NO. 2007-CP-01142-COA

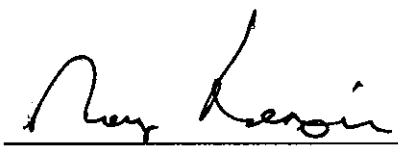
RAY CHARLES LENOIR — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
MONROE COUNTY, MISSISSIPPI

BRIEF OF THE APPELLANT



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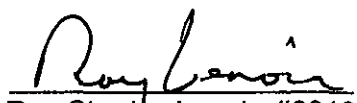
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel 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 disqualification or recusal.

Ray Charles Lenoir, Appellant
John R. Young, Attorney for the State
Jim Hood, Mississippi Attorney General's Office, Attorney for the State
Sharion R. Aycock, Circuit Court Trial Judge

DATED this 6th day of December, 2007.



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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.

TABLE OF AUTHORITIES

Lenoir v. State, 943 So.2d 113 (p1) (p2) (p3) (Miss. App. 2006).

United States v. Matthews, 312 F.3d 652, 657 (5th Cir. 2002).

Bell v. State, 759 So.2d 1111 (Miss. 1999).

Johnson v. State, 824 So.2d 638 (p2) (p5) (p6) (Miss. App. 2002)

Daniel v. State, 742 So.2d 1140 (p17) (Miss. 1999).

Montaya v. Johnaon, 226 F.3d 399 (5th Cir. 2000),

Toney v. State, 906 So.2d 28 (p6) (Miss. App. 2004), quoting

Bell v. State, 759 So.2d 1111 (p20) (Miss. 1999).

United States v. Fuzer, 18 F3d 517, 520 (7th Cir. 1994).

United States v. Padilla, 589 F2d 481, 484 (10th Cir. 1978);

United States v. Luros, 243 F.Supp. 160, 168 (N. D. Iowa 1965).

Stand v. Schmittroth, 251 F.2d 590 (9th Cir. 1957);

Pasela v. Fenno, 167 F.2d 593 (2d Cir. 1948);

Stewart v. United States, 267 F2d 378 (10th Cir. 1959);

United States ex. rel. Spellman v. Murphy, 217 F.2d 247 (7th Cir. 1954).

United States v. Cole, 416 F.3d 894 (8th Cir. 2005),

Thomas v. Brewer, 923 F.2d 1361 (9th Cir. 1991) and

Wright v. Benov, 201 Fed Appx. 541 (9th Cir. 2006).

Brewer v. Maroney, 315 F.2d 687 (3rd Cir. 1963)

Jones v. Cunningham, 371 U.S. 236 (1962)

Miss. Code Ann. Section 97-21-33 (2003).

Miss . Code Ann. Section 97-21-33

Miss Code Ann. Section 99-19-33.

provided by new statute?

2. Did the trial court go beyond the law of the case an/or mandate of the Mississippi Court of Appeals?

3. Did the trial court consider, and was the trial court improperly influenced by, irrelevant evidence that was prejudicial?

4. Did the trial court rely on a line of authority which was not applicable nor dispositive of the claim in this post-conviction proceedings?

5. Once the status of the federal sentence was determined, did the trial court take appropriate action to ensure the terms of the original sentencing order are carried out?

STATEMENT OF THE CASE

NATURE OF PROCEEDINGS

The nature of the proceeding involve a post conviction proceeding.

COURSE OF PROCEEDING IN TRIAL COURT

The "Facts and Procedural History" of this case were adequately set forth on the previous appeal of this case. See Lenoir v. State, 943 So.2d 113 (p1) (p2) (p3) (Miss. App. 2006).

Subsequent to the first appeal, the trial court conducted an evidentiary hearing, and issued an order denying Lenoir's post-conviction claims on merits. See order dated June 14, 2007.

STATEMENT OF THE FACTS

The record evidence shows that the status of Lenoir's federal sentence, at the time of the state's revocation of state post-release supervision, was that Lenor's federal sentence of post-release supervision remained and had not been revoked. At the state revocation hearing the state informed the trial court that Lenoir had 5-year federal probation sentence to serve upon release from federal prison. See Transcript of Revocation Proceeding on September 26, 2003, at page 24 (lines 24-28). Lenoir was released from federal prison on February 13, 2003. Id. at page 5 (lines 26-27). The trial court stated at the state revocation proceeding that Lenoir may receive revocation of federal probation. Id. at page 33 (lines 4-5).[1]

Upon state revocation proceeding the trial court imposed a 15-year sentence for the uttering forgery in cause no. CR-99-053. See Transcript of Revocation Proceeding, supra, at page 29 (lines 21-28). This uttering forgery involved a $250.00 check. See Record at page 42. Before the imposition of 15 year sentence of imprisonment, on July 1. 2003, a new statute became effective mandating a much milder punishment for forgeries under $500.00. See Miss. Code Ann. 97-21-33 (2003).

