

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LARRY WAYNE MCKENZIE

APPELLANT

VS.

NO. 2008-CP-1603

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF MISSISSIPPI

LARRY WAYNE McKENZIE

APPELLANT

VERSUS

NO. 2008-CP-1603-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

This appeal is taken from the Circuit Court of Lauderdale County, wherein Larry Wayne McKenzie pleaded guilty to a charge of statutory rape. Thereafter, he filed in the circuit court a petition for post-conviction relief, which was denied. The Court of Appeals affirmed this judgment and denied McKenzie's motion for rehearing; the Mississippi Supreme Court denied the subsequent petition for writ of certiorari. *McKenzie v. State*, 856 So.2d 344 (Miss. App. 2003).

On March 31, 2005, McKenzie filed another motion for post-conviction relief in the circuit court. That motion was denied as time-barred and successive. Again, the Court of Appeals affirmed the judgment denying relief and denied the motion for rehearing. The Mississippi Supreme Court denied the petition for writ of certiorari. *McKenzie v. State*, 946 So.2d 392 (Miss.2006).

Once more, on July 21, 2008, McKenzie filed in the circuit court a petition for post-conviction relief. The court dismissed this petition as successive. Aggrieved by the judgment rendered against him, McKenzie has perfected an appeal to this Court.

SUMMARY OF THE ARGUMENT

The circuit court properly denied McKenzie's successive petition for post-conviction relief. The judgment entered below should be affirmed.

PROPOSITION:

THE CIRCUIT COURT PROPERLY DISMISSED MCKENZIE'S SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF

Having reviewed the history of McKenzie's case, the circuit court denied relief with the finding that the current petition obviously was barred as a successive writ. The court also found that each petition had presented essentially the same issues.

The court's order is not subject to reversal "absent a finding" that it "was clearly erroneous." *Taylor v. State*, 766 So.2d 830, 832 (Miss. App. 2000), citing *Kirksey v. State*, 728 So.2d 565, 567 (Miss.1999). Accord, *Black v. State*, 963 So.2d 47, 48 (Miss. App. 2007). Moreover, "In a petition for post-conviction relief, the petitioner carries the burden of proving that his claim is not procedurally barred." *Massey v. State*, 843 So.2d 74 (Miss. App. 2003). Accord, *Powers v. State*, 945 So.2d 386, 395 (Miss. 2006).

Pursuant to MISS. CODE ANN. § 99-39-23(6) (Rev.2007), "all successive petitions are barred if the prisoner has filed a previous post-conviction-relief motion." *Dawkins v. State*, 991 So.2d 189, 190 (Miss. App. 2008). The petitioner is required to show that his petition falls within one or more of the exceptions enumerated in § 99-39-23(6).

In this case, the record, procedural history and applicable case law support the circuit court's finding that this was McKenzie's third attempt to obtain post-conviction relief and that the petition accordingly was subject to the successive-writ bar. McKenzie has failed to that his case falls within any of the statutory exceptions. No basis exists for disturbing the court's judgment.

CONCLUSION

The state respectfully submits the circuit court properly dismissed McKenzie's petition without a hearing. The judgment entered below should be affirmed.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI**

A handwritten signature in black ink, appearing to read "Deirdre McCrory", is written over a horizontal line.

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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:

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Circuit Court Judge
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This the 12th day of March, 2009.



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