

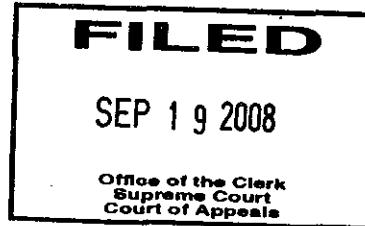
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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LARRY SMITH

APPELLANT

VS.



NO. 2008-CP-0538

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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**VS.**

**NO. 2008-CP-0538**

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**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE ISSUES**

- I. The Circuit Court of Scott County did not err in barring Smith's Petition for Post-Conviction Relief as the indictment was valid, Smith having mistakenly referred to an incomplete copy of the indictment.
- II. Smith's claim of ineffective assistance of counsel in his Post-Conviction Relief Motion was properly denied without an evidentiary hearing.
- III. The Trial Court did not err in barring Smith's Post-Conviction Relief Motion and Smith's guilty plea was voluntarily and intelligently made.

**STATEMENT OF THE CASE**

Appellant, Larry Smith, brings an appeal from the lower court's order denial of his motion for post-conviction relief. In his post-conviction motion, Smith argued, *inter alia*, that there was a violation his due process rights in Scott County Circuit Court Cause Numbers 4768 and 4769. He makes the same arguments, *inter alia*, on appeal.

## SUMMARY OF THE ARGUMENT

Smith argues that the Scott County Circuit Court erred in barring his Motion for Post Conviction Collateral Relief. Smith states that the foreman and clerk did not sign the indictments in his case. He argues that the indictments had jurisdictional defects and were therefore void and that he could not have waived the defect. Specifically, he contends that the indictments were not signed by the grand jury foreman, the district attorney and the circuit clerk.

However, Smith, either through trickery or inadvertence neglected to ensure that the record included both sides, front and back, of the necessary document, that is, the indictment. The complete indictments, including both front and back sides, in Cause Numbers 4768 and 4769 are necessary in order to allow a complete and fair examination of Smith's conviction and the court's denial of his post-conviction motion. Copies of the complete indictments are attached hereto and incorporated herein as Exhibits A and B. Both indictments are single page documents printed on **both the front and back of the page**. The back of each indictment includes the signatures of the district attorney and the foreman of the grand jury, as well as the affidavit of the foreman of the grand jury, notarized by the circuit clerk. The back of each document also includes a statement by the sheriff's office that Smith received a copy of the indictment.

Therefore, Smith's argument that the trial court erred in dismissing Smith's Motion for Post-Conviction Relief due to lack of jurisdiction fails. The trial court correctly dismissed Smith's Motion for Post-Conviction Relief pursuant to Miss. Code Anno. 99-39-23 (6), since previous denial of a post-conviction relief petition is a final judgment and thus bars filing of any second or successive motions under the UPCCRA. See also, *Bowie v. State*, 949 So.2d 60, 62 (Miss. 2006). Further, the trial court correctly held that Smith's Motion for Post Conviction Relief was barred by the three year statute of limitations contained in Miss. Code Anno. 99-39-

5(2). Therefore, the trial court was without jurisdiction to entertain Smith's Motion for Post Conviction Relief.

Smith argues that he received ineffective assistance of counsel due to his counsel's failure address the allegedly invalid indictments and in not informing the Smith of the right to a valid indictment. He also argues that by not being informed of his right to a valid indictment, he was coerced into an invalid plea agreement.

Again, as noted above and in the State's Motion to Supplement, Smith is relying on incomplete copies of the indictments. Copies of the complete indictments, front and back are attached hereto and incorporated herein. There was no defect in the indictments and his counsel therefore could not have erred by failing to advise him of defective indictments.

These issues are without merit and the trial court's dismissal of Smith's Motion for Post Conviction Relief should be affirmed.

