

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

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**2008-CP-00430**

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**OTHA HORTON  
APPELLANT**

**vs.**

**CHRISTOPHER EPPS, MARGARET BINGHAM  
AND MICHELLE TAYLOR  
APPELLEES**

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**On Appeal From the Circuit Court  
of Rankin County, Mississippi**

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**BRIEF OF APPELLEE**

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## CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal:

1. Otha Horton, Appellant
2. Samac S. Richardson, Circuit Court Judge
3. Jim Hood, Attorney General

The undersigned counsel further certifies that the following attorneys have an interest in the outcome of this case:

For Appellees:

1. Jane Mapp, Special Assistant Attorney General, State of Mississippi
2. James Norris, Special Assistant Attorney General, State of Mississippi

By: 

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## **ISSUES**

- 1. Did Circuit Court Err in Dismissing Pleading Pursuant to M.R.C.P. 12(b)(6) for Failure to State a Claim upon Which Relief Can Be Granted.**
- 2. Did the Circuit Court Err in Dismissing Pleading for Failure to File Within Thirty (30) Days Time Period or Request Judicial Review.**
- 3. Did the Circuit Court Err in Dismissing Pleading Because Plaintiff Did Not Have Liberty Interest in Trusty Time (Section 47-5-138.1 of the Mississippi Code of 1972); Trusty Time Is a Discretionary Matter.**
- 4. Did the Circuit Court Err in Dismissing Pleading as Frivolous and Without Merit, and Causing Plaintiff to Forfeit Accumulated Earned Time Pursuant to Section 47-5-138 of the Mississippi Code of 1972.**
- 5. Did the Circuit Court Err in Dismissing Plaintiff's Motion to Alter or Amend Judgment.**
- 6. Did the Circuit Court Err in Dismissing Plaintiff's Motion for Leave to Amend Habeas Corpus Or/ Alternative Motion to Show Cause.**

## STATEMENT OF THE CASE

On or about May 8, 2006, Otha Horton, an inmate legally incarcerated within the Mississippi Department of Corrections (“MDOC”) filed a petition in the Circuit Court of Rankin County, Mississippi, entitled “Habeas Corpus or/Alternative Motion to Show Cause”. (C.P. at 9)<sup>1</sup>. In his petition Horton argues that Miss. Code Ann. § 47-5-138.1, as amended effective April 28, 2004, which excluded certain drug offenders from being eligible to receive the trusty earned time allowance, violated *ex post facto* laws as applied to offenders such as he who committed the crime of sale of cocaine prior to the effective date of the amendment. (C.P. 9-10).

Horton states that he committed the crime of Sale of Cocaine on January 29, 2004. (C.P. at 9). He pled guilty in the Circuit Court of Attala County, Mississippi, on September 14, 2005 and was sentenced to twelve (12) years in the custody of MDOC with seven (7) years to serve and 5 years post-release supervision. (C.P. at 16). Miss. Code Ann. § 47-5-138.1 as it read on January 29, 2004, when Horton committed his crime, did not specifically exclude offenders convicted of sale of a controlled substance from being eligible for the trusty earned time allowance. However, prior to Horton being sentenced for the crime on September 14, 2005, Miss. Code Ann. 47-5-138.1 was amended to increase the trusty time allowance from 10 days for every 30 days in trusty status (10/30) to 30 days for every 30 days in trusty status (30/30) and to specifically exclude offenders convicted of certain crimes,

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<sup>1</sup>C.P. = Clerk’s Papers

including sale of a controlled substance, from being eligible for the trusty earned time allowance. Horton argues that this amendment is *ex post facto* as applied to offenders who committed their crimes before the April 28, 2004 effective date of the amendment. (C.P. at 9-10).

Horton maintains that he began working in the maintenance department of the Central Mississippi Correctional Facility (CMCF) on October 26, 2005. He states that the maintenance department is designated as a sensitive placement and is a program approved to receive trusty time. (C.P. at 10-11). Horton argues that since he committed his crime before § 47-5-138.1 was amended that he is entitled to receive 10/30 trusty earned time for his participation in this work program. (C.P. at 11).

A Response and Motion to Dismiss was filed on behalf of the Defendants/Respondents on or about June 7, 2006. (C.P. at 18). Horton filed a Response to the motion to dismiss on June 14, 2006. (C.P. at 22).

On or about August 10, 2006 Circuit Court Judge Samac Richardson entered an Order of Dismissal in the case finding that the court lacked venue jurisdiction. Horton appealed and the Court of Appeals reversed and remanded finding that venue was proper in Rankin County because Horton is incarcerated there, two of the defendants work there, and the action of denying Horton trusty status took place there. *See Horton v. Epps*, 966 So.2d 839, 841 (Miss.Ct.App. 2007).

