

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**KENNETH W. KEYS**

**APPELLANT**

**VS.**

**NO. 2009-CA-1050**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**KENNETH W. KEYS**

**APPELLANT**

**VS.**

**NO. 2009-CA-1050**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

KENNETH KEYS, a convicted murderer twice paroled, appeals from the denial of a post-conviction motion styled “Motion to Mandate Parole Eligibility.” Keys claimed in the court below, and argues on appeal as well, he “. . . retain[ed] his pre-1995 parole eligibility on his 1987 life sentence notwithstanding his post-1995 parole ineligible five (5) year sentence” imposed after his conviction in 2003 of simple assault on a police officer. (C.P. at 9)

Keys argues on appeal (1) the trial court erred when it ruled that Keys was ineligible for parole on his life sentence and (2) the decision of the Court of Appeals relied upon to reach this conclusion “. . . is an *ex post facto* law which affects sentences imposed prior to April 12, 2005.” (Brief of Appellant at 4-5, 9)

The relief requested by Keys is a ruling declaring he is eligible for parole or, perhaps more appropriately stated, that he can again be paroled on his life sentence. (Brief of Appellant at 10)

Even if Keys, despite his two revocations of parole previously granted, retains his parole

eligibility on his original life sentence, he cannot be paroled because Miss.Code Ann. §99-19-21 is an impediment to parole.

We respectfully submit the circuit judge did not abuse his judicial discretion in denying the requested post-conviction relief.

### **STATEMENT OF FACTS**

Nearly twenty-three (23) years ago, on or about February 6, 1987, Kenneth Keys entered a plea of guilty to murder in the circuit court of Forrest County and was sentenced to life imprisonment. All parties agree that because of the law in effect at that time, Keys was parole eligible after serving ten (10) years on the life sentence.

On or about November 4, 1998, after serving eleven (11) years and nine (9) months, Keys was released on parole. (C.P. at 14, 22)

This was Keys's first parole.

Three and one-half (3 ½) years later, on or about April 30, 2002, Keys's parole, for reasons not reflected by the record, was revoked, and he was returned to custody. (C.P. at 22)

This was Keys's first revocation of parole.

Four (4) months later, on or about August 28, 2002, Keys was again paroled. (C.P. at 16, 22)

This was Keys's second parole.

On December 14, 2002, while at liberty subsequent to his second parole, Keys committed a new offense, viz., simple assault on a police officer. (C.P. at 22) As a result of this new offense, Keys's parole was again revoked.

This was Keys's second revocation of parole.

Keys was subsequently convicted on December 12, 2003, of simple assault on a police officer and was sentenced to serve a term of five (5) years in the custody of the Mississippi Department of

Corrections (MDOC). This five (5) year sentence was imposed to run consecutively to his previously imposed life sentence. (C.P. at 18-19, 20-21)

All parties agree that pursuant to Miss.Code Ann. §47-7-3, as amended in 1995, Keys's consecutive five (5) year sentence imposed for committing a simple assault in 2002 was mandatory in the sense that Keys was not parole eligible. (Brief of Appellant at 2; C.P. at 7, ¶¶ 5, 7)

On March 21, 2008, Keys filed in the Circuit Court of Forrest County, a well written post-conviction pleading styled "Motion to Mandate Parole Eligibility" "... pursuant [to] the Mississippi Uniform Post-Conviction Collateral Relief Act and Section 99-39-27 of the Mississippi Code of 1972, as amended . . ." (C.P. at 6-11)

The State of Mississippi filed an equally impressive answer or response to Keys's motion on April 29, 2008, and denied he was entitled to any relief. *See* appellee's exhibit A, attached.

Following an evidentiary hearing and arguments taking place on May 19, 2009, Robert Helfrich, Circuit Judge, denied the requested relief. In a two page order signed on May 27, 2009, and entered on June 3, 2009, Judge Helfrich found as a fact and concluded as a matter of law that "[p]ursuant to MCA §99-19-21 Keys cannot commence serving the fi[v]e (5) year [parole ineligible] sentence until the termination of the preceding life sentence" and that ". . . the Mississippi Department of Corrections has correctly determined Kenneth Keys to be ineligible for parole." (C.P. at 30-31; appellee's exhibit B, attached)

In denying relief, the circuit judge relied, at least in part, on **Snow v. Johnson**, 913 So.2d 334 (Ct.App.Miss. 2005), which held, *inter alia*, that by virtue of Miss.Code Ann. §99-19-21, James Snow, a post-conviction petitioner, was required to finish serving his non-mandatory sentences before beginning service of his mandatory and parole ineligible sentences and, further, that an administrative correction of prior misinterpretation of the parole laws did not violate the *ex post*

*facto* clause of the state or federal constitution. *See* appellee's exhibit C, attached.

Keys disagrees with the conclusions of law reached by the circuit judge. He argues that Judge Helfrich erred when he ruled the MDOC correctly determined that Keys was ineligible for parole on his life sentence and likewise erred in concluding that **Snow v. Johnson**, *supra*, expressly and correctly approved the department's interpretation of the statutory laws.

### SUMMARY OF THE ARGUMENT

Even if Keys retains his parole eligibility on his original life sentence, he cannot be paroled because Miss.Code Ann. §99-19-21 is an impediment to parole.

"The burden is upon [Keys] to prove by a preponderance of the evidence that he is entitled to the requested post-conviction relief." **Bilbo v. State**, 881 So.2d 966, 968 (¶3) (Ct.App.Miss. 2004) citing Miss.Code Ann. §99-39-23(7) (Rev.2000).

When reviewing the trial court's decision to deny a petition for post-conviction relief, an appellate court will not disturb the trial court's factual findings unless they are found to be clearly erroneous. **Brown v. State**, 731 So.2d 595, 598 (¶6) (Miss. 1999).

