

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

**ELIUS LAMAR REED**

**APPELLANT**

**VS.**

**NO. 2010-CP-0545**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

**JIM HOOD, ATTORNEY GENERAL**

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## **STATEMENT OF THE ISSUE**

- I. Reed's Motion for Post-Conviction Relief was correctly denied by the trial court as it is procedurally barred as moot, untimely and a successive writ.

## **STATEMENT OF THE CASE**

On or about January 5, 1977, Elius Lamar Reed was convicted of armed robbery in the Circuit Court of Lauderdale County, Mississippi. He was sentenced to six years in the custody of the Mississippi Department of Corrections. Reed did not file a direct appeal. On March 30, 1979, Reed was paroled. On January 5, 1983, Reed was discharged from the custody of the Mississippi Department of Corrections. In 1991, Reed filed a Motion for Post-Conviction Relief which was denied by the trial court. The trial court's decision was affirmed by the Mississippi Supreme Court on April 14, 1994.

On June 18, 2008, Reed filed a Motion for New Trial, asserting that he had newly discovered evidence that would prove his innocence. The trial court denied the motion as untimely. Reed then filed a Motion to Reconsider, which the trial court treated as Corrected 2<sup>nd</sup> Motion for Post-Conviction Relief/Out of Time-Appeal and denied as frivolous. The instant appeal ensued.

## **SUMMARY OF THE ARGUMENT**

Reed's Motion for Post-Conviction Relief was correctly denied by the trial court as it is, moot, untimely, unsupported by affidavits other than that of Reed and a successive writ. Reed was discharged from the custody of the Mississippi Department of Corrections on January 5, 1983. Reed filed his latest Motion for Post-Conviction Relief which is the subject of the instant appeal in August of 2009. Therefore, Reed is no long a "prisoner in custody under sentence of a

court of record....” Miss.Code Ann. § 99-39-5(1) (Rev.2000), and the matter is therefore moot and cannot be heard. Further, this is a successive writ, since Reed filed his first Motion for Post Conviction Collateral Relief on December 4, 1990 and his second on June 18, 2008, making the motion that is the subject of the instant appeal his *third* motion for post-conviction relief. Additionally, Reed’s current Motion for Post-Conviction Relief is grossly untimely, filed some 30 years post trial. The motion does not fall within an exception to these two procedural bars. The reports Reed claims are newly discovered evidence were created prior to trial, on or about May 4, 1976, and June 23, 1976. Trial was held on November 16, 1976. Therefore, the reports were not undiscoverable pursuant to Miss.Code Ann. §§ 99-39-5(2)(a)(i); 99-39-23(6) (Supp.2009).

Reed’s issues are without merit and the trial court’s dismissal of Reed’s third Motion for Post-Conviction Relief filed 30 years post-trial, long after Reed’s discharge from custody, should be affirmed. Further the trial court’s assessment of a fine against Reed for frivolous, untimely and successive motions should be upheld pursuant to *Retherford v. State*, 749 So.2d 269 (Miss.Ct.App.1999).

## ARGUMENT

**I. Reed's Motion for Post-Conviction Relief was correctly denied by the trial court as it is procedurally barred as moot, untimely and a successive writ.**

A circuit court's dismissal of a petition for post-conviction collateral relief will not be reversed on appeal absent a finding that the trial court's decision was clearly erroneous. *Williams v. State*, 872 So.2d 711, 712 (Miss.Ct.App.2004). However, when reviewing issues of law, this Court's proper standard of review is de novo. *Brown v. State*, 731 So.2d 595, 598 (Miss.1999).

Reed's Motion for Post-Conviction Relief was correctly dismissed by the trial court as it is moot, since Reed served out his term and was discharged from the Custody of the Mississippi Department of Corrections on January 5, 1983. In *Bohreer v. State*, 812 So.2d 256 (Miss.Ct.App.2002), the Mississippi Court of Appeals held:

The post-conviction statute clearly reads that "[a]ny prisoner in custody under sentence of a court of record...." Miss.Code Ann. § 99-39-5(1) (Rev.2000). Bohreer was a prisoner at the time of filing; however, at the time of our consideration, his sentence of incarceration would appear to have been served. If that is the case, then Bohreer now presents a moot point which cannot be heard. *McDaniel v. Hurt*, 88 Miss. 769, 769, 41 So. 381, 381 (1906).

