

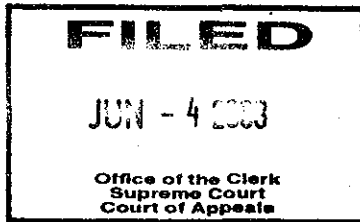
IN THE SUPREME COURT OF MISSISSIPPI

COPY

OTHA HORTON

APPELLANT

VS.



CAUSE NO. 2008-CP-00430

CHRISTOPHER EPPS, MARGARET
BINGHAM & MICHELLE TAYLOR

APPELLEE(S)

APPELLANT'S BRIEF

OTHA HORTON, #W0589, PRO'SE
CMCF 1-A G BLDG.
P.O. BOX 88550
PEARL, MS. 39288-8550

IN THE SUPREME COURT OF MISSISSIPPI

OTHA HORTON

APPELLANT

VS.

CAUSE NO. 2008-CP-00430

CHRISTOPHER EPPS, MARGARET
BINGHAM & MICHELLE TAYLOR

APPELLEE(S)

CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Otha Horton, pro'se 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 the supreme court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Otha Horton, appellant
2. Hon. Samac Richardson, Circuit Court Judge
3. Hon. James Norris, Attorney for Appellee
3. Mr. Christopher Epps, Appellee
4. Ms. Margaret Bingham, Appellee
5. Mx. Michelle Taylor, Appellee

Done this the 4th day of June 2008.

Respectfully Submitted,

Otha Horton
Otha Horton, pro'se

TABLE OF CONTENTS

	PAGE
CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF CASES	iii & iv
STATEMENT OF ISSUES	1
STATEMENT OF CASE	1-3
STATEMENT OF FACTS	3-8
SUMMARY OF ARGUMENT	8-10
ARGUMENT	10-24
RELIEF SOUGHT	24-25
CERTIFICATE OF SERVICE	26

TABLE OF CASES

STATUTES	PAGE
MCA §47-5-138.1 (Supp. 2004)	3,4,5,12,14,15,16, 17,20,25
MCA §47-5-807	6,18,22
COURT RULES & CONSTITUTION	
MRCP 12(b)(6)	1,6,7,8,10,11
MRCP 6(a)	6
Mississippi Constitution Article 3 § 16	17
U.S..Constitution, Artilce 1 § 10, clause 1	17

STATEMENT OF 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 ERR IN DISMISSING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGEMENT.

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 CASE

1. The Appellant filed a Request for Administrative Remedy via Administrative Remedy Program in the Mississippi Department of Correction, to be placed in trusty status to receive ten (10) days reduction of sentence for every thirty (30) days of participation in an approved work program.

2. The MDOC Commissioner, Mr. Christopher Epps, denied relief, and the Appellant received his Third Step Response Form, and Certificate on April 7, 2006.

3. On May 8, 2006, the Appellant filed his Habeas Corpus Or/alternative Motion To Show Cause to request Judicial Review of the Administrative Decision.

4. On June 7, 2006, Appellee's filed Response and Motion To Dismiss to Habeas Corpus Or/Alternative Motion To Show Cause.

5. On June 14, 2006, the Appellant filed his Response To Motion To Dismiss.

6. On August 10, 2006, Circuit Judge, Samac Richardson dismissed Habeas Corpus Or/Alternative Motion To Show Cause for lack of venue jurisdiction.

7. On October 20, 2006 the Appellant filed his Notice of Appeal to dismissal of Habeas Corpus Or/Alternative Motion To Show Cause, and Motion To Alter or Amend Judgement.

8. On October 2, 2007, the judgement of the court was reversed and remanded.

9. On January 18, 2008, Hon. Samac Richardson, Circuit Court Judge entered an order dismissing Appellant's Habeas Corpus Or/Alternative Motion To Show Cause.

10. On January 31, 2008, Appellant filed Motion To Alter Or Amend Judgment to order of Dismissal, and Motion For Leave To Amend Habeas Corpus or/Alternative Motion To Show Cause.

11. On February 4, 2008, HOn. Samac Richardson dismissed Appellant's Motion To Alter Or Amend Judgment, and Motion For Leave To Amend Habeas Corpus Or/Alternative Motion To Show Cause.

12. On February 28, 2008, the Appellant filed his Notice of Appeal from denial of Habeas Corpus Or/Alternative Motion To Show Cause, Motion To Alter Or Amend Judgment, and Motion For Leave to Amnd Habeas Corpus Or/Alternative Motion To Show Cause.

STATEMENT OF FACTS

1. Otha Horton [Hereinafter referred to as plaintiff] committed the charge of sell of cocaine on January 29, 2004, in Attala County, Mississippi. [R. Vol. 1 p. 00009]¹

2. On September 14, 2004, the plaintiff was convicted of a sell of cocaine in violation of Miss. Code Ann. §41-29-139(a), and sentenced to seven years to serve and five (5) years probation under Miss. Code Ann. §41-29-139(b). [R. Vol. 1 p. 00009-00010].

