COURT OF APPEALS OF GEORGIA
DOCUMENT RETURN NOTICE FOR BRIEFS OR MOTIONS

February 16, 2016

To: Mr. Kenneth W. Mikell, Sr., GDC1154850, Wheeler Correctional Facility, Post Office Box 466, Alamo, Georgia 30411

Docket Number: A16A0574 **Style**: Kenneth Mikell v. The State

Your document(s) is (are) being returned for the following reason(s).

1. ☐ Your Appellant's Brief, was not accompanied by the statutory filing fee ($300.00 civil; $80.00 criminal *Effective July 1, 2009) or a sufficient pauper's affidavit. OCGA§5-6-4 and Rule 5 **Please be advised that your pauper's affidavit should be notarized by a notary public.**

2. ☐ A Request for Oral Argument must be filed as a separate document. Rule 28 (a) (3)

3. ☐ Your document(s) was (were) not signed by counsel (No signatures with expressed permission are permitted). Rule 1 (a)

4. ☐ No Certificate of Service or an improper Certificate of Service accompanied your document(s). Rule 6

5. ☐ Your Certificate of Service did not include the complete name and mailing address of each opposing party. Rules 1(a) and 6. You should provide a copy of your filing to the District Attorney and include his/her name and address on your Certificate of Service.

6. ☐ There were an insufficient number of copies of your document. Rule 6.

7. ☐ Your document exceeds page limits. Rules 24 (f) and 27 (a)

8. ☐ Your document was submitted without permission to file (supplemental brief or second motion for reconsideration). Rules 27 (a) and 37 (d)

9. ☐ Letter briefs and letter cites are not permitted. Rule 27 (b)

10. ☐ Your request for court action must be submitted in motion form. Rule 41 (a) I have enclosed a copy of the Rules of the Court of Appeals of Georgia for your review.

11. ☐ Your motions were submitted in an improper form (joint, compound or alternative motions in one document). Rule 41 (b)

12. ☐ Type was on both sides of the paper; type font was smaller than 10 characters per inch; and/or the type was not double-spaced. Rules 1(c), 37(a) and 41(b).

13. ☑ **No filing fee is due.**

14. ☑ Other: **You cannot attach exhibits to your Brief. Please see Rule 24(g). I have enclosed a copy of the Rules of the Court of Appeals of Georgia for your review.**

For Additional information, please go to the Court's website at: www.gaappeals.us

Updated Form: Sep 2013

COURT OF APPEALS OF GEORGIA
DOCUMENT RETURN NOTICE FOR BRIEFS OR MOTIONS

To: Kenneth W. Mikell, Sr Style: Kenneth Mikell v. The State
Docket Number: A16A0574

Your document(s) is (are) being returned for the following reason(s).

1. ☐ Your Appellant's Brief, was not accompanied by the statutory filing fee ($300.00 civil; $80.00 criminal *Effective July 1, 2009) or a sufficient pauper's affidavit. OCGA§5-6-4 and Rule 5 **Please be advised that your pauper's affidavit should be notarized by a notary public.**

2. ☐ A Request for Oral Argument must be filed as a separate document. Rule 28 (a) (3)

3. ☐ Your document(s) was (were) not signed by counsel (No signatures with expressed permission are permitted). Rule 1 (a)

4. ☐ No Certificate of Service or an improper Certificate of Service accompanied your document(s). Rule 6

5. ☐ Your Certificate of Service did not include the complete name and mailing address of each opposing counsel and pro se party. Rules 1(a) and 6. You should provide a copy of your filing to the District Attorney and include his/her name and address on your Certificate of Service.

6. ☐ There were an insufficient number of copies of your document. Rule 6.

7. ☐ Your document exceeds page limits. Rules 24 (f) and 27 (a)

8. ☐ Your document was submitted without permission to file (supplemental brief or second motion for reconsideration). Rules 27 (a) and 37 (d)

9. ☐ Letter briefs and letter cites are not permitted. Rule 27 (b)

10. ☐ Your request for court action must be submitted in motion form. Rule 41 (a)

11. ☐ Your motions were submitted in an improper form (joint, compound or alternative motions in one document). Rule 41 (b)

12. ☐ Type was on both sides of the paper; type font was smaller than 10 characters per inch; and/or the type was not double-spaced. Rules 1(c), 37(a) and 41(b).

13. ☐ The pages were not sequentially numbered with arabic numerals. Rule 24 (e)

14. ☐ Case and/or record citations were not made in the proper form. Rules 24 (d) and 25 (c) (2)

15. ☐ Margins were too small or paper size incorrect. Rules 1(c), 24(c), 37 (a) and 41(b)

16. ☐ Your document(s) was (were) not securely bound at the top with staples or round head fasteners. Rule 1 (c)

17. ☐ The Motion to Supplement has not been granted.

18. ☑ Other: You cannot attach exhibits to your brief. Rule 24(g). No filing fee due.

For Additional information, please go to the Court's website at: www.gaappeals.us

Updated Form: Sep 2013

In The Court Of Appeals
For The
State Of Georgia

Kenneth Wayne Mikell, Sr.,
Appellant,

Vs.

The State Of Georgia,
Appellee.

Docket No:
A16A0574

Re: CR031837

Brief For The Appellant
On Appeal From The Superior Court Of Chatham County
On The Denial Of The Motion To Vacate
Honorable Timothy R. Walmsley, Judge
Case Number: CR03-1837-WA

William L. Martin III
Clerk, Court Of Appeals
Of The State Of Georgia

Kenneth Wayne Mikell Sr
GDC# 1154850
Wheeler Correctional Facility
P.O. Box 466
Alamo, GA. 30411

Attn: Meg Heap, D.A.
Office Of The District Attorney
Suite 600,
133 Montgomery St.
P.O. Box 2309
Savannah, GA. 31402

PART ONE

A

STATMENT OF THE CASE

Mikell's Jury Trial Occurred On January 21, 2004 Ending In A Conviction Under 16-6-4 (b) (pre 2006) And, 17-10-7 (c) (2005) To Serve A Life Without Parole Sentence. [Sentencing Transcript, Pages 272-280, Exhibit A.]

Mikell Filed A Motion To Vacate Sentence On July 20, 2012, [Exhibit B]

The State Filed A Response To The Motion To Vacate Sentence On August 17, 2012, [Exhibit C].

A Partial Hearing Was Held Approx. Between August - December, 2012, Before The Honorable Judge Timothy Walmsley, Where Mikell, Pro-Se, Presented His Motion To Vacate Sentence, When Mikell Started To Argue The Facts And Error's Of His Case, The Court Stopped The Hearing, And Stated That Arguments Will Be At A Later Date.

On December 18, 2012 The State Sent The Judge Two Case Laws For Consideration On The Pending Motion. [Exhibit D]

On May 5, 2014 Mikell After A Delay Of Twenty-One Months Waiting For The Hearing To Occur/Continue, Filed A Rebuttal So To Correct Misinterpretations Of The Issues. [Exhibit E].

The Court On August 25, 2014 Filed A Order Denying Mikell's Motion To Vacate Sentence Without A Hearing Occurring To Allow A Full And Fair Litigation Of The Claims To Show Cause As To Why The Sentence Should Be Vacated. [Exhibit F]. A Notice Of Appeal Was Filed On Oct 1, 2014. [Exhibit G].

PART ONE

B

STATEMENT OF FACTS

AT THE CONCLUSION OF MIKELL'S JURY TRIAL HE WAS FOUND GUILTY ON THREE COUNTS OF 16-6-4. THE COURT ASKED THE STATE FOR EVIDENCE IN AGGRAVATION AND IT WAS ESTABLISHED THAT THE STATE HAD FILED TWO NOTICES OF INTENT INTO EVIDENCE IN AGGRAVATION OF PUNISHMENT; ALLOWED THE USE OF PRIOR CONVICTIONS FROM SOUTH CAROLINA TO INVOKE 17-10-7 (c) AND; PROVIDED A NOTICE OF INTENT TO SEEK A LIFE SENTENCE UNDER 16-6-4 (b).

THERE WAS A FORMAL OBJECTION MADE AGAINST THE USE OF THE PRIOR GUILTY PLEAS FOR FAILING TO HAVE COLLOGUYS ESTABLISHING THE VOLUNTARINESS, AND OF OTHERS FAILING TO SHOW REPRESENTATION BY COUNSEL. THE COURT ALLOWED SIX PRIOR GUILTY PLEAS INTO EVIDENCE OF TRIAL EXHIBITS 8, 9, 13, 15, 16, AND 17 WHICH ALLOWED MIKELL TO BE SENTENCED TO LIFE UNDER THE 16-6-4 (b) PROVISIONS, AND AS A RECIDIVIST UNDER THE 17-10-7 (c) PROVISON.

AT THE MAY 2005, MOTION FOR NEW TRIAL MIKELL'S APPELLANT COUNSEL HAD QUESTIONED THE TRIAL COUNSEL ABOUT THE PRIOR GUILTY PLEAS ON FAILING TO HAVE A COLLOGUY, AND THAT THERE WAS NO BOYKIN QUESTIONS ESTABLISHED TO HAVE OCCURRED, BUT A ISSUE WAS NOT RAISED ON THE DIRECT APPEAL.

