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

**ERIC ROACH  
a/k/a ERIC SHANE ROACH**

**FILED**

**APPELLANT**

**MAR 20 2008**

**VS.**

**OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS**

**NO. 2007-CP-01058-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR APPELLEE**

**THE STATE DOES NOT REQUEST ORAL ARGUMENT.**

Respectfully submitted,

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STATE OF MISSISSIPPI**

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STATE OF MISSISSIPPI

APPELLEE

**BRIEF FOR APPELLEE**

**STATEMENT OF THE CASE**

**Procedural History**

Eric Roach, also known as Eric Shane Roach ["Roach"], filed a motion for post-conviction relief in the Circuit Court of Lowndes County. The Circuit Court, Honorable James T. Kitchens, Jr., Circuit Court Judge, presiding, dismissed said motion in an order filed on May 24, 2007. Feeling aggrieved of that ruling, Roach appeals, raising the following as issues, quoted *verbatim*:

**I. Appellant Eric Roach was effective assistance of counsel during the pretrial proceedings because of defense counsel's failure to be abreast of the proceedings, the applicable law, and the facts of the case. Roach was subjected to a violation of his 6<sup>th</sup> Amendment rights in regards to such actions by his counsel.**

**II. The sentence imposed upon Eric Roach**

**constitutes a denial of due process of law in sentencing where Eric Roach was sentenced to a more severe sentence as a first time offender with no prior criminal record. The sentence imposed upon Roach is in direct conflict with the 5<sup>th</sup> and 14 Amendments to the United States Constitution.**

**III. Appellant was subjected to a denial of due process when the trial court failed to advise Roach of the correct law in regards to appealing his case after he was convicted and where, in absence of and as a direct result of such failure Roach was unable to appeal his case directly.**

**IV. Appellant Roach was denied the right to effective assistance of counsel on direct appeal where the trial court failed to appoint counsel to Roach to perfect and prosecute appeal in that the trial court was aware that counsel assisting Roach, who attempted to appeal conviction and sentence, was not licensed in Mississippi and was therefore without standing and where right to a direct appeal from a criminal conviction and sentence has constitutional origin.**

**V. The indictment which charged Roach with the crime was constitutionally void where the indictment failed to set out the judicial district in which criminal offense was charged. Appellant Roach was denied due process of law where he was convicted of the offense of armed robbery without the prosecution having presented adequate proof. Roach was denied his fundamental constitutional right to a fair trial.**

#### **Additional Procedural History**

Unlike the typical post-conviction movant, Roach did not plead guilty. Rather, having been indicted for armed robbery on February 6, 2004, he went to trial and was convicted on November 30, 2004. (C.P. 3) After a pre-sentence investigation report was compiled, Roach was sentenced on December 1, 2004, to

serve a term of twenty years in the custody of the Mississippi Department of Corrections. (C.P. 3; 9) Apparently unsatisfied with his public defender, Roach hired another attorney for his appeal. Brief for Appellant at p. 5. On December 29, 2004, the Circuit Clerk of Lowndes County received a notice of appeal in the case from Roach's new attorney, who happened to be a foreign attorney. Upon the advice of the Clerk of the Supreme Court, who cited M.R.A.P. 46(b), that notice was not filed. (C.P. 3) A year later to the day, on December 29, 2005, Roach filed a motion for post-conviction relief requesting an out-of-time appeal. (C.P. 1) That motion was denied by the lower court on March 9, 2006. (C.P. 1) Roach did not appeal that order. On December 13, 2006, Roach filed another motion for post-conviction relief, the dismissal of which he now appeals. (C.P. 1; 11)

### **SUMMARY OF THE ARGUMENT**

The lower court did not commit error in dismissing Roach's motion for post-conviction relief as successive.

## ARGUMENT

### PROPOSITION

#### THE LOWER COURT DID NOT COMMIT ERROR IN DISMISSING ROACH'S MOTION AS SUCCESSIVE.

As stated, on December 29, 2005, Roach filed a motion for post-conviction relief, requesting an out-of-time appeal, which is one of the grounds of post-conviction relief. Miss. Code Ann. §99-39-5(1)(h). The lower court denied that motion on March 9, 2006, but Roach never appealed from that denial. Miss. Code Ann. §99-39-23(6) states, in pertinent part, as follows: "The order as provided in subsection (5) of this section or any order dismissing the prisoner's motion or otherwise denying relief under this article is a final judgment and shall be conclusive until reversed. It shall be a bar to a second or successive motion under this article." Plainly, the motion for post-conviction relief filed by Roach on December 13, 2006, the dismissal of which Roach now appeals, is a second, successive motion under §99-39-23(6) and therefore barred, just as the lower court ruled. **Buckley v. State**, 919 So.2d 5, 77 (Miss.App.2005); **Black v. State**, 963 So.2d 47, 49 (Miss.App.2007). Although §99-39-23(6) admits some exceptions, none is claimed and none appears applicable.

The State submits that this bar is sufficient unto the day to prove that the lower court's ruling in this regard is not clearly erroneous, and that said ruling should therefore be upheld. **House v. State**, 754 So.2d 1147, 1152 (Miss.1999).

Solely for purposes of argument, the State would also submit the following in regard to Roach's arguments on appeal.

