

*In The Supreme Court
of The State of Mississippi*

COPY

Albert Edmond **FILED**

Appellant

Versus

MAR 24 2008

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

No. 2007-CP-01163

State of Mississippi *Appellee*

Appellant's Reply Brief

Oral Argument Not Requested

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In The Supreme Court
of The State of Mississippi

Albert Edmond Appellant

Versus No. 2007-CP-01163

State of Mississippi Appellee

Appellant's Reply Brief

Comes Now, the Appellant Albert Edmond, Pro se, and files this his Reply Brief, and will shew to the response of the Appellee's Argument-to-wit:

Statement of Case

This is an appeal against an Order of the Circuit Court of Sunflower County, Mississippi in which relief upon the Appellant's petition for writ of

Hereinafter, AB referred to Appellant's Brief
CP as to Clerk's Papers

habeas corpus was denied and dismissed without the mandated evidentiary hearing on remand from the Mississippi Supreme Court and relief upon Appellant's out-of-time motion for appeal denied and dismissed pursuant to the 180 days rule 4(a)(h). [See AB-pp. 1-8]

Statement of Facts

Appellant avers that on or about March 7, 1974, he was convicted in Hinds County Circuit Court for forcible rape and sentenced to a term of Life in the Mississippi State Penitentiary. [CP-p. 58; AB-p. 1];

That on or about June 16, 1982, the parole board, under the chair of Mr. Charles Jackson, granted and released him on a conditional parole; that about two week thereafter, he was arrested, under the direction of Bolivar County Sheriff - where he was paroled to

by the Cleveland, Mississippi Police Detectives on a warrant for charge of Breaking and Entering Occupied Dwelling, and jailed in the Bolivar County Jail on or about July 3, 1982; and remained there until July 20, 1982, when he was later transported back to the State's Penitentiary to appear before the Parole Board. That on or about July 9, 1982, he appeared before an unknown justice of the peace judge; where he was given six (6) days time spent in the jail and was released; but said deputy sheriff escorted him back to the County jail; that the records do not contain a order of conviction or sentence for the reduced charge of malicious trespass; that no time did his parole officer interview him; nor was he served with a copy of an alleged waiver of a preliminary hearing; nor a notice of a final revocation hearing; that

neither the alleged preliminary hearing waiver; the alleged letter of a revocation of parole hearing or meeting; Revocation of Parole Certificate stated that he, appellant, had been convicted and sentenced for violating any laws or conditions of parole - only that he was charged and arrested for malicious trespass. That he was never afforded a proper revocation hearing before his parole was revoked in August 2, 1982. [CP- p. 99; AB- pp. 9-10];

That on or about November 22, 1999, he filed a state petition for writ of Habeas corpus with the Greene County Circuit Court; that the State was ordered to file an Answer; that on or about December 6, 1999, the State filed their answer, but failed to attack and submit any documents to refute and disprove the appellant's allegations and assertions [CP- p. 3]; that on or about December 22, 1999, denial and dismissal of said petition

was entered into record and a copy of said order was mailed to appellant and the State [CP-p. 3]; said denial and dismissal were without an evidentiary hearing. [AB-pp. 10-11];

That on or about January 12, 2000, he filed a timely notice of appeal with the Greene County Circuit Court; that the state filed their appellees' brief, but failed to submit any documents to the supreme court to refute and disprove appellant's allegations and assertions [CP- pp. 70 and 77]; that on or about April 12, 2001, the supreme court reversed and remanded said case for an evidentiary hearing [AB-p. 11];

That on May 8, 2001, he was transported to Hinds County Circuit Court for said hearing by an error of MDOC; but was not afforded said hearing and transported back to Greene County; that on May 14, 2001, Greene County Circuit Court transferred the case to Sunflower County Circuit

Court - where and when Judge Evans became the presiding judge - for the purpose of the evidentiary hearing; That Sunflower County Circuit Clerk filed the entire records under a new cause number, as opposed to retaining the original cause number; That Judge ^{Evans J.E.} did not order the state to answer or order an expansion of record; that Judge Evans conducted lengthy hearings and heard considerable testimony - said hearings were ex parte; that said hearings were not made a part of the records nor were the names of the witnesses who offered testimony made part of the record; that the Clerk filed those original documents and records one month after they were transferred to said Court. [CP-p. 1-2]; That fourteen (14) days after the filing of said record (June 15, 2001) Judge Betty Sanders petitioned the Supreme Court to appoint Judge Evans as Special Judge ^{to A.C.} continue and re-preside over the case due to his resignation before concluding the matter; that the date and reasons

