IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LESTER DARRELL MOORE **APPELLANT**

V. **NO. 2015-KA-00207-SCT**

STATE OF MISSISSIPPI **APPELLEE**

MOTION FOR REHEARING

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COMES NOW the Appellant, Lester Darrell Moore, in the above-styled matter, by and through counsel, pursuant to Rule 40 of the Mississippi Rules of Appellate Procedure, and files this Motion for Rehearing of the decision handed down by this Honorable Court on January 28, 2016, and in support thereof would show unto the Court the following:

STANDARD OF REVIEW

Pursuant to Rule 40 of the Mississippi Rules of Appellate Procedure "[a] motion for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain[.]" M.R.A.P. 40. Rule 40 also provides that "[t]he motion shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misapprehended. . . ." *Id.*

ARGUMENT

I. The trial court erred by failing to apply the ameliorative punishment provisions of Mississippi Code Annotated Section 97-23-93 through the grant of instruction S-1 and denial of instruction D-8.

The opinion in this case quotes at length from *Wilson v. State*, 967 So. 2d 32, 42 (Miss. 2007), and summarily concludes that the trial court properly granted instruction S-1

and denied instruction D-8. Opinion at (¶¶15-16). In so doing, the opinion overlooks Moore's arguments that *Wilson* should not control because it misapprehended and misapplied the law of retroactive amelioration under *Daniels v. State*, 742 So. 2d 1140 (Miss. 1999) and Mississippi Code Annotated Section 99-19-33. Moore does not dispute that *Wilson* addressed an issue nearly identical to issue presented in this appeal; Moore disputes that the *Wilson* decision correctly decided the issue.

The critical inquiry in this case is whether the value or stated price of merchandise taken, which determines the classification or degree of the crime of shoplifting, is merely a substantive element of the offense or instead a determinative element in the imposition of "punishment" within the meaning of Section 99-19-33.[1] The *Wilson* opinion first noted that the amendment at issue "[e]ffectively made the charge of shoplifting merchandise over $250 in value but not more than $500 in value to be a misdemeanor rather than a felony[,]" and that "section 99-19-33 and *Daniels* stand for the proposition that when the statutory penalty for a particular crime is legislatively reduced after the date of the commission of the crime but before the date of sentencing, the trial court must sentence the defendant under the amended statute." *Wilson*, at 42 (¶¶21, 22). However, the *Wilson* decision then summarily concluded that Section 99-19-33 and *Daniels* were "totally irrelevant"

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[1] Section 99-19-33 provides that:

> If any statute shall provide a punishment of the same character, but of milder type, for an offense which was a crime under pre-existing law, then such milder punishment may be imposed by the court but no conviction, otherwise valid, shall be set aside and new trial granted merely because of an error of the court in fixing punishment. Such error shall only entitle the party injured to vacate or reverse the judgment as to the punishment, and the legal punishment shall then be imposed by another sentence based on the original conviction or plea of guilty.

Miss. Code Ann. §99-19-33.

because "[w]e are not dealing with an amended sentencing statute, but instead an amended statute as it relates to the elements of the criminal offense." *Id*. at (¶22).

The opinions in *Wilson* and in this case overlooked that both prior to and after the amendments at issue, Section 97-23-93(1) defines the elements of the crime of shoplifting *without regard to value* and explicitly provides the punishment for the crime of shoplifting is provided elsewhere in that section:

> (1) Any person who shall willfully and unlawfully take possession of any merchandise owned or held by and offered or displayed for sale by any merchant, store or other mercantile establishment with the intention and purpose of converting such merchandise to his own use without paying the merchant's stated price therefor shall be guilty of the crime of shoplifting and, upon conviction, *shall be punished as is provided in this section*.

Miss. Code Ann. §97-23-93(1) (emphasis added).

As alluded to in subsection (1), punishment for the crime of the shoplifting (relevant to this case) is addressed in subsections (5) and (7) which make the punishment–i.e., whether the crime is a misdemeanor or felony–dependent on the value of the merchandise. Contrary to the *Wilson* majority, the amendments to the shoplifting punishment statutes–subsections (5) and (7)–do not "relate[]to the elements of the criminal offense." *Wilson*, at (¶22). Instead, the amendments were made to punishment statutes. "[T]he amendment has everything to do with sentencing. . . [,]" *Id*. at 47 (¶40) (Diaz, P.J., Dissenting), and Section 99-19-33 and *Daniels* should control.

