

CERTIFICATE OF INTERESTED PERSONS

Charles Lee Parker v. State Of Mississippi,

Case No.: 2008-TS-01350-COA

Appeal from dismissal of Post-Conviction Relief in the Neshoba County Circuit Court.

The undersigned hereby 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 this Court may evaluate possible disqualification or recusal.

- Charles Lee Parker, Appellant in Case
- State of Mississippi, Appellee in Case
- Honorable Marcus D. Gordon, Neshoba County Circuit Court Judge, presided over lower court proceedings
- Honorable District Attorney of Neshoba County

Signed this 2 day of April, 2009.

Charles L. Parker
Charles Lee Parker

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PRELIMINARY PRO SE STATEMENT

Appellant, Charles Lee Parker, submits this Appellate Brief pro se with the assistance of prison law clerk and would respectfully request liberal construction of his pro se pleadings before this Honorable Court. Haines v. Kerner, 404 U.S. 519, 521 (1972); United States v. Torres, 163 F.3d 909, 910 note 5 (5th Cir. 1990) (pro se pleadings construed liberally).

Further, this Court should be aware that Appellant is serving life without parole in a federal prison in the Commonwealth State Of Kentucky at U.S. Penitentiary McCreary, Pine Knot, KY. Appellant does not have access to Mississippi Case law, statutes, or Court Rules at U.S.P. McCreary law library. Some Mississippi case law, statutes and court rules have been gleaned from federal cases reported on LEXIS as part of the Federal Reporter System which Appellant does have access to. Therefore, Appellant's brief will be lean on Mississippi case law, but rely instead on federal authority as analogous with State law questions related to habeas corpus/post-conviction jurisprudence. ^{1/}

Appellant is in the process of having family procure a copy of the Mississippi Rules of Appellate Procedure. Otherwise, Appellant prays this Court will accept his pro se brief and grant him a measure of latitude in the preparation of such brief and arguments contained therein.

^{1/} Most of the regional state case law cited by Appellant was gleaned from American Jurisprudence and The E-Z State-By-State Post-Conviction Manual, 1st Ed. Crossroads Pub. (2007).

STATEMENT OF ISSUES ON APPEAL

- A. WHETHER THE LOWER COURT ABUSED ITS DISCRETION BY SUMMARILY DISMISSING APPELLANT'S APPLICATION FOR POST-CONVICTION RELIEF AS UNTIMELY UNDER MISS. CODE ANN. § 99-39-5(2)?
- B. WHETHER A PRISONER SERVING A SENTENCE THAT WAS ENHANCED BY CRIMINAL CONVICTION UNDER COLLATERAL ATTACK IS "IN CUSTODY" FOR PURPOSES OF FILING A MISSISSIPPI POST-CONVICTION REMEDY UNDER MISS. CODE ANN. § 99-39-5?

STATEMENT OF CASE

1. Procedural Background

This case began in 1985 when Appellant was charged in Neshoba County Circuit Court with Possession of more than one ounce of marijuana in violation of Miss. Code Ann. § 41-29-139(a)(1) (1972). State v. Parker, Case No.: 7880.

After exercising his right to a jury trial Appellant was found guilty as charged and sentenced to three (3) years in the State penitentiary on September 29, 1986 (R-53,54). 2/

No appeal was taken from the criminal judgment or sentence and Appellant ultimately served the prison time and was released completely satisfying the Court's sentence.

On May 15, 2008, the Neshoba County Circuit Court filed Appellant's pro se Application for Post-Conviction Relief filed under Miss. Code Ann. § 99-39-5 et. seq. (R-4, 12).

On July 14, 2008, the Honorable Marcus D. Gordon, Circuit Court Judge, summarily dismissed Appellant's Application for Post-Conviction Relief (R-30, 31).

A timely Notice of Intent to Appeal and Application for Leave to Appeal was filed on August 11, 2008 (R-24, 25). Appellant filed for Application to Proceed in forma pauperis (IFP) on August 14, 2008 (R-41, 42). The Circuit Court denied IFP status on August 28, 2008 (R-60, 61). This Court denied IFP

2/ Appellant mistakenly thought that he pled guilty to the marijuana charge and went to trial on an unrelated robbery charge; however, after Appellant received a copy of the Record On Appeal for this Appeal it was discovered that Appellant did not plead guilty to marijuana charges.

status on September 22, 2008 (R-67).

