

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

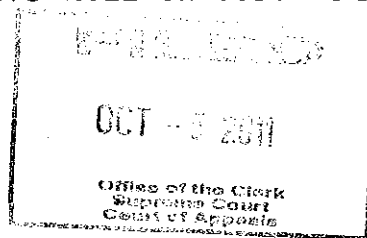
NO. 2011-CP-00376-COA

RODNEY HILLS

APPELLANT

V.

STATE OF MISSISSIPPI



APPELLEE

BRIEF FOR APPELLANT

BY:

Rodney Hills

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P. O. Box 528
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ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF

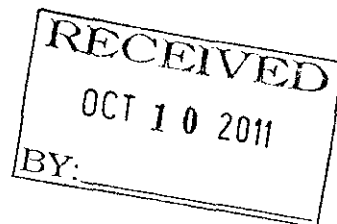


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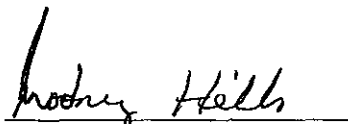
CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Rodney Hills, 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. Rodney Hills, Appellant pro se.
2. Honorable Jim Hood, and Staff, Attorney General.
3. Honorable Albert B. Smith, Circuit Court Judge.
4. Honorable Walter E. Beck, Assistant District Attorney.

Respectfully Submitted,

BY:



Rodney Hills, #R0986
MCCF
P. O. Box 528
Columbia, MS 39429

Appellant

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2011-CP-00376-COA

RODNEY HILLS

APPELLANT

V

STATE OF MISSISSIPPI

APPELLEE

STATEMENT OF ISSUES

ISSUE ONE

WHETHER THE HABITUAL OFFENDER PORTION OF THE INDICTMENT, CHARGING HILLS AS A HABITUAL OFFENDER UNDER MISS. CODE ANN. §99-19-81, AS WELL AS THE ORDER WHICH FOUND HILLS TO BE A HABITUAL OFFENDER, AND THE PROCEEDINGS CONDUCTED THEREIN, IS DEFECTIVE AND VOID WHERE THE INDICTMENT, ORDER, AND PROCEEDINGS, FAIL TO DEFINE ALLEGE OR CHARGE, THAT THE DATES PROVIDED IN THE INDICTMENT WERE THE DATES OF "JUDGMENT" WHICH MAKES THE INDICTMENT A VOID INSTRUMENT ON THAT POINT.¹ SUCH FAILURE CONSTITUTE PLAIN ERROR BY VIOLATION OF THE CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTIONAL PROVISIONS OF THE 5TH AND 14TH AMENDMENT AND ARTICLE 3, SEC. 14 OF THE CONSTITUTION OF THE STATE OF MISSISSIPPI.

¹ Rule 11.03(1) of the Miss. Unif Rules of Cty. and Cir. Court Practice requires that the indictment allege the dates provided as being the dates of judgment, not dates of conviction or sentencing. Where the indictment fail to contain this language then it fails to set forth an element required for charging habitual status. The rule do not allow the state to substitute date of "judgment" with date of "conviction" or "sentencing". The rule contains mandatory language on this point.

ISSUE TWO:

WHETHER HILLS WAS SUBJECTED TO INEFFECTIVE ASSISTANCE OF COUNSEL, AT THE TIME OF THE TRIAL AND DURING SENTENCING PROCEEDINGS IN THE COURT, WHEN HIS ATTORNEY FAILED TO OBJECT AND ALLOWED THE HABITUAL PORTION OF THE INDICTMENT TO BE FILED AND ALLOWED THE COURT TO ENTER AN ORDER APPROVING SUCH SENTENCE SENTENCING IN EACH PRIOR CONVICTION, WHERE SUCH INDICTMENT FAILED TO COMPLY WITH LAW IN SETTING OUT THE DATES OF JUDGMENT AND SENTENCING IN EACH PRIOR CONVICTION, IN VIOLATION OF HIS 6TH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF MISSISSIPPI.

