

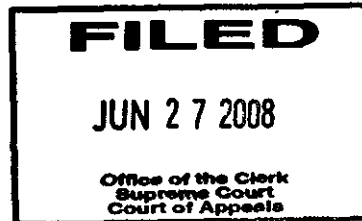
**COPY**

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

**LIONELL JAVON DYSON**

**APPELLANT**

**VS.**



**NO. 2008-CP-0379-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

**JIM HOOD, ATTORNEY GENERAL**

**BY: BILLY L. GORE  
SPECIAL ASSISTANT ATTORNEY GENERAL  
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MS 39205-0220  
TELEPHONE: (601) 359-3680**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
STATEMENT OF FACTS .....	2
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	4
DYSON'S PETITION FOR OUT-OF-TIME POST-CONVICTION RELIEF BASED UPON ALLEGEDLY INVOLUNTARY GUILTY PLEAS ENTERED IN MARCH/APRIL 2004, WAS TIME-BARRED BY VIRTUE OF THE THREE (3) YEAR STATUTE OF LIMITATIONS SET FORTH IN SECTION 99-39-5(2). ....	4
CONCLUSION .....	11
CERTIFICATE OF SERVICE .....	13

## TABLE OF AUTHORITIES

### STATE CASES

<b>Anderson v. State, 577 So.2d 390, 392 (Miss. 1991)</b>	<b>4, 9, 10</b>
<b>Anselmo v. State, 312 So.2d 712 (Miss. 1975)</b>	<b>9</b>
<b>Austin v. State, 863 So.2d 59 (Ct.App.Miss. 2003)</b>	<b>5</b>
<b>Beamon v. State, 816 So.2d 409 (Ct.App.Miss. 2002)</b>	<b>7</b>
<b>Bishop v. State, 812 So.2d 934, 945 (Miss. 2002)</b>	<b>10</b>
<b>Brister v. State, 858 So.2d 181 (Ct.App.Miss. 2003)</b>	<b>11</b>
<b>Crawford v. State, 787 So.2d 1236 (Miss. 2001)</b>	<b>7</b>
<b>Creel v. State, 814 So.2d 176 (Ct.App.Miss. 2002)</b>	<b>4, 7</b>
<b>Dennis v. State, 873 So.2d 1045 (Ct.App.Miss. 2004)</b>	<b>4, 9</b>
<b>Drennan v. State, 695 So.2d 581 (Miss. 1997)</b>	<b>10</b>
<b>Durr v. State, 446 So.2d 1016, 1017 (Miss. 1984)</b>	<b>9</b>
<b>Ellzey v. State, 196 So.2d 889, 892 (Miss. 1967)</b>	<b>9</b>
<b>Freelon v. State, 569 So.2d 1168, 1169 (Miss. 1990)</b>	<b>6, 7</b>
<b>Harris v. State, 819 So.2d 1286 (Ct.App.Miss. 2002)</b>	<b>7</b>
<b>Isaac v. State, 793 So.2d 688 (Ct.App.Miss. 2001)</b>	<b>7</b>
<b>Jackson v. State, 506 So.2d 994, 995 (Miss. 1987)</b>	<b>6</b>
<b>Jefferson v. State, 556 So.2d 1016, 1019 (Miss. 1989)</b>	<b>4, 9</b>
<b>Jones v. State, 700 So.2d 631 (Miss. 1997)</b>	<b>7</b>
<b>Kelly v. State, 797 So.2d 1003 (Miss. 2001)</b>	<b>7</b>
<b>Kirk v. State, 798 So.2d 345 (Miss. 2000)</b>	<b>7</b>