On or about January 18, 2008, following remand from the Court of Appeals, the Circuit Court entered another Order of Dismissal finding that Horton had failed to state a



claim upon which relief may be granted; that he failed to prove that he sought judicial review within 30 days of receipt of the denial of the third steps response to his grievance was required by Miss. Code. Ann. § 47-5-807; and that he has no property or liberty interest in trusty time which is a discretionary matter. The court went on the find that Horton's petition was frivolous and without merit and therefore he should forfeit the appropriate amount of accumulated earned time a required by Miss. Code. Ann. § 47-5-138. (C.P. at 34-35).

Following the Circuit Court's dismissal of his petition, Horton filed a Motion for Leave to Amend Habeas Corpus or/Alternative Motion to Show Cause and a Motion to Alter or Amend Judgment. (C.P. at 36; 42). Through these motions Horton sought to finally submit to the court a copy of his receipt from the Administrative Remedy Program showing that he received the Third Step Response to his grievance on April 7, 2006 less than 30 from the date he filed his motion seeking judicial review. (C.P. at 50).

On February 4, 2008, the circuit court entered an Order denying Horton's Motion for Leave to Amend Habeas Corpus or/Alternative Motion to Show Cause. (C.P. at 53). Aggrieved, Horton filed his Notice of Appeal on or about February 21, 2008 and this matter now ensues.

### **SUMMARY OF THE ARGUMENT**

No inmate, upon sentencing, could reasonably expect to gain trusty status and thus any detriment from retroactively excluding certain offenders from trusty status eligibility would be speculative and thus does not violate the *ex post facto* clause.

## ARGUMENT

### **1. Did Circuit Court Err in Dismissing Pleading Pursuant to M.R.C.P. 12(b)(6) for Failure to State a Claim upon Which Relief Can Be Granted.**

Horton argues that the trial court erred in dismissing his motion for failure to state a claim. He maintains that at the time he committed the crime of Sale of Cocaine, Miss. Code Ann. § 47-5-138.1 did not prohibit offenders convicted of that crime from receiving trusty earned time which was limited to 10 days for every 30 days in trusty status (“10/30 trusty status”). Subsequent to his committing his crime, but prior to his being sentenced, § 47-5-138.1 was amended to prohibit offenders convicted of certain violations of the Uniformed Controlled Substance Act, including Sale of Cocaine, from being eligible for the trusty earned time allowance. Horton argues that since he has been assigned to a job approved for trusty earned time that §47-5-138.1, as amended, is *ex post facto* as applied to him and he should be eligible to receive 10/30 trusty time.

When Miss. Code Ann. § 47-5-138.1 was amended effective April 28, 2004, making inmates convicted of certain crimes ineligible for trusty status, MDOC did not remove any inmate convicted of such crimes from trusty status. Those inmates already in trusty status as of the date of the amendment were allowed to keep receiving the 10 days for 30 days trusty earned time allowance, but not the increased 30 for 30 trusty earned time allowance. However, if an inmate, such as Horton, who was ineligible to attain trusty status under the amendment was not already in trusty status, that inmate was not allowed to attain trusty status regardless of whether or not his crime was committed prior to the passage of the amendment.

The question before the Court is whether this application of the 2004 amendment to § 47-5-138.1 violates the *Ex Post Facto* Clause of the United States Constitution. Put in more practical terms, the issue is whether all inmates who committed their crimes prior to the April 28, 2004 amendment to § 47-5-138.1 should be eligible to attain 10 for 30 trusty status if they would have been eligible prior to the revision.

“The States are prohibited from enacting an *ex post facto* law. U.S. Const., Art. I, § 10, cl. 1. One function of the *Ex Post Facto* Clause is to bar enactments which, by retroactive operation, increase the punishment for a crime after its commission.” *Garner v. Jones*, 529 U.S. 244, 250 120 S.Ct. 1362,1367, 146 L.Ed.2d (2000) (citing *Collins v. Youngblood*, 497 U.S. 37, 42, 100 S.Ct. 2715, 111 L.Ed. 2d 30 (1990). The Mississippi Supreme Court in *Puckett v. Abels*, 684 So.2d 671 (Miss. 1996), held that a statute violates the *Ex post facto* clause when “applied retroactively ... has the effect of increasing the punishment beyond what was prescribed when the crimes were committed.” *Id.* at 678. The case sub judice differs from *Puckett* in one significant respect: unlike the 25% parole eligibility date and the 50% earned time allowance, trusty status was not automatically granted to an offender upon sentencing and commitment to MDOC, rather trusty status and thus the trusty earned time allowance was a special designation that had to be earned.

