

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

**DENNIS DUHART**

**APPELLANT**

**VS.**

**NO. 2007-CP-0177-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES ..... ii**

**STATEMENT OF ISSUES ..... 1**

**STATEMENT OF FACTS ..... 1**

**SUMMARY OF THE ARGUMENT ..... 2**

**ARGUMENT ..... 3**

**I. THE TRIAL COURT PROPERLY DENIED DUHART’S PETITION  
        FOR POST-CONVICTION RELIEF. .... 3**

**II. DUHART IS NOT SERVING AN ILLEGAL SENTENCE. .... 3**

**III. MISSISSIPPI CODE ANNOTATED § 47-7-33 IS WHOLLY  
        INAPPLICABLE TO DUHART’S SENTENCE. .... 4**

**IV. DUHART’S GUILTY PLEA WAS KNOWINGLY, VOLUNTARILY,  
        AND INTELLIGENTLY MADE. .... 6**

**V. DUHART FAILED TO SHOW INEFFECTIVE ASSISTANCE OF  
        COUNSEL. .... 6**

**CONCLUSION ..... 7**

**CERTIFICATE OF SERVICE ..... 8**

## TABLE OF AUTHORITIES

### FEDERAL CASES

United States.” U.S. v. Banaban, 2004 WL 75423 (5th Cir. 2004) .....	4
--	---

### STATE CASES

Brown v. State, 923 So. 2d 258, 259-60 (Miss. Ct. App. 2006) .....	4
Brown v. State, 944 So. 2d 103, 105 (Miss. Ct. App. 2006) .....	6
Chancellor v. State, 809 So. 2d 700, 702 (Miss. Ct. App. 2001) .....	5
Donnelly v. State, 841 So. 2d 207, 211 (Miss. Ct. App. 2003) .....	7
Duhart v. State, 927 So. 2d 768, 771-72 (Miss. Ct. App. 2006) .....	4
Hoyt v. State, 952 So. 2d 1016, 1023 (Miss. Ct. App. 2007) .....	6
Jewell v. State, 946 So. 2d 810, 813 (Miss. 2000) .....	3
Johnson v. State, 925 So. 2d 86 (Miss. 2006) .....	5
Sweat v. State, 912 So. 2d 458, 461 (Miss. 2005) .....	5
Towner v. State, 837 So. 2d 221, 225 (Miss. Ct. App. 2003) .....	3
Vielee v. State, 653 So. 2d 920, 922 (Miss. 1995) .....	7
Weathersby v. State, 919 So. 2d 262, 264 (Miss. Ct. App. 2005) .....	5
White v. State, 921 So. 2d 402, 405 (Miss. Ct. App. 2006) .....	6
Wilson v. State, 735 So. 2d 290, 292 (Miss. 1999) .....	5

### STATE STATUTES

Mississippi Code Annotated § 47-7-33 .....	4, 5
Mississippi Code Annotated §63-11-30 .....	4

## **STATE RULES**

**Criminal Law § 895 p. 163 ..... 5**

**Criminal Law § 904 p. 169 ..... 5**

## **OTHER AUTHORITIES**

**Issue of Standing, 29 Case W. Res. J. Int'l L. 299 (1997) ..... 4**

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**STATEMENT OF ISSUES**

- I. THE TRIAL COURT PROPERLY DENIED DUHART'S PETITION FOR POST-CONVICTION RELIEF.
- II. DUHART IS NOT SERVING AN ILLEGAL SENTENCE.
- III. MISSISSIPPI CODE ANNOTATED § 47-7-33 IS WHOLLY INAPPLICABLE TO DUHART'S SENTENCE.
- IV. DUHART'S GUILTY PLEA WAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY MADE.
- V. DUHART FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL.

**STATEMENT OF FACTS**

Dennis Duhart pled guilty to D.U.I. maiming on May 23, 2003. C.P. 54. Duhart subsequently filed a petition for post-conviction relief in the trial court, which was dismissed as time-barred. T. 65.

## **SUMMARY OF THE ARGUMENT**

- I. THE TRIAL COURT PROPERLY DENIED DUHART'S PETITION FOR POST-CONVICTION RELIEF.**
- II. DUHART IS NOT SERVING AN ILLEGAL SENTENCE.**
- III. MISSISSIPPI CODE ANNOTATED § 47-7-33 IS WHOLLY INAPPLICABLE TO DUHART'S SENTENCE.**
- IV. DUHART'S GUILTY PLEA WAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY MADE.**
- V. DUHART FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL.**

## **ARGUMENT**

### **I. THE TRIAL COURT PROPERLY DENIED DUHART'S PETITION FOR POST-CONVICTION RELIEF.**

The trial court dismissed Duhart's motion as time-barred, finding that Duhart entered his plea of guilt on May 23, 2003, but did not file his motion for post-conviction relief until June 13, 2006. C.P. 65. Duhart claimed that he delivered his motion to prison authorities for mailing on May 3, 2006, although it was not stamped "filed" until June 13, 2006.

