

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

**CHARLES DOUGLAS OWENS, II**

**APPELLANT**

**VS.**

**NO. 2008-CP-1601-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**NO. 2008-CP-1601-COA**

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**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

In this appeal from, *inter alia*, a second quest in a state trial court for post-conviction relief sought in the wake of his guilty pleas to armed robbery and aggravated assault, CHARLES OWENS, proceeding *pro se*, apparently seeks to exempt himself from a time bar based upon “exceptions in §99-39-5 MCA (1992).”

Owens desires to either vacate his sentence and convictions or enjoy the benefit of an evidentiary hearing which has been twice denied by Lisa P. Dodson, Circuit Judge. *See* appellee’s exhibits A and B, attached.

**STATEMENT OF FACTS**

Following his two-count indictment returned on May 20, 2002, for armed robbery and aggravated assault (C.P. at 10-11), Charles Owens, a twenty-four (24) year old Caucasian male and former resident of South Carolina with an associate’s degree (C.P. at 14, 35 109-10), entered pleas of guilty to armed robbery and aggravated on February 4, 2003, in the Circuit Court of Harrison County, Kosta N. Vlahos, Circuit Judge, presiding. Sentencing was deferred pending the completion

of a pre-sentence investigation and report.

On March 17, 2003, Judge Vlahos, who took into consideration the permanent injuries to the victim, Owens's employer, declined to follow the State's sentencing recommendation and sentenced Owens instead to serve thirty (30) years for the armed robbery and ten (10) years for the aggravated assault, with the two sentences to run consecutively for a total of forty (40) years in the custody of the MDOC. (C.P. at 39-41) This did not sit well with Owens who now claims he based his pleas of guilty on the understanding he would be eligible for parole.

On February 2, 2006, Owens filed a motion for post-conviction relief wherein he raised three issues targeting (1) allegedly material facts in mitigation of sentence not presented to the Court at the time of his pleas and sentence, (2) allegedly involuntary and coerced guilty pleas, and (3) an allegedly binding agreement between the trial court, the state, and Owens as to the duration of his sentence. (C.P. at 169-71)

On December 29, 2006, Judge Vlahos entered a four (4) page order addressing each of these claims and denying post-conviction relief. (C.P. at 159-62; appellee's exhibit C, attached)

On June 27, 2007, Owens filed a pleading styled "Motion for Clarification of Sentence" (C.P. at 144-45, 150), requesting the trial court and sentencing judge to clarify his intention that Owens be eligible for parole after serving only ten (10) years.

Later, on April 8, 2008, the Court of Appeals affirmed Judge Vlahos's denial of post-conviction relief in a very thorough and informative opinion penned by Justice Barnes. (C.P. at 164-78; appellee's exhibit D, attached)

On August 11, 2008, Lisa Dodson, Circuit Judge, denied Owens's motion for clarification of sentence in a three (3) page order. *See* appellee's exhibit A, attached. She held, *inter alia*, the motion, in reality, did not seek to clarify anything regarding sentence; rather, it simply sought a

declaration that the sentencing judge intended that Owens be eligible for parole. In this posture, Judge Dodson treated the pleading as a motion seeking post-conviction relief and found as a fact and concluded as a matter of law it was time-barred. (C.P. at 150)

We concur.

Judge Dodson, on August 11, 2008, also addressed in a separate order several other motions filed in 2003 that had neither been brought to the attention of the trial court nor set for hearing. She denied all relief in a separate five (5) page order which is self-explanatory and both judicious and correct. *See* appellee's exhibit B, attached.,

Here and now Owens invites this Court to reverse the trial judge's summary dismissal and either vacate his sentence and convictions or grant him an evidentiary hearing where he will be given an opportunity to prove his claims. (Brief for Appellant at 4, 7, 9) We respectfully submit Judge Dodson, found, perhaps implicitly, no error involving fundamental rights, or any other rights, sufficient to exempt Owens from the statute barring his belated claims made in the motion for clarification of sentence. In this posture, Owens's motion for post-conviction relief was correctly denied by the lower court as time-barred. (C.P. at 150; appellee's exhibit A, attached) This ruling was both judicious and correct.

With respect to the summary denial of Owens's other motions filed in 2003, relief was properly denied for the reasons succinctly expressed by Judge Dodson in her six (6) page order entered on August 11, 2008. We defer to those reasons which are, likewise, both judicious and correct. (C.P. at 153-58; appellee's exhibit B, attached)

### **SUMMARY OF ARGUMENT**

Judge Dodson entered two separate orders denying post-conviction relief. *See* appellee's exhibits A and B. Her findings of fact are not clearly erroneous, and her conclusions of law could

not be more informative and correct. We defer to them here and make her findings our own.

“The burden of proving that no procedural bar exists falls squarely on the petitioner.”

**Crawford v. State**, 867 So.2d 196, 202 (Miss. 2003).

Owens, for the second time, seeks post-conviction relief from the same 2003 guilty pleas.

Owens has already been there and done that. See appellee’s exhibits C and D, attached

Although his second motion was captioned “Motion for Clarification of Sentence,” it was properly treated as a motion for post-conviction relief assailing the integrity of his same guilty pleas and the sentences imposed in their wake. (C.P. at 150)

A rose by any other name smells the same. See **Sanders v. State**, 440 So.2d 278, 282 (Miss. 1983), note 1 [“We affirm our long-standing rule that *pro se* post-conviction relief efforts will be examined in the light of the substantive claims presented rather than their possible inapt denomination.”]

There must at some point in time be an end to seemingly endless litigation.

Owens’s most recent claims were clearly time-barred by virtue of Miss.Code Ann. § 99-39-5(2). **Trotter v. State**, 907 So.2d 397 (Ct.App.Miss. 2005); **Sones v. State**, 828 So.2d 216 (Ct.App.Miss. 2002).

The fundamental rights exemption provides no basis for relief. Owens received all the process he was due.

Owens’s claims were successive writ barred as well. Owens conveniently omits from his chronological “Statement of the Case” the fact that on February 2, 2006 (C.P. at 169), he filed his first motion for post-conviction relief which was ruled upon by Judge Vlahos on December 29, 2006. See appellee’s exhibit C, attached.

This denial by Judge Vlahos was affirmed by the Court of appeals on April 8, 2008. See



appellee's exhibit D, attached.

Finally, we invoke a procedural bar under the principle of *res judicata*. In denying the requested relief, Judge Dodson observed, *inter alia*, that “[t]he issues raised in all three (3) motions were ruled on by [the Court of Appeals in] the December 29, 2006, Order [and] . . . this court finds that the Order in the PCR case does address the issues of the instant motions and that Order is not included in this case to reflect those rulings.” (C.P. at 155-56; appellee's exhibit B, attached)

### ARGUMENT

**OWENS'S POST-PLEA MOTION FOR CLARIFICATION BASED UPON, *INTER ALIA*, ALLEGEDLY INVOLUNTARY GUILTY PLEAS ENTERED IN 2003 WAS TIME-BARRED BY VIRTUE OF THE THREE (3) YEAR STATUTE OF LIMITATIONS SET FORTH IN § 99-39-5(2) AND SUCCESSIVE-WRIT BARRED BY § 99-39-23 (6).**

**OWENS'S OTHER MOTIONS WERE PROPERLY DENIED FOR THE REASONS EXPRESSED BY JUDGE DODSON IN HER ORDER DENYING RELIEF. THE DECISION OF THE COURT OF APPEALS WAS *RES JUDICATA* ON THOSE ISSUES.**

This Court has stated time and again the standard for appellate review of post-conviction cases.

“When reviewing a trial court's decision to deny a petition for post-conviction relief, [an appellate court] will not disturb the trial court's factual findings unless they are found to be clearly erroneous. [citation omitted] However, where questions of law are raised, the applicable standard of review is *de novo*.” *Twillic v. State*, 892 So.2d 187, 189 (Miss. 2004). *See also Buckhalter v. State*, 912 So.2d 159, 160 (Ct.App.Miss. 2005), reh denied.