The United States Supreme Court in *California Dept. of Corrections v. Morales*, 514 U.S. 499, 509-510, 115 S.Ct. 1597, 1605, 131 L.Ed.2d 588 (1995) clarified earlier decisions as they related to the *ex post facto* question, stating as follows:

the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of “disadvantage,” nor ... on whether an amendment affects a prisoner’s “**opportunity** to take advantage of provisions for early release,” but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

*Id.* at 506 n.3 (emphasis in original)(citations omitted).

The Court in *Morales* went on to hold that when an “amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes” there is no *ex post facto* violation. In the case at bar, prior to the 2004 amendment trusty status was not automatically granted to an offender upon sentencing and commitment to MDOC, rather trusty status and thus the trusty earned time allowance was a special designation that had to be earned. Trusty earned time is not a right to be demanded, but a privilege that must be earned in accordance with state statute and MDOC policy. No inmate, upon sentencing could reasonably expect to gain trusty status and thus any detriment or increase in punishment from retroactively excluding certain offenders from trusty status eligibility would be speculative and thus does not violate the *ex post facto* clause.

Horton compares his case to that in *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1980), but the facts of the case sub judice are easily distinguishable from those in *Weaver*. At issue in *Weaver* was a Florida penal statute “repealing an earlier statute and reducing the amount of ‘gain time’ for good conduct and obedience to prison rules deducted from a convicted prisoner’s sentence....” *Id.* at 24. The statute in effect at the time

the petitioner both committed his crime and was sentenced

provided a formula for deducting gain-time credits from the sentences “**of every prisoner** who has committed no infraction of the rules or regulations of the division, or of the laws of the state, and who has performed in a faithful, diligent, industrious, orderly and peaceful manner, the work, duties and tasks assigned to him.” Fla.Stat. § 944.27(1) (1975). According to the formula, gain-time credits were to be calculated by the month and were to accumulate at a n increasing rate the more time the prisoner had already served. Thus, the statute directed that **the authorities “shall grant** the following deduction” from a prisoner’s sentence as gain-time for good conduct:

“(a) Five days per month off the first and second years of his sentence;  
“(b) Ten days per month off the third and fourth years of his sentence; and  
“(c) Fifteen days per month off the fifth and all succeeding years of his sentence.” Fla.Stat. § 944.27(1) (1975).

*Weaver* at 26. (emphasis added)(footnote omitted.).

Prior to April 28, 2004, Miss. Code Ann. § 47-5-138.1, Mississippi’s trusty earned time allowance law, read as follows:

In addition to any other administrative reduction of sentence, **an offender in trusty status as defined by the classification board of the Department of Corrections may be awarded a trusty time allowance of ten (10) days’ reduction of sentence for each thirty (30) days** of participation in an approved program while in trusty status, including satisfactory participation in education or instructional programs, satisfactory participation in work projects and satisfactory participation in any special incentive program.

Miss. Code Ann. § 47-5-138.1 (Supp. 2003).

The statue at issue in *Weaver* used the mandatory term “shall” giving the corrections authorities no discretion in awarding gain-time under the Florida statute. It was a right awarded to “every prisoner” who obeyed the rules. On the other hand, Miss. Code Ann. § 47-5-138.1 used the permissive term “may” and left trusty status and the awarding of trusty

earned time to the complete discretion of MDOC authorities. No inmate, at the time of sentencing, could reasonably believe he would attain trusty status.

In *Wottlin v. Fleming*, 136 F.3d 1032 (5<sup>th</sup> Cir. 1998), the Fifth Circuit Court of appeals found that an amendment to a Federal Bureau of Prisons (BOP) regulation making inmates who previously would have been eligible for early release upon completion of a substance-abuse treatment program ineligible if they had a prior conviction for a violent crime did not violate the *ex post facto* clause. The Court held that:

Wottlin's eligibility for the early release program had always been subject to the discretion of BOP. See 18 U.S.C. § 3621(e)(2)(B) ("period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program **may** be reduced by the [BOP] ...." (Emphasis added)). Section 550.58 is merely a categorical determination by the BOP that it will not exercise that discretion in the case of inmates with a prior conviction for certain specified crimes.

**Wottlin**, 136 F.3d at 1037-38.

Just as in *Wottlin*, an inmate's placement in trusty status and the award of trusty earned time credits was discretionary with MDOC and the 2004 amendment simply means that such discretion will no longer be extended to inmates convicted of specified crimes if they had not attained trusty status as of April 28, 2004. Accordingly, the application of the 2004 amendment to Miss. Code Ann. § 47-5-138.1 to offenders who committed their crimes before the effective date of the amendment, but who had not already attained trusty status does not violate the *Ex post facto* Clause.