Roach contends that his trial attorney rendered ineffective assistance of

counsel in five areas: counsel 1) “failed to summon adequate witnesses”; 2) “failed to perform pretrial investigation”; 3) failed to prepare for trial; 4) opened the door allowing the prosecution to elicit prejudicial evidence; and, 5) failed to seek a timely continuance. Brief for Appellant at p. 7. He does not provide details nor did his post-conviction motion contain attached affidavits from witnesses who could testify in support of his claims.

In the case of *Hoyt v. State*, 952 So.2d 1016, 1021 (Miss.App.2007), this Court stated as follows regarding ineffective-assistance claims:

To prove a claim of ineffective assistance, [a defendant] must show (1) that his defense counsel's performance was deficient, and (2) that the deficient performance was prejudicial to his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Swington v. State*, 742 So.2d 1106, 1114(22) (Miss.1999). The defendant bears the burden of proving both prongs of *Strickland* and faces a rebuttable presumption “that trial counsel's conduct is within the wide range of reasonable conduct and that decisions made by counsel are strategic.” *Edwards v. State*, 615 So.2d 590, 596 (Miss.1993) (citing *Leatherwood v. State*, 473 So.2d 964, 969 (Miss.1985)). “The determination of whether counsel's performance was both deficient and prejudicial must be determined from the ‘totality of the circumstances.’ ” *Cole v. State*, 666 So.2d 767, 775 (Miss.1995) (citation omitted). The two-part test set forth in *Strickland* “applies to challenges to guilty pleas based on ineffective assistance of counsel.” *Brooks v. State*, 573 So.2d 1350, 1353 (Miss.1990) (citations omitted).

Under the facts of this case, the State submits that Roach has met neither of *Strickland's* prongs.

Roach also contends that he suffered from ineffective assistance of appellate counsel, but his argument of that contention is not directed at his appellate attorney,



but instead at the lower court. After having been represented by the public defender at trial, Roach apparently decided to hire his own attorney for appellate purposes. Yet, he now seems to be arguing that the lower court was at fault for *allowing* him to hire a foreign attorney who was not admitted to the Mississippi Bar. He claims that he “had no knowledge that he was entitled to a Mississippi licensed attorney to execute and prosecute his appeal in the absence of his ability to retain a Mississippi counsel.” Brief for Appellant at p. 6. It would seem quite incredible that Roach, having been represented by the public defender at trial, would not have been aware of his right to such, if eligible,<sup>1</sup> for appellate purposes. In any event, the lower court was not to blame, and Roach has not made a case of ineffective assistance.

Roach also contends that his twenty-year sentence is unconstitutional since he “was a first time offender who had never been charged with nor convicted of a crime.” Brief for Appellant at p. 20. This contention is wrong on many levels. First, Roach did not object to his sentence when it was imposed and any argument would now be barred for that reason. ***Reed v. State***, 536 So.2d 1336, 1339 (Miss.1988). In addition, the sentence is well within the limits of the statute. “[S]entencing is within the complete discretion of the trial court and is not subject to appellate review if it is within the limits prescribed by statute.” ***Miller v. State***, 973 So.2d 319, 321 (Miss.App.2008). In addition, this contention is not properly before this Court in an appeal from the denial of post-conviction relief since this is an issue which should

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<sup>1</sup>A question also exists as to Roach’s eligibility for appointed counsel. He seems to have had no trouble hiring the foreign attorney.

have been raised on direct appeal. Miss. Code Ann. §§99-39-3(2), 21(1). Finally, the contention is simply false in its premise. Roach is *not* a first time offender. At the time of his sentencing for this armed robbery he was on probation for another felony and had another felony charge pending. (C.P. 6-8)

Finally, Roach contends that his indictment was unconstitutional because it failed to list the particular judicial district of Lowndes County in which the indictment was brought. Lowndes County, however, is not divided into judicial districts.

Although Roach did not have a direct appeal, his instant appeal from his second post-conviction motion is barred as successive. Furthermore, he at no point showed there existed any excusable neglect for the failure to file a timely notice of appeal. Nor did he make a showing that the failure to secure an appeal was through no fault of his own. The record shows that he waited a year to file his first motion, and then another nine months after the denial of that motion to file his second, again, without appealing the ruling on the first. In no event has he shown his entitlement to an out-of-time appeal. ***Parker v. State***, 921 So.2d 397, 399-400 (Miss.App.2006); ***Havard v. State***, 911 So.2d 991, 993-94 (Miss.App.2005); ***Joshua v. State***, 913 So.2d 1062, 1064 (Miss.App.2005).

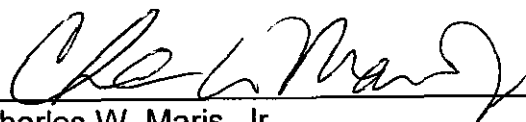
**CONCLUSION**

The lower court did not commit error in denying Roach's motion for post-conviction relief, and its ruling in that regard should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

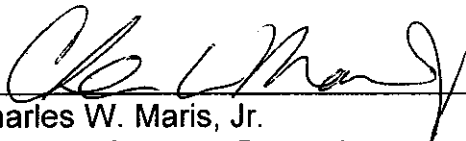
I, Charles W. Maris, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing BRIEF FOR APPELLEE to the following:

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Circuit Court Judge  
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Columbus, Mississippi 39703

Honorable Forrest Allgood  
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This the 20<sup>th</sup> day of March, 2008.

  
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