

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

**OTIS BANKS**

**APPELLANT**

**VS.**

**NO. 2008-CP-0856**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**STATEMENT OF THE ISSUES**

- I. Banks was not denied due process of law and subjected to a fundamental constitutional violation where the trial court imposed a sentence for armed robbery and specified that the sentence was imposed pursuant to Miss. Code Ann. § 47-7-3(d)(ii).
- II. The trial court correctly dismissed Bank's Petition for Post Conviction Relief as a successive writ.

**STATEMENT OF THE CASE**

On or about March 7, 2008, Banks filed a Motion for Post Conviction Collateral Relief in the Circuit Court of Warren County, Mississippi. (C.P. 4) Banks asserted that he plead guilty to the offenses of armed robbery and that his sentence to a total term of thirty (30) years in the custody of the MDOC; that is 15 years on (1) count of Armed Robbery to run consecutive to another 15 years concurrent sentence in regards to five counts of kidnapping. The combined sentences under all charges was (30) years with (15 years to serve without parole or early release under Mississippi Code Ann. Section 47-7-3(d)(ii) (1972, as amended) and 15 years suspended

with post release supervision for a period of five years.

On or about April 17, 2008, the trial court entered an Order dismissing the motion which is the subject of this appeal as well as another Motion for Post-Conviction Relief which was filed on September 11, 2006. The trial court also cited a previous Motion for Post-Conviction Relief filed by Banks on November 23, 2004 and denied by the trial court on April 15, 2005. (C.P. 14) Based on the previous motion filed by Banks, the trial court held the motions of September 11, 2006 and March 17, 2008 were successive and dismissed them. The instant appeal ensued.

### **SUMMARY OF ARGUMENT**

Banks Petition for Post-Conviction Relief was correctly dismissed as a successive writ pursuant to Miss. Code Ann. § 99-39-3 (1972, as amended). Banks was not denied due process of law and subjected to a fundamental constitutional violation where the trial court imposed a sentence for armed robbery and specified that the sentence was imposed pursuant to Miss. Code Ann. § 47-7-3(d)(ii). Further, Bank's Motion for Post Conviction Collateral Relief filed March 7, 2008 was time-barred as the judgement of conviction was entered March 20, 2002. Mississippi Code Ann. § 99-39-5 (1972, as amended). Therefore, the trial court correctly dismissed Bank's Petition for Post Conviction Relief as a successive writ and the decision of the trial court should be affirmed.

### **ARGUMENT**

- I. Banks was not denied due process of law and subjected to a fundamental constitutional violation where the trial court imposed a sentence for armed robbery and specified that the sentence was imposed pursuant to Miss. Code Ann. § 47-7-3(d)(ii).**

The Court of Appeals is not required to reach the merits of this case in order to affirm the

trial court's dismissal of Bank's Motion for Post-Conviction Collateral Relief. This issue was properly dismissed by the trial court as a successive writ since Banks had filed a previous Motion for Post Conviction Collateral Relief on November 23, 2004 which was subsequently denied on February 11, 2005. (C.P. 14) Banks filed another Motion for Post Conviction Relief on September 11, 2006, as well as the motion which is the subject of this appeal, which was filed March 17, 2008. The trial court entered an Order dismissing both the writ of September 11, 2006 and the writ of March 17, 2008 as successive pursuant to Mississippi Code Ann. § 99-39-23 (1972, as amended).

Section 99-39-23 provides that:

(6) The order as provided in subsection (5) of this section or any order dismissing the prisoner's motion or otherwise denying relief under this article is a final judgment and shall be conclusive until reversed. It shall be a bar to a second or successive motion under this article. Excepted from this prohibition is a motion filed pursuant to Section 99-19-57(2), Mississippi Code of 1972, raising the issue of the convict's supervening insanity prior to the execution of a sentence fo death. A dismissal or denial of a motion relating to insanity prior to the execution of a sentence of death. A dismissal or denial of a motion relating to insanity under Section 99-19-57(2), Mississippi Code of 1972, shall be res judicata on the issue and shall likewise bar any second or successive motions on the issue. Likewise excepted from this prohibition 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 his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

(7) No relief shall be granted under this article unless the prisoner proves by a preponderance of the evidence that he is entitled to such.

Mississippi Code Ann. § 99-39-23(6)(7) (1972, as amended).

In his motion before the trial court, Banks did not assert any of these exceptions to the bar against successive writs. Further, Banks Motion for Post Conviction Collateral Relief was time barred, as Banks, according to his own Motion, was convicted on or about the 20<sup>th</sup> day of March, 2002 and the Motion was filed on or about March 7, 2008, some three years beyond the three year statute of limitations of Post Conviction Collateral Relief contained in Mississippi Code Ann. § 99-39-5.

The trial court correctly dismissed Banks' Motion for Post Conviction Collateral Relief as a successive writ. Banks Motion is further time barred pursuant to the three year statute of limitations contained in Miss. Code Ann. § 99-39-5.

**II. The trial court correctly dismissed Bank's Petition for Post Conviction Relief as a successive writ.**

As argued above, the trial court correctly dismissed Bank's Motion for Post-Conviction Collateral Relief filed on or about March 7, 2008. Bank's assertions of error are procedurally barred as a successive writ and are time-barred as well. The trial court's dismissal of Bank's Motion for Post Conviction Collateral Relief should be affirmed.

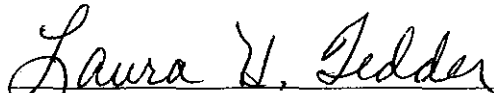
**CONCLUSION**

Banks assignments of error are without merit and are barred as successive writs and are time-barred. The trial court correctly dismissed Banks' Motion for Post-Conviction Relief and should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

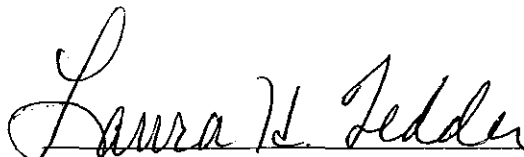
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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Circuit Court Judge  
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Vicksburg, MS 39181-0351

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This the 16th day of December, 2008.

  
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