SUMMARY ARGUMENT

The trial court was in error in failing to comply with Miss. Code Ann. Section 99-19-33 in sentencing Lenoir to prison after the effective date of a milder sentencing law.

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[1] Nota able, it is obvious the trial court knew that Lenoir's federal probationary sentence had not yet been revoked, and

652, 657 (5th Cir. 2002).

Irrelevant evidence improperly influenced the trial court's decision to deny post-conviction relief. M.R.E. 401.

The trial court was misguided by a line of case law which did not apply to the material facts of Lenor's case, resulting in an erroneous outcome of the proceedings on remand.

The trial court failed to take the appropriate action to ensure the terms of the original sentencing order, and amended the original order after the court term had ended, erroneously affected the federal government's power to enforce federal sentence and federal probation. Bell v. State, 759 So.2d 1111 (Miss. 1999).

ARGUMENT

FIRST ISSUE

DID THE TRIAL COURT ERR IN FIXING THE PUNISHMENT IN EXCESS OF THE PUNISHMENT PROVIDED BY NEW STATUTE?

Lenoir claimed in the trial court that his 15-year sentence for uttering forgery in September, 2003, involving a check in the amount of $250.00, was legal in light of the new statute setting forth the penalty of forgery, Miss . Code Ann. Section 97-21-33, as amended July, 2003, and in light of Miss. Code Ann. Section 99-19-33.

The trial court ruled that this illegal sentence claim lacked merit. The basis for the trial court's decision was, Lenoir was indicted March 18, 1999, and given suspended sentence and post-release supervision on June 25, 1999, all prior to the

2002) (new sentencing law applied although crime and first sentence occurred prior to the new law).

State law provides that a statute which provides a milder penalty shall be applied to offenses "under pre-existing law" and to original conviction or plea of guilty." See Section 99-19-33. Therefore, it matters not that Lenoir's offense or original plea of guilty occurred prior to the new forgery statute which provides a milder penalty for forgery, particularly those involving only $250.00. The Mississippi Supreme Court has ruled that:

> "When a statute is amended to provide for a lesser penalty, and the amendment takes effect before sentencing, the trial court must sentence according to the statute as amended."

See Daniel v. State, 742 So.2d 1140 (p17) (Miss. 1999).

In accord with Section 99-19-33 and Daniel's State, supra, where forgery's amended penalty took effect in July, 2003, before the trial court's September 2003, sentencing Lenoir to the State Penitentiary, the trial court was bound to fashion Lenoir's September 2003 sentence according to the statute as amended.[2]

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[2] See also, Johnson v. State, 824 So.2d 638 (p6) Miss. App. 2002, relying on Section 99-19-33.

LAW OF THE CASE AND/OR MANDATE OF THE MISSISSIPPI COURT OF APPEALS?

On the first appeal of this case the Mississippi Court of Appeals issued a mandate directing the trial court to conduct an evidentiary hearing to "determine the status of Lenoir's federal sentence." see Lenoir v. State 943 So.2d 113 (p7) (Miss. App. 2006).[3] This mandate is indeed "considered the law of the case." See Hymes v. State, 703 so.d 258 (p14) (Miss. 1997). And, a trial court on remand "must implement both the letter and the spirit of the appellate court's mandate and may not disregard the explicit directives of that court." See United States v. Matthews, 312 F.3d 652, 657 (5th Cir. 2002).

On remand the trial court made a determination that the trial "court even had the consent of the federal probation officer." See order dated June 14, 2007.

This determination went beyond the mandate on appeal that the trial court determine the status of the federal sentence, not whether there was any consent of the federal probation officer. Further, any consent of the federal probation officer is irrelevant and/or without legal effect for the following reasons.