ISSUE THREE

THAT THE CLAIM REGARDING SENTENCING CONSTITUTES A DENIAL OF DUE PROCESS IN SENTENCING AND PLAIN ERROR AND CANNOT BE SUBJECTED TO A PROCEDURAL.

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections and assigned to the Marion County Correctional Facility in Columbia, Mississippi, in service of the 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

Rodney Hills was indicted on May 28, 2008, in the Fourteenth Judicial District County Court of Pike County, Mississippi for the offense of UNLAWFUL sale of a COCAINE within 1500 feet of a church. Hills was also charged as a habitual offender

Appellant, while represented by Honorable Matt Baldrige, entered a plea of guilty to such charges and was sentenced by the Court to a term of 16 years, as a habitual offender. (R. 6)

STANDARD OF REVIEW

The correct standard of review in this appeal is the clearly erroneous standard.

SUMMARY OF ARGUMENT

The indictment and proceedings in this case subjected Appellant to a denial of due process of law where the judgment date of the prior convictions is an essential element that must be listed in the indictment of the habitual charge in order to exercise enhanced sentencing. *Franklin v. State*, 766 So.2d 16 (Miss. App. 2000). The requirements of certainty and particularity in indictments is directed at the values of fair notice to the accused, the avoidance of subjecting the accused to double jeopardy and enabling the accused to defend. *Jackson v. State*, 450 So.2d 1081 (Miss. 1984). The indictment in this case fail to comply with Rule 11.03(1),

a valid rule of law in Mississippi. The sentence imposed as a result there is an illegal sentence as well as a denial of due process where the court had no jurisdiction to proceed upon a fatally defective indictment by the indictments' failure to contain the essential elements for the enhancement of the sentence.

ARGUMENT

ISSUE ONE

THE HABITUAL OFFENDER PORTION OF THE INDICTMENT, CHARGING HILLS AS A HABITUAL OFFENDER UNDER MISS. CODE ANN. §99-19-81, AS WELL AS THE ORDER WHICH FOUND HILLS TO BE A HABITUAL OFFENDER, AND THE PROCEEDINGS CONDUCTED THEREIN, IS DEFECTIVE AND VOID WHERE THE INDICTMENT, ORDER, AND PROCEEDINGS, FAIL TO DEFINE ALLEGE OR CHARGE, THAT THE DATES PROVIDED IN THE INDICTMENT WERE THE DATES OF "JUDGMENT" WHICH MAKES THE INDICTMENT A VOID INSTRUMENT ON THAT POINT.² SUCH FAILURE CONSTITUTE PLAIN ERROR BY VIOLATION OF THE CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTIONAL PROVISIONS OF THE 5TH AND 14TH AMENDMENT AND ARTICLE 3, SEC. 14 OF THE CONSTITUTION OF THE STATE OF MISSISSIPPI.

The habitual portion of the indictment, which charges Hills as a habitual offender, provides the following:

The Grand Jurors of the State of Mississippi, taken from the body of good and lawful citizens of said county, elected, summoned, empaneled, sworn and charged to inquire in and for the body of the county aforesaid, at the term aforesaid, of the court aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present that RODNEY TIRREL HILLS and SANDRA

² Rule 11.03(1) of the Miss. Unif Rules of Cty. and Cir. Court Practice requires that the indictment allege the dates provided as being the dates of judgment, not dates of conviction or sentencing. Where the indictment fail to contain this language then it fails to set forth an element required for charging habitual status. The rule do not allow the state to substitute date of "judgment" with date of "conviction" or "sentencing". The rule contains mandatory language on this point.

