

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**WILLIE ROSS**

**FILED**

**APPELLANT**

**AUG 19 2008**

**VS.**

**OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS**

**NO. 2007-CP-2192-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

Willie Ross entered a guilty plea to burglary of a dwelling. Ross subsequently filed his first motion for post-conviction relief which the circuit court denied; this Court affirmed the denial of relief. Ross filed this his Successive Motion for Post Conviction Relief to Vacate and Set Aside Sentence on Basis of Intervening Decisions by United States Supreme Court. The Circuit Court of Lowndes County, Mississippi, Honorable Lee J. Howard, presiding, denied the motion as time barred. Ross appeals that denial.

## STATEMENT OF FACTS

The Appellant, Willie Ross, was indicted on February 4, 2002, on the charges of burglary of a dwelling, burglary and larceny of a dwelling, and receiving stolen property. (CP 34). On May 23, 2002, Ross filed his petition to enter a guilty plea with the Circuit Court of Lowndes County agreeing to plead guilty to the first count if the State would drop the two other pending charges and recommend a sentence of twenty (20) years. (CP 39). On May 23, the day of Ross's plea hearing, the State filed a motion to amend the indictment to reflect Ross as a habitual offender pursuant to Mississippi Code Annotated § 99-19-81. (CP 47). After the State introduced proof of Ross's previous convictions, the circuit court granted the motion and ordered the amendment of the indictment. (CP 49; 51-53). A correction to Ross's plea agreement was made, and authorized by Ross, to reflect his changed status and the required sentence of twenty-five years. (CP 39; 52-53). The court sentenced Ross to twenty five years as per Mississippi Code Annotated § 99-19-81 (Rev.2000) as a habitual offender. (CP 36; 58). The transcript of Ross's guilty plea hearing plainly shows the trial court ensured Ross understood that he was pleading guilty as a habitual offender and that he understood the consequences associated with a guilty plea. (CP 51-62).

On June 1, 2005, Ross filed his first *pro se* motion for post-conviction relief in the Circuit Court of Lowndes County, asserting his plea was not voluntarily given and ineffective assistance of counsel. The trial court denied the request for post-conviction relief finding that Ross was aware that his habitual offender status would be considered during sentencing and that he agreed to the twenty-five year sentence. Ross appealed. On August 22, 2006 in *Ross v. State*, 936 So.2d 983 (Miss.App.,2006) this Court affirmed the trial court's denial Ross' first petition for post-conviction relief.

On September 10, 2007, Ross filed the motion *sub judice* claiming an illegal sentence and

violations of his 5<sup>th</sup> and 14<sup>th</sup> Amendment rights. On December 4, 2007, the trial court summarily dismissed the motion finding that Ross' motion was filed past the statute of limitations provided in Mississippi Code Annotated § 99-39-5. (CP 64). Ross now appeals that decision on the grounds that the habitual portion of his sentence is illegal. Ross asserts intervening decisions rendered by the United States Supreme Court except his motion for post-conviction relief from the three-year bar which would otherwise prohibit consideration of such claim.

## **STATEMENT OF ISSUES**

- I. WHETHER THE SUCCESSIVE MOTION FOR POST CONVICTION RELIEF IS TIME- BARRED?**
- II. WHETHER THE SUCCESSIVE MOTION FOR POST CONVICTION RELIEF IS PROCEDURALLY BARRED AS A SUCCESSIVE WRIT?**

## **SUMMARY OF THE ARGUMENT**

Ross failed to show that the circuit court's order denying his Successive Motion for Post-Conviction Relief was clearly erroneous. Ross filed the instant motion for post-conviction relief more than six years after entry of his guilty plea; therefore, it is barred by the statute of limitations as set forth in Mississippi Code Annotated section 99-39-5(2). Further, Ross' motion is procedurally barred as an impermissible second attempt to obtain post-conviction relief, as set forth in Mississippi Code Annotated section 99-39-27(9).



## ARGUMENT

### I. WHETHER THE SUCCESSIVE MOTION FOR POST CONVICTION RELIEF IS TIME- BARRED.

A circuit court may deny relief of a prisoner's motion for post-conviction relief without an evidentiary hearing where "... it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief." Miss. Code Ann. § 99-39-11(2)(Rev. 2007). This Court will not disturb a circuit court's decision to deny relief on a motion for post-conviction relief absent a showing that the circuit court's decision was clearly erroneous. *Epps v. State*, 926 So.2d 242 (Miss.Ct.App.2005).

