

**RAY CHARLES LENOIR**

**FILED**

**APPELLANT**

**JAN 31 2008**

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SUPREME COURT  
COURT OF APPEALS**

**VS.**

**NO. 2007-CP-1142-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

**JIM HOOD, ATTORNEY GENERAL**

**BY: BILLY L. GORE  
SPECIAL ASSISTANT ATTORNEY GENERAL**

**[REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MS 39205-0220  
TELEPHONE: (601) 359-3680**

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**RAY CHARLES LENOIR**

**APPELLANT**

**VS.**

**NO. 2007-CP-1142-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

RAY CHARLES LENOIR, presently a prisoner at the Marshall County Correctional Facility in Holly Springs, appeals from an order denying post-conviction collateral relief entered on June 15, 2007, in the Circuit Court of Monroe County, Sharion Aycock, Circuit Judge, presiding. See appellee's exhibit A, attached.

This is an appeal resulting from a remand of the cause reported as **Lenoir v. State**, 943 So.2d 113 (Ct.App.Miss. 2006), attached as appellee's exhibit B.

Lenoir, upon revocation of his suspended state sentences, was incarcerated after violating the conditions of post-release supervision (PRS) ordered by a state court while he was allegedly serving post-release supervision ordered by a federal court in the wake of federal convictions.

Lenoir, who seeks immediate release from state custody, complained in a post-conviction context his post-release supervision ordered pursuant to sentences imposed in state court was unlawfully revoked while he was on post-release supervision ordered pursuant to his prior federal

supervision proviso, he was, by law, required to complete service of his federal PRS before the State could lawfully revoke his State PRS for violations of the conditions imposed.

### **STATEMENT OF FACTS**

The salient facts and procedural history of this case are found in the published opinion issued by the Court of Appeals on November 21, 2006, reversing summary dismissal by Judge Aycock and remanding the case to the trial court “ . . . in order to determine the status of Lenoir’s federal sentences and a ruling made on his post-conviction relief motion.” *See Lenoir v. State, supra*, 943 So.2d 113 (Ct.App.Miss. 2006), appellee’s exhibit B, attached.

That status has been determined and a ruling made. The record is now wholesome and complete.

Additional facts are contained in the four (4) page order entered by the circuit judge in the wake of remand. *See* appellee’s exhibit A, attached.

An evidentiary hearing was conducted on the 14<sup>th</sup> day of February 2007, at the conclusion of which Judge Aycock found as a fact and concluded as a matter of law that Lenoir’s state sentences for uttering a forgery and possessing a controlled substance were both legal sentences and further finding as a matter of fact and law the circuit court had jurisdiction, i.e., the power to hear and adjudicate on September 26, 2003, that Lenoir had violated the terms and conditions of his state suspended sentences, as well as the power to revoke Lenoir’s suspended sentences.

### **FACTS IN REVIEW**

On June 25, 1999, following a plea-qualification hearing conducted before Barry Ford, Circuit Judge, Ray Charles Lenoir entered guilty pleas to uttering a forgery in lower court cause

In CR99-053 Lenoir was sentenced by Judge Ford to serve a term of fifteen (15) years in the custody of the MDOC with credit for time already served. The balance of this sentence was suspended and was to be followed by five (5) years of post-release supervision.

In CR99-054 Lenoir was sentenced to a term of fifteen (15) years in the custody of the MDOC with credit for time already served. The balance of said sentence was suspended conditioned upon successful completion of the post-release supervision imposed in cause number CR99-053.

The fifteen (15) year suspended sentence imposed in 053 was to run consecutively to the fifteen (15) year suspended sentence imposed in 054 and, more importantly, also consecutively to two federal sentences imposed in federal court cause numbers 98-CR-121 and 99-CR-016.

At some point in time following his guilty pleas, Lenoir, apparently while on federal post-release supervision, violated the terms and conditions of his suspended state sentences. The State subsequently filed a petition to revoke post-release supervision and impose the suspended sentences.

On September 26, 2003, Sharion Aycock, Circuit Judge, revoked Lenoir's suspended sentences and post-release supervision in both cause number CR99-053 and CR99-054. It appears that while Lenoir was on post-release supervision pursuant to his federal sentences, he violated the terms and conditions of his suspended state sentences and post-release supervision.

