IN THE SUPREME COURT OF MISSISSIPPI

NO. 2011-CT-01641-SCT

TOMMY HAMPTON a/k/a THOMAS HAMPTON

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	10/31/2011
TRIAL JUDGE:	HON. ROBERT WALTER BAILEY
TRIAL COURT ATTORNEYS:	JAMES D. ANGERO LISA J. HOWELL MARCUS D. EVANS
COURT FROM WHICH APPEALED:	LAUDERDALE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: JUSTIN TAYLOR COOK
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	BILBO MITCHELL
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 10/16/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

RANDOLPH, PRESIDING JUSTICE, FOR THE COURT:

¶1. Tommy Hampton was sentenced to twenty years after his conviction of armed robbery as a habitual offender. Hampton appeals his sentence. Finding no error, we affirm.

FACTS AND PROCEEDINGS BELOW

¶2. Hampton was indicted for the ". . . tak[ing] of . . . $2,190.00 . . . by violence to [the victim's] person by the exhibition of a deadly weapon . . ." and "having been previously

convicted of at least two (2) felony offenses . . . , and having been sentenced to serve at least one (1) year with a state or federal penal institution. . . ."[1] The jury found the defendant guilty of robbery by use of a deadly weapon and was not instructed to recommend a sentence.

¶3. At his sentencing hearing, the State presented evidence that Hampton previously had been convicted of possession of cocaine and of burglary of a dwelling (twice) and the State had sought an enhanced sentence.[2] The defendant offered evidence that he was sixty-three years old and an alcoholic. No actuarial, mortality, or life-expectancy tables were offered by Hampton.

¶4. The trial judge sentenced Hampton to twenty years as a habitual offender per Section 99-19-81 of the Mississippi Code, absent objection, and credited him with 199 days for time served.[3] Hampton filed a motion for a new trial and/or judgment notwithstanding the verdict (JNOV) arguing, *inter alia*, that "the sentence . . . is unreasonable, harsh and not in conformity with the applicable facts and law, and is inequitable and unjust to this Defendant." Once again, Hampton presented no actuarial, mortality, or life-expectancy tables

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[1]The record also reveals that Hampton previously was convicted of armed robbery in Iowa and forgery in Illinois.

[2]The State also presented evidence that, for the more recent burglary conviction, Hampton "was given an opportunity to be on post-release supervision and not serve any time, but violated those terms and conditions."

[3] The 199 days includes 172 days for time served before Hampton was released on bond, plus 27 days served after his conviction (October 4, 2011), but before the sentencing hearing (October 31, 2011).

to the trial judge and offered no argument that the failure of the trial court to consider same was error. The motion was denied.

¶5. On appeal to the Court of Appeals,[4] Hampton raised, for the first time, that his sentence exceeded his life expectancy. The Court of Appeals held that Hampton's claim was procedurally barred, based on his failure to raise the issue before the trial court. Notwithstanding the bar, the Court of Appeals found that his sentence did not amount to a life sentence. We granted Hampton's petition for certiorari and limit our review to the issue presented on appeal, *verbatim et literatim*:

> Whether the trial court erred in sentencing Hampton to a sentence of twenty (20) years when such a length equates to a life sentence, which could have only been imposed by the jury.

ANALYSIS

¶6. Despite making no objection before the trial court and presenting no tables of estimates, publications, or argument related to life expectancy, Hampton belatedly argues that his sentence should be vacated because his sentence equates to a life sentence. Hampton asks this Court to consider life-expectancy estimates, studies, and argument never presented at the trial level. Hampton urges this Court to consider matters outside the record. The State responds that Hampton's claim is barred, as no objection was presented to the trial court.

¶7. This Court declines to consider matters which were never presented or argued in the trial court and are not part of the record before us today.

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[4] ***Hampton v. State***, 2013 WL 607777 (Miss. Ct. App. Feb. 19, 2013).

> This Court will not consider matters that do not appear in the record, and it must confine its review to what appears in the record. ***Robinson v. State***, 662 So. 2d 1100, 1104 (Miss. 1995) (citing ***Dillon v. State***, 641 So. 2d 1223, 1225 (Miss. 1994)). Issues cannot be decided based on assertions from the briefs alone. The issues must be supported and proved by the record. ***Robinson***, 662 So. 2d at 1104 (citing ***Ross v. State***, 603 So. 2d 857, 861 (Miss. 1992)).

Pulphus v. State, 782 So. 2d 1220, 1224 (Miss. 2001). "This Court has long held that it cannot consider that which is not in the record." ***Stone v. State***, 94 So. 3d 1078, 1082 (Miss. 2012) (citing ***State v. Cummings***, 203 Miss. 583, 591, 35 So. 2d 636, 639 (Miss. 1948) (citations omitted) ("[b]eing an appellate court, we take the record as it comes to us, and receive no new evidence here."), *reh'g denied* (Aug. 23, 2012); ***Pratt v. Sessums***, 989 So. 2d 308, 309-10 (Miss. 2008) (citation omitted) ("[w]e cannot consider evidence that is not in the record.")). As recently as September 18, 2014, a unanimous Court refused to consider an order which was not part of the record, stating that it would not consider as part of its analysis any information outside the record, even though it appeared that the Court of Appeals considered the order. ***Shumake v. Shumake***, 2012-CT-00718-SCT, 2014 WL 4638714, *2, ¶8, n.1 (Miss. Sept. 18, 2014) (citing ***Hardy v. Brock***, 826 So. 2d 71, 76 (Miss. 2002) ("Mississippi appellate courts may not consider information that is outside the record.")). In arguing that his sentence exceeds his estimated life expectancy, Hampton has unequivocally gone outside the record. Considering "*evidence*" not presented to the trial court, the dissent relies on matters outside the record. Neither of the reports or studies referred to by Hampton in his brief, nor the arguments first presented on appeal, will be

considered, as neither was presented to the trial court below, and any analysis of these new issues comes solely from matters not in the record before us.

¶8. "A contemporaneous objection must be made at trial in order to preserve an issue for appeal." ***Cox v. State***, 793 So. 2d 591, 599 (Miss. 2001) (citing ***Smith v. State***, 530 So. 2d 155, 162 (Miss. 1988)). "Errors related to improper sentencing are procedurally barred if no objection is made at trial." ***Hughes v. State***, 983 So. 2d 270, 282 (Miss. 2008) (citations omitted); ***Hobgood v. State***, 926 So. 2d 847, 857 (Miss. 2006); ***Cox***, 793 So. 2d at 599. In ***Cox***, this Court held that when the defendant failed to object before the trial court that his thirty-year sentence for armed robbery "amount[ed] to" a life sentence, he was barred from doing so on appeal. ***Cox***, 793 So. 2d at 598-599. Additionally, "[a] trial judge will not be found in error on a matter not presented to him for decision." ***Ballenger v. State***, 667 So. 2d 1242, 1256 (Miss. 1995); *see also* ***Jones v. State***, 606 So. 2d 1051, 1058 (Miss. 1992); ***Crenshaw v. State***, 520 So. 2d 131, 134 (Miss. 1988); ***Ponder v. State***, 335 So. 2d 885, 886 (Miss. 1976). The Court of Appeals recognized the bar in ***Long v. State***, 982 So. 2d 1042, 1045 (Miss. Ct. App. 2008), holding that a sixty-four-year-old defendant who had failed to object before the trial court that his sentence "amounted to" a life sentence was procedurally barred from raising the issue at the appellate level.

