

IN THE MISSISSIPPI COURT OF APPEALS

Troy Pittman,  
Appellant

v.

State of Mississippi, <sup>1</sup>  
Appellee

On Appeal from the Circuit Court of Alcorn County, Mississippi

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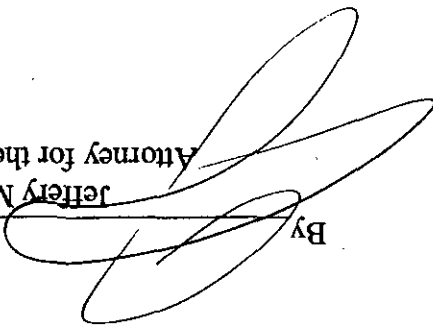
**CERTIFICATE OF INTERESTED PERSONS**

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The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Troy Pittman;
2. Jeffery M. Navarro;
3. Rob Laher, Esq., Attorney for the Defendant/ Appellant in the lower Court;
4. Hon, Jim Pounds, former Assistant District Attorney who tried the case in the lower Court;
5. Arch Bullard, Esq., Assistant District Attorney who tried the case in the lower Court;
6. John R. Young, District Attorney;
7. Hon. Frank Russell, trial judge;
8. Hon. Paul Funderburk, Circuit court judge who ruled on the Motion for Post-

Conviction Relief;

By   
Jeffrey M. Navarro,  
Attorney for the Appellant

Case No.: 2008-CA-00904-COA

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**BRIEF FOR APPELLANT**

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ORAL ARGUMENT REQUESTED

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By \_\_\_\_\_  
Jeffery M. Navarro,  
Attorney for the Appellant

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**STATEMENT OF ISSUES:**

1. Whether or not the APPELLANT, TROY PITTMAN, timely filed his MOTION FOR POST-CONVICTION RELIEF pursuant to *MCA Section* 99-39-5 ( 2 ) (2000)?

## STATEMENT OF THE CASE:

Pittman was convicted in the Circuit Court of Alcorn County, Mississippi on 13 April, 2000, of five (5) sex offenses. He filed an appeal in the Court of Appeals, Pittman v. State, reh. den. 12 Nov., 2002, 10 Dec., 2002, cert. den. 30 Jan., 2003, 836 So.2d 770 (Miss. COA, 2002). The Court of Appeals reversed, rendered and acquitted Pittman of two (2) of the charges. On 27 January, 2005, pursuant to *MCA Section* 99-39-7 (1984), Pittman filed his APPLICATION FOR LEAVE TO PROCEED IN THE TRIAL COURT TO FILE A MOTION FOR RELIEF PURSUANT TO THE MISSISSIPPI UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT in the Mississippi Supreme Court, Mississippi Supreme Court Cause No.: 2006-M-0159. The Supreme Court by Order dated 5 April, 2007, granted the Application. Pittman filed his motion in the Circuit Court of Alcorn County, Mississippi. The Circuit Court, sua sponte, denied Pittman's motion. Pittman filed a Motion to Reconsider. The Circuit court denied that motion as well.

### **STATEMENT OF FACTS:**

The Appellant/Defendant, Troy Pittman, (hereinafter "Pittman"), was convicted by the Circuit Court of Alcorn County, Mississippi on 13 April, 2000, of the following offenses:

1) Digital penetration pursuant to *MCA Section 97-3-97* (1972) by a person of trust as defined in *MCA Section 97-3-95 (2)* (1972) on 27 July, 1998;

2) Sexual intercourse with a child under the age of 14 years by a person more than 24 months older than her, on 30 July, 1998, contrary to *MCA Section 97-3-65 (1) (b)* (1972);

3) Sexual intercourse with a child under the age of 14 years by a person more than 24 months older than her, on 4 August, 1998, contrary to *MCA Section 97-3-65 (1) (b)* (1972);

4) Digital penetration pursuant to *MCA Section 97-3-97* (1972) by a person of trust as defined in *MCA Section 97-3-95 (2)* (1972) on 14 August, 1998; and

5) Sexual penetration pursuant to *MCA Section 97-3-97* (1972) by a person of trust as defined in *MCA Section 97-3-95 (2)* (1972) by performing oral sex on her on 16 August, 1998. (RE 4-6).