PEAVY, late of county aforesaid, on or about February 13, 2007, in Pike County, Mississippi, and within the jurisdiction of this court, did wilfully, unlawfully, feloniously and knowingly sell at least one tenth (0.1) gram but less than two (2) grams of cocaine, a controlled substance, to one confidential informant, for money, contrary to and in violation of Section 41-29-139 of the Mississippi Code of 1972, the above-described sale of cocaine having then and there occurred within one thousand five hundred (1,500) feet of that certain Trinity Baptist Church, located in McComb, Pike County, Mississippi, and because of the proximity of said sale of cocaine to a church, the said RODNEY TIRREL HILLS and SANDRA PEAVY are subject to the enhanced penalty provisions of Section 41-29-142 of the Mississippi Code of 1972; and that on May 16, 1997, the said RODNEY TIRREL HILLS pled guilty in the Circuit Court of Pike County, Mississippi, to the crime of "Unlawful Possession of Cocaine," a felony under the laws of the State of Mississippi, in Cause Number 15,372-13, and was sentenced on May 16, 1997, by the Court to serve a term of two and one half (years in the custody of the Mississippi Department of Corrections, said sentence being of record at Minute Book NNN at page 442, in the office of the clerk of said Court; and that on May 16, 1997, the said RODNEY TIRREL HILLS pled guilty in the Circuit Court of Pike County, Mississippi, to the crime of "Unlawful Possession of Cocaine," a felony under the laws of the State of Mississippi, in Cause Number 15,380-B, and was sentenced by the Court to serve a term of two and one half years in the custody of the Mississippi Department of Corrections, said sentence being of record at Minute Book NNN at page 452; and because of the said prior convictions of the said RODNEY TIRREL HILLS under a statute of Mississippi relating to controlled substances, the defendant is included

within the enhanced punishment provision of Section 41-29-147 of the Mississippi Code of 1972;

And, also the said RODNEY TIRREL HILLS having heretofore been convicted twice of felonies upon charges separately brought and arising out of separate incidents at different times and for which felonies he was sentenced to separate terms of one year or more in a penal institution of the State of Mississippi, to-wit: on May 16, 1997, the said RODNEY TIRREL HILLS pled guilty in the Circuit Court of Pike County, Mississippi, to the crime of "Unlawful Possession of Cocaine," a felony under the laws of the State of Mississippi, in Cause Number 15,372-B, and was sentenced on May 16, 1997, by the Court to serve a term of two and one half years in the custody of the Mississippi Department of Corrections, said sentence being of record at Minute Book NNN at page 442, in the office of the clerk of said Court; and that on May 16, 1997, the said RODNEY TIRREL HILLS pled guilty in the Circuit Court of Pike County, Mississippi, to the crime of "Unlawful Possession of Cocaine," a felony under the laws of the State of Mississippi, in Cause Number 15,380-B, and was sentenced by the Court to serve a term of two and one half years in the custody of the Mississippi Department of Corrections, said sentence being of record at Minute Book NNN at page 452; and because of said prior felony convictions, the said RODNEY TIRREL HILLS is an habitual criminal within the meaning of Section 99-19-81 of the Mississippi Code of 1972, this being count one of the indictment;

The habitual portion of the indictment filed against Hills on May 28, 2008, by the State of Mississippi clearly failed to meet the requirements of law and created plain error in its attempt to charge Hills as a habitual

offender. The indictment never mentioned nor set out the dates of "judgment" in each of the prior convictions. Reading the indictment it is clear that charges made in the indictment fail to allege any date of "JUDGMENT". While the indictment alleges that Hills was sentenced on a certain date, May 16, 1997, in the prior conviction, it fails to allege that date as being the date of judgment. The rule requires that this be defined as exactly that. Hills did not waive the indictment. . The state used this non-compliant statement of allegations against Hills to forfeit many years of Hill's life.. The trial court approved this procedure without reference or comment. There was no finding in the Order as to whether the habitual portion of the indictment, where the state alleged "he was sentenced on May 16, 1997" rather than the date of judgment as required by law. This cannot be disputed.

