IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CP-01576-COA

LADENNIS GRAHAM **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	8/20/2007
TRIAL JUDGE:	HON. BILLY JOE LANDRUM
COURT FROM WHICH APPEALED:	JONES COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	LADENNIS GRAHAM (PRO SE)
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
NATURE OF THE CASE:	CIVIL - POST-CONVICTION RELIEF
TRIAL COURT DISPOSITION:	MOTION FOR POST-CONVICTION RELIEF DENIED
DISPOSITION:	AFFIRMED - 3/9/2010
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE LEE, P.J., IRVING AND BARNES, JJ.

BARNES, J., FOR THE COURT:

¶1. This is an appeal from the denial by the Circuit Court of Jones County of LaDennis Graham's motion for post-conviction relief. Finding no reversible error, we affirm.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

¶2. On December 13, 2005, Graham was indicted for possession of 11.59 grams of cocaine with the intent to distribute pursuant to Mississippi Code Annotated section 41-29-142 (Rev. 2005). Graham pleaded guilty on March 28, 2006, and was sentenced, pursuant

to Mississippi Code Annotated section 41-29-139 (Rev. 2005), to serve sixteen years in the custody of the Mississippi Department of Corrections (MDOC), with fifteen years conditionally suspended upon the successful completion of twelve months of house arrest, four years of supervised post-release supervision, and the successful completion of the Circuit Court Community Service Program. On July 25, 2006, Graham violated the terms of his house arrest and is currently serving the rest of his sentence in the custody of the MDOC.

¶3. Graham timely filed a motion for post-conviction relief with the circuit court on July 27, 2007. Relief was summarily denied on the basis that the circuit court did not have jurisdiction to hear Graham's claims. It is from this denial of post-conviction relief that Graham now appeals, alleging the following assignments of error: (1) the circuit court and defense counsel failed to advise him of his right to appeal his sentence; (2) the indictment under which Graham was charged failed to set forth the correct statute and judicial district; (3) the sentence imposed constituted an unconstitutional, illegal sentence; (4) he was denied effective assistance of counsel; and (5) his guilty plea was not voluntarily and intelligently entered. Finding that the circuit court had jurisdiction over the motion, but that the motion lacked merit, we affirm.

STANDARD OF REVIEW

¶4. This Court will not disturb the findings of the trial court denying a motion for post-conviction relief unless they are found to be clearly erroneous. *Brown v. State*, 731 So. 2d 595, 598 (¶6) (Miss. 1999). Questions of law are reviewed de novo. *Id.*

ANALYSIS

¶5. We must first address the issue of jurisdiction as this was the deciding factor in the circuit court's denial of Graham's motion for post-conviction relief. For the reasons stated below, we find that the circuit court erred in determining that it lacked jurisdiction to review Graham's motion for post-conviction relief.

¶6. In denying Graham's motion, the circuit judge relied heavily on precedent from *Babbitt v. State*, 755 So. 2d 406 (Miss. 2000). Demethris Babbitt was accused of violating the terms of his intensive supervision program (ISP), which is also termed "house arrest," and the circuit court ordered him to complete the original sentence imposed. *Id.* at 407-08 (¶¶6, 7). The MDOC Classification Committee later found that Babbitt was not guilty of the alleged violation; however, Babbitt was not returned to the ISP. *Id.* at 408 (¶7). Babbitt then filed a motion for post-conviction relief with the circuit court, which dismissed the motion. *Id.* at 407 (¶3). The Mississippi Supreme Court ruled that, while the circuit court was correct in dismissing Babbitt's motion for post-conviction relief, the circuit court lacked jurisdiction to reinstate his original sentence as that power is given to the Classification Committee by Mississippi Code Annotated section 47-5-1003(3) (Supp. 1999). *Id.* at 409 (¶14). The court held that, instead of moving for post-conviction relief, Babbitt should have followed the "offender grievance procedure" established by the MDOC. *Id.* at (¶15). In sum, Babbitt's claim came under the jurisdiction of the MDOC as he was attacking aspects of his ISP, not the legality of his original sentence.

¶7. The instant case can be distinguished from *Babbitt*, however, because Graham is not attacking his removal from the ISP. Graham's argument attacks his guilty plea and the original sentence imposed by the circuit court. Therefore, Graham's motion for post-

conviction relief would be subject to review by the circuit court. *See* Miss. Code Ann. 99-39-5 (Rev. 2007). Accordingly, we find that the circuit court erred in its conclusion that it did not have jurisdiction to consider Graham's motion, and we will proceed to address Graham's individual assignments of error.