Pittman filed an appeal in the Court of Appeals, Pittman v. State, reh. den. 12 Nov., 2002, 10 Dec., 2002, cert. den. 30 Jan., 2003, 836 So.2d 770 (Miss. COA, 2002). The Court of Appeals reversed, rendered and acquitted Pittman of two counts of statutory rape ( the second and third above referenced charges). (RE 7).

Inasmuch as Pittman had previously pursued an appeal of his convictions, he was required by *MCA Sections* 99-39-7 (1984) and 99-39- 27 (2008), to first petition the Supreme Court for leave to file a motion for post-conviction relief in the trial court, the Alcorn County, Mississippi Circuit Court. Therefore, on 27 January, 2005, pursuant to *MCA Section* 99-39-7 (1984), Pittman filed his APPLICATION FOR LEAVE TO PROCEED IN THE TRIAL COURT TO FILE A MOTION FOR RELIEF PURSUANT TO THE MISSISSIPPI UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT in the Mississippi Supreme Court, Mississippi Supreme Court Cause No.: 2006-M-0159. The Supreme Court by Order dated 5 April, 2007, found that the Petitioner met his burden under *MCA Section* 99-39-27 (5) (2008) that :

Unless it appears from the face of the application, motion, exhibits and the prior record that the claims presented by such are not procedurally barred under Section 99-39-21 and that they further present a substantial showing of the denial of a state or federal right, the court shall by appropriate order deny the application. The court may, in its discretion, require the Attorney General upon sufficient notice to respond to the application.

Thereupon, with the approval of the Mississippi Supreme Court, the Petitioner filed this action. (RE 4).

The Alcorn County, Mississippi Circuit Court, sua sponte, without benefit of a response to Pittman's motion filed in opposition to same, denied Pittman's motion. The Court noted that Pittman was convicted on 13 April, 2000, on five ( 5 ) separate counts; he appealed the convictions, and the Court of Appeals affirmed in part and reversed in part on 4 June, 2002; and that a writ of certorari to the Supreme Court was denied on 30 January, 2003. The Circuit Court therefore ruled that pursuant to *MCA Section* 99-39-5 (2) (2007), Pittman had three ( 3 ) years from 30 January, 2003 to file his Motion for Post-Conviction Relief. (RE 271-272).

Believing that the Court was unaware of the preliminary activity in the Supreme Court, Pittman filed a Motion to Reconsider with the Circuit Court, pointing out that he had filed his APPLICATION FOR LEAVE TO PROCEED IN THE TRIAL COURT TO FILE A MOTION FOR RELIEF PURSUANT TO THE MISSISSIPPI UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT in the Mississippi Supreme Court, Mississippi Supreme Court Cause No.: 2006-M-0159, pursuant to *MCA Sections* 99-39-7 (1984) and 99-39-27 (2008), within three (3) years of 30 January, 2003 ( the date of denial of the writ of certorari by the Supreme Court). (RE 273).

The Alcorn County, Mississippi Circuit Court summarily denied Pittman's Motion to Reconsider. (RE 277).

### **SUMMARY OF THE ARGUMENT:**

Pittman filed his Application for Leave to File his Motion for Post-Conviction Relief within the three (3) years statute of limitations. The filing of said Application satisfied the statute.

The Alcorn County, Mississippi Circuit Court acted improperly. Pittman made a prima facie showing that he was entitled to an evidentiary hearing. The lower Court should have requested the State to file an answer, and required it to raise any and all affirmative defenses.

The general order of the Supreme Court granting Pittman's Application considered any procedural bars, and concluded that none applied.

## ARGUMENT & LAW:

MCA Section 99-39-5 (2) (2000) provides, in part, that:

(2) A motion for relief under this article shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction.

