

DOCKET NO. 2008-CP-00229-COA

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

**COPY**

JESSIE JAMES DAVIS

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

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**FILED**

**AUG 25 2008**

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

ON APPEAL FROM THE CIRCUIT COURT  
OF GRENADA COUNTY, MISSISSIPPI  
FIFTH CIRCUIT COURT DISTRICT

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BRIEF FOR APPELLANT

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Jessie James Davis  
DCF, #L6579  
3800 County Road 540  
Greenwood, MS 38930

Appellant Pro Se

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CERTIFICATE OF INTERESTED PERSONS

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The undersigned Appellant, Jessie James Davis, certifies that the following listed persons have an interested in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Jessie James Davis, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable Clarence E. Morgan, Circuit Court Judge;
4. Honorable Doug Evans, District Attorney;

Respectfully Submitted,

BY: \_\_\_\_\_

Jessie James Davis  
DCF, #L6579.  
3800 County Road 540  
Greenwood, MS 38930

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STATEMENT OF ISSUES

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**ISSUE I**

Appellant was sentenced to an illegal and excessive sentence where the offenses set forth in the indictment allows a maximum sentence of five (5) years. Such actions violated the Petitioner's right to due process of the law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and constitute plain error. Appellant moves for an evidentiary hearing on these matters.

## **ISSUE II**

Whether trial court erred in summarily dismissing the claims without requiring the State of Mississippi to file an answer to the PCR motion.

## **ISSUE III**

Whether trial court erred in failing to conduct an evidentiary hearing on the PCR motion.

## **STATEMENT OF INCARCERATION**

The Appellant is presently incarcerated within the custody of the Mississippi Department of Corrections and assigned to the Delta Correctional Facility in Greenwood, Mississippi.

## **STATEMENT OF CASE**

In order to succeed in a post-conviction motion under Mississippi law, a Appellant must show that the adjudication of a claim in a Mississippi Court resulted in a conviction or sentence that was obtained in violation of the Constitution or laws of the United States. Miss. Code §99-39-1, *et seq.* The Constitution, as the framework from which all Federal law springs, must not be violated as applied to the Appellant. The trial court, in failing to require an answer or to conduct a hearing before denying relief on the well pleaded claims presented in the PCR has denied Appellant due process of law. The trial court's summary dismissal order fail to fully consider and determine the claims. Where the

indictment placed Appellant on notice that he was charged under Miss. Code Ann. Sec. 97-3-65(3)(a, Appellant could not have pleaded guilty under Miss. Code Ann. Sec. 97-3-65(4)(a) as the trial court would find. The decision cited by the trial court, Purnell v. State, 878 So.2d 124 (Miss. App. 2004) provide that the indictment is the instrument which alerts the defendant of the charges filed against him. The contents of the indictment should be strictly read. Hailey v. State, 537 So.2d 411 (Miss. 1988) There should be no practice to read between lines of the indictment. If the contents of the indictment makes out two different charges then the lesser should be applied. Hailey v. State, 537 So.2d 411 (Miss. 1988) The trial court should have followed this practice and requirement.

It is from this action which Appellant now appeals to this Court.

### **STANDARD OF REVIEW**

In reviewing a trial court's decision to deny a motion for post-conviction relief the standard of review is clear. The trial court's denial will not be reversed absent a finding that the trial court's decision was clearly erroneous. Kirksey v. State, 728 So. 2d 565, 567 (miss. 1999).

In the instant case well-settled law demonstrates that the trial court's decision was clearly erroneous since the trial court failed to recognize the plain statute set forth in the indictment and failed to conduct a hearing to permit

Appellant the opportunity to plead his case before the Court before being summarily dismissed.

### **STATEMENT OF FACTS**

The Appellant was indicted during the July Term, 2001 of the Grenada County, Mississippi, grand jury for the offense of kidnapping, MCA §97-3-53 and Attempted Rape, MCA §97-1-7<sup>1</sup> and MCA §97-3-65(3)(a)<sup>2</sup>.

The Appellant was a first offender without any prior arrest or conviction.

The Appellant subsequently entered a plea of guilty to the offense set forth under Count II of the indictment rape and was sentenced to a term of 10 years to be suspended to a term of 5 years probation.

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<sup>1</sup> Miss. Code Ann. § 97-1-7. Attempt to commit offense; punishment.

Every person who shall design and endeavor to commit an offense, and shall do any overt act toward the commission thereof, but shall fail therein, or shall be prevented from committing the same, on conviction thereof, shall, where no provision is made by law for the punishment of such offense, be punished as follows: If the offense attempted to be committed be capital, such offense shall be punished by imprisonment in the penitentiary not exceeding ten years; if the offense attempted be punishable by imprisonment in the penitentiary, or by fine and imprisonment in the county jail, then the attempt to commit such offense shall be punished for a period or for an amount not greater than is prescribed for the actual commission of the offense so attempted.