MIKELL FILED A MOTION TO VACATE SENTENCE RAISING ISSUES, ALSO WITHIN HIS REBUTTAL. USING THESE DOCUMENTS MIKELL PRAYS TO CLARIFY HIS ISSUES IN THIS BRIEF'S ARGUMENTS AND CITATIONS OF AUTHORITY.

Mikell Tried to obtain Copies of The Six Prior Pleas Used in trial But Was Told That a Court Order Was Needed to obtain the documents (SEE: Exhibit H.)

Part Two

Enumeration Of Errors

1- Appellants Rights To Due Process Was Violated When The Use Of Six Constitutionally Invalid Prior Guilty Pleas Were Used To Enhance Sentence Under O.C.G.A. §§ 16-6-4(b), and 17-10-7(c).

2- Appellant Contends that the Sentencing Court Had A Mistaken belief that it held no discreection But to impose A Life Without Parole Sentence.

3- The State failed to Prove that the 1987 and 1990 Prior felony Convictions would if Committed Within this State Would have Constituted A felony Under O.C.G.A. § 17-10-7(a).

Preservation Of Error

All Errors Complained Have Been Objected To. The Applicable Standards Of Review For Each Enumeration Of Error Have Been Included In The Respected Argument And Citations Of Authority In Support Of The Enumerations Of Error.

Statement Of Jurisdiction

The Court Of Appeals Has Jurisdiction Of This Because It Does Not Fall Within The Appellate Jurisdiction Of The Georgia Supreme Court As Enumerated In Art. VI, Sec VI, Para II Of The Constitution Of The State Of Georgia.

Part Three
Arguments And Citations Of Authority

Enumeration 1

Appellant's Rights To Due Process Was Violated When The Use Of Six Constitutionally - Invalid Prior Guilty Pleas Were Used To Enhance Sentence Under O.C.G.A. §§ 16-6-4(b) and 17-10-7(c).

Appellant Contends That The State Failed To Establish That He Was Aware Of, Knowingly, And Voluntarily Waived His "Three Boykin Rights" With Respect To The Six Prior Guilty Plea Convictions Which Were Used In Aggravation Of Punishment, A Violation Of The Holdings In Boykin V. Alabama, 395 U.S. 238, 243 (5), 89 S.Ct. 1709, 1712 (1969).

Appellant Contends That A Life Without Parole Sentence Could Not Have Occured - Been Imposed Absent The Six Constitutionally - Invalid Prior Guilty Pleas. Boykins, Supra', Also See: Barker V. Barrow, 290 GA. 711, 712, 723 S.E. 2d 905, 907 (2012).

The Existance And Validity Of The Prior Felony Convictions Are Necessary Predicates To The Imposition Of A Recidivist Sentence Under O.C.G.A. § 17-10-7(c). See: Von Thomas V. State, 293 GA. 569, 572 (2), 748 S.E. 2d 446 (2013).

Two Of The Prior Pleas Were Used Also To Maximize The Sentence Under O.C.G.A. § 16-6-4(b) To Life, Even One Of These Was Not A Conviction, But Rather A Dismissed Case.

In The State's Response [Exhibit C] To The Motion To Vacate, On Page 2, Made A Mistatement Of Facts When It Was Alleged That; "During Sentencing Defendant Had Ten Prior Felony Convictions From South Carolina. Of The Ten, At Least Six Of These Certified Copies Of Conviction Showed That Defendant Was Represented By Counsel At The Time Of Sentencing, And That A Proper Plea Colloguy Was Conducted, Thus, Admitted Into Evidence.

In A Presumption Of Correctness Appellant Responded In A Reply To The Mistatement [Exhibit E, Page 2] By Showing In The Trial Records [Exhibit A, Pages 273-274] That A Formal Objection Did Occur Over

OVER THE USE OF THE PRIOR GUILTY PLEAS FOR LACK OF REPRESENTATION ON SOME, AND AGAINST THE LACK OF A COLLOGUY SHOWING THE VOLUNTARINESS ON ALL OF THE PLEAS. THE COURT REMOVED FOUR OF THE TEN FOR LACK OF COUNSEL, AND ADMITTED SIX ONLY BECAUSE THEY HAD A COUNSEL NOTED. THE RECORD IS DEVOID OF COLLOGUY'S AND OF TESTIMONY OF THE NOTED COUNSEL'S ADVICE GIVEN CONCERNING THE CONSTITUTIONAL RIGHTS TO BE WAIVED, NOR OF A STANDARD OF PRACTICE USED IN ADVISING DEFENDANT'S BEFORE GUILTY PLEAS IN RELATION TO THE BOYKIN RIGHTS BEING WAIVED.

THE DENIAL OF THE MOTION TO VACATE [EXIBIT F] FAILS TO ADDRESS THIS CONSTITUTIONAL QUESTION.

AT THE MOTION TO VACATE HEARING WHEN APPELLANT, PRO-SE, STARTED TO ARGUE THIS ISSUE, WAS STOPPED, AND TOLD THAT ARGUMENTS WOULD BE AT A LATTER TIME. APPELLANT'S INTENTIONS WAS TO ESTABLISH THAT THE SIX USED PRIOR GUILTY PLEAS FAILED TO ARTICULATE THAT ANY KIND OF WAIVER OCCURRED, THAT THE RECORDS HAD NO COLLOGUY ATTACHED, THUS BEING A DEVIATION FROM THE CONSTITUTIONAL REQUIREMENTS HELD BY THE UNITED STATES SUPREME COURT IN BOYKIN SUPRA, WHEREFORE, VIOLATING DUE PROCESS. THE STATE'S ALLEGATIONS THAT THE SIX PRIOR GUILTY PLEAS WHERE PROVEN TO BE VOLUNTARY, IS INCORRECT.

IN TYNER V. STATE, 289 GA. 592, 714 S.E.2d 577, 580 (2011), THE GEORGIA SUPREME COURT HELD THAT "ADVICE AND WAIVER" OF THE THREE BOYKIN RIGHTS ARE A STRICT CONSTITUTIONAL REQUIREMENT, AND BOYKIN VIOLATIONS ARE AMONG THE RARE SET OF TRIAL ERRORS THAT CANNOT BE HELD HARMLESS ON APPEAL..... IN A NUMBER OF DECISIONS OVER THE PAST DECADE THIS COURT HAS INTERPRETATED "ADVICE AND WAIVER" OF THE THREE BOYKIN RIGHTS AS A STRICT CONSTITUTIONAL REQUIREMENT [TYNER 289 @ 595] WITH REVERSAL THE AUTOMATIC CONSEQUENCE IF ANY DEVIATION IS FOUND TO HAVE OCCURRED. WILSON V. KEMP, 288 GA. 779, 780-81, 707 S.E.2d 336 (2011); ARNOLD V. HOWERTON, 282 GA. 66, 67-68, 646 S.E. 2d 25 (2007).... IF THE STATE INTRODUCES ANYTHING LESS THAN A PERFECT TRANSCRIPT OF THE PRIOR GUILTY PLEA THE JUDGE THEN MUST WEIGH THE EVIDENCE SUBMITTED BY THE DEFENDANT AND BY THE STATE TO DETERMINE WHETHER THE STATE HAS MET

Its Burden Of Proving That Defendant's Prior Guilty Plea Was Informed, And Voluntary, And Made With An Articulated Waiver Of The Three Boykin Rights. [Tyner 289 @ 596(2)].

The Evidence Submitted By The State On The Six Prior Guilty Pleas Failed To Articulate Any Type Of Proof That Appellant's Guilty Pleas Were Informed, Voluntary, Or Freely Waived His Boykin Rights.

A Deviation From The Constitutional Requirements Exsist Upon The Prior Guilty Plea Documents From South Carolina Making The Sentence Imposed Under Constitutional Question. A Reasonable Probability Exsist That The Sentence Is Null And Void And Needs To Be Vacated.

This Court Can Find that a Presumption Of Regularity Fails to Exsist Because; (1) South Carolina Does Not Perfect Records Of Plea Colloguys; (2) Accepts Guilty Pleas Without A Counsel; (3) Does Not Follow Mandatory Court Rules That Govern Acceptance Of Guilty Pleas; And (4) The Pleas Used As A Whole Establishes A Procedural Irregularity And Constitutional Infirmity Over The Protection Of Constitutional Rights Of A Defendant Thats Governed By Boykins Supra.

A Harmful Error Has Occurred To Appellant's Due Process Rights Do To The Use Of The Six Constitutionally-Invalid Guilty Pleas To Enhance The Sentence Imposed, A Boykins Error.

Wherefore, Appellant Prays This Court To Vacate The Imposed Sentence And Hold That The Six Prior Guilty Pleas Are Constitutionally-Invalid To Use In Re Sentencing.

ENUMERATION 2

APPELLANT CONTENDS THAT THE SENTENCING COURT HAD A MISTAKEN BELIEF THAT IT HELD NO DISCRECTION BUT TO IMPOSE A LIFE WITHOUT PAROLE SENTENCE.