On February 26, 2009, the trial court, as a routine procedure, sentenced Hills to 16 years as a habitual offender without finding that Hills had two previous judgments where he had been sentenced to one year or more on each to a state or federal penal institution. The trial court merely imposed the sentence without any finding on this point. Such sentencing, under these circumstances ad facts, should be void. Such sentence was rendered upon the basis of a tainted indictment which did not comply with

the mandates of law. Certainly the trial court should have placed more emphasis upon the taking of many years of Hills' life then to not impose such a severe term without a proper written finding. The indictment does allege the "date of the prior sentencing" but says nothing in regards to the dates of the JUDGMENT which, could be two different dates. As a matter of law, the state was obligated to allege the dates judgment of previous convictions as part of its proof.

The Sentencing Order provides the following:


Came the District Attorney who prosecutes for the State and the defendant, Rodney Tirrel Hills, in his own proper person and represented by counsel, who on a former day of a prior term of Circuit Court had entered plea of GUILTY to a charge of Unlawful Possession of at Least One Tenth (0.1) But Less Than Two (2) Grams of Cocaine (Count One) and Conspiracy to Distribute Cocaine (Count Two) and the Court had accepted said Guilty plea. It is therefore considered by the Court and so Ordered and Adjudged that the said defendant for such his crime of Unlawful Possession of at Least One Tenth (0.1) But Less Than Two (2) Grams of Cocaine (Count One) and Conspiracy to Distribute Cocaine (Count Two) be sentenced into the custody of the Mississippi Department of Corrections for and during the space of SIXTEEN (16) YEARS ON COUNT ONE AS AN HABITUAL CRIMINAL PURSUANT TO SECTION 99-19-81 OF THE MISSISSIPPI CODE OF 1972 TO SERVE WITHOUT POSSIBILITY OF PAROLE, PROBATION, OR EARLY RELEASE.

The trial court, in the Order imposing the sentence, never mentioned the date of the alleged JUDGMENT or the date of sentencing, nor the Court and Jurisdiction of the prior convictions. There was no plea, waiver, or admission in this case. Said actions clearly amounted to plain error and was never waived by Hills. The evidence demonstrates that Hills was

never advised nor noticed at any time as to the alleged dates of judgment in the prior convictions. The indictment and sentencing order is constitutionally and statutorily faulty.

The law on this issue dictates that the state failed to follow the law by failing to allege and prove the date of JUDGMENT in each of the prior conviction. The law requires this allegation be made by the state. Ard v. State, 403 So.2d 875, 876 (Miss. 1981).

In Ard the Supreme Court held that:

It is readily seen that the indictment does not meet the requirements of the statute as interpreted in Usry in that it does not state the court in which he was convicted, the date of the judgment, the nature or the description of the offense for which he was convicted, nor that he was sentenced to serve "one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere...." 

Ard v. State, 403 So.2d 875, 876 (Miss. 1981).

In Watson v. State, 921 So.2d 741, 743 (Miss. 1974) the Court held that the indictment must substantially set forth the date of judgment of the prior judgment and the nature and description of the offense constituting the previous convictions. Also see Benson v. State, 551 So.2d 188 (Miss. 1989).

In addition to case law, Petitioner would point out that Rule 11.03, Miss. Unif. Crim. R. Cir. Court Pra. provides the following relevant:

In cases involving enhanced punishment for subsequent offenses under state statutes, including but not limited to, the Habitual Criminal Statute, Miss.

Code Ann. Sections 99-19-81 and 99-19-83 and the uniform Controlled Substances Law, Miss. Code Ann. Section 41-29-147:

(1) The indictment must include both the principal charge and a charge of previous convictions. The indictment must allege with particularity the nature or description of the offenses constituting the previous conviction, and the date of judgment.³

Rule 11.03 (1) has the force and effect of a statute where it is a rule of law adopted by the Miss. Supreme Court.

