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**

CERTIFICATE OF INTERESTED PERSONS

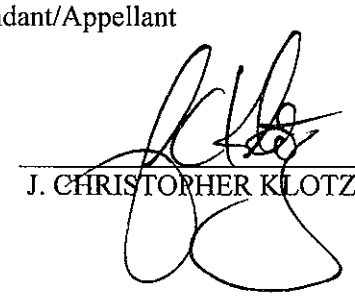
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal:

1. Honorable Judge Tomie Green
   Hinds County Circuit Court Judge
   Post Office Box 327
   Jackson, MS 39205

2. Robert Smith, Esq.
   Hinds County District Attorney
   PO Box 22747
   Jackson, MS 39225-2747

3. Jim Hood, Esq.
   Attorney General, State of Mississippi.
   Criminal Appeals Division
   P.O. Box 220
   Jackson, MS 39205

4. Shawn McLaurin, Defendant/Appellant



J. CHRISTOPHER KLOTZ

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I. STATEMENT REGARDING ORAL ARGUMENT

Mr. McLaurin requests that this Court allow oral argument to help resolve the issues of his case. Oral Argument is permitted pursuant to M.R.A.P. 34 and needed to help the understanding of Mr. McLaurin's appeal.

II. STATEMENT OF ISSUES

Defendant Shawn McLaurin Raises the following single issue in this appeal:

A. The trial court erred when it denied Mr. McLaurin's request to set aside its Order dismissing his Motion for Post Conviction Relief.

III. STATEMENT OF THE CASE AND FACTUAL BACKGROUND

A. Nature of the Appellate Case and Course of the Appellate Proceedings

Currently, Shawn McLaurin, "Defendant", has two pending appeals before this Court. They concern the same case, but different issues. This brief is the appeal of the final Order of the Hinds County Circuit Court denying Defendant's request to set aside its Order Dismissing his Motion for Post Conviction Relief. To prevent confusion, Defendant points out that his other pending appeal (Case Number 2008-KA-00814-COA) is his out of time direct appeal of the underlying rape conviction. This Court has granted leave to proceed out of time in that case.

Defendant is serving a life sentence for rape. After his jury trial, Defendant desired to appeal the verdict and paid counsel in order to do so. See Exhibit "Q", Affidavit of Legal Assistant Alicia Prince with attached cash receipt for "appeal costs" of $2400.00 and Exhibit "R" Affidavit of Defendant's mother. Margaret McLaurin, as to the payment of the appellate fees. The attorney who represented Defendant at trial, hereinafter "Trial Counsel", was paid to file

Defendant's appeal. Though retained under a separate agreement for the appeal, Trial Counsel inexplicably failed to perfect an appeal after accepting $2400.00 from the Defendant's family. See Exhibit "Q". After Trial Counsel missed the filing deadline for the direct appeal, Trial Counsel told Defendant and his family that he would file a Motion for PCR and for out an of time appeal. Trial Counsel stalled the Defendant and ultimately failed to file the PCR despite repeated promises and correspondence to Defendant representing he was preparing the documents and pursuing the case. See Exhibits "S, T, U, V, W and Y".

Realizing that Trial Counsel was not undertaking the legal steps he was hired to complete, Defendant hired a new lawyer, hereinafter "PCR Counsel", to file a Motion for Post Conviction Relief in order to obtain appellate relief. See termination letter to Trial Counsel, Exhibit "X". PCR Counsel eventually filed a two page Motion for PCR which was filed without Defendant ever seeing it or verifying it as required by statute. See PCR Motion, Exhibit "A". There were no supporting affidavits or exhibits attached to the PCR. After the original deficient, two page filing, no hearing or additional briefing was pursued in the PCR. PCR counsel's Motion languished after filing and was eventually dismissed as defective. See Order of Dismissal, Exhibit "B". Defendant was never notified by his lawyer or the court of any deficiency in the PCR. The dismissal was based on significant facial and procedural inadequacies in the PCR Motion. See Exhibits "A & B". These errors were not the fault of Defendant. The right, or need, to appeal the circuit court denial of PCR was never discussed with Defendant, and no timely appeal of the PCR dismissal was ever filed.

