

No. 2009-CA-01050-COA

IN THE SUPREME COURT OF MISSISSIPPI

KENNETH WAYNE KEYS

Appellant

VS.

STATE OF MISSISSIPPI

Appellee

ORAL ARGUMENT REQUESTED

BRIEF OF APPELLANT

On Appeal from the Circuit Court of Forrest County

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies pursuant to Mississippi Supreme Court Rule 28(a)(1) that the following persons have an interest in the outcome of the case. These representations are made in order that Justices of this Court may evaluate possible disqualification or recusal.

Kenneth Wayne Keys
Defendant/Appellant

Honorable Jim Hood
Attorney General

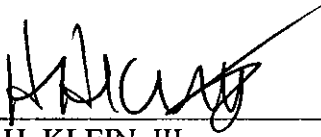
Honorable Jon Mark Weathers
District Attorney of Forrest County

Honorable Patricia Burchell
Assistant District Attorney of Forrest County

Honorable Robert Helfrich
Circuit Court Judge Forrest County

Honorable H. H. Klein, III
Attorney for Appellant/Defendant

SO CERTIFIED, this the 26th day of October, A.D., 2009.



H. H. KLEIN, III

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STATEMENT OF ISSUES

- I. The Trial Court erred when it ruled that Kenneth Keys was ineligible for parole on his life sentence.
- II. *Snow vs. Johnson*, 913 So.2d 334 (Miss. App. 2005) is an ex post facto law which affects sentences imposed prior to April 12, 2005.

STATEMENT OF THE CASE

On February 6, 1987, Kenneth W. Keys pled guilty to the crime of murder in the Circuit Court of Forrest County, Mississippi in Cause No. 12, 214 and was sentenced to serve a term of life in the Mississippi Department of Corrections. On December 12, 2003, Keys was tried and convicted of simple assault on a police officer in Perry County Circuit Court, Cause No. 5036 and was sentenced to serve of term of five (5) years in the Mississippi Department of Corrections, consecutive the life sentence in Forrest County Circuit Court Cause No. 12, 214. Keys was returned from parole on his 1987 murder conviction and is currently incarcerated in the Mississippi Department of Corrections. The Mississippi Department of Corrections has determined Keys is not parole eligible on his life sentence because Keys is not parole eligible on his consecutive five (5) year sentence.

Keys filed a Motion to Mandate Parole Eligibility pursuant to the Mississippi Uniform Post Conviction Collateral Relief Act which was denied on May 27, 2009. It is from the Opinion and Order denying Motion to Mandate Parole Eligibility that Kenneth W. Keys brings this appeal.

STATEMENT OF FACTS

On February 6, 1987, Kenneth W. Keys hereinafter "Keys" pled guilty to the crime of murder in the Circuit Court of Forrest County Mississippi Cause No. 12, 214 and was sentenced to serve a term of life in the Mississippi Department of Corrections. (RE 1)(UPCCR Motion Exhibit A) Pursuant to the version of Section 47-7-3 of the Mississippi Code of 1972 in effect at the time of Keys' guilty plea and sentence, Keys was required to serve ten (10) years of a life sentence before becoming eligible for parole. Keys was paroled on his life sentence on November 4, 1998 to Perry County, Mississippi. (RE 3)(UPCCR Motion Exhibit B) Keys' parole was subsequently revoked, and Keys was incarcerated in the Mississippi Department of Corrections until he was again paroled on his life sentence on August 28, 2002 to Perry County Mississippi. (RE 4)(UPCCR Motion Exhibit C). Section 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.

On December 12, 2003, Keys was tried and convicted of simple assault on a police officer in Perry County Circuit Court Cause No. 5036 and was sentenced to serve a term of five (5) years in the Mississippi Department of Corrections to run consecutive to Keys' life sentence in Forrest County Circuit Court Cause No. 12, 214 (RE 5)(UPCCR Motion Exhibit D) According to the June 30, 1995 version of Section 47-7-3 of the Mississippi Code of 1972, Keys is a subsequent offender and therefore ineligible for parole on his 2003 five(5) year sentence. Keys was returned from parole on his 1987 murder conviction and is currently incarcerated in the Mississippi Department of Corrections.

