

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO.2008-CP-01438-COA

COPY

JON KURRIE PETERSON

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

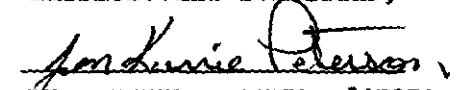
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BRIEF OF APPELLANT

RESPECTFULLY SUBMITTED,


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APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned Pro-Se Appellant 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 may evaluate possible disqualification or recusal.

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STATEMENT OF ISSUES

- (1) NEWLY DISCOVERED EVIDENCE
- (2) APPELLANT WAS DENIED A FAIR TRIAL BECAUSE OF PROSECUTORIAL MISCONDUCT
BY ALLOWING FALSE EVIDENCE TO BE PRESENTED TO THE JURY
- (3) PROSECUTORIAL MISCONDUCT IN FAILING TO TURN OVER TO THE DEFENSE
EXCULPATORY DOCUMENTS WHICH WERE REQUESTED BY DEFENSE IN THE MOTION
FOR PRODUCTION AND INSPECTION
- (4) APPELLANT HAS BEEN DENIED HIS DUE PROCESS RIGHT TO CONFRONTATION BY
PROSECUTORIAL MISCONDUCT
- (5) PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT
- (6) INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL
- (7) TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING APPELLANT'S POST-
CONVICTION MOTION AFTER STATE FAILED TO FILE AN ANSWER.

STATEMENT OF CASE

On the 22nd of April, 2008, Appellant filed into the Circuit Court of Harrison County, Mississippi, his "Motion to Vacate Judgement and Sentence or in the Alternative Motion For New Trial with Brief in Support" being cause NO.A2401-08-129. Appellant filed this Motion, which was a successive motion pursuant to **Mississippi Code Ann. Section 99-39-23(6) (Rev. 2000)**, pursuant to **Mississippi Code Ann. Section 99-39-5(1)(a), (e), and (i) (Rev. 2000)**.

On the 23rd day of July 2008, the Circuit Court of Harrison County, Mississippi dismissed Appellant's Post-Conviction Motion pursuant to **Mississippi Code Ann. Section 99-39-7 (Rev. 2000)**. This Appeal stems from the denial of Appellant's "Motion to Vacate Judgement and Sentence or in the Alternative a Motion For New Trial".

SUMMARY OF THE ARGUMENT

(1) NEWLY DISCOVERED EVIDENCE

Appellant Jon Kurrie Peterson, (hereinafter known as Appellant), had brought his "Motion to Vacate Judgement and Sentence or in the Alternative Motion For New Trial" under the exceptions of **Mississippi Code Ann. Section 99-39-5(2) (Rev. 2000)**, which states in pertinent part;

"...that he has evidence, not reasonably discovered at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence."

Appellant did present the claims of his motion under this standard, because of the fact that the State had committed an act of prosecutorial misconduct by the withholding and suppression of exculpatory evidence. The newly discovered evidence was available at the time of the trial but, could not have been discovered by due diligence by the defense.

Appellant, who had contacted the New Orleans Innocence Project in 2003, requested that their office to begin an investigation into his case. It was during this investigation that it was discovered that the Harrison County Prosecutor's Office had withheld state lab reports and other scientific evidence that was exculpatory in nature.

On January 15th 2008, representatives from the New Orleans Innocence Project, along with Appellant's father John K. Peterson, met with the Honorable W.F. Holder, III, Attorney-At-Law, who had been Appellant's trial counsel, to discuss the possibility that these documents had been withheld from the defense prior and during Appellant's trial. Mr. Holder, did state he would review his files to see if he had information concerning these documents.

Once Mr. Holder had investigated this matter, it was discovered that the documents that were in Appellant's possession, had not been turned over to him by Harrison County Prosecutor's Office on the defense's discovery request. Mr. Holder did give a sworn affidavit attesting to the fact that documents in question were never turned over to him by the State were exculpatory in nature.

(2) APPELLANT WAS DENIED A FAIR TRIAL BECAUSE OF PROSECUTORIAL MISCONDUCT BY ALLOWING FALSE EVIDENCE TO BE PRESENTED TO THE JURY

Newly discovered evidence did show that the State had presented false evidence

to the jury, thus denying the Appellant his right to a fair trial as guaranteed by the **Sixth Amendment of the United States Constitution** and his comparable rights pursuant to **Article 3, §26 of the Mississippi Constitution**.

This false evidence consisted of a shovel which the state did introduce during the trial as the shovel used by the Appellant to bury the body of the victim. This piece of evidence was introduced by the State via its star witness, Vanessa McClendon.

Ms. McClendon did testify that she did witness the Appellant use the shovel to bury the victim. (Tr. 403-407). By the questioning of McClendon, the State gave the impression to the jury that the shovel was positive proof that Appellant had killed the victim.

But, what the State had failed to mention, was the fact that the report from the Mississippi Chemical Lab, could not connect the dirt from the grave site and the dirt from the shovel as being the same. The test results from the Lab stated that the dirt from the grave site and the dirt found on the shovel was "significantly different".

The State had purposely withheld this lab report from the defense, thus allowing this damnable false evidence to be presented to the jury as a conclusive fact. This was in direct violation of **Rule 4.06 (Now Rule (9.04))** of the Uniform Rules of Circuit and County Court Practice. This was so because the defense had filed for discovery on the 13th day of December, 1995.

This was in direct violation of Appellant's right to **Due Process** pursuant to the **14th Amendment of the United States Constitution** and his comparable rights pursuant to **Article 3, §14 of the Mississippi Constitution**. As the State's withholding of this crucial evidence which was exculpatory in nature, did prejudice the Appellant as he was left without a defense to the claims of Vanessa McClendon, the state's witness, and, the state's claim that the shovel was used to bury the victim.

The State did further extend their perfidious false evidence to mislead the jury, with the testimony of Detective Andy Calvannese. This testimony was given to bolster the State's lack of evidence from the Mississippi State Crime Lab that would connect the .25 caliber pistol that did belong to Appellant as the murder weapon.

The ballistics report from the Mississippi Crime Lab was inconclusive as to whether the projectiles removed from the body of the victim came from the

Appellant's weapon. The Lab Report did state that: "[T]he projectile marked 6A bears some similarities in class characteristics with those produced by the gun in exhibit 4". The ballistics report was inconclusive as to whether Appellant's weapon was used in the murder.

The State sought to cure this deficiency in the ballistic report by allowing Detective Andy Calvanese to testify that the gun barrel had been marred by the Appellant to throw off the ballistic examination. The following colloquy was held between the state and Detective Andy Calvanese:

"Q. But then you received information, did you not, after that that supposedly the gun had been cleaned, didn't you?

A. Yes!

Q. Okay, and did you get any in depth meaning of that or just cleaned?

A. I was told that the gun barrel of the gun.

Q. Was cleaned.

A. Had been damaged and cleaned, yes!

Q. All right. But you really don't know what was meant by cleaned?

A. The statement was quite clear."

(Tr. 252)

This was hearsay and was not supported by any expert proof of any type to support such a conclusion. The State did elicit this false evidence from Detective Andy Calvanese to mislead the jury from the fact that the state could not connect Appellant's weapon to the murder.

The State did then call Rudy Marin, who was another of the State's star witnesses to identify Appellant's weapon as the actual murder weapon. This witness did state that Appellant had told him that he shot the victim with the pistol. This was hearsay that was unsupported by any offer of scientific proof or evidence.

The State allowed this false testimony to be given, while the state did withhold from the jury the actual ballistic report from the Mississippi Crime Lab. The State knew that this report would have shown that Rudy Marin was not a credible witness. Thus the State had suppressed this exculpatory ballistics report from the jury. In doing this, did deny the Appellant his due process right to present favorable evidence in his defense.

Also there was the alleged 'burt shoe remnants."The State did attempt to mislead the jury this alleged proof that Appellant had burnt his clothes after the murder.The only problem with this,was the fact that there had not been any forensic testing done that would have supported such a conclusion that the State had presented.

The allegedly burnt shoe remnants were taken from a burn pile that Appellant's parents did use behind their house to burn trash.Earlier in the trial,Evidence Technician,Lou Ann O'Bannon had testified that you could not identify the burnt remnants as part of a tennis shoe.Also,O'Bannon had testified that the burnt remnants had not been scientifically tested to determine where this material had originated from.(Tr.293).