¶9. The trial judge was never afforded the opportunity to consider the merits *vel non* of that issue. Faithful application of our precedent mandates that Hampton's claim of error be denied, not having been preserved for appeal.

¶10. This Court does recognize that there are exceptions to a procedural bar for errors affecting certain constitutional rights. ***Rowland v. State***, 98 So. 3d 1032, 1036 (Miss. 2012) ("we recognized that the State has neither the authority nor the right to subject a person to double jeopardy. We also have recognized exceptions to procedural bars for claims asserting illegal sentence and denial of due process at sentencing"). But Hampton offers no argument or authority that his sentence was illegal based on a constitutional violation. Hampton is trying to convert a nonpreserved claim of improper sentence into a claim of illegal sentence. Hampton's vague complaint is that his sentence is unreasonable, inequitable, and unjust, not unconstitutional. He offers no basis for a constitutional exception to the procedural bar.

¶11. This Court consistently has held that "[s]entencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute." ***Cox***, 793 So. 2d at 599 (quoting ***Hoops v. State***, 681 So. 2d 521, 533 (Miss. 1996)). *See also* ***Ellis v. State***, 326 So. 2d 466, 468 (Miss. 1976); ***Ainsworth v. State***, 304 So. 2d 656 (Miss. 1974); and ***Boone v. State***, 291 So. 2d 182 (Miss. 1974). Furthermore, we have held that a "sentence within the limits of the statute is not cruel or unusual." ***Clanton v. State***, 279 So. 2d 599, 602 (Miss. 1973); ***Green v. State***, 270 So. 2d 695 (Miss. 1972).

¶12. "[A] sentence is not illegal unless it exceeds the maximum *statutory* penalty for the crime." ***Grayer***, 120 So. 3d at 969 (emphasis added). Hampton's sentence does not exceed the maximum *statutory* penalty. Section 97-3-79 of the Mississippi Code requires a court to sentence a defendant convicted of armed robbery to a term less than life but not less than

three years, if the jury does not return a life sentence. Miss. Code Ann. § 97-3-79 (Rev. 2014).

¶13. Hampton cites ***Stewart v. State (Stewart I)***, 372 So. 2d 257 (Miss. 1979), for the proposition that he received a life sentence. As is stated in Justice Coleman's special concurrence, no "statutory maximum" is provided in Section 97-3-79. In ***Stewart I***, the Court added the language that a sentence must be "reasonably expected to be less than life." This language is not found in the statute. Additionally, ***Stewart I*** must be read with ***Stewart v. State*** (***Stewart II***), 394 So. 2d 1337, 1339 (Miss. 1981), to appreciate the Court's holdings and clear distinctions from today's case. In ***Stewart I***, the Court found that a seventy-five-year sentence was excessive and remanded the case for resentencing. ***Stewart I***, 372 So. 2d at 259. In ***Stewart II***, the Court found that a seventy-five-year sentence "amounted to" a sentence twenty-five years longer than Stewart's cohorts' estimated life expectancy. ***Stewart II,*** 394 So. 2d at 1338-39. In ***Stewart II***, the trial court, unlike the trial court in today's case, was presented with **evidence** of Stewart's life expectancy through testimony and a mortality table based on the general population.[5] Stewart appealed once again, and this Court affirmed his sentence of thirty-five years, holding that trial courts "*may* take judicial notice of mortality tables." ***Id.*** at 1339.

¶14. We have addressed the use of life-expectancy tables numerous times and have consistently held these tables can be used as *aids* in determining sentences, if presented to

[5] The table used in ***Stewart II*** is attached as Appendix A.

the trial court. As early as 1937, this Court held that mortality tables can be used as *aids* to assist the trier of fact. *See* ***Tucker v. Gurley***, 179 Miss. 412, 176 So. 279, 279 (1937). We are not the trier of fact in today's case. Recently, we held that life-expectancy charts are of "limited utility" in defining whether a sentence amounts to a life sentence. ***Johnson v. State***, 29 So. 3d 738, 745 (Miss. 2009). In ***Johnson***, Justice Lamar wrote:

> [A]ttempts to define precisely at what point a term of years becomes a life sentence . . . [are] of limited utility. Estimated life expectancy is just that – an estimate. The reality is that some persons live beyond their life expectancies while others do not. To hold that a defendant's sentence must be a certain number of years or months less than his life expectancy would place unwarranted emphasis on a number that is itself only a rough approximation.

Johnson, 29 So. 3d at 744-45 (citing ***U.S. v. Martin***, 115 F.3d 454, 455 (7th Cir. 1997)). Not a single justice disagreed. *See also* ***Lindsay v. State***, 720 So. 2d 182, 186 (Miss. 1998), and ***Henderson v. State***, 402 So. 2d 325 (Miss. 1980).

¶15. Where Hampton's argument fails is that none of the cases he cites stands for the proposition that a defendant may stand mute, present no **evidence** to the trial court, and then claim error on appeal that the trial court did not consider what he did not offer as **evidence**. Hampton offers no excuse for the failure to present such **evidence** and argument to the trial court to support a claim of error.

¶16. In ***Rogers v. State***, 928 So. 2d 831 (Miss. 2006), this Court held:

> As a general rule, this Court cannot disturb a sentence on appeal if that sentence is within the boundaries allowed by the statute. ***Hoops v. State***, 681 So. 2d 521, 537 (Miss. 1996). Here, the sentence imposed by the trial court was acceptable as it did not exceed the statutory limits provided in Miss. Code Ann. § 97-3-65(2). *See* ***Wilkerson v. State***, 731 So. 2d 1173, 1183 (Miss. 1999); *see also* ***Freshwater v. State***, 794 So. 2d 274, 277 (Miss. Ct. App.

> 2001); ***Shabazz v. State***, 729 So. 2d 813, 822 (Miss. Ct. App. 1998). Therefore, Rogers'[s] argument that he was sentenced to more time than was applicable at the time of his offense is without merit.

Rogers, 928 So. 2d at 835. Hampton, a recidivist, was convicted of yet another armed robbery, as a habitual offender, and was sentenced to a term of twenty years by the trial court.[6] This sentence conforms to the statute, i.e., the trial court did not sentence him to life and the term was more than three years. The trial court did not deviate from the statute when imposing the sentence upon this habitual offender convicted of armed robbery. We find no abuse of discretion by the trial court.