I. Whether Graham was advised of his right to appeal.

¶8. Graham claims that neither defense counsel, nor the circuit court judge, informed him of his right to appeal his sentence directly to the Mississippi Supreme Court. We first note that the circuit court clearly stated to Graham that, by entering a plea of guilty, he waived any right to appeal. At the time that Graham pleaded guilty, section 99-35-101 of the Mississippi Code Annotated (Rev. 2000), denied appeal from the circuit court to the supreme court "in any case where the defendant enters a plea of guilty." However, this section was not interpreted to deny the defendant the right to appeal the sentence given as a result of that plea. *See Trotter v. State*, 554 So. 2d 313, 315 (Miss. 1989) ("an appeal from a sentence imposed pursuant to a guilty plea is not equivalent to an appeal from the guilty plea itself").[1] In a recent case, *Elliott v. State*, 993 So. 2d 397, 399 (¶10) (Miss. Ct. App. 2008), the defendant raised the same issue as the one put forth by Graham, and this Court found that: "While it is true that a defendant may appeal the sentence resulting from a plea of guilty independently of the plea itself, there is no corresponding requirement that the circuit court notify the defendant of that right during the plea process." Accordingly, we found that the

[1] Section 99-35-101 of the Mississippi Code Annotated has been amended, effective July 1, 2008, to provide that "where [a] defendant enters a plea of guilty and *is sentenced*, then no appeal from the circuit court to the Supreme Court shall be allowed." Miss. Code Ann. §99-35-101 (Supp. 2009) (emphasis added).

circuit court's failure to inform a defendant of the ability to appeal the sentence separately did not deny the defendant due process. *Id.* at 399-400 (¶10). We find Graham's argument regarding the circuit court's failure to advise him of the right to appeal his sentence is without merit. We will address Graham's contention regarding his counsel's similar failure under his claim of ineffective assistance of counsel.

II. Whether the indictment was defective.

¶9. Graham alleges that his original indictment contained a defect because it only referenced the enhancement statute, section 41-29-142, not section 41-29-139, under which he ultimately pleaded guilty. He also claims that the indictment did not list the correct judicial district where he was charged.

¶10. First, we find no error as to the judicial district listed on the indictment. The indictment stated that Graham was indicted in the Second Judicial District of Jones County, Mississippi. The sentencing order also stated that he was in the Second Judicial District of Jones County, Mississippi. Therefore, there is no discrepancy between the indictment and the sentencing order.

¶11. Second, the statute under which Graham was indicted, section 41-29-142, was a penalty enhancement to the statute under which Graham was ultimately sentenced, section 41-29-139.[2] "An indictment must contain (1) the essential elements of the offense charged,

[2] The sentencing order on Graham's guilty plea stated that it was a violation of Mississippi Code Annotated section 41-29-139, not 41-29-142 as stated in the indictment. Section 41-29-142 is a statute that calls for enhanced penalties for crimes committed under 41-29-139, which are within a certain distance of a specified venues (i.e., schools, churches, and parks).

(2) sufficient facts to fairly inform the defendant of the charge against which he must defend, and (3) sufficient facts to enable him to plead double jeopardy in the event of a future prosecution for the same offense." *Gilmer v. State*, 955 So. 2d 829, 836-37 (¶24) (Miss. 2007). Section 41-29-142(1) states in part:

> Except as provided in subsection (f) of Section 41-29-139 or in subsection (2) of this section, *any person who violates or conspires to violate Section 41-29-139(a)(1)* . . . by selling, bartering, transferring, manufacturing, distributing, dispensing or possessing with intent to sell, barter, transfer, manufacture, distribute or dispense, a controlled substance, in or on, or within one thousand five hundred (1,500) feet of, a building or outbuilding which is all or part of a public or private elementary, vocational or secondary school, or any church, public park, ballpark, public gymnasium, youth center or movie theater or within one thousand (1,000) feet of, the real property comprising such public or private elementary, vocational or secondary school, or any church, public park, ballpark, public gymnasium, youth center or movie theater shall, upon conviction thereof, *be punished by the term of imprisonment or a fine, or both, of that authorized by Section 41-29-139(b) and, in the discretion of the court, may be punished by a term of imprisonment or a fine, or both, of up to twice that authorized by Section 41-29-139(b).*

(Emphasis added). It is apparent from our review of the record that the reason for the different statute was a result of Graham's plea agreement with the State in order to receive the more lenient sentence available under section 41-29-139. Consequently, we find no error in the disparity between the indictment and sentencing order.