“A trial judge's finding will not be reversed unless manifestly wrong.” *Hersick v. State*, 904 So.2d 116, 125 (Miss. 2004).

It will serve no useful purpose to re-plow ground that has already been plowed time and again by Judge Vlahos, Judge Barnes, and Judge Dodson. It is enough to say the fact-finding made by Judge Dodson in the wake of Owens's most recent quest for post-conviction relief was neither clearly erroneous nor manifestly wrong. We adopt the findings made in her dual orders and opinions.

Owens motions for clarification and or reconsideration of sentence, essentially a second and successive motion for post-conviction relief assailing the same two guilty pleas, were properly denied for several reasons.

**First**, his motions were time-barred.

**Second**, his motions were successive-writ barred.

**Third**, his claims were barred by the doctrine of *res judicata*.

**Fourth**, any claims made in Owens's second and successive motions that were not raised in his first motion for post-conviction relief are barred because Owens "could or should" have raised them in his first motion. *Cf. Crawford v. State*, 867 So.2d 196, 202 (Miss. 2003); *Smith v. State*, 434 So.2d 212, 215 (Miss. 1983)

**Fifth**, Owens's claims were manifestly without merit as well. Judge Dodson found as a fact that "... there is nothing in this record to indicate that Owens in any manner based his plea on any understanding of eligibility for parole.

**Time Bar.**

**First**, we submit Judge Dodson was eminently correct in denying the requested relief on the basis of a time bar. Indeed, there should be no legitimate question about it. (C.P. at 150; appellee's exhibit A, attached)

Owens's motion for clarification and/or reconsideration of sentence was essentially a second

motion for post-conviction collateral relief. Judge Dodson correctly observed:

“Insofar as the motion is one seeking either reconsideration or post conviction relief, it was not timely filed. More than four (4) years elapsed between sentencing and the filing of this motion. The motion is, therefore, barred as to any reconsideration or post conviction relief on this motion.” (C.P. at 150)

We assert with great vigor that post-conviction relief claims based on allegedly involuntary guilty pleas are subject to the three (3) year statute of limitations and the time bar. **Luckett v. State**, 582 So.2d 428 (Miss. 1991); **Wallace v. State**, 823 So.2d 580 (Ct.App.Miss. 2002). *See also* **Austin v. State**, 863 So.2d 59 (Ct.App.Miss. 2003), reh denied [Claim that defendant’s guilty plea to rape was not knowing, intelligent, and voluntary was the type of claim that fell squarely within the three-year statute of limitations governing post-conviction relief.]

Owens’s complaints are controlled by the following language found in **Trotter v. State**, *supra*, 907 So.2d 397, 402 (Ct.App.Miss. 2005), reh denied, cert denied.

There is one judicially-created exception to the three-year time bar imposed on most post-conviction relief motions. “Errors affecting fundamental constitutional rights may be excepted from procedural bars which would otherwise prohibit their consideration.” **Smith v. State**, 477 So.2d 191, 195-96 (Miss. 1985). The circuit court dismissed as time-barred Trotter’s claim that he was subjected to double jeopardy, his claim that his guilty plea was involuntary, and his claim that he received ineffective assistance of counsel. In dismissing these claims as time-barred, the court found that these claims affected none of Trotter’s fundamental rights. The court cited **Luckett v. State**, 582 So.2d 428, 430 (Miss. 1991), which dismissed as time-barred the defendant’s assignment of errors concerning the validity of the indictment, claims of double jeopardy, claims that his guilty plea was involuntary, and claims of ineffective assistance of counsel. The judge’s application of the law was correct, and we affirm.

Same here.

Miss.Code Ann. §99-39-5(2) identifies, in plain and ordinary English, the time limitations

for motions to vacate guilty pleas, judgments of conviction obtained other than by plea, and erroneous sentences filed under the Mississippi Uniform Post-Conviction Collateral Relief Act. It reads as follows:

(2) **A motion for relief under this chapter 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 entry of the judgment of 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 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 that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. [emphasis supplied]

The post-conviction relief act applies prospectively from its date of enactment, April 17, 1984. Individuals such as Charles Owens who entered pleas of guilty or were otherwise convicted *after* April 17, 1984, have three (3) years from the date of the entry of their conviction via guilty plea to file their petition for post-conviction relief. **Lockett v. State**, 656 So.2d 68, 71 (Miss. 1995); **Lockett v. State**, 656 So.2d 76, 78-79 (Miss. 1995); **Freelon v. State**, 569 So.2d 1168, 1169 (Miss. 1990); **Jackson v. State**, 506 So.2d 994, 995 (Miss. 1987); **Odom v. State**, 483 So.2d 343, 344 (Miss. 1986).

In **Odom**, *supra*, we find the following language:

\* \* \* \* This act applies *prospectively* from its date of enactment, April 17, 1984. Individuals convicted prior to April 17, 1984, have three (3) years from April 17, 1984, to file their petition for post conviction relief. **Those individuals convicted after April 17, 1984,**

**generally have three (3) years in which to file a petition for relief as provided for in the UPCCRA, Miss. Code Ann. §99-39-5(2) (Supp. 1985), . . . [emphasis supplied]**

Owens entered his pleas of guilty to armed robbery and aggravated assault February 4, 2003, well *after* the enactment on April 17, 1984, of the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA), Miss.Code Ann. §99-39-1 *et seq.* (C.P. at 58-71) Following a presentence investigation and report, Owens was sentenced on March 17, 2003, to serve thirty (30) years in the MDOC for the armed robbery and ten (10) years for aggravated assault, said sentences to run consecutively.

It is no secret that Owens had three (3) years from February 4, 2003, and/or March 17, 2003, the dates of the entry of the judgment of conviction and sentence for armed robbery and aggravated assault, to file in the trial court his motion to vacate conviction and sentence or to otherwise seek post-conviction collateral relief.

Consequently, the deadline for filing Owens's post-conviction papers was on or about February or March of 2006.

Owens timely filed his first post-conviction motion attacking his pleas of guilty to armed robbery and aggravated assault on February 2, 2006. On December 29, 2006, Judge Vlahos signed a four page order denying relief. *See* appellee's exhibit, C, attached.

The denial by Judge Vlahos was affirmed on appeal by the Court of Appeals on April 8, 2008. *See Owens v. State*, No. 2007-CA-00153-COA decided April 8, 2008 [Not Yet Reported], attached as appellee's exhibit D.

Owens's second motion for post-conviction relief disguised as a motion for clarification of sentence assailed the same two pleas of guilty and was not filed until on or about June 27, 2007, more than a year after the time for assailing his convictions by way of guilty pleas had expired. This

was excruciatingly tardy and too little too late. The old adage that "it's better late than never," once again, does not apply here.

The three year statute of limitations bars a post-conviction relief motion absent a showing the case falls within any one of the three statutory exceptions. **Phillips v. State**, 856 So.2d 568 (Ct.App.Miss. 2003).

We concur with the finding made implicitly by Judge Dodson that the case at bar clearly does not exist in this posture. *See* appellee's exhibits A and B attached.

In the final analysis, none of the exceptions, statutory or judicially created, to the time bar, which is alive and well, apply to this case. The findings and conclusions made by the trial judge in his order denying relief were eminently correct and not clearly erroneous.

#### **Successive Writ Bar.**

**Second**, Owens's motions for clarification and/or reconsideration of sentence and/or withdrawal of pleas were essentially second and successive requests for post-conviction collateral relief. Judge Dodson made the following observations in her order denying Owens's motion for clarification of sentence:

"Additionally, the Court notes that Owens filed a post conviction relief proceeding on February 2, 2006, concerning this case. That request for post conviction relief sought a reconsideration of sentence or a setting aside of the plea. An Order (by the same judge who accepted Owens's plea) denying the post conviction petition was filed December 29, 2006. Owens appealed that decision. On April 8, 2008, the Mississippi Court of Appeals affirmed that ruling denying the post conviction relief."