"However, where questions of law are raised the applicable standard of review is *de novo*," i.e., afresh or anew. *Id.*

The State's position on the issues raised in Keys's motion to mandate parole eligibility has been succinctly set forth in the State's "Response to Motion to Mandate Parole Eligibility" filed in the trial court on April 29, 2008, by James M. Norris, senior staff attorney for the MDOC, and Jane Mapp, Special Assistant Attorney General. *See* appellee's exhibit A, attached. We defer to the argument presented within the four corners of that response and respectfully decline to plow in great detail that ground again here.

It is enough to say that *de novo* review of the conclusions of law reached by Judge Helfrich

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should result in a finding that (1) the trial court did not abuse its judicial discretion in finding that Kenneth Keys was not eligible for parole on his life sentence and (2) the MDOC, by virtue of the rationale expressed in **Snow v. Johnson**, *supra*, 913 So.2d at 337-40 (§§ 11-14), has correctly determined Keys to be ineligible for parole in the sense that he cannot be again paroled.

## ARGUMENT

### THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN DENYING POST-CONVICTION RELIEF.

The MDOC has determined that Keys cannot be paroled on his original life sentence because Keys is not parole eligible on his consecutive parole ineligible five (5) year sentence.

All parties agree the law in effect at the time of Keys's guilty plea to murder and his subsequent sentence to life imprisonment, required Keys to serve at least ten (10) years of a life sentence before becoming parole eligible. Stated differently, Miss.Code Ann. §47-7-3 was not an impediment to parole eligibility after service of ten (10) years. ]

Keys was, in fact, paroled, not once, but twice.

All parties also agree that pursuant to Miss.Code Ann. §47-7-3, as amended, Keys's *consecutive*, as opposed to *concurrent*, five (5) year sentence imposed after his conviction for assaulting a police officer is mandatory in the sense that it is not parole eligible. (Brief of Appellant at 2, C.P. at 7, §§ 5, 7) Stated differently, Keys is not eligible for parole, and cannot be paroled, on his five (5) year consecutive sentence.

Keys, nevertheless, claims that even though his consecutive five (5) year sentence is not parole eligible, he can still be paroled on his original life sentence.

We disagree.

Miss.Code Ann. §99-19-21(1) is an impediment to a third parole on Key's original life



sentence. It reads, in its entirety, as follows:

(1) When a person is sentenced to imprisonment on two (2) or more convictions, the imprisonment on the second, or each subsequent conviction shall, in the discretion of the court, commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction.

When an offender who is serving a parole eligible sentence subsequently receives a consecutive mandatory or non-parole eligible sentence, he must complete the term of imprisonment on the first sentence before the second or subsequent consecutive mandatory or non-parole eligible sentence begins to run. Otherwise,

“[a]fter his mandatory sentence was completed he would recommence serving the remainder of his original sentence. Such a practice is contrary to Mississippi Code Annotated Section 99-19-21.”

**Snow v. Johnson**, *supra*, 913 So.2d at 337 (¶11).

Keys argues that “[c]onfirmation in **Snow** of the MDOC policy came two (2) years subsequent to Keys latest conviction [in December of 2003], and therefore is an *ex post facto* law as applied to Keys.” (Brief of Appellant at 9)

★ One of the problems with this argument, it seems, is that “such a practice” by the MDOC has always been contrary to the provisions of 99-19-21, even before the MDOC became aware of its misinterpretation of the law in 2001 and before **Snow** in 2005 declared it to be so.

Moreover, the facts in **Snow** reflect that James Parker Snow received a corrected time sheet indicating he was not eligible for parole or trusty status on November 28, 2001. **Snow v. Johnson**, *supra*, 913 So.2d 335 (¶1), 337 (¶7). Thus, it is clear that MDOC’s current policy “that an offender does not complete his first sentence until the conditional discharge date, or what is now known as his tentative release date” was in effect at least two years prior to Keys’s conviction and five (5) year sentence on December 12, 2003, for simple assault.

The case of **Snow v. Johnson**, *supra*, in conjunction with the Supreme Court's holding in **Taylor v. Mississippi State Probation and Parole Board**, 365 So.2d 621 (Miss. 1978), controls the posture of Keys's *ex post facto* claim (§ 14 of **Snow**) as well as the validity of MDOC's interpretation of §99-19-21. (§ 13 of **Snow**)

In **Taylor** the Supreme Court held that “ . . . administrative correction of a prior misinterpretation of parole laws as applied to the appellant did not violate the *ex post facto* clause of the United States or Mississippi Constitutions.” The same is true here.

We take no issue with Keys's observation that “[s]ection 47-7-3 of the Mississippi Code of 1972 was amended effective June 30, 1995[,] which rendered subsequent offenders ineligible for parole on sentences received for crimes committed after that date.” (C.P. at 7, ¶7)

Keys agrees that “[a]ccording to Section 47-7-3 of the Mississippi Code of 1972, as amended [in 1995], Keys is a subsequent offender and therefore ineligible for parole on his 2003 five (5) year sentence.” (C.P. at 7, ¶ 7)

Keys insists, however, he “ . . . retains his pre-1995 parole eligibility on his 1987 life sentence notwithstanding his parole ineligible five (5) year sentence received in 2003.” (C.P. at 8, ¶ 12) Keys reasons that the murder he committed in the 80's and the conviction and sentence flowing in its wake took place prior to the 1995 amendment to §47-7-3.

We reiterate. Even if Keys retains his parole eligibility he cannot be paroled because Miss.Code Ann. §99-19-21 is an impediment to parole.