¶12. Regardless of these findings, Graham waived any claim of defect with his entry of a guilty plea. The Mississippi Supreme Court "has held that a guilty plea waives any claim to a defective indictment." *Harris v. State*, 757 So. 2d 195, 197 (¶9) (Miss. 2000) (citing *Jefferson v. State*, 556 So. 2d 1016, 1019 (Miss. 1989)). "The entry of a guilty plea constitutes an admittance of 'all elements of a guilty charge' and 'operates as a waiver of all non-jurisdictional defects contained in an indictment.'" *Adams v. State*, 950 So. 2d 259, 261

(¶6) (Miss. Ct. App. 2007) (quoting *Brooks v. State*, 573 So. 2d 1350, 1352 (Miss. 1990)). "The only two exceptions to this rule are if the indictment fails to state an essential element of the crime charged or if there exists no subject matter jurisdiction." *Elliott*, 993 So. 2d at 398 (¶4) (citation omitted). As neither of these exceptions apply to the instant case, we find this issue is without merit.

III. Whether the sentence imposed upon Graham constituted an unconstitutional, illegal, and indeterminate sentence.

¶13. "The right of freedom from an illegal sentence is a fundamental right." *Edwards v. State*, 839 So. 2d 578, 579 (¶4) (Miss. Ct. App. 2003) (citing *Luckett v. State*, 582 So. 2d 428, 430 (Miss. 1991)). Graham argues that his original sentence was unconstitutionally vague and amounts to an indeterminate term not sanctioned by Mississippi law. The sentencing order reads, in pertinent part, as follows:

> In Cause No. 2005-233-KR2, whereby Defendant is charged with Possession of Cocaine, 11.59 grams, the Defendant is to serve a sixteen (16) year sentence with the Mississippi Department of Corrections, with fifteen (15) years to be suspended conditioned upon the successful completion of twelve (12) months of house arrest and four (4) years on supervised post-release supervision and successful completion of the Circuit Court Community Service Program.

Graham specifically asserts that since his final arrest occurred because of the failure to comply with the house-arrest rules, not on the basis of any additional criminal conduct, the circuit court should have only the authority to impose the amount of time Graham was on house arrest. We find this argument without merit. The order clearly stated a specific time of sixteen years to be served. The plain meaning of the sentencing order is apparent – that the suspended sentence of fifteen years was conditioned upon Graham's successful completion of the terms of his house arrest, post-release supervision, and community-service

program. Therefore, we find no merit to this argument by Graham.

¶14. Graham also contends that, as he was sentenced under section 41-29-139, he was not subject to the house-arrest program. Mississippi Code Annotated section 47-5-1003(1) (Rev. 2004) states:

> An intensive supervision program may be used as an alternative to incarceration for offenders who are low risk and nonviolent as selected by the department or court. Any offender convicted of a sex crime or a felony violation of Section 41-29-139(a)(1) shall not be placed in the program.

Graham points to the portion of section 47-5-1003(4) which states: "The courts may not require an offender to complete the intensive supervision program as a condition of probation or post-release supervision." We find this portion of the statute not applicable to the present case. Only Graham's suspension of fifteen years, not his probation, was conditional upon his completion of house arrest. This Court has held that "[m]aking [a] *suspension* of part of a defendant's sentence contingent upon successful completion of the ISP is not prohibited by statute." *Jenkins v. State*, 910 So. 2d 23, 25 (¶9) (Miss. Ct. App. 2005) (emphasis added).

¶15. Accordingly, although Graham's sentence was a violation of section 47-5-1003(1), we do not find that this constituted reversible error. Graham did not suffer any prejudice by the imposition of house arrest. This Court has stated that where "a [d]efendant is given an illegal sentence that is more favorable than what the legal sentence would have been then he/she is not later entitled to relief through a post-conviction action." *Jefferson v. State*, 958 So. 2d 1276, 1279 (¶9) (Miss. Ct. App. 2007). Under section 41-29-139(c)(1)(D), Graham could have been sentenced to no "less than six (6) years nor more than twenty-four (24) years and a fine of not more than Five Hundred Thousand Dollars ($500,000.00)." As we have

already mentioned, Graham was originally indicted under section 41-29-142, which was a penalty-enhancement statute to section 41-29-139. Graham, as a result of his plea bargain with the State, only pleaded guilty to violating 41-29-139, which was mere possession of cocaine, as opposed to 41-29-142, which involved the intent to distribute and carried a harsher sentence. As such, Graham received what we consider to be an extremely lenient sentence from the circuit court. As Graham "benefitted from the illegal sentence" that was "more lenient than the sentence to which he was entitled[,] . . . he did not suffer 'any fundamental unfairness from the illegal sentence, nor were his fundamental rights violated.'" *Jefferson*, 958 So. 2d at 1279 (¶11) (citations omitted). He received the sentence recommended by the State and, as such, was provided the opportunity to reduce his sentence by successfully completing the conditions set forth in that order. Having failed to satisfy those conditions, he cannot now attempt to set aside the sentence as prejudicial. This Court has stated: "[A] defendant cannot stand mute when he is handed an illegal sentence which is more favorable than what the legal sentence would have been, reap the favorable benefits of that illegal sentence, and later claim to have been prejudiced as a result thereof." *Hughery v. State*, 915 So. 2d 457, 459 (¶8) (Miss. Ct. App. 2005) (quoting *Graves v. State*, 822 So. 2d 1089, 1091 (¶8) (Miss. Ct. App. 2002)).

