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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CP-00428-COA

KERRY L. MORGAN

FILED

APPELLANT

V

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COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR APPELLANT

BY:

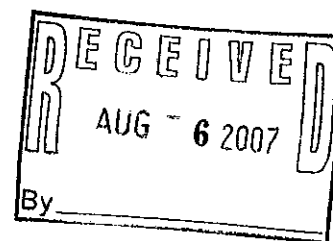
Kerry Morgan

Kerry Louis Morgan, #15117

Carroll CCF

1440 Hwy 35

Vaiden MS 39176



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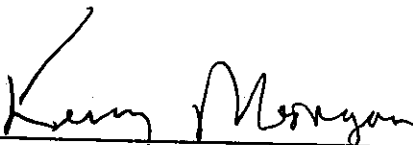
CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Kerry L. Morgan, certifies that the following listed persons have an interested in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Kerry L. Morgan, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable Andrew C. Baker, Circuit Court Judge.
4. Honorable John W. Champion, District Attorney.

Respectfully Submitted,

BY:



Kerry Louis Morgan, #15117
Carroll CCF
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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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STATEMENT OF ISSUES

ISSUE ONE

Whether Appellant was denied fundamental due process of law, in violation of the 5th and 14th Amendment to the United States Constitution, where his probation or supervision earned release was violated without any conviction of crime or other valid conviction or violation of his release.

ISSUE TWO

Whether trial court erred in summarily dismissing the PCR motion without conducting an evidentiary hearing nor requiring the state to file an answer to the motion where record demonstrates that there was no criminal conviction of any crime, either before or after conviction, to warrant revocation of suspended sentence and that such revocation was based upon information and allegation by the state which was presented to the trial court.

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Carroll County Correctional Facility at Valden, Mississippi, in service of a mandatory prison term

Imposed with the assistance and support of the conviction and sentence under which he now attack in this case. Appellant has been continuously confined in regards to such sentence since date of conviction and imposition by the trial court.

STATEMENT OF CASE

Morgan was sentenced by the Circuit Court of Yalobusha County, Mississippi, on January 29, 2004, to a term of twenty eight years and eleven months of post release supervision pursuant to the provision of Miss. Code Ann. § 47-7-34. The terms of Appellant's post release supervision consisted of the following:

- (1) Commit no crimes;
- (2) Avoid injurious or vicious habits;
- (3) Avoid persons or places of disreputable or harmful character;
- (4) Report to the Department of Corrections as directed;
- (5) Permit the Field Supervisor to visit him at home, work or elsewhere;
- (6) Work faithfully at suitable employment so far as possible;
- (7) Remain within the State of Mississippi unless authorized to leave on proper application therefore;
- (8) Support his dependents;
- (9) Waive extradition to the State of Mississippi from any state of the United States and also agree that he will not contest any effort by any state to return him to the State of Mississippi and does hereby consent to any such extradition;
- (10) Not own or carry with him any weapons;

- (11) Pay to the Mississippi Department of Corrections such monthly reporting fees as authorized by the Laws of Mississippi; said fees to be paid monthly by certified check or money order;
- (12) Submit to such breath, saliva, urine, or other chemical analysis as requested to detect the possible presence of narcotics, alcohol, or other prohibited substance;
- (13) Obey all rules and regulations of the Mississippi Department of Corrections;
- (14) Pay the following to the Clerk of this Court:: \$100.00 to the MS Crime Victims Compensation Fund, and court costs
- (15) Further, all assessments are due and payable as follows: to be paid to the Circuit Clerk of the First Judicial District of Yalobusha County at the Courthouse in Coffeeville, Mississippi to be paid at the rate of \$50.00 dollars per month beginning March 1, 2005 and continuing in the same amount each month thereafter until paid in full.
- (16) And further, _____

Morgan was subsequently arrested and accused of forgery in reference to checks which belonged to Morgan's step father. On March 11, 2005, a hearing was conducted before the court where the state called several witnesses and I represented myself. That the state only sought to violate post release supervision on the grounds that Morgan had forged the checks. That there was no trial held on any of the accusations

against Morgan and there has been no conviction regarding such changes. That after Morgan called his mother to the witness stand and after she testified before the court, the judge announced that he would revoke all time set forth in the sentencing order in cause 2002-12-BY1, Count One. ¹ (Tr. 27). The trial court never found, as a fact, that Appellant Morgan was guilty of violating any condition of his post release supervision or that the state had actually proved any such violation.