Keys argued in the court below, and he claims on appeal as well, that “[t]he denial of parole eligibility based on an amended parole statute is contrary to the Constitution of the United States, and the Constitution and law of Mississippi.” (C.P. at 9) Specifically, he claims that “[a]pplication of the June 30, 1995 amendment of Section 47-7-3 of the Mississippi Code of 1972 to Keys' parole

eligibility on his 1987 conviction violates the *ex post facto* clause of the United States Constitution, Article 1, Section 10, Clause 1." (C.P. at 8)

Mr. Norris and Ms. Mapp, attorneys for the State, were correct when they argued that Keys's non-eligibility for parole on his original life sentence has nothing whatever to do with parole eligibility under Miss.Code Ann. §47-7-3, whether in its amended form or not. The impediment to parole is §99-19-21 which was triggered by Keys's new crime and the sentence imposed in its wake.. The reason Keys is no longer eligible to be released on parole for a third time on his original life sentence is because he committed a new crime requiring a parole ineligible sentence which was imposed to run consecutively to his original parole eligible life sentence.

Stated differently, Keys's ineligibility for parole on his original life sentence is a by-product of his own misconduct in committing another crime well after MDOC's administrative correction   
 \* of its prior misinterpretation of the law.

Finally, in his appellate brief, Keys tosses an "earned time" argument into the mix. (Brief of Appellant at 5-8)

It is a red herring.

Insofar as we can tell Keys is not eligible for earned time because he has been sentenced to life imprisonment. *See* Miss.Code Ann. §47-5-139 (1)(a). We find nothing in the record reflecting that Keys has reached the age of 65 years or has served at least fifteen (15) years of his sentence. Our research, in fact, reflects that Keys was born in 1964.

Keys is, likewise, ineligible for earned time on his consecutive five (5) year sentence imposed in 2003 because he has not yet begun to serve that sentence. An inmate cannot earn time on a sentence he is to serve in the future.

We summarize.

“[P]risoners have ‘no constitutionally recognized liberty interest in parole.’ ” **Snow v. Johnson**, *supra*, 913 So.2d at 339 citing **Vice v. State**, 679 So.2d 205, 208 (Miss. 1996). Although Keys’s original life sentence was parole eligible, by virtue of Miss.Code Ann. 99-19-21(1) he cannot be paroled because he has a consecutive non-parole eligible sentence that he has to serve following the termination or discharge of his life sentence. Keys’s life sentence can only be terminated or discharged by his death. \*

The circuit judge did not err in denying post-conviction relief because Keys failed to establish by a preponderance of the evidence he was entitled to parole. Accordingly, Keys’s MDOC’s time sheet requires neither correction nor reformation.

It is elementary “[t]he burden is upon [Keys] to prove by a preponderance of the evidence that he is entitled to the requested post-conviction relief.” **Bilbo v. State**, *supra*, 881 So.2d 966, 968 (¶3) (Ct. App.Miss. 2004) citing Miss.Code Ann. §99-39-23(7) (Rev.2000).

We respectfully submit the trial judge did not abuse his judicial discretion in finding that Kenneth Keys has failed to do so here.

### CONCLUSION

In seeking post-conviction relief Keys appears to have bypassed MDOC’s Administrative Remedies Program. We concur with the observation made by Ms. Mapp in her response that “[t]he Petitioner has failed to exhaust his Administrative Remedies as required by Miss. Code Ann. §47-5-803(2).” (C.P. at 27; appellee’s exhibit A, attached)

Nevertheless, we candidly admit that any grievance filed by Keys, more likely than not, would have been decided adversely to his position.

Keys’s original life sentence, then and there, was parole eligible, and he has been twice paroled.

Keys, here and now, cannot be paroled on his life sentence because he subsequently committed a new offense resulting in a consecutive parole ineligible five (5) year sentence. Such is the price Keys must pay for committing a new offense.

Keys cannot be paroled a third time because he now has a consecutive non-parole eligible sentence which cannot commence until the expiration of his previous term of life imprisonment. *See* Miss.Code Ann. §99-19-21(1). That term, by its very nature, cannot expire until Keys's death.


Appellee respectfully submits this case is devoid of any claims worthy of a reversal of the trial court's decision denying Keys's motion to compel parole eligibility.

Accordingly, the judgment entered in the lower court denying Kenneth Keys's motion for post-conviction relief sought in the form of a motion to mandate parole eligibility should be affirmed.

Respectfully submitted,

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BY: 

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IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

KENNETH W. KEYS

PETITIONER

FILED

v.

CAUSE NO. CI08-0044

APR 29 2008

STATE OF MISSISSIPPI

RESPONDENT

*John E. Adams*  
FORREST COUNTY CIRCUIT CLERK

RESPONSE TO MOTION TO MANDATE PAROLE ELIGIBILITY

COMES NOW the Respondent, the State of Mississippi, by and through undersigned counsel, and submits for filing and the Court's consideration, this its Response to Petitioner's Motion to Mandate Parole Eligibility, and would respectfully show unto the Court as follows:

1.

That on or about February 6, 1987 Kenneth Keys pleaded guilty in the Circuit Court of Forrest County to the crime of Murder and was sentenced to a term of Life imprisonment. Because of the law in effect at the time this crime was committed, Keys was eligible for parole after serving 10 years on the life sentence.

2.

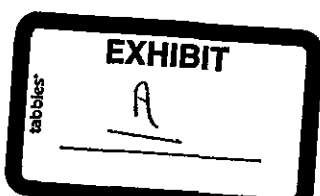
Keys was released to parole on or about November 4, 1998. Keys' parole was revoked and he was returned to custody on or about April 30, 2002.

3.

Keys was again paroled on or about August 28, 2002.

4.

On December 14, 2002, while out on his second parole, Keys committed a new offense of simple assault of a police officer. Because of this new offense Keys' parole was once again revoked.