In CR99-053 Lenoir's fifteen (15) year suspended sentence was revoked by Judge Aycock, and he was ordered to serve the balance of the remaining fifteen (15) years.

In CR99-054 ten (10) years of the fifteen (15) year suspended sentence were revoked, and Lenoir was ordered to serve those ten (10) years in the custody of the MDOC with the remaining five (5) years still suspended with PRS and conditioned upon Lenoir's good behavior. On November 4,

alleging his suspended sentences with state post-release supervision were unlawfully revoked and he was being held unlawfully in State custody.

On December 17, 2004, Judge Aycock signed an order summarily denying Lenoir's motion to vacate and set aside sentence as well as his motion for evidentiary hearing and motion for records and transcript. She found as a fact and concluded as a matter of law "... that [Lenoir's] revocation was proper ... "

Lenoir appealed from that judgment.

On November 21, 2006, the Court of Appeals, Lee, P.J. for the Court, issued a written opinion reversing the judgment of the trial court and finding "... that an evidentiary hearing should be granted in order to determine the status of Lenoir's federal sentences and a ruling made on his post-conviction relief motion."

The evidentiary hearing was conducted on February 14, 2007, at which time Judge Aycock, the trial judge, found as a fact that Lenoir had been released from federal prison - a release from actual physical custody, if you please - on February 13, 2003, and that three (3) months later on May 10, 2003, he violated the terms and conditions of his state suspended sentences by possessing a controlled substance.

At the conclusion of the evidentiary hearing Judge Aycock again found as a fact and concluded as a matter of law that Lenoir's state sentences were legal sentences, and the court had the power to revoke Lenoir's suspended sentences and require him to begin service of his suspended sentences.

Lenoir, once again, cries foul.

statute; (2) the trial court went beyond the mandate issued by the Court of Appeals; (3) the trial court was improperly influenced by irrelevant and prejudicial evidence, and (4) the trial court relied upon a line of authority that is neither applicable nor dispositive of Lenoir's post-conviction claims.

We disagree on all counts.

### SUMMARY OF ARGUMENT

The findings of fact and conclusions of law made by the circuit judge were both judicious and correct. We rely upon the four (4) page order and opinion entered by Judge Aycock in the wake of remand.

*First*, Judge Aycock did not err in finding that the new statute mitigating the penalty for uttering a forged instrument when the amount involved was less than \$500 became effective from and after July 1, 2003, nearly four (4) years *after* Lenoir entered his guilty pleas to uttering and cocaine possession on June 25, 1999. Lenoir's convictions had become final.

Miss.Code Ann. §99-19-33 which, according to Lenoir, requires that he receive a milder sentence, does not apply where, as here, the statute providing for a milder sentence is passed after the conviction has become final. **Davis v. State**, 308 So.2d 87 (Miss. 1975).

*Second*, Judge Aycock did not err in revoking Lenoir's suspended state sentences and requiring him to begin service of the suspended portion thereof because he had been released from incarceration in federal prison on February 13, 2003. The termination of federal imprisonment and release from actual physical custody terminated, for the purpose of his state suspended sentences, Lenoir's federal sentences.

If not, his federal PRS ended when Lenoir was arrested in May of 2003 and charged with



years of state PRS.

## ARGUMENT

### **LENOIR HAS FAILED TO DEMONSTRATE BY A PREPONDERANCE OF THE EVIDENCE HE IS ENTITLED TO RELEASE FROM CONFINEMENT.**

Lenoir, in the wake of his court-ordered evidentiary hearing, contends in his latest appeal that (1) the trial court, after revocation, erred in fixing his punishment in excess of the punishment provided by a new statute; (2) the trial court went beyond the mandate issued by the Court of Appeals; (3) the trial court was improperly influenced by irrelevant and prejudicial evidence, and (4) the trial court relied upon a line of authority that is neither applicable nor dispositive of Lenoir's post-conviction claims.

