

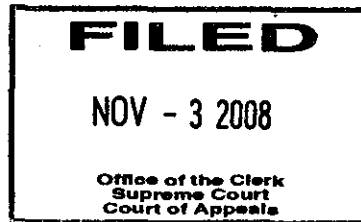
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DERRICK POSS

APPELLANT

V.

STATE OF MISSISSIPPI



CAUSE NUMBER ~~CR03-777(PF)~~

APPELLEE

2008-CP-1686-COA

CERTIFICATE OF INTERESTED PERSONS

THE UNDERSIGNED COUNSEL OF RECORD 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 THE SUPREME COURT AND/OR JUDGES OF THE COURT OF APPEALS MAY EVALUATE POSSIBLE DISQUALIFICATION OR RECUSAL.

1). HON. JIM HOOD, ATTORNEY GENERAL

P.O. BOX 220

JACKSON, MS 39205

2). HON. JOHN YOUNG, DISTRICT ATT.

P.O. BOX 212

CORINTH, MS 38834

ATTORNEY OF RECORD,

/s/ Derrick Poss

APPELLANT, PRO SE

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STATEMENT OF ISSUE

I. WHETHER THE CIRCUIT COURT ERRED BY DISMISSING APPELLANTS MOTION FOR POST-CONVICTION AS PROCEDURALLY BARRED AS A SUCCESSIVE MOTION WHEN APPELLANT IS UNCONSTITUTIONALLY DETAINED AND IMPRISONED ON AN ILLEGAL SENTENCE BECAUSE THE APPELLANT'S SENTENCE INVOLVES AN EX POST FACTO RETROSPECTIVE APPLICATION OF SECTION 47-7-3 MISS.CODE OF 1972 AS AMENDED BY SENATE BILL #2680,2004.

STATEMENT OF CASE

ON OR ABOUT THE 5TH DAY OF SEPTEMBER, 2003, APPELLANT WAS ARRESTED AND CHARGED WITH THE CRIME OF ARMED ROBBERY. THEREAFTER, APPELLANT POSS WAS INDICTED ON OR ABOUT THE 22ND DAY OF OCTOBER, 2003, BY A LEE COUNTY GRAND JURY FOR ARMED ROBBERY IN VIOLATION OF SECTION 97-3-79 OF THE MISS. CODE. ON MAY 10, 2004, POSS ENTERED A GUILTY PLEA AND WAS AJUDICATED GUILTY. POSS WAS SENTENCED TO A FIFTEEN YEAR SENTENCE. ON JULY 28, 2005 POSS FILED A MOTION FOR POST-CONVICTION RELIEF IN THE CIRCUIT COURT OF LEE COUNTY, WHICH WAS DISMISSED ON JANUARY 31, 2006. POSS ASSERTED CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND INVOLUNTARY GUILTY PLEA ON THIS POST-CONVICTION MOTION ABOVE. POSS THEN FILED HIS APPEAL TO THE SUPREME COURT/COURT OF APPEALS ON FEBRUARY 23, 2006. POSS' APPEAL WAS AFFIRMED BY THE COURT OF APPEALS ON MARCH 20, 2007. POSS THEN FILED A MOTION FOR REHEARING ON MARCH 27, 2007, WHICH WAS DENIED ON JUNE 5, 2007.

UPON ONGOING RESEARCH OF CASE LAW, POSS DISCOVERED THE REVISION OF SECTION 47-7-3(2004), WHICH DID NOT BECOME EFFECTIVE UNTIL AFTER POSS WAS SENTENCED. A MISINTERPRETATION OF SECTION 47-7-3(2004) WHICH WAS AMENDED BY SENATE BILL #2680, WAS APPLIED TO POSS' SENTENCE AND THEREFORE CAUSED HIS ENTIRE SENTENCE TO BE MANDATORY. THIS MADE POSS' SENTENCE BECOME AN EX POST FACTO RETROSPECTIVE APPLICATION OF SENATE BILL #2680, BEING APPLIED TO POSS' SENTENCE WHEN POSS COMMITTED HIS CRIME BEFORE THIS LAW WAS PASSED OR CAME INTO EFFECT. POSS FILED A MOTION FOR POST-CONVICTION RELIEF CLAIMING THAT HIS SENTENCE IS ILLEGAL ON JUNE 17, 2008. ON AUGUST 11, 2008, POSS' MOTION WAS DISMISSED AS BEING PROCEDURALLY BARRED AS A SUCCESSIVE MOTION. NOW POSS IS APPEALING THE LOWER COURTS DECISION TO THIS COURT FOR REVIEW AND IN HOPES TO DEMONSTRATE THAT HIS SENTENCE IS ILLEGAL, AND THE CLAIM OF AN ILLEGAL SENTENCE MAY BE WAIVED FROM THE TIME-BAR IF THERE IS A FUNDAMENTAL RIGHT VIOLATED.