¶16. Although not specifically addressed by either party, the separate opinion has raised an additional question regarding the legality of the sentencing order – namely, whether the circuit court's failure to retain jurisdiction in the sentencing order, or its failure to conduct a revocation hearing following Graham's removal from the ISP constituted error. We agree with the separate opinion (hereafter "the dissent") that this sentencing order was unusual as

fifteen years of Graham's sixteen-year sentence were "*to be suspended conditioned* upon the successful completion of twelve (12) months of house arrest and four (4) years on supervised post-release supervision and successful completion of the Circuit Court Community Service Program." (Emphasis added).[3] Under the order, Graham's completion of the ISP and post-release supervision were conditions precedent to the suspension of his remaining sentence. Thus, it appears that the circuit court intended for the suspension to be self-executing; that is, once Graham had successfully completed the ISP, the suspension would automatically occur without Graham's being returned to the circuit court for re-sentencing. *See Brown v. Miss. Dep't of Corr.*, 906 So. 2d 833, 835 (¶5) (Miss. Ct. App. 2004) (finding that once the MDOC determines that a prisoner has violated the terms of his ISP, the MDOC is required to enforce the judge's original sentencing order.)

¶17. The dissent claims the sentence is "impossible" as it "suspends part of Graham's sentence while simultaneously requiring Graham to serve that sentence" and contends that this Court should reverse and remand for re-sentencing, or if necessary, withdrawal of Graham's guilty plea as the order impermissibly delegated to the MDOC the authority to revoke Graham's suspended sentence. Due to the unique nature of Graham's sentence and his status as a self-represented litigant, we requested and were provided with an *Amicus*

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[3] However, this type of conditional suspended sentence has occurred occasionally in the Mississippi circuit court system. *See Burns v. State,* 933 So. 2d 329, 330 (¶3) (Miss. Ct. App. 2006) ("if and when defendant successfully completes the [ISP,] the remaining FOUR (4) years be SUSPENDED, pending successful completion of a FOUR (4) year period of post-release supervision, pursuant to Mississippi Code 47-7-34"); *and Jenkins*, 910 So. 2d at 25 (¶8) (Miss. Ct. App. 2005) (sentence of five years in the custody of the MDOC, with one year in ISP, remaining four years suspended upon successful completion of one years in the IS and four years reporting probation).

Curiae brief from the Criminal Appeals Clinic at the University of Mississippi School of Law.[4] The *Amicus Curiae* brief asserts that the "self-executing" provision of the sentence, coupled with the court's failure to retain jurisdiction, constituted an improper delegation of authority over sentencing to the MDOC. The State also filed a supplemental brief wherein it argues that there is no improper delegation as it was the circuit court which determined the sentence should be suspended upon successful completion of the ISP; the MDOC merely decided whether the offender violated the ISP. We agree with the State that since the circuit court set the condition for the suspension of the sentence, it did not impermissibly delegate authority to the MDOC. The suspended sentence never came into being as the condition was not met; therefore, Graham is not entitled to a revocation hearing as the dissent argues. *See Moore v. State*, 830 So. 2d 1274, 1276-77 (¶¶8, 13) (Miss. Ct. App. 2002) (an inmate must complete the terms of his ISP and receive his suspended sentence in order to receive his right to a hearing prior to revocation). The removal from the ISP "to the general prison population is nothing more than an internal reclassification matter for which the inmate enjoys no liberty interest that would trigger the need for the kind of due process hearing necessary to revoke probation or parole." *Lewis v. State*, 761 So. 2d 922, 923 (¶3) (Miss. Ct. App. 2000). Even in cases where the circuit court has retained jurisdiction, this Court has found no violation of due process in the MDOC's reclassification of a prisoner in the ISP. *Miller v. State*, 804 So. 2d 1062, 1066 (¶12) (Miss. Ct. App. 2001). Graham had the opportunity to have fifteen

[4] The Criminal Appeals Clinic is headed by Professor Phillip Broadhead. Nakesha McQuirter, Senior Research Counsel, also contributed to the *Amicus Curiae* brief. We thank her and Professor Broadhead for their assistance to the Court.

years of his sentence suspended; all he had to do was to complete the ISP. There is nothing to indicate that, had Graham successfully completed the ISP, the MDOC would not have interpreted the sentencing order as automatically suspending the remainder of Graham's sentence as envisioned by the circuit court. It is only because Graham failed to complete the ISP that his suspended sentence never came into being. Therefore, the issue of whether the court had retained jurisdiction to modify his sentence is moot. *See Ivory v. State*, 999 So. 2d 420, 429 (¶27) (Miss. Ct. App. 2008) (as the defendant violated the terms of her ISP, any omission of language by the circuit court to have the defendant return for modification of sentence "becomes a nullity").