Lenoir, again relying upon **Milam v. State**, 578 So.2d 272 (Miss. 1991), together with Miss.Code Ann. § 99-19-21, argues that under **Milam**, his state post-release supervision sentence could not begin until after the petitioner had finished serving his federal post-release supervision sentence. (Brief of the Appellant at 11) *See also Ball v. State*, 437 So.2d 423, 426 (1983) [Orders imposing sentence to be served consecutively should provide for commencement at the termination of the imprisonment for the (prior or preceding) conviction.]

Lenoir does not deny he violated the terms and conditions of his suspended sentences imposed in state court. He claims only that his suspended sentences, including the terms and conditions attached to them, could not begin until after his federal sentence, including PRS, was completed.

“[T]he petitioner’s state post-release supervision sentence had not begun running where the petitioner was still serving his federal post-release supervision sentence, and continues serving that federal sentence, when this Court sought to revoke its post-release supervision sentence. This Court simply could not lawfully revoke its post-release supervision sentence at [a] time when that sentence had [not] yet begun running nor at [a] time the petitioner was still serving his federal post-release supervision sentence. Under the facts of this case, and the law of *Milam v. State*, this court’s actions were unlawful and should be vacated.” Original Memorandum in First Appeal at C.P. 16-17)

Lenoir exclaims: “I should be free!” (*Id.* at C.P. at 18)

The Court of Appeals remanded this case for an evidentiary hearing where Lenoir was given an opportunity to prove his claims. In remanding the cause to the circuit court, the Court stated the following:

We find that an evidentiary hearing should be granted in order to determine the status of Lenoir’s federal sentences and a ruling made on his post-conviction relief motion. 943 So.2d at 114.

An evidentiary hearing was conducted on February 14, 2007, and a ruling denying post-conviction relief was forthcoming on June 14, 2007, in the form of a four page order and opinion. *See* appellee’s exhibit A, attached.

Lenoir, as previously stated, contends in his second and latest appeal that (1) the trial court, after revocation, erred in fixing his punishment in excess of the punishment provided by a new statute; (2) the trial court went beyond the mandate issued by the Court of Appeals; (3) the trial court

We contend, on the other hand, Lenoir has failed to demonstrate by a “preponderance of the evidence” proffered during his evidentiary hearing, or at any other time, he is entitled to any relief. **Bilbo v. State**, 881 So.2d 966, 968 (Ct.App.Miss. 2004) citing Miss.Code Ann. §99-39-23(7).

*First*, Lenoir claims his revocation on September 26, 2003, for uttering a forgery resulted in an illegal sentence because the statute was amended effective July 1, 2003, and ameliorated the punishment.

Judge Aycock did not err in finding that the amended statute mitigating the penalty for uttering a forged instrument when the amount involved was less than \$500 was effective from and after July 1, 2003, nearly four (4) years *after* Lenoir entered his guilty pleas to uttering a forgery and possession of cocaine on June 25, 1999. By that time, Lenoir’s convictions had already become final.

Both the uttering itself, as well as the original sentence for uttering, took place years before the statute was amended to ameliorate the punishment. Although the trial court revoked Lenoir on September 26, 2003, approximately a month after the effective date of the amended statute, such is of no consequence. The date controlling the posture of Lenoir’s complaint is the date of his convictions via his guilty pleas - June 25, 1999 - not the date he was revoked and ordered to begin serving the 25 years originally imposed in CR99-053 (uttering a forgery) and CR99-054 (possession of cocaine).

When a sentence requiring incarceration is suspended, the incarceration is simply held in abeyance pending the obedience of the defendant to the terms and conditions of his suspended

is not the same as sentencing a defendant after the effective date of a milder sentencing law but before the conviction has become final.

The cases of **Johnson v. State**, 824 So.2d 638 (Ct.App.Miss. 2002), and **Daniel v. State**, 742 So.2d 1140 (Miss. 1999). are inapplicable here because the instant case does not involve sentencing or re-sentencing but revocation of suspended sentences after the original sentence has become final.

Miss.Code Ann. §99-19-33 which, according to Lenoir, requires that he receive a milder sentence, does not apply where, as here, the statute providing for a milder sentence is passed after the conviction has become final. **Davis v. State**, *supra*, 308 So.2d 87 (Miss. 1975).

Therefore, Judge Aycock did not err in rejecting Lenoir's claim. The controlling statute is the one on the books at the time of a defendant's final conviction and not at a later time when his suspended sentence is revoked.

