

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

**TROY PITTMAN**

**APPELLANT**

**VS.**

**NO. 2008-CA-0904-COA**

**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 .....	3
SUMMARY OF THE ARGUMENT .....	4
ARGUMENT .....	5
I.	
WHETHER THE TRIAL COURT WAS CORRECT IN SUMMARILY DENYING THE POST-CONVICTION MOTION AFTER THE SUPREME COURT GRANTED DEFENDANT LEAVE TO PROCEED IN THE TRIAL COURT. ....	5
CONCLUSION .....	8
CERTIFICATE OF SERVICE .....	9

## **TABLE OF AUTHORITIES**

### **STATE CASES**

<b>Pittman v. State, 836 So.2d 779 (Miss.App. 2002)</b>	<b>1, 3</b>
<b>Porter v. State, 963 So.2d 1225, 1228 -1229 (Miss.App. 2007)</b>	<b>6</b>

### **STATE STATUTES**

<b>Miss. Code Ann. § 99-39-5(2)</b>	<b>2</b>
<b>Miss.Code Ann. § 99-39-19</b>	<b>6</b>
<b>Miss. Code Ann. 99-39-5(2)</b>	<b>2</b>

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

**TROY PITTMAN**

**APPELLANT**

**VS.**

**NO. 2008-CA-0904-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

Defendant, Troy M. Pittman, Jr., was indicted, tried and convicted in Alcorn County for sexual battery (3 counts) and statutory rape (3 counts). The verdicts were appealed and the Court of Appeals for the State of Mississippi issued a decision. The Court of Appeals reversed and rendered the statutory rape convictions for insufficiency of proof of penile penetration. *Pittman v. State*, 836 So.2d 779 (Miss.App. 2002).

Within the period for such filing, on January 27, 2006<sup>1</sup>, (three days from the

---

<sup>1</sup>Counsel for defendant repeatedly claims to have filed his application to proceed in the trial court with the Supreme Court in January 2005, however, the docket clearly shows the filing to have been in January 2006. Still within the statutory period for such filing.

end of the period for such filing prescribed by Miss. Code Ann. 99-39-5(2)) defendant filed an application with the Mississippi Supreme Court seeking leave to seek post-conviction relief in the trial court. The Supreme Court granted defendant's application on April 6, 2007 [2006-M-00159] to allow defendant to proceed and file his petition for post-conviction relief in the trial court.

On June 12, 2007, defendant filed his petition for post-conviction relief in the Circuit Court of Alcorn County, Cause No: CV2007-000348 PA. In an order filed October 17, 2007 the trial court denied the petition for post-conviction relief as being time barred under *Miss. Code Ann.* § 99-39-5(2). (c.p. 271). Counsel for defendant filed a Motion to Reconsider (c.p. 273-275) succinctly bringing to the trial court's attention the procedural history emphasizing the present filing was pursuant to relief granted by Supreme Court order of April 6, 2007. On April 15, 2008, the court found the motion not well taken and again denied same.

It is from those orders denying his petition for post-conviction relief that defendant timely noticed this instant appeal.

## **STATEMENT OF FACTS**

The above statement of the case gives the procedural facts since the date of the indictment. The facts of the crime, as noted by the Court of appeals, – “Because of the nature of the evidence in this case, the discussion is necessarily more graphic than is desirable.” *Pittman v. State*, 836 So.2d 779 (Miss.App. 2002).

## **SUMMARY OF THE ARGUMENT**

### **I.**

#### **WHETHER THE TRIAL COURT WAS CORRECT IN SUMMARILY DENYING THE POST-CONVICTION MOTION AFTER THE SUPREME COURT GRANTED DEFENDANT LEAVE TO PROCEED IN THE TRIAL COURT.**

The supreme court's permission to proceed with this matter was a finding of a prima facie case, the trial court should have requested the State to respond, and file its answer and raise all affirmative defenses, pursuant to Section 99-39-13. After doing so, the trial court should have examined the motion under Section 99-39-19, along with the filed answer and any completed discovery, to determine if an evidentiary hearing should be required.

## ARGUMENT

### I.

#### **WHETHER THE TRIAL COURT WAS CORRECT IN SUMMARILY DENYING THE POST-CONVICTION MOTION AFTER THE SUPREME COURT GRANTED DEFENDANT LEAVE TO PROCEED IN THE TRIAL COURT.**

The State of Mississippi has been accused of over-relying upon procedural bars in arguing the position of the State. The State is of the ardent belief the procedural process as defined by statute and interpreted by the courts (including the concomitant bars) are an integral part of the judicial process. By the same token the State must occasionally, and only after much thought and discussion with colleagues, ask the reviewing Courts of the State to follow precedential procedure – not as a bar to defendant – but on behalf of defendant.

