IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-CP-01757-COA

WILL ROBERTSON BROWN **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	05/24/2010
TRIAL JUDGE:	HON. KATHY KING JACKSON
COURT FROM WHICH APPEALED:	JACKSON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	WILL ROBERTSON BROWN (PRO SE)
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JOHN R. HENRY JR.
NATURE OF THE CASE:	CIVIL - POST-CONVICTION RELIEF
TRIAL COURT DISPOSITION:	DENIED MOTION FOR POST-CONVICTION RELIEF
DISPOSITION:	AFFIRMED-06/12/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE IRVING, P.J., ISHEE AND RUSSELL, JJ.

ISHEE, J., FOR THE COURT:

¶1. In 1986, Will Robertson Brown pleaded guilty in the Jackson County Circuit Court to second-degree arson, burglary, and larceny. Brown was sentenced to serve seven years on each count in the custody of the Mississippi Department of Corrections (MDOC), with the sentences to run concurrently. After his release from the MDOC, Brown was convicted of a federal crime and is currently serving an enhanced sentence in a federal prison. In 2010, while in federal prison, Brown filed a motion for post-conviction relief (PCR) in the circuit court. The circuit court denied the motion finding that Brown was not entitled to any relief

and that his PCR motion was time-barred. Brown then appealed the circuit court's judgment. We affirmed, finding that Brown's PCR motion was time-barred. *See Brown v. State*, 71 So. 3d 1267, 1269 (¶8) (Miss. Ct. App. 2011). Brown now attacks the same circuit court judgment asserting that his allegedly involuntary guilty plea and ineffective assistance of counsel have resulted in a more strenuous sentence in federal court. Finding no reversible error, we affirm the circuit court's judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

¶2. On September 12, 1986, Brown pleaded guilty in the circuit court to burglary, larceny, and second-degree arson. He received seven years on each count to be served in the custody of the MDOC, with the sentences to run concurrently. Brown completed his sentence and was released from the MDOC.

¶3. Some time after his release, Brown was convicted in the United States District Court for the Southern District of Mississippi of a federal crime involving the possession of a firearm. The United States Sentencing Guidelines (USSG) mandated that the district court consider Brown's prior criminal activity in assessing his sentence. After doing so, the district court classified Brown as an "armed career criminal" (ACC) purportedly due to his 1986 conviction for second-degree arson. He received an enhanced sentence of 188 months. Brown is currently serving his sentence in a federal prison in Marion, Illinois.

¶4. On May 17, 2010, over twenty years after the circuit court's sentencing order and well after his release from the MDOC, Brown filed a PCR motion in the circuit court. Therein, Brown attacked the legality of his 1986 guilty plea to second-degree arson and claimed he received ineffective assistance of counsel. We addressed Brown's appeal in *Brown*, 71 So.

3d at 1267 (¶8). Because Brown filed his PCR motion approximately seventeen years after the statute of limitations had run, we agreed with the circuit court's determination that Brown's motion was time-barred. *Id.* at 1268 (¶6). We further found that because Brown was no longer in the custody of the MDOC, he was not entitled to relief under Mississippi's PCR statute. *Id.* at 1269 (¶7).

¶5. In his current appeal, Brown again claims his second-degree-arson conviction should be overturned because it was involuntarily entered and he received ineffective assistance of counsel. He further asserts this Court should reverse his second-degree-arson conviction so that he would receive a reduced federal sentence since the ACC enhancement would no longer apply to him.

DISCUSSION

¶6. "We will not disturb a circuit court's denial of a PCR motion unless the decision is found to be clearly erroneous." *Id.* at 1268 (¶4) (citation omitted). Questions of law are reviewed de novo. *Id.*

I. Time-Bar and Successive-Writ Bar

¶7. Mississippi Code Annotated section 99-39-5 (Supp. 2011) governs motions for post-conviction relief. The statute provides that a prisoner has three years to request post-conviction relief. After that time, only certain cases are excepted from the procedural bar. Exceptions to the three-year statute of limitations are as follows:

> 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 [the movant's] conviction or sentence or that [the movant] 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; or [t]hat, even if the petitioner pled guilty or nolo contendere, or confessed or admitted to a crime, there exists biological evidence not tested, or, if previously tested, that can be subjected to additional DNA testing that would provide a reasonable likelihood of more probative results, and that testing would demonstrate by reasonable probability that the [movant] would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution. Likewise excepted are those cases in which the [movant] claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction.

