In The Mississippi State Court of Appears Opy

Patrick Fluker (Pro-Se)#101069
Appellant

V

State of Mississippi

Appellee

FILED

FEB 27 2008

OFFICE OF THE CLERK SUPREME COURT COURT OF APPEALS

Cause No. 2007- CP-01068- COA

Brief of Appellant
Appeal from the Circuit Court of Forrest Co., Mississippi

Request for appointment of counsel. (Halbert V. Michigan 125 s.ct. 2585(2005). Request Oral Argument Request Evidentiary Heuring

Filed This 20th Day of Feb 2008.

Filed by: Pro-Se

Patrick Fluker # 101069

S.M.C.I. II, B-1, A-Zone # 80

P.O. Box 1419

Leakesville, MS 39451

In The Mississippi State Court of Appeals

Patrick Fluker

State of Mississippi

Petitioner

Cause No. 2007- CP- 01068-COA

<u>Respondent</u>

Certificate of Intrested Persons

The undersigned appellant of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this court may evaluate possible disqualifications or recusals.

- 1.) Appellant Pro-Se Patrick Fluker
- 2) Hon. Bob Helfrich of Forrest Co., Presiding Judge
- 3) Hon. Jim Hood, Attorney Gren. of Mississippi:

Filed This Day of Feb 2008

Filed by: Pro-Se
Patrick Fluker #101069
S.m.c.I. II, B-1, A-Zone#80
P.O. Box 1419
Leakesville, Ms 39451

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Cited Case/aw:	
Goss v. State 721 So. 2d 144 (Miss. 1998.)	2
Halbert V. Michigan 125 S.Ct. 2585 (2005)	
Johnson V. State 925 So. 2d. 86 (Miss 2006.)	
Cited Statue:	
All cited statue derive from Miss Code Ann:	
399-39-5 (1)(d)	v <i>i</i>
§ 99-39-5 (1) (9)	vi
§ 97-5-1 (d)	vi
§ 97-3-79	vì
\$ 97-3-75	4.
\$ 97-3-73	vi, vii, 4
§ 47-7-138	 2.
§ 47-1-33	2 .
§ 47-7-34	2,3,4,5.
\$ 47-7-35	_ a.
·	

Identity of Proceedings below:

- 11.) Patrick Fluker ("Fluker") Files the instant appeal of his P. C. R. through the assistance of a jailhouse "writ-writer". Fluker was indicted for Armed Robbery (M.C.A. \$97-3-79) but entered a plea of guilty to a lesser Robbery count under (M.C.A.\$97-3-73) on or about 12-17-2003 before the Hon: Bob Helfrich who imposed a 15 year sentence, three (3) to serve, twelve (12) suspended, and four (4) years Post-Release Supervision (P.R.S.) Sentence.
- ¶12.) Fluker Completed his three (3) year sentence, released on Earned Release Supervision ("E.R.S.") subsequently put on Supervised Post-Release Supervision which was violated on or about 5-4-2005 for being arrested on an Armed Robbery Charge (ibid.) and possession of a firearm (violating (M.C.A. 397-5-1). A preleminary hearing was held on 6-23-2005 where the lower Court revoked the supervised P.R.S. and re-instated the twelve (12) suspended years which Fluker now serves. Fluker also received a twenty (20) year Consecutive sentence for the new Armed Robbery (not at issue here). ¶3.) Fluker instited a Post-Conviction Relief, on or about 6-05-2006 How: Bor Helfrich denied it (see CP 41-45) which Fluker now appeals seeking relief on the basis that he was illegally put on P.R.S. and subsequently revoked under (M.C.A. \$99-39-5 (1)(9)) as the sentence was illegally revoked under (M.C.A. \$99-39-5 (1)(0)).

State of Mississippi)
) Affidavit of Patrick Fluker stating facts that
) was within his Knowledge
County of Greene)

I, Patrick Fluker hereby swear under the penalty of perjury that the below foregoing statement is true and correct.