By way of explanation, Defendant's PCR was filed mere days before PCR counsel was deployed to Iraq with his military unit. During almost all of the time the PCR was pending before dismissal, PCR counsel was on active duty assignment in the military, in Iraq. PCR

Counsel's Mississippi practice was temporarily closed. When after making inquiry Defendant could get no response from his attorney about the status of his case, Defendant paid another quasi-legal professional to give him advice on how to proceed. Defendant retained PPS Legal Research Clinic, P.A. to advise him how to proceed. Unfortunately, PPS Legal is not a law firm, but a "paralegal" firm in Southaven, MS.

PPS Legal Research Clinic frequently sells "para-legal" services to Mississippi Department of Corrections inmates. By the time Defendant was finally advised of the dismissal of his PCR Motion in circuit court, the 30 days to appeal his PCR had already long expired. PPS Legal states in their correspondence to Defendant that they did pay an attorney from funds paid to PPS by Defendant. See Exhibit "D", June 8, 2005 Letter from PPS. Despite the representation of engagement of some sort of unidentified legal counsel by PPS for Defendant, no one from PPS, or elsewhere, ever advised Defendant that he needed to specifically seek leave from the Circuit Court to file an out of time appeal of the Court's PCR denial. The relationship with PPS ends abruptly with a letter saying little more than, since Defendant has run out of money, they can do nothing further to help him. See Exhibit "D", June 8, 2005 Letter from PPS.

Defendant hired current counsel for two purposes; to attempt to secure an out of time direct appeal of the trial and conviction and to attempt to position the Defendant to be able to pursue a meaningful Motion for Post Conviction Relief. We have succeeded, fortunately, in arguing to the trial court and to the Supreme Court that Defendant deserved an out of time direct appeal of his rape conviction. (Which is Defendant's other currently pending appeal before this Court in Case Number 2008-KA-00814-COA). However, his petition to the trial court to set aside the dismissal of his PCR was denied. This is the appeal of the trial courts Order refusing to reinstate his right to pursue a meaningful Motion for Post Conviction Relief.

B. Identity and History of the Underlying Proceedings:

Defendant was indicted for a rape that is alleged to have occurred on or about January 16, 1997. The complaining witness reported the rape on January 16, 1997 and said that the assault was committed by a person that she knew, and had been dating, over a period of three years. Defendant was arrested 17 months after the alleged rape on or about June 21, 1998. He was indicted for the crime of rape in Hinds County indictment number 98-4-314. He was represented at trial by private counsel hereinafter "Trial Counsel", to replace his court appointed lawyer. Trial Counsel was retained on January 4, 2000. See Attorney Fee Agreement, Exhibit "E". The Defendant's two day trial began on February 7, 2000, one month after Trial Counsel was retained. Defendant was convicted of rape on February 8, 2000 and sentenced by a jury's finding to a term of life imprisonment.

IV. SUMMARY OF THE ARGUMENT

The Defendant hired two separate lawyers to file post trial, appellate pleadings. He first paid the lawyer who tried his case to file an appeal. Trial Counsel missed the appellate filing deadlines and promised he would file a Motion for PCR. Although Trial Counsel prepared some of the documents for the PCR, he ultimately never filed them. See Exhibits "S, T, U, V, X and Y. Exhibit "Y" is a document prepared by Trial Counsel for the Defendant's PCR, but never filed.

Realizing that Trial Counsel was not performing as promised, the Defendant hired a second lawyer to file a PCR. This lawyer filed a wholly defective Motion for PCR just days before he left the country with his National Guard unit for indefinite tour in the War in Iraq. No action was ever taken on the PCR to correct or supplement the deficiencies and it was ultimately

dismissed as defective. See Exhibit "A", the PCR as filed and see Exhibit "B", Order dismissing PCR for deficiencies.

Although the Defendant corresponded with the circuit clerk in an effort to see what his attorneys had done in his case, he was never advised that his PCR was filed and defective on its face, needing to be supplemented with evidence and an affidavit from the Defendant. Additionally, the PCR did not even raise the allegation of Ineffective Assistance of Trial Counsel, one of the purposes for which PCR counsel was hired.

The Defendant took all steps that he could have taken to attempt to perfect a direct appeal and then a PCR. He was failed by his previous attorneys. He has no remedy which would allow him to pursue a PCR at this time under the existing rule of law and this makes the existing law unconstitutional. Respectfully, Defendant prays that he be allowed to purse a Motion for Post Conviction Relief.

V. ARGUMENT

A. Substantial and Specific Supporting Facts Exist Establishing a Basis in Truth for the Claims Desired to be Asserted in Defendant's PCR.

