

MARK S. ALLEN

APPELLANT

VS.

FILED

NO. 2007-CA-0672-COA

JAN 31 2008

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SUPREME COURT
COURT OF APPEALS**

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
I. & II.	
THESE CLAIMS WERE TIME BARRED AND NOT WITHIN AN EXCEPTION.	5
III.	
DEFENDANT WAS REPRESENTED BY CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.	8
CONCLUSION	10
CERTIFICATE OF SERVICE	11

Alexander v. State, 605 So.2d 1170, 1172 (Miss.1992)	6
Bevill v. State, 669 So.2d 14, 17 (Miss.1996)	8
Chancy v. State, 938 So.2d 267 (Miss.App. 2005)	8
Cross v. State, 954 So.2d 497 (Miss.App. 2007)	6
Kirk v. State, 798 So.2d 345, 346 (Miss.2000)	8
Luckett v. State, 582 So.2d 428, 429-30 (Miss.1991)	8
McGleachie v. State, 840 So.2d 108, 110 (Miss.Ct.App.2002)	8
Myers v. State, 583 So.2d 174, 177 (Miss.1991)	6
Nichols v. State, 955 So.2d 962 (Miss.App. 2007)	6
Reeder v. State, 783 So.2d 711, 717 (Miss.2001)	6
Richardson v. State, 767 So.2d 195, 203 -204 (Miss. 2000)	6
Sneed v. State, 722 So.2d 1255, 1257 (Miss.1998)	8

STATE STATUTES

Miss. Code Ann. § 97-3-19	1
Miss. Code Ann. § 99-39-5	5
Miss. Code Ann. § 99-39-5(2)	8

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BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

The grand jury of Adams County indicted defendant, Mark S. Allen for Murder in violation of *Miss. Code Ann.* § 97-3-19. (Indictment, cp.1). Counsel for defendant petitioned the court for a competency examination. Said was done by experts at Mississippi State Hospital and their report submitted to the Court. A hearing was held and defendant was found to be competent to stand trial. Subsequently, aided by counsel (two), defendant petitioned the Circuit to enter a plea of Guilty. (Petition c.p.118-123). In December 2000, a hearing was held defendant entered a plea of guilty to Manslaughter and the trial court sentenced defendant to Twenty (20) years in the custody of the Mississippi Department of Corrections plus

motion for post-conviction relief, supplements by hundreds of pages of exhibits. (Motion for Post-Conviction Relief starts at c.p. 155. The trial court denied the motion on April 10, 2007. (Order denying relief (c.p. 619-620).

It is from the denial of post-conviction this instant appeal was timely noticed. (Notice of appeal, c.p. 144).

**THESE CLAIMS WERE TIME BARRED AND NOT WITHIN AN
EXCEPTION.**

III.

**DEFENDANT WAS REPRESENTED BY CONSTITUTIONALLY
EFFECTIVE ASSISTANCE OF COUNSEL.**

EXCEPTION.

At the trial court level counsel claimed defendant was incompetent and could not have knowing and voluntarily pleaded guilty. The petition was supported with hundreds of pages of documentation.

Now on appeal counsel claims the mental competency of defendant tolls the statute of limitations.

Such is not the law.

The trial court denied the petition as being time barred and not within an exception pursuant to *Miss. Code Ann.* § 99-39-5. (C.p. 619-20).

The first hurdle defendant must overcome is the statutory time-bar to post-conviction relief. Looking at the time line it is clearly outside the limits. The trial court was correct in denying the petition for post-conviction relief as time barred.

Without waiving the procedural bar to review the State would also point out there is no merit to the claim of incompetency in either fact or law.

Most obvious is the fact that defendant (at request of his two trial counsel) did have a competency hearing. Further, in the transcript defendant answered he was competent and both of his counsel signed a certificated stating defendant was physically and mentally competent to plead guilty. (C.p.122). Twice within the

¶ 5. The only error that Cross alleges in her motion for PCR is that her plea was not voluntarily and intelligently made. A guilty plea is binding upon a defendant only when it is voluntarily and intelligently entered. *Alexander v. State*, 605 So.2d 1170, 1172 (Miss.1992) (citing *Myers v. State*, 583 So.2d 174, 177 (Miss.1991)). In *Reeder v. State*, 783 So.2d 711, 717(¶ 20) (Miss.2001),

Cross v. State, 954 So.2d 497 (Miss.App. 2007)(alleged mental illness made her incompetent to plead guilty).