*Second*, the circuit judge did not err in finding as a fact and ruling as a matter of law that despite consecutive federal and state sentences, the court had jurisdiction or the power to revoke Lenoir's suspended sentences.

Lenoir's release from actual physical custody in his federal environment terminated, for the purpose of his state suspended sentences, Lenoir's federal sentences.

If not, his federal PRS ended when Lenoir was arrested in May of 2003 and charged with possession of a controlled substance. Lenoir's state sentences, by virtue of his release from actual federal incarceration and/or his subsequent arrest in Mississippi, could begin, including his five (5) years of state PRS.

“Lenoir’s point is that this Court cannot revoke a state PRS where that state PRS had not yet begun. That would be like violating probation before the probation began.”

In **Artis v. State**, 643 So.2d 533, 537 (Miss. 1994), the Supreme Court made the following observations:

\* \* \* The courts are empowered to revoke any or all of the defendant’s probation or any part or all of the suspended sentence if, **during the period of probation**, it is found that the defendant violated the **conditions** of his probation/suspended sentence. See *Moore v. State*, 585 So.2d 738 (Miss. 1991).

The facts surrounding Lenoir’s federal sentences, his release from federal confinement, revocation of his state suspended sentences , and the status of his federal PRS, all of which, at best, were distorted and incomplete have now been made a part of the official record.

Lenoir argued at great length that the revocation of his suspended state sentences and his subsequent incarceration could not take place until after he had finished serving his federal sentence, including his federal PRS. He claimed his state sentence with five (5) years PRS could not being until after his federal sentence with five (5) years PRS was completed.

The original sentence was 15 years in 053 (uttering a forgery) as well as 15 years in 054 (possession of cocaine), to run consecutively.

The balance of the sentence in 053 was suspended and was to be followed by five (5) years of state post-release supervision.

The balance of the sentence in 054 was suspended conditioned upon successful completion

actual physical custody, if you please - on February 13, 2003.

She also found as a fact that Lenoir was arrested on May 10, 2003, and charged with possession of a controlled substance.

Finally, she found as a fact that Lenoir had violated the conditions of his state suspended sentences on May 10, 2003, only three (3) months after he was released from actual custody in a federal environment.

On September 26, 2003, the Circuit Court of Monroe County determined that Lenoir had violated the terms and conditions of his suspended sentences and his state post-release supervision. The court revoked Lenoir's suspensions and PRS. Lenoir was ordered to serve the balance of his 15 years in 054 with 5 years suspended as well as 15 years in 054 for a total of twenty-five (25) years.

Judge Aycock was correct when she found Lenoir's claim to essentially be a question of jurisdiction or the power of the circuit court to hear and revoke Lenoir's suspended sentences.

Judge Aycock did not err in finding as a fact that Lenoir was released from federal prison on February 13, 2003, and concluding as a matter of law that after his release from "actual physical custody" Lenoir was fair game for any violation of the terms and condition of his state suspended sentences. Indeed, Judge Ford's sentencing order in cause number 053 issued in June of 1999 stated the following: "After receiving credit for time served, the balance shall be and the same is hereby suspended and the defendant shall be placed under Post-Release Supervision *upon the release from the term of incarceration* for a period of Five (5) year(s) . . . and the suspension of said sentence

Lenoir was released from federal incarceration on February 13, 2003. To hold that Lenoir could roam the countryside for his five (5) years of federal PRS and violate with absolute impunity the terms and conditions of his state PRS would simply not make good sense.

If Lenoir's federal PRS commenced at the time of his release from federal imprisonment, it was surely terminated upon his arrest - actual physical custody - in Mississippi on May 10, 2003, for possession of a controlled substance.

In **Strand v. Schmittroth**, 251 F.2d 590, 599 (9<sup>th</sup> Cir. 1957), cert dismissed 78 S.Ct. 258 (December 3, 1957), cited and relied upon by Judge Aycock, the following language pertaining to the rights of sovereigns appears to be applicable here:

In any discussion of the rights of sovereigns, the territories of which do not overlap, actual physical possession of one accused is the sole criterion of the power to proceed absent agreement or self imposed restriction. The power of the courts to adjudicate and sentence and of the authorities to imprison is based thereon. The reason is obvious. Where the body of the accused is in manual possession of one sovereign surrender can be obtained by another such sovereign only by consent of the first or by force. The latter is unthinkable.