for said resignation were not given and made a part of the record. Judge Sanders petition was dated June 29, 2001; the supreme court's chief justice ordered on July 3, 2001 - Judge Evans' appointment as special judge and was made part of the records; That one day after Judge Sanders' petition and three days before Chief Justice Pittman's order of appointment, Judge Evans signed (June 30, 2001) an Order denying and dismissing appellant's state habeas corpus petition - which was transferred from its original jurisdiction - without the mandated evidentiary hearing; that the circuit clerk entered its judgment on July 12, 2001, into the records but failed to mail appellant a copy as required by statute - that she only mailed a filed copy to Mr. Norris; Supreme Court; and Judge Backstrom [CP - p. 1] [AB - pp. 11-12]

That on or about July 19, 2001, he, appellant, submitted to Greene County Circuit Clerk a Motion for Appointment of Counsel, which was filed on July 23, 2001, and transferred

to Sunflower County Circuit Clerk, who filed it on July 25, 2001 and August 15, 2001; that said motion was sent to said circuit clerk; Mr. Morris; and the attorney general's office by appellant; that said motion bore the original cause number but, when Sunflower County Circuit Clerk filed it - the Clerk did not file it under the new cause number as she had done the other original documents; that he, appellant, did not attach any exhibits onto said motion as alleged; that the said clerk made said attachment as exhibits. [CP-pp. 88-92];

That on or about June 21, 2001, appellant filed a Motion for Contempt of Supreme Court Mandate - which was dismissed without prejudice; that on or about October 8, 2001, appellant filed a second Motion for Contempt of Supreme Court Mandate; and that the Court ordered Judge Evans to respond by October 26, 2001; that Judge Evans failed to respond; That appellant wrote three letters in the span of four years, requesting

the status of said motion to the supreme court's clerk; and the clerk responded each time that no ruling had been made and the motion was still before the court. [AB-p.13]

That appellant filed on or about August 17, 2005, a Petition for Writ of Mandamus to order Judge Evans to respond; that on September 26, 2005, Judge Evans responded to the writ of mandamus; that he admitted that he did not respond to the Supreme Court's Order; that he had denied and dismissed the original petition for habeas corpus relief without the mandated evidentiary hearing; that on December 1, 2005, the Court dismissed the writ as moot; that the final order from the Supreme Court in regards to Judge Evans dismissal was on August 20, 2006. [AB-pp.13-14]

That thereafter, appellant filed on or about August 29, 2006, nineteen (19) days later, a Motion for Out-of-Time Appeal; said Motion was dismissed on or about May 4, 2007; but the circuit clerk failed to

serve a copy of the judgment on him until June 18, 2007 [AB-pp. 14-15]

That the Clerk's Papers submitted to the Supreme Court on said appeal were not proper and correct; they were not proper because the Clerk failed to certify the General Docket as required by rule of the appellate courts; they were not correct because the clerk reflects that appellant filed or attached several exhibits onto his motion for appointment of counsel; that the alleged exhibits are the ones that Judge Evans used to deny and dismiss the original habeas corpus petition; that appellant filed with the Court on October 9, 2007, his Written Statement of the Proposed Corrections to the Record; but the trial court has not made its ruling as of this date. [See Excerpt of Record; AB-pp. 15-16]

Argument

1. Whether the Appellate Court is Mandated to Grant Appellant an Out of Time Appeal.

The Appellee states that "... the Court only has Edmond's word that he did not receive notice of these orders..." [App. B-p. 6], in reference to the July 12, 2001 and May 7, 2007's orders denying habeas corpus petition and out-of-time appeal motion, is contradicted by the record [CP-pp. 1-2]; the record reflects that as to the July 12, 2001's judgment - the clerk mailed a filed copy to three individuals and he was not one of three; and the May 7, 2007's judgment - the clerk mailed a filed copy to only one (1) person, Judge Richard Smith. The appellate courts are authorized to only consider those facts that were found in the record, and not rely on mere allegation contained within petitioner's brief. (See Barnes vs. States, 937 So. 2d 1006 (Miss. Ct. App. 2006)).