SUMMARY OF THE ARGUMENT

APPELLANT ARGUES THAT HIS SENTENCE IS ILLEGAL AND VOID, AND THERE ARE EXCEPTIONS TO PROCEDURAL BARS WHEN ONE'S FUNDAMENTAL RIGHT HAS BEEN VIOLATED. THE LOWER COURT WRONGFULLY DISMISSED POSS' PETITION FOR POST-CONVICTION BECAUSE THE LOWER COURT OVERLOOKED THE FACT THAT DUE TO THE ALLEGATION OF AN ILLEGAL SENTENCE, THE PETITION WAS NOT SUBJECT TO THE TIME-BAR.

ARGUMENT

I. PETITIONER POSS CONTENDS THAT THERE ARE CERTAIN EXCEPTIONS TO
PROCEDURAL BARS INVOLVING TIME AND SUCCESSIVE WRIT BARS.

THERE ARE CERTAIN EXCEPTIONS CARVED OUT TO PROCEDURAL BARS WHERE THERE IS A QUESTION THAT A PARTIES FUNDAMENTAL RIGHTS HAVE BEEN VIOLATED. SNEED V. STATE, 722, SO.2d 1255,1257(7) (MISS.1998). "THE RIGHT TO BE FREE FROM AN ILLEGAL SENTENCE HAS BEEN FOUND TO BE FUNDAMENTAL." Id. IN IVY V. STATE, 731 So.2d 601,603(13) (MISS.1999), THE MISSISSIPPI SUPREME COURT REITERATED ITS FORMER RULING THAT "ERRORS AFFECTING THE FUNDAMENTAL RIGHT SUCH AS THE RIGHT TO A LEGAL SENTENCE MAY BE EXCEPTED FROM PROCEDURAL BARS WHICH WOULD OTHERWISE PREVENT THEIR CONSIDERATION." IVY 731 So.2d AT 603 (13), (CITING LUCKETT V. STATE, 582 So.2d 428,430 (MISS.1991). SEE ALSO, SMITH V. STATE, 477 So.2d 191,195-96 (MISS.1985). IN IVY, THE SUPREME COURT RECOGNIZED THAT THE LOWER COURT WRONGFULLY DISMISSED IVY'S PETITION FOR POST-CONVICTION RELIEF BECAUSE THE LOWER COURT OVERLOOKED THE FACT THAT DUE TO THE ALLEGATION OF AN ILLEGAL SENTENCE THE PETITION WAS NOT SUBJECT TO THE TIME-BAR. IVY 731 So.2d 603(14). SEE ALSO, STEVENSON V. STATE, 674 501,505 (MISS.1996); GRUBB V. STATE, 584 So.2d 786,789 (MISS.1991); LUCKETT V. STATE, 582 So.2d at 430 AND SMITH 477 So.2d at 195-96. THE MISSISSIPPI SUPREME COURT HAS HELD THAT THE THREE(3) YEAR STATUTE OF LIMITATIONS IN MISS.CODE ANN. §99-39-5 (2) (SUPP.2004) MAY BE WAIVED WHEN A FUNDAMENTAL CONSTITUTIONAL RIGHT IS IMPLICATED. THE MISSISSIPPI SUPREME COURT HAS CONSISTENTLY HELD THAT THE TIME-BAR OF MISS.CODE ANN. §99-39-5(2) (SUPP.2004), APPLIES TO A PETITIONER'S POST CONVICTION RELIEF CLAIMS BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL AND INVOLUNTARY GUILTY PLEAS. KIRK V. STATE, 798 So.2d 345,346 (MISS.2000), (CITING LUCKETT V. STATE, 582 So.2d 428,429-30 (MISS.1991)). THE SUPREME COURT HAS HELD THAT THE THREE YEAR STATUTE OF LIMITATIONS MAY BE WAIVED WHEN A FUNDAMENTAL RIGHT IS IMPLICATED. MCGLEACHIE V. STATE, 840 So.2d 108,110 (MISS. CT APP.2002), SNEED V. STATE, 722 So.2d 1255,1257 (MISS. 1998). THERE ARE EXCEPTIONS TO THE THREE YEAR LIMITATIONS:

- 1).CASES IN WHICH THE PRISONER CAN DEMONSTRATE 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 SENTENCE OR CONVICTION;OR
- 2).THE PRISONER 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 OUTCOME IN THE CONVICTION OR SENTENCE;OR
- 3).CASES IN WHICH THE PRISONER CLAIMS THAT HIS SENTENCE HAS EXPIRED,ILLEGAL, OR HIS PROBATION,PAROLE,OR CONDITIONAL RELEASE HAS BEEN UNLAWFULLY REVOKED.

APPELLANT ARGUES THE TIME-BAR SHOULD NOT BE APPLIED AS THE ERROR HE CLAIMS AFFECT HIS FUNDAMENTAL CONSTITUTIONAL RIGHT. IT IS TRUE THAT WHEN THE FUNDAMENTAL RIGHTS OF AN INDIVIDUAL ARE IMPLICATED IN A PETITION FOR POST-CONVICTION RELIEF, THE PROCEDURAL TIME-BAR WILL NOT ALWAYS BE APPLIED TO PRECLUDE REVIEW OF THE CLAIMS.

LUCKETT V. STATE, 582 So.2d 428,430 (MISS.1991). HOWEVER, ALLEGATIONS OF AN ILLEGAL SENTENCE WILL BE REVIEWED EVEN IF THEY ARE FILED AFTER THE THREE-YEAR STATUTE DEADLINE. TWILLIE V. STATE, 892 So.2d 187 191 (12) (MISS.2004). ACCORDING TO MY FUNDAMENTAL CONSTITUTIONAL RIGHT TO A LEGAL SENTENCE AND THE ABOVE CASE AUTHORITY AND WEAVER V. STATE, 2001, 785 So.2d 1085. THIS COURT IS ABLE TO REVIEW MY ILLEGAL SENTENCE CLAIM EVEN IF MY POST-CONVICTION MOTION IS SUCCESSIVE. LYLES V. STATE, 756 So.2d 1,2 (6) (MISS. CT.APP.1999).

CONCLUSION

APPELLANT PRAYS THAT THIS HONORABLE COURT REVERSE THE TRIAL COURT'S DISMISSAL OF HIS POST-CONVICTION MOTION AND REMAND FOR SUCH A HEARING TO DETERMINE THE MERITS OF POSS' ILLEGAL SENTENCE CLAIM.

THIS THE 3rd DAY OF November, 2008.

RESPECTFULLY SUBMITTED,

/s/ Derrick Poss

APPELLANT, PRO SE

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT I, THE UNDERSIGNED, HAVE THIS DAY AND DATE MAILED VIA UNITED STATES, POSTAGE PRE-PAID, A TRUE AND CORRECT COPY OF THE FOREGOING AND ATTACHED INSTRUMENTS TO THE FOLLOWING;

1). HON. JIM HOOD, ATTORNEY GENERAL

P.O. BOX 220

JACKSON, MS 39205

2). HON. JOHN YOUNG, DISTRICT ATT.

P.O. BOX 212

CORINTH, MS 38834

THIS THE 3rd DAY OF November, 2008.

RESPECTFULLY SUBMITTED,

/s/ Derrick Poss

DERRICK POSS #104788

M.S.P.

P.O. BOX 1057

PARCHMAN, MS 38738