4.

Keys was subsequently convicted on December 12, 2003 of Simple Assault on a Police Officer and was sentenced to serve a term of five (5) years in the custody of the Mississippi Department of Corrections (MDOC). This five (5) year sentence is to run consecutively to his previously imposed life sentence.

5.

It is undisputed that pursuant to Miss. Code Ann. § 47-7-3, as amended, Keys' consecutive five (5) year sentence is not parole eligible.

6.

Keys argues that even though his consecutive five (5) year sentence is not parole eligible he should still be parole eligible on his life sentence. Keys maintains that MDOC is incorrectly applying the 1995 amendment to Miss. Code Ann. § 47-7-3 to his pre-1995 life sentence by refusing to allow him to retain his parole eligibility in violation of the *Ex post facto* clause.

7.

Miss. Code Ann. § 99-19-21 requires that when an offender is sentenced to two or more consecutive terms the imprisonment on the second or each subsequent term shall commence at the termination of the imprisonment for the preceding conviction. Therefore when an offender who is serving a parole eligible sentence subsequently receives a consecutive mandatory or non-parole eligible sentence, the offender must complete the term of imprisonment on the first sentence before the second or subsequent consecutive mandatory or non-parole eligible sentence begins to run. Otherwise, the offender would serve a portion

of one sentence up until his parole eligibility date, then he would begin serving his mandatory or non-parole eligible sentence and once the mandatory or non-parole eligible sentence was completed he would recommence serving the rest of the original sentence. This is contrary to Miss. Code Ann. § 99-19-21 which states:

(1) When a person is sentenced to imprisonment on two (2) or more convictions, the imprisonment on the second, or each subsequent conviction shall, in the discretion of the court, commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction.

The Court of Appeals in *Snow v. Johnson*, 913 So.2d 334 (Miss.Ct.App. 2005), citing *Taylor v. Mississippi State Probation and Parole Board*, 365 So.2d 621, 622 (Miss. 1978), approved MDOC's interpretation of statutory law regarding consecutive mandatory sentences. The law and reasoning as applied to mandatory sentences is exactly the same as applied to non-parole eligible sentences. Sentences can not be combined for commutation purposes unless all of the sentences are eligible for commutation.

Furthermore, "prisoners have no constitutionally recognized liberty interest in parole." *Snow*, 913 at 339, citing *Vice v. State*, 679 So.2d 205, 208 (Miss.1996). While Keys' original sentence was parole eligible, when his parole eligibility date on that sentence comes up he can not be paroled because he has a consecutive non-parole eligible sentence which can not commence until the expiration of his previous term. In Keys' case since his first sentence is a life term it can not expire, and therefore, he will never be eligible to commence serving the consecutive five (5) year term. This is in accordance with Miss. Code Ann. § 99-



19-21 and has nothing to do with Keys' parole eligibility pursuant to Miss. Code Ann. § 47-7-3 on his life sentence.

8.

Neither the State, MDOC , nor the Parole Board denied Keys' parole eligibility. Keys' own action of committing a new crime is the only reason he is no longer eligible to be released to parole on his earlier sentence. If the consecutive sentence was somehow vacated his would still be parole eligible on the life sentence. There is no point; however, in giving Keys a parole eligibility date on his time sheet on the life sentence because when his parole eligibility date on his life sentence came up he could not be paroled because he has a consecutive non-parole eligible sentence that he has to theoretically<sup>1</sup> serve following the termination of his life sentence. Since he can not be paroled he has to continue to serve the sentence until it is discharged and then he would theoretically begin serving the consecutive five (5) year term. *See Snow v. Johnson*, 913 So.2d 334 (Miss.Ct.App. 2005). This is in accordance with Miss. Code Ann. § 99-19-21.

**AFFIRMATIVE DEFENSES**

1. The Petitioner has failed to state a claim upon which relief may be granted.
2. This Court lacks jurisdiction in this matter.
3. The Petitioner has failed to exhaust his Administrative Remedies as required by Miss. Code Ann. § 47-5-803(2).

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<sup>1</sup>Since the only way an offender can discharge a life sentence is through death, Keys will never actually be able begin serving the consecutive five (5) year sentence.

**WHEREFORE**, the Respondent, the State of Mississippi, having fully answered and setting forth its affirmative defenses to Plaintiff's Motion, deny that the Petitioner is entitled to relief against them in any form whatsoever, and move the Court for an order dismissing said motion with prejudice at Petitioner's cost.

Respectfully submitted,

STATE OF MISSISSIPPI-RESPONDENT

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STATE OF MISSISSIPPI**

JAMES M. NORRIS  
MDOC SENIOR STAFF ATTORNEY  
MS BAR NO. [REDACTED]

JANE L. MAPP  
SPECIAL ASSISTANT ATTORNEY GENERAL  
MS BAR NO.: [REDACTED]

BY: Jane L. Mapp

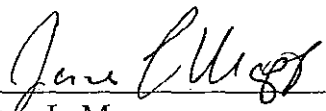
**CERTIFICATE OF SERVICE**

I, Jane L. Mapp, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first class postage prepaid, a true and correct copy of the foregoing **Response to Motion to Mandate Parole Eligibility**, in the above-styled and numbered cause to the following:

Mr. H.H. Klein, III  
Attorney at Law  
P.O. Box 1914  
Hattiesburg, MS 39403

Hon. John Mark Weathers  
District Attorney  
P.O. Box 166  
Hattiesburg, MS 39403-0166

This, the 24<sup>th</sup> day of April, 2008.