IN THE MOTION TO VACATE SENTENCE (EXHIBIT B.) APPELLANT CHALLENGED IN 2004 THE SENTENCING COURT HAD DISCRETION TO IMPOSE SOMETHING LESS THAN LIFE WITHOUT PAROLE, IN HAVING A DISCRECTION TO SUSPEND OR PROBATE PART OF THE SENTENCE.

ALTHOUGH O.C.G.A. § 17-10-7 (c) PROHIBITS PAROLE, IT DID NOT TAKE AWAY ITS DISCRECTION GIVEN IN O.C.G.A. § 17-10-7 (A) TO PROBATE OR SUSPEND PART OF THE SENTENCE. MUAMMAD V. STATE, 242 GA. APP. 540 (2000).

AT THE TIME THE SENTENCE WAS IMPOSED THERE WAS NO LIMITATION ON THE trial COURT'S AUTHORITY UNDER OCGA § 17-10-1 TO GRANT PROBATION OF SENTENCE to a FOURTH OFFENDER RECIDIVIST WHO UNDER § 17-10-7 IS NOT ELIGIBLE FOR PAROLE UNTIL the MAXIMUM SENTENCE has been SERVED, SINCE PROBATION is not PAROLE. BROOKS V. STATE, 165 GA. APP. 115 (1983). STATE V. CARTER, 175 GA. APP. 38 (1985).

ALTHOUGH THE TRIAL COURT WAS REQUIRED to IMPOSE the MAXIMUM PENALTY, The COURT did have discrection to PROBATE OR SUSPEND it. MINTER V. STATE, 245 GA. APP. 327 (2000).

Within the APPELLANTS MOTION it SHOWED in the transcripts OF trial (EXHIBIT A) That the COURT did not have ANY RECOGNITION OF this AT ALL, OF the AUTHORITY, TO CONSIDER SUSPENDING OR PROBATING the SENTENCE. THE TRIAL COURT FAILED to believe it had discrection TO IMPOSE SOMETHING LESS Than IMPOSED.

APPELLANT CONTENDS THAT HAD THE COURT been made AWARE OF SUCH discreection had exsisted there's A REASONABLE PROBABILITY, That The COURT WOULD have CONSIDERED A POSSIBLE LESSEE RANGE OF PUNISHMENT.

WHEREFORE, APPELLANT PRAYS THIS COURT TO GRANT THE MOTION BY VACATING THE SENTENCE.

ENUMERATION 3

THE STATE FAILED TO PROVE THAT THE 1987 and 1990 PRIOR FELONY CONVICTIONS WOULD if Committed Within this STATE Would have CONSTITUTED A FELONY UNDER O.C.G.A. § 17-10-7 (a).

APPELLANT WAS intending to Raise this issue during the Motion to VACATE HEARING Where The three below Prior Convictions Would not have Constituted Felonies Within this State at the time of these Commission. THE Priors challenge Are:

1. Trial Exhibit #13 UNLAWFUL Poss. OF FIREARM (1987)
2. Trial Exhibit #15 Poss. OF FIREARM BY Convicted Felon (1990)
3. Trial Exhibit #16 Poss. OF FIREARM BY Convicted Felon (1990)

THE APPELLANT'S Prior Conviction History Establishes that these three Priors Were based OFF OF An 1981 Uncounseled Guilty Plea For Housebreaking (Trial Exhibit #10) which Was Used AS A Predicate Felony to Establish Violations To South Carolina Gun Laws.

Within this State the Uncounseled Guilty Plea Could Not have been Used in ANY type OF Trial AS A Predicate Felony Conviction. Had APPELLANT in 1987 OR 1990 been Found in Possession OF A Firearm Within this STATE it Would Not been A Violation OF GEORGIA Law because, A Prior Felony Conviction Could Not have been ESTABLISHED For it to be Used AS A Felony Conviction FOR A Charge OF Possession OF A Fire Arm BY A Convicted Felon.

THIS CASETS Holdings in Lewis V. STATE, 263 GA.APP. 98, 587 S.E. 2d 245 (2003). STATES That, before a defendant Can be Sentenced Under

O.C.G.A. § 17-10-7 (A) based upon a Foreign Conviction, the State was Required to Prove that the Conviction was for Conduct that Would Also Constitute a Felony in Georgia.

Appellant Contends that these three Prior Convictions in Question Could Not be Considered or Established as Felonies Within this State. Thus, they Cannot be Used as Prior felony Convictions Under §17-10-7 to Enhance this Sentence. The State Would Not be Able to Prove or find a Predicate Prior felony Conviction to establish that Appellant was a felon So to Convict for Possession of a Firearm by a Convicted felon Under Georgia Laws, Because the Housebreaking Plea was an Uncounseled and illegal Conviction to Use.

Wherefore, Appellant Prays this Court to Grant the Motion to Vacate Sentence.

Conclusion

Appellant Prays that this Court Grant the Motion to Vacate Sentence by Holding that the Six Prior Convictions were Not Proven to have Shown that the Boykin Rights were Waived by Any Evidence, and are Constitutionally - Invalid to have been Used in Enhancing the Sentence imposed. The Use of The Six Priors has infringed Upon the Due Process Rights of the Appellant and the Sentence must be Vacated.

Upon Re Sentencing the Six Priors are to be Constitutionally - In Vaild to Use based Upon the foregoing Enumerations Of Error

Respectfully Submitted, This 2nd day of December, 2015

Kenneth W. Mikell, Sr.

Kenneth W. Mikell, Sr.
GDC# 1154850
Wheeler Correctional Facility
P.O. Box 466
Alamo, GA. 30411

TABLE OF EXHIBITS

A.- TRIAL TRANSCRIPT PAGES 272-280 OF SENTENCING OF "evidence in AGGRAVATION".

B.- MOTION TO VACATE SENTENCE

C.- STATE'S RESPONSE TO DEFENDANTS MOTION TO VACATE SENTENCE

D.- LETTER FROM STATE TO JUDGE WALMSLEY.

E.- DEFENDANT'S REBUTTAL TO STATE'S RESPONSE ON MOTION TO VACATE SENTENCE

F.- ORDER DENYING DEFENDANT'S MOTION TO VACATE SENTENCE.

G.- NOTICE OF APPEAL

H- REQUEST AND DENIAL FOR COPIES OF PRIOR CONVICTIONS

* ONLY ONE SET OF COPIES AVAILABLE, TRUE ACESS TO PHOTO COPIER.

A.

time?

MR. MCCONNELL: Not from the State.

THE COURT: Okay. Members of the jury, this completes your service on this case. Jurors decide guilt or innocence. In just a minute I'm going to conduct a short hearing with regard to sentencing, and you would be welcome to stay if you wanted to even though you were officially discharged of your duties and hear what the evidence is with regard to the possible prior records and things like that that I'd have to consider. On the other hand, if you would want to go home when I excuse you, you'd be free to go with the thanks of the Court. The decision of whether or not to stay or go will be totally your decision to make.

(NOTE: The jurors were excused with the thanks of the Court.)

THE COURT: Any evidence in aggravation?

MR. MCCONNELL: Yes, sir. We do. The State indicted the defendant as a recidivist. In addition, we filed two notices of intent into evidence in aggravation of punishment. As well as to use prior convictions as recidivist counts, we've also provided the defense with notice of intent to seek life in prison based on his prior convictions, the sexual convictions concerning a child. So the State will for purposes of sentencing retender Number Eight and Nine. Those were admitted during the trial.

We tender State's Exhibit Number Ten which is the defendant's conviction in York County, South Carolina for housebreaking and larceny. We tender State's Exhibit Number 11 which is the defendant's conviction in York County, South Carolina for failure to stop for the police for which he received a felony sentence. I tender State's Exhibit Number 12 which is the defendant's conviction for unlawful possession of marijuana which is a misdemeanor.

I tender State's Exhibit Number 13 which is his felony conviction for unlawful possession of a firearm. I tender State's Exhibit Number 14 which is the defendant's felony conviction for giving false information to pawn a handgun. I tender State's Exhibit Number 15 which is the defendant's felony conviction for possession of a firearm by a convicted felon. I tender State's Exhibit Number 16 which is a felony conviction for possession of a firearm by a convicted felon and State's Exhibit Number 17 which is the defendant's felony conviction for theft by receiving stolen goods.

THE COURT: Is there any objection to the certified copies of the convictions?

MR. LEWIS: Yes, Your Honor. There is. I've had a chance to review each of the certified copies. Although they are certified, and that appears to be in order, there is no colloquy attached to any of them that I can see indicating the voluntariness of the pleas. It's difficult

for me to even ascertain if there was a lawyer identified on here who represented my client. I note the Nash case, Nash v. State, 271 Georgia 281. I object to those documents going into evidence in aggravation.

THE COURT: What about that?

MR. MCCONNELL: On State's Exhibit Number Eight, Your Honor, the document shows on its face the defendant was represented by Gerald Smith, an attorney. On State's Exhibit Number Nine he was represented by the same attorney. On State's Exhibit Number 13 on the face of the document it shows the defendant was represented by Jim Boyd, counsel. On State's Exhibit Number 15 the defendant was represented as shown on the face of the document by Gerald Smith, an attorney. The same is true with Number 16 and Number 17.

THE COURT: I'll admit the ones that show representation by an attorney over objection. So what numbers are those now?