- 974.) Fluker was initially charged under Armed Robbery but pled guilty to a lesser count of Robbery under (M.C.A. § 97-3-73).
- 915.) Fluker was sentenced to fifteen (15) years, three(3) to serve in M.D.O.C., twelve (12) years suspended, all with four (4) years of P.R.S. and he was aware the maximum time allowed was fifteen years.
- 976.) Fluker served three(3) years in M.D.O.C. released under (M.C.A. 3 47-7-138) "Earned Release Supervision", once done with that was placed under Post-Release Supervision under the auspice of M.D.O.C. Officer Stan Canoy.
- ¶17.) On or about 6-23-05 Mr. Canoy violated the P.R.S. contract when Fluker caught an Armed Robbery charge, Fluker had his twelve (12) suspended years revoked and re-instated while receiving an additional consecutive term for the new Armed Robbery.
- 918.) Fluker now serves twelve (12) years in addition to the original three (3) years and time spent on Post-Release Supervision.

State of Mississippi)

Affidavit of Patrick Fluker stating facts that

were not within his knowledge

County of Greene)

I, Patrick Fluker hereby swear under the penalty of perjury that the

below foregoing statement is true and correct.

- ¶9.) Fluker was unaware that the P.R.S. time must be calculated towards and along with any other sentencing combination to avoid being sentenced over the statutory maximum of fifteen (15) years.
- 910.) Fluker was unaware that the trial judge exhausted the maximum term cap by simply sentencing Fluker to three(3) years to serve with twelve (12) years suspended.
- 911) Fluker was unaware that his sentence was over the maximum allowed for Robbery by four (4) years, the exact time sentenced to P.R.S. thus being illegal to place him on P.R.S. and subsequently revoke it.
- 113.) Fluker does not know why he was sentenced in like manner by the trial judge nor does he know why he was placed on and had his P.R.S. revoked if serving that portion of his sentence was illegally imposed.

913.) I.) Distinguished from Johnson V. State) was Flutus of 128.5. illegally inibated and revolted as an illegal sentence the moder the Johnson court ? Also, did the Johnson court? Also, did sepplication with a new case basis review by over-tuling (2005)?

Statement of Issues

I.) Past - Johnson

97 14) The Miss Supreme Court decided (Johnson V. State) - which served to overrule (Gross V. State) and clear up various discrepencies between (M.C.A. \$47-7-33; 34; 35; 37,) and crediting sentence combinations for culculation towards the maximum allowed on any given crime, portions as:

a.) Time to be served within M.D.O.C.;
b.) Portions that are suspended; and not to be used interchangely
with suspended sentences or between each other;

C.) Non-Supervised Probation, or Post-Release Supervision, ("P.R.S.");

d.) Supervised Probation, or Post-Release Supervision under the auspice of M.DO.C.

¶ 15.) The practical effect of the finding was centered around the problem that the Supreme Court found this court to have errored in modify (Johnsons) sentence of fifteen (15) years, seven (7) to serve in M.D.O.C., eight (8) suspended with fivels) years 9. R.S. only because the trial court interobed that the fivels) years P.R.S. derive from the eight (8) suspended years and not be stacked atop it. Also clarifying which sentencing combinations can be imposed on defendants with or without prior convictions in returning discression, "Moreover our appellate courts should recognize the intentions of our trial judges when they suspend a sentence and either impose probation under [\$33], or [P.R.S.] under [\$34.]" 3 the intention of the trial court was critical, in effect the (Johnson) court replaces the old Mechinistic rule under (Goss supra) and gives the illegal sentence determination middle ground by instituting a case by case basis review (emphasis actual) 9/16) Now reviewing the case subjudice Flukers trial judges intention and sentence combination are diametrically different from (Johnsons) which

is as follows: 1.) "[Fluker] is sentenced to serve a term of fifteen (15) years "(see CP 32

9/2.)

^{1.) 925} So. 24. 86 (Miss 2006.)

^{2) 721} So. 2d 144 (Miss. 1998)

^{3.)} Johnson Supra @ 925 So. 2d. 102-3 (p.31)

- 2)" [Fluker] is to serve three (3) years of said [15 years] sentence" In M.D.O.C. under M.C.A. \$ 47-7-138 (See Cp 33 at top.)
- 3.) "[T]he remaining twelve (12) years of the fifteen (15) year sentence be and the same are hereby suspended" under \$34 (see ibid)

917) Fluker served out the three (3) years, released and put on Earned Release Superusion under \$138, following completion of that, placed under supervision of M.D.O.C. P.R.S. Officer Stan Canony which was subsequently revoked (see Record exceppt pg A) and the (12) suspended years was re-instated now being served (see Rec. exceppt B), Distinguished from the (Johnson) court, the trial judge in the case at bar intended that the P.R.S. be supervised and stacked on top or in addition to the three (3) and (12) years respectively. This court may find a significant need to depart and distinguish cases where the total sentence is actually imposed as opposed to when they are not.

