

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

**COBY**

**ROBERT H. JACKSON**

**FILED**

**APPELLANT**

**AUG 15 2008**

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SUPREME COURT  
COURT OF APPEALS**

**VS.**

**NO. 2008-CP-0074**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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

**ROBERT H. JACKSON**

**APPELLANT**

**vs.**

**CAUSE No. 2008-CA-00074-COA**

**THE STATE OF MISSISSIPPI**

**APPELLEE**

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

**STATEMENT OF THE CASE**

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

**STATEMENT OF FACTS**

The prisoner was convicted upon his plea of guilty of capital murder by the Circuit Court of Warren County, this in 1979. The underlying offense alleged in the indictment was burglary of a dwelling. *Jackson v. State*, 506 So.2d 994 (Miss. 1987).

On 21 April 1986, the prisoner filed a motion to vacate in the Circuit Court of Warren County. In this motion, he alleged various instances of ineffective assistance of counsel. The Circuit Court, citing Miss. Code Ann. Section 99-39-5(2), found that the prisoner's filing was time barred. The Mississippi Supreme Court reversed the Circuit Court and remanded the case "for development of the facts of [the prisoner's] substantive claim. . . ." *Jackson, supra*, at 995.

What transpired after this action by the Supreme Court is difficult to make out. There was an appeal from a judgment of the Circuit Court of Warren County dated 27 January 1989. Whatever this judgment concerned, the Supreme Court affirmed the Circuit Court without opinion. *Jackson v. State*, 568 So.2d 1212 (Miss. 1990). There was then an appeal from a judgment of the Circuit Court of Warren County dated 26 February 1993; the Supreme Court affirmed the Circuit Court, again without opinion. *Jackson v. State*, 665 So.2d 1356 (Miss. 1995). Both of these appeals concerned cause number 8434 in the Circuit Court of Warren County. This cause number was, in fact, assigned to the capital murder case against the prisoner. ( R. Vol. 1, pg. 80). However, in view of the fact that the prisoner's conviction resulted from a guilty plea, we suspect that these appeals were both post conviction relief cases.

Reviewing the Supreme Court's general docket, it appears that in 2001 the prisoner filed in the Supreme Court what appears to have been an appeal. Later, confusingly, he filed an application for leave to proceed in the trial court in the same cause number. It appears that relief was denied on the application or appeal or whatever it was. *Jackson v. State*, 2001-M-00864. Undeterred, however, the prisoner then filed in the Supreme Court a "Petition for Discretionary Review (en banc) to Contrary Rulings and Unreasonable Application Law Pursuant to MRCP Rule(s) 60(b)(3) and 61 and Miss. Code Ann. Section 99-37-27-(9)." There was apparently a supplemental motion, but, in any event, relief on these motions was apparently denied as well. *Jackson v. State*, 2003-M-01858.

There may or may not have been other filings by the prisoner in the Circuit Court between 1986 and 2003, but the only event we are certain of is that on 14 November 2007 the prisoner filed a motion in post - conviction relief to vacate his 1979 conviction and sentence for capital murder in the Circuit Court's cause number 8434. ( R. Vol. 1, pp. 5 - 71). In this filing,

the prisoner alleged that *State v. Berryhill*, 703 So.2d 250 (Miss. 1997) constituted an “intervening decision” under the Uniform Post Conviction Relief Act. He then went on to assert that the indictment exhibited against him in 1979 was fatally defective in light of *Berryhill* because the underlying offense of burglary was not sufficiently pleaded. He then went on to allege what in effect was an ineffective assistance of counsel claim, asserting that his attorney improperly advised him and lied to him about the plea agreement. The prisoner also alleged that he did not understand what was being asked of him during the plea colloquy. There were several other specific claims of ineffective assistance of counsel, but it will not be necessary to mention them.