3. Pursuant to Miss. Code Ann. §47-5-138.1 (2003), the plaintiff was eligible to receive ten (10) days reduction off sentence for every thirty (30) days of participation in an approved work program, because his charge was committed when said statute was still in effect.

4. On April 28, 2004, after plaintiff's crime was committed, Miss. Code Ann. §47-5-138.1 was amended to eliminate ten (10) days reduction off sentence for every thirty (30) days of participation in an approved work program, and made no provisions for plaintiff and other offenders whose crimes where committed prior to April 28, 2004, to receive ten (10) days reduction of sentence under prior law.

¹ R. Vol. 1 p. refers to Volume 1 of record and page.

5. Furthermore Miss. Code Ann. §47-5-138.1 amended on April 28, 2004, excluded plaintiff from receiving trusty status time of thirty (30) days for each thirty days of participation in an approved work program, because he was convicted in violation of Miss. Code Ann. §41-29-139(a) and sentenced under Miss. Code Ann. §41-29-139(b). [R. Vol. 1 p. 00010].

6. On October 26, 2005, the plaintiff begin working at the Maintenance Department at CMCF. [R. Vol. 1 p. 00010].

7. The Maintenance Department at CMCF is a sensitive placement. [R. Vol. 1 p. 00010].

8. Sensitive placement is a program approved to receive trusty status time. [R. Vol. 1 pp. 00010-00011].

9. On November 15, 2005, the plaintiff did a Request for Administrative Remedy to be placed in trusty status to receive ten (10) days reduction of sentence for every thirty (30) days of participation in maintenance program. [R. Vol. 1 p. 00011].

10. On January 11, 2006, Michelle Taylor answered the First Step of Administrative Remedy stating, "Offender Horton, MDOC is no longer putting offenders in 10/30 trusty status. When 30/30 trusty statute passed on 4-28-04, the 10/30 became non-existent to new offenders arriving after that date." [R. Vol. 1 p. 00011].

11. On February 15, 2006, Superintendent Margaret Bingham answered the Second Step of Administrative Remedy, denying relief. [R. Vol. 1. p. 00011].

12. On March 13, 2006, Commissioner, Christopher Epps answered the Third Step of Administrative Remedy, denying relief (See

Ex. "I" attached), based on misconception that plaintiff complaint was concerning his time sheet being miscalculated. (See ex. "I" attached). Nevertheless, plaintiff's complaint was concerning being placed in trusty status to receive ten (10) days reduction of sentence for every thirty (30) days of participation in an approved work program. [R. Vol. 1 p. 00011].

13. Miss. Code Ann. §47-5-138.1 amended on April 28, 2004, increased plaintiff's punishment by eliminating ten (10) days reduction off sentence for every thirty (30) days of participation in an approved work program under law in effect at time plaintiff's crime was committed, and not making provisions for plaintiff and other offenders whose crimes were committed prior to April 28, 2004, to receive trusty status under law in effect at time their crimes were committed. [R. Vol. 1 pp. 00011-00012].

14. In Alternative, the defendant's erred in not allowing plaintiff to receive trusty time of ten (10) days of reduction off sentence for every thirty (30) days of participation in an approved work program, at CMCF Maintenance Department, because Miss. Code Ann. §47-5-138.1 amended April 28, 2004, did not specifically state that it applied retroactive to crimes committed before its enactment. [R. Vol. 1 p. 00012]

15. Plaintiff should receive trusty time of ten (10) days reduction off sentence for every thirty (30) days of participation in Maintenance Department from Oct. 26, 2005, when he started work at Maintenance. [R. Vol. 1. p. 00012].

16. Plaintiff's Administrative Remedy Certificate is attached hereto.

17. On June 7, 2006, Appellee(s) filed "Response And Motion To Dismiss to Habeas Corpus Or/Alternative Motion To Show Cause. [R.Vol. 1 p. 00018].

19. Response And Motion To Dismiss alleged as follows: "This fails to state a claim upon which relief can be granted and should be dismissed under MRCPT 12(b)(6); This Court lacks Jurisdiction; ARP exhaustion was March 13, 2006; Convicts only have thirty (30) days to seek Judicial review: This is untimely (MCA §47-5-807); Trusty time is discretionary with MDOC Classification; no property or liberty interest is attached. (MCA CA §47-5-138.1); This is legally frivolous. [R. Vol. 1 p. 00020].

19. Plaintiff filed "Response To Motion To Dismiss," addressing all the defenses raised in Respondent "Response and Motion To Dismiss." [R. Vol.1 pp. 00022-00028].

20. In Response To Motion To Dismiss, plaintiff stated, "The plaintiff did not receive MDOC's Final Decision of ARP until April 7, 2006. (See Ex. "A" attached). [R. Vol.1 p 00025 ¶3].

21. Plaintiff had from April 7, 2006 until May 7, 2006 to file for Judicial review. [R.Vol 1 p. 00025 ¶3].

22. Since May 7, 2006, fell on Sunday, the plaintiff had until May 8, 2006 to file for Judicial Review pursuant to Rule 6(a) of Miss. Rules of Civil Procedure. [R.Vol.1 p. 00025 ¶ 3].