On October 6, 2008, Appellant paid the filing fees in the Neshoba Circuit Court Clerk's Office, however, this Court issued an order dismissing appeal on October 16, 2008, for failure to pay costs of appeal (R-69). Appellant filed a motion to reconsider dismissal of appeal which this Court granted on December 11, 2008 (R-75). This Appeal follows in timely fashion.

2. Alleged Criminal Conduct ^{3/}

In about 1985, the Appellant was residing in Neshoba County with his then girlfriend Denise Thomas. At some point local police conducted a search of Appellant's residence and seized a small amount of marijuana—less than an ounce for personal consumption. At the time Appellant admitted that the marijuana belonged to him, but denied ownership of some marijuana cigarettes that belonged to Ms. Thomas.

It was Appellant's position that the local police combined the marijuana seized from Appellant with the rolled-up marijuana cigarettes—that belonged to Ms. Thomas—to turn an otherwise simple possession of marijuana case into a felony drug case.

3. Facts Related To Post-Conviction Filing

On January 25, 2006, Appellant was sentenced to life imprisonment without parole in the U.S. District Court for the Southern District of Mississippi. See United States v. Charles Lee Parker,

^{3/} Appellant went to trial on these charges and disputes the prosecution's "facts" of case, but will respect the jury's verdict and recite case as found by verdict.

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The basis for Appellant's harsh federal sentence was the existence of the instant felony drug offense and an earlier felony drug offense from Neshoba County Circuit Court. See Title 21 U.S.C. § 851 (Mandating Life without parole for violation of federal controlled substance laws after two previous felony drug offense convictions).

In an attempt to reduce his federal life sentence the Appellant filed for post-conviction relief in Neshoba County Circuit Court challenging the constitutional validity of his 1980 and 1986 felony drug convictions. ^{4/} The federal courts allow prisoners to motion the district court for sentence reduction when one or more prior conviction (used to enhance federal sentence) has been vacated. See Johnson v. United States, 544 U.S. 295 (2005). ^{5/}

SUMMARY OF ARGUMENTS

First, Appellant will argue that the lower court abused its discretion by summarily dismissing Appellant's application for post-conviction relief as untimely under Miss. Code Ann. § 99-39-5(2), because the three (3) year limitations period for filing post-conviction relief is subject to equitable tolling in "extraordinary circumstances." The lower court failed to

^{4/} Appellant's post-conviction filed in case numbers 7523 and 7524 are still pending in the lower court.

^{5/} Assuming Appellant was successful in vacating one or both of his prior drug convictions he would still face a substantial prison sentence of 10 years to life. See 21 U.S.C. §§ 841 (a)(1), 841(b)(1)(A).

make any determination related to Appellant's cause for filing his post-conviction application beyond the three (3) year limitations period.

Next, Appellant will argue that the lower court's finding that Appellant was not "in custody" for purposes of post-conviction relief under Miss. Code Ann. § 99-39-5, was erroneous because Appellant's present sentence was substantially enhanced based on the 1986 criminal conviction under attack by Appellant in this case.

ARGUMENTS

- A. THE LOWER COURT ABUSED ITS DISCRETION BY SUMMARILY DISMISSING APPELLANT'S APPLICATION FOR POST-CONVICTION RELIEF AS UNTIMELY UNDER MISS. CODE ANN. § 99-39-5(2).

Although the lower court's order dismissing Appellant's Application for Post-Conviction does not indicate as much, the three (3) year limitations period under Miss. Code Ann. § 99-39-5(2) is neither jurisdictional nor absolute. Consequently, there are "extraordinary cases" in which a court could excuse the (3) year limitations period by applying principles of equitable tolling. Since the lower court had authority to entertain and rule on Appellant's Application for Post-Conviction Relief notwithstanding untimeliness of filing, it necessarily abused its discretion by not considering that authority in light of the circumstances presented by Appellant's Post-Conviction Petition.

