

IN THE COURT OF APPEAL OF THE STATE OF MISSISSIPPI

MAURICE GRAY

APPELLANT

FILED

VS.

FEB 25 2008

NO. 2007-CA-0160-COA

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I.	
THE RULING OF THE TRIAL COURT IS WITH THE CORRECT. DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AND DID NOT MEET HIS BURDEN AS REQUIRED IN <i>STRICKLAND</i> TO GARNER ANY RELIEF	4
CONCLUSION	6
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

STATE CASES

Cole v. State, 666 So.2d 767, 777 (Miss.1995)	4
Givens v. State, 967 So.2d 1(Miss. 2007)	5
Gray v. State, 846 So.2d 260 (Miss.App. 2002)	1, 2
Martin v. State, 970 So.2d 723 (Miss. 2007)	4
Tate v. State, 912 So.2d 919, 928 (Miss.2005)	4
Wilcher v. State, 479 So.2d 710, 712 (Miss.1985)	4
Williams v. State, 937 So.2d 35 (Miss.App. 2006)	5

IN THE COURT OF APPEAL OF THE STATE OF MISSISSIPPI

MAURICE GRAY

APPELLANT

VS.

NO. 2007-CA-0160-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

Defendant was convicted of Murder & Aggravated assault, which was affirmed on direct appeal. *Gray v. State*, 846 So.2d 260 (Miss.App. 2002). Certiorari was denied by the Mississippi Supreme Court. Subsequently a motion for post-conviction relief was filed and granted by the Mississippi Supreme Court.

A hearing was held at which defendant was represented by counsel. Subsequently, the trial court denied relief by order with findings of fact and conclusions of law. (Order denying relief, c.p. 105-07).

Pursuant to request defendant was granted an out-of-time appeal of the denial of post-conviction relief.

STATEMENT OF FACTS

Fact relevant to the facts of the murder and aggravated assault are in the opinion of the Court of Appeals. *Gray v. State*, 846 So.2d 260 (Miss.App. 2002). Subsequent facts are mostly procedural and are succinctly laid out by appellate counsel.

ARGUMENT

I.

THE RULING OF THE TRIAL COURT IS WITH THE CORRECT. DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AND DID NOT MEET HIS BURDEN AS REQUIRED IN *STRICKLAND* TO GARNER ANY RELIEF.

First to make it clear, the ONLY issue preserved and presented for review is the ineffective assistance of counsel claim. That was the ONLY issue on which evidence was presented at the lower court hearing.

So, anything and everything else was waived and is procedurally barred from review.

¶ 15. . . . We consistently have held that issues not presented to the trial court are deemed waived and may not be raised for the first time upon appeal. *Tate v. State*, 912 So.2d 919, 928 (Miss.2005); *Wilcher v. State*, 479 So.2d 710, 712 (Miss.1985).

Martin v. State, 970 So.2d 723 (Miss. 2007).

With a look at the transcript of the evidentiary hearing – evidence regarding only one issue was presented for the trial court’s consideration. The trial court specifically held that trial counsel (Johnnie Walls) was more than adequate and much higher than the minimum required. Further, the trial court specifically found defendant had wholly failed to show any prejudice. (C.p. 107).

¶ 15. As stated supra, there is a rebuttable presumption that counsel's performance was effective. *Id.* “[C]ounsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall[s] within the ambit of trial strategy.” *Cole v. State*,

666 So.2d 767, 777 (Miss.1995) (citing *Murray v. Maggio*, 736 F.2d 279 (5th Cir.1984)). We find nothing in the record affirmatively showing constitutional ineffectiveness. Furthermore, Givens has failed to show prejudice. Thus, Givens has failed to meet his *Strickland* burden and we find these two issues to be without merit.

Givens v. State, 967 So.2d 1(Miss. 2007).

Therefore it is the succinct position of the State the clearly addressed the issue.

The State will stand on the findings of the trial court.

¶ 14. . . . Consequently, considering the totality of the circumstances, we find that Williams has failed to rebut the strong presumption that his attorney's performance was reasonable. This issue is without merit.

Williams v. State, 937 So.2d 35 (Miss.App. 2006)(claimed ineffective assistance of Johnnie Walls).

No relief should be granted on this assertion of error.

Just to reiterate, the remainder of the issues raised (the fact that an issues is claimed as being appealed doesn't mean they are appealable, all the time, every time defendant comes before a court) are procedurally barred from review as *res judicata*, waived or procedurally barred.

CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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 Albert B. Smith
Circuit Court Judge
Post Office Drawer 478
Cleveland, MS 38732

Honorable Laurence Mellen
District Attorney
Post Office Box 848
Cleveland, MS 38732

Jeffrey L. Ellis, Esquire
Attorney At Law
Post Office Box 982
Ridgeland, MS 39158

This the 25TH day of February, 2008.



JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680

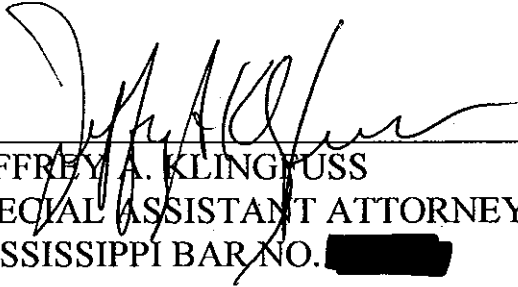
CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the trial court denial of post-conviction relief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:


JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680