¶17. This case is akin to ***Lindsay v. State***, 720 So. 2d 182 (Miss. 1998), in which this Court upheld a sentence that likely "amounted to" a life sentence. ***Lindsay***, 720 So. 2d at 182-83. In ***Lindsay***, the defendant was convicted of armed robbery and sentenced to fifteen years, ten of which were mandatory. ***Id.*** at 183. Lindsay appealed on the grounds that the sentence "amounted to" a life sentence because of his HIV status. ***Id.*** at 185. Like Hampton, Lindsay did not present any evidence of life expectancy. ***Id.*** at 186. This Court upheld the sentence, emphasizing that the defendant's repeated criminal history and failure to present any evidence as it related to life expectancy outweighed the potential that the sentence "amounted to" a life sentence. ***Id.*** This Court also noted that the defendant could not argue life expectancy when he failed to submit any proof from medical journals or any other sources. ***Id.***

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[6] Hampton would serve only 19.5 years from the date of sentencing, with credit for time served.

¶18. This Court repeatedly has upheld sentences that likely "amount to" life sentences. In ***Tate v. State***, 912 So. 2d 919, 932-934 (Miss. 2005), this Court upheld a sixty-year sentence that "for all practical purposes [amounted to a] life sentence" since the defendant would not be eligible for parole until the age of ninety-nine. The Court held "[t]he Legislature has made its decisions, and we may not impose our own opinion on the issue, *absent a constitutional violation* which we do not find." ***Id.*** at 934 (emphasis added). In ***Cannon v. State***, 919 So. 2d 913, 915 (Miss. 2005), this Court upheld a 120-year sentence that "amounted to" a life sentence, even though the trial court made no "on-the-record finding and consideration of his age, health, or life expectancy." Other sentences that "amount to" a life sentence also have been upheld. ***Mosely v. State***, 104 So. 3d 839, 843 (Miss. 2012) (upholding a 126-year sentence); ***Williams v. State***, 794 So. 2d 181 (Miss. 2001), *overruled on other grounds by* ***Brown v. State***, 994 So. 2d 698, 703 (Miss. 2008).

¶19. "This Court employs the plain-error rule only 'when a defendant's substantive or fundamental rights are affected.'" ***Grayer v. State***, 120 So. 3d 964, 969 (Miss. 2013) (citation omitted). To find plain error, this Court first must determine "'if the trial court has deviated from a legal rule, whether that error is plain, clear[,] or obvious, and whether that error has prejudiced the outcome of the trial.'" ***Id.*** (citation omitted). Under the plain-error doctrine, "there has to be a finding of error, and that error must have resulted in a manifest miscarriage of justice for reversal to occur." ***Williams v. State***, 134 So. 3d 732, 736 (Miss. 2014) (citing ***Gray v. State***, 549 So. 2d 1316, 1321 (Miss. 1989)). Hampton has failed to show any error,

much less plain error, or that a miscarriage of justice has been visited upon this six-time convicted felon.

¶20. The trial court articulated and followed the correct standard. The trial judge received evidence related to Hampton's age, general health, alcohol abuse, prior convictions, and incarcerations. Drawing on the wealth of his experience as a trial judge, Judge Bailey utilized his discretion and imposed a twenty-year sentence, effectively sentencing Hampton to 19.5 years by giving credit for time served. After receiving all **evidence** offered at the sentencing hearing, the trial court found that twenty years was a proper and legal sentence. The trial court's holding does not reveal a "manifest miscarriage of justice." We affirm.

¶21. The trial court properly considered all facts presented when sentencing Hampton. The learned trial judge weighed evidence before him and meted out a fair and reasonable term (not life) sentence. He considered Hampton's prior convictions, degree of guilt, need for deterrence, public safety, and the unlikelihood of rehabilitation for Hampton. A trial judge has the discretion to consider all relevant and pertinent factors when fixing a sentence. It is incumbent on the defendant to introduce evidence of mitigating factors or circumstances to seek reduction of the term within the statutory scheme.

CONCLUSION

¶22. "Our law has long provided that the imposition of sentence following a criminal conviction is a matter within the discretion of the Circuit Court, *subject only to statutory and constitutional limitations*." ***Jackson v. State***, 551 So. 2d 132, 149 (Miss. 1989) (emphasis added). The sentence received by Hampton, a multiple recidivist of violent crimes sentenced

as a habitual offender, is not constitutionally infirm, nor does it exceed the trial court's sentencing authority. Given that the sentence is permissible under the Mississippi Code and our state and federal Constitutions, there exists no basis to accept Hampton's argument that his sentence is illegal. As the sentence imposed by the learned trial judge and affirmed by the Court of Appeals was and is a legal sentence, we affirm Hampton's sentence for armed robbery.

¶23. **CONVICTION OF ROBBERY BY USE OF A DEADLY WEAPON AND SENTENCE OF TWENTY (20) YEARS, AS A HABITUAL OFFENDER, IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. SENTENCE SHALL NOT BE REDUCED OR SUSPENDED; NOR SHALL APPELLANT BE ELIGIBLE FOR PROBATION, PAROLE, EARNED TIME OR GOOD-TIME CREDIT. APPELLANT SHALL RECEIVE CREDIT FOR 172 DAYS FOR TIME PREVIOUSLY SERVED IN THIS CAUSE. APPELLANT SHALL PAY COURT COSTS IN THE AMOUNT OF $411.50, RESTITUTION IN THE AMOUNT OF $2,000, AB FEE IN THE AMOUNT OF $1,500, AND VBF IN THE AMOUNT OF $10.00.**

WALLER, C.J., LAMAR AND PIERCE, JJ., CONCUR. COLEMAN, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED IN PART BY DICKINSON AND RANDOLPH, P.JJ., AND PIERCE, J. DICKINSON, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION. CHANDLER, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS AND KING, JJ.; DICKINSON, P.J., JOINS IN PART.

COMMISSIONERS

1958

STANDARD ORDINARY MORTALITY TABLE

Complete Expectation of Life

Age	Years	Age	Years	Age	Years	Age	Years
0	68.30	25	45.82	50	23.63	75	7.81
1	67.76	26	44.90	51	22.82	76	7.39
2	66.90	27	43.99	52	22.03	77	6.98
3	66.00	28	43.08	53	21.25	78	6.59
4	65.10	29	42.16	54	20.47	79	6.21
5	64.19	30	41.25	55	19.71	80	5.85
6	63.27	31	40.34	56	18.97	81	5.51
7	62.35	32	39.43	57	18.23	82	5.19
8	61.43	33	38.51	58	17.51	83	4.89
9	60.51	34	37.60	59	16.81	84	4.60
10	59.58	35	36.69	60	16.12	85	4.32
11	58.65	36	35.78	61	15.44	86	4.06
12	57.72	37	34.88	62	14.78	87	3.80
13	56.80	38	33.97	63	14.14	88	3.55
14	55.87	39	33.07	64	13.51	89	3.31
15	54.95	40	32.18	65	12.90	90	3.08
16	54.03	41	31.39	66	12.31	91	2.82
17	53.11	42	30.41	67	11.73	92	2.58
18	52.19	43	29.54	68	11.17	93	2.33
19	51.28	44	28.67	69	10.64	94	2.07
20	50.37	45	27.81	70	10.12	95	1.80
21	49.46	46	26.95	71	9.63	96	1.51
22	48.55	47	26.11	72	9.15	97	1.18
23	47.64	48	25.27	73	8.69	98	.83
24	46.73	49	24.45	74	8.24	99	.50

COLEMAN, JUSTICE, SPECIALLY CONCURRING:

¶24. In a legal world where ***Stewart v. State***, 372 So. 2d 257 (Miss. 1979), is good law, I am of the opinion that the majority is correct, and I concur with the opinion authored by Presiding Justice Randolph. I write separately because, in my opinion, the Mississippi Supreme Court exceeded the boundaries of its constitutional authority when, in ***Stewart v. State***, 372 So. 2d 257 (Miss. 1979), it amended Mississippi Code Section 97-3-79 to prohibit a judge from sentencing one convicted of armed robbery to any term of years greater than the defendant's life expectancy; I am of the opinion that ***Stewart*** must be overruled.

