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Case No. 2007-^d~~TS~~ 00708-COA

Court Of Appeals Of The State Of Mississippi

CAR/D. Watts
Appellant

FILED

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OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

vs.

State Of Mississippi
Appellee

Appeal From The Circuit Court Of
Forrest County Mississippi

Appellant's Opening Brief

Oral Argument Not Requested

By: Carl Watts, Appellant, pro-se
CARL D. Watts, #18202
C-Zone, S.C.R.C.F.
1420 Industrial Park Road
Wiggins, MS 39577

September _____, 2007

CARL D. Watts #18202

C-Zone, S. C. R. C. F,

1420 Ind. Pk. Rd.

Wiggins, Ms 39577

Hon. Betty W. Sephton

Supreme Court Clerk

P.O. Box 249

JACKSON, Ms 39205-0249

RE: CARL D. Watts v. State of Mississippi

Supreme Court # 2007-TS-00708-COA

Dear Ms. Sephton:

Please file the hereto attached "Appellants Brief" in the above referenced case. I have included the original and 3 copies pursuant to Rule 32(c).

Also, would you please send me a list of all the documents filed in this case for my records. I have included herewith a addressed, postage pre-paid envelope for your convenience.

Thanking you in advance for your normal, prompt courteous help I am

Sincerely,

Carl Watts

CARL D. Watts

C.

I.

Statement Regarding ORAL Argument

Appellant does not specifically request ORAL ARGUMENT in this case as it is believed that the issues are capable of being adequately briefed by the parties. However, in the event the Court believes ORAL ARGUMENT would be helpful or beneficial to the Court then Appellant does not oppose ORAL ARGUMENT and would in the Court's discretion, ask that counsel be appointed to deliver such ORAL ARGUMENT for Appellant.

By: Carl Watt, Appellant, pro-se

CARL D. WATTS, #18202

C-ZONE, S.C.R.C.F.

1420 INDUSTRIAL PARK RD.

WIGGINS, MS 39577

II.

Certificate of Interested Persons

The undersigned Appellant, CARL D. Watts, hereby certifies that the following persons have interest 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. CARL D. Watts, Appellant pro-se
2. Honorable Jim Hood, AND staff, Attorney General
3. Honorable Robert B. Helfrich, Circuit Court Judge
4. Honorable Jon Mark Weathers, District Attorney

Respectfully submitted,

By: Carl Watts, Appellant, pro-se

CARL D. Watts #18202

C-Zone, S.C.R.C.F.

1420 Industrial Park Rd.

Wiggins, MS 39577

III

Certificate of Incarceration

Appellant, CARL D. Watts, was sentenced to the custody of the Mississippi Department of Corrections (M.D.O.C.) and is incarcerated at the Stone County Regional Correctional Facility, located at Wiggins, Ms, where he is continuously serving the sentence imposed by the trial court.

Respectfully submitted,

By: Carl Watts, Appellant, pro-se

CARL D. Watts #18202

C- Zone, S.C.R.C.F.

1420 Industrial Park Rd.

Wiggins, Ms 39577

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Mississippi Commission ON Judicial Performance

Code of Judicial Conduct ON Mississippi Judges

Statement of Issues

CARL D. WATTS, Appellant pro-se, presents the following contentions as his statement of the issues for this appeal:

Issue One

Whether the trial court committed plain error in violation of the Appellant's constitutional rights to procedural and fundamental due process of law when the trial court judge imposed 7 specific terms and conditions on his 30 year suspended sentence without placing him on probation under the supervision of the M.D.O.C. for a period of time not to exceed 5 years as set out and authorized in sections 47-7-33, -35, and -37.

Issue Two

Whether the 30 year banishment provision (condition G) imposed by the trial court in the Order of Conviction (R0041-44) is statutorily unenforceable pursuant to sections 47-7-35 and -37; and is thereby plain error in violation of the Appellant's state and federal constitutional rights to due process of law, a legal sentence and also his liberty in light of the fact (R0045) Watts is now serving a 30 year term of incarceration for violating the 30 year banishment condition.

Issue Three

Whether the 30 year banishment provision contained in the Order of Conviction is in violation of Watts' constitutional rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution.

Issue Four

Whether the Appellant's constitutional rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution were violated when the trial court imposed the 30 year banishment provision without articulating on the record the reasons for and/or benefits of said banishment.

Issue Five

Whether Judge Robert B. Helfrich violated sections 47-7-33, -35 and -37; section 177A of the Mississippi State Constitution (1890 as amended); CANNONS 1, 2, 2A, 2B and 3A(1) of the Code of Judicial Conduct of Miss. Judges; AND the Appellant's constitutional rights to procedural and fundamental due process of law; AND thereby had no judicial authority to alter or amend his original sentence

Statement of Case

CARL D. WATTS, Appellant pro-se, presents the following as his statements of the case:

ON September 13, 2005, CARL D. WATTS was indicted for Transfer of Controlled Substance in violation of Section 41-29-139(A)(1), Miss. Code of 1972, AS AMENDED; AND AS A Habitual Offender pursuant to Section 99-19-81, Miss. Code of 1972, AS AMENDED. (R0031-32)

ON November 29, 2005, CARL D. WATTS entered a plea of guilty to the charge of Transfer of Controlled Substance in violation of Miss. Code Ann. s.s. 41-39-139(A) (1972), AS AMENDED AND WAS sentenced to a term of thirty years in the custody of the M.D.O.C.; but the trial court suspended the entire 30 year sentence contingent upon Watt's good behavior AND seven (7) specific conditions. (R0041-44)

ON JANUARY 3, 2006 the State filed a Petition For Revocation Of Suspended Sentence on the grounds that Watts had violated the terms and conditions of his suspended sentence in a material respect by being found in Hattiesburg, Miss. on December 30, 2005. (R0045)

ON JANUARY 6, 2006, IN RESPONSE TO THE AFOREMENTIONED petition the trial court imposed the previously suspended thirty (30) year sentence.

