

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

SHAWN MCLAURIN

APPELLANT/DEFENDANT

VS.

No. 2008-CA-01251-COA

STATE OF MISSISSIPPI

APPELLE/PLAINTIFF

REBUTTAL TO STATE'S BRIEF

COMES NOW McLAURIN to rebut the Reply Brief of the State.

1. Response to the State's Comments About the History of this Case and Defendant's Prayer in this Appeal.

The State accurately describes the history of this case as "convoluted". (States Reply, 7). However, the issue is not overly complicated. The State overly complicates the singular purpose of this particular appeal, a design to seek relief from the trial court's refusal to withdraw its order dismissing McLaurin's (hereinafter "Defendant") Motion for Post Conviction Relief.

As has been pointed out in pervious briefs, Defendant currently has two separate and distinct appeals pending before this Court which arise out of the same accusation of rape in Hinds County, Mississippi. There is this appeal, regarding the lower court's refusal to set aside its order dismissing the defective PCR Motion of the Defendant. And,

there is 2008-KA-00814 COA. 2008-KA-00814 is an out of time direct appeal of the Defendants' rape conviction in the lower court.

Present counsel was retained by the Defendant's family to try develop an approach which might revive his rights to both a direct appeal and to post conviction relief. Both of which had been totally botched by two prior lawyers whose errors cost the Defendant his right to direct appeal and PCR. The deficient actions of the prior two attorneys caused the Defendant to be without any avenue for appellate recourse.

In order to reach the goal of being able to effect a meaningful appellate process, present counsel started by asking the trial court for several modalities of relief in a single motion styled "Petition for Out of Time Appeal and to Set Aside Order Dismissing Motion for Post Conviction Relief or, a New Trial". The trial court ruled that the inadequate actions of prior trial counsel warranted an out of time appeal. This is an opinion which the Supreme Court shared and validated in its Order dated June 18, 2008 in cause 2008-KA-00814 COA signed by Judge Waller. That direct appeal is pending now before this Court as 2008-KA-00814 COA.

The second part of the trial court's ruling regarding present counsel's "Petition for Out of Time Appeal and to Set Aside Order Dismissing Motion for Post Conviction Relief or, a New Trial" was that the trial court refused to set aside the dismissal of the Defendant's PCR. As filed by previous PCR counsel in 2003, the PCR pleading was facially and procedurally defective. The deficiencies were never corrected because PCR counsel's military unit was activated to Iraq and he shipped out one or two days after filing the facially defective PCR. The PCR languished with absolutely no further action whatsoever and was eventually dismissed. The actual merits of the first PCR in trial

court were never considered because the PCR pleading contained no supporting affidavits, was attended by no testimony and spurred no hearing on the issues.

The appeal at hand presents one single issue. The trial court improvidently denied the request of the Defendant to set aside the order dismissing his facially defective PCR and the ruling denies the Defendant of due process. The Defendant wishes this Court to find that the Defendant's right to proceed with a Motion for Post Conviction Relief should be reinstated since the Defendant timely retained an attorney to file a PCR. That attorney accepted payment for the task, but filed a defective two page document that did not meet the bare requirements of the Mississippi Rules of Appellate Procedure. Mr. McLaurin believed he had retained an attorney to shepherd his PCR through the lower Court an upward if needed. Though he paid for an attorney, that attorney never completed the task. This is not the fault of Mr. McLaurin and a grave injustice has been done by depriving him of his avenue of PCR relief.

Defendant completely agrees with the States reading of the law that the Defendant may not simultaneously pursue a direct appeal and PCR. (State's Reply, 8). The Defendant does not request to be allowed to proceed with both avenues at the same time. The State's assertion that Defendant is attempting to do so is inaccurate and a red herring.

The purpose of this appeal is to request the Court to revive the Defendant's right to an avenue of PCR consideration. If that right is reinstated, present counsel would expect permission to initiate and pursue a PCR only after the out of time direct appeal, 2008-KA-00814 COA, has been finally ruled upon.

Should present counsel not request the right to pursue a PCR be revived, consider the following scenario that the State has apparently not envisioned.

PCR-type issues are raised in the direct appeal. One of these PCR type issues raised is ineffective assistance at trial. This Court could hold that it does not wish to consider the PCR-type issues in the course of the direct appeal (2008-KA-00814 COA). Instead this Court may defer ruling on them by dismissing without prejudice to be revisited in a future PCR to be filed by the Defendant. That scenario would be disastrous in this case since, unless the Court revives the Defendant's right to PCR, there will never be an avenue for him to bring those issues.

In other words, there have been instances where a defendant raises on direct appeal issues of a PCR-type nature because of the requirements of MRAP 22(b). In some cases, the Supreme Court dismisses or severs the PCR type issues from the direct appeal and preserves them to be revisited in whatever, if any, post conviction vehicle that appellant pursues after the direct appeal is finally resolved. If that scenario occurs in McLaurin's out of time direct appeal (2008-KA-00814 COA), then he is terminally confounded because currently, he has no right to file a PCR in the future due to the ineffectiveness of prior PCR counsel.

Further compelling the need to seek the relief requested in the instant appeal is this; there are likely issues needing redress in post conviction that were not "apparent" from the record and thus not required to be briefed under MRP 22(b) in the out of time direct appeal (2008-KA-00814 COA).

The State's snide Reply attacks the Defendant's plea for justice in an unnecessarily personal manner by labeling the Defendant's arguments as "nattering", "otiose", "manifestly untrue", "a long tale of woe", "absurd", and logically absurd. (States Reply, 6-7, 9, 10). The State has expended significant effort perusing *Roget's*

Thesaurus, but given no consideration to the scenario in which there may be other PCR issues not raised in the direct appeal or that this Court may dismiss PCR issues from direct appeal without prejudice to be brought in the PCR process later. A denial of this motion has the potential to foreclose any opportunity for the Defendant to seek meaningful post conviction relief. A right lost by previous counsel who failed to protect his client.

2. **Purpose of Identifying the Issues of Ineffective Assistance and Other Issues usually brought in Post Conviction.**

We agree with the State that the Court should not rule on the merits of the many alleged issues of ineffective assistance of counsel in this appeal. (States Reply 5, 6). However, if there were no legitimate legal issues to be considered in post conviction, there would be less reason for the Court to revive the Defendant's right to pursue post conviction relief. By describing the issues of ineffective assistance and other PCR type errors, the Defendant hopes to show the Court that there are solid grounds for post conviction relief and stress the importance of the Court allowing Mr. McLaurin to pursue them.

Respectfully, for the reasons of law cited in the appeal of the lower court's final order, McLaurin requests that this Court revive and preserve his rights to pursue a PCR at the appropriate time, at the conclusion of his direct appeal.

Respectfully submitted this the 13th day of July, 2009.

Respectfully submitted,

SHAWN McLAURIN

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CERTIFICATE OF SERVICE

The undersigned counsel of record certifies that the following listed persons have been served via U.S. Mail, postage pre-paid, with the above Appellant's Brief:

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