¶25. We many times have noted, but perhaps fewer times followed, the principle that our role in the constitutional framework of our state government "should not place [the Court] in the position of changing the substantive law enacted by the Legislature." ***Little v. Miss. Dep't of Transp.***, 129 So. 3d 132, 138 (¶ 12) (Miss. 2013) (citing ***Stockstill v. State***, 854 So. 2d 1017, 1022-23 (¶ 13) (Miss. 2003) ("It is not the duty of this Court to add language where we see fit.")). Stated differently, we have a "constitutional mandate to faithfully apply the provisions of constitutionally enacted legislation." ***Tallahatchie Gen. Hosp. v. Howe***, 49 So. 3d 86, 92 (¶ 17) (Miss. 2010). The Legislature "alone has the power to create *and modify* statutes. It is not the province of the Court to insert requirements where the Legislature did not do so." ***Finn v. State***, 978 So. 2d 1270, 1272-1273 (¶ 9) (Miss. 2008) (emphasis added); *see also* ***Zambroni v. State***, 217 Miss. 418, 424, 64 So. 2d 335, 337 (1953) ("It is not our province to write the statutes, but only to construe them as written."); ***Harris v. State***, 175

So. 342, 344 (1937) ("In construing this statute, we are admonished and have clearly in mind that penal statutes must be strictly construed, and that the court can neither add to nor take from them, and we cannot by judicial construction, or considerations of expediency, supply what is palpably omitted from a statute."). Despite such limits on our power, the ***Stewart*** Court did indeed insert a requirement into Section 97-3-79 that the Legislature did not – the requirement that a judge-imposed sentence be for less than the defendant's reasonable life expectancy.

¶26. Section 97-3-79 provides as follows:

> Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years.

Miss. Code Ann. § 97-3-79 (Rev. 2014). The statute as enacted by the Legislature provides two, and only two, sentencing possibilities. First, a jury may choose to sentence the offender to a life sentence. If not, the judge may impose a "penalty of imprisonment . . . *for any term* not less than three (3) years." *Id.* (emphasis added). The requirement that the latter option, a judicially-imposed sentence, be for less than the life expectancy of the defendant is not in the statute. It was created by the Court.

¶27. The ***Stewart*** Court explained its creation of the requirement by comparing Section 97-3-79 to the death penalty statute which places the death sentence "within the sole province

of the jury." ***Stewart***, 372 So. 2d at 258 (quoting ***Bullock v. Harpole***, 233 Miss. 486, 494, 102 So. 2d 687, 690 (1958)). However, the statute at issue in ***Bullock***, the then-existing Section 2536, Code of 1942, provided by its very terms that only the jury could impart the death penalty. In fact, the way it was worded, Section 2536, Code of 1942, left all sentencing options in the sole province of the jury.[7] ***Bullock***, 233 Miss. at 494, 102 So. 2d at 690. Nothing at all in the wording of Section 97-3-79 prohibits the trial judge from setting a penalty of years greater than the life expectancy of the one convicted. To achieve such a result, the ***Stewart*** Court had to add to the language chosen by the Legislature.

¶28. Even if the ***Stewart*** Court was correct, that, in its wisdom, Section 97-3-79 made better sense and better policy with the added requirement, under our State's Constitution and the strict separation of powers it explicitly imposes in Article 1, Section 2, we lack the power to substitute our judgment for that of the Legislature and to judicially amend its statutes. The prohibition exists for good reason. As we elsewhere noted,

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[7] The statute provided as follows:

> In any case in which the penalty prescribed by law upon the conviction of the accused is death, except in cases otherwise provided, the jury finding a verdict of guilty may fix the punishment at imprisonment for the natural life of the party; and thereupon the court shall sentence him accordingly; but if the jury shall not thus prescribe the punishment, the court shall sentence the party found guilty to suffer death, unless the jury by its verdict certify that it was unable to agree upon the punishment, in which case the court shall sentence the accused to imprisonment in the penitentiary for life.

Bullock, 102 So. 2d at 690 (quoting Section 2536, Code of 1942).

The objectives desired to be accomplished and the evils sought to be prevented by separation of governmental powers were articulated by the authors of The Federalist. In that work James Madison stated:

> . . . It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.

The Federalist, No. 48 (J. Madison) (J. Cooke ed. 1961).

Thomas Jefferson also wrote of the necessity of internal restraints on the powers of government:

> . . . An elective despotism was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. Jefferson, "Notes on the State of Virginia," 1781-1785, ch. 13, as reprinted in "the Complete Jefferson" by Padover, Ch. XIV, pp. 648, 649.

Book v. State Office Building Commission, 238 Ind. 120, 149 N.E.2d 273, 294 (1958).

In his farewell address George Washington observed,

> The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of the love of power, and proneness to abuse it, which predominates in the

> human heart, is sufficient to satisfy us of the truth of this position.
>
> ***Book v. State Office Building Commission***, 149 N.E.2d at 294.

Alexander v. State By and Through Allain, 441 So. 2d 1329, 1336 (Miss. 1983).

¶29. Our trial courts are perfectly capable of enforcing Section 97-3-79 as written and without the extra requirement added by the ***Stewart*** Court. *See* ***Franklin Collection Serv., Inc. v. Kyle***, 955 So. 2d 284, 288-289 (¶ 13) (Miss. 2007) ("[T]his Court has no right, prerogative, or duty to bend a statute to make it say what it does not say. No citation of authority is necessary for the proposition that courts, judges, and justices sit to apply the law as it is, not make the law as they think it should be."). As we wrote in ***McAdory v. State***, 354 So. 2d 263 (Miss. 1978), *overruled by* ***Stewart***, 372 So. 2d at 257, the statute as written simply means that, if a jury chooses a life sentence, the trial judge has no discretion and must impart a life sentence. ***Id.*** at 266. If the jury did not so choose, the trial judge has discretion to impart any sentence greater than three years. ***Id.*** A sentence of one hundred years imposed after a jury declines to mandate a life sentence violates no part of the statute as crafted by the Legislature. It violates *only* the ***Stewart*** Court's language.