ON September 13, 2006 (R0006) AND ON JANUARY 11, 2007 (R0055) Watts filed motions for post conviction relief.

ON April 12, 2007 the trial court summarily dismissed the aforementioned pleadings for relief. (R0102); in response to the Petition For Writ Of Mandamus filed by Watts. (R0107)

ON April 24, 2007, following the denial of the post conviction relief pleadings, Watts filed a Notice Of Appeal to the Forrest County Circuit Court appealing said decision to the Mississippi Supreme Court. (R0108)

Statement Of Facts

The Appellant hereby states the following facts:

CARL Watts was indicted on September 13, 2005 AS A Habitual Offender pursuant to Section 99-19-81; for T.C.S. in violation of Section 41-29-139 (A)(1); by the grand jury of Forrest County, Mississippi. (R0031-32)

On November 29, 2005 Watts entered a plea of guilty to said charge of Transfer Controlled Substance in the Circuit Court of Forrest County, Mississippi in cause NO. 05-559 CR. The trial court did not sentence Watts as a Habitual Offender. The trial court did sentence Watts to thirty (30) years in the custody of the M.D.O.C.; but the trial court suspended the entire thirty (30) year sentence with said suspension of sentence contingent upon Watts' good behavior and seven (7) specific terms and conditions. Watts was not placed on probation under the supervision of the M. D.O.C and a probation officer. (R041-44)

On January 6, 2006, in response to the State's Petition To Revoke Suspended Sentence filed January 3, 2006 (R0045) the trial court imposed the 30 year sentence for violating one of the 7 specific terms and conditions.

Summary of The Argument

In light of the fact Watts was indicted as a Habitual Offender (R0031), the trial court knew that Watts was not eligible for a suspended sentence and probation pursuant to Miss. Code Ann. S.S. 47-7-33. Johnson v. State, (P39), 925 So. 2d 86, Miss. 2006. Therefore, the trial court fully intended to sentence Watts to a straight 30 year sentence suspended contingent upon

Watts good behavior which would have been a legal sentence pursuant to Miss. Code Ann. S.S. 47-7-33; see Robinson v. State, (P22), 836 So. 2d 747, Miss. 2002; also see Johnson v. State, (P39,) (supra); and thereby Watts does not challenge the trial court's authority under section 47-7-33 to suspend the 30 year sentence. Watts' argument is that the trial court violated his state and federal constitutional rights to procedural and fundamental due process of law when the judge indicated the 30 year sentence suspension was contingent upon 7 specific terms and conditions without placing Watts on probation under the supervision of the M.D.O.C. as required by sections 47-7-35-37. see Robinson v. State (P20.) (supra) and Johnson v. State, (P12) Miss. 2006. Watts further alleges that the banishment condition of his 30 year suspension of sentence can only be imposed pursuant to section 47-7-35, condition G; on probation under the supervision of the M.D.O.C. for a period not to exceed 5 years and that thereby the 30 year banishment provision is statutorily unenforceable pursuant to sections 47-7-35 and 37. Watts also alleges that the 30 year banishment provision is cruel and unusual punishment in violation of his constitutional rights under the First, Fifth and Fourteenth Amendments to the U.S. Constitution. see Cobb v. State 437 So. 2d 1218, Miss. 1983; Jenkins v. State, No. 95-CA-013784-SCT, Miss. 1997, (R011) and (R056-57)

Issue One

Whether the trial court committed plain error in violation of the Appellant's constitutional rights to procedural and fundamental due process of law when the trial court judge imposed 7 specific terms and conditions on his 30 year suspended sentence without placing him on probation under the supervision of the M.D.O.C. for a period of time not to exceed 5 years as set out and authorized in sections 47-7-33, -35, and -37.

Argument

The trial court, as clearly shown in the Order of Conviction filed November 29, 2005 (R041-044), failed to indicate a statute of statutory state law authorizing the judge to suspend the 30 year sentence with said suspension contingent upon 7 specific terms and conditions without placing the Appellant on probation under the supervision of the M.D.O.C. for a period of time not to exceed 5 years as required by sections 47-7-33, -35, and 37.