MR. MCCONNELL: That would be Number Eight was represented. Number Nine he was represented. Number 13, Number 15, 16, and 17.

THE COURT: Okay. They're admitted. Any other evidence in aggravation?

MR. MCCONNELL: Not by the State.

THE COURT: Evidence in mitigation, Mr. Lewis.

MR. LEWIS: One second, Your Honor.

THE COURT: Mr. Clerk, can I see the convictions that are admitted in evidence, please? Eight, Nine, 13, 15, 16, and 17.

(NOTE: Long pause.)

MR. LEWIS: No evidence, Your Honor. And for the record, that's my understanding that your hands are pretty much tied as to what the sentencing range is.

THE COURT: That's my understanding. He's dug himself a hole here with these.

MR. LEWIS: And that's my understanding also. So anything we said or didn't say couldn't change your authority one way or another from my understanding of the law.

THE COURT: That's my understanding of the law. He's way over the limit. Mr. McConnell, let's talk about the sentence ranges here please. Child molestation, does this count as a second child molestation in view of his South Carolina offense?

MR. MCCONNELL: Yes, that would be the State's position.

THE COURT: Do you have any law on it?

MR. MCCONNELL: No, sir. I think this is going to be the first case.

THE COURT: So it's five to 20 on the -

MR. MCCONNELL: Five to 20 or life.

THE COURT: On the first?

MR. MCCONNELL: Five to 20 on the first. It's five to 20 or life - I'm sorry, it's ten to 20 or life.

THE COURT: I thought it was 30.

MR. MCCONNELL: Not simple child molestation.

THE COURT: Okay. Aggravated then. Okay. I understand there's an enhancement thing in the child molestation area. He's also got so many prior felonies that I was wondering whether 17-10-7(c) kicked in. And what's the State's position as to which or either or both of these, how they apply?

MR. MCCONNELL: I think they both apply. I think the Court is duty bound to sentence the defendant to life in as much as this is the second or subsequent conviction. And I believe that he is not eligible for parole based on the number of prior convictions.

THE COURT: What about that, Mr. Lewis? What do you see my options to be?

MR. LEWIS: Your Honor, I have to agree with the sentencing range of life. But as to the eligibility for parole or not, based on out of state convictions, I'm not sure how those apply to the Georgia statute and whether the crimes for which he was convicted qualify in this state for those purposes. So I'm not sure whether the 17-10 code section would apply to this case, and I would object to any

ruling such as that.

THE COURT: The enticing a child, what's the sentence range on that?

MR. MCCONNELL: One to 20.

THE COURT: One to 20. And they acquitted him of the sexual battery. So we've got three child molestations and one enticing. (Pause.) I'm going to go ahead and sentence him as a recidivist that I see him to be. If someone can show me I'm wrong, I'll consider the sentencing on a proper motion. I'll resentence him if you can prove to me I'm wrong. Stand up, Mr. Mikell. You come before this Court with a horrible record, and you've gotten yourself in a situation where I can do nothing to help you at all. And you need to know that.

DEFENDANT: I wouldn't have come here if I didn't think I was innocent, and that's why I asked for a jury panel.

THE COURT: Well, you have an absolute right to do it. I'm not going to punish you -

DEFENDANT: I wouldn't have come here knowing I had all these, sir, and jeopardize my life for a life sentence and the rest of my life to be going away.

THE COURT: Well, please. You had an opportunity to do something other than go before a jury. You chose to do it. I'm not going to -

DEFENDANT: That's the reason I did, sir. I didn't do this.

THE COURT: I'm not going to punish you because I'm also on the spot because I have to give you the mandatory maximum sentence as provided by law. And the reason why is because of your prior conduct and also the fact that you've been found guilty beyond a reasonable doubt for some pretty ugly acts. Okay?

DEFENDANT: Yes, sir. I understand.

THE COURT: I'm going to sentence him on child molestation to life in prison and 20 years concurrent on enticing a child. And the sentence is imposed under 17-10-7(c) with the intention of the Court that he serve the total amount of the sentence.

DEFENDANT: What does that mean, sir?

THE COURT: It means you just got a life sentence with no parole. Give me the 12 year form. Mr. Mikell, you're notified by the Court that under the law of Georgia you're entitled to appeal the guilty verdict of the jury. And if you decide to do so you must file your appeal within 30 days of this date.

DEFENDANT: (Inaudible.)

THE COURT: Listen to me. Listen to me because this is on the record, and you need to listen. You're also informed that you have the right to retain a lawyer of your

own choice to represent you at the post trial motions and appeals to the appropriate Appellate Court of Georgia. If you cannot afford a lawyer the Court will appoint one for you. You're entitled to and will be given a transcript of all pretrial and post trial matters without cost to you if you cannot afford a transcript. You may file a motion for new trial, or you may appeal your case directly to the appropriate Appellate Court of Georgia. Mr. Lewis, will you have him sign the notification, please?

MR. LEWIS: Yes, Your Honor.

THE COURT: Again, I don't know whether I have to read it on a mandatory sentence, but I'm going to go ahead and do it. Used to be. I'm not sure whether they changed it or not. Sign the notification, and you can talk to Mr. Lewis about it.

END OF PROCEEDINGS.

C E R T I F I C A T E

I, WILLIAM M. DELOACH, do hereby certify that the foregoing two hundred seventy-nine (279) pages of typewritten material were taken down and transcribed under my supervision and that the same contain a true, correct, and complete transcript of the proceedings as stated in the caption.

I further certify that I am not of kin nor counsel to any of the parties hereto and, further, that I have no interest whatsoever in the outcome of said proceedings.

SO WITNESS MY HAND AND SEAL this 29th day of April, 2004.

William M. DeLoach
Certified Court Reporter A-4
Savannah, Georgia

B

FILED IN OFFICE
DEP. CLK SUPERIOR CT.
CHATHAM COUNTY, GA.

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

KENNETH W. MIKELL, SR.,
PETITIONER,

VS.

THE STATE OF GEORGIA,
RESPONDENT.

CASE NO: CR03-1897

COPY

MOTION TO VACATE SENTENCE

COMES NOW KENNETH W. MIKELL SR. IN THE ABOVE-STYLED CAUSE OF ACTION AN FILES THIS MOTION TO VACATE SENTENCE BASED UPON THIS COURTS STATEMENT MADE IN THIS CASE AT THE SENTENCING PHASE AND STATES AS FOLLOWS:

(1)

ON JANUARY 22, 2003, THIS COURT SENTENCED PETITIONER UNDER A MISTATEMENT OF LAW AND MISTAKEN BELIEF THAT A MANDATORY LIFE WITHOUT PAROLE SENTENCE HAD TO BE IMPOSED.

(2)

THIS COURT ALLOWED THAT; "IF SOMEONE CAN SHOW ME WRONG. I'LL CONSIDER THE SENTENCING ON A PROPER MOTION. I'LL RESENTENCE HIM IF YOU CAN PROVE TO ME IM WRONG" (T.T. PG. 277).

(3)

Petitioner Contends that the Court Sentenced him Under the mistaken belief And Mistatement of Law that it had No discretion but to impose a Life Without Parole Sentence.

The Court: "Im Not Going to Punish You because Im Also On the Spot because I have to Give You the Mandatory Maximum Sentence imposed by Law". (T.T. pg. 278).

(4)

In Analysis of this issue Petitioner Request this Court to Consider the Following Citations And Authority.

(5)

Petitioners Authority is held Under Blevins V. State, 270 GA. App. 388, 394 (2004). (Under O.C.G.A. § 17-10-7(c) the Sentencing Judge Retains the discretion either to impose any Sentence within the Statutory Mandatory Minimum and Maximum Sentence range, or in this Case Under O.C.G.A. § 16-6-4(b), to impose a Life Sentence," because the Judge mistakenly believed that a Life Sentence Was Mandatory. the Court Vacated Sentence and Remanded "for the exercise of trial Judge's discretion Upon Resentencing".)

(6)

In fact Blevins shows how § 16-4-6(b) - Which Was amended after Petitioner's trial incidentally - Worked With § 17-10-7(c) to ultimately authorise a Life Without Parole Sentence in the State's Case against Recidivist Child Molester William Russell Blevins. Blevins Successfully appealed on the Ground that his Sentencing Judge Misread § 17-10-7(c) As Mandating Life Without Parole. Under § 16-6-4(b) once a Person is Notified of the intent to Seek a Life

Sentence. the defendant "shall be Punished by imprisonment for Not less than 10 Years Nor More than 30 Years OR by imprisonment for Life". In Addition, the State Presented evidence indicating that Blevins had 3 Prior felony offenses and Sought recidivist Sentencing Pursuant to § 17-10-7 (c). That Statute Mandates that a defendant Convicted of a forth felony must Serve the Maximum time Provided in the Sentence of the Judge and Shall not be eligible for Parole Until the Maximum Sentence has been Served. Blevins, 270 GA. APP. 2 394 (2004); See Also: Colbert Vi State, 303 GA. APP. 802, 804 (2010).

