

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JON KURRIE PETERSON

APPELLANT

VS.

NO. 2008-CP-1438-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: W. GLENN WATTS
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 FACTS	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
PROPOSITION I	
PETERSON WHOSE CONVICTION WAS AFFIRMED ON DIRECT	
APPEAL DID NOT RECEIVE PERMISSION TO PROCEED IN	
THE TRIAL COURT.	
THIS MOTION WAS ALSO A SUCCESSIVE WRIT UNDER	
M.C. A. 99-39-27.	5
PROPOSITION II	
INEFFECTIVE ASSISTANCE WAS RES JUDICATA. AND THE	
OTHER ISSUES WERE WAIVED SINCE THEY COULD HAVE	
BEEN RAISED AT TRIAL OR ON DIRECT APPEAL.	8
CONCLUSION	11
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

STATE CASES

Bevel v. State, 669 So. 2d. 14, 17 (Miss. 1996)	8
Crosby v. State , 982 So.2d 1003, 1005 (Miss. App. 2008)	4, 6
Mann v. State, 490 So. 2d 910 (Miss 1986)	4, 8, 10
Patterson v. State, 594 So. 2d. 606 (Miss. 1992)	8
Peterson v. State, 740 So. 2d 940 (Miss. 1999)	1, 3, 4, 8, 10
Stovall v. State, 873 So. 2d 1056, 1058 (Miss. Ct. App. 2004)	4, 10
Wilcher v. State, 479 So. 2d 710 (Miss. 1985)	9
Wiley v. State, 517 So. 2d 1373, 1378 (Miss. 1987)	4, 9, 10

STATE STATUTES

M. C. A. § 99-39-7	1,3,4, 5,6
M. C. A. § 99-39-21.	9
M. C. A. § 99-39-27	6,7
M. C. A. § 99-39-5	8

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JON KURRIE PETERSON

APPELLANT

VS.

NO. 2008-CP-1438-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On April 19, 1996, Mr. Jon Kurrie Peterson, "Peterson" was convicted of murder of Mr. Joseph Darious Saucier, and arson by a Harrison County Circuit Court jury, the Honorable Roger T. Clark presiding. Peterson was sentenced to a life sentence for murder and a consecutive three years for arson in the custody of the Mississippi Department of Corrections. C.P. 91.

Peterson's conviction was affirmed on direct appeal on March 9, 1999. **Peterson v. State**, 740 So. 2d 940 (Miss. 1999). A motion for rehearing was denied. A motion for writ of certiorari was denied by the Mississippi Supreme Court "on September 2, 1999." See **Peterson v State**, 740 So. 2d at page 940 (Miss. 1999).

On April 17, 2008 , Peterson filed for post conviction relief. C.P. 21-71. The trial court denied relief, finding Peterson had not received permission to proceed under M. C. A. § 99-39-7. The trial court also pointed out that on "November 14, 2003," a previous motion to proceed in the trial court was denied by the Mississippi Supreme Court in **2002-M-01410, Peterson v. State**. C.P. 76. Peterson filed notice of appeal to the Mississippi Supreme Court. C.P. 84.

ISSUES ON APPEAL

I.

DID PETERSON HAVE PERMISSION TO PROCEED? HAD HE BEEN PREVIOUSLY DENIED PERMISSION TO PROCEED IN THE TRIAL COURT? DID THE TRIAL COURT LACK JURISDICTION? AND WAS THIS MOTION A SUCCESSIVE WRIT AND BARRED BY M. C. A. § 99-39-27 (9)?

II.

WAS INEFFECTIVE ASSISTANCE RES JUDICATA? AND WERE EVIDENTIARY ISSUES WAIVED SINCE THEY COULD HAVE BEEN RAISED AT TRIAL OR ON DIRECT APPEAL?

STATEMENT OF THE FACTS

A Harrison County grand jury returned a two count indictment against Peterson for the murder of Mr. Joseph Darious Saucier and arson for burning a Ford Ranger pickup belonging to Ms. Wendy Thomas with whom Mr. Saucier had been living at the time of his death. This indictment was returned on September 27, 1995. C.P. 7.