This Court should find that the indictment failed, in its language, to comply with the statute where it does not specifically allege the date of JUDGMENT but sets out the date of conviction. Judgments are entered after the conviction date and are two different instruments. The Sentencing Order entered by the Court never mentioned nor referred to the date of JUDGMENT as required by law. The sentencing Order therefore failed to cure the defect on the subject of the habitual offender status where the instrument failed to comply with the requirements of law as set forth under rule 11.03(1) of the Miss. Unif. Rules of County and Cir. Court practice. Moreover, if the indictment and order was defective, which it was according to law, then the enhancement of the sentence on the basis of this defective indictment and sentencing order should be voided. Hills v. State, 561 So.2d 1037, 1039 (Miss. 1990); Ormoud v. State, 599 So.2d

³ This rule specifically requires date of "judgment" as opposed to date of "conviction". The inclusion of conviction in the rule requires that the indictment include both the principal charge and a charge of previous conviction. It do not ask for date of previous conviction but only the date of judgment. Conviction and judgment and sentence are often carried out on separate dates.

951, 963 (Miss. 1992); Vance v. State, 844 So.2d 510, 516-17 (Miss. App. 2003).

Finally, in conclusion of this initial ground, Hills would assert here that the real question before this court and one which this court must consider is, when fundamental constitutional rights are at stake, such as the indictment, would Hills be entitled to an evidentiary hearing. Hills should have been entitled to such to determine why the indictment was not amended and why his attorney never objected. There is a constitutional right, not to be tried for a felony without being properly indicted for that felony? MCA §99-39-5(1)(b); MS Art. III, 27; 5th Amendment.) (The trial court, in all due respect, did in deed lack jurisdiction to convict or impose said sentence, due to Hill's fatally defective indictment.) (This court in reviewing Hill's claim is required to open the gates and Rule on the merits of Hill's claims. Smith v. State, 725 So.2d 922, 927 (Miss. 1998); Quick v. State, 569 So.2d 1197 (Miss. 1990).

ISSUE TWO

HILLS WAS SUBJECTED TO INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND DURING SENTENCING PROCEEDINGS IN THE TRIAL COURT, IN VIOLATION OF HIS 6TH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF MISSISSIPPI.

To prevail on a claim of ineffective assistance of counsel the defendant must satisfy the well-established two prong test set forth in Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). First the party must show that counsel's performance was objectively deficient. Then the party must show that, but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. Gilliard v. State, 462 So.2d 710, 714 (Miss. 1985).

It is clear that Hills was prejudiced by his attorney's failure to raise the issue outlined here as well as the many other deficiencies set forth in this case. Defense counsel did not object to the proof on it's face of the prior convictions nor raise to the Court that the indictment did not comply with Rule 11.03(1).

This Court should conclude that here counsel rendered ineffective assistance of counsel and that such ineffectiveness prejudiced Hills by counsel not raising the issue of the indictment not quoting the word Judgment but using conviction. This failure of Hills' attorney effected the state's ability to bring Hills to trial as a habitual offender. Counsel did not challenge the habitual portion of the indictment on it's face. Moreover, counsel failed to challenge the procedural elements used by the State in

the language of the indictment. In Mississippi a Judgment is totally different from the conviction. Defense counsel was charged with knowing the law and being familiar with the record and evidence.

Hills sentence as a habitual offender was the result of ineffective assistance of counsel in the trial court. The sentence imposed upon Hills as a result of such conviction was illegal where the state failed to come forward with a proper indictment and the Court erred in accepting what the state presented. This Court should grant the post conviction relief indictment in this case and vacated the habitual portion of the indictment which was the result of the amendment.

The defense attorney sentencing order which has been demonstrated by Appellant in his previous ground as being an error of law.

In Jackson v. State, 815 So. 2d 1196 (Miss. 2002), the Supreme Court held the following in regards to ineffective assistance of counsel:

Our standard of review for a claim of ineffective assistance of counsel is a two-part test: the defendant must prove, under the totality of the circumstances, that (1) his attorney's performance was deficient and (2) the deficiency deprived the defendant of a fair trial. *Hiter v. State*, 660 So.2d 961, 965 (Miss.1995). This review is highly deferential to the attorney, with a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. *Id.* at 965. With respect to the overall performance of the attorney, "counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy" and cannot give rise to an ineffective assistance of counsel claim. *Cole v. State*, 666 So.2d 767, 777 (Miss.1995).