Current Mississippi jurisprudence appears to require that a Defendant make a showing of "substantial and specific supporting facts" or a "basis of truth for the claims" to be asserted in order to prevail upon the Court to reinstate his PCR on constitutional grounds. **Stovall v. State,** 873 So.2d 1056 ¶7. and **Chancey v. State**, WL 3112688, (Miss.App. 2005).

Defendant argues that the following errors constitute a sufficient showing by the Defendant that there is a basis for Motion for Post Conviction relief. These facts were sworn to

by the Defendant and argued to the trial court in the Defendant's original Motion to overturn the trial court's dismissal of the Defendant's PCR for being procedurally defective. See Exhibit "F", Affidavit of Defendant and Exhibit "R" Affidavit of Defendant's Mother, Margaret McLaurin.

1. McLaurin prays for relief based on the failure of PCR Counsel to file a timely and non-defective PCR despite his agreement to undertake the case with reasonable legal skill and being paid in full to do so.

2. McLaurin argues the following conduct of Trial Counsel, considered individually or cumulatively, provides a reasonable basis of an appellate finding of ineffective assistance of counsel during the trial of this case. The primary allegations of ineffective assistance are:

a. Failing to appeal the jury verdict of guilty despite being retained to do so.

b. Trial Counsel had the opportunity to review the incriminating identifying photo of Defendant used by the State at trial, but admittedly never went to prosecutor's office to review it and never filed motion to exclude it based on the suggestive procedure in which it was presented to the complainant. (TR, 99).

c. After Defendant's arrest, the prosecution sent a JPD detective to the Defendant's house to take photographs of the house. The JPD Detective engaged the Defendant in a conversation outside of the house while she was taking pictures and received a statement that was used in trial against the Defendant. Trial Counsel never filed a motion to challenge the constitutionality of this statement though it was used to the detriment of McLaurin at trial. (TR, 112, 176).

d. The opening statement and closing arguments of Trial Counsel are so disjointed and, in places appear so incoherent, that they must have had a profound impact on the jury to the detriment of the Defendant. (TR, 113-118 and 288-303).

e. Trial Counsel filed no motion or objection to an in-court identification of the Defendant despite the fact that the complainant has been shown two separate out of court photo lineups of McLaurin (a procedure recognized to be unduly suggestive). One of these two "arrays" is a single-photo, photo array shown to the complainant and thus, in itself, impermissibly suggestive. (TR, 120-121).

f. Trial Counsel failed to investigate the identity of the complainant's cousin who introduced the complainant to her alleged assailant. This cousin was dating the assailant's friend and would have known the assailant's identity. (TR, 121). Additionally, Trial Counsel failed to cross examine the complainant on the totally inconsistent prior statements of the complainant regarding this issue which would have established that there was no reason for the identification of the Defendant to take 17 months after the alleged rape.

g. The complainant testified there was vaginal penetration by the assailant's penis. (TR, 132-133). But, the police report states that the perpetrator was unable to achieve an erection. See Exhibit "G", JPD Police Reports styled "General MO", Section 74: "Suspects Characteristics", #3. "Not Achieve Erection". This piece of information could only have come from the complainant at the time the report was taken from her. Trial Counsel failed to cross examine at all on the issue of vaginal penetration versus the reported inability of the assailant to achieve an erection. The penetration issue is a central element to the crime of rape and this major inconsistency should have been thoroughly explored on cross examination of the complainant.

h. Trial Counsel failed to cross examine on the fact that the complainant never told the police that she heard her alleged assailant's sister call him "Shawn" just after the alleged rape. (TR, 135). This came out for the first time, at trial. Compare this testimony to JPD's reports,

Exhibit "G" which wholly lack Shawn or Eshawn as the suspects name or nickname. (See specifically Exhibit "G", "JPD Offense/Supplementary", dated January 17, 1997, where a suspect description is given and no nickname is provided in box #28 "Alias". Additionally, this damaging testimony from the complainant constitutes a discovery violation to which defense counsel never objected. This crucial inculpatory information was not provided to the defense prior to trial.

i. Trial Counsel failed to object to the introduction into evidence of an arrest mug shot of McLaurin that was taken during an unrelated prior arrest. This photo was shown to the complainant as a single photo lineup, an thus was a textbook example of an unconstitutional, impermissibly suggestive and highly prejudicial lineup procedure. (TR, 142). See Police Composite Police Reports and discovery including the photographic lineups, Exhibit "G".