¶18. Further, as the State points out, Graham had the right to seek judicial review of the MDOC's decision regarding an ISP violation pursuant to Mississippi Code Annotated sections 47-5-801 to - 807 (Rev. 2004). In *Edwards v. Booker*, 796 So. 2d 991, 995-96 (¶¶20-22) (Miss. 2001), the Mississippi Supreme Court interpreted section 47-5-807 as giving jurisdiction to a circuit court to review the MDOC's removal of a prisoner from the ISP. We held similarly in *Lewis*, 761 So. 2d at 923 (¶6), stating that, under section 47-5-807, a prisoner who is aggrieved by a decision of the MDOC, after exhausting his administrative remedies, has a right "to judicial review of the matter[.]" Consequently, although the failure to conduct a revocation hearing before a prisoner is removed from the ISP does not violate any constitutional rights held by the prisoner, there is a statutory avenue which provides for judicial review over an prisoner's removal from the ISP. Accordingly, there was a procedure which, if followed by Graham, would have resulted in a judicial review of his removal from the ISP. There is no indication in the record that this procedure was followed. This appeal

does not arise from that process.

¶19. In sum, we do not find that the circuit court's failure to retain jurisdiction was fatal to the efficacy of Graham's sentence in this case, nor do we find that the failure to conduct a revocation hearing violated Graham's constitutional rights. Accordingly, with all respect to our dissenting colleagues, we find this issue is without merit.

IV. Whether defense counsel rendered ineffective assistance of counsel.

¶20. Graham claims that his trial counsel failed to render effective assistance of counsel. Specifically, he alleges that his counsel did not make him aware of the elements of the crime for which he pleaded guilty, and his counsel failed to advise him of his right to appeal. Graham also contends that his counsel neglected to investigate facts regarding the arrest prior to advising him to enter a plea of guilty.

¶21. "This Court employs the standard of review set forth in *Strickland v. Washington*, 466 U.S. 668, 687-96, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) in evaluating an ineffective assistance of counsel claim." *Calvert v. State*, 726 So. 2d 228, 231 (¶9) (Miss. Ct. App. 1998). Under *Strickland*, Graham "must prove that the performance of his attorney was deficient, and the deficiency was so substantial as to deprive [him] of a fair trial." *Id.* "[W]hen a convicted defendant challenges his guilty plea on grounds of ineffective assistance of counsel, he must show unprofessional errors of substantial gravity." *Buck v. State*, 838 So. 2d 256, 260 (¶12) (Miss. 2003). The defendant must also show that, but for counsel's errors, the defendant would not have entered a plea of guilty. *Id.*

¶22. Graham was fully advised by the court as to the consequences of his guilty plea, which we will discuss in further detail below. Also, as we have already found that there was

no error in regard to the judicial district, we find that Graham's allegation of ineffective assistance of counsel as to that particular issue is without merit. As to the claim that counsel failed to investigate the charge, this Court has found that "[f]or failure to investigate to arise to the level of ineffective assistance of counsel, the defendant must state with particularity what the investigation would have revealed and how it would have altered the outcome." *Middlebrook v. State*, 964 So. 2d 638, 640 (¶10) (Miss. Ct. App. 2007) (citing *Triplett v. State*, 840 So. 2d 727, 731 (¶11) (Miss. Ct. App. 2002)). Therefore, we have to ask "whether the evidence and testimony, if properly investigated and presented, would have changed the outcome had the parties gone forward." *Hannah v. State*, 943 So. 2d 20, 25 (¶9) (Miss. 2006).

¶23. Graham has presented this Court with no evidence to this effect. Although he contends that his counsel should have mentioned to him or the circuit court that the elements of possession of cocaine had not been met by the admissions made by Graham, we find that Graham knowingly and intelligently admitted to the charge against him, which included the possession of cocaine.

¶24. As to his right to appeal his sentence, Graham's affidavit does not even state that defense counsel failed to advise him of this right. Nor did he show how this alleged error affected his guilty plea. Mississippi Code Annotated section 99-39-9 (Rev. 2007) requires a movant for post-conviction relief to include, along with his filing, "an affidavit setting forth those facts and proof of facts within the scope of his personal knowledge as well as those beyond his personal knowledge[,]" not just "mere conclusions." *Sutton v. State*, 873 So. 2d 120, 123 (¶17) (Miss. Ct. App. 2004). Even if Graham's counsel failed to advise him of his

right to appeal his sentence, Graham has not alleged that he would have appealed his illegally lenient sentence. Any such claim would have been viewed with skepticism, as it was not in Graham's interest to appeal the sentence until four months later when his ISP status was revoked. By that time, his time for a direct appeal of his sentence had expired. *See Maston v. State*, 750 So. 2d 1234, 1237 (Miss. 1999) (appeals to the Mississippi Supreme Court must be made "by filing a notice of appeal with the trial court 'within 30 days after the date of entry of the judgment or order appealed from'") (citing M.R.C.P. 4(a)).