In the case of *Tunstall v. State*, No. 97-CA-00252-SCT, Miss. 1998; the Supreme Court held: "Miss. Code Ann. s.s. 47-7-33, which empowers the circuit court to suspend a sentence, reads: Such court shall have the power, after conviction or a plea of guilty, to suspend the imposition

or execution of sentence and place the defendant on probation as herein provided. In placing any defendant on probation, the court, or judge, shall direct that such defendant be under the supervision of the department of corrections. Miss. Code Ann. S.S. 47-7-33 (1993). *Id.* at HN-1. Also, Miss. Code Ann. S.S. 47-7-35 states, 'the courts referred to in S.S. 47-7-33 shall determine the terms and conditions of probation and may, at any time during the period of probation, alter or modify the conditions.' Miss. Code Ann. S.S. 47-7-35. *Id.* at HN-2. Furthermore, in reference to an arrest for a violation of probation, Miss. Code Ann. S.S. 47-7-37 provides in part: The period of probation shall be fixed by the court, and may at any time be extended or terminated by the court, or judge in vacation. Such period with any extension thereof shall not exceed 5 years. "*Id.* at HN-3.

In *Robinson v. State*, (supra), *Id.* at (P20.), Justice Carlson in his concurring opinion cited *Carter v. State*, 754 So 2d 1207, 1210-11, Miss 2000 where the Supreme Court held: "there is a difference between a 'suspended sentence' and 'probation'". In *Carter*, Justice Mills stated in pertinent part: 'A suspended sentence is a sentence which is given formally following the conviction of a crime, but the defendant is not required to serve the sentence at the time the sentence is imposed. Black's Law Dictionary 1446 (6th ed. 1990) The suspension is conditioned upon the good behavior of the →

defendant. Id at 1363. The trial court does have the power to revoke a suspended sentence, and the defendant is not required to report to any officer if his sentence is suspended. However, if a defendant's sentence is suspended upon specific terms and conditions (as set out and authorized in section 47-7-35) he is given probation and released under the supervision of the M.D.O.C. and a probation officer. The defendant must agree to these terms and conditions of probation and any violation of such terms and conditions will subject the defendant to a revocation of probation."

As shown in the Order of Conviction (R041-44), the trial court unambiguously indicated that the Appellants 30 year sentence had been suspended; "upon his good behavior and compliance with the following: (enumerated conditions A thru G)"; but the trial court made no mention that it had thereby placed Watts on probation under the supervision of the M.D.O.C. for a period of time not to exceed 5 years as set out and authorized in sections 47-7-33, -35, -37; and Watt's was thereby seriously prejudiced by the fact that he was subject to the terms and conditions of probation for the entire 30 year suspended sentence in violation of sections 47-7-35 and 37. These contentions are evidenced by the fact that all 7 of the aforementioned terms and conditions imposed by the trial court are set out and authorized in section →

47-7-35; specifically condition F and condition G. in that these 2 conditions can only be imposed upon defendants placed on probation under the supervision of the M.D.O.C. The condition F contained in the Order of Conviction (R-042) reads in pertinent part: "Submit, as provided in Miss. Code Ann. S.S. 47-5-603 (1972) as amended, to any breath, saliva or urine analysis test" . . .

Pursuant to section 47-5-603 (1972) in pertinent part:
"Any offender on probation or released from a facility of the M.D.O.C. on parole or earned probation who remains under the supervision of the M.D.O.C. or any offender who is incarcerated in the custody of the M.D.O.C. may be required to participate in the M.D.O.C. drug identification program." Therefore the condition F imposed by the trial court only applies to offenders under the supervision of the M.D.O.C.

The condition G contained in the Order of Conviction (R-042) reads in pertinent part: "Depart from Hattiesburg, Ms and remain outside a radius of 100 miles from the Forrest County Courthouse situated in Hattiesburg Ms, for the entire period of his suspended sentence." In Jenkins v State, NO. 95-CA-01374- SCT, Miss. 1997 the Supreme Court cited Cobb v State, 437 So. 2d 1218, Miss 1983 and held: "Under section 47-7-35, the terms and conditions of probation may include a requirement that the defendant (condition G.) 'remain within a specified area.'" We (Supreme Court) →

have held this to authorize a trial court to impose banishment as a condition of probation." Therefore, in light of the Aforeshown statutory state law AND the holdings of the Supreme Court in Jenkins (supra) and Cobb (supra) the Appellant would show his contentions that his constitutional rights to fundamental and procedural due process of law were violated when the trial court judge imposed terms and conditions upon the 30 year suspended sentence, specifically condition G and condition F; without placing Watts on probation under the supervision of the M.D.O.C. for a period of time not to exceed 5 years as required by sections 47-7-33, -35, and -37.

In further support of the Aforeshown contentions, Watts would bring to the Court's attention that in Johnson v. State, (supra) on March 23, 2006 the Supreme Court held:

"Generally, the law distinguishes the suspension of a sentence from probation. While both probation AND the suspension of sentence involve the trial court's discretionary AND conditional release of a convict from the service of a sentence within the penal system, a probationary sentence is served under the supervision of probation officers whereas a straight suspended sentence is served without such supervision. Moreover, a "straight suspended sentence" is not subject to the conglomeration of rules that are →

attached to a sentencing order granting probation." Id. at HN-3. Watt's would again bring to the Court's attention that the Order of Conviction filed November 29, 2005, (R041-044) by the trial court, indicates the 30 year sentence suspension was contingent upon his good behavior 'AND' 7 specific terms and conditions, but the trial court made no mention that it had thereby placed Watts on probation for a period of time not to exceed 5 years as required by sections 47-7-33, 35, and 37.