Appellant avers that the reason he did not file his motion for out-of-time appeal

¹ Hereinafter App. B refers to Appellee's Brief

when he first heard from the supreme court of Judge Evans' judgment was because he filed a motion-petition for writ of mandamus with the supreme court to order the trial court's clerk to mail him a certified copy of the judgment and clerk's docket; said motion was dismissed to be filed in the trial court; that thereafter, he filed said motion/petition with the trial court of which has not been ruled on as of the date of said appeal; So, after no ruling and no copy of judgment, he filed his out-of-time appeal motion after the last order from the Supreme Court in Judge Evans' regards;

That, the appointment of counsel motion has never been ruled upon by the trial court; and the clerk knew when it was filed - that Judge Evans had already ruled without a hearing, and that she had not mailed appellant a copy. [App. B-6]; Appellee's claim that Appellant have been transferred to several different facilities over the years "is misplaced, because at the time of Judge Evans' entry

of judgment; he was still housed in the South Mississippi Correctional Institution (SMCI) and the Clerk had full knowledge of it via "order changing venue" [CP-pp. 82-83] [App. B-p. 7]; so, Appellee's argument holds no merit.

Therefore, Appellant, contrary to the Appellee's argument, has shown good cause why this court should suspend the rules and allow appellant to appeal the judgment of entry of Judge Evans; That pursuant to case law cited in Appellant's Brief [AB-p. 19], this Appellant Court may be permitted to consider the merits to prevent manifest injustice under Miss. R. App. P. 4(g), Miss. R. App. P. 2(c) and Miss. Code 99-39-25 (1), Hea brea vs. State, 947 So. 2d 354 (Miss. Ct. App. 2007)

2. Whether the Trial Court Erred in Denying Appellant's Habeas Corpus Petition Without the Mandated Evidentiary Hearing.

Appellant avers that when the Supreme

Court remanded his case to Greene County Circuit Court - which was arbitrarily transferred to Sunflower County Circuit Court - it was clearly pursuant to Miss. Code Ann. Secs. 99-39-17 and 99-39-19, as opposed to, Section 99-39-11, the section which Judge Evans arbitrarily and erroneously applied to appellant's habeas corpus petition. See Edmond vs. Miss. Dept. of Corrections, 783 So. 2d 685, 678 (Miss. 2001); Incomplete record did not allow the supreme court to determine if, under Miss. Code Ann. Sec. 99-39-5(1)(g), defendant's release was unlawfully revoked; the case was remanded to the circuit court for an expansion of the record..., if necessary, an evidentiary hearing..., and consideration of and a ruling on the merits of defendant's petition. Greel vs. State, 944 So. 2d 891 (Miss. 2006). It is noted that Section 99-39-11 was abused by Judge Evans; he applied subsections (1)(2) only to dismiss said petition; but the record reflects that Greene County Circuit Court had already applied said section and executed subsection (3) and

the State responded with their Answer, but did not submit any of the alleged documents used by Judge Evans later; the Sunflower County Circuit Clerk filed said Answer under the new cause number "2001-309C1" [CP-p.1]; therefore, Judge Evans abused his discretion by applying subsections (1) and (2). Furthermore, Judge Evans did not cause appellant to be notified pursuant to subsection (2); he did not direct the circuit clerk to mail appellant a copy of his dismissal; nor did Judge Evans have "any annexed exhibits" properly filed before him. He abused his discretion [App. B-p. 8];

Appellant avers that he did not attach any of the alleged documents to his motion for appointment of counsel (the only document that he ever possessed was his certificate of parole); that there is no record that the court ordered the supplement of record; nor is there any record of the State submitting said documents; and the State did not submit any proof that said documents were the authentication of the proceedings of the revocation of parole; they did not

bare any "filed in" certification" of the clerk and parole board, therefore, improper before the Court. Section 99-39-17(4)(1);

Appellant avers that Judge Evans and the State failed to list the witnesses' names who he stated were dead or no longer employed with MDOC; so, how can this Court accept that said allegation is true? Appellant stated the names of the persons who had personal knowledge of the unlawful revocation [CP pp. 4-35; 56-66]. The Appellant are authorized to only consider those facts found in the record. See Barnes. Also, contrary to what Judge Evans stated; most of the alleged witnesses were at the time and presently are still alive; and there is no factor if they are no longer with MDOC. They are still witnesses.