STATEMENT OF FACTS

Appellant Morgan was sentenced by the Circuit Court of Yalobusha County, Mississippi, on January 29, 2004, to a term of twenty eight years and eleven months of post release supervision pursuant to the provision of Miss. Code Ann. § 47-7-34.

The terms of Appellant's post release supervision consisted of the following:

- (1) Commit no crimes;
- (2) Avoid injurious or vicious habits;
- (3) Avoid persons or places of disreputable or harmful character;
- (4) Report to the Department of Corrections as directed;
- (5) Permit the Field Supervisor to visit him at home, work or elsewhere;
- (6) Work faithfully at suitable employment so far as possible;
- (7) Remain within the State of Mississippi unless authorized to leave on proper application therefore;
- (8) Support his dependents;

¹ The sentencing order in CR-2002-12-B(Y1) consisted of a sentence of thirty (30) years as a habitual offender under §99-19-81, MCA, in the custody of the Mississippi Department of Corrections.

- (9) Waive extradition to the State of Mississippi from any state of the United States and also agree that he will not contest any effort by any state to return him to the State of Mississippi and does hereby consent to any such extradition;
- (10) Not own or carry with him any weapons;
- (11) Pay to the Mississippi Department of Corrections such monthly reporting fees as authorized by the Laws of Mississippi; said fees to be paid monthly by certified check or money order;
- (12) Submit to such breath, saliva, urine, or other chemical analysis as requested to detect the possible presence of narcotics, alcohol, or other prohibited substance;
- (13) Obey all rules and regulations of the Mississippi Department of Corrections;
- (14) Pay the following to the Clerk of this Court:: \$100.00 to the MS Crime Victims Compensation Fund, and court costs
- (15) Further, all assessments are due and payable as follows: to be paid to the Circuit Clerk of the First Judicial District of Yalobusha County at the Courthouse in Coffeeville, Mississippi to be paid at the rate of \$50.00 dollars per month beginning March 1, 2005 and continuing in the same amount each month thereafter until paid in full.
- (16) And further, _____

That Appellant Morgan was subsequently arrested and accused of forgery in reference to checks which belonged to his step father.

On March 11, 2005, a hearing was conducted before the court where the state called several witnesses and Appellant represented himself.

That the state only sought to violate Appellant's post release supervision on the grounds that Appellant had forged the checks.

That there was no trial held on any of the accusations against Appellant and there has been no conviction regarding such charges.

That after Appellant called his mother to the witness stand and after she testified before the court, the judge announced that he would revoke all times set forth in the sentencing order in cause 2002-12-BY1, Count One. ² (Tr. 27).

8. The trial court never found, as a fact, that Appellant was guilty of violating any condition of his post release supervision or that the state had actually proved any such violation.

STANDARD OF REVIEW

In reviewing a trial court's decision to deny a motion for post-conviction relief the standard of review is clear. The trial court's denial will not be reversed absent a finding that the trial court's decision was clearly erroneous. Kirksey v. State, 728 So.2d 565, 567 (Miss. 1999).

² The sentencing order in CR-2002-12-B(Y1) consisted of a sentence of thirty (30) years as a habitual offender under §99-19-81, MCA, in the custody of the Mississippi Department of Corrections.

SUMMARY OF ARGUMENT

Kerry Morgan is being illegally confined under an Order which is invalid where the trial court failed to sustain a conviction of crime or other term and condition of release before directing Morgan to be confined in prison. Sentence was invalid since such sentence was illegal where Mississippi Law prohibited a sentence to be imposed to be served concurrent with another term not imposed by the same court and at the same term of court. Glover v. State, 419 So.2d 588; Tate v. State, 455 So.2d 1312 (Miss. 1982). Since the trial court was without jurisdiction to impose such sentence and since the plea of guilty was motivated and entered into upon the agreement that such sentence would be imposed illegally the conviction and sentence is a null and void act and should be vacated and set aside as it violates the 5th and 14th amendments to the United States Constitution, as well as the Constitution of the State of Mississippi. Such action was tantamount to imposing a partially suspended sentence and, therefore, constitutes an illegal sentence and a violation of the spirit of the decision rendered by the Mississippi Supreme Court in Goss v. State, 721 So.2d 144 (Miss. 1998)..