On or about January 23, 2008, Keys was provided his Mississippi Department of Corrections Inmate Time Sheet which reflected him as ineligible for parole or any other early release. (RE 7)(UPCCR Exhibit E) On March 21, 2008, Keys filed a Motion to Mandate Parole Eligibility pursuant to the Mississippi Uniform Post Conviction Collateral Relief Act (RE 8) On May 27, 2009, Circuit Judge Robert Helfrich entered an Opinion and Order denying Motion for Post Conviction Collateral Relief. (RE 22)

SUMMARY OF THE ARGUMENT

The Trial Court erred when it ruled that Keys was ineligible for parole based on his serving a consecutive sentence for simple assault on a police officer after completion of his life sentence for murder. The Trial Court erred when it ruled that pursuant to Mississippi Code Section 99-19-21 that Keys cannot commence serving his five (5) year sentence until the termination of the preceding life sentence. The Trial Court erred when it applied *Snow v. Johnson*, 913 So.2d 334(Miss. App. 2005) as said ruling violated the ex post facto clause of the United States Constitution, Article I, Section 10, Clause 1.

LEGAL ARGUMENT

I.

The Trial Court erred when it ruled that Kenneth Keys was ineligible for parole on his life sentence.

The Trial Court erred when it ruled that Keys was ineligible for parole on his 1987 life sentence because his 2003 five (5) year sentence was not parole eligible. Keys is not a habitual offender and is not precluded from earned time allowance pursuant to Section 47-5-138. Mississippi Code Section 47-5-138 reads as follows:

Earned time allowance program: earned-release supervision

- (1) The department may promulgate rules and regulations to carry out an earned time allowance program based on the good conduct and performance of an inmate. An inmate is eligible to receive an earned time allowance of one-half (½) of the period of confinement imposed by the court except those inmates excluded by law. When an inmate is committed to the custody of the department, the department shall determine a conditional earned time release date by subtracting the earned time allowance from an inmate's term of sentence. This subsection does not apply to any sentence imposed after June 30, 1995.
- (2) An inmate may forfeit all or part of his earned time allowance for serious violation of rules. No forfeiture of the earned time allowance shall be effective except upon approval of the commissioner or his designee, and forfeited earned time may not be restored.
- (3)(a) For the purposes of this subsection "final order" means an order of a state or federal court that dismisses a lawsuit brought by an inmate while the inmate was in the custody of the Department of Corrections as frivolous, malicious or for failure to state a claim upon which relief could be granted.
- (b) On receipt of a final order, the department shall forfeit:
 - (i) Sixty (60) days of an inmate's accrued earned time if

- the department has received one (1) final order as defined herein;
- (ii) One hundred twenty (120) days of an inmate's accrued earned time if the department has received two (2) final orders as defined herein;
 - (iii) One hundred eighty (180) days of an inmate's accrued earned time if the department has received three (3) or more final orders as defined herein.
- (c) The department may not restore earned time forfeited under this subsection.
- (4) An inmate who meets the good conduct and performance requirements of the earned time allowance program may be released on his conditional earned time release date.
- (5) For any sentence imposed after June 30, 1995, an inmate may receive an earned time allowance of four and one-half (4-1/2) days for each thirty (30) days served if the department determines that the inmate has complied with the good conduct and performance requirements of the earned time allowance program. The earned time allowance under this subsection shall not exceed fifteen percent (15%) of an inmate's term of sentence; however, beginning July 1, 2006, no person under the age of twenty-one (21) who has committed a nonviolent offense, and who is under the jurisdiction of the Department of Corrections, shall be subject to the fifteen percent (15%) limitation for earned time allowances as described in this subsection (5).
- (6) Any inmate, who is released before the expiration of his term of sentence under this section, shall be placed under earned-release supervision until the expiration of the term of sentence. The inmate shall retain inmate status and remain under the jurisdiction of the department. The period of earned-release supervision shall be conducted in the same manner as a period of supervised parole. The department shall develop rules, terms and conditions for the earned-release supervision program. The commissioner shall designate the appropriated hearing officer within the department to conduct revocation hearings for inmates violating the conditions of earned-release supervision.

- (7) If the earned-release supervision is revoked, the inmate shall serve the remainder of the sentence and the time the inmate was on earned-release supervision, shall not be applied to and shall not reduce his sentence.