[7] [8] [9] ¶ 9. Anyone claiming ineffective assistance of counsel has the burden of proving, not only that counsel's performance was deficient but also that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80

L.Ed.2d 674 (1984). Additionally, the defendant must show that there is a reasonable probability that, but for his attorney's errors, he would have received a different result in the trial court. *Nicolaou v. State*, 612 So.2d 1080, 1086 (Miss.1992). Finally, the court must then determine whether counsel's performance was both deficient and prejudicial based upon the totality of the circumstances. *Carney v. State*, 525 So.2d 776, 780 (Miss.1988).

In the instant case now before this Court, Rodney Hills would assert that his attorney failed to bring to the attention of the court, by proper objections, that the state's indictment was defective in its attempt to charge Hills as a habitual offender. Defense counsel did not object to the validity of the enhancement portion of the indictment in this case and allowed the state to proceed without compliance with Rule 11.03(1). Defense counsel stood still and did absolutely nothing on that issue while the state proceeded on a defectively worded indictment to seek a sentence on the basis of prior convictions which the state did not know the date of judgment and was barely able to show the Court and Jurisdiction in which the records were acquired from.

In Ward v. State, 708 So.2d 11 (Miss. 1998) (96-CA-00067), the Supreme Court held the following:

Effective assistance of counsel contemplates counsel's familiarity with the law that controls his client's case. See *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984) (noting that counsel has a duty to bring to bear such skill and knowledge as will render the trial reliable); see also *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir.1974) (stating that a lawyer who is not familiar with the facts and law relevant to the client's case cannot meet the constitutionally required level of effective assistance of counsel in the course of entering a guilty plea as analyzed under a test identical to the first prong of the *Strickland* analysis); *Leatherwood v. State*, 473 So.2d 964, 969 (Miss.1985) (explaining that the basic duties of criminal defense

attorneys include the duty to advocate the defendant's case; remanding for consideration of claim of ineffectiveness where the defendant alleged that his attorney did not know the relevant law).

To successfully claim ineffective assistance of counsel, the defendant must meet the two-prong test set forth in Strickland v. Washington, 466 U.S. 668,687 (1984). This test has also been recognized and adopted by the Mississippi Supreme Court. Alexander v. State, 605 So.2d 1170, 1173 (Miss. 1992); Knight v. State, 577 So.2d 840, 841 (Miss. 1991); Barnes v. State, 577 So.2d 840,841 (Miss. 1991); McQuarter v. State, 574 So.2d 685, 687 (Miss. 1990); Waldrop v. State, 506 So.2d 273, 275 (Miss.1987), aff'd after remand, 544 So.2d 834 (Miss. 1989); Stringer v. State, 454 So.2d 468, 476 (Miss. 1984), cert. denied, 469 U.S. 1230 (1985).

The Mississippi Supreme Court visited this issue in the decision of Smith v. State, 631 So.2d 778, 782 (Miss. 1984). The Strickland test requires a showing of (1) deficiency of counsel's performance which is, (2) sufficient to constitute prejudice to the defense. McQuarter 506 So.2d at 687. The burden to demonstrate the two prongs is on the defendant. Id. Leatherwood v. State, 473 So.2d 964, 968 (Miss. 1994), reversed in part, affirmed in part, 539 So.2d 1378 (Miss. 1989), and he faces a strong rebuttable presumption that counsel's performance falls within the broad

spectrum of reasonable professional assistance. McQuarter, 574 So.2d at 687; Waldrop, 506 So.2d at 275; Gillard v. State, 462 So.2d 710, 714 (Miss. 1985). The defendant must show that there is a reasonable probability that for his attorney's errors, defendant would have received a different result. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992); Ahmad v. State, 603 So.2d 843, 848 (Miss. 1992).