"The issue of whether [Owens's] petition is procedurally barred as a second or successive writ is a question of law and is reviewed *de novo*." **Arnold v. State**, 912 So.2d 202, 203 (Ct.App.Miss. 2005).

Miss.Code Ann. § 99-39-23 (6) identifies in plain and ordinary English the successive writ limitations on motions for post-conviction collateral relief. We quote:

(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 chapter is a final judgment and shall be conclusive until reversed. It shall be a bar to a second or successive motion under this chapter. \* \* \* \* \*

See **Arnold v. State**, *supra*, 912 So.2d 202, 203 (Ct.App.Miss. 2005); **Skinner v. State**, 864 So.2d 298 (Ct.App.Miss. 2003); **Lewis v. State**, 797 So.2d 248 (Ct.App.Miss. 2001); **Clay v. State**, 792 So.2d 302 (Ct.App.Miss. 2001), reh denied.

The June 27, 2007, motion for clarification was at least Owens's second appearance in the Circuit Court of Harrison County in a post-conviction environment. It was a successive writ and was properly denied for this reason, if for no other.

Owens has not successfully alleged anything that would exempt him from the successive writ bar or, for that matter, from the oft-applied time bar.

**Res Judicata Bar.**

**Third**, as pointed out by Judge Dodson,

"[t]he issues raised in all three (3) motions were ruled on by [Judge Vlahos's] December 29, 2006, Order. The Order simply did not refer to the three (3) motions by name and it was not entered in this cause number. However, it is clear that Owens was well aware of the Court's ruling on the underlying issues."

Those same three (3) issues were addressed by the Court of Appeals in Justice's Barnes's opinion affirming Judge Vlahos's denial of post-conviction relief. See appellee's exhibit C, attached.

We invoke a procedural bar under the principle of *res judicata*. "The doctrine of *res judicata* shall apply to all issues, both factual and legal, decided at trial and on direct appeal." Miss.Code Ann. §99-39-21(3). The three issues identified by Judge Barnes were decided adversely to Owens

on direct appeal in a post-conviction environment.

**Manifestly Without Merit.**

**Fourth**, Judge Dodson's finding of fact that "... there is nothing in this record to indicate that Owen in any manner based his plea on any understanding of eligibility for parole" was neither clearly erroneous nor manifestly wrong. We respectfully defer to Judge Dodson's order dated August 11, 2008, which finds as a fact, *inter alia*, that "[t]he record in this matter clearly reflects that Owens was advised that he faced up to life without parole on the armed robbery charge. His Petition to Enter Guilty Plea so states." See appellee's exhibit A, attached.

Miss.Code Ann. § 99-39-11 (Supp. 1999) reads, in its entirety, as follows:

(1) The original motion together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.

**(2) *If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified.***

(3) If the motion is not dismissed under subsection 2 of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

(4) This section shall not be applicable where an application for leave to proceed is granted by the supreme court under section 99-39-27. [emphasis added]

It does. He did. And he was.

Owens's claims were time-barred, successive writ barred, and procedurally barred by the doctrine of *res judicata*. They were manifestly without merit as well.



## CONCLUSION

Owens argues that dismissal of his claims without an evidentiary hearing was an abuse of judicial discretion.

We disagree.

Not every motion for post-conviction relief filed in the trial court must be afforded an adversarial hearing. **Rodolfich v. State**, 858 So.2d 221 (Ct.App.Miss. 2003).

Put another way, the right to an evidentiary hearing is not guaranteed in every case. **Brister v. State**, 858 So.2d 181 (Ct.App.Miss. 2003).

“This Court reviews the denial of post-conviction relief under an abuse of discretion standard.” **Phillips v. State**, *supra*, 856 So.2d 568, 570 (Ct.App.Miss. 2003). No abuse of judicial discretion has been demonstrated here.

Owens is time barred from bringing his claims at this late date. He failed to file his motion for post-conviction relief within the three-year time frame prescribed by Miss.Code Ann. §99-39-5(2), and he fails to make a claim falling under any of the recognized exceptions to the statutory time bar.

Owens is, likewise, successive-writ barred and barred by the doctrine of *res judicata*.

Appellee respectfully submits this case is devoid of error. Accordingly, summary dismissal, as time-barred, of Owens’s motion for clarification of sentence filed June 27, 2007, as well as

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**IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI  
SECOND JUDICIAL DISTRICT**

**STATE OF MISSISSIPPI**

**VERSUS**

**CAUSE NO. B2402-2002-00187**

**CHARLES DOUGLAS OWENS**

**DEFENDANT**

**ORDER**

THIS CASE is before the Court on Defendant's *pro se* Motion for Clarification of Sentence filed June 27, 2007. The Motion was not provided to the Court at any point by Defendant and was, in fact, not provided by anyone until the Court became aware of same via a petition for writ of mandamus. Defendant (hereinafter Owens) was indicted in this cause on a charge of Armed Robbery in Count I and a charge of Aggravated Assault in Count II. Owens entered a plea of guilty to both counts and was sentenced on March 17, 2003, to thirty (30) years in Count I and to ten (10) years in Count II to run consecutively to Count I for a total of forty (40) years to serve in the custody of the Mississippi Department of Corrections. Owens requests that the Court clarify that it intended that Owens be eligible for parole eligibility after ten (10) years. He maintains that the sentencing judge stated his belief that Owens would be eligible for parole at that time, but that the Mississippi Department of Corrections maintains that Owens is not eligible for parole at all.

While the motion is styled as one seeking clarification, the relief sought does not seek to clarify anything with regard to the sentence. It merely seeks a declaration of the sentencing judge's intent concerning parole. Insofar as the motion is one seeking either reconsideration or post conviction relief, it was not timely filed. More than four (4) years elapsed between sentencing and the filing of this motion. The motion is, therefore, barred as to any reconsideration or post conviction relief on this motion.



The sentencing judge in this case is now retired. Any intention or belief he had must, therefore, be gleaned as best as possible from the record. The record in this matter clearly reflects that Owens was advised that he faced up to life without parole on the armed robbery charge. His Petition to Enter Guilty Plea so states. The portion of the transcript on which Owens relies occurred during a hearing on a Motion to Withdraw by Owens' attorney. This hearing occurred prior to Owens' plea. The judge did not at any point advise Owens that he would be paroled after serving ten (10) years nor did he indicate that the sentence was in any way based on such a premise. Further, there is nothing in this record to indicate that Owens in any manner based his plea on any understanding of eligibility for parole.

Additionally, the Court notes that Owens filed a post conviction relief proceeding on February 2, 2006, concerning this case. That request for post conviction relief sought a reconsideration of sentence or a setting aside of the plea. An Order (by the same judge who accepted Owens' plea) denying the post conviction petition was filed December 29, 2006. Owens appealed that decision. On April 8, 2008, the Mississippi Court of Appeals affirmed that ruling denying the post conviction relief.

Further, even if this Court were inclined to grant such relief as is requested by Owens on this Motion, it would have no effect. He asks that the Court clarify that it intended that he be eligible for parole at a certain point. Even had that been the sentencing judge's intention at sentencing (which is not supported by the record or the post conviction case opinion by that judge), a judge cannot order or direct parole consideration at sentencing which is in contravention to the statutes. Mississippi Code of 1972 Annotated §47-7-3 clearly prohibits parole for one convicted after October 1, 1994, of a robbery by use of a firearm. Owens did, in

fact, use a firearm in this case, shooting his victim in the course of the robbery. Our courts have stated:

Section 47-7-3 gives the parole board exclusive responsibility to grant or deny parole, and parole is not part of the court's sentencing power. *Mitchell v. State*, 561 So.2d 1037, 1039 (Miss. 1990). Any such language included in a sentencing order is mere surplusage and will not render the sentence illegal. *Gardner v. State*, 514 So.2d 292, 294 (Miss. 1987); *Norwood v. State*, 846 So.2d 1048, 1050 (P3) (Miss. Ct. App. 2003).