Keys eligibility is provided in Mississippi Code Section 47-5-139 which reads as follows:

Earned time allowance; eligibility; forfeiture

- (1) An inmate shall not be eligible for the earned time allowance if:
 - (a) The inmate was sentenced to life imprisonment; but an inmate, except an inmate sentenced to life imprisonment for capital murder, who has reached the age of sixty-five (65) or older and who has served at least fifteen (15) years may petition the sentencing court for conditional release;
 - (b) The inmate was convicted as a habitual offender under Sections 99-19-81 through 99-19-87;
 - (c) The inmate has forfeited his earned time allowance by order of the commissioner;
 - (d) The inmate was convicted of a sex crime; or
 - (e) The inmate has not served mandatory time required for parole eligibility for a conviction of robbery or attempted robbery with a deadly weapon.
- (2) An offender under two (2) or more consecutive sentences shall be allowed commutation based upon the total term of the sentences.
- (3) All earned time shall be forfeited by the inmate in the event of escape and/or aiding and abetting an escape. The commissioner may restore all or part of the earned time if the escapee returns to the institution voluntarily, with expense to the state, and without act of violence while a fugitive from the facility.
- (4) Any officer or employee who shall willfully violate the provisions of this section and be convicted therefore shall be

removed from office or employment.

Keys is eligible for earned time allowance and therefore said sentences are not “mandatory”.

Keys is likewise eligible for earned time allowance on his 1987 life sentence and may be released before the expiration of his term of sentence pursuant to Section 47-5-138(6). Mississippi Code Section 99-19-21(1) reads as follows:

Consecutive or concurrent sentences; felonies committed while under supervision or suspended sentence

- (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. (*emphasis added*)

When reading Section 47-5-138 in conjunction with the language contained in Section 99-19-21(1) it is clear that there is a distinction between “termination of the preceding life sentence” as ruled in the Forrest County Circuit Court Opinion and Order (RE 22), and “termination of the imprisonment for the preceding conviction” in Mississippi Code Section 99-19-21(1). Keys imprisonment on the life sentence could “terminate” by means other than parole, and therefore he could begin serving his five (5) year sentence.”

Keys retains his parole eligibility on his life sentence pursuant to *Puckett v. Abels*, 684 So.2d 671 (Miss. S.Ct. 1996). In addition, Keys maintains eligibility for earned time allowance and commutation of his sentence. The Court erroneously relies upon *Snow v. Johnson*, 913 So.2d 334 (Miss. App. 2005). [Application of *Snow* to the 1995 amendment of Section 47-7-3 of the Mississippi Code to determine eligibility of a 1987 life sentence is in violation of the ex post facto clause of the United States Constitution Article I, Section 10, Clause 1 and should be reversed and

remanded, or alternatively this Court should render Keys eligible for parole on his life sentence.

II.

***Snow vs. Johnson*, 913 So.2d 334 (Miss. App. 2005) is an ex post facto law which affects sentences imposed prior to April 12, 2005.**

The Trial Court erroneously applied *Snow* to Keys 2003 five (5) year sentence and Keys 1987 life sentence.

In *Snow* @ 337, the Court stated the following:

“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 reun. 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*.”

When Keys was convicted of both crimes, the MDOC policy in effect allowed him to be paroled on his 1987 life sentence and then beginning serving his 2003 five (5) year sentence.

Confirmation in *Snow* of the MDOC policy came two (2) years subsequent to Keys latest conviction, and therefore is an ex post facto law as applied to Keys.

The Opinion and Order denying Keys Motion to Mandate Parole Eligibility pursuant to the Mississippi Post Conviction Collateral Relief Act should be reversed and remanded, or alternatively this Court should render Keys eligible for parole on his life.

CONCLUSION

For these reasons, and any other reason this Court may find on the record, Kenneth W. Key's sentence should be determined to be eligible for parole on his life sentence.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'H. H. Klein, III', is written over a horizontal line. The signature is stylized with a large 'H' and a long, sweeping underline.

H. H. KLEIN, III

CERTIFICATE OF SERVICE


This is to certify that a true and correct copy of the above and foregoing Appellant's Brief was this date posted via first class mail, postage prepaid, to the following:

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This the 26th day of October, A.D., 2009.



H. H. KLEIN, III