j. Trial Counsel failed to object to the six person photo spread of McLaurin that was shown to the complainant subsequent to his arrest. The array was impermissibly suggestive and highly prejudicial to the defendant at trial. Supporting the allegation of the suggestive nature of the photo array is the fact that the photo array was shown after an in-person identification of McLaurin by the complainant just days before the photo lineup. (TR, 142).

k. Trial Counsel failed to investigate and tender discovery in the form of medical records to the State that would have proved that McLaurin, at the time of the alleged rape, was on crutches and had been the victim of a recent gunshot wound to the leg. The assailant described by the complainant lacked any such wound. The State objected to cross examination of the complainant on this key issue because none of the medical information, critical to the defense of the case, was provided in discovery to the State by Trial Counsel. In addition to sustaining the

State's discovery violation objection, the Court inappropriately limited cross examination on this issue because of a *sua sponte* finding of lack of relevance. (TR, 149-150).

l. During the trial, the State attempted to show through collateral testimony that McLaurin possessed a car similar in appearance to the one described by the complainant. This testimony took the form of JPD undercover officer Richard Lowrey stating that he had on a previous, unrelated date, seen McLaurin in a small black truck with the word "outlaw" across the back window. This previous, unrelated date concerned the officer's investigation of another criminal matter, a fact which became very apparent to the jury. No objection was made by Defense counsel. Lowrey, an undercover officer, was allowed, without objection, to testify that he "was aware of the existence" of Shawn McLaurin. On cross examination Trial Counsel solicited that "another officer impounded his [McLaurin's] vehicle". (TR, 192). On redirect, without objection, the State elicited that there were rifles and guns taken from the black truck. (TR, 193). All of this information was evidence of other crimes to which Trial Counsel should have objected and requested a hearing outside of the presence of the jury. No hearing was conducted as to whether the prejudice of this information was outweighed by is probative value. In fact, during pretrial motions, the Court ruled that evidence of other crimes was not going to be permitted as related to using officer Lowrey's testimony. (TR, 91-94). Despite this, Trial Counsel never objected, and even helped elicit the testimony, thus harming his own client.

m. In his motion for directed verdict at the close of the state's case, Trial Counsel argues that the suggestive lineup procedures and suggestive photo arrays should be considered a persuasive factor in his oral motion to dismiss. However, as the trial court and the prosecutors both pointed out, that issue should have been raised in a pretrial motion. (TR, 215-218). The motion was denied as untimely.

n. One of the witnesses called by McLaurin was Rochelle Williams, the mother of McLaurin's child. In its cross examination, the state, with no objection from Trial Counsel, asked Williams about a prior affidavit she had allegedly signed accusing McLaurin of domestic violence. The State never revealed it was about to attempt to introduce other crimes evidence of a prior alleged domestic violence charge against McLaurin. Compounding the State's error, Trial Counsel did not object, ask for a cautionary instruction or move for a mistrial. (TR, 230). Later in the case, the State moved and was allowed to admit into evidence a certified copy of an affidavit signed by Williams alleging an unrelated domestic violence. Williams denied on the stand that the affidavit was hers, but the seed was planted in the jury's mind anyway. (TR, 230). There was no objection from Trial Counsel to the admission of the purported prior affidavit of Rochelle Williams against McLaurin for domestic violence. (TR, 264). There was no objection by Trial Counsel or request for a balancing test by the court on the document's probative value versus it prejudicial effect. (TR, 264).

o. Trial Counsel did not object to the State asking Rochelle Williams questions which revealed that McLaurin was on probation from an unrelated charge, thus allowing the jury unfiltered knowledge of prior convictions of McLaurin without a probative/prejudicial evaluation by the Court. (TR, 231-233). Trial Counsel did not object, ask for a cautionary instruction or, move for a mistrial.

p. Trial Counsel announced Defendant Shawn McLaurin as the Defense's final witness while the jury was present in the courtroom. The Court asked the jury to step outside so that it could make its usual determination of whether the Defendant is informed of his right to testify or not testify. No motion had been filed by Trial Counsel to exclude McLaurin's prior conviction. While the jury was still out, the prosecutor brought up the fact that she wanted to impeach