Unringing the Bell

9 18) Although the (Johnson supra) sought to eleminate the benificial sentence called by many "Illegal" by substituting whatever time given that spilled over the maximum allowed statutory cap from supervised to unsupervised, the same cannot be said for theker because unlike that first class he falls into a second where the bell has been rung, he is serving the full (15) years and has ... already ... been taxed by M.D.O.C. in the P.R.S. program (paying monthly fees, uranaloysis test ect.) which continued it's jurisdiction over him, during the four (4) year period.

The bell cannot be unrung.

Post-Release Supervision

1919.) Finally the main point, the trial court sentenced Fluker pursuant to (M.C.A.\$47-7-34) stacking each sentencing component atop each other, in

interpring \$34 The (Johnson supra) court edicted that the courts under take to calculate, that is a.) Total years of incurceration, and; b.)
The period of P.R.S. 4 Adding them together in order to determine in each case whether the individual was illegally sentenced, if the total of the two do not exceed the statutory maximum then the lower court acted within it's authority and purisdiction, However, the sentence is illegal if it exceeds the statutory maximum cap.

90.) Following those directions Fluker adds the three(3) years initially served with the (12) years now imposed for part "a". Totaling (15) years, adding that to the ... , superused ... P.R.S. of (4) years for part "b." the total is (19) years. However, under (M.C.A. 397-3-73) Rubbery (see CP 32.) the maximum penalty is (15) years under (M.C.A \$97-3-75) and not life as the lower court stated. Here after adding the two parts we find that the (19) years exceeds the (15) year statutorily allowed by (4) years, the exact amount of time the P.R.S. was set for. That time cannot be magically converted into time that does not count, the conclusion being that as it stands when Fluker finishes the instant sentence he will have served beyond (15) years under the direct supervision of M.D.O.C. which is above and beyond the statutory Maximum and against the (Johnson supra) holding that "the period of [P.R.S.] Is limited only to the numbers of years, which when added to the total period of incanceration, would not exceed the maximum penalty statutority prescribed for the felony offense committed "5 and since it occurred exactly that way by the exact time of P.R.S. it was illegal to initially place Fluter on superused P.P.S. and by that end it was illegal to subsequently revoke the P.R.S. and re-instate the (12) years. Fluker argues that since the placement and revocation was illegal

^{4.)} Johnson supra @ 925. So. 2d 105 (P, 39 93.)

^{5.).}Ibid.

Hhis court should terminate the (12) years sentence at the time it was revoked on or about 6-23-2005 and render it moot while transfering the time served since 2005 to date to the consecutively imposed Armed Robbery conviction and sentence that served as the basis of the revocation of P.R.S. Because to refuse to do so will constitute an illegal sentence where Fluker will have served more than (15) years under M.D.O.C. Jurisdiction.

7121.) The last question which must come up as a result of (Johnson supra) if this court hesitated to grant the relief asked, is how does the court resolve the question of an inmate facing the danger of serving time above and beyond the statutorily maximum where the \$34 calculations are violated. The only other answer Fluker sees is that the courts would have to credit, towards the sentence, all time served under P.R.S. which is spent on the street, so if the trial court maxes out the statutory maximum cap in the combinations of time to serve and suspended sentence alone, as was done here, 3 years and 12 years, then to avoid the danger of serving above the maximum with supervised P.R.S. (as is hoppening here, being illegal exceeding the max) time when given, the time served on the streets under superused P.R.S. will have to actually reduce the suspended time or rather be given credit for it so in the imposed event the suspended time is revoked the sentence can be time ted but must substract the P.P.S. time so that in the end the only time under direct superision of M.D.O.C. meets the statutory maximum allowed but will not exceed it.