¶30. The ***Stewart*** requirement is nothing but the unconstitutional imposition of judicial power over a political question. *See* ***Monaghan v. Reliance Mfg. Co.***, 236 Miss. 462, 470 111 So. 2d 225 (1959) ("The function of the court is to construe the legislative act and not to add to it or deduct from it that which the legislature itself did not enact into the statute."). We must guard against such overreaching, even if doing so means revisiting an old decision

which has shaped how criminals have been sentenced for decades. When it comes to any movement, no matter how slight, toward consolidation of power in one, rather than three, branches of government, we must exercise the utmost caution. "Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis." ***Morrison v. Olson***, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

¶31. Justice Chandler, in his dissent, would apply the doctrine of *stare decisis* to ***Stewart***. Cries of *stare decisis* are the inevitable effect caused by a call to overturn a decades-old case such as ***Stewart***, and the Court should take care to adhere to the doctrine where appropriate. However, I discern no reason to dogmatically cling to it here. As Justice Chandler points out, we apply *stare decisis* when the Legislature ratifies by re-enacting or amending the statute without directly addressing or contradicting a holding of ours from an earlier case. *See* ***Caves v. Yarbrough***, 991 So. 2d 142, 153 (¶ 41) (Miss. 2008). However, the Legislature has not amended or changed Section 97-3-79 since before ***Stewart***, and we have flatly rejected that "the Legislature's mere silence is enough. . . ." absent an amendment, to invoke *stare decisis*. ***Caves***, 991 So. 2d at 153.

¶32. More generally, we have written as follows:

> In *stare decisis* generally, we look for error, but, finding that, we look for more and we look largely in the area of public or widespread disadvantage. Ordinarily, we do not overrule erroneous precedent unless it is "pernicious," ***Stone v. Reichman-Crosby Co.***, 43 So. 2d 184, 190 (Miss. 1949); "impractical," ***Robinson v. State***, 434 So. 2d 206, 210 (Miss. 1983) (Hawkins,

> J., concurring); or is "mischievous in its effect, and resulting in detriment to the public." ***Childress v. State***, 188 Miss. 573, 577, 195 So. 583, 584 (1940). We look for "evils attendant upon a continuation of the old rule." ***Tideway Oil Programs, Inc. v. Serio***, 431 So. 2d 454, 467 (Miss. 1983).

Caves, 991 So. 2d at 151-52 (¶ 36) (quoting ***State ex rel. Moore v. Molpus***, 578 So. 2d 624, 635 (Miss. 1991)). Above, I attempted to go into some detail of the importance of the separation of powers and explain that even a small encroachment of the Court into the legislative sphere should be prevented. For the reasons discussed, I have no difficulty in labeling the ***Stewart*** Court's amendment of Section 97-3-79 pernicious and mischievous in its effect. *See* ***Gwin, White & Prince, Inc. v. Henneford***, 305 U.S. 434, 454-55(1939) (Black, J., dissenting) ("[T]he rule of *stare decisis* cannot confer powers upon the courts which the inexorable command of the Constitution says they shall not have."); ***Robinson v. City of Detroit***, 462 Mich. 439, 473, 613 N.W.2d 307, 324 (2000) (Corrigan, J., concurring) ("If a prior decision of this Court reflects an abuse of judicial power at the expense of legislative authority, a failure to recognize and correct that excess, even if done in the name of stare decisis, would perpetuate an unacceptable abuse of judicial power.").

¶33. On a final *stare decisis* note, I acknowledge that Mississippi Code Section 97-3-65(4)(a), which sets the penalty for forcible rape, provides as follows:

> Every person who shall have forcible sexual intercourse with any person, or who shall have sexual intercourse not constituting forcible sexual intercourse or statutory rape with any person without that person's consent by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment, the court shall fix the penalty at

> imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.

Miss. Code Ann. § 97-3-65(4)(a) (Rev. 2014). Without question, the above-quoted sentencing directive mirrors that of the armed robbery sentencing statute at issue, and in ***Lee v. State***, 322 So. 2d 751, 753 (1975), we added the same amendment to Section 97-3-65(4)(a) that the ***Stewart*** Court would later add to Section 97-3-79. Unlike Section 97-3-79, the Legislature amended the forcible rape statute, Section 97-3-65(4)(a), since ***Lee*** was decided and has never spoken to the ***Lee*** holding. Accordingly, the doctrine of *stare decisis* via subsequent legislative amendment arguably would apply to ***Lee*** and Section 97-3-65(4)(a). On the other hand, while Section 97-3-79 is worded similarly to the forcible rape statute, I see no reason to apply the Legislature's amendment of a different statute to the question of whether *stare decisis* applies to ***Stewart.***

¶34. Even if the Legislature had amended Section 97-3-79, I would not agree that *stare decisis* saves the ***Stewart*** Court's amendment of it. I simply cannot agree that our assumption that the Legislature reads our opinions and ratifies our holdings by their silence is enough to ratify an unconstitutional encroachment upon its authority. While, as I concede above, we have held that the Legislature ratifies via its silence our interpretation of a statute by re-enacting or amending the statute without directly addressing or contradicting a holding of ours from an earlier case, *see* ***Caves***, 991 So. 2d at 153 (¶ 41), the combination of legislative action with legislative silence can itself be a pernicious thing for a court trying to discern the meaning of statutory pronouncements.

> The last string to respondents' and the Government's bow is their argument that two amendments to Title VI "ratified" this Court's decisions finding an implied private right of action to enforce the disparate-impact regulations. . . . Respondents point to ***Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran***, 456 U.S., at 381-382, 102 S. Ct. 1825, which inferred congressional intent to ratify lower court decisions regarding a particular statutory provision when Congress comprehensively revised the statutory scheme but did not amend that provision. But we recently criticized Curran's reliance on congressional inaction, saying that "[a]s a general matter . . . [the] argumen[t] deserve[s] little weight in the interpretive process." ***Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.***, 511 U.S., at 187, 114 S. Ct. 1439. And when, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, we have spoken more bluntly: "It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." ***Patterson v. McLean Credit Union***, 491 U.S. 164, 175, n.1, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989) (quoting ***Johnson v. Transportation Agency, Santa Clara Cty.***, 480 U.S. 616, 671-672, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987) (Scalia, J., dissenting)).

Alexander v. Sandoval, 532 U.S. 275, 291-92 (2001). I find persuasive the warning, "It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." J. Madison, *The Federalist*, No. 48 (J. Cooke ed. 1961). Accordingly I consider the United State Supreme Court's concerns to be compelling, especially in the context of ratifying an unconstitutional encroachment by the Court into the power of the Legislative branch.

¶35. Justice Chandler correctly raises concerns about the retroactive application of any holding overruling ***Stewart*** to Hampton. *See* ***Rogers v. Tennessee***, 523 U.S. 451, 457 (2001). Were the majority to overrule ***Stewart***, we would have to analyze whether or not the overruling of it would be retroactive and effective as to Hampton's sentence. For example, the Supreme Court of the United States has written,

> Deprivation of the right to fair warning, we continued, can result both from vague statutory language and from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face. For that reason, we concluded that if a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, the construction must not be given retroactive effect.

Rogers, 532 U.S. at 457 (internal quotations and citations omitted). However, in light of the fact that a majority of the Court disagrees and wishes to uphold ***Stewart***, I will forego the analysis as moot.