23. The plaintiff's Habeas Corpus Or/Alternative Motion To Show Cause was filed on May 8, 2006, the last day for filing.

[R. Vol. 1 p. 00025 ¶3].

24. It is not necessary for plaintiff to have a property or liberty interest in trusty time for his ex post facto rights to be violated. [R. Vol. 1 p. 00027].

25. The plaintiff has raised appropriate facts to support his claim. Therefore his claims are not frivolous as is shown in paragraph 1& 4 above. [R. Vol. 1 pp. 00027-00028].

26. Circuit Judge, Samac Richardson, dismissed the plaintiff's Habeas Corpus Or/Alternative Motion To Show Cause as follows: (1) The pleadings filed fails to state a claim upon which relief can be granted and should be dismissed pursuant to Mississippi Rules of Civil Procedure 12(b)(6); (2) The Motion herein was dated May 1, 2006, and filed with the Clerk May 8, 2006, which is fifty-six (56) 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; (3) The movant does not have a property or liberty interest in trusty time (Section 47-5-138.1 of the Mississippi Code of 1972); trusty time is a discretionary matter; (4) The Motion as filed herein is frivolous and without merit and the movant shall forfeit the appropriate amount of accumulated earned time pursuant to section 47-5-138 of the Mississippi Code of 1972 for the filing of a frivolous pleading herein. [R. Vol. 1 pp. 00040-00041].

27. The plaintiff filed a "Motion To Alter or Amend Judgment," to dismissal of Habeas Corpus Or/Alternative Motion To Show Cause;

addressing all issues for dismissal.[R. Vol. 1 pp. 00042-0048].

28. Plaintiff requested the Court to Alter Of Amend Judgment to Allow him to Amned his pleadings if necessary, and enclosed Motion For Leave To Amend. [R. vol.1 pp. 00045 ¶1, 00046¶2, 000047-00048, and 00036-00038].

29. Circuit Judge gave no justifying reason for the denial or Motion To Alter Or Amend Judgment. [R. Vol 1. p. 00053].

30. The plaintiff filed a Motion For Leave To Amend Habeas Corpus Or/Alternative Motion To Show Cause on January 31, 2008 [R.Vol. 1 p. 00036]

31. The Circuit Court dismissed the plaintiff's Motion For Leave To Amend Habeas Corpus Or/Alternative Motion To Show Cause without any justifying reasons for the denial. [R. Vol. 1 p. 00053].

SUMMARY OF ARGUMENT

1. DID CIRCUIT COURT ERR IN DISMISSING PLEADINGG PURSUANT TO MRCP 12(b)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The Circuit Court erred in dismissing the plaintiff's Habeas Corpus for failure to state a claim under M.R.C.P 12(b)(6), because the allegations in complaint should be taken as true, and it did not appear beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim.

2. DID THE CIRCUIT COURT ERR IN DISMISSING PLEADING FOR FAILURE TO FILE WITHIN THIRTY DAY TIME PERIOD OR REQUEST JUDICIAL REVIEW.

The Circuit Court erred in dismissing pleading for failure to file within thirty day time period for filing judicial review, because in plaintiff's "Response To Motion To Dismiss," he attached a copy of document from Administrative Remedy Program showing that he received 3rd Step Response and Certificate on 4-7-06. Therefore, he had until May 7, 2006 to file for judicial review. May 7, 2006 was on Sunday; Thus he had until May 8, 2006 to file for judicial review. Therefore, pleadings were filed on last day.

3. DID THE CIRCUIT COURT ERR IN DISMISSING PLEADING BECAUSE PLAINTIFF DID NOT HAVE A LIBERTY INTEREST IN TRUSTY TIME (SECTION 47-5-138.1 OF THE MISSISSIPPI CODE 1972); TRUSTY TIME IS A DISCRETIONARY MATTER.

In plaintiff's "Response To Motion To Dismiss," he showed that discretion in granting of trusty time does not foreclose ex post facto claim, and an ex post facto violation is not dependent on the existence of property or liberty interest. Therefore, Circuit Court erred in dismissing pleadings because plaintiff do not have property or liberty interest in trusty status time.

4. DID 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).

In plaintiff's "Response To Motion To Dismiss," he showed that he raised the appropriate facts to support his claim, and he showed that in paragraphs 1 & 4 of "Response To Motion To Dismiss," that

claims were not frivolous because they did not lack an arguable basis in law or fact.

5. DID CIRCUIT COURT ERR IN DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT.

Plaintiff in his "Motion To Alter Judgment", showed that his pleading state a claim upon which relief could be granted; that he filed Habeas Corpus Or/Alternative Motion To Show Cause within thirty (30) day time period to file for judicial review; that he did not have to have a property or liberty interest to trusty time in order to state a claim under ex post facto clause; that his claims are not legally frivolous. Thus, Circuit Court erred in denying Motion To Alter Or Amend Judgment. Furthermore, the court erred in denying Motion To Alter Or Amend Judgment, because plaintiff requested Court to Alter Or Amend Judgment to allow him to amend his pleading if necessary, and enclosed Motion For Leave To Amend. Court erred by denying without any justifying reason appearing for denial. Thereby abusing his discretion.