Relief

1922) Fluker prays that this court Nunic pro tunic terminate the instant sentence in 6-23-05 and credit the time toward his consecutive unserved sentence.

Respectfully:

DATE 1 20 1 # 1000

Certificate of Service

I, Patrick Fluker hereby swear that I have delivered a true and correct copy of the foregoing Writ of Post-Conviction Relief appeal to the below parties via pre-paid postage by the United States mail by delivering the instant writ to Prison Authorities on the undersigned date.

1.) Betty W. Sephtun Clerk of the Court P.O. Box 249 Tackson, MS 39205

2.) Jim Hood
Altorney General
P.O. Box 220
Jackson, MS 37205

Filed This Day of Feb. 2008.

Filed by Pro-Se
Patrick Fluker # 101069
S.M.C.I. II, B-1, A-Zone#80
P.O. Box 1419
Leakesville, MS 39451

K

In The Mississippi State Court of Appeals

Patrick Fluker (Pro-Se)#101069

Appellate

V.
State of Mississippi

Appellee

Cause No. 2007-CP-01068-COA

Appellants Exhibit Excerpts
Appeal From the Circuit Court of Forcest County, Mississippi

Filed This Day of Feb. 2008.

Filed by: (Pro-Se)

Patrick Fluker #101069

S.M.C.I. II, B-1, A-Zone #80

P.O. Box 1419

Leukesville, MS 39451

8) Fluters M.D.O.C. Time-Sheet Reflecting Time 3. A.) Order Revolung J.R.S. and M.D.O.C. Affirmance __ 3.

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IN THE CIRCUIT COURT OF	FORREST COUNTY, MISSISSIPPI
IN VACATION	ON TERM, 2005 FILED
· ·	FILED
STATE OF MISSISSIPPI	iliNi 9 o 2005
VS.	JUN 2 3 2005 _{AUSE NO. 03-481CR}
	FORREST COUNTY CIRCUIT CLERK
ADDED DEVOVINC	OST RELEASE SUPERVISION
OKDEK KEVOKING I	OSI RELEASE SUI ERVISION
THIS CAUSE CAME ON FOR HEARING THIS	DAY ON PETITION TO REVOKE POST RELEASE
SUPERVISION AND IMPOSE SUSPENDED SENTENCE	CE ON DEFENDANT AND THE
COURT HAVING HEARD THE PETITION, FINDS AS	FOLLOWS: Patrick Dantre Flucker
THAT BY ORDER DATED December 17, 2	SAID DEFENDANT WAS SENTENCED TO SERVE A
TERM OF Fifteen (15) YEAR (S) IN CUSTODY OF THI	STATE DEPARTMENT OF CORRECTIONS, AND THE COURT
SUSPENDED THE IMPOSITION OF Twelve (12) YI	ARS OF SAID SENTENCE PENDING THE DEFENDANT'S GOOI
BEHAVIOR AND THE DEFENDANT WAS PLACED (ON Four (4) YEAR (S) POST RELEASE SUPERVISION.
THAT THE DEFENDANT SUPERVISION BY: Patrick Dantre FI	, HAS VIOLATED THE TERMS OF HIS POST RELEASE
	Offender was arrested for Armed Robbery and Possession of a
Weapon After Felony Conviction.	offender admitted that during the Armed Robbery he had been on
"powder" (cocaine) and "ecstasy" pills.	Trender admitted that diffing the Affiled Robbery he had been on

IT IS THEREFORE ORDERED THAT SAID POST RELEASE SUPERVISION AND Twelve (12) YEAR (S) OF THE Twelve (12) YEAR (S) SUSPENSION OF SENTENCE BE AND THE SAME ARE HEREBY REVOKED AND THE DEFENDANT IS REQUIRED TO SERVE Twelve (12) YEAR (S) OF HIS SENTENCE IN THE CUSTODY OF THE STATE DEPARTMENT OF CORRECTIONS AT A FACILITY TO BE DESIGNATED BY THAT DEPARTMENT, THE REMAINING __0_YEAR(S) SHALL REMAIN SUSPENDED CONDITIONED UPON THE DEFENDANT'S GOOD BEHAVIOR AND THAT HE DOES NOT VIOLATE ANY LAWS UPON HIS RELEASE FROM CUSTODY. DEFENDANT SHALL BE GIVEN CREDIT FOR TIME SERVED AWAITING THIS HEARING.