Additionally, Reed's Motion for Post-Conviction Relief was correctly dismissed as it is barred as untimely and as a successive writ. The circuit court dismissed the petition as a successive writ under Mississippi Code Annotated section 99-39-23(6) (Supp.2009). Further, the petition falls outside the three year time limitation under Mississippi Code Annotated section 99-39-5(2) (Supp.2009). Also, the petition falls outside the three year time limitation under Mississippi Code Annotated section 99-39-5(2) (Supp.2009), as it is some 30 years late. And, it should be noted that Reed states that he received the reports through a FOIA request on August 3, 2000, some ten years before the instant post-conviction motion was filed. Thus, Reed's petition is

barred unless an exception applies. Reed argues that the Motion for Post Conviction Relief he previously filed on December 4, 1990 which was denied by the trial court, did not rely on the fingerprint evidence Reed now cites as undiscoverable. The Mississippi Supreme Court affirmed the trial court's denial of Reed's first Motion for Post-Conviction Collateral Relief on April 14, 1994.

Reed claims that fingerprint comparisons made prior to trial that allegedly showed that Reed's fingerprints were not identical to the latent fingerprints found on the cash register. He states that no discovery was conducted by their attorney and the prosecuting attorney did not disclose the FBI fingerprint comparison reports. These reports were created prior to trial, on or about May 4, 1976, and June 23, 1976. Trial was held on November 16, 1976. Therefore, the reports were not undiscoverable pursuant to Miss.Code Ann. §§ 99-39-5(2)(a)(i); 99-39-23(6) (Supp.2009). The Mississippi Court of Appeals has held:

The term "newly discovered evidence" refers to evidence, that is, an exhibit, testimony, or some other information that could have been offered as evidence in the defendant's trial but was not offered because it was not reasonably discoverable at the time of the trial. The concept of newly discovered evidence does not embrace a prisoner's untimely realization that legal errors occurred at his trial. Accordingly, we have held that a prisoner's failure to understand the law until conducting research into his case does not constitute newly discovered evidence.

*Pickle v. State*, 942 So.2d 243, 246(Miss.Ct.App.2006) (citation omitted).

Under this definition, the reports made by the FBI existed at the time and could have been introduced at trial. Therefore, they were not undiscoverable. This exception does not apply and Reed's Motion is procedurally barred as a successive writ and as untimely.

Reed's issues are without merit and the trial court's dismissal of Reed's third Motion for

## CERTIFICATE OF SERVICE

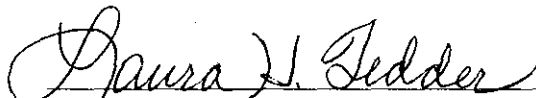
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Lester F. Williamson, Jr.  
Circuit Court Judge  
P. O. Box 86  
Meridian, MS 39302

Honorable E. J. (Bilbo) Mitchell  
District Attorney  
P. O. Box 5172  
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This the 21<sup>st</sup> day of January, 2011.

  
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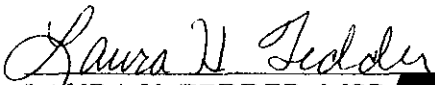

Post-Conviction Relief filed 30 years post-trial, long after Reed's discharge from custody, should be affirmed. Further the trial court's assessment of a fine against Reed for frivolous, untimely and successive motions should be upheld pursuant to *Retherford v. State*, 749 So.2d 269 (Miss.Ct.App.1999).

### **CONCLUSION**

Reed's Motion for Post-Conviction Relief was correctly denied by the trial court as it is, moot, untimely, unsupported by affidavits other than that of Reed and a successive writ. The trial court's dismissal of Reed's Motion for Post-Conviction relief, along with the assessment of a fine for a frivolous and successive writ should be affirmed.

Respectfully submitted,

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