6. DID THE CIRCUIT COURT ERR IN DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND HABEAS COPUS OR/ALTERNATIVE MOTION TO SHOW CAUSE.

The Circuit Court erred by dismissing plaintiff's Motion For Leave to Amend by denial without any justifying reason appearing for denial. Thereby abusing his discretion.

ARGUMENT

DID THE CIRCUIT COURT ERR IN DISMISSING PLEADING PURSUANT TO MRCP 12(b) (6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The Circuit Court Judge dismissed the plaintiff's Habeas Corpus Or/Alternative Motion To Show Cause pursuant to MRCP 12(b)(6) for failure to state a claim upon which relief can be granted. [R. Vol. 1 p. 00034].

The standard for review for failure to state a claim under MRCP 12(b)(6) is set forth in Sennett, et al. v. U.S Fidelity and Guaranty Co. & Fidelity Guaranty and Insurance Underwriters, Inc., 757 So.2d 206, 209 (Miss. 2000), which states:

"A Motion To Dismiss for failure to state a claim under Mississippi Rules of Civil Procedure 12(b)(6) raises an issue of law. (citations omitted). This court reviews questions of law denovo. Miss. Transp. Comm'n v. Fire , 693 So.2d 917, 920 (miss. 1987). When considering a motion to dismiss, the allegations in the complaint must be taken as true, and the motions should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of fact in support of his claim. Butler v. Board of Supervisors, 659 So.2d 578, 581 (Miss. 1995)."

Under this standard of review the Circuit Court erred in dismissing the plaintiff's Habeas Corpus for failure to state a claim under MRCP 12 (b)(6), because the allegations in the complaint should be taken as true, and the Motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim. For it does not appear beyond doubt that plaintiff will not be able to prove any set of facts in support of his claim. The plaintiff raised the claim that:

THE PLAINTIFF IS BEING DENIED TRUSTY STATUS TIME
OF TEN DAYS REDUCTION OFF HIS SENTENCE FOR
EVERY THIRTY DAYS OF PARTICIPATION IN AN APPROVED
WORK PROGRAM IN VIOLATION OF THE EX POST FACTO CLAUSES

OF THE U.S. AND MISSISSIPPI CONSTITUTIONS,
OR/ALTERNATIVELY MDOC ERRONEOUSLY EXCLUDED
PLAINTIFF FROM RECEIVING TRUSTY TIME.

The facts in support of plaintiff's claims are as follows:

1. The plaintiff [Hereinafter referred to as plaintiff] committed the charge of sell of cocaine on January 29, 2004. [R. Vol. 1 p. 0009 ¶1]. This fact was admitted by defendants. [R.Vol. 1 pp. 00018 ¶1 & 00030, Admission No. 1 and Response].

2. On September 14, 2004, the plaintiff was convicted of a sell of cocaine in violation of Miss. Code Ann. §41-29-139(a), and sentenced to seven years to serve and five (5) years probation under Miss. Code ann. §41-29-139(b). This was admitted to by defendants. [R. Vol. 1 p. 00018, ¶2].

3. Pursuant to Miss. Code Ann. §47-5-138.1 (2003), the plaintiff was eligible to receive ten (10) days reduction off sentence for every thirty (30) days of participation in an approved work program, because his charge was committed when statute was still in effect. [R. Vol. 1 p. 00010]. The Defendant admitted that, "Pursuant to Miss. Code ann. §47-5-138.1 (Supp. 2004) inmates were eligible to receive ten (10) days reduction of sentence for every thirty (30) days of participation in an approved work program for charge committed in violation of Miss. Code Annn. §41-29-139(a), and sentenced under Miss. code Ann. §41-29-139(b), prior to April 28, 2004. [R. Vol. 1 p. 00030, Admission No. 2 and Response].

4. On April 28, 2004, after the plaintiff's crime was committed Miss. Code Ann. §47-5-138.1 was amended to eliminate ten (10) days reduction off sentence for every thirty days of participation

in an approved work program, and made no provisions for plaintiff and other offenders whose crimes were committed prior to April 28, 2004, to receive ten (10) days reduction of sentence under pror law. [R. Vol. 1 p. 00010]. This was admitted by defendants. [R. Vol. 1 p. 00018 ¶ 4].

5. On October 26, 2005, the plaintiff begin working at the Maintenance Department at CMCF [R. Vol 1 p. 00010 ¶6]. Defendant's admitted this fact. [R. Vol. 1 p. 00019 ¶ 6 & 00030, Admission No. 3 & Response].

6. The Maintenance Depatment is a sensitive placement. Sensitive placement is a program approve to receive trust status time. [R. Vol. 1 pp. 00010 & 00011 ¶¶7&8]. Defendant admit to CMCF Maintenance Department being an approved work program for receiving trust status time of ten days reduction off sentence for every thirty (30) days of participatiton in said program prior to April 28, 2004. [R. Vol. 1 p. 00031, Admission No. 4 & Response].