¶25. Thus, we find that Graham has not properly supported his claim of ineffective assistance of counsel. This issue is without merit.

V. Whether Graham's guilty plea was voluntarily and intelligently entered.

¶26. Graham alleges that his guilty plea was entered unknowingly and involuntarily. "A plea of guilty is binding only if it is entered voluntarily and intelligently[,]" which requires that "the defendant [be] informed of the charges against him and the consequences of his plea." *Jones v. State*, 922 So. 2d 31, 34 (¶10) (Miss. Ct. App. 2006) (citations omitted). "A defendant [also] must be told that a guilty plea involves a waiver of the right to a trial by jury, the right to confront adverse witnesses, and the right to protection against self incrimination." *Epps v. State*, 926 So. 2d 242, 245 (¶11) (Miss. Ct. App. 2005) (citation omitted).

¶27. Based on our review of the record, it is apparent that the circuit judge carefully questioned Graham about his ability to understand the charges against him, the repercussions of his guilty plea, and his willingness to enter into the plea arrangement. The circuit court

found Graham's decision was freely, voluntarily, and intelligently made and accepted his plea. Therefore, we find that this issue is without merit.

¶28. **THE JUDGMENT OF THE CIRCUIT COURT OF JONES COUNTY DENYING THE MOTION FOR POST-CONVICTION RELIEF IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO JONES COUNTY.**

KING, C.J., LEE AND MYERS, P.JJ., IRVING, ISHEE AND MAXWELL, JJ., CONCUR. ROBERTS, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY GRIFFIS, J.

ROBERTS, J., CONCURRING IN PART, DISSENTING IN PART:

¶29. I concur with the majority's resolution of Issues I, II, IV, and V. I write separately to address the majority's resolution of Issue III. In my opinion, the sentencing order, as drafted by the circuit judge, allowed or at least implicitly authorized the Mississippi Department of Corrections (MDOC) to revoke Ladennis Graham's suspended sentence, and the circuit court impermissibly made completion of the Intensive Supervision Program – colloquially known as house arrest – a condition of Graham's post-release supervision. In effect, the circuit court's sentence is illegal in that it suspends part of Graham's sentence while simultaneously requiring Graham to serve that sentence. In my judgment, such a sentence is logistically impossible. A defendant cannot be an inmate and serve a suspended sentence simultaneously, all based on the same sentence. Inmate status and simultaneous service of a suspended sentence, based on the same sentence, are mutually exclusive of one another. This is exactly what has occurred in Graham's case. Accordingly, I respectfully concur in part and dissent in part to the majority opinion.

¶30. I will briefly address certain factual and procedural matters in this case not because the majority's well-written opinion is inadequate, but to provide a framework for my own

analysis. The circuit court's sentencing order stated as follows:

> the Defendant is to serve a sixteen (16) year sentence with the Mississippi Department of Corrections, with fifteen (15) years to be suspended conditioned upon the successful completion of twelve (12) months of house arrest and four (4) years on supervised post-release supervision and successful completion of the Circuit Court Community Service Program.

It is important to note that, in this case, the circuit court judge did not retain sentencing authority for one year pursuant to Mississippi Code Annotated section 47-7-47(2)(a) (Rev. 2004), which states that a sentencing court may:

> upon its own motion, acting upon the advice and consent of the commissioner not earlier than thirty (30) days nor later than one (1) year after the defendant has been delivered into the custody of the [MDOC], to which he has been sentenced, suspend the further execution of the sentence and place the defendant on earned probation . . . .

¶31. According to the circuit court's order summarily denying post-conviction relief, the circuit court sentenced Graham on March 28, 2006. On July 25, 2006, Graham was arrested again. At that time, he was an inmate in the house-arrest program serving his twelve-month sentence to house arrest. House arrest is "the confinement of a person convicted or charged with a crime to his place of residence under the terms and conditions established by the [MDOC] or court." Miss. Code Ann. § 47-5-1001(e) (Rev. 2004). House arrest is not a probationary status, but merely an alternative form of confinement. *Lewis v. State*, 761 So. 2d 922, 923 (¶4) (Miss. Ct. App. 2000).