<b>Lockett v. State, 656 So.2d 68, 71 (Miss. 1995) .....</b>	<b>6</b>
<b>Lockett v. State, 656 So.2d 76, 78-79 (Miss. 1995) .....</b>	<b>6</b>
<b>Luckett v. State, 582 So.2d 428 (Miss. 1991) .....</b>	<b>5, 6, 10</b>
<b>Mason v. State, 867 So.2d 1058 (Ct.App.Miss. 2004) .....</b>	<b>4</b>
<b>Maxie v. State, 330 So.2d 277, 278 (Miss. 1976) .....</b>	<b>9</b>
<b>Odom v. State, 483 So.2d 343, 344 (Miss. 1986) .....</b>	<b>6, 7</b>
<b>Phillips v. State, 856 So.2d 568 (Ct.App.Miss. 2003) .....</b>	<b>8, 11</b>
<b>Rodolfich v. State, 858 So.2d 221 (Ct.App.Miss. 2003) .....</b>	<b>11</b>
<b>Rowe v. State, 735 So.2d 399 (Miss. 1999) .....</b>	<b>4, 9</b>
<b>Sanford v. State, 726 So.2d 221 (Ct.App.Miss 1998) .....</b>	<b>7</b>
<b>Sanders v. State, 440 So.2d 278, 283 (Miss. 1983) .....</b>	<b>9</b>
<b>Skinner v. State, 864 So.2d 298 (Ct.App.Miss. 2003) .....</b>	<b>4</b>
<b>Smith v. State, 477 So.2d 191, 195-96 (Miss. 1985) .....</b>	<b>5</b>
<b>Sones v. State, 828 So.2d 216 (Ct.App.Miss. 2002) .....</b>	<b>4</b>
<b>Taylor v. State, 766 So.2d 830, 835 (Ct.App.Miss. 2000) .....</b>	<b>10</b>
<b>Thomas v. State, 798 So.2d 597 (Ct.App.Miss. 2001) .....</b>	<b>7</b>
<b>Trotter v. State, 907 So.2d 397 (Ct.App.Miss. 2005) .....</b>	<b>4, 5</b>
<b>Turner v. State, 961 So.2d 734 (Ct.App. Miss. 2007) .....</b>	<b>10</b>
<b>Wallace v. State, 823 So.2d 580 (Ct.App.Miss. 2002) .....</b>	<b>5</b>
<b>Williams v. State, 726 So.2d 1229 (Ct.App.Miss. 1998) .....</b>	<b>7</b>
<b>Williams v. State, 872 So.2d 711 (Ct.App.Miss. 2004) .....</b>	<b>4</b>

#### STATE STATUTES

<b>Miss.Code Ann. § 99-39-11 (Supp. 1999) .....</b>	<b>10</b>
---	-----------

Miss.Code Ann. § 99-39-5(2) .....	4, 7
Miss.Code Ann. §99-39-1 .....	7
Miss.Code Ann. §99-39-5 .....	3
Miss.Code Ann. §99-39-5(2) .....	5, 6, 11
Mississippi Constitution of 1890 .....	9

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

**LIONELL JAVON DYSON**

**APPELLANT**

**VS.**

**NO. 2008-CP-0379-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

In this appeal from his quest in a state trial court for out-of-time post-conviction relief sought in the wake of his guilty pleas, LIONELL JAVON DYSON, proceeding *pro se*, seeks to exempt himself from a time bar because of, *inter alia*, the denial of a speedy trial and a double jeopardy violation. (Brief of Appellant at 1)

Dyson's pleas of guilty in state court to car jacking (Count 1) and armed robbery (Count 4) took place on March 24, 2004. Sentencing was deferred until April 23, 2004, at which time Dyson received ten (10) and twenty (20) years, respectively.

In his petition for out-of-time post-conviction collateral relief, Dyson assailed, *inter alia*, the voluntariness of his pleas and the effectiveness of his lawyer.

Dyson also complained he was denied his right to a fast and speedy trial, he was subjected to double jeopardy, and his *ex-post facto* law rights were violated.