The Appellee failed to submit the date of Judge Evans alleged resignation; furthermore, it's not the "filing" of the order, but the "signing" of the order which is a factor in the claim. The State failed to provide this Court with any record surrounding Judge Evans resignation; therefore, its argument

holds no merit. See Rucker vs. State, 909 So. 2d 137 (Miss. Ct. App. 2005). There was no need to appoint Judge Evans as "Special Judge" if he had already concluded the matter before June 29, 2001, the date of the request. [App. B. - p. 9]

3. Whether the Appellant Was Afforded Due Process Rights and a Proper Revocation Procedure Before His Parole Was Revoked.

The Appellee argue that "the record has been supplemented since the case was remanded and those documents show that Edmond was accorded due process in the revocation of his parole". But the Appellee failed to argue - who supplemented the record; proof and evidence of said supplement via order of expansion of record; certificate of authentication of proceedings of revocation documents pursuant to Miss. Code Ann. Sec. 99-39-11, as proof that said documents were proper before Court. The Court of Appeals stated in Payton vs. State, 845 So. 2d 713 (Miss. Ct. App.

2003), "It is fundamental that this Court will only consider facts found within the trial record. Colenburg v. State, 735 So. 2d 1099 (P6) (Miss. Ct. App. 1999). This Court does not rely on assertions made in briefs, but only on facts preserved within a record certified by law. Henderson v. State, 783 So. 2d 769 (P4) (Miss. Ct. App. 2001)" (Emphasis added by Appellant)

Appellant avers that if this Court determines that the said documents were proper before the Court - which he has argued that they were improper - nevertheless, the record still reflects that he was not afforded due process rights and a proper revocation proceeding/procedure before his parole was revoked in August of 1982 pursuant to Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) because: (a) the alleged letter did not adequately state a bona fide violation of a parole's condition by asserting "... condition No. 5 by being arrested and charged with Malicious Trespassing"; it does not state anything about a conviction or sentence; nor did it state anything about the contents of

police report; also, no proof that appellant received such letter - no signature of the appellant; and furthermore, it is policy that the parole officer or field supervisor hand deliver said notice of a preliminary hearing and final revocation hearing's date; (b) there was no disclosure to appellant of evidence against him (appellant states that no one ever stated to him any of the contents of the police report; that he did not know whether it was the house or residence he allegedly entered; no of the allegations were ever proven in a court of law - he had no knowledge of said allegations); (c) that he was not given an opportunity to have witnesses at said hearing; nor was there any documented evidence to prove that he was convicted and sentenced for committing any crime or parole conditions. See Payton, which states, "... the evidence against him was presented and he was given the opportunity to be heard on the matter..." (P23) (Emphasis added); (d) he, appellant, was not given the right to confront and cross-examine adverse witnesses (the record on tape will

reflect that the Board discussed the police report submitted to the Board by said parole officer); (4) there was no written statement by the Board (factfinders) as to the evidence relied on (the "parole revocation" document only stated, "he violated condition No. 5"; "No. 5 arrested and charged with Malicious Trespassing"); and a copy of said document was not given to appellant; also, the letter dated August 11, 1982 - 9 days after the alleged meeting - only stated, "your parole be revoked and continued 1 yr. ... due to Violated condition No. 5". Appellant avers that the Board could not lawfully revoke his parole solely upon an alleged arrest and charge of or with Malicious Trespassing (appellant notes: there is nothing in the record via arrest warrant to support said arrest see CP-pp. 93-100) [App. B-pp. 10-11]; also, there is no, warrant for Petitioner's arrest was issued by the City of Cleveland for the charge of Burglary of an Inhabited Dwelling, "in the record; nor is there a "Warrant for Arrest of Paroled Prisoner" issue by MDOC dated July 3, 1982 [App. B-p. 11; CP-pp. 93-100]; and because

of no such warrant, the sheriff had no authority to detain him in jail after the justice peace judge had released him; Furthermore, the revocation of appellant's parole based on an alleged arrest and charge was unlawful. See Brown vs State, 864 So. 2d 1058 (Miss. Ct. App. 2004) ("the Court of Appeals held that a mere arrest was insufficient to support a revocation") Creel;

Furthermore, "Violation Report Form" signed by the parole officer was inadequate and incomplete: it did not list the arresting officers' names as required by section II, it also was dated "July 12, 1982" and stated, "no" preliminary hearing was requested (?) but stated, after it was signed, that: - "On 7-14-82, defendant signed Waiver of Preliminary Parole Hearing"; the question is - how could a preliminary hearing not be requested before a "waiver" of said hearing be signed by the defendant (?) The report was no more than a "Sham".