The State is well aware of the "prison mailbox rule" which deems "a pro se petitioner's motion for post-conviction relief [] delivered for filing...when the prisoner delivers the papers to prison authorities for mailing." **Jewell v. State**, 946 So. 2d 810, 813 (¶7) (quoting **Sykes v. State**, 757 So. 2d 997, 1000 (¶14) (Miss. 2000)). Duhart submitted a copy of the daily batch report from the prison's mail system which showed that he mailed something on May 3 to the Lee County Circuit Court Clerk. C.P.64. The State contacted the MDOC Director of the Legal Assistance Program who verified that Duhart's only mailing to the circuit court during the months of May and June of 2003 was on May 3, 2003. Accordingly, the State concedes that his motion was timely filed.

However, "It is the customary practice, in the name of judicial economy, for an appellate court to affirm the trial court if the right result is reached even though for the wrong reason." **Towner v. State**, 837 So. 2d 221, 225 (¶9) (Miss. Ct. App. 2003) (citing **Puckett v. Stuckey**, 633 So. 2d 978, 980 (Miss. 1993)). The State asks this honorable Court to affirm the trial court's denial of relief because each of Duhart's claims for relief are meritless.

### **II. DUHART IS NOT SERVING AN ILLEGAL SENTENCE.**

Duhart claims that he is serving an illegal sentence because the State violated the "specialty doctrine." He then rambles incessantly about "the Treaty of 1842," apparently referring to the

Webster-Ashburton Treaty of 1842. The specialty doctrine applies only in cases where the defendant was “delivered by any foreign government to an agent of the United States.” **U.S. v. Banaban**, 2004 WL 75423 (5th Cir. 2004). The Webster-Ashburton Treaty of 1842 is an extradition agreement between the U.S. and Great Britain. See John J. Barrett III, *The Doctrine of Specialty: A Traditional Approach to the Issue of Standing*, 29 Case W. Res. J. Int’l L. 299 (1997). As Duhart was not extradited from another state within the United States<sup>1</sup>, much less from Great Britain or any other country, his illegal sentence argument based on alleged violations of the doctrine of specialty and the Webster-Ashburton Treaty of 1842 is so meritless as to be frivolous.

An illegal sentence is one which exceeds the statutory maximum. **Brown v. State**, 923 So. 2d 258, 259-60 (¶4) (Miss. Ct. App. 2006) (citing **House v. State**, 754 So. 2d 1147, 1150 (Miss.1999)). Duhart pled guilty to violating Mississippi Code Annotated §63-11-30 (5), which carries a twenty-five year maximum sentence. Miss. Code Ann. §63-11-30 (5). Duhart was sentenced to twenty years with five suspended. C.P. 54. Because Duhart is serving less than the statutory maximum, he is not serving an illegal sentence.

### **III. MISSISSIPPI CODE ANNOTATED § 47-7-33 IS WHOLLY INAPPLICABLE TO DUHART’S SENTENCE.**

Duhart claims that he was sentenced in violation of Mississippi Code Annotated § 47-7-33, which provides in part that defendants previously convicted of felonies are not entitled to be placed on probation. This statute is inapplicable to Duhart’s sentence because he was not placed on probation. Rather, he was given a twenty year sentence with five years suspended. The supreme

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<sup>1</sup>Duhart believes he was extradited from Ohio, but this Court has previously found otherwise. **Duhart v. State**, 927 So. 2d 768, 771-72 (¶4) (Miss. Ct. App. 2006). In his direct appeal on another charge, the Court found that he was actually brought to Mississippi from Ohio by a bail bondsman, not by the State of Mississippi.



court recently clarified certain sentencing laws, including Mississippi Code Annotated § 47-7-33, in **Johnson v. State**, 925 So. 2d 86 (Miss. 2006). In **Johnson**, the court held that “suspending a sentence and imposing probation are distinct events[.]” **Id.** at 99 (¶24).