McLaurin with his prior felony conviction. When the Court said she would allow the State to question McLaurin on the prior conviction, McLaurin changed his mind and decided not to testify. It is obvious from reading exchange in the trial record that McLaurin had never been advised by Trial Counsel on this issue until the Court made it's ruling. Unfortunately, the jury could not escape the fact that Trial Counsel had announced to them that McLaurin would testify before they were sent out of the courtroom. When the jury came back, McLaurin has now suspiciously (to the jury) withdrawn from testifying. This appears very bad for McLaurin. This whole scenario, brought about by Trial Counsel, could have been completely avoided by a simple pretrial or even oral motion to exclude the prior conviction before announcing in the jury's presence that McLaurin intended to testify. (TR, 259-263).

q. No objection was made to the State calling US Probation Officer James Chappell. Rochelle Williams had allegedly called Chappell saying she had been threatened by McLaurin. This is evidence of other crimes of McLaurin in two ways; first, the alleged criminal act of the threats and second it further called the jury's attention to prior unfiltered convictions by emphasizing that Chappell was McLaurin's existing probation officer. Further error lies in this exchange. Officer Chappell testified he could not verify the identity of the caller to actually be Rochelle Williams. So, his testimony did not meet authentication standards under MRE 901 or satisfy any hearsay exception under MRE 803 or MRE 804. There was absolutely no objection from Trial Counsel on any of these grounds or issues. (TR, 264-271).

r. Trial Counsel submitted no jury instructions.

s. Trial Counsel failed to object or demand hearing, cautionary instruction or mistrial after the state's inappropriate comment in closing pointing out that McLaurin failed to put on medical evidence or medical testimony regarding his gunshot wound. This was an impermissible

and unconstitutional comment of the failure of a Defendant to call witnesses or put on evidence. (TR, 284).

t. Trial Counsel failed to object to the State's argument that McLaurin had apparently assaulted his own witness Rochelle Williams in the past. (TR, 287). This is impermissible character evidence and evidence of other crimes. No balancing test was ever requested by Trial Counsel or conducted by the court. Witness Williams, denied it ever happened.

u. Trial Counsel advised the jury of the wrong legal standards and burdens of proof in the case, a fact highlighted by the state, adding to the cumulative negative impression of counsel and confusion to the jury. (TR, 298-304).

3. McLaurin prays for relief from other errors during the course of his trial that prejudiced the outcome of his case.

4. McLaurin prays for relief based on the failure of PCR Counsel to advise McLaurin of the Court's denial of the PCR, failure to advise of the need to appeal the Circuit Court denial of the PCR, and failure to appeal the denial of Motion for Post Conviction Relief on McLaurin's behalf.

5. McLaurin prays for relief from a constitutional violation of procedural due process under the 5th, 6th and 14th Amendments of the United States Constitution and those corollary rights under the Mississippi Constitution. Defendant was not timely informed of the denial of his Motion for PCR by the court system or counsel so to be put on notice that he needed to start an appeal of the Order Denying PCR or attempt to cure a facial defect of his PCR.

B. Defendant Took All Possible Steps to Perfect His PCR

After the Defendant learned that retained Trial Counsel had missed the deadline to file a direct appeal and that Trial Counsel had not filed the Motion for PCR that Trial Counsel said he would file, Defendant sought a new lawyer. Being without funds, it took a while for the family to save up to hire another lawyer. Sometime shortly before September 18, 2001, Defendant hired his second attorney, hereinafter "PCR Counsel", to file a Motion for PCR based on the ineffective assistance of Trial Counsel at trial, and failure of Trial Counsel to file a timely appeal. More than sixteen months after being hired, PCR Counsel filed a defective two page Motion for PCR on February 13, 2003. See Exhibit "A", PCR Motion.

The PCR contained no reference to, or excerpts from, the trial transcript though the trial record had been transcribed almost a year before on March 4 2002. See Transcription date on Trial Record "TR", Exhibit "H". The PCR contained no supporting evidentiary affidavits. The PCR was filed without ever being seen, reviewed by or sworn to by McLaurin as required by §99-39-9 MCA . See Exhibit "A", Motion for PCR. The PCR Motion was filed on the day, or the day before, the PCR attorney was to report for active duty military deployment to Iraq. After being filed, the PCR Motion sat idle for 17 months with no action being taken on it.

