

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

CEARIC A. BARNES

V

CAUSE NO. 2007-CA-00705-COA


STATE OF MISSISSIPPI

APPEAL FROM THE CIRCUIT COURT OF LINCOLN COUNTY,  
MISSISSIPPI

APPELLANT'S REPLY BRIEF

ORAL ARGUMENTS NOT REQUESTED

CEARIC BARNES, APPELLANT

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## **STATEMENT OF THE ISSUES**

### **PROPOSITION 1**

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## **SUMMARY OF THE ARGUMENT**

This case presents a compelling dilemma for the Court in that several procedural defects prevent the Court from reviewing the appeal. The appellant, a pro se litigant drafted the post conviction motion and timely submitted it to the Circuit Court of Lincoln County, Mississippi. The Circuit Court Judge on April 25, 2007 and September 18, 2007 issued an order denying the Motion for Post Conviction Relief. Yet on April 9, 2009, the Judge wrote that the file was checked out of the Circuit Court Clerk in 2006 and that his office has never had possession of the file. The appellant contends that the Circuit Court Judge in ruling in 2007 never reviewed the documents on file in compliance with the statute. The Circuit Court was ordered by this Court to reconstruct the record. Yet the Circuit Court only submitted an amended post conviction motion which they had on file.

Further the appellant contends that his appeal has further been thwarted by the absence of records which he designated on appeal which would have included the transcript and the underlying Court file. These records were never submitted to the Supreme Court. The appellant maintains that his rights under the statute have been severely restricted resulting in the denial of due process of law.

The appellant contends that this matter should be remanded to the lower court for a full evidentiary hearing or in the alternative that a supplemental record be submitted. Yet even in submitting the supplemental record, the appellant contends that the failure of the lower court to review constitutes the full basis for reversal.

A full review of the record in the lower court will reveal that the appellant's rights were denied, with specific reference to the lack of a finding of competency. Coupled with these factors and the prosecution of the post conviction relief motion, this Court should find that the appellant was restrained and denied due process of law.

### **ARGUMENT**

**THIS CASE SHOULD BE REMANDED FOR A FULL EVIDENTIARY HEARING BASED UPON THE UNDERLYING RECORD OR IN THE ALTERNATIVE THE SUBMISSION OF A SUPPLEMENTAL RECORD TO INCLUDE THE DOCUMENTS DESIGNATED BY THE APPELLANT**

The appellant contends that he has taken every action to ensure that his post conviction motion was properly reviewed and heard by the Trial Court and the

Court of Appeals. The appellee contends that the appellant has failed in his duty to submit the record.

The petition at the Circuit Court level complied in every respect with the requirements of the law. It should be noted that the clerk did not dismiss the petition for failure of the appellant to conform to the statute herein referenced.

**99-39-9. Requirements of motion and service.**

(1) A motion under this article shall name the state of Mississippi as respondent and shall contain all of the following:

(a) The identity of the proceedings in which the prisoner was convicted.

(b) The date of the entry of the judgment of conviction and sentence of which complaint is made.

(c) A concise statement of the claims or grounds upon which the motion is based.

(d) A separate statement of the specific facts which are within the personal knowledge of the prisoner and which shall be sworn to by the prisoner.

(e) A specific statement of the facts which are not within the prisoner's personal knowledge. The motion shall state how or by who said facts will be proven. Affidavits of the witnesses who will testify and copies of documents or records that will be offered shall be attached to the motion. The affidavits of other persons and the copies of documents and records may be excused upon a showing, which shall be specifically detailed in the motion, of good cause why they cannot be obtained. This showing shall state what the prisoner has done to attempt to obtain the affidavits, records and documents, the production of which he requests the court to excuse.

(f) The identity of any previous proceedings in federal or state courts that the prisoner may have taken to secure relief from his conviction and sentence.

(2) A motion shall be limited to the assertion of a claim for relief against one (1) judgment only. If a prisoner desires to attack the validity of other judgments under which he is in custody, he shall do so by separate motions.

(3) The motion shall be verified by the oath of the prisoner.

(4) If the motion received by the clerk does not substantially comply with the requirements of this section, it shall be returned to the prisoner if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion so returned.

(5) The prisoner shall deliver or serve a copy of the motion, together with a notice of its filing, on the state. The filing of the motion shall not require an answer or other motion unless so ordered by the court under Section 99-39-11(3).

The appellant maintains that the trial Court had a duty to review the entire file in conformity with the statute. The appellant maintains that the Trial Court did not review the full record pursuant to Mississippi Code Annotated 99-39-11. The appellant also contends that the Clerk in submitting the record failed to include all documents designated by the appellant.

When a post conviction motion is forwarded to the Supreme Court, the file includes both the post conviction motion and the underlying case. Yet in this instance, the Circuit Court only forwarded the document which they had left in their file i.e. the amended post conviction motion. As the appellant was limited in his access to the Court, due to his incarceration, he should not be held accountable for reconstructing a file which he did not lose. Once the appellant designates the record it is the duty of the clerk to submit the required documentation to the Court.

The appellee contends that the appellant had the duty to ensure that the record was submitted to the Court. The appellant met that duty by designating the record. The appellant herein prays that the Court will supplement the record of all proceedings which occurred in the underlying cases herein referenced as **State of Mississippi v Cearic Barnes**, 02-250. The efforts by the appellee to prevail based upon the absence of the records should not be rewarded given the difficulty of the preservation of this claim.