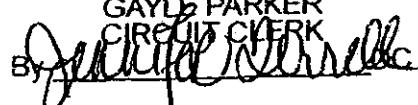
Here, however, Hinton pled guilty to armed robbery through the display of a deadly weapon. Under Mississippi Code Annotated Section 47-7-3(1)(d)(ii), he is not eligible for parole.

*Hinton v. State*, 947 So.2d 979, 981, ¶6-7 (Miss. Ct. App. 2006). See also *Cochran v. State*, 969 So.2d 119, 122, ¶9-10 (Miss. Ct. App. 2007); *Mitchell v. State*, 561 So.2d 1037, 1039 (Miss. 1990); et al. Regardless of the sentencing judge's opinion or belief, neither he nor the undersigned judge have any control over parole in this matter. The sentence is within the range permitted by the sentencing statute. The question of parole in this matter must be addressed by the proper authorities, not the Court. Based on all of the foregoing, Owens' Motion must be denied. It is, therefore,

ORDERED that the Motion for Clarification of Sentence be and it is hereby denied.

SO ORDERED this the 11<sup>th</sup> day of August, 2008.

  
CIRCUIT COURT JUDGE

**FILED**  
205 1034-96  
AUG 11 2008  
GAYLE PARKER  
CIRCUIT CLERK  
By 

**IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI  
SECOND JUDICIAL DISTRICT**

**STATE OF MISSISSIPPI**

**VERSUS**

**CAUSE NO. B2402-2002-00187**

**CHARLES DOUGLAS OWENS**

**DEFENDANT**

**ORDER**

THIS CASE is before the Court on Defendant's *pro se* Motion for Reconsideration filed March 20, 2003; his attorney's Motion for Reconsideration or in the Alternative Motion to Withdraw Plea filed March 27, 2003; and his *pro se* Motion to Withdraw Plea filed April 14, 2003. None of these motions were timely provided to either the current judge or the judge then handling this matter. Defendant (hereinafter Owens) was indicted in this Cause on a charge of Armed Robbery in Count I and a charge of Aggravated Assault in Count II. Owens entered a plea of guilty to both counts and was sentenced on March 17, 2003, to thirty (30) years in Count I and to ten (10) years in Count II to run consecutively to Count I for a total of forty (40) years to serve in the custody of the Mississippi Department of Corrections. Owens' Motion for Reconsideration (hereinafter First Motion) was timely filed. The Motion for Reconsideration or in the Alternative Motion to Withdraw Plea (hereinafter Second Motion) was likewise timely filed. The Motion to Withdraw Plea (hereinafter Third Motion) was not timely filed and, as a result, this Court lacks jurisdiction to hear that motion.<sup>1</sup>

As to the First Motion and the Second Motion, the Court notes that neither motion has ever been set for hearing. Nor is there any order carrying those motions from term to term for hearing. Owens' counsel obviously knew that he must set the motions for hearing. Owens himself was advised of this on more than one occasion by the Circuit Court Clerk's office. On

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<sup>1</sup> All three (3) motions, when referred to jointly, will be referred to as the instant motions.



March 28, 2003, the Clerks received a letter from Owens asking about his hearing date. He was advised by correspondence dated March 31, 2003, that court dates had to be set with the Court Administrator. On that same date, the Clerks received a second letter from Owens asking when his hearing date was to be and on April 2, 2003, he was told to contact his attorney or the Court Administrator to get a court date. On April 3, 2003, Owens' letter advising that he had changed attorneys was filed. The new attorney filed a Motion to Transport Defendant to enable Owens and the attorney to work on a post conviction relief matter which was followed by Owens' *pro se* motion seeking the same relief, being filed on June 9, 2003. By letter received by the Clerks on May 16, 2003, Owens asked about his pending motions and court dates and was told by letter dated May 19, 2003, that there were no pending court dates at that time. On June 19, 2003, (filed on June 24, 2003), the Court denied the Motion to Transport Defendant. Nothing more was filed in this matter until June 27, 2007. No further hearings were set on any matter by either Owens or his attorney.

Innumerable terms have elapsed since the filing of the instant motions. Nothing has ever been set for hearing on any of them. Nor have any of the instant motions ever been submitted to either judge for decision without a hearing. No orders of any kind have ever been entered to carry any of the instant motions from term to term for decision. It appears that Owens has waived these motions and that jurisdiction to hear them is questionable.

Owens did, however, file a timely post conviction relief proceeding on February 2, 2006, concerning this case. That post conviction proceeding is Cause No. A2402-2006-00016 (hereinafter PCR case). That request for post conviction relief alleges that the Second Motion was never ruled on; that certain facts were not presented at the time of the plea which would

have changed the sentence; that the plea should be set aside as it was coerced, involuntary and involved the court; that counsel was ineffective; and that the motion seeking to withdraw the plea and reconsider sentence was being renewed. These allegations include all matters raised in the instant motions. An Order denying the post conviction petition was filed December 29, 2006. A true and correct copy of that Order is attached hereto as Exhibit A and incorporated herein by reference. Owens appealed that decision. On April 8, 2008, the Mississippi Supreme Court affirmed that denial of relief. A true and correct copy of that decision is attached hereto as Exhibit B and incorporated herein by reference. The December 29, 2006, Order in the PCR case basically addressed the matters raised in Owens' instant motions. The First Motion alleges that the sentence was unreasonable and seeks a reduced sentence. The Second Motion alleges that the sentence is disproportionate to the recommendation of the State and seeks a reduction in sentence or a withdrawal of the plea. The Third Motion seeks withdrawal of the plea because there were mitigating factors not presented to the Court, causing Owens to believe that he may have had inappropriate representation of counsel, and alleging that he would not have entered his plea if he had had sufficient legal counsel. The December 29, 2006, Order clearly finds that the plea was appropriately entered; that the issue of material facts not presented to the Court at sentencing failed on the merits; and that what Owens really sought was a commutation of his sentence based on his conduct after the sentence. The issues raised in all three (3) motions were ruled on by the December 29, 2006, Order. The Order simply did not refer to the three (3) motions by name and it was not entered in this cause number. However, it is clear that Owens was well aware of the Court's ruling on the underlying issues. That ruling denied all of Owens' arguments and did not reconsider or alter the sentence and did not set aside the plea.



As Owens has now filed a Petition for Writ of Mandamus alleging that these motions have not been ruled on, and while it is apparent that the sentencing judge did rule on the issues by way of his Order in the PCR case, there is no specific order in this file stating that the ruling in the PCR case applies to these motions. In order to clarify this record, this Court finds that the Order in the PCR case does address the issues of the instant motions and that Order is now included in this case to reflect those rulings.

Alternatively, this Court has reviewed this file. After doing so, it appears that the motions are without merit. The First Motion seeks reconsideration based on a claim that the sentence is unreasonable and would be a sentence making Owens ineligible for parole. Based on the facts of the crimes and the permissible range of sentencing as well as the decision of the Mississippi Court of Appeals in the PCR case, the sentence is within the permissible range and is not unreasonable. Additionally, it is not the sentence which makes Owens ineligible for parole. His eligibility for parole is determined by statute and by the Mississippi Department of Corrections acting pursuant to those statutes, all as more fully set forth in the Order entered in this cause ruling on the Motion for Clarification of Sentence. The sentence as pronounced does not affect that eligibility.

The Second Motion alleges that the sentence is cruel and unusual because it is disproportionate with the District Attorney's recommendation and there was nothing to justify and "upward departure" from that recommendation. The record reflects that Owens knew that the judge was not bound by the recommendation made by the District Attorney's office. Further, as stated, the sentence was within the permissible statutory range and has been affirmed by the Mississippi Court of Appeals. The Second Motion also seeks to set aside the plea, but gives no

particular reason for doing so other than that concerning the sentence. There is nothing factual which supports a setting aside of the plea. Owens was sufficiently advised of his rights and the potential sentencing range prior to the acceptance of his plea. The Second Motion and the record contain nothing which would indicate that the plea should be set aside.