The circuit judge, R. I. Prichard, dismissed Dyson's motion summarily on the basis of, *inter*

*alia*, a time bar. (C.P. at 24-26; appellee's exhibit A, attached)

Here and now Dyson invites this Court to reverse the trial judge's summary dismissal and discharge him from custody. (Brief of Appellant at 12)

We respectfully submit Judge Prichard correctly found no error involving fundamental rights, or any other rights, sufficient to exempt Dyson from the statute barring his belated claims. In this posture, Dyson's motion for post-conviction relief was correctly denied by the lower court as time-barred. (C.P. at 24-26; appellee's exhibit A, attached)

### **STATEMENT OF FACTS**

LIONELL JAVON DYSON, a twenty (20) year old male with an 11<sup>th</sup> grade education (C.P. at 31, 36), appeals from summary denial of a post-conviction pleading styled "Petitioner's Petition for Out-of-Time Post-Conviction Collateral Relief, §99-39-5(1)(g)." (C.P. at 3-23)

Over four (4) years ago, on March 24, 2004, Dyson entered in the Circuit Court of Pearl River County pleas of guilty to car jacking (Count 1) and armed robbery (Count 4) by the exhibition of a firearm. (C.P. at 35-71) Following consideration of a pre-sentence investigation report, Dyson was sentenced to ten (10) years for car-jacking and twenty (20) years for armed robbery, the latter to run consecutive to the former. (C.P. at 72-76)

Ten (10) years of the latter sentence are to be served "... without eligibility of probation, parole, or early release, and upon successful completion of the service of said ten (10) years, the remaining ten (10) years of the twenty (20) year sentence on count 4 be and the same are hereby suspended pursuant and in conformity with the Post-Release Supervision set out and authorized in Section 47-7-34 . . ." (C.P. at 72-73)

A five (5) count indictment returned on June 27, 2003, by a Pearl River County Grand Jury charged Dyson and another person with armed car jacking (Count One), kidnaping (Count Two),

kidnaping (Count Three) armed robbery (Count Four) and attempted armed robbery (Count Five). (C.P. at 28)

These charges were later reduced to car jacking and armed robbery. (C.P. at 72) All others were *nolle prossed* in the wake of a plea-bargain agreement. (C.P. at 60, 63, 66-67) According to young Dyson, both he and his confederate were under the influence of drugs at the time of the offenses, the commission of which was freely admitted by young Dyson. (C.P. at 54-60)

Dyson claims, *inter alia*, he entered a plea of guilty to an illegal charge and received an illegal sentence because he was exposed to double jeopardy. (Brief for Appellant at 5) He also suggests his indictment was fabricated. (C.P. at 10; Brief for Appellant at 5)

Both a Petition to Enter Plea of Guilty and a transcript of the plea-qualification hearing have been made a part of the official record on appeal. (C.P. at 30-34, 35-70, respectively)

On February 19, 2008, Dyson sought post-conviction relief in the trial court via his belated petition. (C.P. at 2)

In what is obviously a clerical or scrivener's error, Judge Prichard summarily denied Dyson's motion by signing a memorandum opinion and order dated "February 14, 2007." (C.P. at 26) The issues addressed in the memorandum opinion and order directly address the issues raised in Dyson's petition which was signed and sworn to by Dyson on January 31, 2008. (C.P. at 17-18)

In any event, any discrepancy is not an issue in this appeal. Judge Prichard denied Dyson's petition on the ground the

" . . . defendant's motion is time barred pursuant to Miss.Code Ann. §99-39-5, which provides in regards to guilty pleas, the time begins to run on the date of the entry of the judgment of conviction. \* \* \* (C.P. at 25)

This ruling was both judicious and correct.



## SUMMARY OF ARGUMENT

Dyson's claims were clearly time-barred by virtue of Miss.Code Ann. § 99-39-5(2). **Trotter v. State**, 907 So.2d 397 (Ct.App.Miss. 2005); **Sones v. State**, 828 So.2d 216 (Ct.App.Miss. 2002).

The fundamental rights exemption provides no basis for relief.

In addition, Dyson, by voluntarily pleading guilty, waived and/or forfeited his right to present a defense in his behalf or assail any speedy trial or double jeopardy violations. **Rowe v. State**, 735 So.2d 399 (Miss. 1999); **Anderson v. State**, 577 So.2d 390, 392 (Miss. 1991); **Jefferson v. State**, 556 So.2d 1016, 1019 (Miss. 1989); **Dennis v. State**, 873 So.2d 1045 (Ct.App.Miss. 2004).