ISSUE THREE

THAT THE CLAIM REGARDING SENTENCING CONSTITUTES A DENIAL OF DUE PROCESS IN SENTENCING AND PLAIN ERROR AND CANNOT BE SUBJECTED TO A PROCEDURAL BAR.

The Mississippi Supreme Court defined "Plain Error" as error that affects the Substantive Rights of a defendant. Grubb v. State, 584 So.2d 786, 789 (Miss. 1991); "the Plain Error Doctrine has been construed to include anything that "seriously affects the Fairness, integrity or Public reputation of judicial Proceedings"...." Porter v. State, 749 So.2d 250 , 260-61 (36)(Miss. 1999) (quoting U.S. v. Olano, 507 U.S. 725, 732-35, 113 S.Ct. 1770 (1993)). Mississippi Rule of Evidence 103 (d) authorizes a Court to address "Plain Error" affecting substantial rights although they were not brought to the attention of the Court." According to the Mississippi Supreme Court, the reviewing Court may address issues as Plain Errors "When the Trial Court has impacted upon a

Fundamental State Constitutional Right of the defendant.” Berry v. State, 728 So.2d 568, 571 (Miss. 1999)(quoting Sandes v. State, 678 So.2d 663, 670 (Miss. 1996). This “Plain Error” Rule “reflects a policy to administer the Law Fairly and Justly and protects Willaims “when (1) he had failed to protect his Appeal and (2) when his substantial rights (Defected Indictment) are affected. “MCA 99-39-5(1)(b); MS Art. III, 27; 5th Amendment.

In conclusion of this Ground It is very clear that, from the beginning, the people of Mississippi have ordained that they not be prosecuted for felonies except upon the indictment by a Grand Jury. It has been the Law since 1858 that the Court has No Power to proceed with an indictment which fail to appraise the defendant of the correct charges, information, and names of the accusers.

McGuire v. State, 35 Miss. 366 (1858); Miller v. State, 53 Miss. 403 (1876); Peebles v. State, 55 Miss. 434 (1877).) It is refreshing to be able to cite authorities from the last century, and , indeed, from the annotations under the Constitutional Section and to experience the rare and unusual assurance that, in some ways, the Law changes slowly or not at all. Van Norman v. State, 365 So.2d 644 (Miss. 1978). These cases clearly support the Rule above quoted that the state can prosecute only on the indictment returned by the Grand Jury and that the Court has no authority to Modify or Amend the indictment in any material respect.) Quick, 569 at 1199. Hills states that the Grand Jury returned his indictment with the

omission of an essential element, the dates of the judgments which were to be used to deprive Hills of the best year of his life. The state did not consider this important enough as to quote these dates in accord with the rules in which this Court have held to be valid rules of law. The state, nor the court, had no authority to proceed upon an indictment which had not appraised Hills of this information merely on the premises that Hills did not need to know it in order to place him on notice. This information is more than mere notice. It is information which can be formed into a defense of the charges. If Hills was deprived of this information then the state deprived him of a defense. This was "Plain Error". Simpson, Hawthorne, Quick, Grubb, Porter, Supra. The State must concede this point since it is clear from the face of the existing State Court Records.

Hills avers that he is Actually Innocence of the conviction and sentence imposed upon him by the trial court. "In order to be Actually Innocence of a non-capital conviction/sentence, Hills must show that but for the Fundamental constitutional error (fatally defected indictment), he would not have been legally eligible for the conviction/sentence he received." Smith v. Collins, 977 F.2d 951, 959 (5th Cir. 1992).