The Third Motion seeks withdrawal of the plea as Owens alleges that there were mitigating matters not presented to the court and that he did not receive sufficient legal counsel on mitigation and "his other options and alternatives." It alleges only that he "surmises" that his counsel was inadequate and that he wants to have new counsel to look at these matters. He finally seeks to have the victim present in court so that he can rebut the impact of the offense. The record is clear that Owens was allowed to present mitigating information to the judge prior to sentencing. There is no showing that there was any new mitigating evidence which was not available to him at the time of the hearing. Nor is there any showing that there would have been any different result had he presented that information. Owens does not properly support his claims of ineffective assistance of counsel as he provides no affidavits and no facts of any kind which would support such a claim. He merely guesses that there may have been some sort of insufficiency in counsel's performance. This is not enough.

The United States Supreme Court adopted a two-prong standard for evaluating claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show that the attorney's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Second, the defendant must show that there is a reasonable probability that, but for the attorney's alleged errors, the result of the proceeding would have been different. *Id.* at 694. This analysis applies to challenges to pleas of guilty. *See, e.g., Hill v.*

*Lockhart*, 474 U.S. 52, 58 (1985). When considering this issue as to pleas, the analysis for the first prong remains the same. The analysis of the second prong must focus on whether the attorney's unprofessional conduct affected the outcome. *Id.* Owens must show that the representation of his attorney at the plea hearing fell below the reasonableness standard and that, but for his attorney's conduct or error, there is a reasonable probability that he would have obtained a different result. This Court must look to the totality of the circumstances. *See, e.g., Osborn v. State*, 695 So.2d 570, 575 (Miss. 1997). In looking at the totality of the circumstances, the conduct of Owens' counsel was neither deficient nor prejudicial.

Finally, as to the Third Motion, there is no requirement for a victim to be present at a plea. Owens makes no argument and states no facts as to how that presence would have in any way assisted him or assisted the court in making its determination as to sentence or would have altered the sentence in any manner. For all of the foregoing reasons, Owens' instant motions must be denied. It is, therefore,


ORDERED that the Motion for Reconsideration be and it is hereby denied. It is further,

ORDERED that the Motion for Reconsideration or in the Alternative Motion to Withdraw Plea be and it is hereby denied. It is further,

ORDERED that the Motion to Withdraw Plea be and it is hereby denied.

SO ORDERED this the 11<sup>th</sup> day of August, 2008.

  
CIRCUIT COURT JUDGE

**FILED**  
245 / 687 / 92  
AUG 11 4 2008  
GAYDE PARKER  
CIRCUIT CLERK  
By 

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI  
SECOND JUDICIAL DISTRICT

CHARLES DOUGLAS OWENS  
VERSUS  
STATE OF MISSISSIPPI

PETITIONER  
CAUSE # A2402-Cle-17  
RESPONDENT

ORDER

This case is before the court on a Petition for Post-Conviction Relief. The grounds assigned are: 1.) material facts were not presented to the court at "...at the time of the defendant's plea and sentencing..." and, 2.) defendant's plea "...should be set aside and vacated because it was coerced, involuntary and the product of plea negotiations and plea bargaining that the court unfortunately was involved with...". The prayer for relief request that Petitioner's plea on February 4, 2003 be vacated..."and grant him such relief as the Court may deem proper, included but not limited to: A) sentence with time served and allow him to have probation for the remainder of his sentenced, or B) run the Defendants sentences concurrent instead of consecutive, and C) grant the Petitioner such that the Court may seem proper." *The petition is void of any complaint that any alleged unfair procedures resulted in the conviction of an innocent person or resulted in an unjust conviction.*

Clearly, what the petitioner desires is a commutation of sentence based on his alleged conduct or "good behavior" after sentence. The Mississippi Constitution and our statutes vest such authority in the Executive and Legislative branches. A review of the petition with its exhibits, the file, the transcripts and the law, compels this court to find that Petitioner, being aggrieved with his sentence, should seek relief in those branches.

On its face, the petition fails on the issue that material facts were not presented to the court at the time of plea and sentence evidenced by the exhibits attached. First, most of the exhibits postdate the sentencing date and could not have been presented to the

Exhibit A

EXHIBIT

FILED

court at the time of sentencing. As to those dated prior to the sentencing date, there is no allegation or proof that "with due diligence" they could not have been presented to the court.

On the date of the plea, February 04<sup>th</sup>, 2003, the transcript reveals, at petitioner's request to have the opportunity to have his family from South Carolina present, the court deferred sentence, ordered a pre-sentence report, reset the case for sentencing for March 17<sup>th</sup>, 2003, and advised both the State (who indicated that it may take more than thirty (30) days to get documentation of charges in Texas and Florida) and petitioner to advise the court if either party needed more time for a sentencing hearing.

Secondly, there is no prima facie showing that any of the exhibits predating the sentence would have resulted in a different sentence. While attending the new judges seminar, the undersigned judge was exposed to the four general principles of sentencing: Deterrence, (general and specific), Restitution, Rehabilitation and Retribution. The law in this case mandated time and the transcript reveals that the judge attempted to explain general and specific deterrence to the defendant.

Petitioner is less than candid with his allegations that the plea was coerced, involuntary and the product of plea negotiations with the court; and, with the authority cited in support thereto. The excerpts quoted in the petition are spun out of context. The transcript reveals that the Court first entertained the Motion to Withdraw, from which all of the quoted transcript in the petition is taken. What petitioner chose not to include was that prior to ruling on the Motion to Withdraw the transcript reveals that, with the concurrence of the petitioner and his attorney, the court took a recess and directed that they visit in the jury room while the court proceeded with other cases. After a period of time, petitioner came before the court, and after being asked by the court: "...Now that you have had this time to reflect upon it what is your position as to Mr. Denton being your attorney?" To which petitioner stated: "I'm satisfied to move forward with him representing me." Upon being advised that the petitioner desired to plea guilty and prior to placing him under oath and proceeding with the plea hearing, the court asked: "Why have you changed your mind?" To which the petitioner stated: "It was my intentions from the beginning to move forward and to pursue an agreement with the court to plead guilty." The Court states: "The agreement with the Courts?" to which the petitioner

responds: "Well to pursue pleading guilty to the court." And lastly, the following colloquy ensues:

Court: You're pleading guilty because you are, in fact guilty, or are you pleading guilty for another reason?

Petitioner: I'm pleading guilty because right is right and wrong is wrong, and I made a mistake.

Court: Did you do what they said that you did in those two counts?

Petitioner: Yes, sir.

The court then proceeded to place the petitioner under oath and conducted the sentencing hearing. After accepting his free and voluntary plea, and adjudicating him guilty, the Court at the Defendant's request deferred sentence.

Upon examination, Petitioner's cited authority on the issue of Court participation in plea negotiations is at best tangential but factually disingenuous. In Fermo v. State, 370 So2d 930 (Miss.1979), the Judge met with the defense attorney alone, telling him that he would not accept the plea recommendation of the attorney. The following day the judge told the defense attorney he would give the defendant ten years, if he entered a plea of guilty, telling the defense attorney that: "Well, he'd better take it." Then after the jury was impaneled the judge told the attorney for the defendant that seven years was the best that he could do.

The facts in this case are totally different. There is nothing in the record in this case that even remotely resembles the facts in Fermo, *supra*.

To assist in a clear understanding of what transpired in this case, the court directs that the Court Reporter transcribe all proceedings in this matter and make an audio copy of the them for the benefit of the appellate court in the event of an appeal. Judge Leslie B. Grant states in Summary of Mississippi Laws at Section 115:

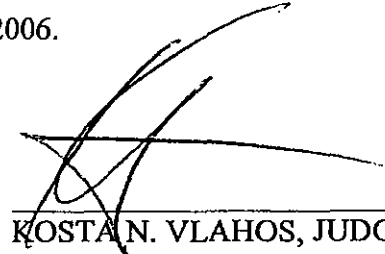
One witness may give testimony that reads in print as if falling from the lips of an angel, and yet not a soul who heard it believed a word of it; and the testimony of another witness may read brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify.

