

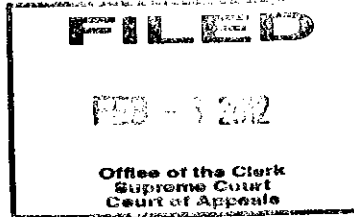
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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RONALD GENE JOHNSTON

VS.

STATE OF MISSISSIPPI



APPELLANT

NO.2011-CP-0825--COA

APPELLEE

REPLY BRIEF FOR THE APPELLANT

RESPECTFULLY SUBMITTED,

Ronald Gene Johnston
Ronald Gene Johnston, #33602
Unit 30-D
Parchman, MS. 38738

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT.....	4
CONCLUSION.....	6
CERTIFICATE OF SERVICE.....	7

TABLE OF AUTHORITIES

CASE	PAGE
BROOKS V.STATE,46 So.2d 94(1950).....	6
ETHRIDGE V.STATE,800 So.2d 1221(Miss.Ct.App.2001).....	4
LEE V.STATE,469 So.2d 1225(Miss.1985).....	6
PATTERSON V.STATE,594 So.2d 606(Miss.1992).....	5
ROWLAND V.STATE, 42 So.3d 503 (Miss.2010).....	5
SNEED V.STATE, 722 So.2d 1255(Miss.1998).....	5

UNITED STATES CONSTITUTION

FIFTH AMENDMENT.....	5
----------------------	---

MISSISSIPPI CONSTITUTION

Article 3, §22.....	5
---------------------	---

MISSISSIPPI CODE ANN.

§99-39-5(2).....	5
§99-39-11(2).....	4

STATEMENT OF CASE

Appellant, Ronald Gene Johnston, (hereinafter known as Appellant), filed his post-conviction motion into the Circuit Court of Lowndes County, Mississippi, attacking his conviction and sentences in Cause Numbers 7858 and 7859 for armed robbery. Appellant did claim that these sentences were illegal as the conviction and sentences not only violated his Fifth Amendment right to the United States Constitution against double jeopardy, but also violated his comparable rights pursuant to Article 3, §22 of the Mississippi Constitution.

The Circuit Court of Lowndes County, Mississippi, denied Appellant's post-conviction motion as time-barred, holding that the Appellant had not presented proof of new evidence or an intervening higher court decision has passed, and, the motion is without merit and is not well taken.

This appeal stems from that final order of the Circuit Court of Lowndes County, Mississippi.

SUMMARY OF THE ARGUMENT

I.

APPELLANT'S MOTION WAS AN EXCEPTION TO PROCEDURAL BARS

Appellant respectfully directs this Court's attention to the Appellee's assertions that, Appellant's claims of double jeopardy are mere assertions unsupported by the record.(Appellee Brief,p.3). This assertion is contradicted by the fact that Appellant is serving three(3) consecutive Thirty(30) year sentences for armed robbery in Cause Numbers 7855, 7858, and 7859. The judgment and sentences for these armed robberies were imposed February 18,1983, in the Circuit Court of Lowndes County, Mississippi. So that, Appellant's contention of a violation of double jeopardy is supported by the record, and he has raised a prima facie claim that is ipso facto due to the judgment and sentences that he has received.

Though Appellant admits that he had alluded to the Mississippi Supreme Court's recent ruling in Rowland v.State, 42 So.3d 503(Miss. 2010), as an intervening decision.(Appellant's Brief p.12). That allusion was in reference to Appellant's citing of Rowland in his post-conviction Brief in support of his claim that he was suffering from double jeopardy.(See Brief in support of Motion To Vacate Judgment and Sentence,p.3). This reference was made not to mislead the Court, but to show the Court that the post-conviction court erred in not finding Appellant's claim of double jeopardy an exception to

any procedural bars that would preclude review.

In any event, needless to say, Mississippi Code Ann. §99-39-5 (2)(Supp.2009), "intervening decision" exception applies only to those decisions that create new intervening rules, rights, or claims that did not exist at the time of Appellant's conviction.

* Appellant's claim of the due process protection against double jeopardy would not fall within the intervening decision exception.

Appellant states that the Appellee's contention that "mere assertions unsupported by the record and not presented to the trial court are found wanting, (Appellee Brief, p.4), does not apply in the case of the Appellant that is now before this Court. Though Appellee states to have reviewed the record on appeal, this Appellant was not afforded that opportunity. This is due to the fact that the "Notice of Completion of Appeal Transcript" by the Circuit Clerk of Lowndes County, Mississippi, states that this Appellant will not have access to the record for inspection. (See Attached Notice of Completion). This being the case, Appellant cannot say what part of the record can be used to support his claim of double jeopardy.

But, the facts that the Appellant has raised on this appeal are these: (1) it was alleged that Appellant entered a banquet room at the Ramada Inn, and robbed the occupants in that room, thus constituting one armed robbery; (2) the district attorney drafted the indictments in such a fashion that he created three (3) distinct and separate indictments for armed robbery; and (3) once the trial court entered judgment and sentence in Cause Number 7855, the state was foreclosed

on the grounds of double jeopardy from proceeding against the Appellant on Cause Numbers 7858 and 7859.

Because the judgment and sentences in Cause Numbers 7858 and 7859 violates the protection against double jeopardy, they are illegal sentences. This being the case, it has long been held that the right to be free from an illegal sentence is a fundamental right and any claim of an illegal sentence is an exception to any procedural bars that would preclude review.