ORDERED AND ADJUDGED THIS

CIRCUIT COURT JUDGE

EX A.

MISSISSIPPI DEPARTMENT OF CORRECTIONS

NUMBERCMCF - 2007 -0378

SECOND STEP RESPONSE FORM (SUPERINTENDENT)

Type or use request.	e ball point pen. You must respo	ond to the offender within 25 c	-
	Patrick Fluker. #101069		Wilkinson CCF
TO:	Offender's Name and Numb	her	Housing Unit
	Ms. Margaret Bingham	001	CMCF
FROM:	Superintendent		Institution
An inves	tigation has been conducted int	to your complaint in which yo	ou allege that your time has been
			stated the gold seal should have
	ŕ		ged to probation. This would no
have elm	ninated the twelve (12) suspend	led years. Your original sente	rnce was fifteen (15) years. You
served (3) years and twelve (12) were su	spended and you were placed	on probation. You violated you
probation	and now you are here to serve	e the remaining twelve (12) y	ears. Attached is a current time
sheet.			
Therefore	e. I find no merit in your compla	aint.	
5-3	0-07	Marell	Binham
	Date	Superinten	ident's Signature
-	· · · · · · · · · · · · · · · · · · ·		7

If you are not satisfied with this response, you may go to STEP 3 by filling out the third step section of ARP-1 and sending the light yellow copies of ARP-1, ARP-2, AND ARP-3 to the Commissioner, Mississippi Department of Corrections. These forms must reach his office within 5 days of the date of this response.

INSTRUCTIONS TO SUPERINTENDENT: Send original and STEP 3 copy to the inmate. Keep Superintendent's Copy.

INSTRUCTIONS TO OFFENDER: This original is for you to keep.

OFFENDER'S ORIGINAL



... MISSISSIPPI DEPARTMENT OF CORRECTIONS

NUMBER <u>CMCF</u> - <u>07</u> - <u>378</u>

THIRD STEP RESPONSE FORM (COMMISSIONER)

You m	ust respond to the OFFENDER within	40 days of receipt of th	e appeal of the STEP 2 Response.	
TO:	PATRICK FLUKER #10	1069	SM C) if	
10:	Offender's Name and Num	ıber	Housing Unit	
	Your request for Adminis		ives a complaint to the effect that your ti	ime
	The staff of the Administrative grievance and the following determined to the control of the Administrative grievance and the following determined to the control of the Administrative grievance and the following determined to the Administrative grievance and the following determined grievance and the grievance and the following determined grievance and the grievance grievance and the grievance grievanc		am has received and investigated your ade:	
	According to MDOC Rec to you in the second step respons		time sheet is correct. This was explain.	*
	Therefore, based upon the denied.	e facts outlined above	, your request for further relief is hereby	ŗ
		·		
	9/28/07 Date	Chris	Tophus Epps 8	•

INSTRUCTIONS TO OFFENDER: This original is for you to keep.

IF YOU ARE NOT SATISFIED WITH THIS RESPONSE, YOU MAY WITHIN THIRTY (30) DAYS AFTER RECEIPT OF THIS DECISION, SEEK JUDICIAL REVIEW.

OFFENDERS ORIGINAL

Mississippi Department of Corrections

Inmate Time Sheet

Offender: FLUKER, PATRICK DANTRE 101069

Housing: SMCI, SMCI 2, BLD B1, ZONE A, BED 0080

Computation Date: 02/28/2007 15:55

Date Printed:

02/07/2008 16:25

Sentences:

DATE	CAUSE/COUNT	OFFENSE	COMMITTED	COUNTY	SERVE	HOUSE	PROBATION H	AB DEI	FERRED	OVERRIDE	CONCURRENT	CONSECUTIVE
06/23/05	03 481 CR/1	1299:ROBBERY	05/19/03	Forrest	12Y		N	€				
02/13/07	05434CR/2	1288:ARMED ROBBERY	05/04/05	Forrest	15Y		5Y N	1				03 481 CR/1
First	Time Offender											

Pre Trial/Pre Sentence Jail Time:

05/05/05 06/23/05 49

Total Jail Time: 49

Override:

Time now being served.