But,the State did state to the jury that the burnt remnants taken from the burn plie behind Appellant's parents home,were the actual shoe remnants from Appellant's shoes(Tr.297).The State did take this perfidious false evidence before the jury in closing arguments,and did state that they knew that Appellant had burned his shoes after the murder,and that these burnt remnants proved the testimony of the State's two star witnesses.(Tr.707;733).

Appellant's due process rights were violated by the state's introduction of this false evidence,and testimony of its witnesses.The State did allow the false evidence to go uncorrected,and did deny Appellant his right to confrontation by withholding documents that would have shown that the evidence and testimony of the State's witnesses to have been false.

Due process and fundamental fairness did require that State to correct this false evidence,eves if such evidence could have been used to bolster the credibility of the State's witnesses.On the other hand,the State had a duty to correct the false testimony of its own witnesses.In the State's failure to perform this duty,did deny Appellant of his right to be only tried by an impartial jury.

(3)PROSECUTORIAL MISCONDUCT IN FAILING TO TURN OVER TO THE DEFENSE EXCULPATORY DOCUMENTS WHICH WERE REQUESTED BY DEFENSE IN THE MOTION FOR PRODUCTION AND INSPECTION

Appellant's trial counsel had files a "Motion For Production and Inspection" of all evidence that State had in its possession,both physical and verbal.The request did indicate that if the State had in its possession any exculpatory material that would be beneficial to the defense,should be given for inspection.

In said motion, Appellant made the following request from the State;

"A. Independent inspection by a defense expert of the following items (or a sample thereof), purportedly to be used by the State against The Defense.

1. .25 caliber handgun, serial #DK06743;
2. Bullet casing;
3. bullet projectiles gathered in the investigation of the case;
4. Sample of dirt taken as evidence;
5. remnants of burnt shoes or clothes;
6. blood samples taken from pavement; and
7. hair sample (from shovel and grave site).

B. A copy of any and all reports, memos, tests results, findings or other written materials compiled or prepared by experts for the State in analyzing or testing any evidence gathered in anticipation of or to be used in the trial of this case."

The State withheld the lab report that did indicate that the dirt from the grave site and that which was found on the shovel was "significantly different". This did prejudice the defense, as the State's witnesses did testify that this shovel was used to bury the body of the victim. The shovel was actually entered into evidence as proof of the testimony of the State's witnesses.

Appellant was further prejudiced by the State withholding this crucial lab evidence, as, Appellant was unable to refute the testimony of the State's witnesses on this point, and, did allow false testimony and evidence to be presented to support the State's theory of the case.

The actions of the State in withholding the lab reports did deny the Appellant his due process right pursuant to the **Sixth Amendment to the Constitution** and his comparable rights pursuant to **Article 3, Section 26 of the Mississippi Constitution** to confront and cross-examine adverse witnesses against him.

The State did also withhold from the defense the ballistics report that did show that the projectile retrieved from the head of the victim, could not be matched to the weapon owned by the Appellant. So that, because the State did not have expert verification to depend on in the ballistics report, it had been alluded to in the evidence submission form, that Appellant had attempted to damage the barrel of the weapon.

This evidence was presented to the jury through the testimony of Detective Andy Calvanesse, who did state that he had information that Appellant had attempted to mar the barrel of the weapon to keep it from being tested by the ballistics expert.

by the State withholding this crucial ballistics report, did prejudice the defense in its cross-examination of this prosecution witness. As, the ballistics

report and the testimony of John Franovich, a firearms expert from the State Crime Lab, did not attest to the conclusion of the State that the barrel of the weapon had been tampered with in any way that would have precluded accurate testing of the weapon.

Also, in the State's withholding of the ballistic report, did hinder the defense in its ability to impeach the testimony of the State's witness Rudy Marin, who had testified that Appellant did tell him that Appellant had shot the victim with his own .25 caliber pistol.

The ballistics report was exculpatory evidence, that should have been turned over to the defense on request. The State's failure to produce this crucial piece of evidence to the defense, did allow false testimony to be presented to the jury.

Also, by the State's failure to inform the defense that there had not been any forensic scientific testing done on the infamous burnt remnants that the State, in front of the jury did refer to as shoe remnants, did cause the defense to be forced to stipulate that the burnt remnants were actually Appellant's burnt shoes. This was highly prejudicial to the Appellant, as there was no way that the burnt remnants should have been allowed into evidence, when there was no proof, scientific or otherwise, that the burnt remnants were what the State presented it to be.

Appellant asserts in that the State's presentation of falsified evidence, testimony, and in the suppression of exculpatory evidence from the jury, did prejudice Appellant. If, the exculpatory had not been withheld from the defense, it would have lead to a different result in the finding of the jury.

These claims of the prosecutorial misconduct, does raise serious questions about the reality and appearance of fairness of Appellant's conviction and sentence. Appellant has been denied his due process right to present a defense and a fair trial by an impartial jury.

(4) APPELLANT HAS BEEN DENIED HIS DUE PROCESS RIGHT TO CONFRONTATION BY PROSECUTORIAL MISCONDUCT

The ~~Sixth~~ Amendment's Confrontation Clause, which is also available to defendants in criminal trials pursuant to **Article 3, Section 26 of the Mississippi Constitution**, provides that a criminal defendant has the right to directly encounter hostile witnesses, the right to cross-examine adverse witnesses, and the right to possession of all exculpatory evidence to effectively cross-examine adverse witnesses.

Appellant asserts that because the State withheld crucial exculpatory evidence, deny him of his right to confrontation to test both the State's witnesses' credibility and the witnesses' knowledge of the facts bearing on his guilt or innocence. This did deny Appellant of his right to a full and fair opportunity to probe and expose the State's witnesses' infirmities through cross-examination.

This violation of Appellant's right to confront and effectively cross-examine the State's witnesses, because of the fact that the State suppressed and withheld crucial exculpatory evidence, and in doing so, effectively denied Appellant a defense. The exculpatory evidence would have posed to the jury a question of the State's witnesses' credibility.

Appellant has been denied the right to the fundamental fairness that is guaranteed to defendants in criminal trials pursuant to the **Sixth Amendment of the United States Constitution** and his comparable rights pursuant to **Article 3, Section 26 of the Mississippi Constitution**. The actions of the State did deny the Appellant of his due process right to fair trial.

Appellant further asserts that his conviction and sentence has been obtained in violation of the **United States and Mississippi Constitutions**. Because of the State's failure to turn over exculpatory evidence in the State's possession, Appellant has been denied his right to confrontation.

(5) PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

RULE 3.02 of the **Uniform Rules of Circuit and County Court Practice**, dictates the policy of attorneys in the trial setting. Attorneys are required to act in a fit, dignified, and courteous manner which will not degrade or interfere with the administration of justice. **Rule 3.02**, also requires that "[I]n the argument to the jury, the attorneys will be required to keep within proper bounds, and any attempt to inject improper matter may be stopped by the court without the necessity of an objection." In the case of Appellant, the State Attorney overstepped the bounds outlined in **Rule 3.02**, and did interject claims in the evidence that were not supported by the evidence, by expert testimony or otherwise.

The State Attorney did state to the jury that the projectile removed from the victim, was matched to the weapon that did belong to the Appellant. (Tr. 707-708). This was a false representation of the evidence and testimony of John Franovich, a firearms expert, and of the ballistics report which stated that the projectile may have had the same similarities in class characteristics, of Appellant's weapon, but it could not be positively stated that it came from Appellant's weapon.

The State Attorney did also state that there was positive evidence that had been presented by the State to prove that: (1) burnt remnants is a Sperry Topsider shoe (Tr. 707); (2) that he, (the State Attorney), knew who took them off and set them on fire, the defendant (Tr. 707); (3) that the tire tracks were the tire tracks of the victims's truck, (Tr. 711); (4) that the shovel had been proved positively to have been used to bury the victim (Tr. 732); and finally, (5) that the physical and scientific evidence support all of the evidence that had been presented by the State. (Tr. 703).

The State did misrepresent the evidence by mis-stating facts and commenting on facts not in evidence. This is a fact that, because there was no positive proof that did connect the projectile from the Appellant's weapon and the projectile removed from the victim. Nor was there any positive proof, expert or scientific that could be stated conclusively that the burnt remnants were from a Sperry Topsider Shoe or, that Appellant had burnt them. All the evidence presented to the jury about the burnt remnants, and who, had set them on fire, was nothing more than speculation and conjecture on the part of the State Attorney. There was no direct evidence that would have supported this conclusion by the State.