¶36. For the foregoing reasons, I would overrule ***Stewart.***

DICKINSON AND RANDOLPH, P.JJ., AND PIERCE, J., JOIN THIS OPINION IN PART.

DICKINSON, PRESIDING JUSTICE, DISSENTING:

¶37. I fully agree with Justice Coleman's well-reasoned opinion that this Court exceeded the limits of its constitutional authority when it decided ***Stewart v. State***;[8] that we should now overrule that opinion; and that retroactive application of that change creates due-process concerns. But, applying ***Stewart's*** holding to this case, it is clear that Hampton received an illegal sentence. So I agree with Justice Chandler that Hampton's claim is excepted from procedural bars, and that Hampton's sentence exceeded a reasonable calculation of his life expectancy.

CHANDLER, JUSTICE, DISSENTING:

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[8] ***Stewart v. State***, 372 So. 2d 257 (Miss. 1979).

¶38. I respectfully dissent. This Court has held that the statutory maximum to which a trial court can sentence one convicted of armed robbery is a term reasonably expected to be less than life. ***Stewart v. State***, 372 So. 2d 257, 259 (Miss. 1979). Hampton has produced on appeal an actuarial table indicating that the trial court imposed an armed-robbery sentence of twenty years that exceeded his life expectancy, as a black male, of sixty-three years. Thus, this case reduces to the question, "should race and gender be considered along with age in calculating the life expectancy of a defendant being sentenced to a term of years 'reasonably calculated to be less than life?'" Both Hampton and the State answer that question with an unequivocal "yes."

¶39. This Court recognized the necessity of this substantive question when it issued an order for supplemental briefing, signed by Presiding Justice Randolph, asking the parties "[w]hat factors, other than age, may a trial court consider at sentencing?" As the State responded, "[i]ndividualized sentencing has always been a goal of both the State and Federal judiciary. . . . we find ourselves in agreement with the appellant who states that '. . . a trial court should consider age, race, and gender when sentencing a defendant convicted of armed robbery.'" Yet the majority finds this issue procedurally barred.

¶40. This Court cannot refuse to hear a challenge to an illegal sentence merely because the defendant failed to raise that argument or present evidence supporting that argument at the trial court. As Presiding Justice Randolph's unanimous majority opinion in ***Rowland*** states, "errors affecting fundamental rights are *exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal*." ***Rowland v. State***, 98 So. 3d 1032,

1036 (Miss. 2012) (emphasis added). Hampton does not, in this circumstance, have an obligation to present an "excuse for the failure to present such evidence and argument to the trial court." Maj. Op. at ¶15. As this Court recognized in ***Rowland***, one practical function of exempting illegal sentences from procedural bars is to relieve defendants of exactly such an obligation. ***Id***. Further, at the sentencing hearing, the burden is on the State to present evidence that will result in a legal sentence, rather than on the defendant to present or anticipate evidence to ensure that he will not receive an illegal sentence. *See* ***Chase v. State***, 645 So. 2d 829, 860-861 (Miss. 1994). If, *on appeal*, Hampton shows that his sentence is illegal because it exceeds what this Court has for four decades construed to be the maximum "*statutory* penalty," then Hampton's failure to object at the trial court is no procedural bar to our consideration of this violation of his fundamental right to be free from an illegal sentence. This is especially true because this Court can take judicial notice of life-expectancy tables. ***Henderson v. State***, 402 So. 2d 325, 328 (Miss. 1981); ***Walton v. Scott***, 365 So. 2d 630 (Miss. 1978). *See also* Mississippi Rule of Evidence 20(f).

¶41. The sentencing statute provides that a convicted armed robber:

> shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years.

Miss. Code Ann. § 97-3-79 (Rev. 2014). For four decades, this Court has correctly held that, under Section 97-3-79, when a jury of twelve peers fails to unanimously impose the maximum sentence of life, the judge lacks the authority to supersede the jury's judgment by

imposing a sentence equal to or exceeding life. ***Stewart v. State***, 372 So. 2d 257, 259 (Miss. 1979). The trial court must therefore "make a record of and consider all relevant facts necessary to fix a sentence for a definite term [of years] *reasonably expected to be less than life*. The court should consider the age and *life expectancy of the defendant* and any other pertinent facts which would aid in fixing a proper sentence." ***Id***. at 259 (emphasis added).

¶42. The majority takes an ambiguous position on whether Mississippi's armed-robbery sentencing scheme has a statutory maximum. It states agreement with Justice Coleman's special concurrence that "no 'statutory maximum' is provided," thus calling into question the validity of ***Stewart*** as *controlling* precedent. But under ***Stewart***, which is the controlling precedent, examining the legality of a sentence for armed robbery requires an examination of whether the sentence exceeds a reasonable estimation of the defendant's life expectancy. Because Hampton's sentence exceeds the life expectancy of a person of his race and gender, Hampton's sentence can be affirmed only by concluding that the neutral actuarial factors of age, race, and gender are not required when considering evidence of a defendant's life expectancy.[9]

¶43. The majority repeatedly states that Hampton's sentence does not exceed the maximum "*statutory*" penalty. But under ***Stewart***, the maximum "*statutory*" penalty is a term of years reasonably calculated to be less than life and, in making that calculation, the trial court must

[9]The majority does not address the fact that both parties, although adversarial to each other, returned supplemental briefing agreeing that age, race, and gender should be the minimum actuarial starting point for sentencing a defendant under the armed-robbery statute.

consider evidence of the defendant's age, life expectancy, and any other relevant factors. ***Stewart***, 372 So. 2d at 259. Because Hampton's sentence is within the life expectancy of an American of his age but exceeds that of an American of his age, race, and gender, this issue is squarely before the Court. We can today decide whether the trial court can impose a sentence for armed robbery that exceeds the life expectancy of a person of the defendant's age, race, and gender. And while recidivism can be a relevant factor to consider, Hampton's unsavory character as a recidivist, alcoholic, and general ne'er-do-well in no way relieves our justice system from its responsibility of imposing a legal sentence on him. The majority's discussion of those factors is therefore irrelevant to the ultimate legal question at hand.

¶44. The majority's citation to cases where this Court upheld sentences that likely "amount to" life sentences does not support the proposition that Hampton's sentence was legal. Maj. Op. at ¶8. It is true that this Court regularly affirms term-of-years sentences that significantly exceed a defendant's life expectancy, but only *when the relevant sentencing statute permits such a sentence*. The statutory maximum to which a trial court may sentence a convicted armed robber under Section 97-3-79 is a term reasonably expected to be less than life. Miss. Code Ann. § 97-3-79 (Rev. 2014); ***Stewart***, 372 So. 2d at 259. Our holdings under other statutes with greater maximum penalties have no bearing on the issue at hand.