<sup>2</sup> Miss. Code Ann. § 97-3-65(3)(a)

(3) Upon conviction for statutory rape, the defendant shall be sentenced as follows:

(a) If eighteen (18) years of age or older, but under twenty-one (21) years of age, and convicted under paragraph (1)(a) of this section, to imprisonment for not more than five (5) years in the State Penitentiary or a fine of not more than Five Thousand Dollars (\$5,000.00), or both;

The Appellant's probation was subsequently revoked which resulted in Appellant being committed to the Mississippi Department of Corrections for a period of 10 year.

The law is clear that both statutes set forth by the state in the indictment and under Count II, in combination, allows a maximum sentence of 5 years in the custody of the Mississippi Department of Corrections. Miss . Code Ann. § 97-1-7 Miss. Code Ann. §97-3-65(3)(a).

Sentencing occurred in Grenada County, Mississippi, on July 10, 2003.

The Appellant has taken no further legal action in this case.

During pre-trial, and at sentencing, the Appellant was represented by Honorable Leon Johnson of Grenada, Mississippi.

The Appellant subsequently filed PCR in the trial Court where he submitted that his imprisonment was unlawful and argued that:

I. The claim presented by the motion for PCR adequately set forth grounds of cause and prejudice for failing to raise these claims at trial or on direct appeal.

II. Appellant's sentence should be vacated on ground that Appellant was denied due process of law and in having been illegally and excessively sentenced in violation of. Code Ann. § 97-1-7 Miss. Code Ann. § 97-3-65(3)(a).

III. Appellant asserted that where there is an illegal sentence that no time bar or other restraint which would prohibit a collateral attack upon such

sentence would not apply. Lockett v. State, 582 So.2d 428, 430 (Miss. 1991).

The trial court subsequently dismissed the appeal with a hearing or requiring the state to file an answer to the motion.

### **ARGUMENT**

The law is clear that in order to succeed in a post-conviction motion under Mississippi law, a Appellant must show that the adjudication of a claim in a Mississippi Court resulted in a conviction or sentence that was obtained in violation of the Constitution or laws of the United States. Miss. Code §99-39-1, *et seq.* The Constitution, as the framework from which all Federal law springs, must not be violated as applied to the Appellant.

### **ISSUE I.**

#### **THE APPELLANT'S CLAIMS ADEQUATELY SET FORTH GROUNDS OF CAUSE AND PREJUDICE FOR FAILING TO RAISE THESE CLAIMS AT TRIAL OR ON DIRECT APPEAL.**

The purpose of a post-conviction proceeding is to bring to the trial court's attention material facts not known at the time of judgment. Foster v. State, 687 So.2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108 117 S.Ct. 2488 (1997). Other issues which were either presented through direct appeal or at trial may be procedurally barred in a motion for post-conviction relief. In the instant matter, the Petitioner's claims rest upon facts within the record as well as facts outside the



record, making their inclusion in any trial or appellate action improper. Appellant's conviction, sentence, revocation of probation, and denial of earned time and early release on such sentence was based upon a plea of guilty and without a trial or appeal.

Mississippi Code Ann. §99-39-7 (2001) provides that a petition for post-conviction relief is a motion in the original cause, except where the conviction and sentence have been appealed to the Supreme Court of Mississippi and there affirmed or the appeal dismissed. Mississippi has a three year time limitation on filing for post-conviction relief. This petition is properly before the court as the issues presented have not previously been raised at trial or in any appeal and have resulted in the deprivation of the Petitioner's constitutional rights. This petition was timely filed in that the claim could be procedurally barred. The trial court recognized this law and did not dismiss or deny the motion on the basis of any procedural bar. The Court therefore recognized that "[e]rrors affecting fundamental constitutional rights may be excepted from procedural bars which would otherwise prohibit their consideration. *"Fuselier v. State*, 654 So.2d 519, 522 (Miss. 1995) (citing *Smith v. State*, 477 So.2d 191, 195-96 (Miss. 1985).

However, prejudice only resulted after the time the revocation of the probation and imposition of the confinement. Appellant had no standing to commence a challenge to the conviction as long as he was not being held in

physical custody in regards to the conviction and sentence under attack. Miss. Code Ann. §99-39-5(1). Thus, even were this claim not allowed under the illegal sentence provisions, any time which Appellant spent on release, following the conviction and imposition of the probation, was equitably tolled by the law which deprived Appellant of standing to challenge the conviction and sentence since there was no “in custody” requirement to be met at that time. The Appellant sought to have the sentence vacated and/or set aside due to errors of constitutional magnitude occurring during his plea negotiations, plea hearing, and sentencing. These errors in sentencing constitute constitutional plain error. As indicated herein, both cause and prejudice are present in this case justifying that the issues be decided upon their merits.

## **ISSUE II**

Whether trial court erred in summarily dismissing the claims without requiring the State of Mississippi to file an answer to the PCR motion.

Appellant would assert that the trial court erred in summarily dismissing the PCR without requiring the state to file an answer to the motion and without conducting an evidentiary hearing.