## ARGUMENT

### **DYSON'S PETITION FOR OUT-OF-TIME POST-CONVICTION RELIEF BASED UPON ALLEGEDLY INVOLUNTARY GUILTY PLEAS ENTERED IN MARCH/APRIL 2004, WAS TIME-BARRED BY VIRTUE OF THE THREE (3) YEAR STATUTE OF LIMITATIONS SET FORTH IN SECTION 99-39-5(2).**

We respectfully submit the trial judge was eminently correct in denying the requested relief on the basis of a time bar. Indeed, there should be no legitimate question about it. (C.P. at 14; appellee's exhibit A, attached)

Dyson suggests his indictment could have been fabricated because the "... [e]vidence shows such 'alligation' could be true." (Brief for Appellant at 5)

We are not impressed by this "alligation" or by the "alligator."

It took Dyson nearly a year to come to this realization. Dyson, it appears, exercised his right to silence by remaining silent for ten (10) months. We respectfully submit Judge Prichard was eminently correct in his application of the time bar. **Williams v. State**, 872 So.2d 711 (Ct.App.Miss. 2004); **Mason v. State**, 867 So.2d 1058 (Ct.App.Miss. 2004); **Skinner v. State**, 864 So.2d 298

(Ct.App.Miss. 2003); **Creel v. State**, 814 So.2d 176 (Ct.App.Miss. 2002) [4<sup>th</sup> motion for post-conviction relief untimely as well as successive.]

We assert with great vigor that post-conviction relief claims based on allegedly involuntary guilty pleas are subject to the three (3) year statute of limitations and the time bar. **Lockett v. State**, 582 So.2d 428 (Miss. 1991); **Wallace v. State**, 823 So.2d 580 (Ct.App.Miss. 2002). *See also* **Austin v. State**, 863 So.2d 59 (Ct.App.Miss. 2003), reh denied [Claim that defendant's guilty plea to rape was not knowing, intelligent, and voluntary was the type of claim that fell squarely within the three-year statute of limitations governing post-conviction relief.]

Dyson's complaints are controlled by the following language found in **Trotter v. State**, *supra*, 907 So.2d 397, 402 (Ct.App.Miss. 2005), reh denied, cert denied.

There is one judicially-created exception to the three-year time bar imposed on most post-conviction relief motions. "Errors affecting fundamental constitutional rights may be excepted from procedural bars which would otherwise prohibit their consideration." **Smith v. State**, 477 So.2d 191, 195-96 (Miss. 1985). The circuit court dismissed as time-barred Trotter's claim that he was subjected to double jeopardy, his claim that his guilty plea was involuntary, and his claim that he received ineffective assistance of counsel. In dismissing these claims as time-barred, the court found that these claims affected none of Trotter's fundamental rights. The court cited **Lockett v. State**, 582 So.2d 428, 430 (Miss. 1991), which dismissed as time-barred the defendant's assignment of errors concerning the validity of the indictment, claims of double jeopardy, claims that his guilty plea was involuntary, and claims of ineffective assistance of counsel. The judge's application of the law was correct, and we affirm.

Miss.Code Ann. §99-39-5(2) identifies, in plain and ordinary English, the time limitations for motions to vacate guilty pleas, judgments of conviction obtained other than by plea, and erroneous sentences filed under the Mississippi Uniform Post-Conviction Collateral Relief Act. It reads as follows:

(2) **A motion for relief under this chapter 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. [emphasis supplied]

The post-conviction relief act applies prospectively from its date of enactment, April 17, 1984. Individuals such as Lionell Javon Dyson who entered pleas of guilty or were otherwise convicted *after* April 17, 1984, have three (3) years from the date of the entry of their conviction via guilty plea to file their petition for post-conviction relief. **Lockett v. State**, 656 So.2d 68, 71 (Miss. 1995); **Lockett v. State**, 656 So.2d 76, 78-79 (Miss. 1995); **Freelon v. State**, 569 So.2d 1168, 1169 (Miss. 1990); **Jackson v. State**, 506 So.2d 994, 995 (Miss. 1987); **Odom v. State**, 483 So.2d 343, 344 (Miss. 1986).