7. On November 15, 2005, the plaintiff did a Request For Administrative Remedy to be placed in trusty status to receive ten (10) days reduction of sentence for every thirty (30) days of participation in maintenance program. [R. Vol. 1 p. 00011]. The Defendants admit this [R.Vol. 1 p. 00019 ¶9].

8. On January 11, 2006, Michelle Taylor answered the First Step of Administrative Remedy stating, "Offender Horton, MDOC is no longer putting offenders in 10/30 trusty status. When 30/30 trusty statute passed on 4-28-04, the 10/30 became non-existent to new offenders arriving after that date." [R. Vol. 1 p.00011¶10].

Furhermore, the defendants admitted that Miss. Code Ann. §47-5-138.1 amended on April 28, 2004, was applied to plaintiff to prevent him from receiving ten (10) days reduction off sentence for every thirty (30) days of participation in an approved work program. [R. Vol. 1 p. 00031, Admission No. 5 & Response].

In summary the above facts show that plaintiff's crime was committed on January 29, 2004. [R. Vol. 1 p. 00030, Admission No. 1 & Response]. He was convicted of a sell of cocaine in violation of Miss. Code Ann. §41-29-139(a), and sentenced to seven years to serve and five years probation under Miss. Code Ann. §41-29-139(b) on September 14, 2004. [R. Vol. 1 p. 00009-00010¶2]. That He was eligible to receive ten days reduction of sentence for every thirty days of participation in an approved work program for conviction under 41-29-139(a), and sentrenced under 41-29-139(b), prior to April 28, 2004. [R. Vol 1 p. 00030, Admission No. 2 & Response]. See Miss. Code Ann. §47-5-138.1 (Supp. 2003). That the defendants retroactively applided Miss. Code Ann. §47-5-138.1 to plaintiff to prvent him from receiying ten (10) days reduction of sentence for every thirty days of participation in an approved work program [R. Vol. 1 p. 00031, Admission No. 5 & Response & p.000016].

Thus violating the ex post facto clauses of th U.S. and Mississippi Constitutions. See California Department of Corrections v. Morales, 514 U.S. 499, 504, 115 S.Ct. 1597, 1601, 131 L.Ed.2d 588 (1995); Weaver v. Graham, 450 U.S. 25, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17(1981); Puckett v! Abel, 684 So.2d 671, 673 (Miss. 1996). For it is mafortiori that preventing the plaintiff from receiging ten (10)

days reduction of sentence for every thirty (30) days in an approved work program under statute that was enacted after his crime was committed, increased his punishment. In *California Department of Corrections v. Morales*, 514 U.S. 499, 504, 115 S.Ct. 1597, 1601, 131 L.Ed.2d 588 (1995) stated:

"... The ex post facto clause incorporate "A term of art with an established meaning at the time of the framing of the constitution." In accordance with this original understanding, we have held that the clause is aimed at laws that retroactively... increase the punishment for acts." (Citations omitted).

Compare *Weaver v. Graham*, 450 U.S. 24, 31, 101 S.Ct. 960, 965, 67, L.Ed.2d 17, (1981), which stated:

"The respondents maintains Florida's 1978 law altering the availability of gain time is not retrospective because, on its face, it applies only after its effective date... This argument fails to acknowledge that it is the effect, not the form of the law that determines whether it is ex post facto. n.15. The critical question is whether the law changes the legal consequences of acts completed before its effective date. In the context of this case, this question can be recast as asking whether Fla. Stat. §944.275(1), (1979) applies to prisoners convicted for acts committed before the provisions effective date. clearly, the answer is in the affirmative. The Respondents concedes that the state uses §944.275(1), which was implemented on January 1, 1979, to calculate gain time available to petitioners who was convicted of a crime occurring on January 31, 1976. n. 16. Thus, the provision attaches legal consequences to a crime committed before the law took effect."

In my case, as in *Weaver*, supra, 450 U.S. at 31, although Miss. Code Ann. §47-5-138.1 amended on April 28, 2004, was supposed to be prospective, it is being applied retrospectively to my crime

to prevent me from receiving ten (10) days reduction of sentence for every thirty (30) days of participation in an approved work program. [R. Vol. 1 p. 00031, Admission No. 5 & Response]. Thus, Miss. Code Ann. §47-5-138.1 amended on April 28, 2004 attaches legal consequences to a crime that was committed on January 29, 2004, before the law took effect. Therefore, said statute increased the punishment for my crime by constricting my opportunity to earn early release. Compare Puckett v. Abel, 684 So.2d 671, 675 (Miss. 1996), which stated:

"Senate Bill 2175, like the statute in Weaver, constricts the inmates opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment. This result runs afoul of the prohibition against Ex Post Facto Laws. (Citations omitted)."

See also, Weaver v. Graham, supra, 450 U.S. at 30-31, and California Department of Corrections v. Morales, supra, 514 U.S. at 506 n.3:

"After ~~Collins~~ the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," nor, as the dissent seems to suggest, on whether an amendment affects a prisoner's "opportunity to take advantage of provisions for early release," see post, at 518, but on whether any such change... increases the penalty by which a crime is punishable."