One reading a "cold transcript" may wrongly assess what actually was communicated in the courtroom.

ORDERED, that for the reasons given above, the Petition for Post Conviction Relief is hereby denied.

ORDERED that in the event of an appeal, the court reporter shall transcribe the entirety of these proceedings and also make an audio copy of them.

ORDERED, this the 29<sup>th</sup> day of December 2006.

  
KOSTA N. VLAHOS, JUDGE

JAN 3

226/646, 647, 648, 649  
**FILED**  
JAN 03 2007  
GAYLE PARKER  
CIRCUIT CLERK  
*Linda B. Smith*

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

**NO. 2007-CA-00153-COA**

**CHARLES DOUGLAS OWENS**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

DATE OF JUDGMENT:	12/29/2006
TRIAL JUDGE:	HON. KOSTA N. VLAHOS
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JIM DAVIS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DESHUN TERRELL MARTIN
NATURE OF THE CASE:	CIVIL - POST-CONVICTION RELIEF
TRIAL COURT DISPOSITION:	DENIED MOTION FOR POST-CONVICTION RELIEF
DISPOSITION:	AFFIRMED - 04/08/2008
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

**BEFORE LEE, P.J., CHANDLER AND BARNES, JJ.**

**BARNES, J., FOR THE COURT:**

¶1. Charles Douglas Owens pleaded guilty in the Circuit Court of Harrison County to one count of armed robbery and one count of aggravated assault for robbing and shooting his employer. Owens was sentenced to thirty years for the armed robbery and ten years for the aggravated assault, with the sentences to run consecutively for a total of forty years in the custody of the Mississippi Department of Corrections (MDOC). Owens filed for post-conviction relief with the trial court, which was denied. From the denial Owens brings this appeal, raising the following issues:

I. The trial court was in error when it summarily dismissed Owens's petition for post-conviction relief without holding an evidentiary hearing.

**EXHIBIT**



II. The trial court was in error when it sentenced Owens to a term of years that exceeded the State's recommended sentence which Owens had detrimentally relied upon prior to the entry of his pleas.

III. The trial court was in error when it found that Owens's pleas were freely and voluntarily entered.

¶2. Finding no merit to any of Owens's alleged errors, we affirm the decision of the trial court.

### **FACTS AND PROCEDURAL HISTORY**

¶3. A Harrison County grand jury returned a two-count indictment against Owens on May 20, 2002, for the armed robbery and aggravated assault of his employer Raleigh Richard Carter, a retired school teacher who owned a beach-side vending service. Owens admitted that he and Carter were discussing Owens's wages when the conversation became heated. At that point, Owens hit Carter on the head with a claw hammer, causing skull fractures. Then, as the two men "tussled," Owens pulled a pistol out of his pocket and fired at Carter. The bullet struck Carter in the chest. Owens then taped the hands of the bleeding Carter, took \$1,400 from him, and fled to Texas. Carter was able to crawl out of a window and into his car. He summoned help from security at the nearby Edgewater Mall. As a result of Owens's actions, Carter's skull was cracked and bones were broken in his face. Carter has difficulty talking and can only speak in a whisper. Carter has no feeling on the right side of his face as a result of being pistol-whipped by Owens. The bullet remains lodged in Carter's aorta and cannot be surgically removed. The prosecutor said that it was "just an absolute one in a million [chance] that [Carter] lived."

¶4. On May 2, 2002, Owens petitioned the trial court, as an indigent, for court-appointed representation. On May 29, 2002, Jack Denton of Biloxi was appointed as counsel. On December 30, 2002, Owens filed a bar complaint with the Mississippi Bar against Denton, seeking to have him removed as his attorney. Owens claimed primarily that Denton had met with him only once in the seven months since Denton was appointed to represent him, and he had received only seven parcels

of correspondence from Denton. On January 3, 2003, the Bar rejected Owens's complaint, stating that attorneys for criminal defendants are appointed by the circuit court and any requests to have a court-appointed attorney removed must be directed to the circuit court. Four days later, Denton filed a motion to withdraw as Owens's counsel. Denton said that the allegations that Owens made against him in the Bar complaint were "categorically false." Denton rebutted each allegation with documents showing the extent of his work on Owens's case. Denton said that Owens was "hearing what he wanted to hear" and had "unrealistic expectations" about how his case would turn out. For example, in a December 23, 2002, letter Denton responded to Owens's question, which asked whether Owens might enlist in the military as an alternative sentence. Denton told Owens that he had discussed Owens's case with the district attorney "at some length," and the district attorney "made it very clear that he intends to prosecute this case to [the] fullest extent allowed by law." In an earlier letter from Denton to Owens, Denton noted that he had reviewed the prosecution's discovery, and based upon the "voluminous amount of evidence" against Owens, Denton suggested that Owens consider a plea of guilty. As Owens had given a written and a videotaped confession, Denton informed Owens that "jail time is going to be unavoidable."

¶5. On February 4, 2003, a hearing was held on Denton's motion to withdraw as Owens's counsel. After the trial judge updated himself on the court file, there was a discussion among Owens, Denton, the assistant district attorney, and the court. The trial judge asked Owens what his response was to Denton's motion to withdraw. Owens said that his disagreements with Denton were mostly miscommunications and that he filed the bar complaint "to move forward" in his case. Owens said that he was unaware of the efforts Denton had made in his case, including the three visits with the district attorney's office to review the evidence. The trial judge then told the parties that

he had two unrelated pleas he had to hear and suggested that Owens visit with Denton in a backroom before the court made a decision about removing Denton as his attorney.

¶6. Following the recess, Owens said that he was "satisfied to move forward" with Denton as his counsel. In turn, Denton told the trial court that he was withdrawing his motion to withdraw as Owens's attorney. Also, Owens told the trial court that he wanted to plead guilty to the charges. The trial court asked Owens why he wanted to change his pleas to guilty. Owens replied that it was his intention all along to plead guilty. The trial court asked Owens if he were pleading guilty because he was in fact guilty, or was he pleading guilty for any other reason. Owens responded, "I'm pleading guilty because right is right and wrong is wrong, and I made a mistake."

¶7. Owens then submitted a petition to enter a guilty plea to both counts. The trial court asked Owens if he had read every sentence in every paragraph of the petition prior to signing it. Owens responded, "Yes, sir." In addition, Owens said his attorney went over the petition with him. Owens volunteered to the trial court that he was aware of the constitutional rights he was waiving by pleading guilty because he had been a reserve law enforcement officer in Anderson County, South Carolina, as well as an emergency medical technician.

¶8. The plea colloquy continued:

THE COURT: Do you have any questions about your rights or about this petition or anything that concerns you about what you're doing here today that you want to pause and either ask Mr. Denton or you can ask me as far as entering the plea of guilty? Not at the sentencing stage, we'll get there for a later time. But do you have any questions at all in your mind as to your rights? Do you have any questions about your rights?

MR. OWENS: No, sir.

THE COURT: You don't think it's necessary for me to explain them further to you?

MR. OWENS: No, sir. I understand them.

THE COURT: All right. Do you have any questions about entering a plea at this time that you want to go over with me, and again we're going to have a sentencing later?

MR. OWENS: No, your honor.

THE COURT: All right. . . . [L]et me ask you this; has anybody forced you to give up your rights?

MR. OWENS: No, sir.

THE COURT: Threatened you in any manner?

MR. OWENS: No, sir.

THE COURT: Offered you any reward?

MR. OWENS: No, sir.

THE COURT: Did I, Mr. Denton, Mr. Ward, any of the deputies or anybody in the back influence you in any way to give up your rights?

MR. OWENS: No, your honor.