¶45. As the State points out, both Mississippi and federal courts consistently have used race and gender to calculate life expectancy in sentencing. In ***Arrington v. State***, we found that the sentence was not greater than the defendant's reasonable life expectancy where "[t]he 1980 Statistical Abstract of the United States, published by the United States government,

shows the life expectancy of the average *black male* in 1978, 17 years of age, to be 50.2 years." ***Arrington v. State***, 411 So. 2d 779, 780 (Miss. 1982) (emphasis added). In ***Trammell v. State***, the Court of Appeals found that the record supported that the defendant's sentence was reasonably less than life when "the [actuarial] tables showed the life expectancy for a person of Trammell's *age, sex, and race* to be thirty-nine years." ***Trammell v. State***, 62 So. 3d 424, 431 (Miss. Ct. App. 2011) (emphasis added). *See also* ***Payton v. State***, 897 So. 2d 921, 950 (Miss. 2003); ***Henderson v. State***, 402 So. 2d 325, 328-29 (Miss. 1981).

¶46. Federal caselaw expressly approves the use of race and gender and the use of life-expectancy tables to arrive at a sentence less than life. Judge Posner of the Seventh Circuit stated:

> the best way . . . is to direct the sentencing judge when choosing a period of years for a defendant not eligible for a life sentence to select a period that *in light of the defendant's fundamental demographic characteristics*, of age and sex . . . is significantly, though not necessarily greatly, less severe than a sentence of life imprisonment . . . . *The differences in adult life expectancy between blacks and whites in this country are so dramatic that to ignore them in computing a defendant's life expectancy might make it difficult to pick a sentence consistent with [the statute]*.

U.S. v. Prevatte, 66 F. 3d 840, 847-48 (7th Cir. 1995) (J. Posner, concurring) (emphasis added). ***U.S. v. Martin***, 115 F. 3d 454, 455 (7th Cir. 1997).

¶47. Our inability to know the lifespan of any particular individual is exactly what creates the need for an objective starting point that takes into account the most basic and consistent of human demographic characteristics. Consider Presiding Justice Randolph's majority discussion in ***Rebelwood Apartments RP, LP v. English***, 48 So. 3d 483 (Miss. 2010), in

which the court found that, in a wrongful-death case, the trial court had erred in allowing the plaintiff's economist to use the national-average incomes to calculate loss of future earnings as opposed to relying on the decedent's actual earnings. After approving departure from the nationally averaged tables for work-life expectancy in order to reach a more accurate calculation for the decedent, Presiding Justice Randolph wrote for the Court:

> Work-life expectancy cannot be assumed, but must be based on an objective standard . . . "courts are not prophets and juries are not seers. In making awards to compensate injured plaintiffs or the dependents of deceased workers for loss of future earnings, however, *these fact-finders must attempt, in some degree, to gauge future events. Absolute certainty is by the very nature of the effort impossible. It is also impossible to take into account every bit of potentially relevant evidence concerning the tomorrows of a lifetime.* The approach we adopt attempts to assure plaintiffs a fair measure of damages, to give defendants a reasonable adjustment for reducing future losses to present value, and to avoid making trials even more complex and their results even more uncertain. It is the product of a balancing of competing values. Ultimately, however, that is the root of all justice."

Id. at 497 (quoting ***Culver v. Slater Boat Co.***, 722 F. 2d 114 (5th Cir. 1983) (emphasis added)). Sentencing judges, "these fact-finders," can reasonably–and here should–part from broad averages when "attempting to gauge future events" in order to arrive at a "fairly measured" and "balanced" results for the *actual individual*, even though "absolute certainty is by the very nature of the effort impossible." *See* ***id***.

¶48. The potential disparities when fundamental demographic characteristics are disregarded are striking. For example, there is an approximately nine-year disparity between the life expectancy of a thirty-five-year-old white female (46.9 years) and a thirty-five-year-

old black male (38.2 years).[10] Life-expectancy tables are one example of appropriate evidence to consider when examining life expectancy under ***Stewart***. Judges can take judicial notice of actuarial tables, which are instantly available from a plethora of reliable sources such as the Centers for Disease Control.[11] They can be easily accessed, as Hampton's supplemental brief states, "with a few keystrokes."

¶49. The true effect of the majority's holding is to grant the trial court the liberty of completely ignoring ***Stewart***, the controlling precedent, when sentencing a defendant convicted of armed robbery. When a defendant shows he has received an illegal sentence, this Court must reverse. Because Hampton has shown that his sentence is illegal because it exceeds the life expectancy of a person of his age, race, and gender, I would vacate his sentence and remand for resentencing.

¶50. I respectfully disagree with Justice Coleman's concurrence positing that this Court's long-standing interpretation of Mississippi's armed-robbery statute is unconstitutional. *See* ***Stewart v. State***, 372 So. 2d 257 (Miss. 1979). To hold that ***Stewart*** violates the Constitution would be to ignore the principles of *stare decisis* and legislative ratification. Such a holding also ignores significant federal caselaw interpreting similar federal statutes, as we did in ***Stewart***. Even if overturning ***Stewart*** were the correct result, this Court is prohibited from

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[10] *See* http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_09.pdf (last visited October 15, 2014).

[11] A judge's failure to consult tables is not grounds to reverse a sentence where there is no evidence that the resulting sentence is actually illegal. ***Cox v. State***, 793 So. 2d 591, 599 (Miss. 2001).

imposing a harsher sentence on this defendant than that permitted under our current caselaw. Such a decision would violate the prohibition on *ex post facto* laws. ***Marks v. United States***, 430 U.S. 188, 192, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (quoting ***Bouie v. City of Columbia***, 378 U.S. 347, 353, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964)) (due to the principle of fair warning inherent in the Ex Post Facto Clause, "[a]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law," and is prohibited by the Due Process Clause of the Fourteenth Amendment); ***Conley v. State***, 790 So. 2d 773, 803 (Miss. 2001).

¶51. Under our Constitution, this Court is to interpret our state's statutes, as we did in ***Stewart***. *See* ***Mauldin v. Branch***, 866 So. 2d 429 (Miss. 2003); ***Pope v. Brock***, 912 So. 2d 935 (Miss. 2005). By amending the relevant statute without correcting this Court's prior interpretations, the Mississippi Legislature has ratified this Court's nearly four-decades-long interpretation that Section 97-3-79 grants only the jury, not the trial judge, the right to impose a life sentence for the crime of armed robbery. Even if this Court were now to decide that ***Stewart*** was incorrectly decided, we must "continue to apply the previous interpretation" because "such action on the part of the Legislature amounts to incorporation of our previous interpretation into the . . . amended statute." ***Porter v. Porter***, 23 So. 3d 438, 448 (Miss. 2009) (Randolph, J., for the Court) (quoting ***Caves v. Yarbrough***, 991 So. 2d 142, 153 (Miss. 2008) (Dickinson, J., for the Court)).

¶52. The armed-robbery statute states in its entirety:

> Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery and, upon conviction, *shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years.*

Miss. Code Ann. § 97-3-79 (Rev. 2014) (emphasis added). The sentencing statute for forcible rape uses substantially identical language, and our caselaw consistently has applied both statutes in an identical manner. Miss. Code Ann. § 97-3-65 (Rev. 2014); ***Lee v. State***, 322 So. 2d 751, 753 (1975); ***Stewart v. State***, 372 So. 2d 257 (1979). In ***Lee***, interpreting the forcible-rape statute, we stated: "[t]he statute before us places the imposition of a life sentence within the sole province of the jury and, in our opinion, no such sentence can be imposed by a judge unless he has the authority from the jury so to do." ***Lee***, 322 So. 2d at 753. In ***Stewart***, we affirmed this interpretation as applied to the armed-robbery statute and held that the trial judge's sentencing authority is limited to a "definite term reasonably expected to be less than life." ***Stewart v. State***, 372 So. 2d 257, 259 (1979).