The retroactive application of Miss. Code Ann. §47-5-138.1 amended on April 28, 2004 increased plaintiff's penalty by eliminating ten (10) days reduction of sentence for every thirty (30) days of participation in an approved work program in violation of ex post facto prohibition. California Department of Corrections v. Morales, supra 514 U.S. at 506 n.3.

Alternatively, if this court finds that Miss. Code Ann. §47-5-138.1 amended on April 28, 2004, is not unconstitutional in part, in violation of the ex post facto clauses of the U.S. and Mississippi Constitutions, it nevertheless should find that MDOC's retroactive application of Miss. Code Ann. §47-5-138.1 amended on April 28, 2004, to my crime to prevent me from receiving ten days reduction of sentence for every thirty (30) days of participation in an approved work program, violated the ex post facto clauses of U.S. and Mississippi Constitutions. Article I § 10, Clause 1 of U.S. Constitution, and Article 3 § 16 of Mississippi Constitution. For said statute did not specifically state that it was to be applied retroactive to crimes committed prior to its enactment, but said statute on its face stated that it was to be effective from and after passage. Thus, defendants action of applying statute to me was arbitrary and capricious, and violated the ex ost facto prohibition of U.S. and Miss. Constitutions. Miss. State Board of Accountancy v. Gray, 674 So.2d 1251, 1253 (Miss. 1996).

Based on foregoing, taking the allegations in the complaint as true, and it not appearing beyond doubt that plaintiff's unable to prove any set of facts to support his claim, it was error for Circuit Court to dismiss for failure to state a claim under MRCP 12 (b)(6). Sennett, supra, 757 So.2d at 209. This truth is furthered by the fact that plaintiff is proceeding pro'se, and his pleading should be liberally construed. Haines v. Kerner, 404 U.S. 519, 520

2. DID THE CIRCUIT COURT ERR IN DISMISSING PLEADING FOR FAILURE TO FILE WITHIN THIRTY DAY TIME PERIOD OR REQUEST JUDICIAL REVIEW.

On January 18, 2008, Circuit Court entered an order stating:

"The movant has thirty (30) days after receipt of the denial of the Third Step Response Form to file for Judicial Review and the said (30) day(s) time period expired on April 13, 2006, pursuant to Section 47-5-807 of the Mississippi Code of 1972.

The movant does not state in said motion when he received the denial of the Third Step Response form and is must be presumed by the Court to be within a reasonable time after the date of March 13, 2006, as stated on Third Step Form.

The motion herein was date May 1, 2006, and filed with the Clerk on May 8, 2006, which is fifty-six (56) day(s) after date of the Third step response form and is outside the statutory thirty (30) days time period to file or request judicial review." [R. Vol. 1 pp. 00040-00041, ¶¶ 3-5].

On June 7, 2006, a Repsonse and Motion To Dismiss was filed by defendants. [R. Vol.1 p. 00018]. The defendant alleged in Response and Motion To Dismiss that, "ARP exhaustion was March 13, 2006; convicts only has thirty (30) days to seek judicial review; this is untimely (MCA §47-5-807). [R. Vol. 1 p.00020 ¶3].

On June 14, 2006, a "Reponse To Motion To Dismiss", was filed by plaintiff. [R. Vol. 1 p. 00022]. In "Response To Motion To Dismiss, the plaintiff addressed the issue regarding pleading was untimely. [R. Vol. 1 pp. 00025-00026 ¶3]. Plaintiff did not receive MDOC's Final Decision of ARP until April 7, 2006. [R. Vol. 1 pp. 00025 ¶3, and 00050]. Ex. "A" on page 00050 of

R. Vol. 1, was same Ex. "A" attached to "Response to Motion To Dismiss." Notice that Ex. "A" was referred to in R. Vol. 1 p. 00025 ¶3, which is page 035 of prior Record on appeal in this case. The last page of Response To Motion To Dismiss on prior appeal was 039 (R.Vol. 1. p. 00029), and Ex. "A" on last appeal was numbered 040 [R. Vol. 1 p1 00050]. Ex."A" shows that plaintiff did not receive Third Step Response (Final Decision) and Certificate until 4-7-06 [R. Vol. 1 p. 00050]. Plaintiff had thirty days from April 7, 2006 to file for judicial review pursuant Miss. Code Ann. §47-5-807. Plaintiff had from April 7, 2006 until May 7, 2006 to file for judicial review. [R. Vol. 1 p. 00025 ¶3]. Since May 7, 2006 came on Sunday, plaintiff had until May 8, 2006 to file for judicial review pursuant to Rule 6(a) of MRCP. [R.Vol. 1 p. 00025¶3]. The plaintiff's Habeas Corpus Or/Alternative Motion To Show Cause was filed on May 8, 2006, the last day for filing. [R. Vol. 1 p. 00025 ¶3] & p1 00009]. Thus, plaintiff's pleading was timely filed.