The State had made a big deal before the jury of the tire tracks that were allegedly found behind the Peterson's home. The State did state positively that these tire tracks were from the pick-up truck that the victim had been driving. (Tr. 711). But that State presented no proof that there were plaster casts made and had been matched to the truck of the victim. This was an improper comment on the evidence which was in no way supported by the testimony or the evidence presented by the State.

the State Attorney also took this improper closing argument a step further by testifying to what was in the mind of the victim that, did cause Appellant to kill him. (Tr. 734). There was no way that the State Attorney could testify to what was in the victim's mind to the jury, as it would be impossible for Appellant to refute this testimony of the State Attorney. Which did deny Appellant his right to confrontation.

The State Attorney in his closing argument stated when speaking about the alleged Sperry Topsider Shoes: "I know who took them off his feet and set them on fire, the defendant." (Tr. 707). Here that State Attorney is testifying to something that was supported by the evidence. Also the State Attorney projects an idea to the jury that he has information that conclusively proved that the burnt

remnants were the Topsider Shoes, and that Appellant did burn them. This was an improper argument as it did invade the province of the jury as the sole trier of the evidence. It also gave the jury information that had not been presented in the trial.

The State's case against Appellant did not include any scientific evidence that did tie Appellant to the crime. The only scientific evidence that the State had, was a bullet casing that was supposedly found in the truck the victim was driving. Which was once owned by the Appellant's family and driven numerous times by the Appellant. Other than that one piece of evidence, there was nothing else. The State Attorney even misrepresented this evidence to the jury. (Tr. 707).

This misrepresentation of the evidence by State in the case of the Appellant, was highly prejudicial, as the misrepresentation did allegedly provide physical evidence supporting the testimony of the State's two star witnesses, whose testimony was suspect at best. Since there was no scientific physical evidence that could connect Appellant to the crime, the State had to fabricate scientific credibility to what would otherwise be spurious evidence.

Though not one of the errors of the prosecutorial misconduct in his closing argument deny Appellant to his right of a fair trial, but, when taken in the context of the whole trial the cumulative effect of the errors infected the entire trial and the resulting conviction violates Appellant's due process right to a fair trial.

(6) INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Appellate Counsel, Bobby Joe Randall, (hereinafter know as Appellate Counsel), was ineffective in his representation and preparation of the Appeal of Appellant. Appellant Counsel had asked for two(2) thirty day extensions of time. The first was filed on the 2nd day January 1997, which was granted by the Court. The other was filed on the 5th February 1997, also granted by the Court.

In second request for and extension of time, Appellate Counsel was seeking to have Appellant transported to the Harrison County Jail to help in the preparation of the appeal brief. The trial court did not have Appellant transported to the Harrison County Jail, and neither did Appellate Counsel ever consult with Appellant at anytime prior to the filing of the appeal brief on what issues were to be raised on appeal.

When Appellate Counsel did finally file the Appellant's brief, he did file what would be considered a meritless brief. There was no issue in the brief that did present a claim that would have justified relief.

Appellant was denied effective assistance of counsel in his Direct Appeal, because of the Appellate Counsel's failure to raise the issue of ineffective assistance of trial counsel; in failing to raise the prosecutorial misconduct issue; in failing to raise the issue that the verdict was against the overwhelming weight of the evidence, and in the failure to discover the issues in this Appeal that is now before this Court.

Appellate Counsel did have in his possession the information that the State had withheld exculpatory evidence, and that, the State did present false evidence concerning the ballistics report; the dirt on the shovel; the burnt remnants; and, that the State had withheld all of the scientific evidence that was favorable to the Appellant's defense. Although Appellate Counsel did have this information before him, he had failed to utilize this information in the preparation of the Appellant's Appeal, and did only raise frivolous issues on Direct Appeal.

Appellate Counsel failed to also raise the issue the prosecutorial misconduct in the closing argument. This issue was apparent from even a casual reading of the transcript, and was a viable issue for Appeal. It was clear that the State in its closing argument had presented false facts in an attempt to mislead the jury on the State's lack of physical and scientific proof to support the State's case. Appellate Counsel passed by this issue which did have merit.

It is plain that Appellate Counsel was deficient on the Direct Appeal of Appellant, and this deficient performance cannot be considered within the wide range of professional conduct as, Appellate Counsel failed to consult with the Appellant prior to the filing of the Appeal Brief. Appellant has been prejudiced by the deficient performance of his Appellate Counsel, as prejudice is presumed where Appellate Counsel fails to consult Appellant on the issues of Appeal.

Appellant has been denied his **Sixth Amendment right to Effective Assistance of Counsel on Direct Appeal**. There is a reasonable probability that the outcome of his Direct Appeal would have been different if Appellate Counsel would have rendered effective assistance by investigating the issues for Appeal and in consulting with Appellant prior to filing the Appeal Brief. Also, if Appellate Counsel would have raised the issues of this Appeal that are now before this Court, the Court would have more likely than not reversed for New Trial.

(7) TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING APPELLANT'S POST-CONVICTION MOTION AFTER STATE FAILED TO FILE AN ANSWER.

On April 22nd 2008, Appellant did file into the Court of Harrison County,

Mississippi, his Motion To Vacate Judgement and Sentence or in the Alternative Motion For New Trial. Appellant had filed this motion pursuant to **Mississippi Code Ann. Section 99-39-5(1)(a), (e), and (i) (Rev. 2000)**.

This motion was filed as newly discovered evidence into the trial court, as Appellant had previously sought leave in a prior Application For Leave To File Motion For Post-Conviction Relief in the Mississippi Supreme Court on different issues that are now before this Court. So that pursuant to **Mississippi Code Ann. Section 99-39-23(6), and Section 99-39-5(2)**, the Newly Discovered Evidence met the exceptions that are numerated to overcome the procedural bars for filing a time-barred or successive post-conviction motion.

On the 11th day of June 2008, the Circuit Court of Harrison County, Mississippi, after examining Appellant's post-conviction motion pursuant to **Mississippi Code Ann. Section 99-39-11**, found that Appellant's motion did fall within the exceptions of **Section 99-39-5(2)**, and did order the State to file an answer or other responsive pleading to Appellant's motion. (**ADDENDUM "Order Of Circuit Court"**).

When on the 10th day of July, 2008, the State had defaulted and was in contempt of court in its failure to file an answer pursuant to the Circuit Court's Order of June 11th 2008, Appellant pursuant to **Mississippi Code Ann. Section 99-39-19 (Rev. 2000)**, did file his Motion For Summary Judgement (see **ADDENDUM "Motion For Summary Judgement"**).

The State once Appellant filed for summary judgement, filed an Ex Parte Motion for an Extension Time alleging that the State had not received the court's order of June 11th 2008. The State also alleged it was not until the 18th day of July, 2008 that the court's order was received directing the State to file and answer to Appellant's post-conviction motion. Appellant will direct this Court's attention to the fact that Appellant's Motion For Summary Judgement was filed on the 18th day of July, 2008, the same day the State allegedly received the court's order of June 11th 2008. (see **ADDENDUM "State's Ex Parte Motion For Extension of Time"**).

On the 21st day of July, 2008, an Order was issued by the Circuit Court of Harrison County, Mississippi, granting the ex parte motion for an extension of time to file an answer to Appellant's Motion to Vacate Judgement and Sentence or in the Alternative a Motion For New Trial. (see **ADDENDUM "Court's Order July 21st, 2008"**)

Appellant on August 4th 2008, filed his **Rule 60(b) Motion** pursuant to **Mississippi Rules of Civil Procedure** asking the court to rescind its order ex parte to grant

the State the extension of time. In the 60(b) Motion Appellant did direct the Circuit Court's attention that the State was defaulted by 11 days and because of Appellant's pending Motion For Summary Judgement, and **Rule 81 Mississippi Rules of Civil Procedure**, could not move the court ex parte for an extension of time. (see **ADDENDUM "Rule 60(b) Motion"**).

On August 4th 2008, Appellant had his father to contact the Circuit Clerk's of Harrison County, Mississippi, to inquire about the pending Motion For Summary Judgement. It was at this time that Appellant's father was informed by the Circuit Clerk, that an Order was issued on the 23rd day of July, 2008, by the Circuit Court dismissing Appellant's Motion to Vacate Judgement and Sentence or in the Alternative Motion For New Trial. (see **ADDENDUM "Court's order July 23rd, 2008"**).

In the Circuit Court's dismissal order of July 23rd, 2008, the court stated that Appellant, pursuant to **Mississippi Code Ann. Section 99-39-7 (Rev. 2000)**, had to first seek permission from the Mississippi Supreme Court before filing his post-conviction motion into the Circuit Court of Harrison County, Mississippi. Appellant asserts that this was an abuse of discretion on the part of the Circuit Court and its dismissal order is erroneous for the following reasons.