In **Odom**, *supra*, we find the following language:

\* \* \* \* \* This act applies *prospectively* from its date of enactment, April 17, 1984. Individuals convicted prior to April 17, 1984, have three (3) years from April 17, 1984, to file their petition for post conviction relief. **Those individuals convicted after April 17, 1984, generally have three (3) years in which to file a petition for relief as provided for in the UPCCRA, Miss. Code Ann. §99-39-5(2) (Supp. 1985), . . .** [emphasis supplied]

The case of **Lockett v. State**, *supra*, 582 So.2d 428, 430 (Miss. 1991), is applicable to a great

extent even though Lockett entered his plea of guilty *prior* to April 17, 1984. We quote:

Issue Numbers II, III, IV and V are time barred. Miss.Code Ann. § 99-39-5(2) (Supp. 1990). Individuals (as Lockett) convicted prior to April 17, 1984, had three (3) years from April 17, 1984, to file their petition for post-conviction relief. **Freelon v. State**, 569 So.2d 1168 (Miss. 1990); **Odom v. State**, 483 So.2d 343 (Miss. 1986). Lockett's application was filed more than nine (9) years subsequent to the entry of his guilty pleas. No appeal or other pleading for relief was filed by him prior to the application presented, and no exceptions to this procedural bar are applicable.

The subject matter of Issues II, III, IV, and V that were time barred in **Lockett** were fatally defective indictments (issue II); *double jeopardy* (issue III); coerced, *involuntary, and unintelligent pleas of guilty* (issue IV); and the *ineffective assistance of counsel* (issue V). Accordingly, Dyson's claim that his pleas were neither knowing nor intelligent because of double jeopardy and ineffective counsel are time barred by virtue of **Lockett** alone. *See also* **Kelly v. State**, 797 So.2d 1003 (Miss. 2001); **Crawford v. State**, 787 So.2d 1236 (Miss. 2001); **Kirk v. State**, 798 So.2d 345 (Miss. 2000); **Jones v. State**, 700 So.2d 631 (Miss. 1997); **Harris v. State**, 819 So.2d 1286 (Ct.App.Miss. 2002); **Beamon v. State**, 816 So.2d 409 (Ct.App.Miss. 2002); **Creel v. State**, 814 So.2d 176 (Ct.App. 2002); **Thomas v. State**, 798 So.2d 597 (Ct.App.Miss. 2001), reh denied; **Isaac v. State**, 793 So.2d 688 (Ct.App.Miss. 2001); **Williams v. State**, 726 So.2d 1229 (Ct.App.Miss. 1998); **Sanford v. State**, 726 So.2d 221 (Ct.App.Miss 1998).

Dyson entered his pleas of guilty to car jacking (Count 1) and armed robbery (Count 4) on March 24, 2004, well *after* the enactment on April 17, 1984, of the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA), Miss.Code Ann. §99-39-1 *et seq.*

Sentencing took place on April 23, 2004, following a presentence investigation. (R. 63-71; C.P. at 72-76) Judgment was actually entered on April 23, 2004. (C.P. at 72)

It is no secret that Dyson had three (3) years from April 23, 2004, the date of the entry of the judgment of conviction for car jacking and armed robbery, to file in the trial court his motion to vacate or to otherwise seek post-conviction collateral relief.

Consequently, the deadline for Dyson's post-conviction papers was on or about April 23, 2007.

Dyson's motion or petition for post-conviction relief was not filed, however, until February 18, 2008, ten (10) months after the time for assailing his conviction by way of guilty plea(s) had expired. This was excruciatingly tardy and too little too late. The old adage that "it's better late than never," once again, does not apply here.