¶9. After the trial judge satisfied himself that Owens's guilty plea was freely and voluntarily given, he then questioned Owens as to his guilt of the charges. Owens admitted his guilt to Count I, armed robbery, by taking and carrying away \$1,400 belonging to Carter by the exhibition of a deadly weapon, a pistol; and he admitted his guilt to Count II, the aggravated assault of Carter, by shooting him with a deadly weapon, a handgun. The State recommended a sentence of twenty-five years on the armed robbery count and twenty years on the aggravated assault count, with the sentences to run concurrently.

¶10. At Owens's request, the trial court deferred sentencing pending a presentence investigation to allow Owens's relatives from South Carolina to be present to offer statements on his behalf. It was determined that both Texas and Florida had holds on Owens, and he was wanted on a forgery charge in his home state of South Carolina.

¶11. On March 17, 2003, the sentencing hearing took place. The trial judge allowed seven of Owens's family members and his former pastor, all from South Carolina, to offer their favorable opinions about Owens to the court and to ask for mercy for him. Owens then spoke on his own behalf expressing his remorse and regret for his actions.

¶12. The trial judge said that from his experience as a district attorney and judge, Owens's crime was one of the worst, if not the worst, armed robberies that he had seen. The trial judge said that the State's recommendation of twenty-five years was in the mid-range of possible sentences. He determined that the vicious nature of Owens's crime warranted imposition of a sentence in the upper limits of the sentencing statutes. The trial court then sentenced Owens to thirty years on the armed robbery count and ten years on the aggravated assault count, with the sentences to run consecutively, for a total sentence of forty years in the custody of the MDOC. The sentencing order was entered on March 17, 2003.

¶13. On March 20, 2003, Owens filed a pro se motion for reconsideration of sentence, the crux of which was that his sentence should be shortened because he is "a likely candidate for successful rehabilitation in the custody of MDOC" because of his age. Owens also placed letters in the record from seven family members in support of him. On March 27, 2003, his court-appointed attorney filed a motion for reconsideration of the sentence or, in the alternative, a motion to withdraw the guilty pleas. He based his motion upon a theory of disproportionality of Owens's sentence. On April 14, 2003, Owens filed another pro se motion, seeking to withdraw his guilty pleas. There is no indication in the record that a ruling was ever obtained on any of the motions.

¶14. The next action in the record is nearly three years later, on February 2, 2006, when Owens's new counsel filed a motion for post-conviction relief, making three arguments.

¶15. First, Owens argued that he had material facts that were not presented to the Court at the time of his pleas and sentence which, if allowed, would have greatly changed the sentence which he was given by the trial court. Owens claims that the material facts that were not considered by the trial court were that Owens had completed various Bible studies and had become an ordained minister in prison. Owens signed his name on fund-raising materials for his ministry as Rev. Charles Douglas Owens II. Owens argued that a criminal defendant is allowed to present mitigation evidence on his behalf at the time of sentencing and that if the trial court had known of his religious prowess at the time of sentencing, Owens's sentencing might have been different. In his four-page opinion denying Owens's post-conviction relief motion, the trial court denied error on this issue. The trial judge pointed out that most of the exhibits which Owens attached to his petition were dated after the sentencing date and could not have been presented to the court at the time of sentencing. As to the documents dated prior to the sentencing, the trial court said that there was no allegation or proof that "with due diligence" the document could not have been presented to the court. Also, the trial court said that none of the exhibits, which predated the sentencing, would have resulted in a different sentence.

¶16. Owens's second issue in his post-conviction relief motion was that his pleas were involuntary, coerced, and was a product of plea negotiations in which the trial court unlawfully participated. Owens quoted the trial court at length, claiming that the quoted passages showed that the trial judge got involved in negotiating a guilty plea with Owens. In denying this issue, the trial court said that Owens was "less than candid" with his allegations that the trial judge was involved in plea negotiations, and the excerpts from the plea hearing quoted by Owens were "spun out of context."

¶17. Owens's final post-conviction relief argument was that he should be allowed to withdraw his guilty pleas and be resentenced because there was a binding agreement between the trial court, the State, and Owens as to his sentence. Owens argued that because of the sentence agreement, the doctrine of specific performance should be applied, and he should be allowed to be sentenced based on the agreed upon twenty-five-year sentence. Rejecting this argument, the trial court explained the chronology of the proceedings and the context in which the quoted statements were made. The trial judge noted that all of the quoted excerpts were made during the part of the hearing devoted to the attorney's motion to withdraw as Owens's counsel, and the statements were not made during Owens's plea hearing or at his sentencing hearing. The trial court quoted the plea colloquy where Owens was asked if he was pleading guilty because he was guilty, to which Owens responded, "I'm pleading guilty because right is right and wrong is wrong and I made a mistake." The trial court further quoted Owens's response of "Yes, sir." to the inquiry of whether he had done what was alleged in the two criminal counts. The trial court found Owen's argument to be without merit. It is from this ruling that Owens now appeals.

### STANDARD OF REVIEW

¶18. "In reviewing a trial court's decision to deny a petition for post-conviction relief this Court will not reverse such a denial absent a finding that the trial court's decision was clearly erroneous." *Kirksey v. State*, 728 So. 2d 565, 567 (¶8) (Miss. 1999) (citing *State v. Tokman*, 564 So. 2d 1339, 1341 (Miss. 1990)). However, when issues of law are raised, the proper standard of review is de novo. *Brown v. State*, 731 So. 2d 595, 598 (¶6) (Miss. 1999).

#### **I. Whether the trial court was in error when it summarily dismissed Owens's petition for post-conviction relief without holding an evidentiary hearing.**

¶19. Owens's argument on this issue is that he relied on the State's recommendation of a twenty-five-year sentence when he agreed to plead guilty to both counts. He claims that at no point during

the proceedings did the trial court advise him that the court did not have to follow the State's sentencing recommendation and could sentence him as the court saw fit.

¶20. The State argues that this issue was not raised in the trial court, and it is, therefore, procedurally barred. However, an examination of Owens's February 2, 2006, post-conviction relief motion shows that he argued this issue in the trial court. Therefore, we find that Owen's argument is not procedurally barred.

¶21. Our examination of the record, however, reveals that his argument is without foundation. First and foremost, he was made aware that the trial judge was not bound by the State's recommendation because it was clearly stated in his petition to plead guilty. Owens's petition to enter a guilty plea reads as follows:

I know that the sentence is up to the Court; that the Court is not required to carry out any understanding made by me and my attorney with the District Attorney; and further, that the Court is not required to follow the recommendation of the District Attorney; and further, that the Court is not required to follow the recommendation of the District Attorney, if any.

Then, on a blank line directly following, was written by hand, "Sentence is deferred pending PSI and sentencing hearing." Owens signed his name at the bottom of the petition.

¶22. Before accepting Owens's guilty pleas, the trial judge asked him if he had "read every word in every sentence in every paragraph above the place for your signature," of the petition to plead guilty, to which Owens replied, "Yes, sir." The trial judge asked Owens if he understood what he read, and again Owens replied, "Yes, sir." Then the trial judge asked Owens if his attorney had gone over the plea petition with him, and Owens replied that his attorney "clarified everything satisfactory." The supreme court has consistently stated that a trial court may place great emphasis upon statements made by criminal defendants under oath in open court during their guilty pleas and sentencing. *Holt v. State*, 650 So. 2d 1267, 1270 (Miss. 1994). Our Court has applied this rule and



stated that in considering a post-conviction relief motion, a trial judge is “entitled to rely upon the sworn statements made by defendants during their plea qualification hearings.” *Graves v. State*, 872 So. 2d 760, 762 (¶10) (Miss. Ct. App. 2004). Owens told the trial court under oath that he had read and understood every word of his petition to plead guilty and also that his attorney had explained the petition’s contents. Clearly stated in the petition is an acknowledgment made under oath that Owens was aware that the trial court was not bound to follow any sentencing recommendation made by the prosecution and that sentencing was completely at the discretion of the court. In deciding this issue, we must also apply the long-standing rules that sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute. *Reynolds v. State*, 585 So. 2d 753, 756 (Miss. 1991) (citing *Reed v. State*, 536 So. 2d 1336, 1339 (Miss. 1988)).