First, Lenoir plea agreement regarding his federal sentencing involved the attorney for the government, not the probation officer. See F.R. Crim. P. 11(c)(1)(b)(c). It is the consent of federal prosecutors that is needed, if any. In Montaya v. Johnaon, 226 F.3d 399 (5th Cir. 2000), our Fifth Circuit Court of Appeals made this much clear when it said:

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[3] Notable, "once the status of (the federal) sentences is determined, the trial judge should take appropriate action to ensure his original sentencing order is properly carried out." See Toney v. State, 906 So.2d 28 (p6) (Miss. App. 2004), quoting Bell v.

Id. at 406, quoting United States v. Fuzer, 18 F3d 517, 520 (7th Cir. 1994). The same is clear when our state court of Appeals said:

> "The circuit Court could not force the federal authorities to allow the sentences to run concurrently."

Toney, 906 So.2d at P5, citing Montoya v. Johnson, supra.

Secondly, where "the United States was not a party to the state prosecution here, its power to enforce its criminal laws cannot be affected by any proceeding in the State Court." Bell, 759 So.2d at P29, citing United States v. Padilla, 589 F2d 481, 484 (10th Cir. 1978); United States v. Luros, 243 F.Supp. 160, 168 (N. D. Iowa 1965).

Finally, and most importantly, the federal probation officer cannot give the trial court consent to alter or amend its original 1999 sentencing order that the state post release sentences are to run "consecutive" to the preceding federal post-release sentences. A "consecutive sentence" is one that runs after the preceding sentence. See Merriam-Webster's Dictionary of Law (1996). See also, Milam v. State, 578 So.2d 272, 274 (Miss. 1991), citing Miss. Code Ann. Section 99-19-21 (1972). This means that the consecutive state post-release sentence could not commence until after the preceding federal post-release sentence is completed. If this consecutive portion of the 1999 state sentencing order were disregarded, the sentence would, in effect, be modified after the end of the term of court in which Lenoir was sentenced in 1999, a practice forbidden by Mississippi Law, Bell, 759 So.2d at P19, citing Dickerson v. State,

THIRD ISSUE

DID THE TRIAL COURT CONSIDER, AND WAS THE TRIAL COURT IMPROPERLY INFLUENCED BY , IRRELEVANT EVIDENCE THAT WAS PREJUDICIAL?

The record shows the trial court considered evidence of Lenoir being convicted of an indicted charge of possession of a controlled substance. **See Order** dated June 14, 2007, at page ___.

Lenoir contends that this evidence is irrelevant in that it has no tendency to make the existence of any fact concerning the status of Lenoir's federal sentence. See M.R.E. 401. The fact the mandate directed to be determined after an evidentiary hearing is the status of Lenoir's federal sentence. Lenoir, 943 So.2d at P7. A new conviction for a state possession charge is not relevant to the status of Lenoir's federal sentence.

Lenoir would further contend that any new conviction is not relevant to the issue before this court; that is whether Lenoir's state post-release sentence cannot begin until after the completion of his preceding federal post-release sentence , where said state sentence was ordered to urn consecutive to said federal sentence. This case does not challenge the legality of a new felony sentence from a new conviction. This case only challenges a sentence given Lenoir for revocation of state post-release supervision. Moreover, Lenoir has no new felony sentence. The alleged possession charged resulted in a guilty plea to a mere misdemeanor charge.

authority which involved the state's authority to prosecute new charge committed while of federal probation. See Fourth Issue herein. But in the instant case Lenoir does not challenge the state's authority to prosecute new crimes committed while defendant is on federal probation. What Lenoir challenges is the state's authority to revoke a state probationary sentence it ran consecutive to a preceding federal probationary sentence while that federal probationary sentence is being served and/or when that federal probationary sentence has never been revoked.

FORTH ISSUE

DID THE TRIAL COURT RELY ON A LINE OF AUTHORITY WHICH WAS NOT APPLICABLE NOR DISPOSITIVE OF THE CLAIM IN THIS POST-CONVICTION PROCEEDING?