Appellant had sought leave from the Mississippi Supreme Court on his first post-conviction motion and was denied leave to file his post-conviction motion. Appellant's current post-conviction motion, is based on the fact of newly discovered evidence, and, had to meet the exceptions enumerated in **Mississippi Code Ann. Sections 99-39-5(2) and 99-39-23(6) (Rev. 2000)**, as the current motion was time-barred and a successive petition.

The Circuit Court's order of June 11th, 2008, found that Appellant's current post-conviction motion had met the exceptions of the above stated post-conviction statutes, because of the allegations of the Newly Discovered Evidence, and Appellant's Trial Counsel's affidavit attesting to the fact that the State had withheld exculpatory evidence before and during Appellant's Trial on April 19th, 1996. The Circuit Court did take jurisdiction of the motion pursuant to **Mississippi Code Ann. Section 99-39-5 (Rev. 2000)**.

Appellant asserts that he did not have to seek leave from the Mississippi Supreme Court to file a successive post-conviction motion. Neither **Mississippi Code Ann. Section 99-39-5(2)**, nor **Section 99-39-23(6)** give the idea that on newly discovered evidence, on a time-barred and successive petition, that a petitioner must seek leave from the Mississippi Supreme Court pursuant to **Mississippi Code**

Ann. Section 99-39-7 and Section 99-39-27(Rev.2000).Section 99-39-5(2) and Section 99-39-23(6),only conveys that requirement that a petitioner must fall within the exceptions of the statue to file a time-barred,succesive motion for post-conviction relief.Of the which,the Circuit Court of Harrison County,Mississippi, found that the allegations in Appellant's Motion To Vacate Judgement and Sentence or in the Alternative Motion For New Trial did meet these rare exceptions,and required an answer from the State.

It was not until the State was in contempt of court,and had defaulted in failing to file the requested answer,causing the Appellant to move for Summary Judgement,that the Circuit Court dismissed Appellant's Motion on jurisdictional grounds.This was clearly erroneous reasoning on the part of the Circuit Court, and that court did abuse its discretion when it dismissed Appellant's Motion.

Though the Circuit Court of Harrison County,Mississippi,did rule on Appellant's 60(b) Motion,it did fail to render a ruling on Appellant's Motion For Summary Judgement.(see **ADDENDUM"Order Denying 60(b) Motion"**).This was error on the part of the Circuit Court,as **Rule 56(c),Mississippi Rules of Civil Procedure,and Mississippi Code Ann. Section 99-39-19(2)**,did require that the State to file responsive pleadings to the Motion For Summary Judgement,and for the Circuit Court to rule on whether there was a genuine issue in dispute,and whether summary judgement was appropriate.

Appellant asserts that the Circuit Court's dismissal of the Appellant's successive post-conviction motion was error.Also that the Circuit Court of Harrison County,Mississippi,abused its discretion by dismissing Appellant's motion without first ruling on Appellant's Motion For Summary Judgement.

ARGUMENT

1.NEWLY DISCOVERED EVIDENCE

Appellant had brought his Motion To Vacate Judgement and Sentence or in the Alternative Motion For New Trial under the standard of review of **Mississippi Code Ann. Section 99-39-5(2)**,and holding of the Mississippi Supreme Court in **MCCLENDON V STATE,539 So2nd 1375,1377(Miss.1989)**,which states;

"Even if petitioner is successful in proving his allegations regarding the newly discovered evidence,there still must be a determination concerning the'probative effect of such evidence to produce a different result on a new trial.'Of course ,if newly discovered evidence will not probably produce a different result or induce a different verdict,it is not sufficient to warrant the granting of a new trial.But conversely,if by legal

standards, it will probably produce a different verdict, it is sufficient and should require a new trial. This is the rule."

The Court adopted the following criteria to be in conjunction with the above rule:

"To warrant the granting of a new trial on the grounds of newly discovered evidence, it must appear that the evidence is such as will probably change the result if a new trial is granted, that it could not have been discovered before trial by exercise of due diligence, that it is material to the issue, and that it is not merely cumulative, or impeaching." *Id.*

Appellant's present claim of the newly discovered evidence meets the above criteria in both aspects, as, he has presented the question of the prosecutorial misconduct by showing that the prosecution had suppressed and withheld crucial exculpatory evidence which was impossible to discover before trial because of the perfidious actions of the State. This meets the first criteria.

The second criteria is easily met because this newly discovered evidence is material to the issue of Appellant's guilt or innocence to the crime of murder, and is of such nature as to present a reasonable probability that had the exculpatory evidence not been suppressed and withheld by the State, that the results of the trial would have been different.

This exculpatory evidence that was withheld after the defense had presented its discovery motion, which was approved by the trial court, asking that the State disclose just such exculpatory evidence. The denial of the State to turn over the exculpatory material, was a due process violation, because the State suppressed exculpatory evidence that, if, disclosed could reasonably alter the result of the proceeding. KYLES V. WHITELEY, 514 U.S. 419, 453 (1995); Also LANG V. STATE, 230 Miss. 147, 92 So2nd 670 (1957).

This newly discovered evidence should be considered by the Court, as it could not have been discovered at the time of the trial by the defense with due diligence, because of the prosecutorial misconduct. see ACEVEDO V. STATE, 476 So2nd 220 (Miss. 1985).

2. APPELLANT WAS DENIED A FAIR TRIAL BECAUSE OF PROSECUTORIAL MISCONDUCT BY ALLOWING FALSE EVIDENCE TO BE PRESENTED TO THE JURY

During Appellant's trial, the State offered several items into evidence that was alluded to as having scientific proof that Appellant had used these items during the commission of the crime. The State did also present testimony from at least three witnesses to substantiate the verity of these items. But, what

the State had failed to mention, was the fact that the scientific evidence, or lack thereof, was at odds with the State's conclusions and of its witnesses.

The State did also state that the burnt remnants were Appellant's shoes and clothes that the Appellant allegedly did burn after the crime. But there had been no scientific testing done on the burnt remnants, which of themselves were indeterminable as to what they were.

The State, and its witnesses did offer false testimony concerning the interpretation of the evidence. The State knew that the evidence was false, and that the State's witnesses were testifying falsely, but, that State failed to correct the false evidence and testimony. The United States Supreme Court held that due process is violated when the State uses false evidence and testimony to obtain a conviction. see UNITED STATES V. AGURS, 427 U.S. 97 (1976).

The State knew that the evidence was false, and also knew that its witnesses were testifying falsely in concern of, the shovel, the pistol, bullet projectile, and the burnt remnants. The State knew that this evidence was false, because of the fact that the State had in its possession the scientific test results that had been done on the shovel, pistol, and the bullet projectile. It has been held that the State may not present false testimony and has a duty to correct testimony that he knows to be false. see NAPLES V. ILL., 360 U.S. 264, 269 (1959).

A new trial is required in this case, because, if the State knowingly, or even negligently, allows false testimony which he has solicited to go uncorrected, a new trial is warranted. see MARTINEZ V. WAINWRIGHT, 621 F.2d 184, 186-188 (5th Cir. 1980). If the State has knowingly used perjured testimony or false evidence, the conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict." see, UNITED STATES V. BAGLEY, 473 U.S. 667, 679 N.9 (1985).

Appellant's guilt or innocence was a question for the jury. But, when the State presented false evidence, and the representation of this evidence is supported by false testimony of its witnesses, then the jury's findings are called into question. Appellant was prejudiced by this false evidence and testimony, as there was no defense that could counter it. The State's presentation of this false evidence did deny Appellant of his due process right to a fair trial.

3. PROSECUTORIAL MISCONDUCT IN FAILING TO TURN OVER TO DEFENSE EXCULPATORY DOCUMENTS WHICH WERE ASKED FOR BY DEFENSE IN ITS MOTION FOR PRODUCTION AND INSPECTION

Appellant had placed a timely motion for discovery which was approved of

by the Circuit Court pursuant to **Rule 4.06, Uniform Rules of Circuit Court and County Court Practice**. The State did fail to honor the court's order and defense's request for exculpatory evidence by failing to provide the defense with the Lab Reports on the shovel and ballistic report.

In **BRADY V. MARYLAND**, 373 U.S. 83, 87 (1963), the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." This Mississippi Supreme Court did state along this same line: "The rule encompasses impeachment evidence as well as exculpatory material." **MALONE V. STATE**, 486 So.2nd 367, 368 (Miss. 1986).