Computation Details:

DATE	DESCRIPTION
06/23/05	03 481 CR/1 1299:ROBBERY 12Y
07/28/05	Into Trusty Status 07/18/05 IN T/S - CLOSE CONFINEMENT
02/13/07	05434CR/2 1288:ARMED ROBBERY 15Y CS to 03 481 CR/1
02/16/07	Trusty Earned Time 07/18/05 to 08/17/05 : 30D
02/16/07	Trusty Earned Time 08/17/05 to 09/16/05 : 30D
02/16/07	Trusty Earned Time 09/16/05 to 10/16/05 : 30D
02/16/07	Trusty Earned Time 10/16/05 to 11/15/05 : 30D
02/16/07	Trusty Earned Time 11/15/05 to 12/15/05 : 30D
02/16/07	Trusty Earned Time 12/15/05 to 01/14/06 : 30D
02/16/07	Trusty Earned Time 01/14/06 to 02/13/06 : 30D
02/16/07	Trusty Earned Time 02/13/06 to 03/15/06 : 30D
02/16/07	Trusty Earned Time 03/15/06 to 04/14/06 : 30D
02/16/07	Trusty Earned Time 04/14/06 to 05/14/06 : 30D
02/16/07	Trusty Earned Time 05/14/06 to 06/13/06 : 30D
02/16/07	Trusty Earned Time 06/13/06 to 07/13/06 : 30D
02/16/07	Trusty Earned Time 07/13/06 to 08/12/06 : 30D
02/16/07	Trusty Earned Time 08/12/06 to 09/11/06 : 30D
02/16/07	Trusty Earned Time 09/11/06 to 10/11/06 : 30D
02/16/07	Trusty Earned Time 10/11/06 to 11/10/06 : 30D
02/16/07	Trusty Earned Time 11/10/06 to 12/10/06 : 30D
02/16/07	Trusty Earned Time 12/10/06 to 01/09/07 : 30D
02/16/07	Trusty Earned Time 01/09/07 to 02/08/07 : 30D
03/10/07	Trusty Earned Time 02/08/07 to 03/10/07 : 30D
04/09/07	Trusty Earned Time 03/10/07 to 04/09/07 : 30D
05/09/07	Trusty Earned Time 04/09/07 to 05/09/07 : 30D
06/08/07	Trusty Earned Time 05/09/07 to 06/08/07 : 30D
07/08/07	Trusty Earned Time 06/08/07 to 07/08/07 : 30D
08/07/07	Trusty Earned Time 07/08/07 to 08/07/07 : 30D
09/06/07	Trusty Earned Time 08/07/07 to 09/06/07 : 30D

DATE	DESCRIPTION
10/06/07	Trusty Earned Time 09/06/07 to 10/06/07 : 30D
11/05/07	Trusty Earned Time 10/06/07 to 11/05/07: 30D
12/05/07	Trusty Earned Time 11/05/07 to 12/05/07 : 30D
01/04/08	Trusty Earned Time 12/05/07 to 01/04/08: 30D
02/03/08	Trusty Earned Time 01/04/08 to 02/03/08 : 30D

Summary:

Begin Date 05/05/2005 House Arrest Date Parole Date

Tent. ERS Date

Tentative Discharge Max Discharge

04/28/2032

Total Term To Serve: 27Y

Total Earned Time: 0D

Earned Time Lost: 0D

Total MET Earned: 0D

10/11/2029

Total Trusty Time Earned: 2Y 200D

End Date

Comments:

M.D.o.C. Consolidated the two consecutive Sentences.

FILED 64: (770-52)
FILED 64: (770-52)
S.M.C.I. II, B-1, A-Zone #80

Filed This Deb Jung of Teb 2008.

L) Jin Hood Attorney General Dackson, MS 39205 Dethy W. Sephtan Clark of the Court 70. Box 2149 Jackson, Ms 39205

T, Putrick Fluker hareby swewr that I have delivered a foregoing specord Excerpts along with the Appellate Brief to the below parties via pre-pand postage by the United States Mad by delivering the Instant writ to Irison Authorities on the below date.

Certificate of Service