Miss. Code Ann. § 99-39-5(2)(a)-(b). Brown has failed to provide any information or claims evincing an exception to the three-year statute of limitations. As such, his PCR motion is time-barred.

¶8. Furthermore, Mississippi Code Annotated section 99-39-23(6) (Supp. 2011) provides that a PCR movant cannot raise any issue that has been addressed in a final judgment with specific findings of facts and conclusions of law. Any motion filed after entry of the final judgment and asserting the same issue is procedurally barred as a secondary or successive writ.

¶9. We addressed Brown's prior appeal of the circuit court's denial of his PCR motion in *Brown*. Brown's current appeal merely differs from his prior appeal in his assertion that the reversal of his 1986 second-degree-arson conviction would reduce his current federal sentence. Brown's argument, however, bears no weight to our adjudication of his appeal. Brown's claim does not negate the fact that he has failed to prove an exception to the time-bar applies, and his claim is now also successive-writ barred.

II. Entitlement to Relief under the Post-Conviction-Relief Statute

¶10. In our prior ruling on Brown's appeal, we noted that Brown is not eligible for relief under Mississippi's PCR statute because he is no longer in the custody of the MDOC. *Brown*, 71 So. 3d at 1269 (¶8). We held: "Post-conviction relief applies only to a prisoner who is in the custody of the State, serving a sentence imposed by a Mississippi court." *Id.* at (¶7) (citing *Smith v. State*, 914 So. 2d 1248, 1250 (¶7) (Miss. Ct. App. 2005)). Specifically, the PCR statute applicable at the time of Brown's state sentencing reflects that "post-conviction relief . . . applies only to a 'prisoner in custody under sentencing of a court of record of the State of Mississippi . . . .'" *Hester v. State*, 749 So. 2d 1221, 1223 (¶8) (Miss. Ct. App. 1999) (quoting Miss. Code Ann. § 99-39-5(1) (Rev. 1994)).

¶11. On March 16, 2009, the PCR statute was amended as follows to expand the reach of the PCR statute to a wider range of individuals:

> Any person sentenced by a court of record of the State of Mississippi, including a person currently incarcerated, civilly committed, on parole or probation or subject to sex offender registration for the period of the registration or for the first five (5) years of the registration, whichever is the shorter period, may file a motion to vacate, set aside or correct the judgment or sentence . . . .

Miss. Code Ann. § 99-39-5(1) (Supp. 2009).[1] With regard to the very foundation of the PCR statute prior to the 2009 amendment, we stated that "[t]he preeminent requirement of the Post-Conviction Collateral Relief Act [(PCR statute)] is that the petitioner be 'a prisoner in custody under sentence of a court of record of the State of Mississippi.'" *Willis v. State*, 856

[1] We note that the current version of Mississippi Code Annotated section 99-39-5(1) (Supp. 2011) remains unchanged from the version in the 2009 Supplement.

So. 2d 555, 556 (¶3) (Miss. Ct. App. 2003) (quoting Miss. Code Ann. § 99-39-5 (Rev. 2000)).

¶12. In 2010, we handed down *Parker v. State*, 47 So. 3d 732 (Miss. Ct. App. 2010), which bears great factual similarity to Brown's case. In 1980, Charles Lee Parker pleaded guilty in a Mississippi circuit court to two drug charges and was placed in the custody of the MDOC. *Id.* at 733 (¶3). After being released, Parker was convicted of armed robbery and another drug charge. In 1986, he was sentenced to three years for the drug conviction to run consecutively to the armed-robbery sentence in the custody of the MDOC. *Id*. at (¶4).