It is generally accepted by most State and Federal Courts, that limitations periods established for application of post-conviction and habeas corpus remedies are not jurisdictional and

subject to "equitable tolling" and other equitable doctrines. See Federal Habeas Corpus Practice And Procedure, 5th Ed. Hertz & Liebman, Vol. 1, § 5.2b, pgs. 276-78; Pace v. DiGuglielmo, 125 S.Ct. 1807, 1814-15 & n. 8 (2005)(discussing elements for establishing casue for equitable tolling in collateral review proceedings); Sonnier v. Johnson, 161 F.3d 941, 944 (5th Cir. 1998) (limitations period under § 2254 may be equitably tolled under "extraordinary circumstances"); Walters v. King, 2006 U.S. Dist. LEXIS 43162 (S.D. Miss. 2006)(explaining that equitable tolling applies in federal habeas corpus proceedings); Sample v. State, 82 S.W.3d 267 (Tenn. 2002)(applying equitable tolling in State PCR case); State v. Parker, 711 So.2d 694 (La. 1998)(discussing Lousisana PCR limitations period and application of exceptions); Seaton v. State, 920 S.W.2d 13 (Ark. 1996)(acknowledging application of equitable tolling to State's PCR mechanism); People v. Germany, 674 P.2d 345 (Col. 1983)(limitations period subject to tolling where prisoner can demonstrate "justifable excuse" for delay in filing PCR); Freeman v. Page, 208 F.3d 572 (7th Cir. 2000)(discussing exceptions to Illinois PCR limitations period under "escape hatch" clause); State v. Richardson, 399 P.2d 799 (Kan. 1969)(applying federal law developed under § 2255 in State PCR cases); McGuire v. Commonwealth, KY, 885 S.W.2d 931 (1994).

Appellant had good cause to show why his post-conviction petition was filed outside of the three (3) year limitations period; however, the lower court did not consider Appellant's cause for untimely filing. Instead, the lower court treated

the three (3) year limitations period as an absolute bar, unaffected by any exceptions or equitable tolling in extraordinary circumstances. Without consideration of the reasons why Appellant's post-conviction petition was filed outside of the three (3) year period, the lower court made a general finding that Appellant's criminal conviction/judgment was beyond the limitations period and therefore subject to dismissal as untimely (R-22, 23). No where does the Court's order make any findings of fact or legal conclusions related to Appellant's proffered cause for untimely filing of post-conviction petition. Consequently, this Court has no record to analyze whether the lower court's decision to reject proffered cause is correct or not.

It is universally accepted practice that trial courts are required to make the necessary findings of fact and legal conclusions to properly adjudicate litigant's claims before the Court. cf. Rule 52, F.R.Civ.P.; Beckfort v. Portundo, 234 F.3d 128 (2nd Cir. 2000)(judgment reversed for failure to make requisite findings of facts and conclusions of law); Williams v. Coyle, 260 F.3d 684 (6th Cir. 2000)(observing Ohio State law requiring trial to make findings of fact and conclusions of law under Ohio Rev. Code § 2953.12); Alexander v. Local 496, 177 F.3d 394 (6th Cir. 1998)(remanding case due to the court's complete failure to make relevant findings and conclusions of law); Hymes v. State, 703 So.2d 258 (Miss. 1997); Williams v. Castilla, 585 So.2d 761 (Miss. 1991). In absence of any factual findings and related conclusions of law, this court is urged to accept Appellant's allegations and arguments presented in

application for post-conviction relief (R-4 thru 19).

As setforth in his pro se application for post-conviction relief and supporting memorandum, Appellant is challenging a 22-year-old prior felony drug case. Admittedly, the conviction became "final" well beyond the three (3) year limitations period established under Miss. Code Ann. § 99-39-5(2). Nevertheless, even if Appellant's prior drug conviction became "final" 22-years-ago, that does not necessarily mean that Appellant's post-conviction petition was properly dismissed as untimely when Appellant proffered good "cause" for delay in filing and demonstrated "prejudice" in the PCR Court's failure to consider the merits of Appellant's post-conviction claims. cf. Smith v. Murray, 477 U.S. 527, 531-34 (1982); 36 GEO. L.R. ANN. REV. CRIM. PROC. (2007) pg. 910; Reynolds v. Berry, 146 F.3d 345 (6th Cir. 1998); Federal Habeas Corpus Practice And Procedure, Id. § 26.3b, pgs. 1422-23.

It has become common practice for federal courts to use a defendant's prior criminal history as the basis for applying enhanced sentencing provisions. Appellant's case illustrates this practice insomuch as Appellant was sentenced to life without parole in federal district court for violation of federal controlled substance statutes. The federal district court used two (2) Mississippi prior drug convictions from 1980 and 1986 to give Appellant life without parole. This was done at Appellant's federal sentencing proceeding on January 25, 2006. Prior to that date, the consequence of Appellant's two (2) Mississippi drug convictions were innocuous—Appellant had long ago forgotten

about the 1980 and 1986 convictions. However, once the federal court used the two (2) criminal judgments to dramatically enhance Appellant's federal sentence, those prior convictions became substantially significant.