The opinions in *Wilson* and in this case also overlook that Section 97-23-93 is, **at best**, ambiguous as to whether the amendments at issue constitute a change in punishment or simply a change to the elements of the crime of shoplifting. To this end, the opinions in *Wilson* and this case overlook "[a] principle deeply imbedded in our law [that] requires us to construe criminal statutes strictly, resolving all doubts and ambiguities in favor of the accused." *Brown v. State*, 102 So. 3d

1087, 1089 (¶7) (Miss. 2012) (citing *Coleman v. State*, 947 So. 2d 878, 881 (Miss. 2006)) (additional citations omitted). The opinions in *Wilson* and this case misapprehended the law by overlooking that Section 97-23-93(1) defines the elements of *the crime of shoplifting* without regard to the merchandise's stated price and specifically states that *punishment* for the crime is provided for elsewhere in the section. Subsections (5) through (9), which set forth the sentencing scheme for shoplifting.

The opinions in *Wilson* and this case represent an unduly narrow view of what constitutes an ameliorative change in penalty warranting retroactive application under Section 99-19-33. This Court has previously instructed that the relevant "[i]nquiry in this case is whether the [statutory amendment] ameliorates the previous *sentencing scheme*.[]" *West v. State*, 725 So. 2d 872, 879 (¶17) (Miss. 1998) (footnote omitted) (emphasis added). Specifically, the opinions overlook that an ameliorative change in a sentencing scheme is often accomplished not only by simply reducing the sentence term, but also by simultaneously reducing a sentence and reclassifying or redefining criminal conduct. As one commentator has explained:

> Ameliorative changes occur when a legislature amends a penal statute to lessen the penalty attached to certain criminalized conduct *or to decrease the scope of criminalized conduct*. A legislature can ameliorate a penalty through decriminalizing conduct, *reclassifying conduct*,[2] *redefining criminal responsibility, or reducing a sentence*.

Eileen L. Morrison, *Resurrecting the Amelioration Doctrine: A Call to Action for Courts and Legislatures*, 95 B.U. L. Rev. 335, 338 (2015) (citing Comment, *Today's Law and Yesterday's*

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[2] "Both [reclassification of criminal conduct and reducing a sentence] generally involve a decision by the legislature that particular acts, though wrongful, may have been punished too severely, and that therefore an adjustment in penalty–and here [with reclassification] also an adjustment in some of the substantive elements of the original crime–is required." Comment, Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U. Pa. L. Rev. 120, 139 (1972).

Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U. Pa. L. Rev. 120, 120 (1972) (emphasis added). Another commentator has similarly observed:

> When a legislature changes the previous categorization of conduct from a higher class felony to a lower one or from a felony to a misdemeanor and reduces the punishment attached to a specific criminal offense, it is the reclassification of conduct. This type of ameliorative change often occurs in two steps. Initially, the conduct is reclassified to a lower degree and then the sentence is reduced accordingly so that it is proportional to the other categories.
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> . . .
>
> When a legislature amends a statute and the change can be categorized as either the decriminalization or the reclassification of conduct or a sentence reduction, the change is therefore ameliorative and should be given retroactive effect.

S. David Mitchell, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, 37 Am. J. Crim. L. 1, 19 (2009) (citing Comment, *Today's Law and Yesterday's Crime*, at 120).

The 2003 and 2014 amendments to subsections (5) and (7) were ameliorative changes in punishment through a reduction in sentence and an attendant reclassification of criminal conduct that decreased the scope of criminal culpability by increasing the misdemeanor/felony amount. As such, the amendments to subsections (5) and (7) were changes providing "a punishment of the same character, but of milder type, for an offense which was a crime under pre-existing law" under the plain meaning of Section 99-19-33. Pursuant to *Daniels*, Moore was entitled to have the ameliorative punishment amendments applied at his trial. *Daniels*, 742 So. 2d at 1145 (¶17) ("when a statute is amended to provide for a lesser penalty, and the amendment takes effect before sentencing, the trial court must sentence according to the statute as amended.").

Courts from other jurisdictions have considered similar amendments and held that they apply retroactively. *State v. Austin*, 503 N.W.2d 604 (Iowa 1993), holding modified by *State v. Chrisman*,

514 N.W.2d 57 (Iowa 1994); *People v. Behlog*, 74 N.Y.2d 237, 543 N.E.2d 69 (1989). The Court in *Austin* considered amendment to Iowa's theft statutes, which, like the amendments at issue in this appeal, increased the threshold values and reclassified the degrees of the crime of theft. *Austin*, 503 N.W.2d at 605. In holding that the defendant–who committed the offense before the amendments became effective and was sentenced after–was entitled to have the ameliorative punishments amendments applied to his case, the Austin court reasoned as follows:

> An examination of our statutory framework concerning theft shows that Iowa Code section 714.1[3] (1991) defines theft and specifies the acts constituting the offense. This section was not amended in 1992. Iowa Code section 714.2[4] classifies the degrees of the offense of theft by specifying the value of the stolen property but does not define the crime. In a different context, we have observed that 'specifying the degrees of theft does not change theft into a different offense; it merely provides a system of categorizing degrees of theft in order to classify the crime for sentencing.' *State v. Garr*, 461 N.W.2d 171, 174 (Iowa 1990).
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> Stated otherwise, section 714.2 does not define the crime of larceny; it merely provides criteria for determining punishment, one criteria being the value of the property. While the State must meet its burden to establish the dollar value of the stolen property in order to designate the crime for sentencing, the proof of the property's value is relevant only to the punishment. We conclude the provision of section 4.13(4) concerning a mitigated penalty is applicable in this case.