It is a corollary of this doctrine that there can be no theoretical possession of the body under such circumstances. **When a defendant or a parolee or a probationer is released from actual physical custody, even for temporary purposes, he may be arrested, tried and convicted by any other such sovereign in the territory in which he may be without the consent of the first sovereign, which may have a judgment against him as yet unsatisfied or which may be seeking to try him. [emphasis ours]**

The other federal cases cited and relied upon by Judge Aycock in her order and opinion appear to be equally *apropos*, and we adopt them and their logic here.

violating the terms and conditions of his suspended sentences.

In her order denying post-conviction relief, Judge Aycock stated the following:

“Petitioner is attempting to convince the Court that when a prisoner is released on Federal Post-Release Supervision, he is immune from any state court until his Post-Release Supervision years have passed. This argument is clearly erroneous.” (C.P. at 77)

We agree.

“The controlling factor in determining the power of the Court to proceed as between two contesting sovereigns is the ‘actual physical custody’ of the accused.” **United States v. Cole**, 416 F.3d 894, 897 (8<sup>th</sup> Cir. 2005) quoting from **United States v. Vann**, 207 F.Supp. 108, 111 (E.D.N.Y. 1962).

Stated differently, when federal imprisonment in the form of actual physical custody and incarceration ended, Lenoir’s state sentence, including his consecutive state PRS, could begin.

Although we have found no authority for it, we agree wholeheartedly with Mr. Baker, the assistant district attorney, that Lenoir’s state and federal PRS could be served simultaneously. (R. 109)

In addition, Judge Aycock also found as a fact that the circuit court had the consent of federal authorities. (C.P. at 77) This is an incidental finding that does not detract from the disposition of Lenoir’s motion to vacate and set aside conviction.

In the final analysis, Judge Aycock’s findings of fact were neither clearly erroneous nor manifestly wrong, and her conclusions of law, upon *de novo* review, were eminently correct.

Notwithstanding consecutive federal and state sentences, Lenoir’s release on February 13,



Stated differently, when actual incarceration in federal prison ended, Lenoir's federal PRS ended and his state sentence, including his five (5) years of state PRS, could begin.

If not, his federal PRS, was terminated on May 10, 2003, when Lenoir was arrested in Mississippi and charged with possession of a controlled substance.

Lenoir argues, however, that a "consecutive sentence" "... means that the consecutive state post-conviction sentence could not commence until after the preceding federal post-release sentence is completed." (Brief of the Appellant at 11)

We disagree.

Release from actual physical custody gave the State the power to arrest Lenoir and revoke his state suspended sentences for violation of the terms and conditions previously imposed. We see no reason why Lenoir's federal and state PRS could not be served simultaneously.

As stated earlier, adopting Lenoir's position would allow a federal inmate at large by virtue of federal post-release supervision - conditional liberty, if you please - to violate with absolute impunity the terms and conditions of his state imposed post-release supervision, including the freedom to commit other offenses without fear of revocation.

In his original memorandum of law filed in support of his motion for summary judgment Lenoir states:

"Lenoir's point is that this Court cannot revoke a state PRS where that state PRS had not yet begun. That would be like violating probation before the probation began." (C.P. at 74)

We note with profound interest that Lenoir's five (5) years of federal PRS which began on

terminated already by his arrest in Mississippi, will have come to an end.

Assuming Lenoir's release from actual physical incarceration did not effectively end his federal sentence for the purpose of beginning his consecutive state PRS, it seems clear to us the latter would begin to run on February 14, 2008.

Lenoir has already violated the terms and conditions of his suspended sentences. The trial judge could revoke here and now for violations taking place then and there. It would serve no useful purpose to remand this case for a second revocation hearing where, as here, Lenoir has not denied he violated the conditions of his suspended sentence. If anything at all, this Court could simply remand for a fresh order from the circuit court revoking Lenoir's suspended sentences.

We summarize.