Nevertheless, Circuit Court dismissed Habeas Corpus Or/Alternative Motion To Show Cause for filing outside the thirty (30) days statutory period.[R. Vol. 1 pp. 00040-00041 ¶¶3-5]. Based on foregoing, Circuit Court erred in dismissing Habeas Corpus Or/Alternative Motion Show Cause for being outside statutory thirty (30) day(s) time period to file or request judicial review. [R. Vol 1 p. 00040-00041 ¶¶3-5].

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.

In "Response And Motion To Dismiss," it was stated, "Trusty time is discretionary with MDOC Classification; no property or liberty interest is attached (MCA CA §47-5-138.1). [R. Vol.1 p. 00030 ¶4].

In Plaintiff's "Response To Motion To Dismiss," he addressed the issue regarding trusty time being discretionary, no property or liberty interest attached. [R. Vol. 1 pp. 00026-00027, ¶4].

In Puckett v. Abels, 684 So.2d 671, 675 (Miss. 1996), the Mississippi supreme Court stated:

The court held that a prisoner need not show that he definitely would have served a lesser sentence under previous legal scheme in order to show an ex post facto violation. Id. at 432, 107 S.C. at 2452. "On other words the mere presence of some discretion...before... the change in law does not in and of itself foreclose an ex post facto claim." Jones v. Georgia State Board of Pardons and Paroles, 59 F.3d 1145, 1149 (11th Cir. 1995)...."

Also compare Jones, supra, at 1148 no 6, which states:

"We note at the outset that our recent conclusion that Georgia's parole system does not create a due process-- protected liberty interest in parole, See Sultentuss, 35 F.3d at 1500-03, does not by itself foreclose the instant ex post facto challenge. The Supreme Court repeatedly has held that the presence of an ex post facto violation is not dependent on the existence of a liberty interest, protected by due process, in pertinent regulation. Although "evaluating whether a right is vested is important for claims under the contracts and Due Process Clauses, which solely protect pre-existing entitlements... the presence or absence of an affirmative enforceable right is

not relevant... to the ex post facto prohibition...." Weaver v. Graham, 450 U.S. 24, 30, 101 S.Ct. 960, 965, 64 L.Ed.2d 17 (1981). (Emphasis ommitted).

Thus, based on the above cases it is not necessary for plaintiff to have a property or liberty interest in trusty time for his ex post facto rights to be violated. Therefore, the Circuit Court erred in dismissing plaintiff's claims because trusty time is discretionary, and plaintiff did not have a property or liberty interest to trusty time.

4. DID 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.

In defendants "Response And Motion To Dismiss," it was stated; "This is legally frivolous.: [R. Vol 1 p. 00030 ¶6].

In plaintiff's "Response To Motion To Dismiss," he addressed the frivolous issue, and stated, "The plaintiff has raised the appropriate facts to support his claim. Therefore, his claims are not frivolous as is shown in paragraphs 1 & 4.above. [R. Vol. 1 p. 00037-00038 ¶6]. Paragraphs 1 & 4 in plaintiff's "Response To Motion To Dismiss" shows that he has an arguable claim in law and fact: See Nietzke v. Williams, 490 U.S. 319, 324, 10 S.Ct. 1827, 1831-32, 104 L.Ed.2d 338 (1989) it stated:

The court of appeals have quite correctly in our view, generally adopted as formulae for evaluation frivolousness under §1915(d) close variants of the definition of legal frivolousness which we articulated in the Sixth Amendment case of Anders v. California, 386 U.S. 738 (1967). There, we stated, that a appeal of a matter of law is frivolous where "[None] of the

legal points are arguable on the merits." Id at 744. By logical extension, a complaint containing as is does both factual allegations and legal conclusions is frivolous where it lacks an arguable basis either in law or in fact."

As shown in Issues 1 & 3 in this brief, the plaintiff's claims does not lack an arguable basis in law and fact.

The Circuit Court dismissed plaintiff's pleading as being legally frivolous. [R. Vol. 1 p. 00041 ¶7]. Based on foregoing, the Circuit Court erred in dismissing plaintiff's pleading as legally frivolous and without merit, and plaintiff's forfeited earned time should be returned.

5. DID THE CIRCUIT ERR IN DISMISSING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT.

On January 31, 2008, plaintiff filed a "Motion To Alter Or Amend Judgment," regarding order dismissing Habeas Corpus Or/Alternative Motion To Show Cause. [R. Vol. 1 p. 00042]. On February 4, 2008, Circuit Court entered an order dismissing Motion To Alter or Amend Judgment without giving a reason for doing so.

