

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

**BENNIE LACY**

**APPELLANT**

**VS.**

**NO. 2008-CP-0917**

**STATE OF MISSISSIPPI**

**APPELLEE**

**MOTION TO DISMISS APPEAL  
OR IN THE ALTERNATIVE,  
BRIEF FOR APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** ..... **ii**

**STATEMENT OF THE FACTS** ..... **1**

**SUMMARY OF THE ARGUMENT** ..... **1**

**ARGUMENT** ..... **2**

**A. MOTION TO DISMISS APPEAL** ..... **2**

**B. BRIEF ON THE MERITS** ..... **2**

**CONCLUSION** ..... **5**

**CERTIFICATE OF SERVICE** ..... **6**

**TABLE OF AUTHORITIES**

**STATE CASES**

*Brown v. State*, 923 So.2d 258, 260 (Miss. Ct. App. 2006) ..... 4

*Epps v. State*, 837 So.2d 243 (Miss. Ct. App. 2003) ..... 2

*House v. State*, 754 So.2d 1147, 1150 (Miss.1999) ..... 4

*Jackson v. State*, 915 So.2d 484 (Miss. Ct. App. 2005) ..... 2

*Lacy v. State*, 632 So.2d 958 (Miss. 1994) ..... 1

*Lawson v. State*, 748 So.2d 96, 98 (Miss.1999) ..... 5

*Robinson v. State*, 968 So.2d 981 (Miss. Ct. App. 2007) ..... 2

**STATE STATUTES**

Mississippi Code Annotated §41-29-139 ..... 4

Mississippi Code Annotated §99-19-81 ..... 4

Mississippi Code Annotated §99-39-23(6) ..... 4

Mississippi Code Annotated §99-39-5(2) ..... 3

Mississippi Code Annotated §99-39-7 ..... 2

**MOTION TO DISMISS APPEAL  
OR IN THE ALTERNATIVE,  
BRIEF FOR APPELLEE**

**STATEMENT OF THE FACTS**

On January 10, 1984, the Appellant, Bennie Lacy, was indicted for the sale of cocaine. (Record p. 46). He was tried, convicted, and sentenced as a habitual offender to thirty years in the custody of the Mississippi Department of Corrections. (Record p. 47 and 82). The Mississippi Supreme Court affirmed his conviction and sentence on February 17, 1994. *See Lacy v. State*, 632 So.2d 958 (Miss. 1994).

Since then, Lacy has petitioned the Supreme Court numerous times for leave to file a motion for post-conviction relief with the trial court and each time was denied. (Record p. 98 - 99). Nonetheless, Lacy filed a motion to vacate illegal sentence with the Wayne County Circuit Court on March 6, 2008. (Record p. 6).<sup>1</sup> The trial court denied Lacy's motion on May 8, 2008. (Record p. 98- 99). Lacy appeals this decision.

**SUMMARY OF THE ARGUMENT**

This Court lacks jurisdiction to hear this appeal as the Appellant was denied leave to proceed with his motion for post conviction relief in the trial court. However, if this Court overrules the State's motion to dismiss appeal, the State of Mississippi alternatively contends that the trial court properly denied Lacy's motion for post conviction relief as it was time barred and successive writ barred.

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Clerk's Docket No. 2004 - M -02336 indicates that Lacy's latest attempt to obtain leave to file in the trial court was also denied. On November 30, 2006, he filed an "application for leave to file successive motion for post conviction collateral relief on intervening decision" and said application was denied by the Court on January 11, 2006.

## ARGUMENT

### A. MOTION TO DISMISS APPEAL

The State of Mississippi respectfully asserts that this appeal should be dismissed as the Appellant was not granted leave by the Mississippi Supreme Court to file the motion for post conviction relief which is the subject of this appeal. Mississippi Code Annotated §99-39-7 states as follows in this regard:

The motion under this article shall be filed as an original civil action in the trial court, except in cases in which the prisoner's conviction and sentence have been appealed to the supreme court of Mississippi and there affirmed or the appeal dismissed. Where the conviction and sentence have been affirmed on appeal or the appeal has been dismissed, the motion under this article shall not be filed in the trial court until the motion shall have first been presented to a quorum of the justices of the supreme court of Mississippi, convened for said purpose . . . and an order granted allowing the filing of such motion in the trial court. . . .

As the Appellant was denied leave to proceed in the trial court, this appeal should be dismissed. *See Crosby v. State*, 982 So.2d 1003 (Miss. Ct. App. 2008); *Robinson v. State*, 968 So.2d 981 (Miss. Ct. App. 2007); *Jackson v. State*, 915 So.2d 484 (Miss. Ct. App. 2005); and *Epps v. State*, 837 So.2d 243 (Miss. Ct. App. 2003). Thus, the State of Mississippi requests that this Honorable Court dismiss Appellant's appeal.