And, in a similar case when looking to the merits the Court held:

¶ 11. While discussing Nichols's competency to enter his guilty pleas, the lower court noted in its denial of Nichols's motion for post-conviction relief, as we did above, that Nichols was questioned regarding his level of understanding of the proceedings and consequences of his guilty plea. This was buttressed with Nichols's attorney's statement regarding Nichols's ability to understand the proceedings. Also, the sentencing court noted, in finding that Nichols had entered his guilty pleas knowingly and voluntarily, that it had the opportunity to observe Nichols during the two-day trial on the aggravated assault cause. While Rule 9.06 of the Uniform Rules of Circuit and County Court Practice require the court to hold a competency hearing if it determines that reasonable grounds exist for such, we find from a thorough reading of the record that reasonable grounds did not exist. We cannot say that the lower court was clearly erroneous in his findings, and, therefore, this issue is without merit.

Nichols v. State, 955 So.2d 962 (Miss.App. 2007).

As the Mississippi Supreme Court has oft held: “. . . there was no dispute that the defendant had been treated for various mental disorders but that “*one suffering from mental illness may be rational and competent to stand trial.*”“ *Richardson v.*

barred and not within an exception; and, 2) Alternatively, this issue is without merit as defendant was examined, found to be competent at the time of his guilty plea.

No relief should be granted on this first allegation of trial court error.

Again this claim, was raised in the petition for post-conviction relief and denied relief as being time barred.

¶ 11. We are cognizant of the fact that the Mississippi Supreme Court has acknowledged that section 99-39-5(2) might be overcome in another manner. “Our supreme court has held that the three-year statute of limitations may be waived when a fundamental constitutional right is implicated.” *McGleachie v. State*, 840 So.2d 108, 110(¶ 12) (Miss.Ct.App.2002) (citing *Sneed v. State*, 722 So.2d 1255, 1257(¶ 11) (Miss.1998)). We clearly realize that the right to competent counsel is a fundamental constitutional right. However, the Mississippi Supreme Court has never held that merely raising a claim of ineffective assistance of counsel is sufficient to surmount the time bar of section 99-39-5(2). *Bevill v. State*, 669 So.2d 14, 17 (Miss.1996). Accordingly, we decline to hold, without substantial and specific supporting facts, that Chancy's assertion that his counsel's ineffective assistance prompted his guilty plea is enough to operate as a waiver of the three-year statute of limitations. ***Finally, we note that the Mississippi Supreme Court has consistently held that the time bar of Mississippi Code Annotated section 99-39-5(2) applies to petitioners's post-conviction relief claims based on ineffective assistance of counsel and involuntariness of guilty pleas.*** *Kirk v. State*, 798 So.2d 345, 346(¶ 6) (Miss.2000) (citing *Lockett v. State*, 582 So.2d 428, 429-30 (Miss.1991)). In light of established Mississippi law, we find that all of Chancy's issues are time-barred, including his claim of ineffective assistance of counsel and the involuntariness of his plea.

Chancy v. State, 938 So.2d 267 (Miss.App. 2005).

Claims of ineffective assistance are time barred. Without waiving the procedural bar to review it is clear this claim is also without merit.

competency as a defense. The were also successful in getting a plea for a lesser charge and had witnesses available at the sentencing for mitigation. This was, Constitutionally effective assistance of counsel.

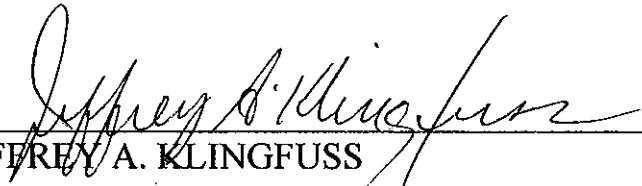
If this issue were not procedurally barred in would, alternatively, be without merit in fact. No relief should be granted on this claim of error.


appeal the State would ask this reviewing court to affirm the trial court denial of post-conviction relief.

Respectfully submitted,

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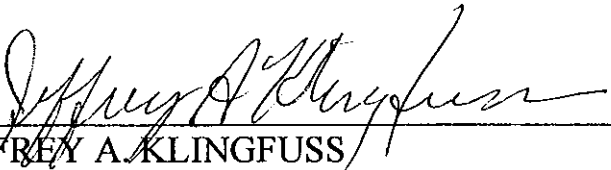
Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 31st day of January, 2008.



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