On April 16-19, 1996, Peterson was tried for murder and arson before a Harrison County circuit court jury, the Honorable Roger T. Clark presiding. Peterson was represented by Mr. W.F. Holder, II.

Mr. Peterson was convicted of murder and arson by a Harrison County Circuit Court jury, the Honorable Roger T. Clark presiding. Peterson was sentenced to a life sentence for murder and a consecutive three year sentence for arson in the custody of the Mississippi Department of Corrections. C.P. 91. Peterson filed a direct appeal to the Mississippi Supreme Court. One of the issues raised was ineffective assistance of counsel.

Peterson's murder conviction was affirmed on direct appeal on March 9, 1999. **Peterson v. State**, 740 So. 2d 940 (Miss. 1999). A motion for rehearing was denied. A motion for writ of certiorari was denied by the Mississippi Supreme Court on September 2, 1999.

On April 22, 2008, Peterson filed a motion for post conviction relief. C.P. 6-71. The trial court denied relief, finding Peterson had not received permission to proceed under M. C. A. § 99-39-7. C.P. 76. The court also noted that a previous motion to proceed was denied on November 14, 2003. **2002-M-01410, Peterson v. State**. C.P. 76. On August 13, 2008 Peterson filed notice of appeal to the Mississippi Supreme Court. C.P. 84.

SUMMARY OF ARGUMENT

1. The record reflects that Peterson's direct appeal was affirmed. His conviction was affirmed on direct appeal on March 9, 1999. **Peterson v. State**, 740 So. 2d 940 (Miss. 1999). His motion for a rehearing and a petition for a writ of certiorari was denied. 740 So. 2d at page 940.

Peterson filed for permission to proceed in the trial court under M.C. A. § 99-39-7 which was denied by the Mississippi Supreme Court on November 14, 2003. See attached copy of Order from the Mississippi Supreme Court in **Peterson v State**, 2002-M-01410, by Judge George C. Carlson, Jr. on November 14, 2003. C.P. 76.

On April 17, 2008 Peterson filed a petition for post conviction relief with the trial court. C.P. 6-71. The trial court denied relief finding that Peterson did not have permission to proceed under M. C. A. sect. 99-39-7. C.P. 76. The court also pointed out that Peterson had been previously denied permission to proceed. It therefore lacked jurisdiction. C.P. 76.

In addition, the record reflected that Peterson had previously been denied permission to proceed in the trial court by the Mississippi Supreme Court. This would constitute "a final judgment" under M. C.A. § 99-39-27(9). The present motion would thus be barred as "a successive writ." **Crosby v. State**, 982 So.2d 1003, 1005 (Miss. App. 2008).

2. Peterson's claim of ineffective assistance of counsel was raised in his direct appeal. See **Peterson v. State**, 740 So 2d 940 at 951. This issue was therefore res judicata. In addition, the non-jurisdiction issues that Peterson attempted to raise about evidentiary matters in this his second motion were all waived since they could have been raised at trial or on direct appeal. **Mann v. State**, 490 So. 2d 910 (Miss 1986) ; **Wiley v. State**, 517 So. 2d 1373, 1378 (Miss. 1987). **Stovall v. State**, 873 So. 2d 1056, 1058 (¶13) (Miss. Ct. App. 2004).

ARGUMENT

PROPOSITION I

I.

PETERSON WHOSE CONVICTION WAS AFFIRMED ON DIRECT APPEAL DID NOT RECEIVE PERMISSION TO PROCEED IN THE TRIAL COURT. THIS MOTION WAS ALSO A SUCCESSIVE WRIT UNDER M .C. A. 99-39-27.

On April 22, 2008, Peterson filed a “motion to vacate judgment and sentence or in the alternative motion for a new trial.” C.P. 6-71. There was a claim of ineffective assistance of counsel which was raised on direct appeal. And there were attempts at raising evidentiary issues related to his conviction for murder and arson in 1996.

On July 23, 2008, the trial court denied relief. C.P. 76. The court found that Peterson had not received permission from the Mississippi Supreme Court to proceed in the trial court under M C A sect. 99-39-7. C.P. 76. From that denial of relief, Peterson filed notice of appeal. C.P. 84.