A motion for post-conviction relief that was not filed within three years after defendant's guilty plea was statutorily time-barred, absent any applicable exception to statute. *Jones v. State*, \_\_ So.2d \_\_, 2008 WL 2582671(Miss.App.) As pointed out by the Lowndes County Circuit Court, the motion *sub judice* is time-barred pursuant to Mississippi Code Annotated section 99-39-27(9). Ross entered his guilty plea on May 23, 2002; the motion which is the subject of this appeal was filed on September 10, 2007, far past the expiration of the time in which to file such post-conviction requests for relief, unless it fits within some enumerated statutory exception. The circuit court was correct in finding that Owens failed to raise any arguments which would allow him to file his motion outside of the three-year time period. Section 99-39-5(2) states in part:

(2) A motion for relief under this article shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction. Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature

that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction...

Ross cites *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) as intervening decisions by the United States Supreme Court for the proposition that his constitutional rights were violated because he was entitled to a jury trial to determine whether he was eligible for enhanced punishment under the state's habitual offender statute. Ross' argument is based on a misperception of the law. "The United States Supreme Court, the Mississippi Supreme Court, as well as this Court, have made clear that an offender has no entitlement to a jury trial on the issue of whether or not he qualifies for enhanced punishment under the habitual offender statute." *Smith v. State*, 963 So.2d 1168 (Miss.App., 2007) citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct 2348.

The Mississippi Supreme Court held in *Jackson v. State*, 965 So.2d 686, 690 (Miss.2007) that post-conviction relief petitions alleging an illegal sentence are not subject to the time bar. However, Ross' sentence was not illegal so as to except it from the time bar.

## **II. WHETHER THE SUCCESSIVE MOTION FOR POST CONVICTION RELIEF IS PROCEDURALLY BARRED AS A SUCCESSIVE WRIT.**

Mississippi Code Annotated section 99-39-27(9) reads in part: “The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this article.” Excepted from the successive-writ bar are certain enumerated exceptions, such as an application filed regarding insanity prior to the execution of a sentence of death, intervening cases of either the United States Supreme Court or the Mississippi Supreme Court that would have actually adversely affected the outcome of conviction or sentence, or newly discovered evidence which was not reasonably discoverable at the time of trial. *Id.*

Ross filed his first motion for post-conviction relief on June 1, 2005. (See Certified Docket Entries in PCR Action 2002-0105-CV1 in CP 1-3). The circuit court denied the relief and summarily dismissed the motion. Ross appealed. On August 22, 2006 in *Ross v. State*, 936 So.2d 983 (Miss.App.,2006) this Court affirmed the trial court’s denial for post-conviction relief. Ross filed this successive writ for-post conviction relief on September 10, 2007.

This Court previously held in *Johnson v. State*, 962 So.2d 87,89(¶12) (Miss.Ct.App.2007) that it will not overturn a denial of a motion for post-conviction relief without a showing that an exception to the successive-writ bar exists. Ross fails to cite any case that exempts his successive writ and none of the statutory exceptions apply. Therefore, the sub judice motion is procedurally barred as an impermissible second attempt to obtain post-conviction relief.

Any complaint about the alleged illegality of Ross’ sentence could have been addressed in his first post-conviction proceeding. Regardless of whether Ross brought his present complaints about his sentence in the original motion, he was bound to have done so. The State invokes the doctrines of collateral estoppel or res judicata with respect to Ross’ claims. The claims could and

should have been raised in the original motion for post-conviction relief.

## CONCLUSION

Ross failed to establish that an intervening decision of either the United States Supreme Court or the Mississippi Supreme Court excepts the motion *sub judice* from the procedural time bar and successive writ bar for post-conviction relief pursuant to Mississippi Code Annotated sections 99-39-5(2) and 99-39-27(9). Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the trial court's denial of Ross' motion for post-conviction relief.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Lisa L. Blount, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 19<sup>th</sup> day of August, 2008.

  
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