¶32. An offender on house arrest is under the full and complete jurisdiction of the MDOC, and only a classification hearing officer may remove that offender from the program and re-classify him to custody status. Miss. Code Ann. § 47-5-1003(3) (Rev. 2004). Thus, the authority to reclassify an inmate from house arrest and to place him in the general prison

population is within the exclusive jurisdiction of the MDOC and outside the authority of the original sentencing judge. *Lewis*, 761 So. 2d at 923 (¶4). In *Babbitt v. State*, 735 So. 2d 406, 409 (¶14) (Miss. 2000), the Mississippi Supreme Court made it clear that an offender in the house-arrest program is an inmate within the exclusive custody and control of the MDOC. Pursuant to that authority, the MDOC reclassified Graham, removed him from house arrest, and placed him in custody status.

¶33. However, based on the language used in the sentencing order, the MDOC required that Graham not only serve the eight remaining months of his house-arrest sentence, but also the fifteen-year suspended sentence. The record reflects that Graham is now serving his entire sixteen-year sentence in the custody of the MDOC. That is, the MDOC "unsuspended" the suspended portion of Graham's sentence. Only a sentencing court is authorized to revoke a suspended sentence. Evidently, this occurred based on the language of the circuit court's sentencing order that made Graham's fifteen-year suspended sentence conditional upon his successful completion of house arrest. However, pursuant to Mississippi Code Annotated section 47-5-1003(4) (Rev. 2004), a sentencing court may not require that an offender complete the house-arrest program as a condition of probation or post-release supervision. The majority attempts to distinguish Graham's case by stating that only Graham's suspended sentence was conditioned on successful completion of house arrest, not his probation or his post-release supervision. Such is a distinction without a difference. An offender cannot logically be placed on probation without all or part of his sentence being simultaneously suspended. Stated differently, the fallacy in this case is that, at the time the MDOC reclassified Graham and "unsuspended" his suspended sentence,

Graham was an inmate in custody. His suspended sentence had yet to begin. It could only begin after the MDOC discharged him from the one-year-incarceration portion of his sentence.

¶34. In *Moore v. State*, 830 So. 2d 1274, 1274 (¶2) (Miss. Ct. App. 2002), a circuit court sentenced Don Moore to ten years, placed him on house arrest, and retained sentencing jurisdiction over him for one year. A handwritten addendum to the circuit court's sentencing order stated that "post[-]release supervision for a period of 3 years will follow successful completion of [the] house[-]arrest program." *Id*. at 1274-75 (¶2). Moore later violated the terms of his house arrest. *Id*. at 1275 (¶3). The MDOC removed Moore from house arrest and reclassified him. *Id*. Moore was then required to serve the remainder of his ten-year sentence. *Id*. This Court held that Moore's probation or post-release supervision was not conditional upon completion of the house-arrest program. *Id*. at 1276 (¶9). Instead, because Moore failed to complete the house-arrest program, "rescission of the possibility of probation" occurred. *Id*. at 1277 (¶15).

¶35. The majority relies on *Jenkins v. State*, 910 So. 2d 23, 25 (¶9) (Miss. Ct. App. 2005) as authority for its conclusion that the circuit court did not violate section 47-5-1003(4). With utmost respect for the majority, as with the facts in *Moore*, I would find that the facts of this case are distinguished from the facts in *Jenkins*. In *Jenkins*, an offender was sentenced to five years in the custody of the MDOC with one year on house arrest with the possibility that the remaining four years would be suspended. *Id*. at 24 (¶1). When Otha Jenkins violated the house-arrest rules, he was placed in the general prison population and told that he would have to serve the remainder of his five-year sentence. *Id*. at 25 (¶6).

Jenkins failed to provide an adequate record for review, and this Court stated that "[b]ecause Jenkins failed to include his motion for post-conviction relief in the record before us, we must affirm the judgment of the circuit court." *Id*. at (¶5). It is unclear in the *Jenkins* opinion whether the circuit court retained sentencing jurisdiction pursuant to section 47-7-47 because we concluded that "[b]ecause Jenkins did not successfully complete the one year of [house arrest], four years of his sentence were never suspended and he was never placed on probation. Rather, for violating the [house-arrest rules], Jenkins had to serve his entire five[-]year sentence." *Id*. at (¶10). Had the circuit court retained jurisdiction and had Jenkins completed the first year of house arrest, the remaining four years of his sentence could have then been suspended, and he would have been placed on probation. *Id*. at (¶6).

¶36. Here, the circuit court did not sentence Graham to an entire sentence while retaining jurisdiction over Graham for one year, thereby making future suspension of his sentence conditional upon completion of one year on house arrest. Instead, the circuit court sentenced Graham to sixteen years and then went further and apparently gave the MDOC the authority to suspend fifteen years of that sentence upon successful completion of house arrest. Future suspension by the circuit court was not at issue. In fact, it was rendered impossible when the circuit court declined to retain jurisdiction over Graham for one year. Without retention of sentencing jurisdiction pursuant to section 47-7-47, the circuit court's authority to modify Graham's sentence terminated at the expiration of the term of court. *Miss. Comm'n on Judicial Performance v. Russell*, 691 So. 2d 929, 944 (Miss. 1997). The fact remains that it is unclear whether the circuit court suspended fifteen years of Graham's sentence *at the time it sentenced Graham*.