¶23. Owens was aware that the trial court was not bound to follow the State’s recommendation regarding his sentence. Clearly, the form he signed and swore to under oath stated that he understood that the sentence he would be given was completely left up to the trial court, which was under no requirement to follow the State’s recommended sentence. Owens’s sentence of thirty years on the armed robbery charge and ten years on the aggravated assault charge, to run consecutively, was within statutory limits.<sup>1</sup> The trial court explained that he was giving the upper limits of the sentences because of the heinous nature of Owens’s crime against Carter, which consisted of beating him in the head with a claw hammer, pistol whipping him, shooting him in the chest, taping him

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<sup>1</sup> Owens pleaded guilty to aggravated assault pursuant to Mississippi Code Annotated section 97-3-7(2) (Rev. 2000). The punishment for aggravated assault under this section is not more than one year in the county jail or not more than twenty years in the penitentiary. He also pleaded guilty to armed robbery under Mississippi Code Annotated section 97-3-79 (Rev. 2000), which provides in cases where a jury fails to fix the penalty to life in the penitentiary, the court shall fix the penalty to any term, but not less than three years. However, only a jury can sentence a convicted armed robber to life in prison. *Id.*; see *Calhoun v. State*, 881 So. 2d 308, 312 (¶15) (Miss. Ct. App. 2004).

after inflicting the injuries to prevent his escape, and then leaving him for dead. We find no error in the trial court's actions and, therefore, find this alleged error to be without merit.

**II. Whether the trial court was in error when it sentenced Owens to a term that exceeded the State's recommended sentence which Owens detrimentally relied upon prior to the entry of his plea.**

¶24. This alleged error is basically a reiteration of Owens's first issue, except that he has added an allegation that he detrimentally relied upon the prosecution's recommendation of a twenty-five-year sentence when he agreed to enter a guilty plea.

¶25. Following the entry of his guilty plea, Owens asked that his sentencing be delayed so that a presentence report could be made and so his family from South Carolina could appear and offer statements to the trial judge.

¶26. A month later, the sentencing hearing was held. It opened with a discussion of the victim's injuries, which the State described as: (1) a broken bone in Carter's face from being pistol whipped by Owens; (2) cracked cheek and skull bones from being beaten by Owens with a claw hammer; and (3) a gunshot wound to the chest caused by Owens shooting Carter with a pistol. As a result of Owens's actions, the prosecutor said that Carter can only speak in a whisper and has no feeling on the right side of his face. Also, the prosecution pointed out that the bullet which Owens fired at Carter is still lodged in his heart. The State offered that it was a miracle that Carter lived, despite these injuries. It was noted that Carter suffered hospital bills of at least \$31,000 as of the date of the sentencing, and further hospitalization might be necessary due to the bullet's remaining lodged in Carter's heart. The State also read from the victim's statement that Carter feared for his life if Owens were ever freed. During the allocution, six members of Owens's family and a minister – all from South Carolina – spoke on Owens's behalf. Some brought out the fact that Owens had completed several courses of Bible study while imprisoned, and he was a changed person who

wanted to make a difference in other people's lives. Owens also spoke on his own behalf, expressing remorse for his actions.

¶27. The trial judge then discussed the factors he considered in sentencing Owens. He said that Owens's armed robbery of Carter was one of the worst armed robberies he had ever seen. "But for the hand of the Lord[,] the man would be dead and you would be facing the death penalty because if he died and you committed an underlying felony of robbery, then you would be looking at the death penalty in this case." The trial judge said that Owens's actions "cried out" for the upper limits of the possible sentence. The trial judge said he considered, as mitigation, the fact that Owens admitted his actions, pleaded guilty, and expressed his remorse for his actions. Then the trial judge discussed his sentencing options.

THE COURT: As [the district attorney] pointed out, and the Court is well aware of, the upper limits and the highest limits that could be imposed is a day less than your natural life expectancy. Generally a life expectancy for a white male at this time is in the vicinity of 77 years of age. So I think at the time of the presentence you were 25. You're how old now?

MR. OWENS: I'm 24, Your Honor.

THE COURT: Twenty-four. So to get to 75 would be 51 years with the Department of Corrections.

I think in view of the fact that you have not required Mr. Carter to relive the agony and pain and mental suffering of having to receive a subpoena and telling him the case is set for trial and that the person charged with the crime for some unmindful reason given the proof and strength of this case which is enormous. We've been over that, you understand the proof is enormous, in addition to your confession. There are some people that do that, and they subject the person who's been victimized to be victimized a second time by waiting for the court system to finally bring closure to what's happened to them, and then hopefully turn to the Lord and be able to live the balance of their lives as best as they can with a fractured skull, a broken cheek bone, not being able to cheer, only being able to whisper, not being able to sing, maybe not even be able to whistle, and to try how he can be able to look in the mirror and not, and you know, thank the Lord, this is day the Lord has made. Let us rejoice and be glad in it. He has to try to do that. That's an unbearable factor in this whole scenario. Like you said if you could reverse it but you can't.

¶28. The trial court said that since Owens did “the honorable thing” when he admitted his wrongdoing and pleaded guilty, he removed from the court’s consideration a fifty-year sentence. The trial judge acknowledged the twenty-five-year sentence, which the State recommended was in “the mid-range” of possible sentencing, but he told Owens that he had to be consistent in his sentencing. The trial judge said because of the extreme nature of his crimes, Owens should be sentenced in the upper limits of the range. The trial court then gave Owens a sentence of thirty years for the armed robbery count and ten years for the aggravated assault count, with the sentences to run consecutively for a total of forty years in the custody of the MDOC.

¶29. In support of his argument, Owens quotes portions of the trial court’s discussion with Owens, his attorney, and the assistant district attorney, which occurred during the hearing on Owens’s attorney’s motion to withdraw as counsel. The quotations are selectively made and quoted out of context by Owens. We have reviewed the complete transcription of what was said at the motion hearing and find nothing in the trial judge’s remarks that could have led Owens to believe that the judge was going to follow the State’s recommended sentence. When read in the proper context, the trial court’s remarks concern the problems that lawyers face when appointed to represent a client. We have reviewed the full record and find that the trial court’s comments could not have been interpreted as showing Owens’s reliance on the State’s recommendation of a sentence. We find this issue without merit.

### **III. Whether the trial court was in error when it found that Owens’s pleas were freely and voluntarily given.**

¶30. Owens’s argument on this point is that his guilty pleas were not intelligently, voluntarily, and freely given because the trial court sentenced him to a term of years in excess of the State’s recommendation.

## **CERTIFICATE OF SERVICE**

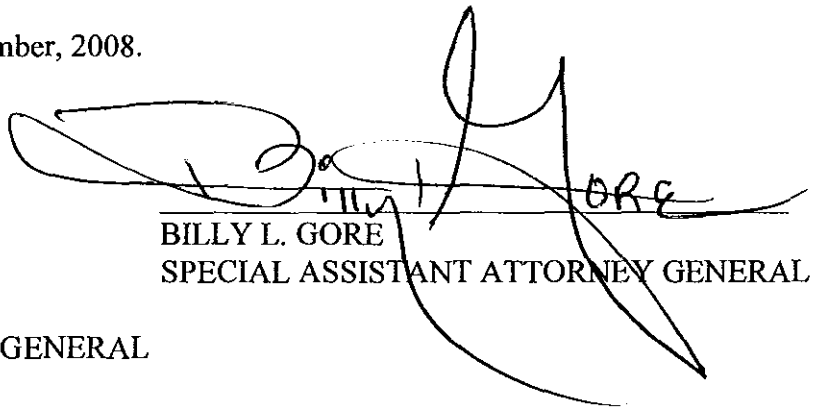
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

**Honorable Lisa P. Dodson**  
Circuit Court Judge, District 2  
Post Office Box 1461  
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**Honorable Cono Caranna**  
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**Charles Douglas Owens, II,** [REDACTED]  
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This the 1st day of December, 2008.



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