Throughout the post-conviction proceeding, including the first appeal in this case, Lenoir claimed that where his state post-release supervision sentence was ordered to run consecutive to his preceding federal post-release supervision sentence, his state post-release sentence could not commerce until after the federal post-release sentence ended, thus the state court could not commence its post-release sentence, and revoke the same, while the federal post-release sentence remained running.[4]

However, in reaching this post-conviction claim for the second time after remand by the Mississippi Court of Appeals, the trial court rested its decision on case laws that decided whether state authorities could prosecute and convict defendant for a new

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[4] Notably, the Mississippi Court of Appeals agreed, finding that an evidentiary hearing must be held to determine the status of the federal sentence. Lenoir, 943 So.2d at P7. Otherwise, there would be absolutely no need to conduct an evidentiary hearing nor to determine status of federal sentence. In this state, evidentiary hearings are not ordered until the prisoner's post-conviction motion states a claim upon which relief may be granted. Myers v. State, 583 So.2d 174, 176 (Miss. 1991), relying on Neal v. State, 525 So.2d 1279, 1280-1281 (Miss. 1987).

Fenno, 167 F.2d 593 (2d Cir. 1948); Stewart v. United States, 267 F2d 378 (10th Cir. 1959); United States ex. rel. Spellman v. Murphy, 217 F.2d 247 (7th Cir. 1954). Although these cases may correctly state the general rule, they are not dispositive in this case where the question is not whether state authorities can properly exercise jurisdiction to prosecute state crimes committed by person on federal probation. Lenoir never claimed the state has no jurisdiction to prosecute state crimes committed by one on federal probation.

The trial court also relied on United States v. Cole, 416 F.3d 894 (8th Cir. 2005), Thomas v. Brewer, 923 F.2d 1361 (9th Cir. 1991) and Wright v. Benov, 201 Fed Appx. 541 (9th Cir. 2006). See Order dated June 14,2007. These cases also are not dispositive of Lenoir's case where the question is not whether defendant would be entitled to credit on federal sentence while in state custody. The state court ran Lenoir's sentence consecutive to the federal sentence. This means the state post-release sentence begins when the federal post-release sentence ends. Milam, 578 So.2d at 274, citing 99-19-21. To have them run at the same time, or give credit for one while other one is being served, would amend the original sentencing order long after the court term ended, which is strictly forbidden. Bell, 759 So.2d at P19, citing Dickerson, supra.

The trial court also relied on United States v. Vann, 207 F. Supp. 108 (E.D.N.Y. 1962). See order dated June 14, 2007. This case is not dispositive because situation of defendant being on probation or parole in one jurisdiction, but arrested and placed in

probation or parole. The Vann prisoner claimed the federal authorities lost jurisdiction over his January 1958 conviction when they allowed him to be released from state prison in March, 1958 without placing him in custody. Vann, 207 F. Supp. at 109-110. Lenoir makes no such claim. Thus, Vann is not controlling nor applicable here.

Finally, the trial court cited Brewer v. Maroney, 315 F.2d 687 (3rd Cir. 1963) as authority to deny Lenoir's post- conviction claim. See Order dated June 14, 2007. The Brewer case was a close call because in that case the defendant was taken into custody by the state for violation of state parole, while he was serving federal parole. But the Brewer case is materially distinguishable because the prisoner's state parole started in May, 1952, long before the January, 1955 federal sentence, and before the June 1961 federal parole. Brewer, 315 F.2d at 687. In the case at bar the state post-release sentence did not take place before the federal post-release sentence. Had that been the case Lenoir would not be before the court. But where the state post-release sentence was after, and was ordered to run consecutive to, the federal post-release sentence, it was clear that the state post-release sentence could not begin until after the completion of the federal post-release sentence. Milam, 578 So2d 274, citing 99-19-21. Unlike in Brewer, supra, to begin the state post-release sentence, or any revocation of that state post-release sentence, before completion of the federal post-release sentence, would be to disregard the portion of the original sentencing order that the state post-release sentence runs consecutive to , thus after, the federal post-release sentence, and would in effect, be amending the original sentencing order

None of the cases relied upon by the trial court governs Lenoir's post-conviction claim, and the trial court erroneously denied Lenoir post-conviction claim. Rather, the cases governing Lenoir's post-conviction claim are those relied on by Lenoir in his first appeal of this case, Lenoir, Supra, as set out in the next, and final, issue of this appeal.

FIFTH ISSUE

ONCE THE STATUS OF THE FEDERAL SENTENCE WAS DETERMINED, DID THE TRIAL COURT TAKE APPROPRIATE ACTION TO ENSURE THE TERMS OF THE ORIGINAL SENTENCING ORDER ARE CARRIED OUT?

The appellate court directed the trial court to determine or remand "the staus of Lenoir's federal sentence." Lenoir, 943 So.2d at P7.

