

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

**CARL JAMES CAVINESS**

**APPELLANT**

**VS.**

**NO. 2010-CP-0758**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI**

**STATEMENT OF THE CASE**

This is an appeal against an Order of the circuit court of Harrison County, Mississippi, Second Judicial District, in which relief on the prisoner's motion in post - conviction relief was denied.

**STATEMENT OF FACTS**

The prisoner filed a "Motion to Vacate and Set Aside Ambiguous Sentences" in the circuit court of Harrison County, Mississippi, Second Judicial District on 10 June 2009. In this filing, the prisoner alleged that he had been convicted and sentenced in February of 1999 on two counts of robbery and one count of armed robbery. He asserted that he had been sentenced to terms of ten years imprisonment on each of the counts of robbery, to be served concurrently, and to a term of ten years imprisonment on armed robbery, that sentence to be served consecutively with the sentences

imposed for robbery. Execution of sentence was suspended as to thirteen years, with seven years to be served, and with three years of post - release supervision. Subsequently, the prisoner's post - release supervision was revoked and he was ordered to serve the term of imprisonment originally suspended. The prisoner asserted that the sentences imposed were ambiguous, and he then went on a lengthy complaint of how the Department of Corrections calculated his time. He asserted that it was unclear which of his ten - year sentences he was to serve. He asserted that he was not given earned time or other such credits on account of the supposed ambiguity. ( R. Vol. 1, pp. 102 - 117).

The circuit court denied relief on the prisoner's various complaints, without an evidentiary hearing. The court found that the prisoner had been convicted and sentenced on three counts of robbery, sentenced to terms of ten years each, all to be served concurrently, and on one count of armed robbery, with a term of ten years imprisonment, that term to be served consecutively to the three ten - year terms. The court further found that thirteen years of imprisonment had been suspended, with seven years to serve, and three years on post - release supervision. The prisoner's post - release supervision was revoked. The court reviewed the prisoner's Inmate Time Sheet and found that the prisoner had served seven years of the ten - years armed a robbery sentence from 1997 to 2004, and served the remaining three years from June 2005 to June 2008. The prisoner then began serving his ten - year robbery sentences in 2008 and began earning "Trusty Earned Time" at that time. The court thus found that the sentences were not ambiguous and for that reason denied relief on the prisoner's motion. ( R. Vol. 1, pp. 137 - 138).

The prisoner has previously presented his complaints about his convictions for robbery and armed robbery and subsequent revocation of post - release supervision in *Caviness v. State*, 1 So.3rd 917 (Miss. Ct. App. 2008).

## STATEMENT OF ISSUES

### 1. DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING?

## SUMMARY OF ARGUMENT

**THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING**

## ARGUMENT

**THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING**

A circuit court may deny relief on a prisoner's motion in post - conviction relief without an evidentiary hearing where it 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. Miss. Code Ann. Section 99-39-11(2) (Supp. 2010). This Court will affirm a summary dismissal of a motion in post - conviction relief where the movant fails to demonstrate a claim procedurally alive substantially showing the denial of a State or federal right. Questions of law, however, are reviewed *de novo*. *Chapman v. State*, 47 So.3rd 203 (Miss. Ct. App. 2010).

The prisoner has previously pursued post - conviction relief concerning these convictions and sentences. *Caviness v. State*, 1 So.3rd 917 (Miss. Ct. App. 2008). In those proceedings, the prisoner asserted that his sentences were illegal on account of an alleged violation of Miss. Code Ann. Section 99-19-21(1)( Rev. 2007) and that they were ambiguous in that it was unclear as to which portion of the suspended sentences was involved in successful completion of the period of post - release supervision. *Caviness*, at 919 - 920. The Court of Appeals found no merit in the prisoner's claims.

Here, on this appeal from the prisoner's subsequent filing in post - conviction relief, the

issues raised by the prisoner are: (1) That his sentence or sentences are illegal because they are ambiguous; (2) that the sentencing order is illegal because it is contrary to the sentence pronounced at the conclusion of the taking of the prisoner's guilty pleas; (3) that the circuit court actually suspended execution of the sentence imposed on the armed robbery conviction, in accord with an alleged plea agreement to this effect and that his attorney was ineffective and that the plea bargain was breached; (4) that the circuit court erred somehow by failing of refusing to correct the record on appeal.

As to the claim here that the sentences are ambiguous, the Court of Appeals considered and ruled upon that issue in the first appearance of this case there. That being so, the issue should not be and may not be reconsidered here. The Court's judgment is *res judicata* as to the issue. To the extent if any that the prisoner is attempting to re-tool his claim that the sentence or sentences are ambiguous, by asserting some other or different reason, this he may not do under the doctrine of collateral estoppel since there is nothing about these sentences that was not known or could not have been known at the time of first motion in post - conviction relief. There is no exception to the operation of these bars available to the prisoner, and none does he plead. The motion in the case at bar was a successive one, and relief would have been properly denied for this reason. Miss. Code Ann. Section 99-39-23(6) (Supp. 2010); *Sykes v. State*, 919 So.2d 1064 (Miss. Ct. App. 2005).

As to the claims that the sentencing orders do not correctly reflect what the circuit ordered from the bench and that the circuit court actually suspended execution of the armed robbery sentence, those issues could and should have been raised in the first post - conviction relief motion and when this case first appeared in the Court of Appeals. They may not be raised now. Beyond this, there is nothing in this record to support the prisoner's claims – there is no transcript of the plea colloquy and sentence as pronounced from the bench, and there is absolutely nothing to show that the sentence

on the armed robbery conviction was pronounced from the bench differently from what the written sentencing order indicates. ( R. Vol. 1, pp. 40 - 43). The record simply does not support the prisoner's contentions. The Appellant thus has failed to meet his burden of persuasion. *Sago v. State*, 978 So.2d 1285 (Miss. Ct. App. 2008).

The motion in the case at bar is also time - barred. Miss. Code Ann. Section 99-39-5(2) (Supp. 2010). Again, the prisoner has not alleged and established the existence of any exception to the operation of the statute of limitations. The sentences imposed upon the prisoner were not unauthorized by law.

Finally, we will point out that the circuit court, in its order denying relief on the prisoner's motion in the case at bar, clearly demonstrated why the prisoner's claims were without merit. In the event that this Court should determine for some reason that the issues in the instant appeal are properly before the Court, notwithstanding the time - bar and successive writ bar, the prisoner's claim is without merit, and we adopt the circuit court's explanation as set out in its order denying relief on the prisoner's motion.

The circuit court committed no error in denying relief on the prisoner's motion in post - conviction relief without an evidentiary hearing.




## CONCLUSION

The order of the circuit court denying relief on the prisoner's motion in post - conviction relief should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

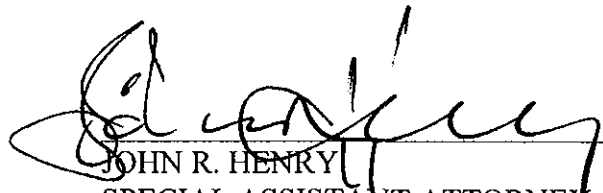
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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Circuit Court Judge  
P. O. Box 1461  
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This the 22nd day of February, 2011.



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