

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

**CEDRIC KING**

**APPELLANT**

**VS.**

**NO. 2009-CP-1790**

**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**

**CEDRIC KING**

**APPELLANT**

**vs.**

**CAUSE No. 2009-CP-01790-COA**

**THE STATE OF MISSISSIPPI**

**APPELLEE**

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

**STATEMENT OF THE CASE**

On or about 30 January 2009 the prisoner filed what was purported to be a motion in post conviction relief, in which he sought to vacate his 1997 conviction and sentence for armed robbery. As grounds for this relief, he asserted ineffective assistance of counsel. Specifically, the prisoner alleged that his attorney misinformed him about parole eligibility on the armed robbery conviction. According to the prisoner, he had been told by his attorney prior to the prisoner's guilty plea that he would be eligible for parole after serving ten years on his armed robbery sentence. The prisoner alleged that he was not aware of his attorney's alleged erroneous advice as to parole eligibility until he was informed in 2008 that he was not eligible for parole or early release on the armed robbery conviction. According to the prisoner, it was "newly discovered evidence" that he found out that he would not be eligible for parole. Consequently, the Appellant believed that time and successive writ bars would not be applicable.

The Appellant also claimed that the trial court failed to inform him that he would not be eligible for parole, or misinformed him that he would be so eligible

He also asserted that he was actually innocent of the armed robbery charge. ( R. Vol. 1, pp.

6 - 20).

The prisoner provided a statement under oath of the facts within his knowledge. ( R. Vol. 1, pp. 22 - 25). The prisoner also provided a copy of his sworn "Petition to Enter Plea of Guilty" to armed robbery. That petition does not demonstrate that the prisoner was informed that he would be eligible for parole after having served ten years imprisonment, though it did demonstrate that the prisoner had been informed of the minimum and maximum terms of imprisonment for armed robbery. The petition further showed that the prisoner had been satisfied with his attorney. ( R. Vol. 1, pp. 26 - 29).

He also provided a transcript of his plea of guilty to armed robbery. However, that transcript does not show that the Circuit Court advised the prisoner as to any matter concerning parole eligibility. In this plea colloquy, the prisoner, who was under oath, testified that his attorney had gone over the petition to enter a plea of guilty with him, that he understood all of it, that he needed no further explanation of the matters embraced by the petition, and that all of his statements in the petition were true and correct. He further stated that he was "completely satisfied" with his attorney's representation. He also stated, under oath, that he was in fact guilty of the felony of armed robbery. ( R. Vol. 1, pp. 32 - 42).

The Circuit Court further informed the prisoner that no one could guarantee early release, parole or probation if he was sentenced to a term of incarceration, and that in fact he might be required to served the entire sentence. The prisoner indicated that he understood that. ( R. Vol. 1, pg. 42)

In October, 2003, the prisoner wrote the Commissioner of the Department of Corrections to complain about the fact that the legislature, in 1994, provided that those convicted of armed robbery would not be eligible for parole. ( R. Vol. 1, pg. 47 - 48). The director of Bureau Records responded

to this complaint on 23 October 2003, indicating that the first ten years of a sentence imposed on a conviction for armed robbery was “mandatory,” and had been so since 1 January 1977. According to the director, though, after the first ten years had been served, the prisoner would be eligible for meritorious earned time and trusty time. ( R. Vol. 1, pg. 49).

On 13 June 2008, the prisoner requested a recalculation of his sentence by the Department of Corrections. On 15 September 2008, MDOC responded, pointing out that those convicted on or after 1 October 1994 of armed robbery must serve their terms of imprisonment in full. ( R. Vol. 1, pp. 50 - 55).

The Appellant provided a document pretending to be an affidavit, in which one Willie Coker stated that the prisoner told him that the plea was coerced and that he, the prisoner, was innocent. ( R. Vol. 1, pg. 56). A Jerome Kirkwood and Tracy Clark provided affidavits, dated 16 September 2001, in which they claimed that the prisoner had nothing to do with the armed robbery. ( R. Vol. 1, pp. 57 - 58).

