

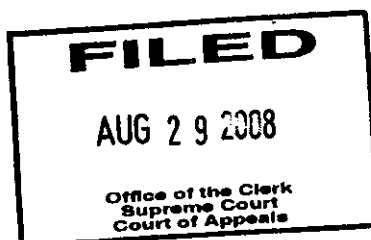
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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT STANLEY ROWLAND

APPELLANT

VS.



NO. 2008-CP-0731

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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ROBERT STANLEY ROWLAND

APPELLANT

vs.

CAUSE No. 2008-CP-00731-COA

THE STATE OF MISSISSIPPI

APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an order of the Circuit Court of Washington County, Mississippi in which relief on the prisoner's motion in post - conviction relief was denied.

STATEMENT OF FACTS

Two indictments for the felony of armed robbery were returned against the prisoner and two others. (R. Vol. 1, pp. 28; 32). Two other indictments for capital murder were also returned against the prisoner and his cohorts. (R. Vol. 1, pp. 36; 40) Armed robbery was the underlying felony alleged in the indictments for capital murder. The prisoner and his co-defendants subsequently entered pleas of guilty to the two counts of capital murder and the two counts of armed robbery. The prisoner was sentenced to life imprisonment on each count of capital murder and twenty - four years on each count of armed robbery, the sentences to be served consecutively. (R. Vol. 1, pp. 17 - 26).

By motion dated 7 November 2007, the prisoner moved to vacate his convictions and sentences. The ground alleged for such relief was a claim that his convictions both for capital murder and the underlying felony alleged in the capital murder indictments offended the proscriptions against double jeopardy. (R. Vol. 1, pp. 7 - 16). In this motion, the prisoner asserted that, while he had previously sought post - conviction relief on other issues, he had not sought such relief on the double jeopardy claim. However, he asserted that the “successive writ bar” was inapplicable because his sentences were illegal. Interestingly, though, is the unusual fact that the prisoner admitted his guilt for the murders and robberies alleged in the indictments. (R. Vol. 1, pp. 9 - 10).

The trial court denied relief on the motion, without an evidentiary hearing, on the ground that the claim was barred by the statute of limitations. (R. Vol. 1, pp. 45 - 46).

STATEMENT OF ISSUES

DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER’S MOTION IN POST - CONVICTION RELIEF, WITHOUT AN EVIDENTIARY HEARING?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER’S MOTION IN POST - CONVICTION RELIEF, WITHOUT AN EVIDENTIARY HEARING

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER’S MOTION IN POST - CONVICTION RELIEF, WITHOUT AN EVIDENTIARY HEARING

The prisoner’s convictions occurred in August of 1979, twenty-nine years ago. Consequently, he had until 17 April 1987 in which to file a motion in post - conviction relief. *Odom v. State*, 483 So.2d 343 (Miss. 1986). The prisoner admits that he filed motions in post -

conviction relief prior to the one at bar, though he does not allege when he filed them. He admits that he did not pursue the claim brought here in those prior filings. He filed the motion in post - conviction relief involved in this case in 2007.

The Circuit court denied relief on the prisoner's motion because it was not filed within the time permitted by Miss. Code Section 99-39-5(2) and *Odom, supra*. While the court did not rely on Miss. Code Ann. Section 99-39-23(6) (Rev. 2007), it might have done so in view of the prisoner's admission that he had previously sought post - conviction relief. A claim such as the one presented here cannot be addressed where it is presented in a successive motion in post - conviction relief. *Smith v. State*, 923 So.2d 241 (Miss. Ct. App. 2006).

The prisoner seeks to avoid the consequence of his failure to present this claim in a timely fashion with an assertion that he has been subjected to an improper sentence because he could not have been convicted, consistent with the jurisprudence arising from the jeopardy clauses of the State and federal constitutions, of capital murder and the underlying offense of the capital murder charge. The prisoner relies on the "intervening decision exception" to both the statute of limitations and successive writ bar as authority in support of his contention that the trial court erred in dismissing his latest motion in post - conviction relief.