His appeal brief is a repetition of the claims in his motion. Appellant’s brief page 1-27.

The appellee would submit that the record reflects that the trial court correctly found, after reviewing Peterson’s motion, that he did not have permission to proceed under M. C. A. sect. 99-39-7. C.P. 76. In addition, the record reflects that Peterson had previously sought permission which was denied by Judge George C. Carlson, Jr. for the Mississippi Supreme Court on November 14, 2003. C.P. 76.

The court found that under M. C. A. § 99-39-7 a petitioner who had his conviction affirmed on direct appeal must file a motion to proceed with the Mississippi Supreme Court. As stated by the trial court in denying relief Peterson had not received permission to proceed in the trial court from the Mississippi Supreme Court as required by M. C. A. § 99-39-7. The court also found that there was record evidence indicating that Peterson had previously sought permission to proceed from the Mississippi Supreme Court. C.P. 76. That permission was denied. Therefore under M C A § 99-39-27(9), the appellee would submit

that this current motion to vacate and seek a new trial was “a successive application.”

As stated by the trial court in his Order denying relief:

Peterson has not applied for or received permission to proceed from the Mississippi Supreme Court. He is required to obtain permission in light of his previous direct appeal, and his prior motion to proceed in the trial court which was denied in 2003. M C A § 99-39-7 requires that he seek leave of the Mississippi Supreme Court to proceed. The Court’s previous order for the state to respond to the petition is rescinded. It is therefore, Ordered that the motion to vacate judgment and sentence in the alternative motion for a new trial with brief in support” is dismissed. C.P. 76. (Emphasis by appellee).

The record from the Mississippi Supreme Court docket indicates that Peterson sought on two prior occasions to proceed in the trial court, The first was in August 26, 2002. The Court entered an Order denying permission “on November 22, 2002.” On a second occasion on November 3, 2003, a petition was filed a second time with the Supreme Court. “On November 14, 2003,” Judge George C. Carlson Jr. denied permission in **2002-M- 01410**. A copy of that Order is attached to this brief as exhibit A.

M. C. A. § 99-39-27 states that the denial of an application is a final judgment and serves as a bar to “any successive application” under this chapter.

(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 chapter.

In **Crosby v. State** , 982 So.2d 1003, 1005 (Miss. App. 2008), the court found that trial court had properly denied Crosby’s petition since he had not been granted permission to proceed from the Supreme Court.

¶ 6. Crosby filed a motion for permission to proceed in the trial court, but his motion was denied. Because Crosby was not granted permission from the supreme court, the trial court lacked jurisdiction to entertain his request for post-conviction relief. Likewise, this court lacks jurisdiction to entertain an appeal of that action.

¶ 7. We find that Crosby's motion for post-conviction relief is dismissed for lack of jurisdiction.

Therefore the appellee would submit that this court should affirm the Circuit Court of Harrison

County in finding that it lacked jurisdiction. It lacked jurisdiction since Peterson had not received permission to proceed in the trial court from the Mississippi Supreme Court. It was also barred as "a successive writ" under M. C. A. sect. 99-39-27.

PROPOSITION II

INEFFECTIVE ASSISTANCE WAS RES JUDICATA. AND THE OTHER ISSUES WERE WAIVED SINCE THEY COULD HAVE BEEN RAISED AT TRIAL OR ON DIRECT APPEAL.

Mr. Peterson 's motion to vacate judgment and for a new trial claimed ineffective assistance of counsel, as well as attempted to raise evidentiary issues that were waived when he did not raise them at his trial or on direct appeal.

The record reflects that ineffective assistance of counsel was raised in his direct appeal. This issue was decided adversely to Peterson in his direct appeal. **Peterson v State**, 740 So. 2d at page 951-952.

In **Mann v. State**, 490 So 2d 910 (Miss 1986), the Supreme court found that claims of alleged exclusion of exculpatory evidence, alleged judicial misconduct along with unreliable identification were waived. The were waived since they could have been raised at trial or on direct appeal. These are some of the same grounds being raised by Peterson in his appeal from the trial court's denial of relief. Motion, page 7-34.