The post-conviction relief act provided Dyson with a statutory procedure for assailing his guilty plea within a reasonable time. Dyson, however, missed the window of opportunity by almost a year.

The three year statute of limitations bars a post-conviction relief motion absent a showing the case falls within any one of the three statutory exceptions. **Phillips v. State**, 856 So.2d 568 (Ct.App.Miss. 2003).

We concur with the finding made implicitly by the trial judge that the case at bar clearly does not exist in this posture. *See* appellee's exhibit A, attached.

In the final analysis, none of the exceptions, statutory or judicially created, to the time bar, which is alive and well, apply to this case. The findings and conclusions made by the trial judge in his order denying relief were eminently correct save for the date of the entry of the judgment addressing Dyson's guilty pleas which was April 23<sup>rd</sup>, 2004, as opposed to April 24<sup>th</sup>, 2004.

Moreover, Dyson waived his right to a speedy trial as well as other valuable rights when he entered knowing and voluntary pleas of guilty. Dyson's plea of guilty operated to waive and/or

forfeit all non-jurisdictional rights and defects incident to trial. **Rowe v. State**, 735 So.2d 399 (Miss. 1999); **Anderson v. State**, 577 So.2d 390, 392 (Miss. 1991); **Dennis v. State**, 873 So.2d 1045 (Ct.App.Miss. 2004).

In **Jefferson v. State**, 556 So.2d 1016, 1019 (Miss. 1989), this Court opined:

We are concerned here with the legal effect of Jefferson's two 1981 guilty pleas. The institution of the guilty plea is well established in our criminal justice process. **A guilty plea operates to waive the defendant's privilege against self-incrimination/2, the right to confront and cross-examine the prosecution's witnesses/3, the right to a jury trial/4 and the right that the prosecution prove each element of the offense beyond a reasonable doubt./5**

Outside the constitutional realm, the law is settled that with only two exceptions, the entry of a knowing and voluntary guilty plea waives all other defects or insufficiencies in the indictment. [citations omitted] A defendant's right to claim that he is not the person named in the indictment may be waived if not timely asserted. *Anselmo v. State*, 312 So.2d 712 (Miss. 1975). The principle exception to the general rule is that the failure of the indictment to charge a criminal offense or, more specifically, to charge an essential element of a criminal offense, is not waived. *See Durr v. State*, 446 So.2d 1016, 1017 (Miss. 1984); *Maxie v. State*, 330 So.2d 277, 278 (Miss. 1976).

And, of course, a guilty plea does not waive subject matter jurisdiction. [Text of notes 2-5 omitted; emphasis supplied]]

We find in **Anderson v. State**, *supra*, 577 So.2d 390, 391 (Miss. 1991), the following language also applicable to Dyson's complaint:

Moreover, **we have recognized that a valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial.** *Ellzey v. State*, 196 So.2d 889, 892 (Miss. 1967). We have generally included in this class "those [rights] secured by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as well as those comparable rights secured by Sections 14 and 26, Article 3, of the Mississippi Constitution of 1890." *Sanders v. State*, 440 So.2d 278, 283 (Miss. 1983); *see also Jefferson v. State*, 556 So.2d 1016, 1019 (Miss. 1989). **We take this opportunity to specifically include in that**

**class of waivable or forfeitable rights the right to a speedy trial, whether of constitutional or statutory origin.**

This view is in accord with that of our sister states. [citations omitted]

This rule also prevails in the federal arena. [citations omitted; emphasis ours]

*See also* **Bishop v. State**, 812 So.2d 934, 945 (Miss. 2002); **Turner v. State**, 961 So.2d 734 (Ct.App. Miss. 2007), reh denied [Voluntary and knowing guilty plea operates as a waiver of all non-jurisdictional defects or rights incident to trial, and this includes a defendant's right to a speedy trial.]