Mississippi Code Annotated section 99-39-11(2) (Rev. 2000) provides: "If 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, the judge may

make an order for its dismissal and cause the prisoner to be notified." The decision to deny an evidentiary hearing is a matter within the sound discretion of the trial court. Stovall v. State, 770 So.2d 1019, 1021 (¶ 8) (Miss.Ct.App. 2000). ¶ 6. The trial court never stated in its order why this discretionary hearing was not conducted and why the court decided to determine the claims without allowing Davis a day in court to make his case. This Court should find that such an action amounts to an abuse of discretion and an evidentiary hearing should have been conducted before the court construed the facts of the motion and law against Appellant when it could have went either way. Fower v. State, 981 So.2d 1061 (Miss.App. 2008)

### **ISSUE III**

#### **THE APPELLANT WAS ENTITLED TO AN EVIDENTIARY HEARING ON THESE MATTERS.**

The Mississippi Supreme Court has held "a post-conviction collateral relief petition which meets basic requirements sufficient to mandate an evidentiary hearing unless it appears beyond a doubt that the Appellant can prove no set of facts in support of his claim which would entitle him to relief." Marshall v. State, 680 So.2d 794, 794 (Miss. 1996).

In the instant case, the Appellant asserted that he was deprived of due process of law where: 1) Appellant was convicted of attempted rape under the

provisions of Miss. Code Ann. Sec. 97-3-65(3)(a) and sentenced to a term which is double the amount allowed by law under such statute.<sup>3</sup>

As a matter of law, the facts, as claimed by the Appellant, are correct and true under the clear contents of the record. There can be little doubt that Appellant was entitled to relief in this matter. Therefore, the Appellant would assert to this Court that the trial court erred in failing to grant relief and in summarily denying the motion without an evidentiary hearing or requiring the state to file an answer.

### **CONCLUSION**

Appellant Davis respectfully submits that based on the authorities cited herein and in support of his brief, that this Court should vacate the decision rendered by the Circuit Court and should remand this case to the trial court for an evidentiary hearing. Moreover, this Court should find that the record and evidence in the case demonstrated that Jessie James Davis was entitled to relief.

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<sup>3</sup> Miss. Code Ann. § 97-1-7. Attempt to commit offense; punishment.

Every person who shall design and endeavor to commit an offense, and shall do any overt act toward the commission thereof, but shall fail therein, or shall be prevented from committing the same, on conviction thereof, shall, where no provision is made by law for the punishment of such offense, be punished as follows: If the offense attempted to be committed be capital, such offense shall be punished by imprisonment in the penitentiary not exceeding ten years; if the offense attempted be punishable by imprisonment in the penitentiary, or by fine and imprisonment in the county jail, then the attempt to commit such offense shall be punished for a period or for an amount not greater than is prescribed for the actual commission of the offense so attempted.

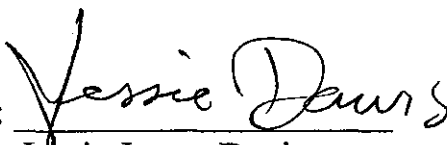
**Miss. Code Ann. § 97-3-65(3)(a)**

(3) Upon conviction for statutory rape, the defendant shall be sentenced as follows:

(a) If eighteen (18) years of age or older, but under twenty-one (21) years of age, and convicted under paragraph (1)(a) of this section, to imprisonment for not more than five (5) years in the State Penitentiary or a fine of not more than Five Thousand Dollars (\$5,000.00), or both;

Additionally, Jessie James Davis would argue that the trial judge's order was clearly erroneous in failing to adhere to the law when the Judge recognized that the indictment did charge Appellant under Miss. Code Ann. Sec. 97-3-65(3)(a) but asserted that to be a mistake and that Miss. Code Ann. Sec. 97-3-65(4)(a) was appropriate. The trial court should not have been allowed to amend and substitute the indictment after the sentencing and after the motion had been filed by Appellant.

Respectfully submitted,

BY:   
\_\_\_\_\_  
Jessie James Davis  
DCF, #L6579  
3800 County Road 540  
Greenwood, MS 38930

Appellant Pro Se

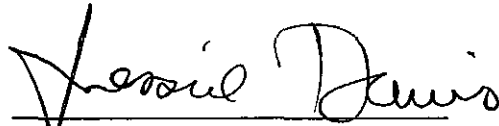
**CERTIFICATE OF SERVICE**

This is to certify that I, Jessie James Davis, have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United States Postal Service, to:

Honorable Doug Evans	Honorable Clarence Morgan	Honorable Jim Hood
District Attorney	Circuit Court Judge	Attorney General
P. O. Box 1262	P. O. Box 721	P. O. Box 220
Grenada, MS 38902	Kosciusko, MS 39090	Jackson, MS 39205

This, the 25 day of August, 2008.

BY:



Jessie James Davis

DCF, #L6579

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Appellant Pro Se