In **Bevel v. State**, 669 So. 2d. 14, 17 (Miss. 1996), the Court found that merely raising a claim of ineffective assistance where a defendant was time barred from filing for relief under the UPCCRA was not enough to constitute an exception to the statute of limitations. As stated:

Bevel 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 ineffectual assistance of counsel is sufficient to surmount the procedural bar. It may also be noted that this Court held in **Patterson v. State**, 594 So. 2d. 606 (Miss. 1992), that a trial court's failure to advise a defendant of maximum and minimum sentences does not implicate a "fundamental constitutional right" sufficient to except a case from the procedural bar of Sect 99-39-5.

In addition, these forensic issues related to the sufficiency of the evidence were waived for failure

PROPOSITION II

INEFFECTIVE ASSISTANCE WAS RES JUDICATA. AND THE OTHER ISSUES WERE WAIVED SINCE THEY COULD HAVE BEEN RAISED AT TRIAL OR ON DIRECT APPEAL.

Mr. Peterson 's motion to vacate judgment and for a new trial claimed ineffective assistance of counsel, as well as attempted to raise evidentiary issues that were waived when he did not raise them at his trial or on direct appeal.

The record reflects that ineffective assistance of counsel was raised in his direct appeal. This issue was decided adversely to Peterson in his direct appeal. **Peterson v State**, 740 So. 2d at page 951-952.

In **Mann v. State**, 490 So 2d 910 (Miss 1986), the Supreme court found that claims of alleged exclusion of exculpatory evidence, alleged judicial misconduct along with unreliable identification were waived. The were waived since they could have been raised at trial or on direct appeal. These are some of the same grounds being raised by Peterson in his appeal from the trial court's denial of relief. Motion, page 7-34.

In **Bevel v. State**, 669 So. 2d. 14, 17 (Miss. 1996), the Court found that merely raising a claim of ineffective assistance where a defendant was time barred from filing for relief under the UPCCRA was not enough to constitute an exception to the statute of limitations. As stated:

Bevel 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 ineffectual assistance of counsel is sufficient to surmount the procedural bar. It may also be noted that this Court held in **Patterson v. State**, 594 So. 2d. 606 (Miss. 1992), that a trial court's failure to advise a defendant of maximum and minimum sentences does not implicate a "fundamental constitutional right" sufficient to except a case from the procedural bar of Sect 99-39-5.

In addition, these forensic issues related to the sufficiency of the evidence were waived for failure

to raise them in Peterson's direct appeal.

In **Wiley v. State**, 517 So. 2d 1373, 1378 (Miss. 1987), the Mississippi Supreme Court found Wiley was not entitled to proceed with a hearing on his motion in the trial court of DeSoto County. Wiley waived issues addressed in his direct appeal, as well as issues that could have been raised with the trial court, or on direct appeal.

Issues C, D, G, N, O, P, Q and R were not raised on direct appeal or at the trial court. Thus, the claims are procedurally barred and not subject to further review by this Court, under M. C. A. § 99-39-21. **Wilcher v. State**, 479 So. 2d 710 (Miss. 1985). Additionally, claims which were available, but not previously asserted on direct appeal, are waived and, on this additional ground these claims are not subject to further review.

While not conceding that these evidentiary issues were waived for failure to raise any sufficiency of the evidence issues on direct appeal, they are also lacking in merit. While the forensic test results on the soil samples on the burial shovel allegedly could not conclusively identify the soil remnants on the shovel as being the same as the soil sample found on the shallow grave for the victim, the result, nevertheless, concluded that "they appear similar." In addition they were similar in some, if not all of their chemical composition. R.E. 45.

While the ballistic results were not conclusive for some of the projectiles, the conclusion was that exhibit 5 projectile was fired from exhibit 4, the .25 caliber auto handgun. R.E. 46-47. There was also testimony that Peterson had tried "to damage the inside of the barrel after the murder occurred." R.E. 48.

