

**COPY**

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

**JOHN PETER MUISE**

**APPELLANT**

**VS.**

**NO. 2007-KA-0553**

**FILED**  
**MAY 09 2008**  
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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**

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**STATEMENT OF THE CASE**

The grand jury of Harrison County indicted defendant, John Peter MuiSE for Accessory Before the Fact to Murder and Murder in violation of *Miss. Code Ann. § 97-1-3 & 97-3-19(1)(a)*. (Indictment, cp.9-10). After a trial by jury, Judge Stephen B. Simpson, presiding, the jury found defendant guilty of Murder. (C.p.98). Defendant was sentenced to LIFE in the custody of the Mississippi Department of Corrections. (Judgment & Sentence Order, cp. 104).

After denial of post-trial motions this instant appeal was timely noticed.

## **STATEMENT OF FACTS**

Defendant went to the trailer home of his victim to collect a debt. Upon opening the door defendant fired several shots killing his victim -- within feet of his wife. Defendant had been to the home before, and the victim's wife recognized defendant, his vehicle, and his voice. No doubt.

Defendant testified that he was there that evening, with another man, in his truck, there was a gun, there was a shooting -- even that he went to the door of the trailer to see what happened. But, the other guy did the shooting. . Police were called and apprehended defendant pulling out of the neighborhood in his vehicle. The jury found defendant guilty.

## **SUMMARY OF THE ARGUMENT**

### **Issue I.**

**DEFENDANT WAS NOT DENIED HIS CONSTITUTIONAL  
RIGHT TO A SPEEDY TRIAL.**

### **Issue II.**

**DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE  
ASSISTANCE OF COUNSEL .**

## ARGUMENT

### Issue I.

#### DEFENDANT WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

In this initial allegation of error defendant claims he was denied is Constitutional right to a speedy trial.

Counsel for defendant has given an adequate time line of events supported by the record; additionally citing the appropriate legal standard and rationale of appellate review.

So, looking to the four facts of *Barker v. Wingo*, 407 U.S. 514 (1972) as applied to the facts of this case:

1) Length of Delay. In this case the length of delay (495 days, or a little over 16 months) is presumptively prejudicial and necessitate analyzing the remaining three factors. “Once the delay is found to be presumptively prejudicial, the burden shifts to the State to produce evidence justifying the delay and to persuade the trier of fact of the legitimacy of the reasons.” *Scott v. State*, 2008 WL 711879 ¶35 (Miss.App. 2008).

2) Reason for the Delay. While there is, as is oft the case, a paucity of information in the record for the delay much may be gleaned from the record we do have. First, although not mentioned I believe this Court could take judicial notice the arrest in this case came just five months after Hurricane Katrina. The

social fabric and infrastructure, and the criminal justice system, were still in recovery. Additionally, it would appear defendant was at all times represented by counsel, often some appointed and some retained. The State would submit the delay was neither caused by the prosecutorial arm of the State, the Court or the defendant. The State would ask this court to find this factor to be neutral. *Scott, supra.*

3) Defendant's Assertion of His Right. It would appear that very shortly after defendant was incarcerated his attorney filed a demand for speedy trial. (April 27, 2006, cp. 11). There is evidence in the docket listing that within a few days there was a waiver of arraignment entered. Then in October of the same year of his arrest he filed motions seeking to dismiss for a Constitutional violation of his speedy trial right based upon our States statutory speedy trial statute. This was followed by entry of an order dismissing defendant's petition for writ of mandamus from the Mississippi Supreme Court, followed by an appeal of the same by defendant. (Docket entries notice of trial setting filed, cp. II.). And, within a month, there was the filing of a motion for continuance by the defendant. (C.p. 31-53). The State would ask this Court weight these factors as weighing against defendant.

4) Prejudice to defendant. It is the succinct position of the State defendant



cannot prove actual prejudice and, consequently, his claim must fail. The only claim of prejudice presented was of lack of ability to call the co-indictee as a witness. Now with all candor to this court, in *Scott*, supra, the question was addressed and remanded for an evidentiary hearing. *Sub judice* the trial court did essentially hold an evidentiary hearing based upon the motion for continuance the day before trial. The trial court heard from defense counsel and possible prejudice to the defense. The trial court made several rulings *in limine* regarding the 'co-defendant' and other testimony. Additionally, such rulings benefitted defendant in that question of his prior convictions, drug dealing and conspiracy with his co-indictee could not be mentioned. Such rationale is supportive of the State position. *Smith v. State*, 977 So.2d 1227(Miss.App. 2008)(more than 600 days delay)..

Based upon the facts of this case the State would ask that no relief be granted.

Issue II.  
DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE  
ASSISTANCE OF COUNSEL .

In this interesting, and last claim, of trial court error trial counsel claims it was ineffective because the trial court did not give funds to defense for a pharmaceutical expert to testify (as a means of impeaching the credibility of the eye-witness) at trial.

So, the first question would be did the trial court err in denying funds for a pharmaceutical expert.

¶ 50. “The standard of review of the trial court's denial of expert assistance is that an abuse of discretion occurred such that the defendant was denied due process whereby the trial was fundamentally unfair.” Richardson, 767 So.2d at 197(¶ 7) (citing Coleman v. State, 697 So.2d 777, 780 (Miss.1997)). The Richardson court also noted that “determination of whether the State must pay for an expert witness for an indigent defendant must be made on a case by case basis.” Id. at 198(¶ 12).

*Gray v. State*, 926 So.2d 961 (Miss.App. 2006).

Looking to the record counsel did bring up the prescription medication and did impeach her with her prior statements regarding those drugs (Tr. 70).

Additionally, since defense counsel had an extra evening there was ample time to prepare. Also, there were exhibits introduced to impeach the witness. Further, an expert would not have been able to testify to impeach the witness as it would not be relevant.

Consequently, there being to merit to the claim that the trial court erred in denying the request for expert funds there can be no ineffective assistance claim.

Accordingly, no relief should be granted on this last allegation of trial court error.

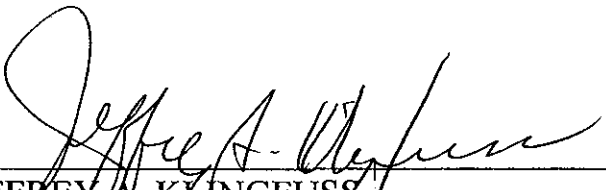
## CONCLUSION

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

## CERTIFICATE OF SERVICE

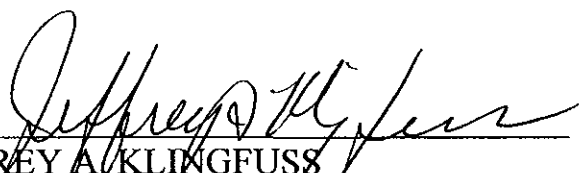
I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Stephen B. Simpson  
Circuit Court Judge  
Post Office Box 1570  
Gulfport, MS 39502

Honorable Cono Caranna  
District Attorney  
Post Office Drawer 1180  
Gulfport, MS 39502

Justin T. Cook, Esquire  
Attorney At Law  
301 North Lamar St., Ste. 210  
Jackson, MS 39201

This the 9th day of May, 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