Appellant argues that recent U.S. Supreme Court holdings require State Courts to entertain collateral challenges to old prior convictions if used to enhance a subsequently imposed sentence. Specifically, Appellant contends that the Supreme Court's holdings in Daniels v. United States, 532 U.S. 374 (2001) and Johnson v. United States, 544 U.S. 295 (2005) compel States to re-evaluate post-conviction mechanisms that do not provide a remedy for prisoners to challenge the Constitutional validity of old prior convictions used to enhance subsequent sentences.

In Daniels Associate Justice Scalia made the following observation:

Perhaps precepts of fundamental fairness inherent in "due process" suggest that a forum to litigate challenges like petitioner's [attack of prior conviction used to enhance subsequent federal sentence] must be available somewhere for the odd case in which the challenge could not have been brought earlier.

* * *

Fundamental fairness could be achieved just as well—indeed, better—by holding that the rendering jurisdiction must provide a means for challenge when enhancement is threatened or has been imposed.

Daniels, 532 U.S. at p.601-02.

Many jurisdictions allow prisoners to collaterally challenge prior convictions that were used as predicate convictions to enhance a subsequent sentence. See Bowers v. Moore, 471 S.E.2d 869 (Ga. 1996)(allowing habeas corpus challenge to state conviction used to enhance federal sentence); Wood v. State, 750 So.2d 592 (Florida 1999)(same); Butler v. State, 935 P.2d 162 (Idaho 1997); Webb v. Commonwealth, 904 S.W.2d 226 (KY 1995)(Supreme Court of Kentucky allows post-conviction challenge of prior conviction used as predicate for persistent felony offender law); Janice v. McCorkle, 144 A.2d 561 (N.J. 1958)(New Jersey Courts allow remedy to challenge prior convictions used to enhance subsequent sentence); State v. Lueder, 276 S.W.2d 555 (N.D. 1978)(same); Commonwealth v. Bell, 516 A.2d 1172 (Pa. 1986)(same); Ferguson v. Cox, 464 F.2d 461 (4th Cir. 1972) (discussing use of Virginia PCR to challenge prior conviction used to enhance subsequent sentence); In re Bush, 616 P.2d 667 (Wash. 1980)(prisoner allowed to use Washington State PCR remedy to challenge prior conviction used to enhance later sentence)(other authority omitted).

Appellant urges this Court to subscribe to Justice Scalia's opinion and provide a means for challenge of prior convictions used to enhance subsequent sentences. Fundamental Fairness and Due Process of Law could be achieved if this Court established an equitable doctrine allowing prisoners a window of time to pursue collateral challenge of a prior conviction used to enhance later sentence. See Wood v. State, 750 So.2d 592, 24 Fla. LWS 240 (Florida Supreme Court 1999)(providing a two

year window to file post-conviction challenging prior convictions used to support subsequent enhancement).

In Johnson the Supreme Court established an accrual point for when a prisoner must exercise due diligence in pursuing collateral attack of any prior conviction used to enhance subsequent sentence. Johnson, 544 U.S. at 560. Justice Kennedy wrote a dissenting opinion which is relevant here. According to Justice Kennedy the majority's holding will upset state created limitations periods attached to post-conviction remedies. Johnson 544 U.S. at 560.(J. Kennedy dissent).

The majority's holding in Johnson creates an accrual point, for attacking prior conviction, at the date prior conviction was used to enhance subsequent sentence. Id. pg. 560. In other words, the Court expects prisoners to begin exercising due diligence in the pursuit of collateral attack of prior conviction as of the date that prior conviction was actually used to enhance later sentence. Applying the Johnson Court's analysis Appellant had 3-years from the date of his federal sentence (January 25, 2006) to file his Mississippi State post-conviction remedy. Therefore, Appellant's filing of such petition on May 15, 2008, is timely under Miss. Code Ann. § 99-39-5(2).

B. A PRISONER SERVING SENTENCE ENHANCED BY A PRIOR CONVICTION UNDER COLLATERAL ATTACK IS "IN CUSTODY" FOR PURPOSE OF FILING MISSISSIPPI POST-CONVICTION REMEDY UNDER MISS. CODE ANN. § 99-39-5.