(7)

O.C.G.A. § 17-10-7 is GEORGIA'S "STRIKE OUT" STATUTE. It's three Subprovisions (a), (b), and (c) Set forth Gradations of Recidivist (REPEAT OFFENDER) Punishment along MAXIMUM Sentence and Parole availability Lines. It's most Severe Provision (the two-Strike Provision) is § 17-10-7 (b), Reserved for those Convicted of a Second "Serious Violent felony" as defined Under § 17-10-6.1 (a). Those Who Strike twice Under it Receive Life Without Parole. §17-10-7 (b). THOSE deadly Sins include Crimes Like Murder, Rape, And Aggravated Child battery.

Section § 17-10-7 (a) in Contrait, authorizes Up to a Life Sentence, Subject to Probation OR Suspension by the Sentencing Judge, for a Second (NON-deadly Sin) felony offense, even if the first Was Committed in another State, So long as it is Not a "deadly Sin" felony, the §17-10-7(c), defendant "shall" Serve the MAXIMUM time Provided in the Sentence of the Judge based Upon Such Conviction and Shall Not be eligible for Parole Until the MAXIMUM Sentence has been Served. (Thus, it is Not an Automatic Life-With-No-Parole Provision).

(8)

The TRIAL Record is Clear about What Provision the State invoked

§17-10-7(c), AND § 16-6-4(b). AT The trials Conclusion, the Petitioner Was found Guilty On 1 Count of enticing, and 3 Counts of child molestation and Sentenced to life Without Parole Pursuant to §17-10-7 (c), But §17-10-7(c) does Not Only Provide Just for Life Without Parole. IT SAYS that [E]xcept as otherwise Provided in Subsection (b) of this Code Section any Person who after having been Convicted Under the laws of this State for three felonies .... Upon Conviction of Such fourth Offense OR for Subsequent offenses, Serve the maximum time Provided in the Sentence of the Judge based Upon Such Conviction and Shall Not be eligible for Parole Until the Maximum Sentence has been Served.

While it does Not Use the Phrase "Life Without Parole" GEORGIA Courts have interpreted it to mean that if one Receives Under it, SAY, 20 YEARS, then one will in fact Serve 20 Years Without Parole. even if §17-10-7(c) does Not Use that exact Language. But, the "Serve the MAXimum time Provided in the Sentence of the Judge", Phrase means that the Judge Still has A discretion to impose Something less than life. So all that §17-10-7(c) means then, is that, if the Judge does Sentence a defendant to life it Would be Without Parole. And AGain, Blevins Showed that §17-10-7(c) Works With §16-6-4(b).

Hence, Petitioner Could have been Sentenced Under §16-6-4(b) to between 10 Years to 30 Years, OR to life, But No Consideration Was Allowed to be Given to the MANDATORY MINIMUM FROM 10 to 30 Years, But Rather Only to the MAXIMUM, "Life".

(9)

THE Court Seemed Confused on what the true Sentencing Range Was On §16-6-4 et Seq. In evaluating this fact the Following Cites from the trial Record are brought to the Courts ATTENTION. SEE:

The Defense Counsel MR. lewis Volunteered A MISSTATEMENT OF Law to the Court When he told the Court that the Court's hands

Were "Pretty Much Tied" As to the Sentencing Range is A "Life Sentence. (T.T.PG. 275) [A MISSTATEMENT OF LAW]

THE COURT: "THATS MY Understanding" (TT.PG 275).

MR. LEWIS: And that's my Understanding also. So Anything We Said or didn't Say Couldn't Change Your Authority One Way or Another from my Understanding of the Law. (TT.PG. 275)

The Record further Shows that the District ATTORNEY, Mr. McConnell, makes A Misstatement of Law To The Court that Also Took Away the Courts decretion, and A mistaken belief that a Mandatory Life Without Parole Sentence Was Mandatory and thus imposed. (T.T. PGS 275-278).

THE COURT: MR. McConnell Lets talk about the Sentencing Ranges here please. Child molestation. does this the Present Conviction Count as a Second child molestation in View of the South Carolina Offense?

MR. McConnell: Yes that would be the State's Position.

THE COURT: Do You have any Law on it?

MR. McConnell: No SIR, I Think this is Going to be the fiest Case.

THE COURT: So its 5 To 20 on the -

MR. McConnell: 5 to 20 or Life.

THE COURT: On the first?

As Shown Above the 5-20-Life Option Was Not what the Pre-2006 Version of § 16-6-4(b) Said. But rather, 10-30-Life. The Subsequent Colloguy With the Prosecutor reveals the Courts Uncertainty about even that Point.

MR. McCONNELL: 5 to 20 on the first. It's 5 To 20 or Life -

- Im Sorry its 10 to 20 or Life.

THE COURT : I thought it was 30.

MR. McCONNELL : Not Simple Child molestation.

THE COURT : Okay. "Aggravated then" Okay I understand there's an enhancement thing in the child molestation Area. He's also got so many Prior felonies that I was Wondering Whether §17-10-7(c) Kicked in. And Whats the States Position as to Which or either or both of these, how they Apply?

MR. McCONNELL : I think they [ie. §16-6-4(b) and §17-10-7(c)] Both apply. I think the Court is duty bound to Sentence the defendant to "Life" in As much as this is the Second or Subsequent Conviction for child molestation Under §16-6-4(b) and I believe he Under §17-10-7(c) is Not eligible for Parole based on the number of Convictions.

THE COURT : What About that, MR lewis?, what do You See MY Options to be?

MR. LEWIS : Your honor I have to agree with the Sentence Range of Life.

The COURT : The enticing a child Whatis the Sentence Range on that?

MR. McCONNELL : 1 to 20.

THE COURT : 1 to 20 and the Jury acquitted him of Sexual battery. So We've Got three child Mostation and one enticing. (Pause) Im Going to Go ahead and Sentence him As A Recidivist, thus Under Georgia's Four-Strike Statute, §17-10-7(c) that I See him to be. If Someone Can Show me Wrong, Ill Consider the Sentencing on a Proper motion, I'll Resentence him if You Can Prove to me Im Wrong.

After Pronouncing Sentence the Court further Stated moments Later. "I'm not Going to Punish You because I'm Also On the Spot, because I have to Give You the [mandatory] maximum Sentence Imposed by Law. (TT. PG. 278).

The above analysis and transcript Quotes Show that Mr. Lewis, Mr. McConnell, and The Court mistakenly misunderstood the Operation of the § 16-6-4, and 17-10-7 Statutes and that mistaken belief Lead the Court to Sentence Petitioner to A Maximum Range of Life, But the Court Still had a discretion to Sentence between 10-to-30-to-Life Under the § 16-6-4 (b), then after deciding between that Range, the Court then Could apply § 17-10-7 (c) To the Sentence to be imposed to be without Parole.

WHEREFORE, THE Petitioner has Shown that the Court was lead to a mistaken belief of what his Choices of Sentence lenght was Under § 16-6-4, and the Same Argument Presented here can be held Error Under the holdings in Blevins. THUS, This Court Can Vacate the Sentence and hold A Resentence hearing for the Court to exercise it's decretion on the § 16-6-4 Sentencing Range [10-30-LIFE], Then Apply § 17-10-7 (c).

THIS 10th DAY OF July 2012.

RESPECTFULLY SUBMITTED,

/s/ Kenneth W. Mikell

KENNETH W. MIKELL SR
GDC # 1154850
JCC. UNIT 1C204 P.O. Box 948
Millen, GEORGIA
30442

Certificate Of Service

This is To Certify That I have This Day Served The Clerk Of Superior Court And The District Attorney's Office With a Copy Of The Foregoing Document by depositing Said Copy In The United States Mail in a Properly Addressed envelope With Adequate Postage Thereon To:

This 10th Day Of July 2012.

Served Upon:

Clerk Of Superior Court
304 Courthouse, 133 Montgomery St.
P.O. Box 10227
Savannah, GA. 31412

Office Of The District Attorney
600 Courthouse, 133 Montgomery St.
Savannah, GA. 31412

IN THE SUPERIOR COURT OF CHATHAM COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	)	**INDICTMENT NO. CR03-1837-BR**
	)	
vs.	)	
	)	
KENNETH WAYNE MIKELL, SR.	)	
Defendant	)	

STATE'S RESPONSE TO DEFENDANT'S

MOTION TO VACATE SENTENCE

COMES NOW the State, by and through Assistant District Attorney, Emily Thomas, who moves this court to DENY Defendant's motion to vacate sentence. In support of said motion the State respectfully shows the following:

Defendant moves this court to vacate his sentence based on one of two grounds: 1) that the sentencing court had no authority to impose a life-without-parole sentence at the conclusion of the trial of Defendant; or 2) that because the trial court believed that the non-parole sentence was mandated by Georgia law instead of within the court's discretion, the Defendant is entitled to be resentenced. Both arguments fail for the reasons below.

As to the first, the trial court absolutely had the authority to impose a non-paroleable sentence upon Defendant. As required by O.C.G.A. § 16-6-4 (2005), the State provided Defendant notice more than two months in advance of trial of its intent to seek a life sentence. That same statute requires that any sentence imposed upon a second conviction of child

molestation shall not be probated or suspended. Thus the court correctly sentenced Defendant to a straight period of time to serve in incarceration.