The trial court found that indictment fully complied with Rule 11.03 and that Appellant could not complain that the indictment did not put him on notice that the State intended to pursue conviction as a habitual offender. Such finding by

the trial court misses the issue and the point. Appellant's assertion is not that the state did not make their intent known to Appellant but that the state failed to follow up with a compliance with procedural due process by complying with the rule of law. If the rule of law, which is Rule 11.03(1) in this instance, requires that the indictment contain the information of the dates of the judgments of the prior convictions, this requirement cannot be substituted by merely telling Hills something other than that and asserting that he knew what the plan was anyway. Hills had a due process right to that information in the form and fashion which the rule require. Otherwise there would be no need for a mandatory rule requiring that the dates of the prior judgments be set out in the habitual indictment. It would seem that when the defendant fail to comply with a rule of law that he is sanctioned but when the state fail in it's duty, the Court is willing to overlook it and make the defendant show why he should be provided with this right which the law allows.

Thus, where the state failed to comply with the rule then Appellant is actually innocent of the sentence. The Actual Innocence exception can extend, in the abstract, to non-capital sentencing procedures. Actual Innocence in a non-capital sentencing case can be no less stringent than a simple demonstration of prejudice. Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514, 2522. In Sawyer, the Supreme Court framed the inquiry as whether absent the constitutional

error, “no reasonable juror would have found the petitioner eligible for the death penalty under the applicable Law.” *Id.* 505 U.S. at---, 112 at 2517. The fifth circuit courts concluded that the focus on the legal eligibility of the petitioner for the sentence received would be dispositive in non-capital sentencing cases also. Thus, assuming the “Actual Innocence” exception is available in a non-capital sentencing case, for Hills to demonstrate actual innocence of the sentence imposed, he would have to show that but for the Fundamental Constitutional Error, (The Defected Indictment), he would not have been Legally Eligible for the sentence/conviction he would not have been legally eligible for the sentence/conviction he received. Smith, 977 at 959. The Records are clear, as to Hills defective indictment, therefore, the Trial Court indeed lack jurisdiction, according to Mississippi Law, to convict or sentence Hills as a habitual offender. Quick, *Supra.*, MCA 99-39-5(1)(b); MS Constitution Art. III, 27. With these facts from the Records, Hills has shown that he would not have been Legally Eligible for the sentence/conviction he received.

The Mississippi Conviction states that “(n)o person shall, for any indictment offense, be proceeded against criminally information...” Miss. Const. Art. III, 27. Hills contends that the state failed to abide by this state’s constitutional requirement of an indictment by a grand jury. The defect in the indictment could not be cured by the actions of the state without seeking the approval of the grand

jury. Hills avers that the court should never have denied the post conviction and sustained the sentence on the basis of such indictment. Hawthorne 751 at 1095.

This Was Fatal Error. Stirone, 703 F.2d at 423.

In Stirone, the Supreme Court stated:

The right to have the Grand Jury make the charge on its own Judgment is a substantial right which cannot be taken away with or without Court Amendment... (W)e cannot know whether the Grand Jury would have included in its indictment (an additional charge) (an additional Word ("Serious")).... Yet because of the Court's admission of evidence and under its charge this might have been the basis upon which the Trial Jury convicted petitioner (Belk). If so, he was convicted on a charge the Grand Jury never made against him. This Constitutes Reversible Error.

Hills further contends that but for the Fundamental Constitutional Error (An Improper Indictment), he would not have been Legally Eligible for the Sentence/Conviction he received. Sawyer v. Whitley, 505 U.S. 333,339-42, 112 S. Ct. 2514, 2519-20 (1992); Smith v. Collins, Supra.

WHEREFORE PREMISES CONSIDERED, this court must find for the Appellant that his enhanced sentence, based upon an indictment which the trial court admitted did not comply with due process of law, violate the due process clause and laws of the United States Constitution and of the Constitution of Mississippi and are, therefore, illegal.

Appellant further prays for any other relief which this Honorable Court deem to be just and proper under the facts of this case and the constitution of the United States and State of Mississippi.

Respectfully submitted on this 5th day of October, 2011

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CERTIFICATE OF SERVICE

This is to certify that I, Rodney Hills, 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

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