The Mississippi Supreme Court held that "[W]here the defendant in a murder trial had filed a complete and exhaustive motion under **Section 4.06 of the Mississippi Uniform Rules of Circuit and County Court Practice**, and the trial court had executed a comprehensive order directing that the State reveal to the defendant all exculpatory statements and material, it was a flagrant violation of the court's order for the State to fail to reveal to the defendant two exculpatory statements by state witnesses, and a reversal of the defendant's conviction was required." **HOOTEN V. STATE**, 427 So.2nd 1388 (Miss. 1983), later App. (Miss.) 437 So.2nd 410.

Appellant had been clear and concise in his motion for discovery, and it was the duty of the State to turn over to the defense all favorable material that was in the State's possession. In **WILLIAMS V. DUTTON**, 400 F.2d 797 (5th Cir. 1968), the Court said: "It is now clear that Brady imposes an affirmative duty on the prosecution to produce at the appropriate time requested evidence which is favorable to the accused either as direct or impeaching evidence."

Such is the case sub judice, the State did fail to honor the defense's request for discovery of all exculpatory material. These documents that were suppressed and withheld by the State were clearly exculpatory material, and the State should have furnished this material to the defense on request. In the failure to do so, the State did deny the Appellant his due process right to a defense. see on **SMITH V. STATE**, 500 So.2nd 973 (Miss. 1986).

4. APPELLANT HAS BEEN DENIED HIS DUE PROCESS RIGHT TO CONFRONTATION BY THE PROSECUTORIAL MISCONDUCT

The Sixth Amendment to the United States Constitution provides in pertinent

part:"In all criminal prosecutions,the accused shall enjoy the right...to be confronted with the witnesses against him."This right extends to State prosecutions through the Due Process Clause of the Fourteenth Amendment.see POINTER V. TEXAS, 380 U.S. 400,403(1965).The Mississippi Constitution also guarantees the right to confrontation through Article 3,Section 26.HUBBARD V. STATE,437 So.2nd 430, 433-34(Miss.1983).Appellant was denied this right for the following reasons.

Appellant asserts that because the State withheld crucial exculpatory evidence, that,it did preclude him of his right to confrontation.One of the well established rules of jurisprudence in this State,as well as in other States,is that an accused is entitled to be confronted with and,have an opportunity to cross-examine witnesses against him.see e.g.,AGEE V. STATE,185 So.2nd 671(Miss.1966);ROBERSON V. STATE,185 SO.2ND 671 (MISS.1966)

This right of Appellant was abridged,because without the exculpatory material, it was impossible to test the State witnesses' credibility and the State witnesses' knowledge of the facts bearing on his guilt or innocence.Pursuant to the Confrontation Clause,Appellant was denied his right to a full and fair opportunity to probe and expose the State's witnesses' infirmities through cross-examination.

In a similar situation,the Fifth Circuit Court of Appeals found that a defendant's confrontation right was violated when the court precluded cross-examination of eyewitness to prison murder regarding letters requesting transfer because transfer request bore heavily on witness'credibility.see WILKERSON V. CAIN,233 F.3rd 886,891(5th Cir.2001).Though the fact situation is different,as it was the prosecution not the trial court that precluded Appellant's right to cross-examination of witnesses through the act of withholding exculpatory material. But the end result was the same,as Appellant was denied his right to cross-examine adverse witnesses through the use of impeachment evidence.

Since the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence.seeDEL V. VAN ARSDALL,475 U.S. 673(1986). It was imperative for Appellant to be able to fully confront every witness against him.see STROMAS V. STATE,618 So.2nd 116,121(Miss.1993).But,because of the prosecutorial misconduct,when taken in context of the trial as a whole,did violate Appellant's right to due process.see UNITED STATES V. WYLY,193 F.3rd 289,298-99(5th Cir.1999).

For this reason,the prosecutorial misconduct denied Appellant a fair trial, and it has been held that such errors that "so [infects]the trial with unfairness

as to make the resulting conviction a denial of due process,"it may justify reversal of conviction.see on DARDEN V. WAINWRIGHT,477 U.S. 168,181(1986).Such is the case of Appellant,so that judgement and conviction should be vacated, and new trial be granted.

5.PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

In GEER V. STATE,755 So.2nd 511(Miss.CT.APP.1999),the Mississippi Court of Appeals held that."Prosecutors are afforded the right to argue anything in the State's closing argument that was presented as evidence.Also see,HANNER V.STATE, 465 So.2nd 306,311(Miss.1985).However,arguing statements of fact which are not in evidence or necessarily inferable from it and which are prejudicial to defendant is error.see BLUE V. STATE,674S So.2nd 1184,1214(Miss.1996)(citing TUBB V.STATE, 217 MISS.741,64 So.2nd 911(1953)).In the case of Appellant,the State overstepped these bounds,and did interject into the closing arguments claims on the evidence that were not proven or supported by expert testimony or otherwise.

In Appellant's trial,it was stated before the jury in closing argument,that the projectile that was removed from the victim was matched to the .25 caliber weapon that was owned by Appellant.(Tr.707).The State did assert before the jury that there was positive evidence that had been presented by the State tha proved,(1)burnt remnants is a topsider shoe(Tr.707);(2)that he,(the prosecutor), "knew who took them off and set them on fire,the defendant"(Tr.707);(3)that the tire tracks were the tire tracks of the truck that the victim was driving; (Tr.711);(4)that the shovel had been proven positively to have been used to bury the victim(Tr.732);and finally,(5)that the physical and scientific evidence supported all of the evidence that had been presented by the State.(Tr.714).

The State misrepresented the evidence and the facts of the Appellant's case, by stating that proof had been presented by either scientific evidence or otherwise that supported the State's interpretation of the evidence.This was as improper closing argument,as the evidence had not been proven positively by scientific or other reliable testimony.

The Mississippi Supreme Court's ruling in DAVIS V. STATE,530 So.2nd 694 (Miss.1988),clearly sets out boundaries for closing argument:"According to CLEMONS V. STATE,320 So.2nd 368,371(Miss.1975),there are certain well-established limits beyond which counsel is forbidden to go;he must confine himself to the facts introduced in evidence and to the fair and reasonable deductions and conclusions to be drawn therefrom,and to the application of the law,as given by

the court, to the facts."the Court, in CLEMONS, Supra, further stated:"so long as counsel in his address to the jury keeps fairly within the evidence and the and the issues involved, wide latitude of discussion is allowed, but when he departs entirely from the evidence in his arguments, or makes statements intended solely to excite the passions or prejudices of the jury, or makes inflammatory and damaging statements of fact not found in the evidence."In case sub judice, the State did not stay within the confines of the evidence, but, did rather interject statements and claims that were not supported by the facts or evidence in the Appellant's case.

It is clear that the State's closing argument was misleading to the jury. The Mississippi Supreme Court stated in CAVANAL V. STATE, 56 Miss. 299 (1879): "Undoubtedly there is a limit to the latitude to be allowed to counsel in addressing a jury, and it is the duty of the court to interfere to prevent an abuse of the privilege or counsel, to the perversion of justice, by misstating facts or commenting on facts not in the evidence."

There was no proof to support the claims of the State of its interpretation of the evidence, and it was proper for the State in closing arguments to allege facts of which no proof is offered. see HOSFORD V. STATE, 525 So. 2nd 789 (Miss. 1988). As the Court stated in CLEMONS, Supra, "that reversal is required when such statements are so inflammatory as to influence the verdict of the jury and thus prevent a fair trial." 320 So. 2nd 368 (Miss. 1975).

The State Prosecutor also alluded that he knew certain facts to be true, thus giving the idea that he was testifying as a witness to facts that he was privy too, that had not been presented to the jury. In essence, the State was the integrity of his Office behind the evidence. It is black-letter law that: "prosecutors may not place the prestige of the government behind a witness by making personal assurances about the credibility of a witness or by indicating that the facts not before the jury support the witnesses testimony." UNITED STATES V. ROSARIO-DIAZ, 202 F.3rd 54, 65 (1st Cir. 2000).

Because of the cumulative effect of the prosecutorial misconduct in the closing arguments, was the State's attempt to prejudice the jury against the Appellant and deny Appellant of his due process right to a fair trial. see COLLINS V. STATE, 408, So. 2nd 1376 (Miss. 1982). This fact in the case of the Appellant is so, because the State is not permitted to use tactics which are inflammatory, highly prejudicial and reasonably calculated to unduly influence the jury. see on TAYLOR V. STATE, 672 So. 2nd 1246 (Miss. 1996).