It is true that there is an exception to the successive writ bar and the statute of limitations where there is an "intervening decision" by the Supreme Court of this State or by the federal supreme court which would have actually adversely affected the outcome of the Appellant's conviction, Miss. Code Ann. Section 99-39-5(2); 99-39-23(6) (Rev. 2007). It is also true that *Fuselier v. State*, 654 So.2d 519 (Miss. 1995), a decision that the prisoner says is an intervening decision, holds, among other things, that one may not be sentenced both on capital murder and the underlying felony alleged in the indictment to elevate the homicide from murder to capital

murder. It is likewise true that *Fuselier* was decided some sixteen years after the prisoner's convictions. But this does not mean that *Fuselier* or the other decisions cited by the prisoner are "intervening decisions," for purposes of post - conviction relief.

In *Harris v. Oklahoma*, 433 U.S. 682 (1977), the United States Supreme Court held that one may not be convicted, consistent with the jeopardy clause of the United States constitution, of felony murder and the underlying offense involved in the felony murder. This is a decision that occurred some two years prior to the prisoner's convictions, and we consider it to be directly on point. So too has the Mississippi Supreme Court, which cited *Harris* in the course of reversing a case involving convictions and sentences for both capital murder and the underlying offense alleged in the indictment for capital murder. *Meeks v. State*, 604 So.2d 748 (Miss. 1992).

While the rule of law cited by the prisoner has been expressed in decisions subsequent to the prisoner's convictions, it existed as a matter of federal constitutional law prior to and at the time of his convictions. There has not been a change of law to the prisoner's benefit in this regard since the time of his convictions and sentences; there is thus no "intervening decision" of benefit to him. The intervening decision exception does not simply mean whether some decision may be identified that occurred after a prisoner's conviction; it refers to a change in law that, had that change existed at the time of the prisoner's trial, would have actually adversely affected the outcome of the conviction or sentence. Here, the rule of law cited by the prisoner existed at the time of his pleas. Thus, the Circuit Court was correct to deny relief under the statute of limitations, and would have been also correct to have done so under the successive writ bar.

That the prisoner's claim involves a claim of violation of double jeopardy is not a significant matter. This Court has held, in the context of guilty pleas, that double jeopardy claims must be raised in the trial court and may not be raised at first instance in post - conviction

relief. *Hoskins v. State*, 934 So.2d 326, 330 (Miss. Ct. App. 2006). This is exactly the situation here: the prisoner entered guilty pleas and made no claims under the jeopardy clauses at the pleas and sentencing. Thus, under *Hoskins*, he may not be heard to raise such in post - conviction relief. The Circuit Court would have been correct had it denied relief for this reason as well.

The Mississippi Supreme Court has held that a double jeopardy claim, if raised in post - conviction relief, must be raised within the time provided by the statute of limitations. *Pinkney v. State*, 757 So.2d 297, 299 (Miss. 2000). While it may be that in *Fuselier, supra* the Court did not find that the double jeopardy issue there was barred, the appellant in that case filed for post - conviction relief within the time provided by the statute of limitations. The Court in *Pinkney* rejected the argument that it should consider the double jeopardy issue on account of the fact that the proscription against jeopardy is a fundamental right.

The order of the Circuit Court denying relief on the prisoner's motion in post - conviction relief should be affirmed.

CONCLUSION

The order denying relief on the prisoner's motion in post - conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

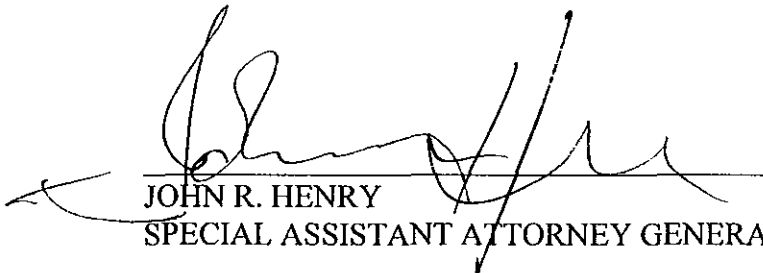
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 29th day of August, 2008.



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