

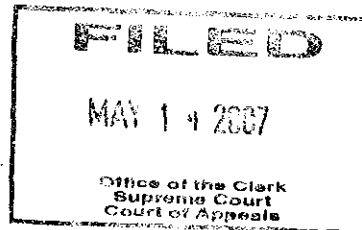
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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TIMOTHY R. SHARP

APPELLANT

VS.



NO. 2006-CP-1407

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of Itawamba County, Mississippi in which relief on the prisoner's motion in post - conviction relief was denied.

STATEMENT OF FACTS

The prisoner was convicted of two counts of sexual battery, and his convictions were affirmed by the Court of Appeals on 6 January 2004. *Sharp v. State*, 862 So.2d 576 (Miss. Ct. App. 2004). In his direct appeal, the prisoner raised a number of claims concerning his attorney's performance at and prior to trial. However, the Court of Appeals did not address them, finding the record before it to be inadequate for the purpose.

On 25 October 2004, the Supreme Court granted the prisoner leave to proceed in post - conviction relief in the trial court on the limited question of whether the prisoner's attorney was ineffective for having failed to call an expert witness to testify that a certain injury suffered by the victim was caused by accident. (R. Vol. 1, pp. 56 - 57). The prisoner, on 13 July 2005, filed a motion in post conviction relief in the trial court. In this motion, the prisoner alleged that his

attorney was ineffective for the reason set out in the Supreme Court's order granting leave to proceed. However, he also alleged quite a few other claims of ineffective assistance of counsel. (R. Vol. 1, pp. 4 - 39).

The Circuit Court entered an Order setting a date for an evidentiary hearing on the prisoner's motion. (R. Vol. 1, pg. 59). A hearing was held at the appointed time, and after the hearing the Circuit Court denied relief on the prisoner's motion, setting out its findings for that ruling. (R. Vol. 1, pp. 71 - 73). The prisoner then prosecuted this appeal.

STATEMENT OF ISSUES

1. DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST -CONVICTION RELIEF

SUMMARY OF ARGUMENT

THAT THE PRISONER HAS FAILED TO DEMONSTRATE ERROR IN THE CIRCUIT COURT'S RULING THAT THE PRISONER WAS NOT ENTITLED TO POST - CONVICTION RELIEF

ARGUMENT

THAT THE PRISONER HAS FAILED TO DEMONSTRATE ERROR IN THE CIRCUIT COURT'S RULING THAT THE PRISONER WAS NOT ENTITLED TO POST - CONVICTION RELIEF

The record presented on this appeal by the prisoner consists only of the pleadings and orders filed in the Circuit Court and certain portions of what appears to be the trial transcript. In view of the Circuit Court's order setting an evidentiary hearing and its order denying relief on the prisoner's motion, in which reference is made to the hearing, it is clear that there was a hearing. However, the prisoner has not seen fit to see to it that the hearing was transcribed by a court reporter.

It is an appellant's duty to see to it that this Court is presented with a proper record. *Smith v. State*, 527 So.2d 847, 849 (Miss. 1990). This rule has no less an application because an

appellant proceeds *pro se*. *Dillon v. State*, 641 So.2d 1223 (Miss. 1994). Here, the prisoner has failed to have the hearing on his motion transcribed and filed. Without it, it is simply impossible to determine whether the trial court's ruling was error. All that is before the Court is the allegations of ineffective assistance of counsel. There is no evidence in support of the claim.

In view of this, the Order of the Circuit Court denying relief on the prisoner's motion must be affirmed. The rulings of a trial court are presumed to be correct in this Court. *Comeaux v. Freeman*, 918 So.2d 780 (Miss. Ct. App. 2005)(citing *Shelton v. Kindred*, 279 So.2d 642 (Miss. 1973)). It is an appellant's burden to demonstrate error in a ruling he complains of here. If there is no record to support his claim, the ruling must be upheld. *Smith, supra*.

The Appellant makes many allegations of fact in his brief here. However, none of these allegations is supported by the record. They are for that reason to be ignored. *Mason v. State*, 440 So.2d 318 (Miss. 1983). Since there is no record here of the evidentiary hearing, this Court must affirm the Circuit Court's ruling. The prisoner has not rebutted the presumption of correctness. For our part, since there is no record to support the facts alleged by the prisoner to exist, there is nothing for us to respond to. The absence of a record makes it impossible to respond to the arguments presented by the prisoner. The allegations of fact set out in the prisoner's brief here and in the filings in the trial court do not constitute facts or a record. To the extent any response by us is required to these mere allegations we deny them.

In addition to these considerations, we will also point out that the Order of the Supreme Court granting leave to proceed in the trial court limited the post - conviction relief action to one issue. The prisoner, here and in the Circuit Court, has attempted to raise a number of other claims of ineffective assistance of counsel. Those other claims were not properly before the Circuit Court and are not properly before this Court.

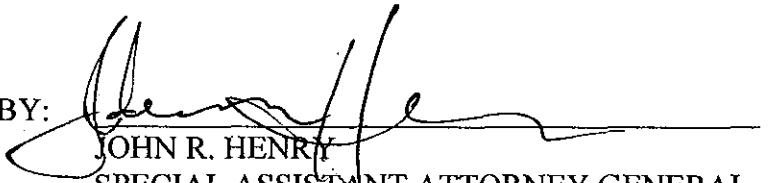

The Order denying relief on the prisoner's motion in post - conviction relief should be affirmed.

CONCLUSION

The Order denying relief on the prisoner's motion in post - conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

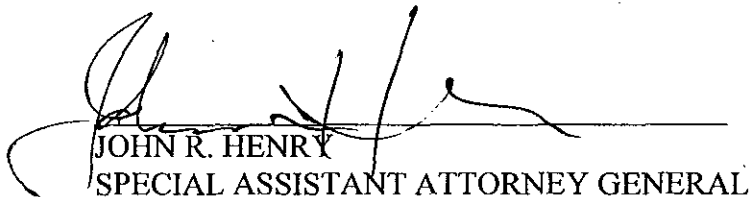
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 14th day of May, 2007.



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