### B. BRIEF ON THE MERITS

Without waiving or compromising the State's foregoing contention that the trial court did not have proper jurisdiction to hear Appellant's motion for post conviction relief and therefore that this appeal should be dismissed, the State of Mississippi also submits the following arguments on the merits of Lacy's appeal.

**THE TRIAL JUDGE PROPERLY DENIED THE APPELLANT'S MOTION FOR POST CONVICTION RELIEF AS IT WAS TIME BARRED AND SUCCESSIVE WRIT BARRED.**

Lacy raises the following issues on appeal: (1) “ineffective assistance of counsel during the habitual offender sentencing hearing”; (2) “Appellant’s present habitual sentence is invalid because of an un-counseled and unconstitutional prior conviction”; (3) “Appellant’s current sentence as a habitual offender is an illegal sentence and exempt from procedural bars”; and (4) “Trial court abused its discretion by applying procedural bars to deny relief on appellant’s post conviction motion.” (Appellant’s Brief p. iv). However, these issues are time barred.

Mississippi Code Annotated §99-39-5(2) states in pertinent part as follows:

A motion for relief under this article shall be made within three (3) years after the time in which the prisoner’s direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after the entry of the judgment or conviction. Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of 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 a prisoner claims that his sentence has expired or his probation, parole, or conditional release has been unlawfully revoked. . . .

Lacey claims that the time bar should not apply to his case noting that “the three-year constitutional limitation for moving for post-conviction relief is irrelevant if a fundamental constitutional right is involved” and that “the right to a legal sentence is fundamental.” (Appellant’s Brief p. 16).

However, this Court has previously held the following with regard to a similar claim:

However, past precedent regarding the fundamental right to be free from an illegal sentence does not provide a “back door” method for raising an untimely

post-conviction relief claim . . . . An illegal sentence in this context is one which exceeds the statutory maximum. *House v. State*, 754 So.2d 1147, 1150 (Miss.1999).

*Brown v. State*, 923 So.2d 258, 260 (Miss. Ct. App. 2006). Lacy's sentence does not exceed the statutory maximum. He was sentenced to thirty years in the custody of the Mississippi Department of Corrections as a habitual offender according to Mississippi Code Annotated §99-19-81 which states as follows:

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced to suspended nor shall such person be eligible for parole or probation.

(*Emphasis added*). Lacy was convicted under Mississippi Code Annotated §41-29-139 which provides that the maximum term of imprisonment for his felony is thirty years. As set forth above, Lacy was sentenced to serve thirty years without the possibility of parole. As §99-19-81 requires that the Appellant receive the maximum term of imprisonment without parole or probation, the Appellant's sentence does not exceed the statutory maximum and therefore is not exempt from the time bar. Thus, the trial judge properly denied Lacy relief as his motion was time barred.

Lacy's Motion for Post Conviction Relief is also successive writ barred. Mississippi Code Annotated §99-39-23(6) reads in pertinent part as follows:

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. . . . 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 had evidence, not reasonably discoverable at the time of trial,

which is of such nature that it would have caused a different result in the conviction or sentence. Likewise are those cases where the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

As set forth above, Lacy has filed numerous applications with the Mississippi Supreme Court requesting leave to proceed with a motion for post conviction relief in the trial court and each has been denied. Thus, he is also successive writ barred. *See Lawson v. State*, 748 So.2d 96, 98 (Miss.1999). Accordingly, the trial judge properly denied the Appellant's motion for post conviction relief as it was also successive writ barred.

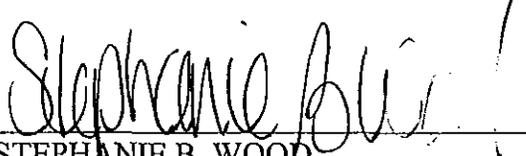
### CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court dismiss the Appellant's appeal as he was denied the proper leave to file his motion for post-conviction relief in the trial court, the denial of which is the basis for this appeal. However, if this Court sees fit not to dismiss the appeal, the State of Mississippi respectfully requests that this Court affirm the trial court's denial of post conviction relief as the Appellant is time barred and successive writ barred.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

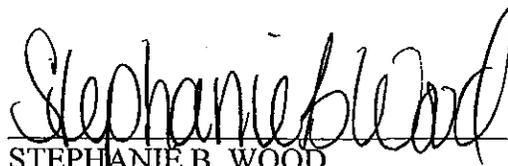
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above **MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE, BRIEF FOR APPELLEE** and foregoing to the following:

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This the 22nd day of September, 2008.



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