Pittman was convicted on 13 April, 2000. (RE 271). He appealed to the Court of Appeals, and two of the charges against him were dismissed. A writ of certiorari to the Supreme Court was denied on 30 January, 2003. *Pittman v. State, reh. den.* 12 Nov., 2002, 10 Dec., 2002, *cert. den.* 30 Jan., 2003, 836 So.2d 770 (Miss. COA, 2002). (RE 7). On 27 January, 2006, Pittman filed his APPLICATION FOR LEAVE TO PROCEED IN THE TRIAL COURT TO FILE A MOTION FOR RELIEF PURSUANT TO THE MISSISSIPPI UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT in the Mississippi Supreme Court, Mississippi Supreme Court Cause No.: 2006-M-0159. Because he had filed an appeal, Pittman could not directly file a motion for post-conviction relief in the trial court, the Alcorn County, Mississippi Circuit Court. *MCA Section* 99-39-7 (1984). He had to file an application for leave with the Supreme Court within three (3) years of 30 January, 2003. *MCA Section* 99-39-27 (2008). He did. (RE 273). Pittman's post-conviction relief began with the timely filing of his above referenced Application with the Supreme Court in Supreme Court Cause No.: 2006-M-0159.

**MCA Section 99-39-27** (2008), provides that:

- (1) The application for leave to proceed in the trial court filed with the Supreme Court under Section 99-39-7 shall name the State of Mississippi as the respondent.
- (2) The application shall contain the original and two (2) executed copies of the motion proposed to be filed in the trial court together with such other supporting pleadings and documentation as the Supreme Court by rule may require.
- (3) The prisoner shall serve an executed copy of the application upon the Attorney General simultaneously with the filing of the application with the court.
- (4) The original motion, together with all files, records, transcripts and correspondence relating to the judgment under attack, shall promptly be examined by the court.
- (5) Unless it appears from the face of the application, motion, exhibits and the prior record that the claims presented by those documents are not procedurally barred under Section 99-39-21 and that they further present a substantial showing of the denial of a state or federal right, the court shall by appropriate order deny the application. The court may, in its discretion, require the Attorney General upon sufficient notice to respond to the application.
- (6) The court, upon satisfaction of the standards set forth in this article, is empowered to grant the application.
- (7) In granting the application the court, in its discretion, may:
  - (a) Where sufficient facts exist from the face of the application, motion, exhibits, the prior record and the state's response, together with any exhibits submitted with those documents, or upon stipulation of the parties, grant or deny any or all relief requested in the attached motion.
  - (b) Allow the filing of the motion in the trial court for further proceedings under Sections 99-39-13 through 99-39-23.
- (8) No application or relief shall be granted without the Attorney General being given at least five (5) days to respond.
- (9) The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this article. Excepted from this prohibition is an application filed under Section 99-19-57(2), raising the issue of the offender's supervening mental illness before the execution of a sentence of death. A dismissal or denial of an application relating to mental illness under Section 99-19-57(2) shall be res judicata on the issue and shall likewise bar any second or successive applications on the issue. Likewise excepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States that would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, that is of such nature that it



would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence. Likewise exempted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

(10) Proceedings under this section shall be subject to the provisions of Section 99-19-42.

(11) Post-conviction proceedings in which the defendant is under sentence of death shall be governed by rules established by the Supreme Court as well as the provisions of this section.

It was impossible for Pittman to file a motion for post-conviction relief within three ( 3) years of 30 January, 2003, contrary to what the Circuit Court ruled. Pittman was required to gain the permission of the Supreme Court. He did. That process took nearly one and one-half (1 ½) years.

The Supreme Court's granting of Pittman's application amounted to a prima facie showing that Pittman was entitled to an evidentiary hearing. *Porter v. State*, 963 So.2d 1225, 1228 (Miss. COA, 2007). Consistent with *Porter*, the Circuit Court should have requested the State to file an answer, raising any and all affirmative defenses, and allowed the case to proceed. *Id.* at 1228-1229.