Unfortunately, there are several procedural deficiencies in the original PCR Motion. There were no supporting affidavits or other evidence in support of the allegations asserted in the PCR. McLaurin's claim of ineffective assistance at trial by Trial Counsel is completely omitted from the Motion for PCR. Additionally, the PCR itself lacked the factual specificity required to trigger the requirement of an evidentiary hearing. Lastly, the PCR was never "verified by oath of

the prisoner" as required by §99-39-9 MCA. In fact, McLaurin never even saw a copy of the Motion before it was filed.

On information and belief, it is thought that the explanation for PCR Counsel filing the deficient PCR was in a good faith effort to preserve the 3 year statute for filing McLaurin's PCR before PCR Counsel was indefinitely deployed with his military unit to the war in Iraq. Come to pass, this hasty filing, while well intentioned, actually harmed McLaurin because the deficient Motion was never supplemented, supported by evidence, briefed or argued. Because McLaurin appeared on paper to be represented by counsel, there may have been no cause for the Court to directly notify McLaurin of the deficiencies. McLaurin and his family believe that while on military deployment another attorney may have taken on some responsibility for PCR Counsel's cases. But, that attorney never made an entry of appearance on behalf of McLaurin and appears to have done no additional work on the case.

Unfortunately, Defendant had no notice of the deficiencies that led to the dismissal of his PCR. McLaurin made an independent inquiry of the Circuit Clerk as to the status of his PCR, however the Circuit Clerk's office replied to McLaurin just prior to the PCR's dismissal. See Exhibit "I", a docket print out from the Hinds County Circuit Clerk's computer. Exhibit "I" indicates that a copy of the docket status of the PCR was mailed to McLaurin the day before the PCR was dismissed. So, as far as McLaurin knew, the PCR Motion was still pending on the docket.

McLaurin eventually received notice of the dismissal of the PCR from PCR Counsel on or about March 8, 2005. See Exhibit "J", a copy of the Order McLaurin received from PCR Counsel and a copy of the outside of the envelope in which the Order arrived from PCR Counsel's office. The Order arrived shortly after March 8, 2005 from PCR Counsel. This would

have been 13 months after the denial and obviously, past the 30 day deadline to appeal the denial of the PCR.

C. Defendant Attempted to Follow the Progress of his PCR and Attempted to Discover the Status of his PCR.

McLaurin tried on numerous occasions to stay apprised and determine what was happening with his case via written inquiry to the Circuit Court. Attached as Exhibits K, L, M, N,O, and P are letters that McLaurin wrote. The chart below is a summary of the letters. It is apparent that some confusion existed because there were, eventually, two files for McLaurin. Some confusion stemmed from the fact that the Defendant did not appreciate that PCR's are civil filings and a request for a status of his "criminal case" would not trigger an inquiry into the civil docket. He had two files, one was the criminal file and one was the civil PCR file. Since McLaurin did not know for a long time that a PCR had even been filed, some inquiries only to referenced the progress of his criminal file and did not cross reference his civil, PCR file.

Here is an outline of the correspondence and result:

Exhibit to this Motion	Date	File Referenced	Correspondence to Circuit Clerk	Clerk Response
L	12-04-02	Criminal Trial, 98-4-314	Trying to find out if lawyer has filed "something". Asks specifically RE PCR.	Clerk mailed last page of docket. Notes on letter that there is no PCR filed
M	08-29-03	Criminal Trial, 98-4-314	Files *pro se* Motion to Quash Indictment trying to get back to Court	Filed by Clerk
N	10-9-03	Criminal Trial, 98-4-314	(Letter is illegible in some parts due to bad copy). Letter seems to be making inquiry as to what has (cont'd from above) ever been filed in his case and also asks what is the status of anything pending. This letter appears to have been forwarded to Judge Green who soon after denies the	Cannot determine clerk's response

Exhibit to this Motion	Date	File Referenced	Correspondence to Circuit Clerk	Clerk Response
			(cont'd) *pro se* Motion to Quash Indictment in an order dated 10-31-03.	
O	12-24-03	Criminal Trial, 98-4-314	Asks for a "Copy of ever (sic) motion that has been file (sic) within the Hinds County Circuit Court House"	Clerk's note on letter: "2-26-01, mailed copy of all motions to Deft." (Clerk appears to have looked at docket entry noting that records had been sent before, but did not check for anything new. Also, since this request **only referenced criminal trial file** (McLaurin did not know PCR had been filed), clerk only checks in criminal trial file, 98-4-314. No civil, PCR, reference.
P	03-17-04	Criminal Trial, 98-4-314	Asks for copy of indictment	Note on letter indicates that clerk had previously responded on 02-26-01.
K	07-02-04	Civil PCR, 251-03-310	Asks what is outcome of PCR.	Clerk sends copy of PCR Motion docket page BEFORE the Order denying PCR is entered. So, PCR Motion appears to McLaurin to be still pending.