The only alternative in this case is to remand this case to the Circuit Court for a complete evidentiary hearing on the merits to include a review of the underlying case as required by Mississippi Code Annotated 99-39-11 or the alternative to supplement the record.

The Court in Wilson v State, 577 So.2d 394 (1991) decided a similar issue wherein the transcript of the sentencing proceedings had not been transcribed. The Court therein reversed and remanded for an evidentiary hearing on the issue of voluntary plea and ineffective assistance of counsel.

The Court wrote,

The record contains only Wilson's Petition to Enter a Plea of Guilty. The plea proceeding whereby the court considered the guilty plea and questioned Wilson about it was not transcribed by a court reporter. Because of the inadequate record, it is impossible to make a determination of whether Wilson really understood the nature of his guilty plea. We have commended the practice of a judge who files a transcript of the guilty plea proceedings within days after that proceeding takes place. "This transcript is then available when a post-conviction motion of this nature is filed, allowing for immediate review and rapid disposition of the motion without the expenditure of county funds for transporting the petitioner from Parch-man for a hearing." *Garlotte v. State*, 530 So.2d 693, 694 (Miss.1988).

Wilson's allegations contained in the Motion, though inartfully drafted, warrant an evidentiary hearing for a determination on those issues. The allegations, if true, amount to a denial of constitutional rights.

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Because the plea hearing was not transcribed, we have no way of knowing whether Wilson entered his plea voluntarily or whether his attorney provided effective assistance. We can only examine his Petition to Enter Plea of Guilty and that is, for the most part, a standardized form. We reverse and remand for an evidentiary hearing on those two issues.

REVERSED AND REMANDED FOR AN EVIDENTIARY HEARING ON THE ISSUES OF THE INEFFECTIVE ASSISTANCE OF COUNSEL AND THE VOLUNTARINESS OF THE GUILTY PLEA; AFFIRMED ON ALL OTHER ISSUES.

**THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF  
COUNSEL.**

The appellant contends that the insufficiency of the record is a major handicap in appealing the matter to the Court – so much so that the absence of the record constitutes a denial of due process. See., **Puckett v Stuckey**, 633 So. 2d. 978, 982( MS., 1992). The record of the underlying charge is replete with instances of ineffective assistance of counsel. The record reveals that the Court ordered that on the motion of defense counsel that the appellant be evaluated. The record is devoid of a competency hearing or even an order of competency by the Court prior to the acceptance of the guilty plea.

The Court failed to adhere to Rule 9.06 of the Uniform Rules of Circuit and County Court Rules , as well as the requirements set forth in **Sanders v State of Mississippi**, No 2004-KA-00625-SCT to provide (1) on the record hearing and (2) a competent finding by the Court..

Counsel for the appellant in pleading the appellant without complying with Rule 9.06 of the Uniform Rule of Circuit County Court Rules contravened the limits of his authority and thus a finding of ineffective assistance of counsel can be made as a matter of fact /record.

The appellee contends that there is “no indication in the record other than the allegations made by Barnes in his brief that his trial attorney’s performance was ineffective”. The appellant prosecuted this claim pro se. Counsel herein noticed her appearance well after the motion and the amended motion had been filed. Notwithstanding, the appellant contends that the actions by the lower court warrant a remand for the purpose of an evidentiary hearing to support the contentions of the appellant. It would be patently inequitable to deny the appellant any relief pursuant to the post conviction statute wherein the error lies in the misplacement of the record and the Court’s failure to comport with the standards in reviewing the post conviction motion.

**THE APPELLEE’S CONTENTION THAT BARNES WAS NOT  
ENTITLED TO AN EVIDENTIARY HEARING IS NOT SUPPORTED BY  
THE LAW**

The appellant’s prayer for an evidentiary hearing is statutorily mandated wherein it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief.

**99-39-11. Judicial examination of original motion; dismissal; filing answer.**

(1) The original motion, together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.

(2) If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified.

(3) If the motion is not dismissed under subsection (2) of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

(4) This section shall not be applicable where an application for leave to proceed is granted by the Supreme Court under Section 99-39-27.

(5) Proceedings under this section shall be subject to the provisions of Section 99-19-42.

**Sources:** Laws, 1984, ch. 378, § 6; Laws, 1995, ch. 566, § 4, eff from and after July 1, 1995.

This case presents an interesting issue before the Court in that the Trial Court admitted that at the time of the decision it did not have before it the original motion in which to review. The decision by the trial court reflects a summary disposition of the case. The Court cannot be said to have properly examined the motion pursuant to MS Code Annotated 99-29-11.

### **CONCLUSION**

The petitioner contends that he has been denied access to the Court by the loss of his records; the failure of the Trial Court to submit to the Court of Appeal the records designated; and finally the actions of the lower court judge to submit an order that was clearly lacking in judicial review and support pursuant to law.

For this reason, the appellant prays that the Court will grant relief and remand for an evidentiary hearing or in the alternative supplemental records.

Respectfully submitted this the 30<sup>th</sup> day of November, 2009

A handwritten signature in cursive script, appearing to read "Wanda Abioto".

/s/ Wanda Abioto

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**CERTIFICATE OF SERVICE**

I, Wanda Abioto certify that I have mailed postage prepaid a true and correct copy of the foregoing to the Hon. Lisa L. Blount, Office of the Attorney General, P.O. Box 220, Jackson, MS 39205-0220 on this the 2<sup>nd</sup> day of November 2009.

  
/s/ Wanda Abioto