  
\_\_\_\_\_  
Jane L. Mapp  
Special Assistant Attorney General

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IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

KENNETH W. KEYS

FILED

PETITIONER

VERSUS

JUN 03 2009

CAUSE NO. CI08-0044

STATE OF MISSISSIPPI

*John E. Adams*  
FORREST COUNTY CIRCUIT CLERK

RESPONDENT(S)

OPINION AND ORDER

This cause came before the undersigned Circuit Court Judge in the Circuit Court in Hattiesburg, Mississippi on Tuesday, May 19, 2009 at 9:00 a.m.

Present for the hearing on this Motion to Mandate Parole eligibility for Mr. Keys were his Attorney, Honorable H.H. "Tracy" Klein, and the attorney for the State of Mississippi, Special Assistant Attorney General Jim Norris.

After hearing the arguments of the parties, the Court decided that the State of Mississippi had correctly determined Mr. Keys to be ineligible for parole based upon his serving a consecutive sentence for simple assault of a police officer after completion of his life sentence for murder.

On February 6, 1987 Keys was sentenced to life for murder in this Court. This crime was parole eligible and Keys was paroled twice. On the second parole he assaulted a police officer, was revoked and on December 12, 2003 sentenced to five (5) consecutive years. The five (5) year sentence is not parole eligible. MCA §47-7-3

Pursuant to MCA §99-19-21 Keys cannot commence serving the five (5) year sentence until the termination of the preceding life sentence. A life sentence cannot be discharged through service.

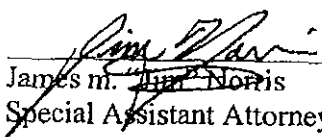


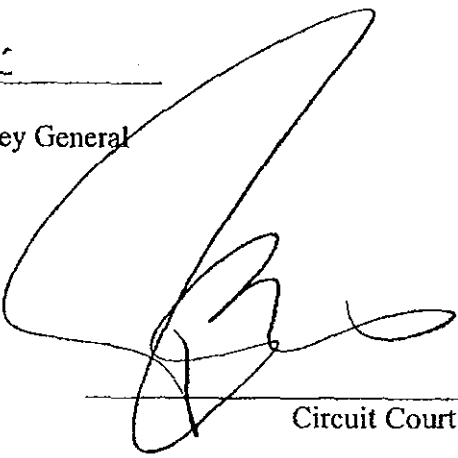
Snow v. Johnson, 913 So.2d 334 (Miss. Ct. App. 2005) approved Mississippi Department of Corrections interpretation of the statutory laws.

Accordingly, this Court rules that the Mississippi Department of Corrections has correctly determined Kenneth Keys to be ineligible for parole.

SO ORDERED AND ADJUDGED, this 27<sup>th</sup> day of May 2009.

Prepared by: \_\_\_\_\_

  
James M. Norris  
Special Assistant Attorney General

  
Circuit Court Judge

**CERTIFICATE OF SERVICE**

I, **JIM NORRIS**, Special Assistant Attorney General, and one of the Attorneys for the Mississippi Department of Corrections and Attorney for the Respondent certify that I have this date mailed, via United States Postal Service, first class postage prepaid, and a true and correct copy of the foregoing document in the above-styled and numbered cause to the following:

Honorable Robert Helfrich  
Circuit Court Judge, District 12  
Post Office Box 309  
Hattiesburg, Mississippi 39403

Honorable H.H. Klein, III  
Attorney at Law  
1507 Hardy Street  
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Hattiesburg, Mississippi 39403

THIS, the 21<sup>st</sup> day of May 2009.

BY: 

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Telecopier No. (662) 745-2959

3. Counsel for the Appellant shall forward a copy of this Brief with advice to the Appellant that he has the right to file a pro se supplemental brief.

4. Counsel for the Appellant requests that this Court allow 30 days additional time for the Appellant to file said supplemental brief, should he so desire.

¶ 6. Dudley did not file a pro se brief within the thirty day period provided under *Turner*.

#### DISCUSSION

¶ 7. Counsel for Dudley has taken all the steps required on his part by *Turner*. *Turner*, 818 So.2d at 1189. *Turner* goes on to say that after these steps are taken, the appellate court must then "make its own independent review of the record." *Id.*

#### CONCLUSION

¶ 8. After a thorough review of the record, we conclude that there is nothing in the record to support an appeal. Thus, for the foregoing reasons, we affirm the judgment below.

**¶ 9. THE JUDGMENT OF THE WASHINGTON COUNTY CIRCUIT COURT OF CONVICTION OF THREE COUNTS OF CAPITAL MURDER AND CONSECUTIVE SENTENCES OF LIFE WITHOUT PAROLE FOR EACH COUNT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO WASHINGTON COUNTY.**

KING, C.J., BRIDGES AND LEE, P.JJ., IRVING, MYERS, CHANDLER, GRIFFIS AND BARNES, JJ., CONCUR.

**James Parker SNOW, Appellant**

v.

**Robert JOHNSON, Commissioner, Mississippi Department of Corrections, and Michael C. Moore, Attorney General for the State of Mississippi, Appellees.**

**No. 2003-CP-02332-COA.**

Court of Appeals of Mississippi.

April 12, 2005.

**Background:** Following his conviction of three counts of profane and indecent language over the telephone, and his receipt of total habitual offender sentence of six years' imprisonment, consecutive to time then being served, petitioner sought writ of habeas corpus, seeking to compel recalculation of his parole eligibility. The Circuit Court, Jasper County, Robert G. Evans, J., dismissed petition, and petitioner appealed.

**Holdings:** The Court of Appeals, Chandler, J., held that:

- (1) petitioner was required to finish serving non-mandatory sentences before beginning to serve mandatory sentences;
- (2) Department of Corrections (DOC) was not required to interpret statutes governing commutation of consecutive sentences to grant parole eligibility to petitioner;
- (3) administrative correction of prior misinterpretation of parole laws did not violate ex post facto clause of state or federal constitution; and
- (4) petitioner was ineligible for trusty status.