¶53. The standard established in ***Stewart*** and ***Lee*** has been consistently applied for almost four decades to both the armed-robbery and forcible-rape statutes. *See* ***Johnson v. State***, 29 So. 3d 738, 744 (Miss. 2009); ***Cannon v. State***, 919 So. 2d 913, 916 (Miss. 2005); ***Foley v. State***, 914 So. 2d 677, 692 (Miss. 2005); ***Cox v. State***, 793 So. 2d 591, 599 (Miss. 2001); ***Lawson v. State***, 748 So. 2d 96, 99 (Miss. 1999); ***Lindsay v. State***, 720 So. 2d 182, 185 (Miss. 1998); ***Kennedy v. State***, 626 So. 2d 103, 105 (Miss. 1993); ***Luckett v. State***, 582 So.

2d 428, 430 (Miss. 1991) (*overruled on other grounds*); ***Mitchell v. State***, 561 So. 2d 1037, 1038 (Miss. 1990); ***Erwin v. State***, 557 So. 2d 799, 801 (Miss. 1990); ***Evans v. State***, 547 So. 2d 38, 40 (Miss. 1989); ***Watkins v. State***, 500 So. 2d 462, 463 (Miss. 1987); ***Davis v. State***, 477 So. 2d 223, 224 (Miss. 1985); ***Cunningham v. State***, 467 So. 2d 902, 906 (Miss. 1985); ***Harper v. State***, 463 So. 2d 1036, 1041 (Miss. 1985); ***Friday v. State***, 462 So. 2d 336, 339 (Miss. 1985); ***Warren v. State***, 456 So. 2d 735, 738-39 (Miss. 1984); ***Ware v. State***, 410 So. 2d 1330, 1332 (Miss. 1982); ***Hickombottom v. State***, 409 So. 2d 1337, 1340 (Miss. 1982); ***Henderson v. State***, 402 So. 2d 325, 328 (Miss. 1981); ***Wilson v. State***, 390 So. 2d 575, 580 (Miss. 1980); ***Parker v. State***, 367 So. 2d 456, 458 (Miss. 1979).

¶54. The Legislature has, since our holding in ***Stewart***, amended Section 97-3-65 multiple times *without altering this interpretation*, most recently in 1998. Under this Court's explicit, well-established holdings regarding legislative ratification, ***Stewart*** must stand. Our current law is that:

> *. . . in cases where this Court concludes a statute was incorrectly interpreted in a previous case—we will nevertheless continue to apply the previous interpretation, pursuant to the doctrine of stare decisis, upon finding the Legislature amended or reenacted the statute without correcting the prior interpretation.* In our view, such action on the part of the Legislature amounts to incorporation of our previous interpretation into the reenacted or amended statute. *The Legislature is, of course, free to preclude our incorrect interpretation by specific provision, failing which, we must conclude that the legislative silence amounts to acquiescence.* Stated another way, the incorrect interpretation becomes a correct interpretation because of the Legislature's tacit adoption of the prior interpretation into the amended or reenacted statute.

Caves v. Yarbrough, 991 So. 2d 142, 153-54 (Miss. 2008) (emphasis added).

¶55. Under ***Caves***, even if members of this Court believe the ***Stewart*** standard is incorrect, "we will nevertheless continue to apply the previous interpretation" because here "the Legislature amended . . . the [identical] statute without correcting the prior interpretation." ***Id***. "An attorney should be able to present his case without fear that this Court will ignore the doctrine of stare decisis." ***McFarland v. Entergy Mississippi, Inc.***, 919 So. 2d 894, 907 (Miss. 2005) (Randolph, J., concurring in part and dissenting in part). "[A] former decision of this court should not be departed from, unless the rule therein announced is not only manifestly wrong, but mischievous." ***Caves***, 991 So. 2d at 151.

¶56. Deference to the Legislature's ratification of ***Stewart*** and four decades of uncontested application should be sufficient to leave the ***Stewart*** standard in place. ***Stewart*** provides a reasonable interpretation of the statute under our principles of statutory construction. Courts must give meaning to the entirety of a statute; "[e]ach clause is to be given force and all provisions harmonized if those goals can be met. Statutes must receive a reasonable construction, reference being had to their controlling purpose, to all their provisions, force and effect being given not narrowly to isolated and disjointed clauses, but to their plain spirit, broadly taking all their provisions together in one rational view."[12] *See* ***Adams v. Yazoo & M.V.R. Co.***, 75 Miss. 275, 22 So. 824 (1897); ***Ellison v. Mobile & O.R. Co.***, 36 Miss. 572, 1858 WL 4620 (1858).

[12] Jeffrey Jackson, 8 Encyclopedia of Mississippi Law § 68:69 (2014).

¶57. As the syntactical progression of the clauses shows, the trial court's sentencing authority to impose a sentence of "any term" is triggered by, and contingent on, the failure of the jury to agree that the defendant should receive a life sentence. The clause granting the jury the authority to impose a life sentence would be negated if we interpreted the statute to allow the trial judge to impose an even longer sentence if the jury did not impose life. Such an interpretation fails to read the statute as a whole and fails to give any meaningful force to the dominant clause expressly vesting the jury with the authority to impose life. The concurrence adopts an interpretation that would remove the life sentence from the exclusive purview of the jury and would permit the trial judge to sentence a defendant to a sentence exceeding the defendant's life.

¶58. This Court's traditional approach to this statute is also reflected at the federal level. Multiple circuits, including the Fifth Circuit, consistently have concluded in various similar contexts that only a jury has the authority to impose a life sentence and that the judge can impose a sentence for a term of years less than life. *See* ***United States v. Tocco***, 135 F. 3d 116 (2d Cir. 1998), *cert. denied*, 523 U.S. 1096, 118 S. Ct. 1561, 140 L. Ed. 2d 795 (1998); ***United States v. Gullett***, 75 F. 3d 941 (4th Cir.), *cert. denied*, 519 U.S. 847, 117 S. Ct. 134, 136 L. Ed 2d 83 (1996); ***United States v. Hansen***, 755 F. 2d 629 (8th Cir. 1985); ***U.S. v. Grimes***, 142 F. 3d 1342, 1352 (11th Cir. 1998).

¶59. For these reasons, I do not accept the premise put forth by Justice Coleman that ***Stewart*** is unconstitutional and that this Court should overrule it. I also dissent from the

majority's affirming this illegal sentence, which exceeds a reasonable calculation of Hampton's life expectancy.

KITCHENS AND KING, JJ., JOIN THIS OPINION. DICKINSON, P.J., JOINS THIS OPINION IN PART.