Further, the State showed during Defendant's sentencing hearing that Defendant had 10 prior felony convictions, including a prior conviction for Child Molestation in South Carolina. Of the 10, at least six of those certified copies of conviction showed that Defendant was represented by counsel at the time of the sentencing and that a proper plea colloquy was conducted, and were admitted as evidence against him and considered by the court in sentencing him.[1] (T. 273-4). Defendant provided no extrinsic evidence either during trial or during the motion for new trial to suggest that the pleas were not knowing and voluntary, or any reason they should not be considered by the trial court. (MNT-1 and 2). Thus they properly were considered to enhance Defendant's sentence pursuant to O.C.G.A. §§ 17-10-7(a) and (c).

Thus, for the reasons stated above, the trial court correctly imposed a straight to-serve sentence without the possibility of parole.

As to Defendant's second argument, that the court improperly only life in prison as a possible sentence, this too must fail. Defendant was sentenced both as a recidivist under O.C.G.A. § 17-10-7(c), and as a recidivist inasmuch as this was his second child molestation conviction. Though he cites it, Defendant fails to read O.C.G.A. §§ 17-10-7(a) and (c) as operating in tandem. O.C.G.A. § 17-10-7(a), as Defendant states, authorizes the trial court to, upon a showing of one prior conviction, sentence a defendant to the maximum punishment allowable under the applicable statute. In the instant case, that maximum punishment was a life

---

1 It should be noted that defense counsel did not object to State's Exhibits 8 and 9 being admitted during the course of trial for lack of colloquy. Those two certified copies of conviction were re-entered later for purposes of

sentence (O.C.G.A. § 16-6-4 (2005)). Though the trial court did not explicitly state such during the trial, it must have operated under the assumption that Defendant must be sentenced to the maximum allowable by law, as the State had established that Defendant had at least one prior felony conviction. Thus under O.C.G.A. § 17-10-7(a), Defendant was sentenced to the maximum, life in prison. Similarly, the trial court also sentenced Defendant under O.C.G.A. § 17-10-7(c), and thus he was sentenced to serve his time without parole.

WHEREFORE the State submits that Defendant was properly sentenced at his original sentencing hearing and his sentence must stand as is.

This the 17th day of August, 2012.

Emily Thomas
Assistant District Attorney
Eastern Judicial Circuit

---

sentencing. (T-119, 272).

CERTIFICATE OF SERVICE

This certifies that I have served a copy of the foregoing State's Motion upon all parties as follows:

Mr. Kenneth Mikell
GDC # 1154850
Jenkins Correctional Center
3404 Kent Farm Drive
Millen, GA 30442

This the 17th day of August, 2012.

EMILY THOMAS
Assistant District Attorney
Georgia State Bar No. 439008

District Attorney's Office
Eastern Judicial Circuit
Post Office Box 2309
Savannah, Georgia 31402

CERTIFICATE OF SERVICE

This certifies that I have served a copy of the foregoing Letter Brief upon all parties via US Mail as follows:

Mr. Kenneth Mikell
GDC # 1154850
C.C.F. Unit 4P-6B
P.O. Box 650
Nicholls, Georgia 31554

This the 18th day of December, 2012.

Emily Thomas Puhala
Assistant District Attorney
Eastern Judicial Circuit

A

Chatham County Courthouse
133 Montgomery Street
Suite 600
Post Office Box 2309
Savannah, Georgia 31402

FILED IN OFFICE
2012 DEC 18 AM 9:07
DEP. CLK. SUPERIOR CT.
CHATHAM COUNTY, GA.

DISTRICT ATTORNEY
EASTERN JUDICIAL CIRCUIT OF GEORGIA
LARRY CHISOLM

Child Support Services
(912) 652-7400

Early Intervention Program
(912) 652-7308

Juvenile Court Division
(912) 652-6700

Special Victims Unit
(912) 652-7308

Superior & State Court Divisions
(912) 652-7308

Victim-Witness Assistance Program
(912) 652-7329
(800) 447-5959

Telephone (912) 652-7308
Fax (912) 652-7328
Web: http://DistrictAttorney.chathamcounty.org

December 18, 2012

Judge Timothy Walmsley
Chatham County Courthouse, 2nd Floor
Savannah, GA 31401

Re: State v. Kenneth Mikell CR03-1837-WA

Judge Walmsley:

In researching another matter recently, I came across two cases I believe may be helpful in considering the pending motion in the above case. The issue was whether Mr. Mikell was properly sentenced to the maximum, Life without Parole, at the conclusion of his jury trial. I believe these cases to be instructive in finding that he was in fact properly sentenced:

State v. Baldwin 167 Ga. App. 737 (1983)

State v. Onumah 313 Ga. App. 269 (2011)

If there are any questions or problems, please do not hesitate to call me at (912) 652-7308. Thank you for your consideration in this matter.

Sincerely,

Emily Thomas Puhala
Assistant District Attorney
Eastern Judicial Circuit

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

KENNETH WAYNE MIKELL, SR., DEFENDANT,	CASE NUMBER: CR03-1837-BR
VS.	IE. MOTION TO VACATE SENTENCE
THE STATE OF GEORGIA, RESPONDENT.	

DEFENDANT'S REBUTTAL TO STATE'S RESPONSE ON MOTION TO VACATE SENTENCE

COMES NOW, KENNETH WAYNE MIKELL, SR., DEFENDANT, IN THE ABOVE-STYLED CAUSE OF ACTION, AND MOVES THIS HONORABLE COURT TO GRANT DEFENDANT'S MOTION TO VACATE SENTENCE FILED ON JUNE 12, 2012, AND PRESENTED PRO-SE. IN SUPPORT OF SAID MOTION DEFENDANT RESPECTFULLY MOVES THIS COURT TO CONSIDER THE FOLLOWING IN REBUTTAL:

(1)

WITHIN THE STATES RESPONSE TWO GROUNDS ARE ARGUED, IN GROUND ONE, THE STATE HAS MISINTERPRETATED THE ARGUMENT RAISED BY DEFENDANT BY STATING DEFENDANT MOVED THIS COURT TO VACATE SENTENCE BECAUSE, "THE SENTENCING COURT HAD NO AUTHORITY TO IMPOSE A LIFE-WITHOUT-PAROLE SENTENCE AT THE CONCLUSION OF THE TRIAL".

When Read, The Motion Raises That, "The Sentencing Court Had A Mistaken Belief That It Had No Discretion But To Impose A Life Sentence," And That The Court Failed To Consider The Lesser Range Of The §16-6-4 Statute, Of Not Less Than Ten Years, Nor More Than Thirty Years. This Lesser Range Is Not Eviscerated By The Application Of § 17-10-7, Thus The Court Held The Discretion To Impose Something Less Than A Life Sentence.

(2)

Further, The State Stated That The Defendant Failed To Object To The Prior Guilty Plea Convictions, And Stated That All The Priors Had An Attached Colloguy To Establish That A Proper Guilty Plea Hearings Occurred. Thus, Contrary To The Trial Records And Evidence. The Trial Record Reflects On Page 273 That A Formal Objection Did Occur On The Failure That No Colloguys Where Attached To The Plea Docket Sheets To Establish A Proper Voluntary Plea Was Made.

Nor Was There Any Extrinic Evidence Presented By The State. Even Was, One Prior, A Dismissed Case Used As A Similar Transaction In Trial. See: Exhibit 9 Of The States Exhibits From Trial.

(3)

In The States Ground Two Raises That Defendant Was Sentenced As A Recidivist Under O.C.G.A. §17-10-7(A) and (C), This Fact Dehors The Facts Of The Records. The Records Of The State Informind Defendant, "ie. Motion In Aggravation Of Punishment", Only Shows That 17-10-7(C) Was To Be Imposed. Therefore Establishing That The Defendant Was Not Informed To Being Punished Under Subsection (A) of 17-10-7.

THE STATE ARGUES THAT 17-10-7 (A) AND (C) WORK IN TANDEM, AND AUTHORIZES THE TRIAL COURT TO SENTENCE A DEFENDANT TO THE MAXIMUM PUNISHMENT ALLOWABLE UNDER THE APPLICABLE STATUTE. THOUGH THE STATE CITES THE 17-10-7 (A) STATUTE, THE STATE FAILS TO STATE THE REST OF (A): "... PROVIDED THAT, UNLESS OTHERWISE PROVIDED BY LAW, THE TRIAL JUDGE MAY IN HIS DISCRETION, PROBATE, OR SUSPEND THE MAXIMUM SENTENCE PRESCRIBED FOR THE OFFENSE".

AGAIN THE SENTENCING RANGES OF 16-6-4 ARE NOT EVISCERATED BY THE APPLICATION OF 17-10-7. SEE: MIKELL V. BRIAN, 2010 U.S. DIST. LEXIS 143308 (NOV. 9, 2010), @ GROUNDS 3+5, SUBSECTION (D), THE 11TH CIR COURT OF APPEALS HELD THAT A DISCRETION WAS STILL AVAILABLE TO IMPOSE SOMETHING LESS THAN LIFE.

WHEREFORE, DEFENDANT PRAYS THIS COURT GRANT THE PRESENTED MOTION TO VACATE SENTENCE AND HOLD A TIMELY RESENTENCING HEARING.