Affirmed.



**EXHIBIT**

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er SNOW, Appellant

v.

ON, Commissioner, Mis-  
 sionment of Corrections,  
 C. Moore, Attorney Gen-  
 eral of Mississippi, Ap-

-CP-02332-COA.

peals of Mississippi.

il 12, 2005.

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 cuit Court of Chancery, Jackson  
 County, Robert G. Ev-  
 ert, Jr., presiding, and petitioner

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 ex post facto clause of state or  
 federal constitution; and

ineligible for trusty sta-

1. Sentencing and Punishment ¶1132

When an offender who is serving a  
 parole eligible sentence subsequently re-  
 ceives a consecutive mandatory sentence,  
 the offender must complete the term of  
 imprisonment on the first sentence before  
 the second or subsequent consecutive man-  
 datory sentence begins to run. West's  
 A.M.C. § 99-19-21(1).

2. Pardon and Parole ¶51

For purposes of computing the parole  
 eligibility of an offender who is serving a  
 parole eligible sentence and subsequently  
 receives a consecutive mandatory sen-  
 tence, the offender does not complete his  
 first sentence until the conditional dis-  
 charge date, or what is known as his tenta-  
 tive release date. West's A.M.C. § 99-19-  
 21(1).

3. Sentencing and Punishment ¶1132

Offender who received non-mandatory  
 sentences prior to receiving habitual of-  
 fender sentences was required to finish  
 serving non-mandatory sentences before  
 beginning to serve mandatory sentences.  
 West's A.M.C. § 99-19-21.

4. Pardon and Parole ¶51

Department of Corrections (DOC) was  
 not required to interpret statutes govern-  
 ing commutation of consecutive sentences  
 to grant parole eligibility to offender who  
 received consecutive habitual offender sen-  
 tences after receiving non-mandatory sen-  
 tences; DOC was entitled to interpret ap-  
 plicable statutes in manner consistent with  
 parole board's authority to impose en-  
 hanced penalties on habitual offenders.  
 West's A.M.C. § 99-19-81.

5. Constitutional Law ¶203

Pardon and Parole ¶51

Administrative correction of prior mis-  
 interpretation of parole laws as applied to  
 offender who received non-mandatory sen-  
 tences prior to receiving habitual offender

sentences did not violate ex post facto  
 clause of state or federal constitution.  
 U.S.C.A. Const. Art. 1, § 10, cl. 1 ; West's  
 A.M.C. § 99-19-21.

6. Pardon and Parole ¶46

Prisoners have no constitutionally rec-  
 ognized liberty interest in parole.

7. Prisons ¶15(3)

Offender serving habitual offender  
 sentences was ineligible for earned trusty  
 time. West's A.M.C. § 47-5-138.1.

James Parker Snow, appellant, pro se.

Office of the Attorney General by Jane  
 L. Mapp, attorney for appellees.

Before LEE, P.J., MYERS and  
 CHANDLER, JJ.

CHANDLER, J., for the Court.

¶ 1. In 1993, James Snow pleaded guilty  
 to crimes for which his sentences were  
 parole eligible. In 1996, he was convicted  
 as a habitual offender and sentenced to a  
 total of six years. As a habitual offender,  
 these sentences were not parole eligible.  
 When his time sheets reflecting his 1996  
 sentences were calculated, the Mississippi  
 Department of Corrections re-calculated  
 his parole eligibility and tentative release  
 dates. These eligibility dates were de-  
 layed by six years. The Mississippi De-  
 partment of Corrections later learned that  
 their procedure for calculating parole eli-  
 gibility and release dates for inmates serving  
 sentences that were parole eligible and  
 later serving sentences that were manda-  
 tory conflicted with Mississippi Code An-  
 notated Section 99-19-21 (Rev.2000).  
 Snow received a corrected time sheet indi-  
 cating that he was not eligible for parole  
 or for trusty status. Snow filed a writ of



habeas corpus demanding that the Mississippi Department of Corrections re-calculate his time. The Jasper County Circuit Court denied this relief. Snow appeals, raising the following issues:

- I. WHETHER THE MISSISSIPPI DEPARTMENT OF CORRECTIONS HAD THE AUTHORITY TO DENY SNOW A PAROLE ELIGIBILITY DATE
- II. WHETHER THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ERRED IN COMPUTING SNOW'S SENTENCES FOR PURPOSES OF PAROLE ELIGIBILITY
- III. WHETHER THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ERRED IN DECLARING SNOW TO BE SERVING THE LAST SIX YEARS OF HIS SENTENCE AS MANDATORY
- IV. WHETHER THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ERRED IN DENYING SNOW ELIGIBILITY FOR TRUST EARNED-TIME STATUS

¶ 2. Finding no error, we affirm.

#### **FACTS**

¶ 3. On December 7, 1993, James Parker Snow pleaded guilty in Newton County Circuit Court to ten counts of profane and indecent language over the telephone with intent to harass and was sentenced to a total of sixteen years in the custody of the Mississippi Department of Corrections (MDOC) with parole eligibility. On October 30, 1996, Snow received a time sheet which showed that he had been awarded the fifty percent earned time allowance of eight years, plus 180 days of meritorious earned time. This computation gave him a

parole eligibility date of January 2, 1997 and a conditional discharge date of January 2, 2001.