¶13. Some time after his release from the MDOC, Parker was convicted of a federal crime and sentenced to serve time in a federal prison. *See id*. at 734 (¶7). His federal sentence was enhanced due to his prior state convictions. *Id.* In 2008, while in federal custody, he filed a PCR motion in the circuit court challenging his 1986 drug conviction on the grounds of innocence and ineffective assistance of counsel. *Id*. at 733 (¶5). We held:

> It is undisputed that Parker was incarcerated in a federal correctional facility — and not under custody of a sentence of a court of record of the State of Mississippi — when he filed his 2008 PCR motion. Therefore, this [C]ourt, like the circuit court, lacks jurisdiction to consider his request for post-conviction relief.
>
> Further, we decline Parker's invitation to expand the reach of the pre-March 16, 2009, version of section 99-39-5(1) to all petitioners whose sentences are based on prior Mississippi convictions.

Id. at 734 (¶11-12).

¶14. A limited exception allows movants who are not in the custody of the MDOC, but are in custody outside of Mississippi, to have a PCR motion heard in a Mississippi court. "The Mississippi Supreme Court has clarified that a prisoner held in another state who, 'but for

that incarceration would be subject to imprisonment here,' is 'in custody' for purposes of section 99-39-5." *Putnam v. Epps*, 963 So. 2d 1232, 1234 (¶6) (Miss. Ct. App. 2007) (quoting *Unruh v. Puckett*, 716 So. 2d 636, 639 (¶11) (Miss. 1998)). In such cases, the State of Mississippi is deemed to have a "hold" on the prisoner, and jurisdiction is conveyed to Mississippi courts to hear the prisoner's PCR motion. *Id.*

¶15. In sum, the exception, though enunciated prior to the 2009 amendment, references Mississippi's potential custody over a prisoner in custody in another state. As stated in *Unruh*, the exception applies when, but for another entity's incarceration of a prisoner, the prisoner would be in the custody of the MDOC. However, once a prisoner is released from the MDOC, Mississippi has no custody over the person whatsoever. In Brown's case, as in *Parker*, Mississippi relinquished any and all custody rights over Brown when he was released from the MDOC.

¶16. In *Putnam*, we referenced the supreme court's acknowledgment that the PCR statute "is arguably 'post-conviction habeas corpus renamed.'" *Putnam*, 963 So. 2d at 1234 (¶5) (quoting *Walker v. State*, 555 So. 2d 738, 740-41 (Miss. 1990)). The Mississippi Legislature has determined that petitions for habeas corpus apply to "cases of illegal confinement or detention by which any person is deprived of his liberty, or by which the rightful custody of any person is withheld from the person entitled thereto . . . ." *Johnson v. Miller*, 919 So. 2d 273, 277 (¶12) (Miss. Ct. App. 2005) (quoting Miss. Code Ann. § 11-43-1 (Rev. 2002)). "A petition for habeas corpus is still a viable option in limited circumstances, such as a challenge of the denial of bail pending an appeal, but 'purely collateral post-conviction remedies attacking a judgment of conviction or sentence should be sought under authority of [the PCR

statute] . . . .'" *Putnam*, 963 So. 2d at 1234 (¶5) (quoting *Walker*, 555 So. 2d at 740-41). As such, a PCR motion is meaningless when filed in a court having no authority over the custody of the person being detained.

¶17. Here, Brown invites us to widen the PCR statute's net by liberally interpreting the legislature's 2009 amendment to allow PCR eligibility for movants who have served time in the custody of the MDOC but who have either been permanently released from the MDOC or whose custody is no longer under the control of the State of Mississippi at the time of the PCR motion's filing. We decline Brown's invitation since such an expansion would eviscerate the very purpose of the PCR statute's enactment.

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

LEE, C.J., IRVING, P.J., BARNES AND RUSSELL, JJ., CONCUR. CARLTON, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. ROBERTS, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY GRIFFIS, P.J., MAXWELL AND FAIR, JJ.

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

¶19. While I agree with the majority's finding that the statutory time and subsequent-writ bars prohibit granting Brown relief under Mississippi's PCR statute, I must respectfully dissent from the majority's gratuitous assertions in regard to Brown's standing to file his PCR motion. I am compelled to clarify my points of concern and dissent from the standing analysis.