The Circuit Court denied relief on this latest motion by the prisoner by Order filed on 4 December 2007. ( R. Vol. 1, pg. 92). In this order, citing *Jackson v. State*, 2001-M-00864 and *Jackson v. State*, 2003-M-01858, the Circuit Court found the prisoner’s 2007 filing to be barred as a successive writ. Miss. Code Ann. Section 99-39-23(6); 99-39-27(9) ( Rev. 2007).

The prisoner filed his notice of appeal on 7 January 2008\* ( R. Vol. 1, pg. 94).

#### 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**

The trial court was correct in finding that the motion in post conviction relief filed in the case at bar was a successive writ, and barred for that reason. Miss. Code Ann. Section 99-39-23(6); 99-39-27(9) ( Rev. 2007).

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We have been able to retrieve our file in *Jackson v. State*, 2001-M-1858. We find that the prisoner, in his “Petition for Extraordinary Circumstances Review,” alleged that *State v. Berryhill*, 703 So.2d 250 (Miss. 1997) was an “intervening decision” and sought the same relief there as he has sought in the case at bar. The Mississippi Supreme Court, on 19 July 2004, found that that petition, like others filed previously by the prisoner, was procedurally barred as a successive writ and denied relief for that reason. The same result should obtain here. The Appellant has raised his argument based upon *Berryhill* in a prior post conviction relief action. He may not renew it here.

We will also point out that *Berryhill* was decided in 1997 and that the motion in the case at bar was filed in 2007. Under the language of the “intervening decision” exception to the successive writ bar, an intervening decision means a decision occurring after an order dismissing the original motion in post - conviction relief. *Berryhill* was decided some ten years before the filing of the motion in the case at bar. Thus, it cannot be considered an intervening decision.

To the extent that the motion in the case at bar alleges ineffective assistance of counsel, this claim is barred under Section 99-39-23(6) as well. The prisoner has previously alleged an ineffective assistance of counsel claim in one of his prior attempts at post - conviction relief. Even if the prisoner had not presented an ineffective assistance of counsel claim until now, any such claim would be time - barred. Miss. Code Ann. Section 99-39-5(2) ( Rev. 2007). All other claims have either been previously considered in post conviction relief or are barred by the statute of limitations just cited.

In addition, we will also point out that it does not appear that the prisoner sought and obtained leave from the Supreme Court to proceed in post - conviction relief. Since it appears that the Supreme Court was the court that last exercised jurisdiction (albeit in what appears to

have been in post - conviction relief, rather than a direct appeal of a conviction), the prisoner should have sought leave from that court before proceeding in the Circuit Court. Miss. Code Ann. Section 99-39-7 ( Rev. 2007). *Dallas v. State*, No. 2007-CP-01339-COA Miss. Ct. App., Decided 29 July 2008, Not Yet Officially Reported). This Court does not appear to have jurisdiction to entertain this appeal.

We also note that the prisoner's notice of appeal was untimely. Rule 4(a) MRAP. Since the instant appeal is one from an order in a civil action, Miss. Code Ann. Section 99-39-7 ( Rev. 2007, the time for taking an appeal under Rule 4 may not be extended. Rule 2( c ) MRAP. We leave it to the prisoner to demonstrate, if he can, compliance with the "mailbox rule." he did

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

### CONCLUSION

The Circuit Court of Warren County committed no error in denying relief on the prisoner's motion in post - conviction relief without an evidentiary hearing.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

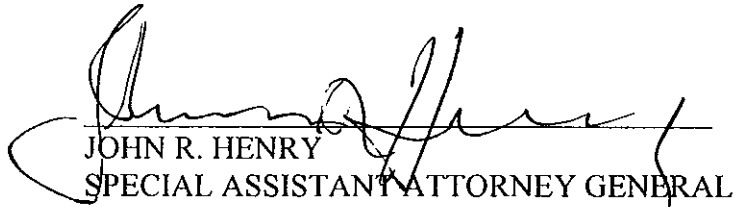
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 15th day of August, 2008.

  
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