In *Johnson v. State*, (supra) the Supreme Court concluded its opinion by holding: "Today (March 23, 2006) we return the legislatively intended sentencing discretion to our trial courts by clarifying that (1) Miss. Code Ann. Section 47-7-33 prohibits the imposition of a suspended sentence and supervised probation on a prior convicted felon; however this statute does not prohibit the imposition of a suspended sentence, in whole or in part, upon a prior convicted felon, so long as the sentence does not involve a period of supervised probation and does not exceed the maximum penalty statutorily prescribed for the felony committed; (2) when a suspended sentence and supervised probation are properly imposed upon a first-offender under the provisions of section 47-7-33, the period of supervision by the M.D.O.C. is limited to a maximum period of 5 years." Id. at P39.

Therefore, relying on the aforementioned Supreme Court ruling in Johnson v. State, Watts would show the following conditions unto this Court:

(1) - The trial court was fully aware that Watts had been originally indicted as a Habitual Offender (R0031-32) and that as a previously convicted felon Watts was not eligible for a 30 year "suspended sentence and supervised probation" pursuant to section 47-7-33. Therefore, the trial court fully intended to sentence Watts to a 30 year "straight suspended sentence". These conditions are further evidenced (R041-44) by the fact the trial court never indicated that Watts had been placed on probation for a period of time not to exceed 5 years and Watts was not required to report to the M.D.O.C. and/or a probation officer.

(2) - The trial court committed plain error when the judge indicated that the 30 year sentence suspension was contingent upon Watts' "good behavior" and "specific terms and conditions"; without placing Watts on probation under

the supervision of the M.D.O.C. These conditions are further evidenced by the herein shown fact that a of the conditions contained in the Order of Conviction (condition F+G), can only be imposed as conditions of probation and only apply to offenders under the supervision of the M.D.O.C. for a period of time not to exceed 5 years pursuant to sections 47-7-33, 35

and -37.

Therefore, this Court should find that the trial court committed plain error when the judge imposed 7 specific terms and conditions upon the 30 year "straight suspended sentence" without placing Watts on probation under the supervision of the M.D.O.C. as required by sections 47-7-33, 35, and 37; in violation of the Appellant's constitutional rights to procedural and fundamental due process of law; and thereby said terms and conditions contained in the Order of Conviction should be vacated and in light of the fact Watts is now serving a 30 year sentence for violating the 30 year banishment provision contained in condition G, the 30 year straight suspended sentence should be reinstated and Watts' constitutional rights to his liberty should be restored,

Issue Two

Whether the 30 year banishment provision (condition G) imposed by the trial court in the Order of Conviction (R041-44) is statutorily unenforceable, pursuant to sections 47-7-35 and -37; and is thereby plain error in violation of the Appellant's state and federal constitutional rights to due process of law, a legal sentence and also his liberty in light of the fact (R0045) Watts is now serving a 30 year term of incarceration for violating the 30 year banishment condition.

In *Weaver v. State*, 856 So. 2d 407, Miss. Ct. App. 2003; the court cited *Cobb*, 437 So. 2d at 1221 and held: "Banishment is, of itself, a probationary provision pursuant to section 47-7-35." *Id.* at (P17.)

In *Jenkins v. State*, No. 95-CA-01374-SCT, Miss. 1997; the Supreme Court cited *Cobb* (*supra*) and held: "Under section 47-7-35, the terms and conditions of probation may include a requirement that the defendant (condition G.) 'remain within a specified area.' We (supreme court) have held this to authorize a trial court to impose banishment as a condition of probation." *Id.* at 716

The Supreme Court in *Jenkins* (*supra*) also held: "Pursuant to Miss. Code Ann. state statute 47-7-37, a trial court judge may impose conditions of probation for a period not to exceed 5 years. Miss. Code Ann. S.S. 47-7-37 provides in pertinent part: The period of probation shall be fixed by the court, and at anytime be extended or terminated by the court. Such period, with any extension thereof, shall not exceed 5 years." *Id.* at HN-7.

In *Weaver v. State*, 764 So. 2d 479, Miss. Ct. App. 2000; *Weaver* entered a guilty plea and was sentenced to 20 years with 15 suspended contingent upon a banishment from a 100 mile radius of a particular city in the state. The Court of Appeals reversed and remanded, holding in pertinent part: "A circuit court

could not have imposed a probationary period that exceeded five years, regardless of the length of the period of incarceration that was suspended, pursuant to Miss. Code Ann. S.S. 47-7-37 (1999). "Id. at 764, see overview section.

The Appellant has herein this brief in Issue One demonstrated to this court via the Order of Conviction (R0041-44) and the Petition To Revoke Suspended Sentence (R0045) that he was never placed on probation. Therefore, relying on the aforementioned holdings of Weaver (*supra*) and Jenkins citing Cobb (*supra*), the Appellant would show his contentions unto this Court that the trial court could not impose the banishment provision without placing Watts on probation under the supervision of the M.D.O.C. and to do so was a violation of Watts' state and federal constitutional rights to procedural and fundamental due process of law. Furthermore, these due process constitutional consideration would not have allowed the trial court to revoke the Appellant from probation for violating the terms and conditions of probation without first placing Watts on probation pursuant to section 47-7-37; which reads in pertinent part: (P2.) "At any time 'during the period of probation' the court, or judge in vacation, may issue a warrant for violating any of the conditions of probation or suspension of sentence and cause the probationer to be arrested."