¶20. It is important to note that in the majority's opinion, it finds Brown does not have standing to file his PCR motion.[2] If a petitioner lacks standing to file a PCR motion, the circuit court and ultimately this Court likewise lack jurisdiction to address the merits of the PCR motion. The proper disposition is for this Court to dismiss the case for lack of jurisdiction. *See Pruitt v. Hancock Med. Ctr.*, 942 So. 2d 797, 801 (¶14) (Miss. 2006). Inexplicably, the majority finds Brown does not have standing while simultaneously addressing the merits of the case by affirming the circuit court's decision to dismiss Brown's PCR motion as time-barred. By affirming the circuit court, the majority is implying that both the circuit court and this Court have proper jurisdiction to hear this case. Therefore, under the majority's analysis of standing, the proper disposition for this case should be a dismissal of Brown's appeal for lack of jurisdiction.

¶21. Further, the majority relies on *Brown v. State*, 71 So. 3d 1267 (Miss. Ct. App. 2011) (*Brown I*), to support its finding that only prisoners in the custody of the MDOC and serving a sentence imposed by a Mississippi court are eligible to file a PCR motion. However, as stated in my opinion in *Brown v. State*, 2012 WL 917602 (Miss. Ct. App. 2012) (*Brown II)*, I would overrule *Brown I* and *Wilson v. State*, 76 So. 3d 733 (Miss. Ct. App. 2011), for the exact proposition that the majority relies on in the current case.[3] In *Brown II*, 2012 WL

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[2] Although neither party raises standing as an issue in its brief, it is well settled that it is the duty of this Court to determine if there is proper jurisdiction before addressing the merits. *See, e.g., Winborn v. State*, 213 Miss. 322, 323, 56 So. 2d 885, 885 (1952).

[3] "To the extent that *Wilson* and *Brown* state or imply that a PCR petitioner who filed a PCR petition after March 16, 2009, must still be in custody for the conviction he is currently attacking, I submit that those two cases should be overruled." *Brown II*, 2012 WL 917602, at *4 (¶15).

917602, at *2 (¶9), we affirmed the circuit court's dismissal of Brown's PCR motion on the ground that his PCR motion was time-barred; however, I concurred in only the result and wrote separately to discuss Brown's standing to bring his PCR motion. I found that Brown did have standing to bring his PCR motion, but two judges opined that Brown lacked standing under the new amendment to the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA). *See id.* at *4-5 (¶16). The UPCCRA was amended on March 16, 2009, as the majority in the current case correctly points out, "to expand the reach of the [UPCCRA] to a wider range of individuals." Maj. Op. at (¶11). In both *Brown I* and *Wilson*, the petitioners filed their PCR motions *after* the effective date of the amendment, and I argued both petitioners should have received the benefit of the expanded language of the statute. *Id.* at *4 (¶13). The proposition that any petitioner not in the custody of the MDOC at the time of filing has no standing to file a PCR motion no longer matches the expansive language of the 2009 amendment to the statute.

¶22. An additional concern lies with the majority's language finding that "once a prisoner is released from the MDOC, Mississippi has no custody over the person whatsoever," and "Mississippi relinquished any and all custody rights over Brown when he was released from the MDOC." Maj. Op. at (¶15). I also have concern with the majority's statement that "a PCR motion *is meaningless* when filed in a court having no authority over the custody of the person being detained." Maj. Op. at (¶16). I submit that these statements are incorrect and misleading based on a reading of the current Mississippi Code Annotated section 99-39-5(1) (Supp. 2011), which clearly allows "[a]ny person sentenced by a court of record of the State of Mississippi, including a person currently incarcerated, *civilly committed*, on *parole* or