In *State v. Bass*, (Miss. COA, 2008), 2008-MS-A0206.003, the Court of Appeals considered a case wherein a defendant filed a second application and motion for post-conviction relief in the Supreme Court nearly ten ( 10) years after his first motion for post-conviction relief had been denied. The State argued that the motion was procedurally barred by time and successive-writs. The Supreme Court entered a "general

order” granting the defendant’s second application for leave to file his motion for post-conviction relief, stating:

This matter came before a panel of this Court consisting of Cobb, P.J., Carlson and Randolph, JJ., on the Application for Leave to File Motion of Post-Conviction Relief filed by counsel for Jimmy Bass. Also before the panel is the response filed by counsel for the State of Mississippi. After due consideration, the panel find the Application to be well taken and that it should be granted. IT IS THEREFORE ORDERED that the Application for Leave to File Motion for Post-Conviction Relief filed by counsel for Jimmy Bass is hereby granted. Bass may proceed in the Circuit Court of Bolivar County, trial court case number 7042, with his Motion for Post-Conviction Relief.

**Bass** at Para. 22.

The Court of Appeals noted that the often the Supreme Court does not grant such broad orders when considering application for leave to file motions for post-conviction relief. And often, the Court limits the relief to only a few claims. The Court of Appeals further noted the effect of **MCA Section 99-39-27 (5)** (Rev. 2006) on the Supreme Court’s order inasmuch as the statute requires the Court to consider procedural bars. **MCA Section 99-39-27 (5)** (Rev. 2006) provides:

[u]nless it appears from the face of the application, motion, exhibits and the prior record that the claims presented by such are not procedurally barred under Section 99-39-21 and that they further present a substantial showing of the denial of a state or federal right, *the court shall by appropriate order deny the application.*

The Court of Appeals therefore concluded that “the supreme court must have found that the petition on its face was not procedurally barred.” **Bass** at Paras. 22-24.

The language of the above order in *Bass, supra*, is similar to the language in the order granting Pittman leave to file his Motion for Post-Conviction Relief.

(Exhibit "A" to Appellant's Motion to Supplement the Record). Pittman's order provides, in part, that:

After due consideration, the panel finds that the petition should be granted. Pittman is hereby granted leave to file his petition for post-conviction relief in the trial court. IT IS THEREFORE ORDERED that the Application for Leave to Proceed in the Trial Court to File a Motion for Relief Pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act filed by Troy M. Pittman, Jr., is granted.

Therefore, consistent with *Bass, supra*, the Supreme Court must have concluded that Pittman's petition was not procedurally barred.

The Court should reverse and remand this matter, so that Pittman can prosecute his post-conviction relief.


### **CONCLUSION:**

Pittman timely filed his Application for post-conviction relief. The Supreme Court granted his Application by means of a general order. Therefore, Pittman made a prima facie showing of his entitlement to an evidentiary hearing. The Alcorn County, Mississippi Circuit Court should have not acted on its own imitative. The State of Mississippi should have been required to answer, and raise any defenses. It did not. And, the Supreme Court has previously considered any and all procedural bars, and found none applicable. Therefore, the Court should reverse and remand this case so that Pittman can prosecute his post-conviction relief. To do otherwise will defeat the interests of justice, and frustrate the prior order of the Supreme Court.

Respectfully Submitted,

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By 

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**CERTIFICATE OF SERVICE**

I, Jeffery M. Navarro, Attorney for the Appellant, Troy Pittman, do hereby certify that I have this day mailed, postage pre-paid, a true and correct copy of the above and foregoing Brief to:

Hon. Paul Funderburk  
Circuit Court Judge  
P.O. Drawer 1100  
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Hon. John Young,  
District Attorney  
P.O. BOX 212  
Corinth, MS 38834

Certified, this the 3<sup>rd</sup> day of November, 2008.

  
Jeffery M. Navarro