¶ 4. On September 5, 1996, following a jury trial, the Jasper County Circuit convicted Snow as a habitual offender on three additional counts of profane and indecent language over the telephone. He was sentenced to three consecutive two year sentences, for a total of six years, to run consecutively with his earlier sentences. Because Snow was convicted as a habitual offender, these sentences were mandatory with no possibility of parole. Miss.Code Ann. § 99-19-81 (Rev.2000). On December 4, 1996, Snow was given a new time sheet. His six years were added to his parole and additional release dates, with his new earliest parole eligibility parole date as January 2, 2003, and his new earliest conditional discharge date being January 2, 2007. These dates were exactly six years delayed from the previous eligibility date given to Snow.

¶ 5. Snow entered trusty status, pursuant to Miss.Code Ann. § 47-5-138.1 (Rev. 2004), on July 1, 1999. He remained on trusty status until April 10, 2000. As such, he received ten days credit off the non-mandatory portion of his sentence for every thirty days he remained in trusty status. The credit Snow received for trusty time is reflected in his time sheets, and his tentative release date was advanced from January 2, 2007 to September 29, 2006.

¶ 6. Snow was placed in trusty status again on December 28, 2000. However, Snow began serving his habitual offender sentences on September 29, 2000.<sup>1</sup> Therefore, he was no longer eligible to receive the trusty time allowance. Miss.Code Ann. § 47-5-138.1(2) (Rev.2004).

1. This date was his original conditional discharge date for his 1993 sentences, less the

trusty time he earned in 1999 and 2000.

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in 1999 and 2000.

¶7. On June 21, 2001, Snow filed a grievance with MDOC's Administrative Remedies Program inquiring as to why he was not receiving credit for trusty time. The Department responded that Snow was in trusty status and that he would receive the trusty time allowance. However, when the records department checked Snow's time sheet, they found that Snow was not entitled to the trusty time allowance and that his time sheet incorrectly indicated a parole eligibility date. On November 28, 2001, Snow received a corrected time sheet informing him that he was not eligible for trusty status. The time sheet showed that his earliest discharge date was September 29, 2006, and his parole eligibility date was removed.

¶8. Snow filed a petition for writ of habeas corpus, alleging error in MDOC's interpretation of parole statutes. In his complaint, Snow asked that MDOC be required to reflect a parole eligibility date and to allow him to receive "good time" incentives once he is eligible for parole. The circuit court dismissed Snow's complaint, finding that MDOC was not required to recompute Snow's sentences.

### ANALYSIS

#### I. WHETHER THE MDOC ERRED IN COMPUTING SNOW'S SENTENCES

#### II. WHETHER THE MDOC ERRED IN DECLARING SNOW TO BE SERVING THE LAST SIX YEARS OF HIS SENTENCES AS MANDATORY

¶9. In 1996, when the jury convicted Snow as a habitual offender, it was the practice of MDOC to simply add subsequent consecutive mandatory terms to existing parole eligibility, conditional release, and maximum release dates. Initially, Snow's parole eligibility and release dates were calculated in this way. The practice

is illustrated in *Williams v. Puckett*, 624 So.2d 496, 498 (Miss.1993), a case upon which Snow relies to argue that he is entitled to receive a parole eligibility date.

¶10. MDOC was required to change its policy regarding its calculation of parole eligibility dates for habitual offenders serving consecutive sentences, because their former methods of calculating parole eligibility conflicted with Mississippi Code Section 99-19-21(1) (Rev.2000). This section states: "When a person is sentenced to imprisonment on two (2) or more convictions, the imprisonment on the second, or each subsequent conviction shall, in the discretion of the court, commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction."

[1, 2] ¶11. MDOC has instituted an administrative correction of their prior misinterpretation of the law. Under the current practice of MDOC, when an offender who is serving a parole eligible sentence subsequently receives a consecutive mandatory sentence, the offender must complete the term of imprisonment on the first sentence before the second or subsequent consecutive mandatory sentence begins to run. Under MDOC's current policies, an offender does not complete his first sentence until the conditional discharge date, or what is now known as his tentative release date. Under MDOC's former policies, the offender would serve a portion of his sentence, until his parole eligibility date, then he would begin serving his mandatory sentence. After his mandatory sentence was completed he would recommence serving the remainder of his original sentence. Such a practice is contrary to Mississippi Code Annotated Section 99-19-21.

[3] ¶12. To support his argument that he is entitled to parole, Snow relies on

*Hill v. State*, 838 So.2d 994 (Miss.Ct.App. 2002). In that case, the offender, who was serving both mandatory and non-mandatory sentences, was given a parole date, because the offender was serving his mandatory sentences before serving his non-mandatory sentence. *Id.* at 998(¶ 12). Snow believes that this Court should rely on *Hill* because it was decided on November 19, 2002, whereas MDOC applied its new interpretation of the law on or before November 28, 2001. However, there is an important difference between *Hill* and the case sub judice. In *Hill*, the defendant received three separate sentences, two of which were imposed as a habitual offender, all given on the same day. *Id.* at 995(¶ 2). Because Hill's sentences were given on the same day, MDOC was free to allow the offender to serve his habitual offender sentences before serving his non-mandatory sentence. Because Hill's sentences were given on the same day, the mandates of § 99-19-21 were not at issue. In the present case, Snow's non-mandatory sentences were given prior to his sentences as a habitual offender. In order to comply with § 99-19-21, Snow is required to finish serving his non-mandatory sentences before he can begin serving his mandatory sentences.