### **ARGUMENT**

**I. The Circuit Court of Scott County did not err in barring Smith's Petition for Post-Conviction Relief as the indictments were valid, signed by both the grand jury foreman and the district attorney, Smith having mistakenly referred to incomplete copies of the indictments.**

Smith argues that the Scott County Circuit Court erred in barring his Motion for Post Conviction Collateral Relief. Smith states that the foreman and clerk did not sign the indictments in his case. He argues that the indictments had jurisdictional defects and were therefore void and that he could not have waived the defect. Specifically, he contends that the indictments were not signed by the grand jury foreman, the district attorney and the circuit clerk.

However, Smith, either through trickery or inadvertence neglected to ensure that the record included both sides, front and back, of the necessary document, that is, the indictment.

The complete indictments, including both front and back sides, in Cause Numbers 4768 and 4769 are necessary in order to allow a complete and fair examination of Smith's conviction and the court's denial of his post-conviction motion. Copies of the complete indictments are attached hereto and incorporated herein as Exhibits A and B. Both indictments are single page documents printed on **both the front and back of the page**. The back of each indictment includes the signatures of the district attorney and the foreman of the grand jury, as well as the affidavit of the foreman of the grand jury, notarized by the circuit clerk. The back of each document also includes a statement by the sheriff's office that Smith received a copy of the indictment.<sup>1</sup>

Therefore, Smith's argument that the trial court erred in dismissing Smith's Motion for Post-Conviction Relief due to lack of jurisdiction fails. The trial court correctly dismissed Smith's Motion for Post-Conviction Relief pursuant to Miss. Code Anno. 99-39-23 (6), since previous denial of a post-conviction relief petition is a final judgment and thus bars filing of any second or successive motions under the UPCCRA. See also, *Bowie v. State*, 949 So.2d 60, 62 (Miss. 2006). Further, the trial court correctly held that Smith's Motion for Post Conviction Relief was barred by the three year statute of limitations contained in Miss. Code Anno. 99-39-5(2). Therefore, the trial court was without jurisdiction to entertain Smith's Motion for Post Conviction Relief.

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<sup>1</sup> In a separate motion, the Appellee, State of Mississippi, and moved this Court, pursuant to M.R.A.P. 10(e), to supplement the record in this case by the inclusion in said record of the complete indictment, front and back, in this case and suspend the briefing schedule. M.R.A.P. 10(e) authorizes this Court to correct omissions or otherwise to supplement the appeal record. Therefore, in a separate motion the Appellee has moved this Court to supplement the record with the attached certified copy of the complete indictment or to direct the Clerk of the Circuit Court of Scott County to supplement the record in this case by the inclusion of the complete indictment in said record of the documents requested herein and suspend the briefing schedule until such documents are received by this Court.

**II. Smith's claim of ineffective assistance of counsel in his Post-Conviction Relief Motion was properly denied without an evidentiary hearing as the indictments were valid and contained all proper signatures.**

Smith argues that he received ineffective assistance of counsel due to his counsel's failure address the allegedly invalid indictments and in not informing the Smith of the right to a valid indictment. He also argues that by not being informed of his right to a valid indictment, he was coerced into an invalid plea agreement.

Again, as noted above and in the State's Motion to Supplement, Smith is relying on incomplete copies of the indictments. Copies of the complete indictments, front and back are attached hereto and incorporated herein. There was no defect in the indictments and his counsel therefore could not have erred by failing to advise him of defective indictments.

This issue is without merit and the trial court's dismissal of Smith's Motion for Post Conviction Relief should be affirmed.

**III. The Trial Court did not err in barring Smith's Post-Conviction Relief Motion and Smith's guilty plea was voluntarily and intelligently made as the indictments were valid and contained all necessary signatures.**

Smith argues that by not being informed of his right to a valid indictment, he was coerced into an invalid plea agreement.

Again, as noted above and in the State's Motion to Supplement, Smith is relying on incomplete copies of the indictments. Copies of the complete indictments, front and back are attached hereto and incorporated herein. There was no defect in the indictments and his counsel therefore could not have erred by failing to advise him of defective indictments.

