IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BRIAN SNEED — **APPELLANT**

VS. — **NO. 2007-CP-0840**

STATE OF MISSISSIPPI — **APPELLEE**

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BRIAN SNEED **APPELLANT**

vs. **CAUSE No. 2007-CP-00840-COA**

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 Quitman County, Mississippi in which relief was denied on the prisoner's motion in post - conviction relief.

STATEMENT OF FACTS

By motion dated 28 September 2006, the prisoner sought to have his habitual offender sentence set aside. In his motion, he alleged that he had been convicted on 9 March 2005 of the felony of "burglary of a building," and sentenced to seven years imprisonment as an habitual offender.

The grounds asserted in his motion were that the indictment exhibited against him was allegedly fatally defective for having failed to set out the convictions upon which habitual offender sentencing would be predicated, that the State failed in its burden of proof concerning

those prior convictions, and, of course, a claim that the defense attorney was ineffective. (R. Vol. 1, pp. 6 - 8).

The Circuit Court considered the prisoner's motion, and, by Order filed 14 April 2007, denied relief on that motion without an evidentiary hearing. In this Order, the court found that the indictment exhibited against the prisoner had been amended on motion by the State to allege habitual offender status as well as the prior convictions the State intended to prove to show that status. The court further quoted certain parts of the plea colloquy in which the prisoner admitted his prior convictions. The prisoner further admitted that he understood that effect of those admissions. The State further proved the prior convictions. The court then went on to address the prisoner's points of law. (R. Vol. 1, pp. 22 - 35). As night follows day, this appeal has followed.

STATEMENT OF ISSUES

1. DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING?

SUMMARY OF ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

The prisoner asserts that he was not noticed of the State's motion to amend the indictment against him so as to provide for sentencing as an habitual offender. He further asserts that the motion was defective because it did not set out the prior convictions upon which the State

intended to rely in establishing the prisoner's habitual offender status. Amusingly, while the prisoner admits that there was an exhibit attached to the State's motion to amend which did indeed set out the prior convictions, he asserts that the exhibit was a fraudulent document.

The Circuit Court, in a very thorough discussion of these issues, set out the facts concerning the amendment. (R. Vol. 1, pp. 22 - 35). We adopt it here.

The fact of the matter is that the motion to amend the indictment did state in an exhibit which prior convictions the State intended to use in support of habitual offender sentencing. There is no rule that we know of to the effect that it was improper to attach an exhibit. Nor is there any rule to our knowledge that the motion was required to be served upon the prisoner, rather than his attorney.

The prisoner cites *Troupe v. State*, 922 So.2d 845 (Miss. Ct. App. 2006). There, among other things, the Court, noting Rule 7.09 URCCC, held that indictments may be amended on motion of the State to allege habitual offender status. It further held that the rule does not require that the accused know that he will be so indicted. The rule requires only that the accused be granted a fair opportunity to present a defense and that he not be unfairly surprised. *Id.* at 846.

In the case at bar, the prisoner does not trouble himself to tell the Court what defense he might have had to sentencing as an habitual offender. This is perhaps not surprising given the fact that the prisoner entered a guilty plea. As pointed out by the trial court in its Order denying relief on the prisoner's motion in post - conviction relief, the prisoner admitted the existence of six prior felony convictions in his petition to enter a plea of guilty. The prisoner further admitted in the plea colloquy that he knew that the court had amended the indictment and knew the consequences of that amendment. The prisoner then stipulated the existence of the convictions used by the State to support sentencing as an habitual offender. (R. Vol. 1, pp. 25 - 28; 31 - 32).

The fact is that the prisoner had no defense to make with respect to his status as an habitual offender.

There is no indication that the prisoner was "unfairly surprised," as noted by the Circuit Court in its Order. The prisoner does not trouble himself to suggest how or in what way he might have been unfairly surprised. The prisoner had a fair opportunity to raise such defenses as he had at the plea colloquy, just at the prisoner in *Troupe* did.

The prisoner claims here that the petition to enter a guilty plea did not inform him that he would be sentenced as an habitual offender. The petition itself is not a part of this record; the prisoner's claim is thus unsupported and is for that reason to be ignored. *Mason v. State*, 440 So.2d 318 (Miss. 1983). In any event, what is clear from the part of the plea colloquy quoted by the Circuit Court is that the prisoner certainly was aware of the possibility at the plea colloquy. He was also informed of the possibility of such sentencing by the Circuit Court.

The prisoner claims that Rule 2.06 URCCC required the State to serve the motion to amend or the amended indictment on the prisoner personally. That rule does not require that. While the rule does require the initial indictment to be personally served on an accused, it does not require motions or amendments to pleadings to be so served, unless ordered by the court. Service of subsequent pleadings and motions are to be made upon the attorney for the accused, if one he has. Here, the prisoner was represented. Neither the motion to amend the indictment nor the amended indictment were required to be served on the prisoner. Those were not initial pleadings.

As for the second issue raised by the prisoner – that being that the exhibit was a "fraudulent document" – that claim is ludicrous. Even more so when the Court recalls that the prisoner admitted the allegations of this supposedly "fraudulent document." In any event, the

prisoner points to nothing that would excite the least suspicion that the exhibit was "fraudulent." The phrase "continuation of indictment against the defendant" (R. Vol.1, pg. 38) did not suggest nor was intended to suggest that the prosecutors returned to the grand jury and got the grand jury to amend the indictment. It is quite plain that the trial court amended the indictment, not the grand jury. There was, of course, no error in the trial court's action in amending the indictment.

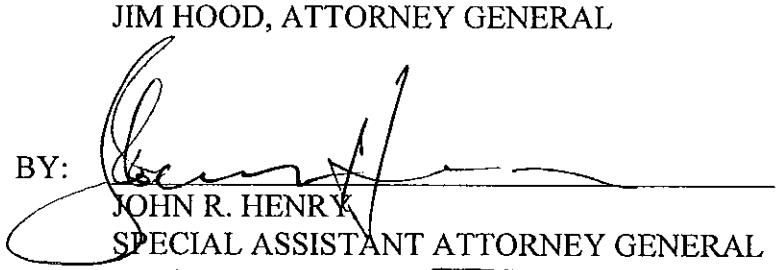
A Circuit Court may deny relief on a motion in post - conviction relief without an evidentiary hearing where in plainly appears from the motion, exhibits and prior proceedings that the prisoner is not entitled to relief. Miss. Code Ann. Section 99-39-11(2) (Rev. 2007). The Circuit Court thoroughly considered the prisoner's claims; its finding that he was entitled to no relief is well supported.

CONCLUSION

The Order denying relief on the prisoner's motion in post - conviction relief should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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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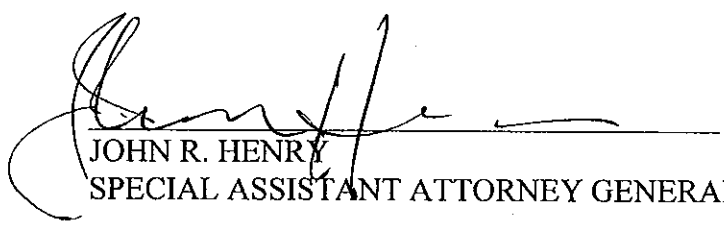
This the 11th day of October, 2007.



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