The Appellant has been denied his due process right to a fair trial by the State's improper closing argument.

6. INEFFECTIVE ASSISTANCE OF APPELLANT COUNSEL

The United States Supreme Court held that "due process requires effective assistance of counsel during first appeal as of right". EVITTS V. LUCEY, 469 U.S. 387, 396 (1985). Appellant was denied this fundamental right on his direct appeal.

The Appellate Counsel had requested for an extension of time on the premise that he was to consult with the Appellant concerning the issues to be raised on appeal. The Appeals Court did grant the extension of time, but appellate counsel made no attempt to consult with the Appellant. In ROE V. FLORES-ORTEGA, 528 U.S. 470, 483-84 (2000), the United States Supreme Court held that "A defendant has been prejudiced because there is a reasonable probability that had appellate counsel had consulted with the defendant the appeal would have been different." Since that appellate counsel never consulted with the Appellant, prejudice can be presumed.

In the case sub judice, appellate counsel failed to raise any viable issues on appeal, and it has been held that where appellate counsel failed to raise any arguable issues in the appeal brief, did constitute ineffective assistance of counsel on appeal. see, e.g., DELGADO V. LEWIS, 223 F.3d 976, 980-82 (9th Cir. 2000).

It was clear from the trial transcript that, appellant was denied a fair trial because of the fact of the State presenting false evidence, and, of withholding exculpatory evidence from the defense. These were viable issues for appeal, but appellate counsel did ignore the obvious, and only raised frivolous issues on appeal. In MATIRE V. WAINWRIGHT, 811 F.2d 1430, 1438 (11th Cir. 1987), it was held that: "counsel's failure to raise issues which was obvious on the record and must have leaped out upon even a casual reading of the transcript was deficient performance."

Appellate counsel did have in his possession the exculpatory evidence that had been withheld by the State, but failed to raise this issue on appeal. This was a viable issue, and had it been raised on appeal would have resulted in the reversal of the Appellant's case. Appellate counsel was deficient in the failure to brief and present this issue on appeal. see LOMBARD V. LYNAUGH, 868 F.2d 1475, 1483-84 (5th Cir. 1989); also MASON V. HANKS, 97 F.3d 887, 902 (7th Cir. 1996).

The Fifth Circuit Court of Appeal held: "if, we adjudge counsel's performance to have been deficient, then we must determine whether there exist a reasonable

probability that but for the complained-of-error the outcome of the trial or appeal would have been different. "PITTS V. ANDERSON, 122 F.3rd 275, 279 (5th Cir. 1997).

IN the case sub judice, there is more than a reasonable probability that had appellate counsel had raised the issue that is contained in the present appeal to this court, that the Appellant's case would have been reversed on direct appeal.

Appellate counsel was deficient, and that deficient performance did prejudice the Appellant on his direct appeal. Therefore, from the facts of this present appeal, the Appellant has more than met the two-prong test set-out by the United States Supreme Court in STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984), in his claim of ineffective assistance of counsel on direct appeal.

7. TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING APPELLANT'S POST-CONVICTION MOTION AFTER THE STATE FAILED TO FILE AN ANSWER

The Mississippi Supreme Court held that "[W]e review a lower court's denial of a post-conviction motion to determine whether there has been an abuse of discretion." BROWN V. STATE, 907 So.2nd 336, 339 (Miss. 2005). In the case sub judice, the lower court erred in failing to rule on the merits of Appellant's post-conviction motion after he had filed his Motion For Summary Judgement pursuant to Mississippi Code Ann. Section 99-39-19(2) (Rev. 2000), after the State had been in default for eleven (11) days. The lower court dismissed Appellant's post-conviction motion pursuant to Mississippi Code Ann. Section 99-39-7 (Rev. 2000). This was an abuse of discretion on the part of the trial court.

Appellant had filed his post-conviction relief motion pursuant to Mississippi Code Ann. Section 99-39-5(1)(a), (e) and (i) which states in pertinent part:

"[a]ny prisoner in custody under sentence of a court of record of the State Mississippi who claims...[t]hat there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice...may file a motion to vacate, set aside or correct the judgement or sentence...."

Under this article, Appellant could file his post-conviction motion on the Newly Discovered Evidence into the trial court, that is, if he could meet the exceptions of Mississippi Code Ann. Section 99-39-5(2) and 99-39-23(6).

Also, since Appellant had previously been denied leave by the Mississippi Supreme Court on a prior application for leave to file a post-conviction motion, Mississippi Code Ann. Section 99-39-27(9) precluded a successive application

to that Court. Appellant's only avenue to raise his claims of newly discovered evidence was in the trial court. see TURNER V. STATE, 673 So.2nd 382 (Miss. 1996).

In TURNER supra, that Court held that the appropriate standard of review of Turner's post-conviction motion is whether he proved by a preponderance of the evidence that material facts existed which had not been previously heard and which required the vacation of his conviction or sentence. Nowhere did that Court rule that Turner, who had a jury trial and had his convictions affirmed on direct appeal, had to seek leave pursuant to **Mississippi Code Ann. Section 99-39-27 (Rev. 2000)**, before filing pursuant to **Section 99-39-5(1)(e) and (i)**.

Appellant had also overcome the time-bar of **Mississippi Code Ann. Section 99-39-5(2) (Rev. 2000)**, by meeting the exceptions of newly discovered evidence clause of the statute. Also the successive writ bar of **Section 99-39-23(6)** could not preclude review of his claim of newly discovered evidence, as is clearly reflected in the **Circuit Court of Harrison County's Order of June 11th 2008**. In that order, the court asked the State to file a response to Appellant's post-conviction motion. So that the Circuit Court had taken jurisdiction of said motion. see, LAWSON V. STATE, 748 So.2nd 96 (Miss. 1999).

The Circuit Court of Harrison County, concluded that the allegations of Appellant's post-conviction motion of his BRADY V. MARYLAND, 373 U.S. 83 (1963) claim, was supported by an affidavit from his trial counsel, overcome any procedural bars that would have precluded review of his claims, and that Appellant's fundamental constitutional rights was involved. see, LUCKETT V. STATE, 582 So.2nd 428 (Miss. 1991). also, GRAY V. STATE, 819 So.2nd 542 (Miss. Ct. App. 2001).

The Circuit Court did not change directions in Appellant's case until the State was in default and Appellant filed for Summary Judgement pursuant to **Mississippi Code Ann. Section 99-39-19(2) (Rev. 2000)**, which had been filed by the Circuit Clerk of Harrison County on July 18th 2008. It was at this time that the State moved the Court ex-parte for an extension of time, and the Court did grant said motion by Order on July 21st 2008, and the Court then dismissing Appellant's post-conviction motion on July 23rd 2008.

This was an abuse of discretion on the part of the Circuit Court of Harrison County, as that Court should have by statute, made a ruling on Appellant's Motion For Summary Judgement because of the State's default in failing to file a timely response. As the Appellant had met his burden of showing that there is no genuine issue of material facts, as, the claims raised in his post-conviction motion have attested, and that the State's complete failure to meet its affirmative obligation

of establishing the existence of genuine fact issue there is no genuine material fact in dispute. So that the Circuit Court should have granted the Appellant's motion for summary judgement. see, ANDERSON V. LIBERTY LOBBY INC., 477 U.S. 242, 249-50 (1986); U.S. FIDELITY & GUARANTY CO. V. WIGGINTON, 964 F.2d 487 (5th Cir. 1992).

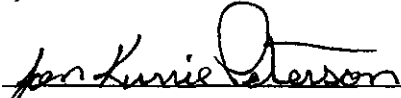
Pursuant to **Rule 56(c) Mississippi Rules Of Civil Procedure**, required that the Circuit Court review all of the evidence in the record, admissions, answers, and other pertinent evidence, and after having done so, find no issue of fact or law disputed, should be compelled to grant summary judgement. see, BARNETT V. STATE, 497 So.2nd 443 (Miss. 1986); WILSON V. STATE, 426 So.2nd 792 (Miss. 1983). But in the case sub judice, the Circuit Court failed to rule on Appellant's Motion For Summary Judgement.

Appellant asserts that since the Circuit Court of Harrison County failed to reach the merits of the Appellant's post-conviction motion as, that Court dismissed the motion on procedural grounds, that this Court should rule on the merits of his case by the authority of this Court in GRAY V. STATE, 819 So.2nd 542 (Miss. Ct. App. 2001).