In conjunction with a finding of untimeliness, the lower court also held that Appellant was not "in custody" for purposes of

filing a Mississippi post-conviction (R-26, 27). The Court relied on this Court's holding in Smith v. State, 914 So.2d 1248, 1250 (Miss. Ct. App. 2005)(Id).

Appellant does not have access to this Court's opinion in Smith, but will assume the lower court's reliance on such authority is accurate. Consequently, Appellant can only argue that Smith was ruled wrongly and ask this Court to reconsider its previous holding in Smith based on the following arguments.

Numerous State and Federal Courts have held that a prison meets the "in custody" requirement if he/she is in prison on a sentence enhanced by the previous conviction being collaterally challenged. See Maleng v. Cook, 490 U.S. 488, 493 (1989)(pro se petitioner's claim that prior used to illegally enhance a later sentence may be construed as challenge of present sentence); Parris v. State, 232 Ga. 687 (Ga. 1974)(prisoner in custody for purposes of attacking prior conviction used to enhance present sentence); Murray v. State, 776 P.2d 206 (Wyo. 1989)(holding that State's post-conviction remedy replaces common law writ of error coram nobis used to challenge sentence already served but used to enhance subsequent term of imprisonment); Jesson v. State, 290 N.W.2d 685 (Wisc. 1980)(allowing use of coram nobis to challenge conviction used to enhance present sentence); In re Bush, 616 P.2d 667 (Wa. 1980); Chavez v. U.S., 447 F.2d 1373 (9th Cir. 1971) (coram nobis proceeding is not moot merely because the prisoner "had long since served the sentences" imposed as a result of the challenged conviction. [A] criminal case is moot only if it is shown that there is no possibility that any collateral legal

consequences"); Sibron v. N.Y., 392 U.S. 40 (1968).

Appellant urges this Court to temper the need of finality of State Court criminal judgments with the need to provide fundamental fairness and due process of law in cases where a prisoner's present sentence was substantially increased because of the long forgotten prior conviction. In Appellant's case he was given Mandatory life without parole based on a 1980 marijuana charge that was essentially simple possession of personal use amount of marijuana, and a 1986 marijuana charge that also involved a user amount of marijuana (just over an ounce). The Federal Judge that sentenced Appellant to Mandatory life expressed his distaste for such a harsh sentence based on the nature of Appellant's prior drug offenses.

A Court considering any post-conviction remedy application—and any Court of Appeals conducting review of such—should look to Fundamental Fairness and concepts of Justice when deciding whether to exercise its broad authority. This case before the Court presents a miscarriage of Justice insomuch as Appellant Parker is serving life without parole based in part on the conviction at issue here which should have been resolved as a simple possession of marijuana case.


Appellant moves this Court to exercise its authority to correct the injustice this case presents. The United States Supreme Court has held that where a prisoner makes a colorable claim of actual innocence the courts may grant relief notwithstanding any procedural default bar. See Bousley v. United States, 523 U.S. 614 (1998); Schlup v. Delo, 513 U.S. 298 (1995).

Although the Supreme Court has held it not to be a violation of the Eighth Amendment to imprison a defendant for Life because of "serious or violent criminal behavior," Appellant's behavior in this case back in 1986 was relatively minor criminal conduct and probably misdemeanor crime, not serious or violent conduct justifying life imprisonment without parole. Solem v. Helm, 463 U.S. 277 (1983)(Eighth Amendment prohibits Life imprisonment for "relatively minor criminal conduct" for purposes of residivism statute). This Court is urged to excuse the untimeliness and standings issues that block the path to relief in this particular case by issuing an opinion that does Justice.

CONCLUSION

WHEREFORE, Appellant prays this Honorable Court will reverse the lower court's decision and remand this case for a hearing on the merits of Appellant's post-conviction claims.

Respectfully prayed for this 2 day of April, 2009.


Charles Lee Parker
55850-019


CERTIFICATE OF SERVICE/MAILING

I, Charles Lee Parker, hereby state under penalty of perjury that I have this day served and filed this appellate brief by depositing same with the prison legal mailroom staff with First Class prepaid postage affixed and addressed as follows:

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Neshoba County District Attorney
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DONE THIS 25th day of March, 2009.



CHARLES LEE PARKER
Appellant, Pro Se