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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES ODELL MCLAMB

FILED

APPELLANT

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SUPREME COURT
COURT OF APPEALS**

VS.

NO. 2007-CP-0496

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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JAMES ODELL McLAMB

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vs.

CAUSE No. 2007-CP-00496

THE STATE OF MISSISSIPPI

APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of Rankin County in which relief was denied on the prisoner's "Emergency Motion for State Habeas Corpus."

STATEMENT OF FACTS

The prisoner was convicted of armed robbery and sentenced as an habitual offender in 1981. He appealed his conviction and sentence to this Court, and this Court affirmed his conviction and sentence in 1982. *McLamb v. State*, 410 So.2d 1318 (Miss. 1982). Later, in 1984, the prisoner filed a motion to vacate his sentence, apparently under the Uniform Post Conviction Relief Act. This Court found merit in the prisoner's claim, vacated his sentence, and the prisoner was then resentenced. *McLamb v. State*, 456 So.2d 743 (Miss. 1984). In 1986, the prisoner appealed some matter to this Court. The Court affirmed the lower court's action, but it is impossible to determine the nature of the action that was before the Court. *McLamb v. State*, 490 So.2d 912 (Miss. 1986). One may surmise, though, that it was an action in post - conviction

relief.

On 16 October 2006, the prisoner filed an “Emergency Motion for State Habeas Corpus.” In that motion, the prisoner alleged that he was being illegally detained by the Mississippi Department of Corrections on account of an alleged expired and illegal sentence. According to the prisoner, his sentencing was a violation of the ex post facto clause. This was so, he said, because the felonies used to support his habitual sentence occurred in 1962 and 1970. The prisoner admitted, though, that the felony he committed for which the sentence was enhanced occurred in 1980. (R. Vol. 1, pp. 5 - 13).

On 16 November 2006, the Circuit Court denied relief on the prisoner’s motion, finding that it did not have venue in the premises. (R. Vol. 1, pg. 30).

On 5 December 2006, the prisoner filed a motion for reconsideration. In this motion, he asserted that, under authority of Rule 2.07 UCCCP, the Circuit Court should have considered the prisoner’s motion since the prisoner was detained in the Rankin County facility of the Department of Corrections. (R. Vol. 1, pp. 31 - 32). The Circuit Court did not rule on this motion, so far as the record indicates. On 7 February 2007, the prisoner filed his notice of appeal. (R. Vol. 1, pg. 36).

STATEMENT OF ISSUES

- 1. IS THE INSTANT APPEAL PROPERLY BEFORE THE COURT?**
- 2. DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER’S PETITION FOR THE WRIT OF HABEAS CORPUS?**

SUMMARY OF ARGUMENT

1. THAT THE INSTANT APPEAL IS NOT PROPERLY BEFORE THE COURT

2. THAT THE CIRCUIT COURT CORRECTLY FOUND THAT VENUE WAS IMPROPER

ARGUMENT

1. THAT THE INSTANT APPEAL IS NOT PROPERLY BEFORE THE COURT

There are three reasons why the instant appeal is not properly before the Court.

First, the prisoner notice of appeal was filed long after the expiration of the time allowed to file an appeal under Rule 4 MRAP.

Secondly, the claim raised by the prisoner in his petition was barred by Miss. Code Ann. Section 99-39-21(1), (2), (3) (Supp. 12006). The prisoner could have raised the issue he attempted to raise in the Circuit Court in his motion on his appeal from his conviction. He certainly could have raised it in his appeal in post - conviction relief, where this Court vacated his original sentence. The prisoner could have discovered this issue with reasonable diligence in 1981 and 1985. There have been no significant changes in the judicial construction of ex post facto law relevant to the case at bar since 1981.

Thirdly, while it may be that the prisoner styled his motion as one in habeas corpus, the fact of the matter is that it was to be considered one in post - conviction relief. *Grubb v. State*, 584 So.2d 786 (Miss. 1991). Since the prisoner had at least one prior action in post - conviction relief considered, in 1986, and admits to having filed a number of others which apparently did not make it to this Court, the motion involved in this case was surely a successive writ and barred for that reason.

2. THAT THE CIRCUIT COURT CORRECTLY FOUND THAT VENUE WAS IMPROPER

As we have said, though the prisoner styled his motion as one for habeas corpus, it was in fact to be treated as one in post - conviction relief. Under the Uniform Post - Conviction Relief Act, the prisoner should have filed his motion in the court in which he was convicted. Miss Code Ann. Section 99-39-7 (Supp. 2006). The prisoner filed in Rankin County, where he is apparently in custody, but he was convicted in Coahoma County. (R. Vol. 1, pp. 16 - 17). The Circuit Court of Rankin County thus properly found that venue was improper.

While the merits of the prisoner's claim are not properly before this Court, since, for several reasons, it was not properly before the Circuit Court, we need not reach the merits of the prisoner's claim. We will merely observe that it is incorrect.

The prisoner was convicted of armed robbery in 1981, the felony occurring in 1980. This was several years after the effective date of the habitual offender statutes. While it appears that the prisoner was originally sentenced under Miss. Code Ann. Section 99-19-83 (Rev. 2000), he was ultimately sentenced under Section 99-19-81.

It is true that the prior convictions used to support the prisoner's sentence occurred some years before the effective date of the habitual offender statutes. But the use of them to support habitual sentencing did not and does not offend the ex post facto clauses. *Smith v. State*, 465 So.2d 999 (Miss. 1985). Habitual offender sentencing is not a new or additional sentence for the crimes the prisoner committed in 1962 and 1970; the habitual sentence was imposed for the 1980 armed robbery. The sentence was enhanced because of the prisoner's predilection for serious law - breaking.

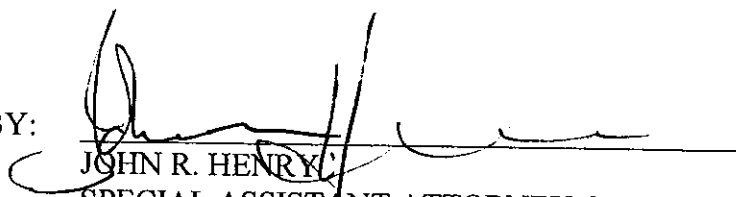
CONCLUSION

The Order of the Circuit Court finding improper venue should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

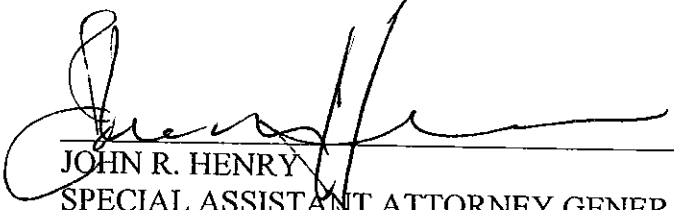
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 25th day of July, 2007.



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