Austin, 503 N.W.2d at 606.

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[3] "Appropriate to the present charge section 714.1(1) provides a theft is committed when a person '[t]akes possession or control of the property of another . . . , with the intent to deprive the other thereof." *State v. Austin*, 503 N.W.2d 604, 606 n.1 (Iowa 1993).

[4] "The 1991 Code version provides in subsection 3: The theft of property exceeding one hundred dollars but not exceeding five hundred dollars in value . . . , is theft in the third degree. Theft in the third degree is an aggravated misdemeanor. The 1992 amendment changes the amounts in subsection 3 to 'five hundred dollars, but not exceeding one thousand dollars . . .' and changes subsection 4 to include amounts between one hundred and five hundred dollars and constitute theft in the fourth degree, a serious misdemeanor." State v. Austin, 503 N.W.2d 604, 606 n.2 (Iowa 1993) (quoting 1992 Iowa Acts ch. 1060, § 1).

Like Iowa's theft statute, Mississippi's shoplifting statute defines the crime of shoplifting without regard to the value/stated price of the merchandise, and the definition of the crime remained unchanged in the 2003 and 2014 amendments. *See* Miss. Code Ann. §97-23-93(1). Like Iowa's theft statute, our shoplifting statutes separately classify the degrees of the crime of shoplifting for sentencing by introducing value/price as a criteria for determining punishment. *See* Miss. Code Ann. §97-23-93(5), (7). The ameliorative changes to subsections (5) and (7) concern punishment and were applicable to Moore's trial under Section 99-19-33.

Similarly, the Court in *Behlog* considered whether an amendment increasing from $250 to $1,000 the required minimum value of stolen property required for the crime of grand larceny was an ameliorative change in punishment that should be applied retroactively to a defendant sentenced after the amendment's effective date. *People v. Behlog*, 74 N.Y.2d 237, 239, 543 N.E.2d 69, 70 (1989). In holding that the amendments were ameliorative changes in punishment that should apply retroactively, the Court held in part as follows: "We reject the People's contention that the amendment here (L.1986, ch. 515) is not ameliorative in nature.[] It reclassifies certain criminal conduct as a class A misdemeanor rather than a class E felony and thereby reduces the penalties that can be imposed." *Behlog*, 74 N.Y.2d at 241, 543 N.E.2d at 72 (footnote omitted).

The amendments to Section 97-23-93 (5) and (7) accomplished an ameliorative change in punishment through reclassification of criminal conduct and a reduction of sentence. The amendments provided "a punishment of the same character, but of milder type, for an offense which was a crime under pre-existing law." Miss. Code Ann. §99-19-33. Under Section 99-19-33 and *Daniels*, Moore was entitled to have the ameliorative amendments applied to his case. The trial court's grant instruction S-1 and refusal of instruction D-8 violated Section 99-19-33. Because the opinions in Wilson and in this appeal overlooked the points of law identified above, Moore requests

this Court to grant rehearing and issue a new opinion reversing his conviction and remanding this case for a new trial.

CONCLUSION

Moore submits that the foregoing propositions warrant the grant of this Motion for Rehearing and requests this Court to withdraw its original opinion handed down on Januray 28, 2016, and substitute a new opinion reversing his conviction and sentence and remanding this case for a new trial.

WHEREFORE, PREMISES CONSIDERED, Appellant requests this Honorable Court to grant this Motion for Rehearing and issue a new opinion reversing his conviction and sentence and remanding this case for a new trial.

Respectfully submitted,

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INDIGENT APPEALS DIVISION
For Lester Darrell Moore, Appellant

BY: /s/ Hunter N. Aikens
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CERTIFICATE OF SERVICE

I, Hunter N. Aikens, Counsel for Lester Darrell Moore, do hereby certify that I have this day electronically filed the foregoing **Motion for Rehearing** with the Clerk of the Court using the MEC system which issued electronic notification of such filing to:

Honorable Jason L. Davis
Attorney General Office
Post Office Box 220
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So certified, this the 11th day of February, 2016.

/s/ Hunter N. Aikens
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