

# **I. CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record for the Appellant certifies that  
The following persons have an interest in the outcome of this case. This  
representation is made in order that the justices of the Supreme Court  
and/or judges of the Court of Appeals may evaluate possible  
disqualification or recusal:

1. Teresa Schwend, Pearl, Ms.
2. David L. Walker, Southaven, Ms.
3. Celeste Wilson, Hernando, Ms.

Respectfully submitted,

This the 31<sup>st</sup> day of March 2008.



David L. Walker  
Counsel for Appellant

2007-KA-02039  
COA-T

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### **III. TABLE OF AUTHORITIES**

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#### **IV. STATEMENT OF ISSUE**

**WHETHER THE TRIAL COURT ERRED IN DENYING  
THE APPELLANT'S PETITION FOR POST-CONVICTION  
RELIEF ALLEGING AN IMPROPER AND ILLEGAL SENTENCE.**

## V. STATEMENT OF THE CASE

On September 13<sup>th</sup>, 2007 the Appellant, Teresa Schwend, filed a petition for post-conviction relief to vacate revoked sentence in the Circuit Court of Desoto County, Ms. R. at 4. The Appellant alleged that on November 6<sup>th</sup>, 2006 the circuit court of Desoto County, Ms. revoked four years of the sentence imposed in Cause No. CR2002-932-C-D. Id. The circuit court had previously sentenced the Appellant to serve this four sentence concurrently with the sentences imposed in cause numbers 2000-188-R-D and 2001-15-R-D on May 7<sup>th</sup>, 2003 with credit for one day time served. Id. The Appellant alleged that at the time the circuit court revoked the aforesaid four year sentence that she had served approximately three years and six months of the sentence that the circuit court attempted to revoke. Id. Thus, she alleged, the aforesaid revoked four year sentence was improper and illegal and violated her Fifth Amendment to the United States Constitution and Article III, Section 26 right to due process of law. Id.

The circuit court denied the Appellant's petition by order filed on October 23, 2007. R. at 17. It noted that the Appellant entered a plea of guilty pursuant to North Carolina v. Alford in CR2002-932-RD

and the circuit court sentenced the Appellant to one day to serve in the MDOC followed by four years of post-release supervision with the sentence in CR2002-932-RD concurrent to the sentences in CR2000-188RD and CR2001-75-R-D. R. at 18.

According to the circuit court the Appellant was released from the MDOC on September 21, 2004. Id. On August 22, 2006 the Appellant's probation officer filed an affidavit claiming that the Appellant had violated her post-release supervision in CR2002-932-RD. Id. After a revocation hearing on November 6<sup>th</sup>, 2006 the circuit court revoked the four years of of the Appellant's post-release supervision in CR2002-932-R-D. Id.

The circuit court cited section 47-7-34 (1) MCA in its order and noted that a defendant may be placed under post-release supervision upon release from the term of incarceration. R. at 19. According to the circuit court, by the plain meaning of the term "post-release supervision" the Appellant's post-release supervision could not begin until she was released from the MDOC on September 21, 2004. Id.

## **VI. SUMMARY OF ARGUMENT**

The Appellant would argue that if she were released from the MDOC on September 21, 2004 then she was on post-release supervision from then until the time that the circuit court revoked her on November 6<sup>th</sup>, 2006 pursuant to the circuit court's own analysis in this case. That is, the Appellant did not have four years of post-release supervision remaining to be served because she had been on post-release supervision since September 21, 2004.

## VII. ARGUMENT

The Appellant would argue that if she were released from the MDOC on September 21, 2004, then she was on post-release supervision from then until the time that the circuit court revoked her on November 6<sup>th</sup>, 2006 pursuant to the circuit court's own analysis in this case. That is, the Appellant did not have four years of post-release supervision remaining to be served because she had been on post-release supervision since September 21, 2004.

As part of the relief the Appellant sought in her petition was a request that the circuit court amend its sentencing order to give the Appellant proper credit for time served. R. at 5. Section 99-39-23 (5) MCA Rev. 2000) provides the trial court with authority to make corrections to an improper sentence and it should be directed to do so.

The Appellant has a right of freedom from an illegal sentence and this right is a fundamental right. **Luckett v. State**, 582 So. 2d 428, 430 (Miss. 1991).

In considering a challenge to the denial by the circuit court of the petition for post-conviction collateral relief a reviewing court may



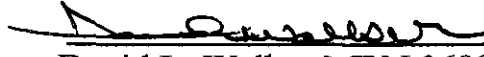
reverse the decision of the trial court if it is clearly erroneous. Smith v. State, 806 So.2d 1148, 1150 (Miss. Ct. App. 2002). The decision of the trial court is clearly erroneous by its own analysis. An attack on a sentence as erroneous due to a trial judge's mistake is proper via a petition for post-conviction collateral relief act. Moore v. State, 859 So. 2d 1018-1019 Miss. Ct. App. 2003). The Appellant should be given credit for the time that she served on post-release supervision from September 21, 2004 to November 6<sup>th</sup>, 2006 on the four year revoked post-release supervision sentence. This portion of her sentence was unlawfully revoked by the trial court because it had already be served by the Appellant.

### **VIII. CONCLUSION**

In conclusion, based upon the foregoing analysis and authorities, the Appellant urges the Court to reverse the decision of the circuit court and to direct it to give the Appellant credit for the time that she served on post-release supervision from September 21, 2004 to November 6<sup>th</sup> 2006.

Respectfully submitted,

This the 31<sup>st</sup> day of March 2008.

  
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662-280-3300

Certificate of Service

I, David L. Walker, counsel for the Appellant, hereby certify that I have this day either hand-delivered or mailed a copy of the Appellant's Brief to Hon. Jim Hood, counsel for the Appellee, Hon. Robert P. Chamberlin, circuit court judge and Hon. Celeste Wilson, counsel for the Appellee, at their usual mailing addresses.

This the 31<sup>st</sup> day of March 2008.

  
David L. Walker