ARGUMENT

The Appellee's assertion that there was no proof presented to the post-conviction court to support Appellant's claims of double jeopardy is belied by the facts putforth by Appellant. This is so due to the factual allegations and the three judgments and sentences imposed for armed robbery in Cause Numbers 7855, 7858, and 7859. So that, Appellant made a prima facie claim and the post-conviction court pursuant to Mississippi Code Ann. §99-39-11(2)(Rev.2000), was required to have the state file an Answer to his claim. See Ethridge v.State, 800 So.2d 1221(Miss.Ct.App.2001).

Appellant's claim of double jeopardy, and an illegal sentence, was an exception to the statute of limitations of Mississippi Code Ann. §99-39-5(2)(Rev.2000). This is so as a correction of an improper sentence is a fundamental right and cannot be restricted by the successive motion or statute of limitations of the Mississippi Uniform

Post-Conviction Collateral Relief Act. See on Sneed v.State, 722 So.2d 1255, 1257(Miss.1998). Also, Appellant was not required to raised the intervening decision exception of §99-39-5(2), though Appellant had appeared to have done so. Appellant admits that his allusion to Rowland v.State, 42 So.3d 503(Miss.2010), cannot be relied on by the Appellant as an intervening decision. This is so because of the Mississippi Supreme Court's holding in the case of Patterson v.State, 594 So.2d 606, 608-09(Miss.1992). That Court held:

"... 'intervening decision' exception applies only to those decisions that create new intervening rules, rights, or claims that did not exist at the time of the prisoner's conviction or during the three(3) year period circumscribed by the statute of limitations."

Appellant's assertions in his post-conviction motion and in his appeal to this Court, are factual allegations supported by the record. He did receive three convictions and three-thirty(30) year sentences for the same armed robbery. It is evident that all of the robberies were the same armed robbery, and, a conviction and sentence in Cause Numbers 7858 and 7859 did violate the Fifth Amendment Protection of the United States Constitution, and Article 3, §22 of the Mississippi Constitution against double jeopardy.

Appellant has presented a claim of the violation of his federal and state constitution rights, as the Double Jeopardy Clause of the Federal and State Constitutions guarantees to each citizen that he

shall not be placed twice in jeopardy for the same offense. See on Lee v.State,469 So.2d 1225 (Miss.1985).

Appellant's illegal sentences in Cause Numbers 7858 and 7859, allows the issue of double jeopardy to be reviewed even though these claims have been untimely filed. This is so, as the Mississippi Supreme Court held in Brooks v.State,46 So.2d 94,97(1950), that:

"[we] repeat that this is a most usual case.We neither condone nor reward inaction. But we cannot affirm where due process has been so lacking that a conviction has resulted without proper consideration of constitutional and fundamental rights."

Appellant's sentences in Cause Numbers 7858 and 7859 are illegal, and should be considered an exception to any procedural bars.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully moves this Honorable Court to reject the assertions in the Appellee's Brief, and grant the relief that he seeks in this appeal.

Respectfully Submitted this the 8th day of February, 2012.

Ronald Gene Johnston
Ronald Gene Johnston, #33602
Unit 30-D
Parchman, MS. 38738

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY, that I, Ronald Gene Johnston, Appellant, have caused to be delivered this day, via United States Postal Service, postage prepaid, a true and correct copy of the foregoing Reply Brief for the Appellant to the below listed person:

Honorable Jeffrey A. Klingfuss
Special Assistant Attorney General
Post Office Box 220
Jackson, MS. 39205-0220

This the 8th day of February, 2012.

Ronald Gene Johnston
Ronald Gene Johnston, Pro Se

IN THE CIRCUIT COURT OF LOWNDES COUNTY, MISSISSIPPI

CIVIL DIVISION

Ronald Gene Johnston

Plaintiff

Versus

Civil Action Number: 2011-0036-CV1 C

State of Mississippi

Defendant

NOTICE OF COMPLETION OF APPEAL TRANSCRIPT

Please be advised that the appeal transcript in the above styled and numbered civil action has been assembled in compliance with the Mississippi Rules of Appellate Procedure. This is an appeal of a post conviction relief action wherein the plaintiff/appellant has proceeded *pro se* and is incarcerated in the Mississippi Department of Corrections; therefore, the plaintiff/appellant will not have access to the record for inspection.

The record will be available for inspection by the counsel for the appellee for fourteen days from the date of this notice.

The transcript will be mailed to the Mississippi Supreme Court on the 12th day of October, 2011, unless an extension is granted.

Notice given this the 27th day of September, 2011.

FILED
SEP 27 2011

Mahala N. Salazar
Circuit Clerk

Mahala N. Salazar, Circuit Clerk
P. O. Box 31
Columbus, MS 39703

By:

[Signature] D.C.

**CERTIFICATE OF COMPLIANCE WITH RULE 11 OF THE
MISSISSIPPI RULES OF APPELLATE PROCEDURE**

I, Mahala N. Salazar, Circuit Clerk, do hereby certify that the appeal transcript in the above styled and numbered civil action has been assembled in accordance with the Mississippi Rules of Appellate Procedure.

Given under my hand and seal of office this the 27th day of September, 2011.



Mahala N. Salazar, Circuit Clerk
P. O. Box 31
Columbus, MS 39703

By: _____

[Signature] D.C.

FILED
SEP 27 2011

Mahala N. Salazar
Circuit Clerk