RESPECTFULLY SUBMITTED
Kenneth Wayne Mikell, Sr.
KENNETH WAYNE MIKELL SR.
GDC# 1154850
WILCOX STATE PRISON, K3-110
P.O. BOX 397
ABBEVILLE, GA. 31001

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS DAY SERVED THE RESPONDENT(S) WITH A COPY OF THE FOREGOING, BY PLACING THE SAME IN THE U.S. MAIL IN A PROPER ENVELOPE WITH ADEQUATE POSTAGE AFFIXED TO:

(1) OFFICE OF THE SUPERIOR COURT CLERK
133 MONTGOMERY STREET
SAVANNAH, GA. 31402

(2) OFFICE OF THE DISTRICT ATTORNEY
133 MONTGOMERY ST., SUITE 600
SAVANNAH GA. 31402

THIS 29TH DAY OF APRIL, 2014

Kenneth W. Mickell Sr.
DEFENDANT, PRO-SE

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	§	
	§	
v.	§	
	§	Case No. CR03-1837-WA
KENNETH WAYNE MIKELL, SR.,	§	
	§	
Defendant.	§	

ORDER DENYING DEFENDANT'S MOTION TO VACATE SENTENCE

After reading and considering Defendant's Motion to Vacate Sentence, the State's Response and Defendant's Reply/Rebuttal thereto, reviewing all argument and evidence of record, and the applicable law, the Court **DENIES** the motion.

RELEVANT BACKGROUND

The issue presented is whether Petitioner, Kenneth W. Mikell, Sr., ("Defendant") was improperly sentenced to life without parole when he was convicted under O.C.G.A. §16-6-4(b) [pre-2006] with recidivist enhancements under O.C.G.A. § 17-10-7(c) (2005).

Defendant was convicted of child molestation under O.C.G.A. § 16-6-4(b) on January 21, 2004. Defendant had multiple previous felony convictions (six of which were admitted as evidence towards the recidivist count), including a previous child molestation felony sentence. Given his history the State provided timely notice of its intent to seek recidivist punishment and indicted Defendant under the Georgia recidivist statute, O.C.G.A. § 17-10-7(c). In accordance with O.C.G.A. § 16-6-4(b), the State provided notice to Defendant that the State was seeking a life sentence. At sentencing the defense attorney, the prosecution, and the trial judge all agreed that the sentence pursuant to O.C.G.A. § 16-6-4(b) with enhancements under O.C.G.A § 17-10-7 fixed the sentence as life in prison. Defendant was accordingly sentenced to such.

In his present motion to vacate his sentence, Defendant argues that he was improperly sentenced because the trial judge sentenced him under a "mistaken belief" that O.C.G.A. § 17-10-7(c) did not allow for anything other than the maximum sentence to be imposed. Defendant argues that the court's failure to use sentencing discretion is not authorized by O.C.G.A. § 17-10-7(c); thus, reversible error. Defendant relies on Blevins v. State, 270 Ga. App. 388, 394, 606 S.E.2d 624, 630 (2004) for the proposition that O.C.G.A. § 17-10-7(c) does, in fact, grant the sentencing judge discretion to sentence a recidivist defendant to a punishment less than the statutory maximum. Blevins, 270 Ga. App. at 394, 606 S.E.2d at 630.

In its response the State contends that because subsections (a) and (c) of O.C.G.A. § 17-10-7 "work in tandem," the sentencing judge had no discretion to sentence Defendant to anything other than the statutory maximum punishment. Accordingly, the State argues that Defendant's sentence should not be vacated.

CITATION OF AUTHORITY

I. Defendant was properly sentenced to life without parole when he was convicted under O.C.G.A. § 16-6-4(b) with recidivist enhancements pursuant to O.C.G.A. § 17-10-7(c).

The Georgia Court of Appeals has repeatedly held that the trial judge does not have discretion to sentence a defendant to anything less than the maximum sentence under O.C.G.A. § 17-10-7(c). *See e.g.*, Allen v. State, 325 Ga. App. 752, 754 S.E.2d 795 (2014); Jefferson v. State, 309 Ga. App. 861, 711 S.E.2d 412 (2011); Lester v. State, 309 Ga. App 1, 710 S.E. 2d 161 (2011); Hill v. State, 272, Ga. App. 280, 612 S.E.2d 92 (2005); Thompson v. State, 265 Ga. App. 696, 595 S.E.2d 377 (2004); State v. Jones, 253 Ga. App. 630, 560 S.E.2d 112 (2002); Buckner v. State, 253 Ga. App. 294; 558 S.E.2d 823 (2002); West v. State, 255 Ga. App. 334, 565 S.E.2d 538 (2002); Hammond v. State, 139 Ga. App. 820, 229 S.E.2d 685 (1976). Defendant's current motion is based on reading subsections (a) and (c) separately. In so doing he construes subsection

(c) to authorize the judge's discretion to impose a sentence less than the statutory maximum punishment. Subsection (a) provides:

> [A]ny person who, after having been convicted of a felony offense in this state or having been convicted under the laws of any other state or of the United States of a crime which if committed within this state would be a felony and sentenced to confinement in a penal institution, commits a felony punishable by confinement in a penal institution shall be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense of which he or she stands convicted, provided that, unless otherwise provided by law, the trial judge may, in his or her discretion, probate or suspend the maximum sentence prescribed for the offense.

O.C.G.A. § 17-10-7(a). Subsection (c) provides:

> [A]ny person who, after having been convicted under the laws of this state for three felonies or having been convicted under the laws of any other state or of the United States of three crimes which if committed within this state would be felonies, commits a felony within this state shall, upon conviction for such fourth offense or for subsequent offenses, serve the maximum time provided in the sentence of the judge based upon such conviction and shall not be eligible for parole until the maximum sentence has been served.

O.C.G.A. § 17-10-7(c).

A. Subsection (c) of O.C.G.A. § 17-10-7 does not allow the trial judge sentencing discretion.

A long line of cases holds that the trial judge does not have discretion to sentence a defendant to anything other than the statutory maximum under O.C.G.A. § 17-10-7(c). Allen, 325 Ga. App. at 55, 754 S.E.2d at 797; Jefferson, 309 Ga. App. at 864, 711 S.E.2d at 414-15; Lester, 309 Ga. App. at 4-5, 710 S.E.2d at 164-65; Hill, 272 Ga. App. at 281, 612 S.E.2d at 94; Thompson, 265 Ga. App. at 698, 595 S.E.2d at 379-80; Jones, 253 Ga. App. at 632, 560 S.E.2d at 113; Buckner, 253 Ga. App. at 296; 558 S.E.2d at 827; West, 255 Ga. App. at 335, 565 S.E.2d at 539; Hammond, 139 Ga. App. at 822, 229 S.E.2d at 687-88.

In Thompson the petitioner argued that the trial court "erred in sentencing him to life without parole because the Court failed to exercise discretion in sentencing" under O.C.G.A. § 17-10-7(c). Thompson, 265 Ga. App. at 698, 595 S.E.2d at 379. The Georgia Court of Appeals held that a recidivist defendant's sentence

> is governed not just by subsection (c) of O.C.G.A. § 17-10-7. It is also subject to the provisions of subsection (a) of that statute, which provides that the trial judge must impose the maximum sentence upon a defendant who has previously been convicted of a felony and is then found guilty of a subsequent felony. These subsections must be read together. If both apply, the trial court must apply them both . . . Therefore, "[i]t follows that when a three-time recidivist commits a fourth felony for which the maximum penalty is life in prison, the trial court lacks discretion to sentence such felon to anything other than a life sentence without possibility of parole."

Id. at 698, S.E.2d at 379-80 (citations omitted).

Similarly, in Buckner v. State the Court of Appeals struck down a recidivist defendant's argument that subsections (a) and (c) of O.C.G.A. § 17-10-7 operate in exclusivity of each other, which would allow the trial court sentencing discretion under subsection (c), but not subsection (a). Buckner, 253 Ga. App. at 296; 558 S.E.2d at 827. The court held

> [w]e have repeatedly rejected this precise argument. Beginning in 1976 in Hammond v. State, we have consistently held that under the language of this statute, whether the offense for which defendant currently stands convicted is his second, third, fourth, or fourteenth—the only sentence imposable for such conviction is the maximum time prescribed by the statute for that offense.

Id. at 296, 558 SE.2d at 827 (citations omitted).

In the present case, Defendant was convicted of child molestation under O.C.G.A. § 16-6-4(b)—his second child molestation felony—for which the maximum sentence is life in prison. *Id.* Defendant also had six previous felony sentences admitted as evidence against him in support of the State's recidivist treatment; thus, both subsections (a) and (c) are applicable. O.C.G.A. § 17-10-7, *see* Thompson, 265 at 698, 595 S.E.2d at 379-80. The State provided notice of

its intent to seek a life sentence as required by O.C.G.A. § 16-6-4. Accordingly, Mikell's sentence of life in prison without parole is the required sentence under O.C.G.A. § 16-6-4(b) and § 17-10-7(c). *See e.g.*, Thompson, 265 Ga. App. at 698, 595 S.E.2d at 379-80.