During the evidentiary hearing conducted pursuant to the remand by the Court of Appeals, certain facts which originally were cloudy and contained only in Lenoir's original *pro se* appellate brief, were more fully developed and made a part of the record.

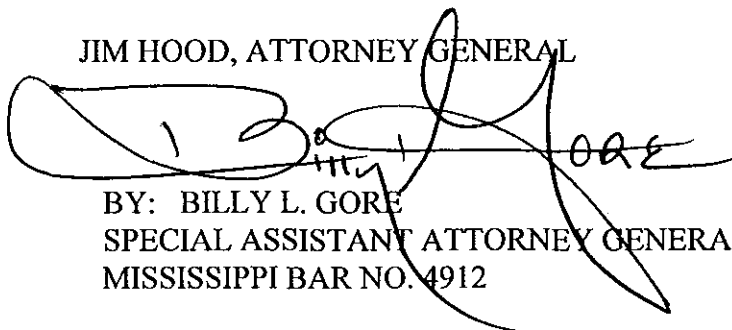
Judge Aycock found as a fact that Lenoir was released by federal authorities from actual physical custody on February 13, 2003, and violated the terms and conditions of his suspended state sentences three (3) months later on May 10, 2003. Lenoir's suspended state sentences, including his state PRS, could begin upon Lenoir's release from actual incarceration which effectively ended his federal sentence.

as a matter of law that Lenoir's "uttering a forgery sentence and possession of a controlled substance sentence are both legal sentences" and that, despite consecutive federal and state sentences, the Court "had jurisdiction to revoke [Lenoir's] suspended sentence." (C.P. at 77-78)

We invite this Court to affirm the decision of the lower court denying post-conviction relief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "Billy L. Gore", is written over the typed name and title. The signature is stylized with a large, sweeping "B" and "G".

BY: BILLY L. GORE  
SPECIAL ASSISTANT ATTORNEY GENERAL  
MISSISSIPPI BAR NO. 4912

**VERSUS**

**CIVIL CAUSE NO. CV04-452 AM**

**STATE OF MISSISSIPPI**

**RESPONDENT**

**ORDER**

This cause comes before this Court pursuant to an order by the Mississippi Court of Appeals for an evidentiary hearing to determine the status of Ray Charles Lenoir's federal sentence and ruling on his post-conviction relief motion.

On July 14, 1998, Ray Charles Lenoir was arrested in Monroe County, MS and charged with uttering a forgery and possession of a controlled substance. He was charged by indictment on March 8, 1999 in CR99-053 and CR 99-054. Before he was indicted on the state charges, Petitioner was indicted in the United States District Court Northern District of Mississippi 1:98CR00121-001 and 1:99CR00016-001. On June 18, 1999, Lenoir was sentenced in the United States District Court Northern District of Mississippi in both case numbers to serve seventy-one (71) months on each count to be served concurrently and to be followed by five (5) years of supervised release. He was to begin sentence July 17, 1999.

On June 25, 1999, before he was sentenced in the Federal charge, Petitioner entered a plea of guilty as to both Monroe County charges in the Circuit Court of Monroe County Mississippi. Judge Barry Ford sentenced Lenoir to serve a term of fifteen (15) years in the custody of MDOC with credit for time served in CR99-053 as well as fifteen (15) years in the custody of MDOC with credit for time served in CR99-054. The fifteen (15) years in CR99-053 was ordered to run consecutively with the 15 years in CR99-054. CR99-053 was also to run consecutively with federal causes 98-CR-121 and 99-CR-016. The balance of these sentences

(5) years post-release supervision pending on both federal and state causes. On May 10, 2003, the petitioner was arrested and charged with possession of controlled substance by the Aberdeen Police Department. Petitioner was later indicted on this charge and plead guilty on November 12, 2003. On September 26, 2003, the Monroe Circuit Court held that Lenoir violated the terms and conditions of his suspended sentence and post-release supervision in both Monroe County Cause 99-053 and CR99-054. Lenoir was sentenced to serve the balance of the fifteen (15) years in CR99-054 with five (5) of those years suspended as well as fifteen (15) years in CR99-053 for a total of twenty-five (25) years.