Stated differently, Lionell Dyson's voluntary pleas of guilty waived and forfeited all rights and non-jurisdictional defects incident to trial, including the right to a trial by jury, the right to subpoena and call witnesses in his own behalf, the right to a fast and speedy public trial, and the right to assail non-jurisdictional defects found in an indictment or information. **Drennan v. State**, 695 So.2d 581 (Miss. 1997); **Luckett v. State**, 582 So.2d 428 (Miss. 1991); **Anderson v. State**, *supra*, 577 So.2d 390 (Miss. 1991).

Because Dyson entered a plea of guilty, he also waived any defenses he might have had to the charge. **Taylor v. State**, 766 So.2d 830, 835 (Ct.App.Miss. 2000).

Finally, the trial judge's **Blockburger** analysis of Dyson's double jeopardy claim is both judicious and correct. (C.P. at 25; appellee's exhibit A, attached.

Miss.Code Ann. § 99-39-11 (Supp. 1999) reads, in its entirety, as follows:

(1) The original motion together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.

(2) *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.*

(3) If the motion is not dismissed under subsection 2 of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

(4) This section shall not be applicable where an application for leave to proceed is granted by the supreme court under section 99-39-27. [emphasis added]

It does! He did!! And he was!!!

Dyson's belated claims were both time-barred and manifestly without merit as well.

### CONCLUSION

Not every motion for post-conviction relief filed in the trial court must be afforded an adversarial hearing. **Rodolfich v. State**, 858 So.2d 221 (Ct.App.Miss. 2003).

Put another way, the right to an evidentiary hearing is not guaranteed in every case. **Brister v. State**, 858 So.2d 181 (Ct.App.Miss. 2003).

"This Court reviews the denial of post-conviction relief under an abuse of discretion standard." **Phillips v. State**, *supra*, 856 So.2d 568, 570 (Ct.App.Miss. 2003). No abuse of judicial discretion has been demonstrated here.

Dyson is time-barred from bringing his claims at this late date. He failed to file his motion for post-conviction relief within the three-year time frame prescribed by Miss.Code Ann. §99-39-5(2), and he fails to make a claim falling under any of the recognized exceptions to the time bar.

Appellee respectfully submits this case is devoid of error. Accordingly, summary dismissal, as time-barred, of Dyson's petition for out-of-time motion for post-conviction relief should be



forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

~~BY.~~

BILLY L. GORE  
SPECIAL ASSISTANT ATTORNEY GENERAL  
MISSISSIPPI BAR NO. 4912

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MS 39205-0220  
TELEPHONE: (601) 359-3680

IN THE CIRCUIT COURT OF PEARL RIVER COUNTY, MISSISSIPPI

LIONELL JAVON DYSON

**FILED**

PETITIONER

FEB 19 2008

VS.

VICKIE R. HARRIS, CIRCUIT CLERK  
By [Signature] D.C.

CAUSE NO.

2008-0099

STATE OF MISSISSIPPI

RESPONDENT

**MEMORANDUM OPINION AND  
ORDER OF SUMMARY DISMISSAL**

BEFORE THIS COURT is Petitioner, Lionell Javon Dyson's, *Pro Se* Motion for Post-Conviction Relief under Miss. Code Ann. § 99-39-1 *et. seq.* In rendering its decision, the Court has thoroughly examined the Petitioner's motion, and accompanying memorandum, together with all the files, records, transcripts and correspondence relating to the judgment under attack. (*See also*, Pearl River County Circuit Court criminal file K2003-410P). Accordingly, the Court finds that it plainly appears from the face of the Petitioner's Motion, the annexed exhibits, and record of prior proceedings, that he is not entitled to any relief, therefore, the Court pursuant to Miss. Code Ann. § 99-39-11(2), SUMMARILY DISMISSES the Petitioner's motion for the following reasons to-wit:

**I. Double Jeopardy**

The crux of the petitioner's motions is that his convictions of Carjacking and Armed Robbery By Exhibition of a Firearm should be set aside, since his rights against Double Jeopardy were violated. The Double Jeopardy Clause of the Fifth Amendment states, in pertinent part provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." *U.S. Const. amend. V.* The Mississippi Supreme Court has stated that the Fifth



000024

Amendment protection against Double Jeopardy encompasses three separate sub-protections: (1) protection against a second prosecution for the same offense following an acquittal; (2) protection against a second prosecution for the same offense following a conviction; and (3) protection against multiple punishments for the same criminal offense. *See, Thomas v. State*, 711 So.2d 867 (Miss. 1998). In analyzing a Double Jeopardy claim, this Court turns to the seminal case of *Blockburger v. State*, 284 U.S. 299 (1932). The Court in *Blockburger*, concluded that "the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Id.* at 304.