**2. Did the Circuit Court Err in Dismissing Pleading for Failure to File Within Thirty (30) Days Time Period or Request Judicial Review.**

Horton argues that the trial court erred in finding that he had failed to seek judicial review within 30 days of receipt of the agency's final decision of his grievance as required by Miss. Code Ann. § 47-5-807. The trial court found that Horton did "not state in said motion when he received the denial of the third step response form and is [sic] must be presumed by the Court to be within a reasonable time after the date of March 13, 2006 as stated on the third step response form." The court went on to find that Horton's motion "was dated May 1, 2006, and filed with the clerk on May 8, 2006, which is fifty-six day(s) after the date of the third step response form and is outside the statutory thirty (30) day(s) time period to file or request judicial review."

The lower court's findings in its January 18, 2008 Order of Dismissal were entirely reasonable based on the record before the court at that time. The issue of whether or not Horton timely sought judicial review was raised as far back as May 31, 2006 in the Defendants' Response and Motion to Dismiss, yet it appears that Horton never included a copy of the receipt for the Third Step Response to his grievance with any of his pleadings filed with the court until after the trial court's January 18, 2008 Order of Dismissal was entered. All the evidence before the court indicated that Horton did not seek judicial review within the 30 day time period required by law. Accordingly, the trial court's January 18, 2008 decision to alternatively dismiss Horton's motion as untimely was not arbitrary or capricious. However, whether or not Horton sought judicial review within the time frame

prescribed in Miss. Code Ann. § 47-5-807 is irrelevant as the court also appropriately dismissed Horton's motion for failure to state a claim.

**3. Did the Circuit Court Err in Dismissing Pleading Because Plaintiff Did Not Have Liberty Interest in Trusty Time (Section 47-5-138.1 of the Mississippi Code of 1972); Trusty Time Is a Discretionary Matter.**

Horton argues that the trial court erred in dismissing his motion in part due to the fact that the awarding of trusty earned time is within the discretion of prison officials and offenders have no property or liberty interest in trusty time. Horton does not argue that these findings by the trial court are incorrect, he merely argues that even without a property or liberty interest in trusty time, Miss. Code Ann. § 47-5-138.1, as amended, is *ex post facto* as applied to him. In support of his argument, Horton cites to *Puckett v. Abels*, 684 So.2d 671, 675 (Miss. 1996) and *Jones v. Georgia State Board of Pardons and Paroles*, 59 F.3d 1145, 1149 (11<sup>th</sup> Cir. 1995).

In *Puckett*, the Court quoting *Jones* held that “the mere presence of *some* discretion ... before ... the change in law does not in and of itself foreclose an ex post facto claim.” The *Jones* Court went on to hold that “the presence of an ex post facto violation is not dependent on the existence of a liberty interest, protected by due process, in the pertinent regulations.” *Id.* at 1149, FN 6.

Although it may be possible to state an *ex post facto* claim even where there is no protected liberty or property interest, the Defendants would argue that Horton has not stated such a claim in this instance. The Defendants' argument, *supra*, in response to Horton's first



Issue, establishes that as a matter of law, the application of the 2004 amendment to Miss. Code Ann. § 47-5-138.1 to offenders not in trusty status as of its effective date does not violate the *Ex post facto* clause. Furthermore, the awarding of trusty earned time even to those offenders participating in trusty eligible programs is discretionary with MDOC. Therefore, the denial of trusty status, even if an offender is eligible, violates no constitutional or statutory right of the offender.

**4. Did the Circuit Court Err in Dismissing Pleading as Frivolous and Without Merit, and Causing Plaintiff to Forfeit Accumulated Earned Time Pursuant to Section 47-5-138 of the Mississippi Code of 1972.**

Horton argues that the trial court erred in holding that his motion was frivolous and without merit and ordering that he forfeit the appropriate amount of accumulated earned time pursuant to Miss. Code Ann. § 47-5-138. Horton argues that his claims do not meet the definition of legally frivolous. While it does not appear that the Mississippi Supreme Court or Court of Appeals has ever defined “frivolous” as it relates to Section 47-5-138, the Supreme Court has “defined ‘frivolous’ in the context of a pleading scrutinized for Rule 11 MRCP purposes as one with ‘no hope of success.’” *Rougeau v. Shepard*, 607 So.2d 1227, 1231 (Miss. 1992)(quoting *Tricon Metals & Services, Inc. v. Topp*, 537 So.2d 1331 (Miss. 1989)).