Also, AS UNAMBIGUOUSLY shown in the Order of Conviction (R-041-44), pursuant to condition G, Watts was banished from a 100 mile radius of Hattiesburg, Ms "for the entire period of his suspended sentence" which was 30 years. Therefore, again relying on the holdings of Weaver (supra) and Jenkins (supra) citing Cobb (supra), the Appellant would show unto the court his contentions that the 30 year banishment provision is statutorily unenforceable pursuant to section 47-7-37 in that it exceeds the statutory maximum; and thereby this Court should find that the trial court committed plain error in violation of Watts' constitutional rights to due process of law when the judge acted without statutory authority (pursuant to sections 47-7-33, 35, and 37) when the judge imposed the 30 year banishment provision without placing Watts on probation under the supervision of the M.D.O.C. for a period of time not to exceed 5 years.

In further support of the aforementioned contentions, Watts would bring to this Courts attention that in the case of the Miss. Comm. on Jud. Per. v Russell, 691 so. 2d 929, Miss. 1997, Id at [HN-15], the Supreme Court defined the limits of a circuit court judges Authority by citing Griffin v. State, 556 so. 2d 545, Miss. 1990, where the Supreme Court held: "A trial court can only act as specifically authorized by either the constitution or statute of law. Id at 547."

Issue Three

Whether the 30 year banishment provision contained in the Order of Conviction is in violation of Watts' constitutional rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution.

Argument

The banishment provision contained in the trial court's Order of Conviction, condition G. (R0042), states:

"The defendant shall depart from Hattiesburg, Ms within 48 hours and remain outside a radius or distance of 100 miles from the Forrest County Courthouse situated in Hattiesburg, Mississippi, for the entire (30 years) period of his suspended sentence."

The Appellant would hereby show unto this Court his contentions that the aforeshown 30 year banishment provision is cruel and unusual punishment in violation of his constitutional rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution in that:

(1) - The 30 year banishment provision exceeds his life expectancy. This claim is based on *Stewart v. State*, 372 So.2d

257, Miss. 1997, AND Lee v. State, 322 So. 2d 751, Miss. 1975. In these cases the Supreme Court has held that "in certain situations, a trial court may not sentence a defendant to a term of years which is tantamount to a life sentence." cited in Payton v. State, 845 So. 2d 713, Miss. Ct. App. 2003, Id. at (P25.). In the Appellant's case Watts was 45 years of age when the trial court imposed the 30 year banishment from Hattiesburg, Ms; from Watts' home and birthplace. Considering Watts' age, the 30 year banishment was the equivalent of telling Watts he could never in his life, return to his home and family in Hattiesburg, Ms. In the case of the United States of America v. Mohamad Abushaar, 761 F. 2d 954, 1985, Id. at 959; The Court for the Third Circuit recognized that: "the harshness of banishment or exile was reflected in the fate of Adam and Eve and that some scholars speculate, in primitive societies, banishment was tantamount to death. see, e.g. H. Barnes and N. Teeters, 'New Horizons in Criminology' 294 (3rd ed. 1959)."

(2) - The trial court did not provide any exceptions to the 30 year banishment which would have allowed Watts to return to home in Hattiesburg, Ms; even in the event of sickness or death of; his 79 year old mother; his 8 children; or his 4 grandchildren. In the case of Cobb v. State, (supra), Id. at 1218; Cobb was placed on probation for 5 years conditioned that he "leave Stone County and stay 125 miles away from

the county" but the probation order did permitt Cobb to "go to Stone County to take care of personal reasons [sic]". In the case of *McCreary v. State*, 582 So. 2d 425, Miss. 1991, Id. at 425; *McCreary* was banished from the State of Miss. for a period of 2 years, but the trial court did permitt *McCreary* to re-enter the state for the purpose of exercising his visitation rights with his natural children twice a year. In the Appellant's case, Watts was given 48 hours to leave his life-long home and family, and considering his age, the trial court made no exceptions to the 30 year banishment that would have ever allowed Watts to return home for any reason. Therefore, in light of the Appellant's charge, transfer of a controlled substance, this court should find that the 30 year banishment provision is cruel and unusual punishment, in violation of Watts' constitutional rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution.

Issue Four

Whether the Appellants constitutional rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution were violated when the trial court imposed the 30 year banishment provision without articulating on the record the reasons for and/or benefits of said banishment.

Argument

The Appellant would bring to this Court's attention, as shown in the Order of Conviction (R0042), that the trial court did acknowledge the aforementioned constitutional considerations required before the banishment provision could be legally imposed, but the judge did not and/or could not specify (in the record) the reasons for and benefits of having banished Watts from Hattiesburg, Ms for 30 years.

In the case of *Ms Creay v State* (supra) the Supreme Court cited *Cobb v. State* (supra) and held; "The Court in Cobb satisfied itself from the record that the banishment provision bore a reasonable relationship to the purpose of probation; that the ends of justice and the best interest of the defendant and the public would be served; that public policy was not violated and the rehabilitative purpose of probation was not defeated; and that thereby Cobb's rights under the First, Fifth, and Fourteenth Amendment to the United States Constitution were not violated; Id. at 437 so.2d at 1219-21."

