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IN THE COURT OF APPEALS OF MISSISSIPPI

JOSH KIRK DAVIS

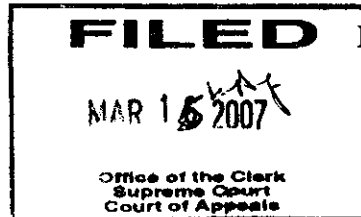
APPELLANT

V.

STATE OF MISSISSIPPI

NO. 2006-CA-0719-COA

APPELLEE



REPLY BRIEF OF APPELLANT

COUNSEL FOR APPELLANT

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I. THE STATE IS PROCEDURALLY BARRED FROM ARGUING THAT JOSH KIRK DAVIS IS PROCEDURALLY BARRED FROM RAISING HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

The Court entered an order on or about November 3, 2004 sending this matter to the Circuit Court of Yazoo County, Mississippi for an evidentiary hearing. Pursuant to § 992-39-27, in particular subparagraph 5, the Supreme Court considers whether claims are procedurally viable before they are considered for hearing. Consequently, the Court's ruling on the evidentiary hearing at least implies that it is under no procedural obstacle to review the merits of the claim.

An evidentiary hearing was held in the Court below on or about April 4, 2006 pursuant to this Court's order entered on or about November 3, 2004. While the State did not respond to the initial Application for Leave to File Motion for Post-Conviction Relief filed in the Mississippi Supreme Court, it did litigate the evidentiary hearing held on or about April 4, 2006. Nowhere in that evidentiary hearing did the State raise a procedural bar to the claim of ineffective assistance of counsel. It is therefore barred from raising it in this appeal.

With regard to this procedural bar, as stated by the state, "the burden of proving that no procedural bar exists falls squarely on the petitioner." Here, the Petitioner is raising a procedural bar on the State. Therefore, the burden of proving that no procedural bar exists falls squarely on the State. See *Crawford v. State*, 867 So.2d 196, 202 (Miss. 2003). In *Crawford*, at 202, the Court noted that claims and theories that could have been brought to the attention of the trial court are procedurally barred from being reviewed by this Court on post conviction relief.

What is good for the goose is good for the gander. The rule of procedural bar is just as applicable here. The failure of the State to raise any argument of procedural bar at the evidentiary hearing held in the Circuit Court of Yazoo County, Mississippi precludes them from raising it here.

II. THE TRIAL COURT AND THE STATE, IN ITS BRIEF, APPLIED THE INCORRECT STANDARD OF REVIEW.

The State has referred to the fact that “when reviewing a trial court’s decision to deny a petition for post-conviction relief, [an appellant court] will not disturb the trial court’s findings unless they are found to be clearly erroneous. [citation omitted] *See Twillie v. State*, 892 So.2d 187, 189 (Miss. 2004). *See also Hersick v. State*, 904 So.2d 116, 125 (Miss. 2004) and note that according to *Davis v. State*, 897 So.2d 960, 967 (Miss. 2004), reh denied, that “[The Supreme Court] reviews a trial court’s findings on ineffective assistance of counsel on a clearly erroneous standard.”

The State in its brief then quoted the trial court:

“As far as the ineffective assistance of counsel, based on the testimony of Attorney Evans, as well as the incorporation of the trial transcript, the Court finds that it would not have changed the outcome of the trial.” (Tr. At 89)

This is a clearly erroneous standard. To prove the prejudice prong of the *Strickland* ineffective assistance of counsel standard, Josh Davis must show that there is “a reasonable probability that, but for counsel’s unprofessional errors, the results of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. 2052 L.Ed.2d 675 (1984). The Supreme Court specifically explained that *Strickland* “did not [and did not have to] show that counsel’s deficient conduct more

likely than not altered the outcome of the case.” 466 U.S. at 693, 104 S.Ct. 2052. *See Martin v. Trosshans*, 424 F.3d 588, 592 (7th Cir. 2005), where the Seventh Circuit held that the lower court incorrectly placed on the burden of the defendant to “show that, but for defense counsel’s unprofessional errors, the result of the proceeding would have been different” in violation of *Strickland’s* burden to show “a reasonable probability that, for counsel’s unprofessional errors, the result of the proceeding would have been different”.

III. IT IS IMPROPER TO PRECLUDE THE
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM
AS PART OF A POST-CONVICTION PROCEEDING
BECAUSE IT WAS RAISED IN SOME FASHION ON
DIRECT APPEAL.

The proper place for raising an ineffective assistance of counsel claim is in a post-conviction proceeding. What was submitted to the Supreme Court here that resulted in the order granting an evidentiary hearing was substantial information by way of affidavits that could not have been presented on direct appeal. *See Sharp v. State*, 862 So.2d 576 (Miss. Ct. App. 2004); *Graves v. State*, 915 So.2d 788 (Miss. Ct. App. 2005); *McGee v. State*, 929 So.2d 53 (Miss. Ct. App. 2006). That was followed by the testimony of five witnesses at the evidentiary hearing that could not have been a part of the record on direct appeal. These include Dr. William Owen, who testified as an expert in effect, that the crime could not have occurred as set forth by the State at trial; the testimony of Lesley Evans regarding the ineffectiveness of trial counsel and the fact that the failures of trial counsel were not strategic in nature; the testimony of Carlton Shaffer, the lieutenant investigator for the Yazoo County Sheriff’s Department regarding what he observed on the scene and the statements made by Davis as part of his investigation of the crime; Ricky Shivers, the chief medical examiner/investigator/coroner of Yazoo County who


was one of the first people on the scene and testified as to what he saw on the scene, corroborating the findings of Dr. Owen.

CONCLUSION

Josh Kirk Davis respectfully moves this Court to enter an order setting aside his conviction and sentence and ordering a new trial and for whatever relief may be appropriate and just.

This the _____ day of March, 2007

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Cynthia A. Stewart, Attorney for Josh Kirk Davis, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of the Appellant to the following:

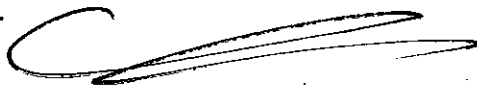
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