Let it also be stated without equivocation or waiver: the State does not imply, agree, or concede that defendant is anything less than guilty for the heinous crimes for which he is imprisoned.

That being stated, the reviewing courts of this State have seen a similar procedural and factual case as the one *sub judice*.

¶ 10. Porter filed his motion in the circuit court, after the supreme court's grant of leave to proceed. Because the supreme court's permission to proceed with this matter is a finding of a *prima facie* case, the trial court should have requested the State to respond, and file its answer and raise all affirmative defenses, pursuant to Section 99-39-13. After doing so, the trial court should have examined the motion under Section 99-39-19, along with the filed answer and any completed discovery, to determine



if an evidentiary hearing should be required. The trial court did not do this, but choose rather to summarily deny Porter's motion under Section 99-39-11 (Supp.2006).

*Porter v. State*, 963 So.2d 1225, 1228 -1229 (Miss.App. 2007).

*Sub judice*, the trial court summarily denied the motion under Section 99-39-5(2), as being time barred. It is the position of the State the issue of the time bar was decided and that it survived the procedural bar as the Mississippi Supreme Court granted relief. *Porter*, ¶5, *supra*. The granting of relief *prima facie* established the right to due process in the trial court. *Porter*, ¶10, *supra*.

*Porter* provided for and delineated the procedure in the trial court upon a grant of relief from the Mississippi Supreme Court.

¶ 9. . . . Once a *prima facie* case is established, the trial court may still proceed under Section 99-39-19 (Supp.2006) and summarily deny a petitioner's motion if, after the answer has been filed and discovery completed, it appears that no evidentiary hearing is warranted. See Miss.Code Ann. § 99-39-19.

*Porter v. State*, 963 So.2d 1225, 1228 (Miss.App. 2007).

As much as this attorney for the State would like to adopt and argue the correctness of the ruling of the trial court – right result, wrong rationale – such a position is just untenable. The State has oft claimed and argued the limitation of the appellate record to support affirming the rulings of a lower court. And, the trial court below may have legal rationale for the ruling. However, the record offers very little

to support that contention so that the State may, with credibility, present an argument to this reviewing Court.

The State also realizes this reviewing court in *Porter* looked beyond the flawed procedural path and affirmed the ruling of the lower court. Basically because *Porter* was limited to the single issue of ineffective assistance of counsel – and the record was sufficient to decide the issue.

In this case we do have an ineffective assistance claim, much bolstered by affidavits and evidence untested and without rebuttal from the State. There is also a potentially complex medical, scientific question that is probably best not decided by an appellate court on review where the State has not responded, presented defenses, and challenged the evidence in the lower court. Nor has the lower court had the real opportunity to assess these very points and make findings of fact and conclusions of law upon which the State can argue to this and other reviewing courts – procedure was followed and this defendant is without question, guilty.

Accordingly, and with heavy heart knowing the victim's will anguish over this position, the State asks this Court to remand to the trial court to utilize the procedure outlined in *Porter*. Alternatively, the State would ask this Court to affirm the ruling of the lower court under the rationale of *Porter*.

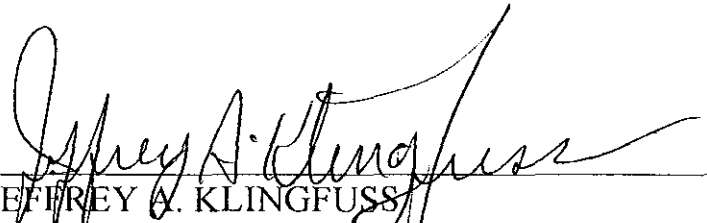
## CONCLUSION

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 or, alternatively, remand to the lower court for proceedings consistent with case law precedence.

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 Paul S. Funderburk  
Circuit Court Judge  
Post Office Drawer 1100  
Tupelo, MS 38802-1100

Honorable John R. Young  
District Attorney  
Post Office Box 212  
Corinth, MS 38834

Jeffery M. Navarro  
Attorney At Law  
Post Office Box 532  
Aberdeen, MS 39730

This the 27th day of January, 2009.

  
\_\_\_\_\_  
JEFFREY A. KLINGFUSS  
SPECIAL ASSISTANT ATTORNEY GENERAL

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