probation or *subject to sex offender registration*." to file a PCR motion. For example, an individual granted parole by the Mississippi Parole Board is not considered to be "in custody" of the MDOC or the circuit court; instead, that individual is under the exclusive authority of the Mississippi Parole Board, though not "in custody." Miss. Code Ann. § 47-7-5 (Rev. 2011). Similarly, an individual on probation is not "in custody" of MDOC but remains subject to the jurisdiction of the circuit court. Miss. Code Ann. § 47-7-37 (Rev. 2011). Prior to the amendment, these individuals on probation or parole whose probation or parole had not been revoked would have no standing to bring a PCR motion since they were not "in custody." Under the amendment, they clearly do. Another obvious example would be an individual who, at the time of filing, was in custody of a foreign state but still subject to sex-offender registration for a five-year period based on a Mississippi conviction. The amended language would unquestionably give him standing to file a PCR motion in the Mississippi court of conviction to collaterally attack his Mississippi conviction. In such circumstances as enumerated above, the filing of a PCR motion would certainly not be "meaningless" as the majority asserts. The amendment specifically abolished the "in custody" requirement and granted such convicted offenders standing. The future will undoubtably bring other less obvious scenarios to light that will require this Court's analysis of the PCR petitioner's standing. When a convicted offender not on parole, probation, civilly committed, or subject to sex-offender registration files a PCR motion and legitimately claims newly discovered evidence, such as DNA evidence, conclusively proving actual innocence, and the State acknowledges such evidence does prove actual innocence, this Court may well hesitate before dismissing for lack of standing. At that time, this Court may conclude such

an individual should not be denied the right to present evidence that could clear his record and relieve him of the collateral consequences placed upon him by his status as a convicted felon. Therefore, I submit that under the present language of the statute, convicted offenders such as Brown do have standing to file a PCR motion even though not in the physical custody of the MDOC at the time of filing.

¶23. Lastly, the majority would find that "[a] limited exception allows movants who are not in the custody of the MDOC, but are in custody outside of Mississippi, to have a PCR motion heard in a Mississippi court." Maj. Op. at (¶14). Relying on *Putnam v. Epps*, 963 So. 2d 1232, 1234 (¶6) (Miss. Ct. App. 2007) (quoting *Unruh v. Puckett*, 716 So. 2d 636, 639 (¶11) (Miss. 1998)), the majority submits that a petitioner who is incarcerated in another state and "'but for that incarceration would be subject to imprisonment here [in Mississippi]' is 'in custody' for purposes of section 99-39-5." Obviously, both *Putnam* and *Unruh* predate the 2009 amendment and clearly illustrate circumstances where both this Court and the Mississippi Supreme Court have relaxed, if you will, the standing requirement and held the petitioner may proceed even though he was not "in custody" of the state of Mississippi at the time of filing. In *Putnam*, James Putnam was a federal inmate serving his sentence in a Kentucky federal facility. *Putnam*, 963 So. 2d at 1233 (¶1). However, he was also then serving a Mississippi circuit court sentence that ran concurrently with his federal sentence. *Id.* *Unruh* is an unusual case. David Unruh was a convicted felon serving a South Dakota sentence in a South Dakota prison. *Unruh*, 716 So. 2d at 638 (¶5). Unruh had been serving a sentence in a Mississippi facility when he agreed to act as an informant and federal witness in a prison money order scam. *Id.* at (¶2). In exchange for his involvement, he was to

allowed to serve the remainder of his prison sentence in a federal facility. *Id.* at (¶3). Unruh was transferred to a federal facility in Alabama, but was soon thereafter returned to a Lowdnes County, Mississippi correctional facility. *Id.* at (¶4). He then escaped from the Lowdnes County facility and fled to South Dakota. *Id.* at (¶¶4-5). Unruh committed a crime in South Dakota, resulting in his incarceration there. *Id.* at (¶5). Mississippi had placed a "hold" on him while he was incarcerated in South Dakota. *Id.* at 639 (¶11). Both Putnam and Unruh were found to have standing to file a PCR motion even though not "in custody." While I recognize that both this Court and the supreme court relaxed the standing requirement in *Putnam* and *Unruh*, I do not agree that this exception to the custody requirement remains the only valid exception, particularly after the Mississippi Legislature's 2009 amendment to the PCR statute.

¶24. I agree with the majority's affirmation of the circuit court's dismissal of Brown's PCR motion as time-barred and the majority's application of the success-writ bar, but I must respectfully dissent from the majority's gratuitous analysis and discussion of standing and the 2009 amendment to section 99-39-5.

GRIFFIS, P.J., MAXWELL AND FAIR, JJ., JOIN THIS OPINION.