By definition, a “suspended sentence” is a unique mechanism by which the court may postpone the imposition of a sentence altogether or delay the execution of a sentence once it has been pronounced. 21A Am.Jur.2d, Criminal Law § 895 p. 163. Suspension is a term which generally applies to the actions of the state in relation to a prisoner under its supervision and control. **Wilson v. State**, 735 So. 2d 290, 292 (Miss. 1999) (citing **Goss v. State**, 721 So. 2d 144, 145 (Miss. 1998)). Simply stated, “suspension” is the restriction placed upon the power of the State to act during that (the suspended portion of a sentence) period. **Id.**

Quite differently, probation restricts the prisoner's rights rather than those of the State. **Goss**, 721 So. 2d at 146. If a prisoner is under court imposed probation, that prisoner may be incarcerated if the conditions of probation are not followed.FN4 **Id.** Probation is a matter of grace and a conditional liberty that is a favor, not a right or entitlement. 21A Am.Jur.2d, Criminal Law § 904 p. 169. Moreover, probation is a sentence and not part of a quasi-contract wherein the court offers something which the defendant is free to accept or reject. **Id.** Probation is to be considered at the time of sentencing, and it starts with the process of probation or conditional discharge, moving toward imprisonment only if certain justifications exist to deny probation or conditional discharge.

**Id.** at 92 (¶¶10-11). Accordingly, Duhart’s claim must fail.

Furthermore, even if the suspended portion of Duhart’s sentence could somehow be construed as probation, our appellate courts have repeatedly rejected similar claims. “The law that states that there is a fundamental right to be free from an illegal sentence is interpreted to apply to sentences which cause the defendant to endure an undue burden rather than the luxury of a lesser sentence.” **Chancellor v. State**, 809 So. 2d 700, 702 (¶8) (Miss. Ct. App. 2001). *See also* **Sweat v. State**, 912 So. 2d 458, 461 (¶9) (Miss. 2005); **Weathersby v. State**, 919 So. 2d 262, 264 (¶6) (Miss. Ct. App. 2005) (citing **McGleachie v. State**, 800 So. 2d 561, 563 (¶4) (Miss. Ct. App. 2001)).

#### **IV. DUHART'S GUILTY PLEA WAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY MADE.**

Duhart claims that, "Duhart's attorney promised him if he [pled] guilty to D.U.I. maiming, his case will be overturned on appeal .... Duhart's attorney stated it doesn't matter whether you plead guilty or not[.] [Y]our case will get overturned on the illegal extradition proceeding." Appellant's brief at 21. However, Duhart testified at the hearing that he was entering a plea of guilt freely and voluntarily and that no threats or promises had been made. C.P. 56. "A motion for post-conviction relief is properly dismissed without an evidentiary hearing where the defendant's claims are directly contradicted by the transcript of the guilty plea hearing." **Hoyt v. State**, 952 So. 2d 1016, 1023 (¶23) (Miss. Ct. App. 2007) (citing **Roland v. State**, 666 So. 2d 747, 750 (Miss. 1995)).

A criminal defendant's guilty plea is binding when it is made voluntarily and knowingly. **Brown v. State**, 944 So. 2d 103, 105 (¶5)(Miss. Ct. App. 2006) (citing **Alexander v. State**, 605 So. 2d 1170, 1172 (Miss.1992)). A plea is voluntary when the defendant has been informed of the nature of the charges against him and the consequences of entering a guilty plea. **White v. State**, 921 So. 2d 402, 405 (¶9) (Miss. Ct. App. 2006) (citing **Alexander v. State**, 605 So. 2d 1170, 1172 (Miss.1992)). The trial court must inform the defendant of the minimum and maximum prescribed penalties and the constitutional rights forfeited by entering a guilty plea. **Id.** An examination of the plea hearing transcript shows that the trial court informed Duhart of the minimum and maximum sentence and explained all of the rights he would waive by entering a guilty plea. C.P. 55-56. Accordingly, Duhart's guilty plea was knowing, voluntary, and intelligent.

#### **V. DUHART FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL.**

Duhart alleges ineffective assistance of counsel with a preposterous allegation that his attorney promised him that if he pled guilty, he "would be released after his petition of habeas corpus

is heard.” Appellant’s brief at 25. To succeed on a claim of ineffective assistance of counsel, the defendant must demonstrate that counsel’s performance was deficient and, but for the deficient performance, a different result would likely have occurred. **Donnelly v. State**, 841 So. 2d 207, 211 (¶8) (Miss. Ct. App. 2003) (citing **Strickland v. Washington**, 466 U.S. 668, 686 (1984)).

Duhart offers only bare assertions regarding the alleged promise made by his attorney. Post-conviction claims of ineffective assistance are properly dismissed where the defendant offers only his affidavit in support of his allegations. **Vielee v. State**, 653 So. 2d 920, 922 (Miss. 1995) (citing **Brooks v. State**, 573 So. 2d 1350, 1354 (Miss.1990)). Duhart offers even less than that, and his claim is without merit.

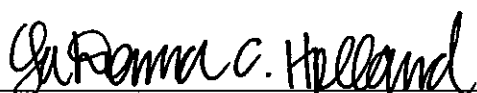
### CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm the trial court’s denial of post-conviction relief.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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