While the shoe remnant remains could not be identified as to the type of shoe, it did appear to be the sole of a shoe which was burned at the Peterson residence.

And finally the record in this cause indicates that Peterson was identified by two different witnesses as the person who murdered Mr. Saucier. Mr. Rudy Marin testified to assisting Peterson in burning up the pickup truck in which the body of the victim had been transported some three miles to a shallow build grave. He testified to not only assisting Peterson in this task but also that Peterson admitted to shooting and killing

the victim. Ms. Vanessa McClendon testified to assisting Peterson in burying the victim which was transported to a wooded area for the digging of a shallow grave with a shovel taken from the Peterson home. She also testified to seeing the victim's body inside the cab of the truck after seeing him leave with Peterson and then hearing what sounded like gun shots. Dr. McGarry testified that the victim was shot five times in the head, neck chest, right arm and abdomen, 740 So 2d at 943.

In **Stovall v. State**, 873 So. 2d 1056, 1058 (¶13) (Miss. Ct. App. 2004), the Court found that "there must at least appear to be some basis for the truth of the claim before the limitation period will be waived."

In short, the record reflects that Peterson's attempted appeal should be dismissed as a successive writ, but that it is also lacking in merit. Ineffective assistance was res judicata since it was decided on his direct appeal. 740 So. 2d 940, 951 (Miss 1999). The evidentiary issues Peterson attempts to raise could have been raised at trial or in his direct appeal. This includes his claims of alleged misconduct, exculpatory evidence withheld, and inaccurate identification testimony. **Mann, supra** and **Wiley, supra**.

In addition, as shown with cites to the record taken from his direct appeal, there was corroborated eye and ear witness testimony sufficient for supporting the jury's verdict without the alleged inconclusive secondary evidence dealing with the shovel, the ballistics conclusions, and the identification of a shoe heel remnant.

CONCLUSION

The trial court's denial of relief for lack of jurisdiction should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:



W. GLENN WATTS
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

Serial: 109136

IN THE SUPREME COURT OF MISSISSIPPI

No. 2002-M-01410

FILED

JON KURRIE PETERSON

NOV 14 2003

Petitioner

v.

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

RECEIVED
NOV 1 2003
CLERK OF THE SUPREME COURT
STATE OF MISSISSIPPI

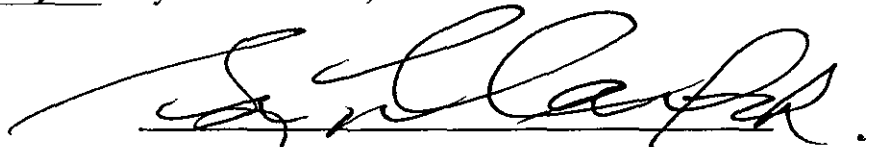
Respondent

ORDER

This matter came before the undersigned Justice on Peterson's pro se "Petition for the Supreme Court to Review Jon Kurries Peterson vs. State of Mississippi, Based on Plain Error." Peterson's conviction was affirmed by the Court of Appeals in *Peterson v. State*, 740 So.2d 940 (Miss. App. 1999). This Court denied his application for post-conviction relief in 2002. The present motion seeks reconsideration of issues already decided by the appellate courts and will therefore be denied.

IT IS THEREFORE ORDERED that the pro se "Petition for the Supreme Court to Review Jon Kurries Peterson vs. State of Mississippi, Based on Plain Error" is hereby denied.

SO ORDERED, this the 14th day of November, 2003.



GEORGE C. CARLSON, JR., JUSTICE

2002-M-01410

Michael C. Moore

2002-M-01410

Wayne Snuggs
Assistant Attorney General
P O Box 220
Jackson, MS 392050220

EXHIBIT

CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 Roger T. Clark
Circuit Court Judge
Post Office Box 1461
Gulfport, MS 39502

Honorable Cono Caranna
District Attorney
Post Office Drawer 1180
Gulfport, MS 39502

Jon Kurrie Peterson, #65059
Delta Correctional Facility
3800 County Road 540
Greenwood, MS 38930

This the 11th day of February, 2009.



W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

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