The Circuit Court denied relief on the prisoner’s motion without an evidentiary hearing. Noting that the prisoner had previously filed a motion in post - conviction relief and that the Court of Appeals had affirmed the order in that case denying relief, the court found the instant filing to be time and successive writ barred. ( R. Vol. 2, pp. 228 - 229).

### **STATEMENT OF ISSUES**

**1. DID THE CIRCUIT COURT ERR IN DENYING RELIEF ON THE PRISONER’S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING?**

### **SUMMARY OF ARGUMENT**

**1. THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER’S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING**

## ARGUMENT

### **1. THAT THE CIRCUIT COURT DID NOT ERR IN DENYING RELIEF ON THE PRISONER'S MOTION IN POST - CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING**

The prisoner's claim is that his attorney gave him inaccurate information concerning parole eligibility on a conviction of armed robbery. Those convicted after 1 October 1994 of armed robbery are not eligible for parole. Miss. Code Ann. Section 47-7-3(1)(d)(ii) (Rev. 2009). The prisoner claims that he was told by his attorney, prior to entering the guilty plea, that he would be eligible for parole after having served ten years of his sentence. This was the law for those convicted of armed robbery on or after 1 January 1977 until 30 September 1994. Miss. Code Ann. Section 47-7-3(1)(d)(i) (Rev. 2009). The prisoner's conviction for armed robbery occurred in 1997, some three years after the possibility of parole or early release on a conviction of armed robbery was eliminated.

The prisoner has had his bite at the post - conviction relief apple. *King v. State*, 828 So.2d 825 (Miss. Ct. App. 2002). He also took a second, unsuccessful bite in 2004. *King v. State*, 2004-M-00728. Relief was denied on those motions. The instant case, then, is the prisoner's third effort. As for the instant motion, it appears that the prisoner did not obtain leave to proceed in post - conviction relief on the instant motion in the Circuit Court from the Supreme Court. He was required to do so since he appealed the Circuit Court's decision in his first motion in post - conviction relief. Since he did not seek leave to proceed, the Circuit Court was without jurisdiction to entertain the instant motion. *Sykes v. State*, 919 So.2d 1064, 1067 (Miss. Ct. App. 2005). Since the Circuit Court lacked jurisdiction, so does this Court. *Crosby v. State*, 982 So.2d 1003 (Miss. Ct. App. 2008)

Assuming for argument that the circuit court had jurisdiction, the prisoner's current motion was barred for a number of reasons.

The prisoner raised an ineffective assistance of counsel claim in the his first post - conviction

relief action. *King v. State*, 828 So.2d 825, 826 - 827 (Miss. Ct. App. 2002). There, though, the attorney was said to have been ineffective because, *inter alia*, the attorney supposedly told the prisoner that he would be eligible for parole in three years. It was in that post - conviction relief action, though, that the prisoner should have raised the claim that he was erroneously informed that he would be eligible for parole after serving ten years imprisonment. The issue of the effectiveness of the prisoner's attorney has been finally adjudicated. The prisoner is either collaterally estopped from re-litigating this issue or is barred by the doctrine of res judicata. *Pickle v. State*, 942 So.2d 243 (Miss. Ct. App. 2006); *Rowland v. State*, No. 2008-CP-00731-COA (Decided 9 June 2009, Not Yet Officially Reported).

The prisoner's motion was also time - barred and successive writ barred, as noted by the circuit court. Miss. Code Ann. Section 99-39-5(2) (Supp. 2009); 99-39-23(6) (Supp. 1999).