Section 47-5-138 reads in pertinent part as follows:

(3)(a) For the purposes of this subsection, “final order” means an order of a state or federal court that dismisses a lawsuit brought by an inmate while the inmate is in the custody of the Department of Corrections as frivolous, malicious or for failure to state a claim upon which relief could be granted.

(b) On receipt of a final order, the department shall forfeit;

Sixty (60) days of an inmate's accrued earned time if the department has received one (1) final order as defined herein;

One hundred twenty (120) days of an inmate's accrued earned time if the department has received two (2) final orders as defined herein;

One hundred eighty (180) days of an inmate's accrued earned time if the department has received three (3) or more final orders as defined herein.

(c) The department may not restore earned time forfeited under this subsection.

Whether or not Horton's motion was so hopeless as to meet the definition of legally frivolous is immaterial since pursuant to § 47-5-138 offenders must also forfeit a certain amount of earned time if a lawsuit is dismissed "for failure to state a claim upon which relief could be granted." As argued, *supra*, the trial court also appropriately found that Horton's petition should be dismissed for this reason.

#### **5. Did the Circuit Court Err in Dismissing Plaintiff's Motion to Alter or Amend Judgment.**

Horton argues that the trial court abused its discretion in denying his Motion to Alter or Amend Judgment without giving a reason for doing so.

"[I]n order to succeed on a Rule 59(e) motion [to alter or amend judgment], the movant must show: (i) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii) need to correct a clear error of law or to prevent manifest injustice." *Brooks v. Roberts*, 882 So.2d 229, 233 (Miss.2004). Horton's Motion to Alter or Amend Judgment did not meet any of these criteria required for success, instead

he merely reiterated his previous arguments which had already been considered and rejected by the trial court. While he did present evidence that he did seek judicial review within 30 day period required under § 47-5-807, this was not new evidence that was previously unavailable. He could have submitted his receipt showing the date he received the Third Step Response to his grievance and anytime prior to the trial court's dismissal of his petition. Regardless, the trial court dismissed his petition not only on the grounds that it was untimely filed, but also for failure to state a claim. Horton presented nothing in his Motion to Alter or Amend that to show an intervening change in law or that the trial court applied a "clear error of law" when it found that he had failed to state a claim. Accordingly, the lower court did not err in denying Horton's Rule 59(e) Motion to Alter or Amend.

**6. Did the Circuit Court Err in Dismissing Plaintiff's Motion for Leave to Amend Habeas Corpus Or/ Alternative Motion to Show Cause.**

After the trial court entered its Order of Dismissal, Horton not only filed a Rule 59(e) Motion to Alter or Amend Judgment but, he also filed a Motion for Leave to Amend Habeas Corpus or/ Alternative Motion to Show Cause. Horton argues that the lower court abused its discretion when it denied his Motion for Leave to Amend without setting out any reasons justifying such denial.

An appellate court will not reverse a trial court's decision to deny a Rule 15, MRCP Motion to Amendment unless there has been an abuse of discretion. *See Simmons v. Thomas Mach. of Miss., Inc.*, 631 So.2d 798, 800-01 (Miss.1994). While Rule 15 requires that amendments be liberally allowed, that requirement only goes so far and the opportunity

to amend a complaint must end at some point. While not specifically set out in his order denying Horton's motion, the trial court judge had several justifiable reasons for denying Horton's motion to amend. First, Horton had been given ample opportunity to amend his original motion as the case had been ongoing for over a year and a half and yet he did not attempt to amend his complaint until after an Order of Dismissal had been entered. Secondly, Horton did not make any new claims or state any new facts that had not been previously presented to the court. Lastly, while Horton did present evidence that his original pleading may have been timely filed, this did not alter the fact that his complaint failed to state a claim upon which relief could be granted. Accordingly, the trial court did not abuse its discretion when it denied Horton's Motion to Alter or Amend.

### **CONCLUSION**

Based on the arguments herein above, the dismissal of Appellant's petition by the lower court was appropriate and should be affirmed.

Respectfully submitted,

**CHRISTOPHER EPPS, MARGARET  
BINGHAM AND MICHELLE TAYLOR -  
APPELLEES**

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

*Jane L. Mapp*

**CERTIFICATE OF SERVICE**

I, Jane L. Mapp, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first class postage prepaid, a true and correct copy of the foregoing **Brief of Appellees** in the above-styled and numbered cause to the following:

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Circuit Court Judge  
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This, the 4<sup>th</sup> day of September, 2008.

A handwritten signature in cursive script, reading "Jane L. Mapp", is written over a horizontal line.

Jane L. Mapp  
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