[4] ¶ 13. Hill argues that § 99-19-21 is inapplicable because the section does not address the commutation of consecutive sentences. He urges this Court to apply Miss.Code Ann. § 47-5-139(2) (Rev.2004). This section states, "An offender under two (2) or more consecutive sentences shall be allowed commutation based upon the total term of the sentences." He argues that this section should be interpreted to allow his non-mandatory sentences to run concurrently with his mandatory sentences, thus entitling him to be released from prison. We are unable to grant such relief. In *Perkins v. Cabana*, 794 F.2d

168, 169 (5th Cir.1986), the prisoner argued that Mississippi's habitual offender statute "conflicts with the statutory provisions that authorize the State Board of Corrections to regulate and award earned time credits, and that define parole eligibility. See Miss.Code Ann. §§ 47-5-138, 47-5-139, 47-7-3." The Fifth Circuit rejected this argument, explaining that "the legislature intended them [statutes designed to award earned time credits and define parole eligibility] to maintain the enhanced penalty that § 99-19-81 imposes on habitual offenders, a penalty that includes the denial of certain privileges available to other prisoners." *Id.* at 170. We hold that MDOC should be allowed to interpret its statutes in a manner that allows the Mississippi Parole Board to impose an enhanced penalty for habitual offenders. MDOC's interpretation of § 99-19-21 as it applies to subsequent mandatory sentences is correct.

### III. WHETHER THE MDOC HAD THE AUTHORITY TO DENY SNOW A PAROLE ELIGIBILITY DATE

[5, 6] ¶ 14. MDOC changed its policies regarding parole eligibility for offenders serving subsequent mandatory sentences because it found that its former policies conflicted with statutory law. In *Taylor v. Mississippi State Prob. and Parole Bd.*, 365 So.2d 621 (Miss.1978), MDOC and the Mississippi Parole Board changed their methods of calculating parole eligibility in order to correct a prior misinterpretation of Mississippi Code Annotated Section 47-7-3. The Mississippi Supreme Court held that "administrative correction of a prior misinterpretation of parole laws as applied to the appellant did not violate the ex post facto clause of the United States or Mississippi Constitutions." *Id.* at 622 (citations omitted). There is no constitutional prohibition on MDOC's new interpretation of

§ 99-19-21. Moreover, because the Mississippi parole statutes use the word "may" rather than "shall," prisoners have "no constitutionally recognized liberty interest in parole." *Vice v. State*, 679 So.2d 205, 208 (Miss.1996) (citations omitted).

#### IV. WHETHER THE MDOC HAD THE AUTHORITY TO DENY SNOW ELIGIBILITY FOR TRUST EARNED-TIME STATUS

¶ 15. Snow's eligibility to earn trusty time is governed by Mississippi Code Section 47-5-138.1 (Rev.2004). This section states:

(1) In addition to any other administrative reduction of sentence, an offender in trusty status as defined by the classification board of the Department of Corrections may be awarded a trusty time allowance of thirty (30) days' reduction of sentence for each thirty (30) days of participation during any calendar month in an approved program while in trusty status, including satisfactory participation in education or instructional programs, satisfactory participation in work projects and satisfactory participation in any special incentive program.

(2) An offender in trusty status shall not be eligible for a reduction of sentence under this section if:

(a) The offender was sentenced to life imprisonment;

(b) The offender was convicted as an habitual offender under Sections 99-19-81 through 99-19-87;

(c) The offender was convicted of a sex crime;

(d) The offender has not served the mandatory time required for parole eligibility, as prescribed under Section 47-7-3, for a conviction of robbery or attempted robbery through the display of a deadly weapon, carjacking through the display of a deadly weapon or a drive-by shooting;

(e) The offender was convicted of violating Section 41-29-139(a) and sentenced under Section 41-29-139(b) or 41-29-139(f); or

(f) The offender was convicted of trafficking in controlled substances under Section 41-29-139.

[7] ¶ 16. Snow concedes that MDOC did not err in denying him eligibility for trusty status on June 6, 2001 and admits that he was not eligible for trusty status at that time. However, he argues that he is now eligible for trusty status because he claims that he was eligible for parole on January 2, 2003. Because Snow began serving his mandatory sentences totaling six years on September 29, 2000, he will be serving his sentences as a habitual offender until September 29, 2006. Snow is currently serving his habitual offender sentences, so he remains ineligible for trusty status. This argument is without merit.

¶ 17. THE JUDGMENT OF THE CIRCUIT COURT OF JASPER COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO JASPER COUNTY.

KING, C.J., BRIDGES AND LEE,  
P.J.J., IRVING, MYERS, GRIFFIS,  
BARNES AND ISHEE, JJ., CONCUR.



Teresa L. PARKER, Appellant

v.

Timothy Robin SOUTH, Appellee.

No. 2004-CA-00352-COA.

Court of Appeals of Mississippi.

April 12, 2005.

**Background:** After an agreed order for adjudication of paternity and establish-

## **CERTIFICATE OF SERVICE**

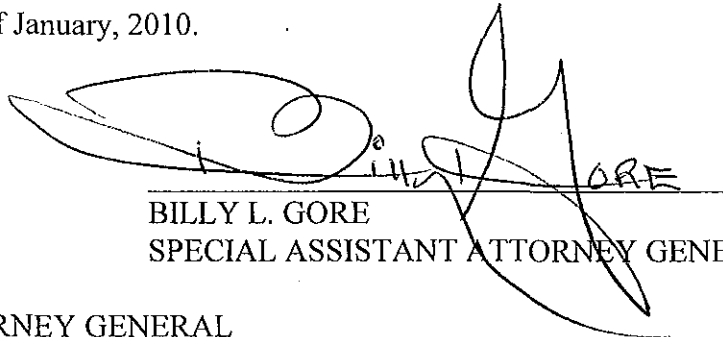
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

**Honorable Robert B. Helfrich**  
Circuit Court Judge, District 12  
Post Office Box 309  
Hattiesburg, MS 39403

**Honorable Jon Mark Weathers**  
District Attorney, District 12  
Post Office Box 166  
Hattiesburg, MS 39403-0166

**H. H. Klein, Esquire**  
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This the 8th day of January, 2010.



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