The prisoner, in an attempt to avoid these bars, makes much of the alleged fact that he did not discover until two years or so ago that his sentence for armed robbery was not parole eligible. Even if this be so, it makes no matter. That is not "newly discovered evidence." *Pickle v. State*, 942 So.2d 243, 246 (Miss. Ct. App. 2006)(Newly discovered evidence does not embrace a prisoner's untimely realization that a legal error might have occurred in his case). To the extent that the prisoner would have this Court consider the possibility that the Department of Corrections was at one point mistaken as to parole eligibility, any such error on its part was no error on the part of the defense attorney or the circuit court. It may be that the Appellant claims that he was misled by the circuit court and his attorney at the time of the plea as to the nature of the sentence for armed robbery, such that he was unaware until only recently that he would have to serve the entire "to serve" portion of his sentence, but this is a hollow claim. The prisoner's first motion in post - conviction relief evinced no confidence in his attorney's advice as to sentencing. There is, in any



event, nothing in this record to so much as suggest an intention to mislead the prisoner or that the prisoner was misled, intentionally or not, by his attorney or the Circuit Court.

As for the claim of actual innocence, the prisoner apparently relies on the affidavits from his friends dated in 2001. These affidavits fall quite short of suggesting “actual innocence.” As significantly, they cannot possibly be regarded as “newly discovered.” The prisoner could and should have alleged this claim in his first motion in post - conviction relief. Beyond this, the prisoner clearly stated under oath that he was guilty of armed robbery in the plea colloquy.

Assuming, however, that the instant case is somehow properly before this Court, there is no merit to the prisoner’s claim.

The only support for the prisoner’s claim that his attorney told him that he would be eligible for parole after having served ten years imprisonment is the prisoner’s own statement. This was insufficient. *King v. State*, 828 So.2d 825 - 826 (Miss. Ct. App. 2002). There is nothing in the plea colloquy to support the prisoner’s claim. On the other hand, the prisoner was told that he might well have to serve his entire sentence if he were to be sentenced to a term of incarceration. While the prisoner would have this Court consider this advice insufficient, the Court noted the significance of it when considering the prisoner’s prior claim that he was not informed of the three - year minimum for armed robbery. *Id.* The record before the Court in 2002 in this case failed to support the prisoner’s ineffective assistance of counsel claim. Nothing has changed since then.

The prisoner cites *Hall v. State*, 800 So.2d 1202 (Miss. Ct. App. 2001), asserting that the decision there shows that the advice given by the circuit court in the case at bar was insufficient to put the prisoner on notice of the mandatory nature of a sentence on a conviction of armed robbery. However, in *Hall*, the circuit court there erroneously advised that prisoner about the applicability of earned time release. This Court held that the advice to the effect that that prisoner might have to

serve the whole sentence was insufficient to cure that error.

There was no such error here. Thus, *Hall* has no application here. Beyond this, as we have said above, this Court has previously considered whether the advice given the prisoner was sufficient. It is far too late now to attempt to review that determination on the basis of *Hall*.

Holding aside the prisoner's self-serving claim that his attorney misadvised him as to the mandatory nature of the sentence, there is nothing to show that the attorney gave erroneous advice. The prisoner pronounced himself "completely satisfied" with the services of his attorney. ( R. Vol. 1, pg. 38). Under these circumstances, there is no basis to find that the attorney was ineffective. *Davis v. State*, 5 So.3rd 435 (Miss. Ct. App. 2008).

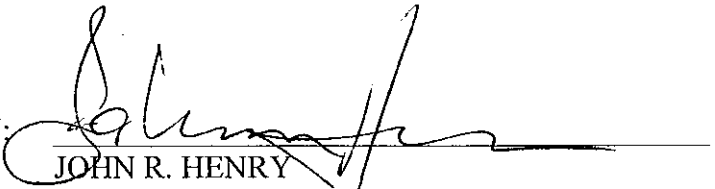
#### CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE OF SERVICE

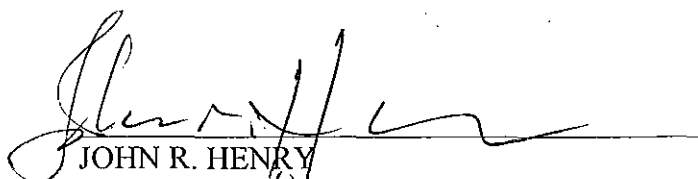
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 15th day of March, 2010.

  
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