Looking at the correspondence above, it is apparent that McLaurin attempted to do the best he could from the distance and restrictions of prison to stay advised of the status of his case. He was usually unable to get a response form his lawyer and tried on his own to find out what was happening in his case through the circuit clerk.

Through these letters, McLaurin is obviously trying to see if his lawyer has filed anything on his behalf. It is not until his July 2, 2004 letter that McLaurin appears to know the there has been a PCR filed on his behalf. In a very unfortunate stroke of timing, the clerk responds to McLaurin's July 2, 2004 letter just before the court's Order Denying the PCR was filed in the

clerks office. So, it appears to McLaurin that his PCR Motion is still pending consideration. See Exhibit "I", docket print out. McLaurin would have no reason to know that as of July of 2004, he should actually be initiating the appeal process on the PCR or requesting leave from the trial court to amend his defective PCR pleadings. Since his lawyer never advised him of the denial of the PCR until March 8, 2005, his appeal time had run long before he had notice of the dismissal Order.

D. There is no existing avenue for relief for the Defendant.

Constitutional procedural due process requires that there be an avenue of meaningful redress for errors in the criminal justice system. §99-39-9 MCA, Mississippi's PCR statute, makes no provision for relief to a prisoner who petitions for an out of time appeal of a failed PCR based on factors that relate completely to the failure of retained counsel to protect the interests of their client despite the fact that the client has taken reasonable steps to effect an appeal of his case.

E. Supporting Case Law and Jurisprudence:

1. Denial of Fundamental Right to Effective Counsel and thus Meaningful Recourse on Appeal:

Defendant contends that the circuit court's denial to reinstate his ability to pursue a PCR violates his Right to Counsel under the 6th Amendment of the United States Constitution and those corollary right under the Mississippi Constitution. It also denies his procedural due process Rights under the 5th, 6th and 14th Amendments of the United States Constitution and those corollary rights under the Mississippi Constitution. When a fundamental constitutional right has been violated, the procedural time bar to an out of time appeal can be waived.

> Errors affecting fundamental constitutional rights may be excepted from procedural bars which would otherwise prohibit their consideration, and this case discloses a denial of due process in sentencing.
> **Luckett v. State**, *582 So.2d428 citing,* **Smith v. State**, 477 So.2d 191, 195-96 (Miss.1985).

A violation of a fundamental right may create an exception to the time bar of appeals. Defendant argues that this necessarily extends to his ability to file a Motion for Post Conviction Relief. Under the law it must be determined whether a claim of ineffective assistance of counsel may rise to the level of injury to a fundamental right. The answer is yes. In the right case, ineffective assistance of counsel can be found to compromise a defendant's fundamental constitutional right. The Mississippi Supreme Court has left this door open for the right case, and has said:

> Bevill raises a claim of ineffective assistance of counsel. **It is conceivable that under the facts of a particular case, this Court might find that a lawyer's performance was so deficient, and so prejudicial to the defendant, that the defendant's fundamental constitutional rights were violated**. However, this Court has never held that **merely *raising*** a claim of ineffective assistance of counsel is sufficient to surmount the procedural bar. Therefore, Bevill's ineffective assistance of counsel claim is insufficient to surmount the procedural bar.

Bevill v. State, 669 So.2d 14, 17 (Miss.1996). (Also cited recently for this issue in **Brown v. State**, 923 So.2d 258 (Miss. App. 2006)). (Also, cited for this issue in **McBride v. State**, 914 So.2d 260 (Miss.App. 2005), ¶12). (Emphasis Added).

Further, the **Stovall** case seems to raise an even less strenuous test of proof of injury to a fundamental right:

> It is true that when the fundamental rights of an individual are implicated in a petition for post-conviction relief, the procedural time bar will not always be applied to preclude review of the claims. **Luckett v. State**, 582 So.2d 428, 430 (Miss.1991). However, the mere assertion of a constitutional right violation is not sufficient to overcome the time bar. **There must at least appear to be some basis for the truth of the claim before the limitation period will be waived.** Even without the complication of the time bar, Stovall would still need to make

some sort of showing of merit to his claims to avoid dismissal. Miss.Code Ann. § 99-39-11(2).