¶37. An offender in the house-arrest program, just like an offender incarcerated in prison, is in the legal custody of the MDOC. For the year following March 28, 2006, Graham was for all intents and purposes an "inmate" in the custody of the MDOC until discharged by the MDOC. After discharge from house-arrest inmate status by the MDOC, Graham would have begun his four years of supervised post-release supervision. If Graham violated any condition of his post-release supervision during that four-year period, the circuit court could then revoke all or part of his previously suspended fifteen-year sentence.

¶38. Moreover and most importantly, Graham was not afforded his constitutional rights incident to revocation of a suspended sentence. Graham has constitutionally protected due-process rights to a hearing before the circuit court prior to the revocation of his suspended sentence. *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973). The record does not indicate that there was ever a revocation hearing before the circuit court. When the MDOC removed Graham from the house-arrest program and reclassified him to inmate status, the MDOC's only authority was to maintain custody of Graham for the balance of his one-year original custodial sentence.

¶39. Mississippi Code Annotated 47-7-37 (Supp. 2009) codifies the minimum due-process requirements applicable to probation-revocation procedures mandated by the United States Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471, 487-88 (1972) and in *Gagnon*, 411 U.S. at 781-82. *Riely v. State*, 562 So. 2d 1206, 1209-12 (Miss. 1990). The procedures for revocation of post-release supervision and recommitment of the offender to the correctional facility must be "conducted in the same manner as procedures for the revocation of probation and imposition of a suspended sentence." Miss. Code Ann. § 47-7-34(2) (Rev. 2004). After

the final revocation hearing, the court "may continue or revoke all or any part of the probation or the suspension of sentence, and may cause the sentence imposed to be executed or may impose any part of the sentence which might have been imposed at the time of conviction." Miss. Code Ann. § 47-7-37. Only a court has the authority to revoke probation or post-release supervision under section 47-7-37. *Grace v. State*, 919 So. 2d 987, 989 (¶8) (Miss. Ct. App. 2005). Likewise, only the circuit court may revoke a suspended sentence. Miss. Code Ann. § 47-7-37. It follows that the MDOC has no such authority. Graham did not go before the circuit court for a revocation hearing. Instead, the MDOC effectively revoked Graham's suspended sentence and ordered him to serve the fifteen-year-suspended portion of his sentence.

¶40. In my judgment, this case hinges on the fundamental illegally indeterminate nature of the sentence imposed by the circuit court that resulted from the plea-bargain agreement. The circuit court's use of the phrase "to be suspended conditioned upon the successful completion of" creates the confusion in this sentence. At the time of sentencing on March 26, 2006, did the circuit court suspend part of Graham's sentence, or did it not? I submit that the answer to that question is undeterminable. Unquestionably, the circuit court lost sentencing jurisdiction over Graham's admitted crime at the end of the term of court during which Graham pled guilty, since the circuit court did not retain sentencing jurisdiction pursuant to section 47-7-47. *Russell*, 691 So. 2d at 944. Only the circuit court can determine if a felony offender's sentence, or part of it, has been suspended. Such authority cannot be delegated or transferred to an agency of the executive department, such as the MDOC. This principle is a constitutional element in maintaining a separation of the branches of the

government. In this case, it is clear beyond peradventure that the circuit court did not revoke Graham's suspended sentence. There was no revocation hearing before the circuit court. When the MDOC classification committee determined that Graham had violated the terms of house arrest, Graham's classification status was changed from house-arrest classification to actual custody in prison – not for the remaining eight months of his house arrest, but for the entire fifteen-year period of his potentially suspended sentence. I submit that the circuit court's sentence was illegally indeterminate, rather than illegally lenient. "An argument that the sentence violates [the] law, either because it is clearly erroneous or because it is unredeemably ambiguous or incomplete, would be proper under the post-conviction[-]relief procedures." *Burns v. State*, 933 So. 2d 329, 331 (¶8) (Miss. Ct. App. 2006).

¶41. In my opinion, the proper resolution would be to reverse the circuit court's summary denial of post-conviction relief and remand this matter for an evidentiary hearing. Graham was sentenced pursuant to a plea bargain with the prosecution. If the circuit court concludes that the illegal plea recommendation was a material factor in Graham's free and voluntary decision to plead guilty, then the circuit court should consider allowing Graham to withdraw his plea. Graham's case would then be reinstated to the active trial docket. Because the majority finds no error, I respectfully dissent.

GRIFFIS, J., JOINS THIS OPINION.