Lenoir argues that his probation and suspended sentences were improperly revoked because his state sentences were ordered to run consecutively with his federal sentences. On or around January 18, 2007, Lenoir filed a Motion to Amend Petition and Request for Summary Judgment claiming that Petitioner's uttering a forgery sentence in CR-053 is an illegal sentence.

At the time of his guilty plea on June 25, 1999, uttering a forgery was punishable as a felony if the amount in question exceeded one hundred dollars and punishable in the State penitentiary for not less than two (2) years nor more than fifteen (15) years. The statute was amended in July 2003 to provide:

when the amount of value involved is less than Five Hundred Dollars in lieu of punishment above provided for, the person convicted may be punished by imprisonment in the county jail for a term of not more than six (6) months, or by a fine of not more than One Thousand Dollars, or both, within the discretion of the court."

Miss. Code Ann. § 97-21-33 (1972).

The statute also states that it is effective from and after July 1, 2003. Since Petitioner was

Petitioner next argues that this court did not have jurisdiction to revoke his suspended sentence and post-release supervision. The United States Court of Appeals for the Eighth Circuit has thoroughly addressed this issue. *United States v. Cole*, 416 F.3d 894 (8<sup>th</sup> Cir. 2005). The Court analyzed primary jurisdiction between state and federal sovereigns. The Court stated:

[a]s between the state and federal sovereigns, primary jurisdiction over a person is generally determined by which one first obtains, custody, or arrests, the person. *Thomas v. Brewer*, 923 F.2d 1361, 1365 (9<sup>th</sup> Cir. 1991); see also *United States v. Vann*, 207 F.Supp. 108, 111, (E.D.NY. 1962). (“The controlling factor in determining the power of the Court to proceed as between two contesting sovereigns is the actual physical custody of the accused.”) Primary jurisdiction continues until the first sovereign relinquishes its priority in some way. Generally, a sovereign can only relinquish primary jurisdiction in one of four ways: 1) release on bail 2) dismissal of charges, 3) parole, or 4) expiration of sentences.

*Cole*, at 897.

In addition, the United States Court of Appeals for the Ninth Circuit also came to a similar conclusion. *Wright v. Benov*, 201 Fed. Appx. 541; 2006 U.S. App. LEXIS 23628, (9<sup>th</sup> Cir. 2006). In *Wright*, the Court stated that, “Wright remained in the custody of the State of Texas from September 20, 2001, until he was paroled in October of 2003. *During this time*, the State had primary jurisdiction, and Wright’s federal sentence did not commence nor did his federal credit begin to accrue.” *Wright*, at 542. (emphasis added). The Court clearly is stating that as soon as he was paroled the State no longer had primary jurisdiction.

Moreover, the United States Court of Appeals for the Ninth Circuit has held similarly in *Strand v. Schmittroth*. *Strand v. Schmittroth* 251 F.2d 590 (9<sup>th</sup> Cir. 1957). The Court cited that “when a defendant or a parolee is released from actual custody, even for temporary purposes, he may be arrested, tried and convicted by any other sovereign in the territory in which he may be

from assuming jurisdiction merely because the individual is on Federal probation)(interpreting *Jones v. Cunningham*, 371 U.S. 236(1962)); *United States ex rel. Pasela v. Fenno*, 167 F.2d 593 (2<sup>nd</sup> Cir. 1948)(holding that when a Federal court places an accused on probation, he is not immune during the period of probation from prosecution for a criminal offense under state law); *Stewart v. United States*, 267 F.2d 378 (10<sup>th</sup> Cir. 1959); *United States ex. rel. Spellman v. Murphy*, 217 F.2d 247 (7<sup>th</sup> Cir. 1954). Petitioner is attempting to convince the Court that when a prisoner is released on Federal Post-Release Supervision, he is immune from any state court until his Post-Release Supervision years have passed. This argument is clearly erroneous. As noted above, as soon as a prisoner is released from custody, he is not immune from prosecution for a criminal offense that he commits in a state's jurisdiction.