This issue is without merit and the trial court's dismissal of Smith's Motion for Post Conviction Relief should be affirmed.

## CONCLUSION

Based on the foregoing, the issues presented by Smith on appeal are without merit, and the trial court's dismissal of his Motion for Post-Conviction Relief should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: Laura H. Tedder  
LAURA H. TEDDER  
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STATE OF MISSISSIPPI

Scott

COUNTY

In the Circuit Court in and for said County at the

February

Term thereof, in the year of our Lord, 19 97

THE GRAND JURORS of the State of Mississippi, taken from the body of the good and lawful persons of the County of Scott, duly elected, empanelled, sworn and charged, at the Term aforesaid of the Court aforesaid, to inquire in and for the body of the County aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present: That

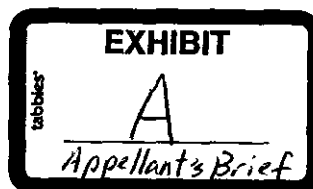
LARRY FLOYD SMITH

late of the County aforesaid, on or about the \_\_\_\_\_ day of December in the year of our Lord, 19 96, in the County and State aforesaid, and within the jurisdiction of this Court, did willfully, unlawfully and feloniously engage in sexual penetration with C. S., a minor male child under the age of fourteen (14) years by performing fellatio on the said C. S., contrary to and in violation of Section 97-3-95, Miss. Code Ann. (1972),

State of Mississippi, County of Scott  
I, Joe Rigby, Clerk of the Circuit Court in and for the  
said State and County do hereby certify that the above  
and foregoing is a true and correct copy of the original  
and the same is on record in  
this office in Vol Book No. 5 at page 389  
Given under my hand and the seal of the Circuit Court  
at Forest this the 26th day of Aug 20 08  
JOE RIGBY, Circuit Clerk  
*Rebecca Dray* D.C.

FILED FOR RECORD  
IN THE CIRCUIT COURT  
SCOTT COUNTY, MISSISSIPPI

FEB 05 1997



JOE RIGBY  
CIRCUIT CLERK

against the peace and dignity of the State of Mississippi.

*Ken Juma*  
District Attorney

STATE OF MISSISSIPPI

Scott

COUNTY

In the Circuit Court in and for said County at the

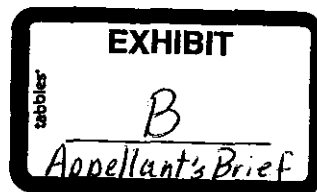
February Term thereof, in the year of our Lord, 19 97

THE GRAND JURORS of the State of Mississippi, taken from the body of the good and lawful persons of the County of Scott, duly elected, empanelled, sworn and charged, at the Term aforesaid of the Court aforesaid, to inquire in and for the body of the County aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present: That

LARRY FLOYD SMITH

late of the County aforesaid, on or about the \_\_\_\_\_ day of December in the year of our Lord, 19 96, in the County and State aforesaid, and within the jurisdiction of this Court, did willfully, unlawfully and feloniously engage in sexual penetration with D. M., a minor male child under the age of fourteen (14) years by performing fellatio on the said D. M., contrary to and in violation of Section 97-3-95, Miss. Code Ann. (1972),

State of Mississippi, County of Scott  
I, Joe Rigby, Clerk of the Circuit Court in and for the  
said State and County do hereby certify that the above  
and foregoing is a true and correct copy of the original  
and the same is on record in  
this office in Doc Book No. 5 at page 389  
Given under my hand and the seal of the Circuit Court  
at Forest this the 26th day of Aug 20 08  
JOE RIGBY, Circuit Clerk  
By Rebecca Pray D.E.



FILED FOR RECORD  
IN THE CIRCUIT COURT  
SCOTT COUNTY, MISSISSIPPI

FEB. 05 1997

JOE RIGBY  
CIRCUIT CLERK

against the peace and dignity of the State of Mississippi.

Kenneth J. [Signature]  
District Attorney