While the defendant is correct that both counts arose out the same incident, Double Jeopardy does not lie. Applying *Blockburger*, it is clear that Carjacking and Armed Robbery By Exhibition of a Firearm are composed of different elements and require proof of additional facts. The most obvious factual distinction being that Carjacking under Miss. Code Ann. § 97-3-117(1), requires the State to prove that a motor vehicle was the defendant's intended target. In contrast, Armed Robbery By Exhibition of a Firearm, under Miss. Code Ann. § 97-3-79, requires the State to prove the defendant utilized a firearm in some capacity.

In the alternative, the Court finds that the defendant's motion is time barred pursuant to Miss. Code Ann. § 99-39-5, which provides in regards to guilty pleas, the time begins to run on the date of the entry of the judgment of conviction. Here, the petitioner's judgment of conviction was entered on April 24, 2004, which would make the three year window for filing, expire on April 24, 2007. In addition, the record is void as to any motions seeking to extend the filing deadline, or for tolling the statute of limitations. Thus, it is clear that the petition is time barred by approximately nine months.

IT IS FURTHER ORDERED AND ADJUDGED that Petitioner's Motion for Post-

Conviction Collateral Relief is hereby SUMMARILY DISMISSED pursuant to Miss. Code Ann.

§ 99-39-11(2). It is further,

ORDERED AND ADJUDGED that the Circuit Clerk of Pearl River County, Mississippi shall mail a copy of the Court's Opinion and Order to Petitioner via certified First Class U.S.

Mail, return receipt requested.

SO ORDERED AND ADJUDGED this the 14 day of February, 2007.

  
CIRCUIT JUDGE

**CERTIFICATE OF SERVICE**

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

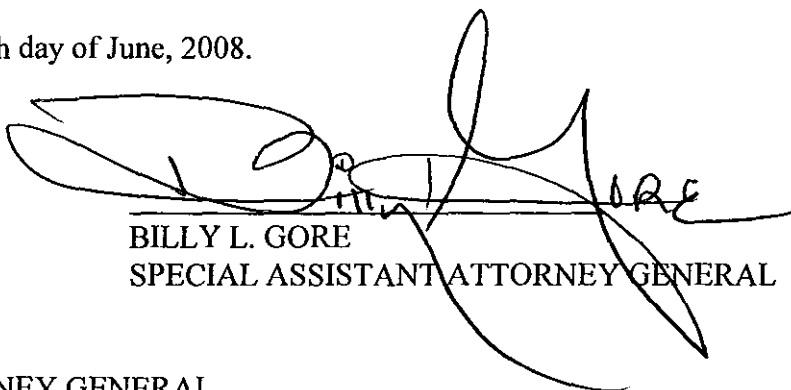
**Honorable Prentiss G. Harrell**  
Circuit Court Judge, District 15  
P.O. Box 488  
Purvis, Mississippi 39475

**Honorable R. I. Prichard III**  
Circuit Court Judge, District 15  
P. O. Box 1075  
Picayune, Mississippi 39466

**Honorable Haldon J. Kittrell**  
District Attorney, District 15  
500 Courthouse Sq., Suite 3  
Columbia, Mississippi 39429

**Lionell J. Dyson, Pro Se**  
D C F/DC #17  
3800 County Rd 540  
Greenwood, Mississippi 38930

This the 27th day of June, 2008.



BILLY L. GORE  
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MISSISSIPPI 39205