In the case sub judice, whoever initially acquired primary jurisdiction is irrelevant. As quoted above, as soon as a sovereign releases an inmate on parole, it relinquishes primary jurisdiction. *Cole* at 897. Therefore, as soon as the Federal authorities released Petitioner to post-release supervision (or parole) on February 13, 2003, they relinquished any primary jurisdiction that they may or may not have had. When Lenoir was arrested in 2003 in Aberdeen, MS, the State of Mississippi gained primary jurisdiction over him, and rightfully revoked his suspended sentence. Moreover, the Court even had consent of Federal probation officers. In sum, the Court rightfully revoked his suspended sentence and rightfully sentenced him accordingly.

**IT IS THEREFORE ORDERED** that Petitioner's Motion for Summary Judgment is **DENIED**. **IT IS FURTHER ORDERED** that Petitioner's uttering a forgery sentence and possession of a controlled substance sentence are both legal sentences. **IT IS FURTHER**

PROCESSED  
JUN 15 2007  
ADMINISTRATOR

SHARION AYCOCK  
CIRCUIT JUDGE

*Sharion Aycock*

FILED  
JUDY K. BUTLER



teen years which credit for time served. The balance of this sentence was also suspended upon successful completion of the post-release supervision imposed in the forgery charge. The sentence imposed in the forgery charge was to run consecutively to the sentence imposed in the possession charge and also consecutively to two federal sentences previously imposed.

¶ 2. While on federal post-release supervision, Lenoir violated the terms of his suspended state sentences. On September 26, 2003, the trial court revoked Lenoir's suspended sentences and post-release supervision on both charges. On November 4, 2004, Lenoir filed a motion to vacate and set aside his sentence. Shortly thereafter Lenoir filed motions for an evidentiary hearing and for records and transcripts. On December 10, 2004, Lenoir filed a motion for summary judgment. On December 17, 2004, the trial court denied all of Lenoir's previous motions.

¶ 3. Lenoir then filed a motion requesting the trial court to amend its order and make additional findings. On August 22, 2005, the trial court dismissed this motion, treating Lenoir's motion to amend as a successive post-conviction petition. Lenoir now appeals to this Court asserting that the trial court erred in denying all of his prior motions for relief.

#### STANDARD OF REVIEW

[1] ¶ 4. When reviewing a trial court's decision to deny a petition for post-conviction relief this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous. *McClinton v. State*, 799 So.2d 123, 126(¶ 4) (Miss.Ct.App.2001). However, where questions of law are raised the applicable standard is de novo. *Brown v. State*, 731 So.2d 595, 598(¶ 6) (Miss.1999).

motions for relief. However, Lenoir's main argument is that his suspended sentences, including the terms and conditions, could not begin until after he had completed his federal sentence, including post-release supervision. Lenoir also states that, if an evidentiary hearing had been granted, he would have proffered his federal court sentencing order as well as testimony from his federal probation officers who had already been subpoenaed.

¶ 6. We note that the State concedes that remanding Lenoir's cause for an evidentiary hearing to determine the status of his federal sentences would be beneficial. The State further concedes that transcripts of the revocation hearing would also be beneficial. According to the record before this Court, a supplemental transcript containing the revocation hearing was filed on July 14, 2006. However, this particular transcript gives no insight as to the status of Lenoir's federal sentence.

¶ 7. We find that an evidentiary hearing should be granted in order to determine the status of Lenoir's federal sentences and a ruling made on his post-conviction relief motion.

**¶ 8. THE JUDGMENT OF THE MONROE COUNTY CIRCUIT COURT IS REVERSED AND REMANDED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO MONROE COUNTY.**

KING, C.J., MYERS, P.J.,  
SOUTHWICK, IRVING, CHANDLER,  
GRIFFIS, BARNES, ISHEE AND  
ROBERTS, JJ., CONCUR.



that I have this date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE**

**APPELLEE** to the following:

**Honorable Sharion Aycock**  
Circuit Judge, District 1  
P.O. Drawer 1100  
Tupelo, MS 38802-1100

**Honorable John R. Young**  
District Attorney, District 1  
P.O. Box 212  
Corinth, MS 38834

**Ray Charles Lenoir, *Pro Se***  
#69169 M.C. C. F.  
833 West Street  
Holly Springs, MS 38635

This the 31st day of January, 2008.



BILLY L. GORE  
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MISSISSIPPI 39205  
TELEPHONE: 601-359-3680