

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

**JEROME WHITAKER**

**APPELLANT**

**VS.**

**NO. 2008-CP-0584-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

**JIM HOOD, ATTORNEY GENERAL**

**BY: JEFFREY A. KLINGFUSS  
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**

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**STATEMENT OF THE CASE**

Defendant pled guilty to the charge of failing to register as a sex offender. Upon sentencing defendant received 5 years, suspended with 5 years of post-release supervision. Within months a petition was filed to revoke the suspended sentence. A hearing was held and proof provided, the trial court finding that defendant had, in fact, violated the terms of his probation. Defendant's probation was revoked and his previous 5 year sentence reinstated with 2 suspended 3 to serve.

Defendant filed a motion for post-conviction relief to reinstate his original suspended sentence. The trial court denied the motion, c.p. 14, which defendant timely appealed.

## **STATEMENT OF FACTS**

Defendant failed to register as a sex offender. He pled guilty and got a suspended sentence. Within months defendant violated conditions of his supervised release, was revoked and a new sentence imposed. Defendant then filed a motion for post-conviction relief challenging his sentence. The trial court denied the motion. Defendant appealed this denial of post-conviction relief.

While the trial court was correct in denying relief there is, possibly, a clerical or scrivener's error in the sentencing order that may need to be corrected.

## **SUMMARY OF THE ARGUMENT**

**THE TRIAL COURT WAS CORRECT IN DENYING THE MOTION FOR POST-CONVICTION RELIEF. ANY CLERICAL ERROR IN THE SENTENCING ORDER MAY BE CORRECTED BY THE TRIAL COURT**

## ARGUMENT

### I.

#### **THE TRIAL COURT WAS CORRECT IN DENYING THE MOTION FOR POST-CONVICTION RELIEF. ANY CLERICAL ERROR IN THE SENTENCING ORDER MAY BE CORRECTED BY THE TRIAL COURT**

¶ 5. When reviewing a lower court's decision to dismiss a petition for post-conviction relief this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous.” *Williams v. State*, 872 So.2d 711, 712(¶ 12) (Miss.Ct.App.2004). However, where questions of law are raised the applicable standard of review is *de novo*.

*Goudy v. State*, 996 So.2d 185 (Miss.App. 2008).

The State will succinctly assert the trial court was correct, overall, in denying the motion for post-conviction relief as defendant had been told the terms of his supervised release and there was evidence he violated those terms and defendant, under oath admitted to violating terms. *Id.*

However, there is one *minor* claim raised by defendant that appears to have some merit. At the revocation hearing the trial court found evidence of violations and revoked his previously suspended sentence. The court then sentenced defendant to 5 years, suspended 2 with 3 to serve, “and you’re going to have to serve *two years’ post-release supervision* after you serve your time.” (Tr. 36.)

However, in the sentencing found in the clerk’s papers (which was attached as an exhibit to the post-conviction petition) the sentencing order appears to have a scrivener’s error. (C.p.12). The order revokes the 5 years suspended, a 3 year

sentence is imposed and 2 to remain suspended. Then, in a handwritten addendum the court order recites that “the offender shall be placed on *3 years Post Release Supervision following* his term of incarceration.”

Without belaboring the point the term of incarceration plus the period of post-release supervision may not exceed the maximum sentence for the offense. *Miss. Code Ann.* § 47-7-34. See, *Goudy v. State*, 996 So.2d 185 (¶9)(Miss.App. 2008).

The crime for which defendant was being sentenced was for failing to register as a sex offender. The maximum sentence is 5 years (plus a fine). *Miss. Code Ann.* § 45-33-33(2).

While defendant claims this sentence subjects him to double jeopardy, and is cruel and unusual punishment under the 8<sup>th</sup> Amendment of the Constitution. However, the remedy is relatively easy and need not involve a hearing.

Courts of record ‘have inherent power to correct clerical errors at any time, and to make the judgment entry correspond with the judgment rendered. This power exists in criminal prosecutions as well as in civil cases.’

*Kitchens v. State*, 253 Miss. 734, 737; 179 So.2d 13, 14 (Miss. 1965)(cited as authority in *Melton v. State*, 950 So.2d 1067, 1073 (¶25)(Miss.App. 2007)).

It is the position of the State the trial court was correct in denying the motion for post-conviction relief, as overall the petition was without merit. Looking at the record presented on appeal there is the possibility the sentencing order does not



correspond to the judgment rendered at the revocation hearing. Such a discrepancy may be readily and easily correct without implicating Constitutional violations.

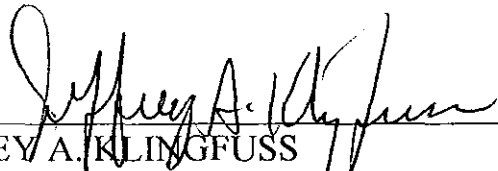
## CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the trial court denial of post-conviction relief and remand to the Circuit Court of Marshall County to correct the sentencing order.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:

  
JEFFREY A. KLINGFUSS  
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

## CERTIFICATE OF SERVICE

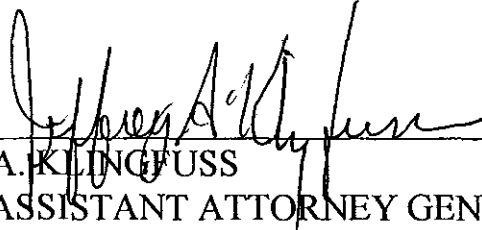
I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Andrew K. Howorth  
Circuit Court Judge  
1 Courthouse Square, Ste.101  
Oxford, MS 38655

Honorable Ben Creekmore  
District Attorney  
Post Office Box 1478  
Oxford, MS 38655

Jerome Whitaker, #127505  
I.C.C.F.  
Post Office Box 220  
Mayersville, MS 39113

This the 28th day of January, 2009.

  
\_\_\_\_\_  
JEFFREY A. KLINGFUSS  
SPECIAL ASSISTANT ATTORNEY GENERAL

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