CONCLUSION

WHEREFORE PREMISES CONSIDERED, Appellant respectfully moves this Court to reverse the judgement of the Circuit Court of Harrison County, and Order the Circuit Court of Harrison County to hold an **EVIDENTIARY HEARING**, to evaluate Appellant's **NEWLY DISCOVERED EVIDENCE**, and or **VACATE JUDGEMENT AND SENTENCE**, OR **GRANT NEW TRIAL**. And for what other relief this Court deems just and proper.

RESPECTFULLY SUBMITTED THIS THE 15 DAY OF NOVEMBER, 2008


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

ADDENDUM

"ORDER OF COURT" JUNE 11th 2008

"MOTION FOR SUMMARY JUDGEMENT"

"STATE'S MOTION FOR EXTENSION OF TIME"

"ORDER OF COURT" JULY 21st 2008

"RULE 60(b) MOTION"

"ORDER OF COURT" AUGUST 11th 2008

**IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

JON KURRIE PETERSON

PETITIONER

VERSUS

NO. A2401-08-129

STATE OF MISSISSIPPI

RESPONDENT

ORDER

THIS MATTER is before the Court on a *pro se* "Motion to Vacate Judgment and Sentence or in the Alternative Motion for New Trial with Brief in Support" filed April 22, 2008. In accordance with **Miss. Code Ann.** §§ 99-39-11, the Court has examined the motion relating to the conviction under attack in cause number B2401-95-755.

On April 19, 1996, Jon Kurrie Peterson was convicted of murder and arson and received a life sentence for the murder and three years on the arson conviction. His conviction was appealed and affirmed on March 9, 1999. (*Peterson v. State*, 740 So.2d 940 (Miss. 1999)). Peterson has charged in his Motion that the State of Mississippi withheld state lab reports and other scientific evidence that was exculpatory in nature and that there was other prosecutorial misconduct. He has attached an affidavit from his trial counsel that they did not receive any crime lab report or expert reports from the State prior to trial and that had such evidence been received it "would have resulted in a different verdict." See 99-39-5 **Miss. Code Ann.** The Court finds the allegations are such that the State should be allowed an opportunity to respond to the petition. It is therefore,

ORDERED that the State shall file its answer or other pleading in response to the petition for post-conviction relief within thirty (30) days of this order.

SO ORDERED AND ADJUDGED, this the 11 day of June 2008

FILED
JUN 11 2008

GAYLE PARKER, CIRCUIT CLERK
BY: *[Signature]*

[Signature]

ROGER T. CLARK
CIRCUIT COURT JUDGE

473/499

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

FIRST JUDICIAL DISTRICT

JON KURRIE PETERSON

VS.

STATE OF MISSISSIPPI

FILED
JUL 18 2008

PETITIONER

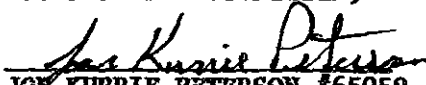
CAUSE NO: A2401-08-129

GAYLE PARKER, CIRCUIT CLERK
By _____ DC

RESPONDENTS

MOTION FOR SUMMARY JUDGEMENT

RESPECTFULLY SUBMITTED,


JON KURRIE PETERSON, #65059
DELTA CORRECTIONAL FACILITY
3800 COUNTY ROAD 540
GREENWOOD, MS 38930

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

JON KURRIE PETERSON

VS.

STATE OF MISSISSIPPI

FILED
JUL 18 2008

GAYLE PARKER, CIRCUIT CLERK
By _____ DC

PETITIONER

CASE NO. A2401-08-129

RESPONDENTS

MOTION FOR SUMMARY JUDGEMENT

COMES NOW, JON KURRIE PETERSON, petitioner, and files this his Motion For Summary Judgement in the above-styled and numbered cause. In support thereof will show unto the Court the following to-wit:

I.

Petitioner did file his post-conviction motion styled as "Motion to Vacate Judgement and Sentence or In The Alternative Motion For New Trial With Brief In Support." The Court finding that the Motion required an answer from Respondents so ordered them to do so on the 11th day of June, 2008. The Court gave the Respondents thirty(30) days from the issuance of said order or up to July 10th, 2008.

II.

Petitioner now brings to this Court's attention that the Respondents have failed to respond in the required time, and, are now in default in their failure to file an answer to the petitioner's motion for post-conviction relief. Petitioner asserts that on the basis of the record as it exists, that there is no genuine issue as to any material fact and he is entitled to a judgement on the merits as a matter of law.

III.

Furthermore, petitioner has met his burden of showing that there is no genuine issue of material facts, as, the claims raised in his post-conviction motion have attested, and that the respondents' complete failure to meet its affirmative obligation of establishing the existence of genuine fact issue there is no genuine material fact in dispute. Therefore, petitioner is entitled to summary judgement in his favor. see: Anderson Vs. Liberty Lobby Inc., 477 U.S. 242, 249-50 (1986); U.S. Fidelity & Guaranty Co. Vs. Wigginton, 964 F.2d 487, 489 (5th Cir. 1992).

IV.

Pettitioner's post-conviction motion has put forth claims that merit relief. Section 99-39-19(2)(Rev.2000) gives this Court the authority to grant a motion for summary judgement. Section 99-39-(2) states the following:

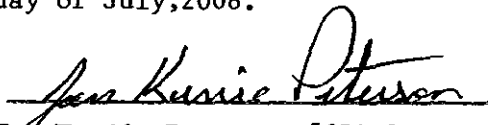
(2) The Court may grant a motion by either party for summary judgement when it appears from the record that there is no genuine issue of material fact and the movant is entitled to judgement as a matter of law.

In the subjudice, petitioner claims that have been raised in his post-conviction motion, are of such nature that would entitle him to a new trial, or on the other hand, that this Court should vacate the judgement and sentence and discharge the petitioner pursuant to Mississippi Code Ann. Section 99-39-23(5)(Rev.2000). So that, this motion for summary judgement should be granted. see; Barnett Vs. State, 497 So.2nd 443 (Miss.1986); Wilson Vs. State, 426 So.2nd 792 (Miss.1983).

CONCLUSION

Wherefore **PREMISES CONSIDERED**, petitioner moves this Honorable Court to grant summary judgement in this cause, and for what other relief the Court deems just and proper.

RESPECTFULLY SUBMITTED this the 14th day of July, 2008.


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

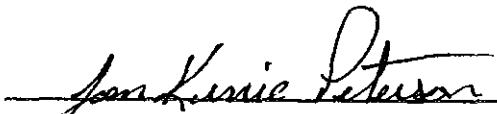
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY, that I, Jon Kurrie Peterson, petitioner, have caused to be delivered this day via United States Postal Service, postage prepaid, a true and correct copy of the foregoing Motion For Summary Judgement to the below listed persons:

HONORABLE ROGER T. CLARK
CIRCUIT COURT JUDGE HARRISON COUNTY
P.O. BOX 1461
GULFPORT, MS. 39502

HONORABLE CONO CARANNA
HARRISON COUNTY DISTRICT ATTORNEY
P.O. DRAWER 1180
GULFPORT, MS. 39502

This the 14th day of July, 2008.


JON KURRIE PETERSON, #65059
Delta Correctional Facility
3800 County Road 540
Greenwood, Ms. 38930

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

JON KURRIE PETERSON

PETITIONER

VERSUS

CAUSE NO: A2401-2008-0129

THE STATE OF MISSISSIPPI

RESPONDENT

FILED
JUL 21 2008
GAYLE PARKER, CIRCUIT CLERK
By *[Signature]* DC

**THE STATE OF MISSISSIPPI'S *EX PARTE* MOTION FOR
EXTENTION OF TIME IN WHICH TO
TO ANSWER P.C.R. PETITION**

COMES NOW, the State of Mississippi, Respondent in the above styled and numbered cause, through Christopher L. Schmidt, Assistant District Attorney and files this Motion for Extension of Time to Answer PRC Petition and would state unto the court as follows:

1. That Petitioner filed a post-conviction relief petition styled Motion to Vacate Judgment and Sentence or in the Alternative Motion for New Trial on April 22, 2008.
2. That on or about June 11, 2008, the Court entered an order which directed the State to answer the PCR within 30 days.
3. That the undersigned received the Court's order on July 18, 2008 and has only begun to research the multiple issues raised by the Petitioner.
4. That the former prosecutors assigned to the case are no longer employed at the Office of the District Attorney and the former law enforcement investigator is retired from his position at the Harrison County Sheriff's Office.
5. That the Petitioner alleges serious allegations of prosecutor misconduct which requires significant research in order to adequately answer.