The plaintiff showed in "Motion To Alter Or Amend Judgment" that his pleading stated a claim upon which relief can be granted; He showed that his pleadings were filed within Thirty (30) days time for filing for judicial review pursuant to Miss. Code Ann. §47-5-807; He showed that he did not have to have a liberty or property interest to trusty time in order to state a claim under ex post facto clause; He showed that his claims are not legally or factually frivolous, and referred to Response to Motion To Dismiss. [R. Vol. 1 pp. 00042-00048]. The Circuit Court erred

in denying Motion To Alter Or Amend Judgment. Further the Trial Court Errred in denying Motion To Alter Or Amend Judgment to allow plaintiff to amend his pleadings, if necessary, and enclosed Motion For Leave To Amend. [R. Vol. 1 pp. 00045 ¶1, 00046 ¶2, 00047-00048, and 00036-00038]. Compare, Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L.Ed.2d 222, 236 (1962), which stated:

"The court of appeals also erred in affirming the District Court's denial of Petitioner's Motion To Vacate Judgment of Complaint... Rule 15(a) declares that leave to amend "shall be freely given when justice so requires ", this mandate is to be heeded. (Citationss ommitted). If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded the opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should as the rules require be "freely given." Of course, the grant or denial of any opportunity to amend is within the discretion of the District Court, but out fight refusal to grant the leave without any justifying reason appearing for denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

In the case sub judice, as in Foman, supra, 371 U.S. at 182, the Circuit Court erred in denying "Motion To Alter or Amend Judgment," in order to amend pleadings, and abused its discretion in denying Motion For Leave to Amend, because Circuit Court gave no justifying reason for denial. [R. Vol. 1 p. 00053].

6. DID THE CIRCUIT COURT ERR IN DISMISSING PLAINTIFF'S MOTION FOR LEAVE TO AMEND HABEAS CORPUS OR/ALTERNATIVE MOTION TO SHOW CAUSE.

The plaintiff filed a Motion For Leave To Amend Habeas Corpus Or/Alternative Motion To Show Cause on January 31, 2008. [R. Vol. 1 p. 00036].

The Circuit Court dismissed the plaintiff's Motion For Leave To Amend Habeas Corpus Or/Alternative Motion To Show Cause, without any justifying reasons for the denial. [R. Vol 1 p. 00036]. This was an abused of discretion. Therefore, this court should reverse. See Red Enterprises, Inc. v. Peashooter, 455 So.2d 793, 795 (1984), which stated:

"Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant leave without any justifying reason appearing for the denial is not an exercise of discretion; is abuse of that discretion and inconsistent with the spirit of the Federal Rules. [371 U.S. at 182, 83 S.Ct. at 230, 9 L.Ed.2d at 226].

RELIEF SOUTHT

Wherefore, Premises Considered, the Appellant respectfully request this Honorable Court to issue an order for following reasons:

1. Declaring the the Circuit Court erred in dismissing pleading pursuant to MRCP 12(b)(6) for failure to state a claim upon which releif can be granted;
2. declaring the circuit Court erred in dismissing the pleading for failure to file within thirty (30) day time period or request judicial review;
3. declaring the Circuit court erred in dismissing pleading

because plaintiff did not have liberty interest in trusty time (Section 47-5-138.1 of the Mississippi Code of 1972); and because trusty time is discretionary;

4. declaring the Circuit Court erred 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; Order MDOC place me in Trusty status from Oct 25, 2006.

5. declaring the Circuit Court erred in denial of plaintiff's Motion To Alter or Amend Judgment;

6. declaring the Circuit Court erred in denial of plaintiff's Motion For Leave to Amend Habeas Corpus Or/Alternative Motion To Show Cause;

7. reversing the orders of the circuit Court, and declaring that the application of Miss. Code Ann. §47-5-138.1 amended on April 28, 2004 after plaintiff's crime was committed, violated the ex post facto clauses of the U.S. and Mississippi Constitutions;

8. declaring Miss. Code Ann. §47-5-138.1 amended on April 28, 2004 unconstitutional in part for eliminating ten (10) days reduction of sentence for every thirty (30) days of participation in an approved work program;

9. Alternatively reverse and remand to Circuit Court for case to be heard on its merits, or for plaintiff to be allowed to amend his pleading, and grant any other relief this court deems in the interest of justice.

Done this the 4th day of June 2008.

Respectfully Submitted,

25. Otha Horton
Otha Horton, pro'se

CERTIFICATE OF SERVICE

This is to certify that the Appellant, Otha Horton, pro'se has this date mailed a true and correct copy of Appellant's Brief, by United States Postal Service, postage prepaid to the following person(s):

Hon. Samac Richardson
Circuit Court Judge
P.O. Drawer 1599
Brandon, Ms. 39043

Hon. James Norris
MDOC Attorney Senior
P.O. Box 36
Parchman, Ms. 38738

Hon. Jim Hood
Attorney General
P.O. Box 220
Jackson, Ms. 39205

Done this 4th day of June 2008.

Respectfully Submitted,

Otha Horton
Otha Horton, #W0589, pro'se
CMCF 1-A G Bldg.
P.O. Box 88550
Pearl, Ms. 39288-8550

CERTIFICATE OF MAILING

I the undersigned certify that I have this date given Appellant's ~~Brief~~ to Inmate Legal Assistance Program to be deposited in the United States Mail, the original and four copies of Appellant's Brief in Cause No. 2008-CP-00430, to Ms. Betty Sephton, Cleerk of Mississippi Supreme Court and Court of Appeals, P.O. Box 249, Jackson, Ms. 39205-0249.

Done this the 4th day of June 2008.

Respectfully Submitted,

Otha Horton
Otha Horton, pro'se