The trial court record evidence demonstrates that Lenoir's federal post-release supervision sentence was running unrevoked by federal court at the time of the state court's revocation of Lenoir's, state post-release supervision sentence.[6] Lenoir had a 5-year federal post-release supervision sentence upon his release from federal prison in February, 2003, at page 5 (lines 26-27) and page 24 (lines 24-28). The trial court knew that federal sentence had not been revoked at the time of the state revocation proceeding where the trial court said during that state proceeding that Lenoir "may" receive revocation of federal probation. Id. at page 33 (lines 4-5).

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[5] The trial court also relied on Jones v. Cunningham, 371 U.S. 236 (1962). See order dated June 14, 2007. The Jones case is short and simple; it ruled that a person on parole is in custody for purposes of bringing federal petition for writ of habeas corpus. That issue is not before this court. Thus, Jones is not relevant.

[6] Federal law provides Lenoir due process prior to any revocation of his federal post-release supervision sentence. F. R. Crim.

Crim. P. 32.1 (b)(2).

In 1999, the state court judge ordered that Lenoir's state post-release sentence run "consecutive" with Lenoir's federal post-release sentences. See Record, at pages 49, 50, 51, 57. All members of the bench, and bar, very well knows that a "consecutive sentence" is defined as one which begins to run after the preceding sentence. See Merriam -Webster's Dictionary of Law (1996). State law has spoken, and says, that "when, by express order, a person is sentence to serve consecutive terms, the terms of the second, or each subsequent, conviction shall commence at the completion of the service of the term for the preceding conviction." Milam, 578 so.2d at 274, citing 99-19-21. By express order in 1999 the trial judge ordered Lenoir's state post-release sentence to run consecutive to, thus at the completion of, the service of the terms of his preceding federal conviction. Thus, as a matter of state law, Lenoir's state post-release sentence, and its supervision, could not begin until the terms of federal post-release sentence ended.

Lenoir argues that to begin his state post-release supervision sentence before the post-release terms of his federal conviction ends, would, in effect, modify and amend the 1999 state sentencing order long after the end of the term of court in which Lenoir was sentenced, a practice which is forbidden by the Mississippi Supreme Court. Bell, 759 So.2d at p19, citing Dickerson, supra.

Lenoir also argues that to permit his consecutive state post-release supervision to begin, and be revoked, before the post-release supervision terms of his preceding

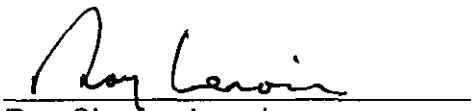
the state prosecution in 1999 this power of the United States prosecution in 1999 this power of the United States was not a party to the state persecution in 1999 this power of the united States cannot be affected by any proceedings in the state court. Bell, 759 So.2d at p29, citing United States v. Pudilla, supra. The consecutive state post-release supervision preceding should not be allowed to affect the post-release terms of the preceding federal conviction and the federal court's power to enforce those terms of the federal sentence.

Lenoir contends that the interference from the trial court in the instant case can bring nothing but reproach upon the administration of justice. The trial court has modified and amended the express consecutive terms of the original sentencing order years after the term of court ended. The trial court has begun a state post-release supervision term which was expressly ordered to run consecutive to the terms of a preceding federal sentence, although the terms of that federal sentence has not ended, setting at naught a federal judge's post-release sentencing order, a state circuit judge's expressed consecutive terms order, and the law cited in this issue.

The express terms of the original sentencing order, that the state post-release sentence runs after the completion of the terms of the preceding federal conviction, must be carried out. This court should vacate the decision of the trial court and direct that the state post-release sentence begin, consecutive to, and at the completion of the terms of Lenoir's federal post-release sentencing.

This court should order Lenoir discharged to his pending federal post-release sentence.

Respectfully submitted,

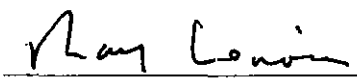
BY: 
Ray Charles Lenoir

PROOF OF SERVICE

This is to certify that I, Ray Charles Lenoir, have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United States Postal Service, first class postage prepaid, upon:

Honorable Jim Hood Attorney General P. O. Box 220 Jackson, MS 39205	Sharion R. Aycock Circuit Court Judge P. O. Drawer 1100 Tupelo, MS 38802-1100	John R. Young District Attorney P. O. Box 212 Corinth, MS 38834

This, the 6th day of December, 2007.



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