The trial court decision is clearly erroneous and incorrect.

A.

Morgan has been denied due process of law where his post release supervision has been violated without the court finding Morgan guilty of any violation of a condition of the release

The law is clear that Morgan's conditional release should not have been violated, resulting in his being returned to custody unless Morgan was convicted of an offense or violated other terms and condition of his release. Miss. Code Ann. §47-7-27.

In Williams v. Castilla, 585 So.2d 761, 764 (Miss. 1991), the court found the following in regards to a parole violation.

On revocation, the state's authority is much narrower, for before on released on parole may be returned to custody, it must be shown that he has violated the terms and conditions of parole. Miss. Code Ann. § (Supp. 1989).

Moore v. Ruth, 556 So.2d at 1061. Of course, a parolee's commission of a felony while at liberty is grounds for revocation, and we recognized in Moore that parole authorities are not required to await the principal trial before commencing proceedings to revoke parole. Moore went further and held that acquittal in a criminal proceeding does not per se preclude parole revocation predicated upon facts and circumstances giving rise to the criminal charge. Moore v. Ruth, 556 So.2d at 1061-62. On the other hand, we held.

The acquittal on the criminal charge means at the very least that, before the accused's parole may be revoked, the state must offer actual proof that he committed an act violating the terms and conditions of his parole.

Moore v. Ruth, 556 So.2d at 1062. The Board may not rely on the mere fact that the parolee has been charged with a felony.

Appellant would assert to this court that while the decision rendered by the court in Williams v. Castilla regarded a parole revocation proceeding, the standards to be applied before violation of a conditional release on supervised earned release is the same as parole since both forms of release pertains to sentences imposed to be served In the Mississippi Department of Corrections. Harwell v. State, 817 So.2d 598, 600 (Miss. App. 2002). The record reveals that the state did not pursue and the court never

used any other grounds, other than Morgan's previous charges of forgery, of checks belonging to his step father, as grounds to revoke the conditional release. The state has not pursued any conviction of those crimes. Even were the court to apply those standards required for probation revocation, which is not what Morgan was under since he was a prior convicted felony ineligible for such release, the court would have been required to provide a written statement by the fact finder as to the evidence relied upon and reasons for revoking the probation. Miss. Code Ann. §47-7-37; Newson v. State, 904 So.2d 1095 (Miss. App. 2004).

Additionally, the trial court judge could not qualify as a neutral and detached hearing body or officer when the court advised Morgan during the end of the proceedings that the court had spent more time with appellant as a trial judge than any person who had been before the court. (Tr. 27). This court should find that Morgan, having been previously found to be a habitual offender, was not on probation and those standards did not apply. Morgan's post release supervision sentence must therefore be evaluated under the revocation standards set forth under Miss. Code Ann. §47-7-27 which would not allow a violation to suffice unless there is a conviction of crime or violation of another condition of release. Morgan has not been convicted of any crime and the state never sought to pursue any other condition violation. Moreover, the record will clearly demonstrate that the trial court judge made no findings of guilt or adjudication on the one single ground in which the state sought to go forward on in the revocation proceedings. (Tr. 23). The law requires that some form of finding of guilt be entered in

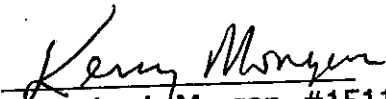
regards to a ground under which the state seeks to revoke. No finding by the court should only be strictly construed for the appellant and in favor of a finding that no violation occurred.

CONCLUSION

Appellant Morgan respectfully submits that based on the authorities cited herein and in support of his brief, that this Court should vacate the guilty plea, conviction and sentence imposed as well as the action taken by the trial court in regards to the post conviction relief motion. This case should be remanded to the trial court for an evidentiary hearing.

Respectfully submitted:


By:


Kerry Louis Morgan, #15117
Carroll CCF
1440 Hwy 35
Vaiden MS 39176

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Motion for Post Conviction Relief, and attachments, A and B have been served, by United States Postal service, upon: Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, Mississippi 39205; Honorable Andrew C. Baker, Circuit Court Judge, P. O. Drawer 368, Charleston, MS 38921; Honorable John W. Champion, District Attorney, 365 Loshier Street, Suite 210, Hernando, MS 38632.

This, the ____ day of August 2007.


Kerry Louis Morgan, #15117
Carroll CCF
1440 Hwy 35
Vaiden MS 39176