6. That the Respondent believes that an additional thirty days in which to answer will be adequate.

WHEREFORE, PREMISES CONSIDERED, the State of Mississippi would ask this court to grant the relief herein sought.

Respectfully submitted, this the 21st day of July, 2008.

THE STATE OF MISSISSIPPI

CONO CARANNA,
DISTRICT ATTORNEY

A handwritten signature in black ink, appearing to read "CL Schmidt", written over the printed name of Christopher L. Schmidt.

CHRISTOPHER L. SCHMIDT,
ASSISTANT DISTRICT ATTORNEY

1042

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

JON KURRIE PETERSON

PETITIONER

VERSUS

CAUSE NO: A2401-2008..0129

THE STATE OF MISSISSIPPI

RESPONDENT

**ORDER GRANTING EXTENTION OF TIME FOR
RESPONDENT TO ANSWER P.C.R. PETITION**

THIS MATTER, coming before the court *ex parte* on the Respondent's Motion for Extension of Time and the court having considered the Motion is of the opinion that the Motion should be granted and sustains same. It is therefore,

ORDERED that the Respondent, The State of Mississippi, shall be given thirty days from this date in which to files its answer. It is,

SO ORDERED, this the 21 day of July, 2008.


CIRCUIT COURT JUDGE

Order presented by:


Assistant District Attorney

FILED
JUL 21 2008

GAYLE PARKER, CIRCUIT CLERK
By 

475/718

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

JON KURRIE PETERSON

VS.

STATE OF MISSISSIPPI

FILED
AUG 04 2008

PETITIONER

CAUSE NO. A2401-2008-129

RESPONDENTS

GAYLE PARKER, CIRCUIT CLERK
By *[Signature]* DC
RULE 60(b) MOTION

COMES NOW, Jon Kurrie Peterson, petitioner in the above-styled and numbered cause, and files this his Rule 60(b) Motion pursuant to Mississippi Rules Of Civil Procedures. In support thereof will show the following facts unto the Court to-wit;

I.

On the 11th day June 2008, this Court enter an Order allowing the Respondents an opportunity to respond to petitioner's post-conviction motion filed April 22nd 2008. The Court did allow the respondents 30 days to file an answer pursuant to Mississippi Code Ann. Section 99-39-11(3) (Rev. 2000), or up to July 10th, 2008.

Because the respondents did fail to file a timely Answer to petitioner's post-conviction motion, petitioner did then file his Motion For Summary Judgement which the Circuit Court Clerk of Harrison County did file on the 18th day of July, 2008. Petitioner did file this motion because of the respondents default in failing to respond to this Courts Order of June 11th 2008.

II.

The respondents did respond to petitioner's motion for summary judgement by filing an *ex parte* request for an extension of time. On the 21st day of July, 2008, the Court did make an *ex parte* ruling granting the respondents' request for a thirty(30) day extension to file an answer to the petitioner's post-conviction relief motion. Petitioner asserts that the Court's ruling was improper for the following reasons;

1. Rule 81(b) of the Mississippi Rules Of Civil Procedure limits the use of ex parte matters that may be disposed as summarily as any pertinent statutes permit. The Rule is intended to preserve, inter alia, the summary manner in which many matters testamentary, of administration, in minors/wards' business, and in cases of idiocy, lunacy, and persons of unsound mind are handled. see. Miss. Code Ann. §11-5-49(1972). Since Rule 81(b) does limit the scope of the Rules Civil Procedure to filings of discovery motions and in the general pleadings in post-conviction matters, the respondents could not move the Court ex parte for an extension time once they had been in Default.

2. Rule 6(b) the Mississippi Rules Of Civil Procedure allows for an enlargement of time of an act of order by a Court, the Rule calls for the request to be made "before the expiration of the period originally prescribed." Also the Rule allows for a motion for an enlargement of time to be made after the expiration of the period prescribed by the Court, [if], it can be shown that there was excusable neglect in failing to perform the act requested by the Court. In the case sub judice, the respondents only filed for the enlargement of time after petitioner filed his motion for summary judgement, because of the respondents' failure to file an answer to the petitioner's post-conviction motion. And because the did improperly rule ex parte on the respondents' request for extension of time, which did excuse the respondents' obligation to show the required excusable neglect for being in Default for 11 days before seeking an extension of time, the Court's granting the respondents' ex parte request for an extension of time is erroneous and abuse of discretion by the Court.

III.

Since the respondents are in default, and because of the Court's erroneous ruling on the respondents' ex parte request for an enlargement of time, the respondents are in an incessant default, and should be sanctioned by the Court in not allowing the respondents to respond to the petitioner's motion for summary judgement. Also the respondents have failed to file a proper motion with the Circuit Court Clerk for an extension of time. It has come to petitioner's attention that the respondents failed to file a proper motion for an extension

of time until July 24th 2008, some three days after the Court ruled ex parte to grant the respondents 30 additional days to file an answer to petitioner's post-conviction motion. Clearly the Court abused to grant a motion that was not on file and never existed.

IV.

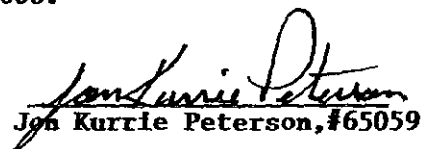
Petitioner moves this Court to correct its order of July 21st 2008, allowing the respondents a 30 day extension of time, by setting a Hearing date on petitioner's request for summary judgement filed in the case sub judice. Petitioner also moves this Court to properly sanction the respondents in their failure to file a timely answer to this Court's Order of June 11th 2008, by finding the respondents in default.

Petitioner has enclosed a proposed order for the Court's consideration in granting the requested relief, not only in his motion for summary judgement, but for all the relief requested in his Motion To Vacate Judgement And Sentence, Or In The Alternative Motion For New Trial.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, petitioner moves this Court to grant this 60(b) Motion and for any other relief this Court deems just and proper.

RESPECTFULLY SUBMITTED THIS THE 31 DAY OF JULY, 2008.


Jon Kurrie Peterson, #65059

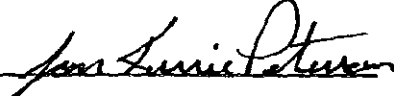
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY, that I, JON KURRIE Peterson, petitioner, have caused to be delivered this day via United States Postal Service, postage prepaid, a true and correct copy of the foregoing Rule 60(b) Motion to the below listed persons;

Honorable Roger T. Clark
Circuit Court Judge-Harrison County
P.O. Box 1461
Gulfport, Ms. 39502

Honorable Cono Caranna
Harrison County District Attorney
P.O. Drawer 1180
Gulfport, Ms. 39502

This the 31 day of July, 2008.


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

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

JON KURRIE PETERSON

PETITIONER

VERSUS

NO. A2401-08-129

STATE OF MISSISSIPPI


RESPONDENT

ORDER

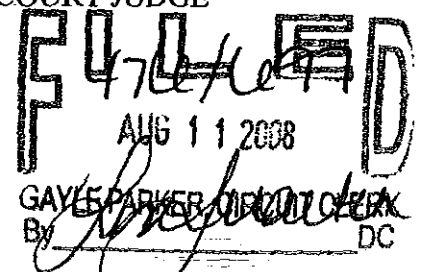

THIS MATTER is before the Court on a *pro se* "Rule 60(b) Motion" asking the Court to set aside the order it entered extending the State's time to respond to Peterson's Petition for Post Conviction Relief. Subsequent to the extension of time it was brought to the Court's attention that Peterson had not obtained leave from the Mississippi Supreme Court to proceed with his petition as required by as required by Miss. Code Ann. §§ 99-39-27. As a result the Court entered an order on July 23, 2008 dismissing Peterson's "Motion to Vacate Judgment and Sentence or in the Alternative Motion for New Trial with Brief in Support" until he obtains leave to proceed. That order renders his current "Rule 60(b) Motion" moot. It is therefore,

ORDERED that the "Rule 60(b) Motion" is denied.

SO ORDERED AND ADJUDGED, this the 11 day of August 2008.



ROGER T. CLARK
CIRCUIT COURT JUDGE


AUG 11 2008
GAYLE PARKER, CLERK
By  DC

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY,that I,Jon Kurrie Peterson,Appellant have cause to be delivered this day,via United States Postal Service,postage prepaid,a true and correct copy of the forgoing Brief of Appellant to the below listed person.

HONORABLE JIM HOOD
ATTORNEY GENERAL
P.O.BOX 220
JACKSON, MS 39205-0220

THIS THE 15 DAY OF NOVEMBER,2008.


JON KURRIE PETERSON, PRO SE