B. Mikell's motion to vacate his sentence relies on case law that was disapproved by the Georgia Court of Appeals.

Mikell's motion to vacate his sentence is predicated on a line of cases that seem to indicate that under O.C.G.A. § 17-10-7(c) the trial judge retains discretion to sentence a recidivist defendant to any punishment within the statutory guidelines. *See* Colbert v. State, 303 Ga. App. 802, 694 S.E.2d 694 (2010); Johnson v. State, 285 Ga. App. 590, 646 S.E.2d 760 (2007); Blevins v. State, 270 Ga. App. 388, 606 S.E.2d 624 (2004).

However, this line of cases was expressly disapproved by the Court of Appeals in Jefferson v. State, 309 Ga. App. 861, 864, 711 S.E.2d 412, 414-15 (2011). The Jefferson Court specifically held that "subsections (a) and (c) of O.C.G.A. § 17-10-7 must be read together." *Id.* Meaning, the language in subsection (a) that specifies upon a defendant's second felony conviction the defendant must be sentenced to the "longest period of time prescribed for the punishment of the subsequent offense of which he or she stands convicted" is not eviscerated by language in subsection (c) that specifies upon a defendant's fourth felony conviction the defendant must "serve the maximum time provided in the sentence of the judge based upon such conviction" without parole. O.C.G.A. § 17-10-7(a) and (c). The court found that the two provisions work together. As such, the "longest period of time" provision from subsection (a) also applies to subsection (c), removing any discretion that the sentencing judge would have to sentence the defendant to a term less than the statutory maximum punishment. *Id.* Thus, Mikell's reliance on the Blevins line of cases misguided.

C. With specific exceptions, O.C.G.A. § 17-10-7(c) allows the trial judge discretion to probate or suspend a portion of the defendant's sentence.

While the trial judge has discretion to probate or suspend a portion of the defendant's sentence under O.C.G.A. § 17-10-7(c), the trial judge does not retain such discretion when the maximum sentence is life in prison. O.C.G.A. § 17-10-1(a); Thompson, 265 Ga. App. at 698, 595 S.E.2d at 380 (citing Stone v. State, 218 Ga. App. 350, 351, 461 S.E.2d 548, 549 (1995)). Further, pursuant to O.C.G.A. § 16-6-4(b) (pre-2006), upon a second conviction for child molestation the sentence shall not be probated of suspended.

In the present case, the trial judge did not have discretion to suspend or probate Mikell's sentence because Defendant received the maximum penalty of life in prison. O.C.G.A. § 17-10-1(a); *see also* Thompson, 265 Ga. App. at 698, 595 S.E.2d at 380. Further, the judge did not retain this discretion because this is Mikell's second conviction for child molestation. O.C.G.A. § 16-6-4(b) (pre-2006).

II. The State was not required to provide notice to the defendant as to the specific recidivist provision to which they sought the defendant sentenced.

In Mikell's rebuttal he claims the State did not properly reference the specific provision of the recidivist statute for which they sought sentencing. As such, he claims that he did not receive proper notice that he would be punished under both O.C.G.A. § 17-10-7(a) and (c). However, this argument fails because the "[t]he State was required to provide only affirmative notice . . . [that] prior felony offenses would be used . . . for recidivist purposes during sentencing." Kinsey v. State, 219 Ga. App. 204, 205, 464 S.E.2d 648, 651 (1995).

Here, the State provided Defendant with proper notice because they filed two motions that outlined their intent to seek recidivist punishment, to seek the maximum sentence, and the State provided a list of the predicate felonies to be used towards the recidivist punishment. Further, the state included the recidivist

count and predicate felonies in Mikell's indictment. "The important requirement [is] that the defendant be given an unmistakable advance warning that the prior convictions will be used against him at sentencing so that he will have enough time to rebut or explain any conviction record." Ogle v. State, 256 Ga. App. 26, 28, 567 S.E.2d 700, 703 (2002). Defendant was given such notice.

III. Defendant's claim that the court was "mistaken" and "confused" is not supported by the Record.

Defendant argues that the Court acted upon some mistaken understanding of the law when pronouncing the sentence. While the trial transcript certainly demonstrates some consultation with counsel and consideration concerning the appropriate sentence that Defendant should receive, the language Defendant uses to support his position is taken out of context. Having reviewed the transcript it becomes clear that any confusion displayed by the Court addressed not the sentence that should be received under the recidivist count, but rather spoke to the correct statutory range of punishment under O.C.G.A. § 16-6-4(b). In context the "confusion" addressed a moot point considering the trial court had no discretion to sentence Defendant to anything other than the maximum sentence.

Paragraph two of Defendant's motion cites the following statement by the trial judge: "[i]f someone can show me I'm wrong, I'll consider the sentencing on a proper motion. I'll resentence him if you can prove to me I'm wrong." Defendant quotes this language as if it proves that there was confusion about how to sentence Defendant under the recidivist statute, but again, taken in context it is clear that the confusion concerns the applicability of the defendant's predicate felony convictions towards the recidivist counts.

CONCLUSION

As explained above, Defendant received a proper sentence when he was sentenced to life without parole under O.C.G.A. § 16-6-4(b) with recidivist

enhancements under O.C.G.A. § 17-10-7(c). As such, Defendant's motion to vacate his sentence is DENIED.

SO ORDERED, this 25th day of August, 2014.

Timothy R. Walmsley, Judge,
Chatham Superior Court, EJC, Georgia

cc: Kenneth Wayne Mikell, Sr., G.D.C. # 1154850, Wilcox State Prison, K3-110B, PO Box 397, Abbeville, Georgia, 31001
Emily Puhala, Asst. District Attorney

FILED IN OFFICE
DEP. CLK. SUPERIOR CT.
CHATHAM COUNTY, GA.

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

KENNETH WAYNE MIKELL,
APPELLANT,

VS.

THE STATE OF GEORGIA,
APPELLEE.

CASE NUMBER:
CR03-1837-WA

NOTICE OF APPEAL

NOTICE IS GIVEN THAT KENNETH WAYNE MIKELL, APPELLANT IN THE ABOVE MATTER HEREBY APPEALS TO THE COURT OF APPEALS OF GEORGIA FROM THE JUDGMENT/ORDER OF THE TRIAL COURT FILED ON THE 25TH DAY OF AUGUST, 2014.

THE CLERK SHALL OMIT NOTHING FROM THE RECORD ON APPEAL. A TRANSCRIPT OF EVIDENCE AND PROCEEDINGS WILL BE FILED FOR INCLUSION IN THE RECORD ON APPEAL.

THE COURT OF APPEALS RATHER THAN THE SUPREME COURT OF GEORGIA HAS JURISDICTION OF THIS APPEAL BECAUSE OF THE ISSUE INVOLVED IS AN APPEAL FROM THE DENIAL OF THE MOTION TO VACATE SENTENCE AND APPEALS OF SUCH CASES ARE NOT RESERVED TO THE SUPREME COURT OF GEORGIA PURSUANT TO ARTICLE VI SECTION V PARAGRAPH II OF THE CONSTITUTION OF THE STATE OF GEORGIA.

RESPECTFULLY SUBMITTED THIS 22ND DAY OF SEPTEMER, 2014.

Kenneth Wayne Mikell

GDC# 1154850
WILCOX STATE PRISON K3-110
P.O. BOX 397
ABBEVILLE, GA. 31001

CERTIFICATE OF SERVICE

I CERTIFY THAT I THIS DAY SERVED THE DISTRICT ATTORNEY OF CHATHAM COUNTY WITH A COPY OF THIS NOTICE OF APPEAL BY MAILING A COPY BY FIRST CLASS MAIL POSTAGE PREPAID TO HIM/HER AT:

THE DISTRICT ATTORNEY OF CHATHAM COUNTY
SUITE 600
CHATHAM COUNTY COURTHOUSE
133 MONTGOMERY STREET
SAVANNAH, GEORGIA 31401

THIS THE 22nd DAY OF SEPTEMBER, 2014.

Kenneth Wayne Mitchell
GDC # 1154850
WILCOX STATE PRISON K3-110
P.O. BOX 397
ABBEVILLE, GA. 31001

FILED IN OFFICE
2014 OCT -1 AM 9:59
DEP. CLK. SUPERIOR CT.
CHATHAM COUNTY, GA.

IN THE SUPERIOR COURT OF Chatham County
STATE OF GEORGIA

Kenneth Wayne Mikell,
Plaintiff

1154850,
Inmate Number

vs.

The State of Georgia,

,

,
Defendant(s)

Civil Action No. CR03-1887-WA

Nature of Action: Notice of Appeal

[redacted]

I, Kenneth Wayne Mikell, depose and say that I am the plaintiff in the above entitled case; that in support of my request to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to questions and instructions below are true.

1. List any and all aliases by which you are known: N/A

2. Are you presently employed? ☐ Yes ☒ No

   If the answer is "Yes," state the amount of your salary or wages per month, and give the name and address of your employer:

   If the answer is "No," state the date of last employment and the amount of the salary and wages per month which you received: 2003, Mikell Plumbing 380.00 wk

3. Have you received within the past twelve months any money from any of the following sources?

   Business, profession, or form of self-employment? ☐ Yes ☒ No

   Pensions, annuities, or life insurance payments? ☐ Yes ☒ No

   Rent payments, interest or dividends? ☐ Yes ☒ No