In the case of *Cobb v. State*, (supra); Cobb appealed the condition of his probation that required him to remain 125 miles away from Stone County for a period of five years after he was convicted of aggravated assault on his nephew; Id. at

1218. The Supreme Court agreed with the trial court judge that given Cobb's uncontrollable temper and the nature of the crime, the ends of justice and the best interest of the public would be served through a period of banishment. Because the trial court judge made an on the record findings of the benefits of the banishment provision, the Supreme Court held that the banishment was reasonable and did not violate public policy or judicial authority. Id. at 1219-20.

Also in the case of *Ms CREARY v. State* (supra), the Supreme Court cited *United States of America v Abushaar* (supra), and held: "Banishment from a large geographical area, especially outside of the state, struggles to serve any rehabilitative purpose, and implicates serious public policy questions against the dumping of convicts on another jurisdiction." Id. at 427-28. The Supreme Court determined that the banishment provision imposed in the sentence failed to serve any rehabilitative purpose and implicated grave public policy questions against the dumping of convicts on another jurisdiction. The Court reversed the judgment of the trial court and remanded the case for proceedings not inconsistent with its opinion. Id. at 528 so. 2d 425 at 428.

Watts would point out that while the banishment provision did not specifically require him to leave the state, the requirement that he remain outside a 100 mile radius of Hattiesburg, Ms could have easily caused him to have to reside in Ala. or La.

IN the case of *Weaver v. State*, 764 so. 2d 479, Miss. Ct. App. 2000; *Weaver* entered a plea of guilty and the sentence he received included a 15 year suspended sentence which was suspended contingent upon a provision of banishment from a 100 mile radius of Houston, Ms for the entire period of the suspended sentence; *Id.* at 481, (P10.). The Court of Appeals reversed and remanded, holding in pertinent part; "In order for the instant case (*Weaver*) to fall directly within the scope of the Miss. Supreme Court's decision in *Cobb*, (*supra*), the benefits of *Weaver's* banishment must be established and on the record." *Id.* at 480-81, (P8.)

IN the case of *Willis v. State*, 904 so. 2d 200, Miss. Ct. App. 2005, this Court held; "The trial court's sentencing order stated that *Willis* was not allowed to reside in Marion County. At no point did the trial court state any reason for reaching this decision. In *Cobb v. State*, 437 so. 2d 1218, Miss. 1983, the banishment provision was upheld because the trial court made an on-the-record finding of the benefits of banishing *Cobb* from a particular area. However, in *Weaver v. State*, 764 so. 2d 479 (P8.) Miss. Ct. App. 2000, this Court reversed and remanded for the trial court to articulate on the record the benefits of *Weaver's* banishment. As the trial court in the case at bar (*Willis*) did not articulate any reason or benefit for banishing *Willis* from Marion County, we reverse and remand for the trial court to do so." *Id.* at (P7.)

In the Appellant's case, as clearly shown in the Order of Conviction (R0041-44), the trial court failed to articulate any reason and/or benefit of the imposition of the 30 year banishment provision. In light of the nature of Watts' crime (transportation of a controlled substance), Watts would show unto this Court his contentions that the 30 year banishment had no benefits and was imposed only as a form of punishment and to remove him from the trial court's jurisdiction with no regards to grave public policy questions against the dumping of convicts on another jurisdiction. Furthermore, at the time (Nov. 29, 2005) the trial court imposed the 30 year banishment provision, (R0041-44), the judge was fully aware of the shortage of available housing throughout a 100 mile radius of Hattiesburg, MS caused by Hurricane Katrina, and these contentions are evidenced by the Affidavits of Watts' family members (R047-49 and R050-52) attached to Watts' Motion For Post Conviction Relief.

Therefore, this Court should find, as the Supreme Court did in *McCree v. State*, 582 So. 2d 435, Miss. 1991, Id at 427-28, that: "In considering the overall sentence, and the banishment provision in particular, we direct the circuit courts' attention to the considerations just noted (at Id. 427) and to our view that banishment from a large geographical area struggles to serve any rehabilitative purpose, and implicates serious public policy questions against the →

dumping of convicts on another jurisdiction. See U.S. v. Abushaar (supra); Rutherford v Blankenship, 468 F. Supp. 1357, 1360-61 (W.D. VA. 1979)."; and thereby this court should also find that the 30 year banishment provision contained in the Order of Conviction is in violation of Watts' constitutional rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution and that said banishment should be vacated.

At the very least, based upon the holdings of Cobb (supra) and Weaver (supra), this court should do as it did in Willis (supra) and reverse and remand this case for the trial court to articulate on the record the reasons and benefits of banishing Watts from his home and family for the rest of his life for committing the crime of transfer of a controlled substance.

Issue Five.

Whether Judge Robert B. Helfreich violated sections 47-7-33, -35 and -37; section 177A of the Mississippi State Constitution (1890 as amended); Canons 1, 2, 2A, 2B and 3A (1) of the Code of Judicial Conduct of Miss. Judges; and the Appellant's constitutional rights to procedural and fundamental due process of law; and thereby had no judicial authority to alter or amend his original sentence.

Argument

The Appellant would show unto this Court his contentions that his constitutional rights to procedural and fundamental due process of law were violated when the trial court judge failed, in the Order of Conviction (R041-44), to indicate what statute of statutory law the judge was exercising his authority under and that thereby the Appellant has been seriously prejudiced in that Watts has had great difficulty in determining if he had any grounds to pursue a claim for post conviction relief. Furthermore, the aforementioned actions of the judge and the herein shown contentions that the judge acted without statutory authority pursuant to sections 47-7-33, -35, and -37; when he imposed 7 specific terms and conditions, including a 30 year banishment provision, upon a suspended sentence without placing Watts on probation under the supervision of the M. D. O. C. for a period of time not to exceed 5 years. Therefore, the trial court failed by any statutory law and/or any statutorily authorized procedure to retain jurisdiction to alter or amend its original sentence after the end of the term of court which the sentence was given.