Stovall v. State, 873 So.2d 1056 ¶7.

This proposition has been further acknowledged and discussed by the Court of Appeals who cites additional Supreme Court authority:

> ¶ 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.
>
> **Chancey v. State,** WL 3112688, (Miss.App. 2005)

In the case at bar, McLaurin has done much more than "merely raise" the issue of ineffective assistance. Considering the proof and argument provided herein, in light of *Stovall*, there "appear[s] to be some basis for the truth of the claim" that a fundamental right of McLaurin has been violated. Frankly, the Supreme court has denied the overwhelming majority of cases brought by defendants based on ineffective assistance claims. The reason for denial is almost always that there is absolutely no specific allegation of fact presented by the frequently *pro se* defendant. In this appeal, there is ample specific identification of potential errors in the lower court that may have been asserted in a PCR.

In the case at hand the **Chancey v. State** requirement of **"substantial and specific supporting facts"** has been met via the attached exhibits A-Y, argument and sworn allegations of McLaurin in the body of the this Motion. See Exhibit "F", Sworn Affidavit. **Bevill's** requirement that proof be supplied instead of "merely raising" the ineffective issue has been satisfied by this Appeal and attachments. **Stovall's** requirement that there "at least appear[s] to be some truth to the claim" is satisfied by this Appeal's contents and Exhibits. McLaurin argues that conclusive evidence has been tendered to establish that McLaurin, try as he might to appeal his case, has experienced several distinct instances of deficient representation which compromised his fundamental constitutional rights and would entitle him to an out of time Motion for Post Conviction Relief.

2: Lack of Notice of Order Denying PCR:

Timely notice was not given to McLaurin of the denial of the PCR Motion by court or counsel. Therefore, he could not have known of the need to appeal the denial of the Motion for PCR. Under controlling case law, when a fundamental right of McLaurin is effected, an exception to the procedural time bar is warranted. Defendant makes this due process argument under the 5th, 6th and 14th Amendments of the United States Constitution and those corollary rights under the Mississippi Constitution.

Mississippi Rule of Appellate Procedure makes an exception to the time bar for criminal defendants who do not receive notice of an order in time perfect an appeal. MRAP 4(h) states:

> **4(h) Reopening Time for Appeal.** The trial court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier,

reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Per this rule, an exception may only be made by the court within 180 days. For defendants who are finally notified of a final order outside of the 180 days, there is no readily apparent remedy. This is a failing in the rule, and thus the appellate process, which McLaurin argues unconstitutionally prejudices him under his particular set of facts. He is left with no apparent opportunity for redress. McLaurin makes and preserves this argument on federal constitutional grounds under the 6th Amendment right to counsel and the 5th, 6th and 14th Amendment right to due process, all under the United States Constitution. Defendant prays for relief in the form of permission to pursue an out of time Motion for Post Conviction Relief.

3. Lack of Recourse under §99-39-9.

McLaurin additionally prays for relief based on a Constitutional procedural due process argument that §99-39-9 MCA, Mississippi's PCR statute, makes no provision for a prisoner who petitions for an out of time appeal based on facts which relate completely to the failure of retained counsel to protect the interests of their client despite the fact that the client has taken reasonable steps to effect a Motion for Post Conviction Relief of their case.

This is a failing in the statute, and thus, the appellate process. This failing creates an unconstitutional prejudice to McLaurin under his particular set of facts by leaving no legal remedy. McLaurin makes and preserves this argument on federal constitutional grounds under the 6th Amendment right to counsel and the 5th, 6th and 14th Amendment right to due process, all under the United States Constitution. Defendant prays for relief in the form of permission to pursue an out of time Motion for Post Conviction Relief.

VI. CONCLUSION

Respectfully, the Defendant requests that this Court enter an Order setting aside the trial court's dismissal of the Defendant's Motion for Post Conviction Relief and further Order that the Defendant either be allowed to Amend and Supplement his previously filed Motion for PCR or, alternatively, file a new action for Post Conviction Relief and proceed in an out of time manner.

Respectfully submitted,

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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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