Also, the alleged "Waiver of Right to Preliminary Parole Revocation Hearing", allegedly signed by

appellant, was inadequate and failed to put appellant on notice of a "bona fide" parole violation; it only states - "I, ..., have been charged with the Parole Violation(s) listed below: Malicious Trespassing" [CP-p. 96]; Appellant argues, "malicious trespassing" was not listed on his Certificate of Parole as one of the several conditions of parole; therefore did not put appellant on actual notice of a parole violation. See Payton, where it is stated "... that he signed a waiver to preliminary probation revocation hearing and that, in this document, he was informed of the violation alleged." Payton (P20) (Emphasis added);

Appellant argues that each of the alleged supplemented documents could very much so support whether a conviction and sentence of malicious trespassing, or any crime ever ~~existed~~^{A.S.} existed [CP-p. 65]; Therefore, even when considering the alleged supplemented documents - Appellant due process rights were violated; and he was not

afforded a proper revocation procedure as dictated by the Morrissey's Court and Riley; and this Court should reverse and render the trial court's judgment and reinstate appellant's original parole.

4. Whether the Doctrine of Laches Should Apply to Appellant's Habeas Corpus Petition.

Appellant argues that the trial should have conducted the mandated evidentiary hearing on matters of the doctrine of laches' applicability because: 1. The State had used the doctrine of laches as one of its "affirmative defenses" [CP-p. 38]; and because; 2. The State again in its brief raised the doctrine of laches as an issue - but was unable to argue it before the Court [CP-pp. 73-74] [App. B. pp. 12-14]; and because the Sunflower County Clerk had filed the State's Answer with the trial court; therefore, the trial court, Judge Evans, should have conducted said

hearing in order to carry out what the Supreme Court pointed out in Bailey vs. Estate of Kemp, 955 So. 2d 777, 784 (Miss. 2007) - the three considerations the courts look to; The State cannot now argue or show the three factors of the doctrine of laches because it was not given the opportunity to present them to the trial court as mandated by the supreme court. See Edmond vs. Miss. Dept. of Corrections, 783 So. 2d 685, 678 (Miss. 2001). ("The doctrine of laches may be applicable, however, in order to invoke laches as a bar, the State must show that it has been prejudiced by the passage of time..., it should be shown by an evidentiary hearing in the trial court") (P13) (Emphasis added) [CP-p. 63] [App. B. pp. 12-14].

The Appellee here, has not argue how the ^{N.E.} ~~how the~~ three considerations the Courts look to in deciding that laches applies caused prejudice to the party (of note: Judge Evans refused and failed to look at said considerations and then made a

presumptuous statement that any witnesses who had knowledge of the revocation proceedings were either dead or no longer employees of MDOC; if that were the case - then who were those alleged witnesses who gave "considerable testimony" during those "lengthy hearings"; and he did not list for the record how he concluded that they were dead; plus, appellant had proof that most of the witnesses were very much alive and all the alleged records were in tact; plus, the record would have reflected that one of the star witnesses, Chaplain Wendy Hatcher, who was present for both parole meetings and who was a friend of Judge Evans via the late Judge John Hatcher, who had knowledge of the revocation hearings, was very much alive and employed with MDOC; therefore, said argument fails. See Lucker vs. State, 909 So. 2d 137 (Miss. Ct. App. 2005) Id. (P10.) ("This Court need not address an issue if the appellant fails to make an argument

pursuant to... Newell v. State, 754
So. 2d 1261, 1264-65 (P6) (Miss. Ct. App.
1999) "(Emphasis added)"

Therefore, the trial court erred in
not conducting said mandated
evidentiary hearing in determining
whether laches should apply. And,
the Appellee has failed to show
how the passage of time had
prejudiced it. Therefore, this
Court should reverse and render
the trial court erroneous judgment
and reinstate appellant's original
parole of 1982; and for any other
relief this Court deems appropriate
under the circumstances of this
case.

Respectfully submitted,

Albert Edmond, pro se

This, 21st day of March, 2008.

Certificate of Service

I do hereby certify that I have this date mailed via United States mail, postage prepaid, a true and correct copy of the foregoing Appellant's Reply Brief in the above-styled and numbered cause to the following:

Hon. Jane L. Mapp
Attorney General's Office
Post Office Box 220
Jackson, MS 39205

Hon. Richard A. Smith
Circuit Court Judge
Post Office Box 1953
Greenwood, MS 38935

This, the 24th day of March, 2008

Albert Edmund