same indictment with the same offense.

A. The Supreme Court of Florida, a sister state, has recognized that disparate sentencing of equally culpable co-defendants in capital cases violates the Eighth Amendment of the United States Constitution. Slater v. State, 316 So.2d at 542.

We pride ourselves on a system of justice that requires equality before the law. Defendants should not be treated differently upon the same of similar facts. When the facts are the same, the law should be the same.

Id. In furtherance of this principle, the Court has vacated death sentences in cases where an equally or more culpable co-perpetrator received a life sentence.

B. In Scott v. Dugger, the Court vacated Mr. Scott death sentence after his equally culpable co-defendant received a life sentence. Scott, 604 So.2d at 468. “(T)he record in this case shows that Scott and Robinson had similar criminal records, were about the same age, had comparable law IQs, and were equally culpable participants in the crime.” Scott, 604 So.2d at 468. James Hunter’s case is indistinguishable. Both Boyd and Hunter participated equally in the homicide/robberies.

While the case presented here is not a Florida case, this court should find that the law of the issue is persuasive. This court should consider the fact that equally culpable defendants should be equally promised.

Appellant’s sentence of 30 years, 18 years suspended and 12 years to serve, should be vacated and a sentence imposed upon Lamb, the equally culpable co-defendant, should be imposed.

While the trial court found that Miss. Code Ann. §4747-3(d)(i) is not applicable to Appellant, the trial Court mentioned no authority on that conclusion. Appellant would assert that, as set out in the petition filed in the trial court as will as in this petition, this section of the Miss. Code applied to Appellant. The trial

court is incorrect on it's ruling on post conviction. This court should reverse such ruling. The trial court should have addressed this issue during the guilty plea colloquy. The fact that the trial court found that the court never address these statutes confirms that Appellant's plea was involuntary. Appellant was not told of the consequences of the plea which was that he would be under the provision of Miss. Code Ann. §47-7-3(d)(ii). This court should reverse on that basis.

#### CONCLUSION

Appellant Ross respectfully submits that based on the authorities cited herein and in support of his brief, that this Court should vacate the sentence imposed in this case and remand to the trial court for additional proceeding of conducting an evidentiary hearing or to require that the court provide explanation for the imposition of the sentence or it's reason for accepting the state's recommendation where the state failed to seek the same prisoner upon the remaining co-defendants.

Respectfully submitted:

By: Daniel Ross  
Daniel Ross, #132320

### CERTIFICATE OF SERVICE

This is to certify that I, Daniel Ross, have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United States Postal service, first class postage prepaid, to: Honorable Jim Hood, Attorney General, 5th Floor of Gartin Justice Building, Jackson, MS 39205; Honorable James L. Roberts, Circuit Court Judge, P. O. Drawer 1100, Tupelo, MS 38802 and a copy to: Honorable John Young, District Attorney, P. O. Drawer 212, Corinth, MS 39189.

This, the 11<sup>th</sup>, day of February, 2011.



Daniel Ross, #132320  
WGCF  
P. O. Box 1389  
Walnut Grove, MS 39189

Appellant