The Appellant would bring to the Court's attention in the case of the Miss. Comm. on Jud. Per. v. Russell, 691 So. 2d 929, Miss. 1997, the Miss. Supreme Court defined the limits of a circuit court judges authority by citing Griffin v. State, 556 So. 2d 545, Miss. 1990, where the Supreme Court held; "A trial court can only act as specifically authorized by either the →

constitution or statute. *Id.* at 547. "*Id.* in *Russell* at [HN-15]. In the case of *Temple v State*, 671 So. 2d 58, Miss 1996, the Supreme Court held; "that [HN-1] every decree is in the breast of the court until entered, and a decree has no validity until written out and signed by the chancellor. *ORR v. MYERS*, 223 Miss. 356, 79 So. 2d 277, 278, (Miss 1955) citing *V. Griffith's Mississippi Chancery Practice*, Section 621. Also see *BANKS v. BANKS*, 511 So. 2d 933, 934-35 (Miss. 1987) (quoting *JACKSON v. SCHWARTZ*, 240 So. 2d 60, 61-62 Miss. 1970.) Based on these cases, we hold that [HN-3] in order for a sentence to be valid, a judgement must be entered as of record. This marks formal evidence of a judgement's rendition which is necessary for its execution or appeal." *Id.* at 59.

Therefore, based upon the aforeshown Supreme Court holdings the Appellant would show his contentions unto this Court that in his case: "The trial court could only act as authorized by statutory law" (*Russell supra*) and that "in order for a sentence to be valid it must be written out" (*Temple supra*). Even though the Court in *Temple* was referring to the judgement itself, the Appellant would thereby (*Temple*) argue that the same due process of law constitutional considerations apply to his case in that the trial court "failed to offer formal evidence of what statutory law it was proceeding under necessary for the execution or appeal of the sentence." (*Temple supra*). Wherefore this Court should find that the trial court violated Watts' constitutional rights to due process of law →

when the judge failed to indicate in the Order of Conviction what statutory law provided him with the authority to suspend the 30 year sentence with said suspension contingent upon 7 specific terms and conditions, without placing Watts on probation under the supervision of the M.D.O.C. for a period of time not to exceed 5 years.

The Appellant has herein this brief demonstrated to this court that the banishment provision can only be imposed as a condition of probation pursuant to section 47-7-35 (condition G) for a period of time not to exceed 5 years pursuant to section 47-7-37; see Cobb, Weaver, Jenkins and Willis (supra). Therefore, the Honorable Judge Robert B. Helfrich knew or should have known he was acting without statutory authority when he imposed a 30 year banishment provision as a condition of Watts 30 year "straight suspended sentence". Furthermore, the trial court judge knew or should have known that he was exceeding the judicial authority conferred upon him as a circuit court judge when he revoked Watts' 30 year "straight suspended sentence" for violating a condition that could only be imposed as a condition of probation (pursuant to section 47-7-35, condition G.); without ever placing Watts on probation, in that pursuant to section 47-7-37 in pertinent part: (P2.) - "At any time 'during the period of probation' the court, or judge in vacation, may issue a warrant for violating 'any of the conditions of probation' or suspension of sentence and cause the probationer to be arrested."

The Miss. Commission on Judicial Performance has repeatedly publicly reprimanded and/or fined circuit court judges for violating section 177A of the Miss. State Constitution (1890 AS Amended) and the Code of Judicial Conduct of Miss. Judges when they improperly applied statutes of state law without statutory authority.

In the case of the Miss. Comm. on Jud. Per. v Byers, (p 23-31), 757, so. 2d 961, Miss. 2000; Judge Byers admitted that she had improperly applied sections 47-7-37 and 47-7-47 without statutory authority. The Commission concluded that her actions violated sections 47-7-37 and 47-7-47 and that this was sufficient conduct to constitute willful misconduct as to canons 1, 2, 2A, 2B, and 3A(1) of the Code of Judicial Conduct of Miss. Judges.

In the case of the Miss. Comm. on Jud. Per. v. Sanders, (p 27-29), 708 so. 2d 866, Miss. 1998; Judge Sanders stated she knowingly suspended the sentence of a 3 time previously convicted felon. This conduct was clearly prohibited (at that time) by two statutes of state law; sections 47-7-33 and 47-7-47. The Commission concluded that Judge Sanders had violated canons 1, 2, 2A, 2B and 3A(1) of the Code of Judicial Conduct of Miss. Judges.

In the case of the Miss. Comm. on Jud. Per. v. Russell, 691 So. 2d 929, Miss Sup. Ct. 1997; Judge Russell was charged with committing judicial misconduct in violation of section 177A of the Miss. State Constitution (1890 as amended). The charges against Judge Russell stemmed from his violation of section 47-7-47 when he acted without statutory authority and suspended the sentences of four (4) defendants and placed such defendants on probation when he had no statutory authority to do so.

In the Appellants' case, as herein clearly shown, Judge Helfrich violated sections 47-7-33, -35, and -37 when he imposed seven (7) specific terms and conditions upon Watts' "straight suspended sentence" without placing Watts on probation. Even if Judge Helfrich had placed Watts on probation, the thirty (30) year banishment provision is still statutorily unenforceable in that it exceeds the statutory maximum of 5 years pursuant to sections 47-7-35 and -37. Also Judge Helfrich completely dis-regarded Watts' constitutional rights under the First, Fifth, and Fourteenth Amendments to the U.S. Constitution when he ordered Watts to leave Hattiesburg, Ms within 48 hours with no exceptions to (considering his age) ever return for any reason and also when Judge Helfrich failed to articulate on the record (R0041-44) any reason or benefit of banishing Watts from his home and family for the rest of his life for committing the crime of Transfer of Controlled Substance.

Furthermore, as shown in the Order of Conviction (R041-44), Judge Helfrich "failed to offer formal evidence of what statutory law he was proceeding under necessary for the execution or appeal of the sentence." see Temple (supra). Watts would thereby argue that he has a constitutional right to know by what due process of statutory law he was sentenced under and also by what statutory law and procedure authorized Judge Helfrich to retain judicial jurisdiction to alter or amend his original sentence by holding a hearing on a Petition For Revocation of Suspended Sentence (R0045) for violating a condition (banishment) that could only be imposed as a condition of probation (condition G, 47-7.35), when no period of probation had ever been established.

In the case of the Miss. Comm. on Jud. Per. v. Russell (supra) the Miss. Supreme Court defined the limits of a circuit court judge's authority by citing Griffin v. State, 556 So. 2d 545, Miss. Sup. Ct. 1990, where the Supreme Court held: "A trial court can only act as specifically authorized by either the constitution or statute of law. Id. at 547. Although, the court recognized that 'there has been a vast expansion by statutory enactment of the times within which circuit court judges are lawfully empowered to conduct court affairs' the Supreme Court has held 'the passage of the next term of court deprived the circuit court judge of any further authority to reinstate the convictions' Id at 550." Id at [HN-15], Russell (supra).

Also in *Russell* (supra) the Supreme Court held: "In light of our precedent, *Aeroglide Corp. v Whitehead*, 433 So. 2d 952, Miss 1983, there is no indication that circuit court judges have inherent authority to alter sentences after the end of the term of court during which the sentence was given." Id at 945 in *Russell* (supra)

In the case of the Miss. Comm. on Jud. Per. v Sanders, (supra), the Miss. Supreme Court held: "When a criminal case has been completed and the term of court ends, unless the circuit court has deferred sentence, or placed the defendant upon a suspended sentence as authorized by statute, the power of the circuit court to alter or amend its sentence is terminated." Id. at LHN-127.

Therefore, this Court should find that Judge Helfrich violated section 177A of the Miss. State Constitution (1890 as amended); Canon 1, 2, 2A, 2B, and 3A(1) of the Code of Judicial Conduct of Miss. Judges; Sections 47-7-33, -35, and -37; and the Appellant's constitutional rights to fundamental and procedural due process of law; when Judge Helfrich acted without statutory authority and imposed a thirty (30) year banishment provision upon Watts' suspended sentence without placing him on probation and that thereby, Judge Helfrich failed to follow the statutorily authorized procedure mandated by the legislature in section 47-7-37 as being necessary for Judge Helfrich to retain any (statutorily authorized) jurisdiction to alter or amend his original sentence after that term of court had ended; and thereby this Court should also find →

that Watts is now being denied his constitutional rights to his liberty without due process of statutory law, as guaranteed by the United States Constitution as well as the Miss. State Constitution.

Conclusion

The Appellant prays this Honorable Court will correct the the trial court's herein shown constitutional and statutory law violations of imposing seven (7) specific terms and conditions of probation, including a 30 year banishment provision, upon Watts' suspended sentence without placing Watts on probation under the supervision of the M.D.D.C. for a period of time not to exceed 5 years by vacating said seven (7) terms and conditions and restoring Watts' constitutional rights to his liberty by fulfilling the trial court's original intentions by re-sentencing Watts to a 30 year "straight suspended sentence"; or remand this case to the Forrest County Circuit Court for proceedings consistent with the opinion of this Honorable Court as justice so requires pursuant to the statutory laws of Mississippi and the Constitution of the United States. Respectfully Submitted by:

Carl Watts

CARL D. WATTS #18202

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1420 Ind. Pk. Rd.

Wiggins, Ms 39577

Certificate of Service

CARL D. Watts, the undersigned pro-se Appellant, hereby certifies that he has this day mailed via the U.S. Postal Service, First Class postage prepaid, a true and correct copy of this "Brief For Appellant" to the following:

Hon. Robert B. Helfrich
Circuit Court Judge, Forrest County
P.O. Box 309
Hattiesburg, Ms 39301

Hon. Jim Hood
State Attorney General
P.O. Box 220
Jackson, Ms 39205

Hon. Jon Mark Weathers
Forrest Co. Dist. Att.
P.O. Box 166
Hattiesburg, Ms 39205

This the 17 day of September, 2007.

Carl Watts
CARL D. Watts, #18202
C-Zone, S.C.R.C.F.
1420 Ind. Park Rd.
Wiggins, Ms 39577

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