

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**TERRY LEE LATTIMORE**

**APPELLANT**

**VS.**

**NO. 2008-CP-1760-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
STATEMENT OF FACTS .....	3
SUMMARY OF THE ARGUMENT .....	4
ARGUMENT .....	6
I.	
THE TRIAL COURT WAS CORRECT IN DENYING THE POST-CONVICTION MOTION CLAIMING INEFFECTIVE ASSISTANCE WITHOUT AN EVIDENTIARY HEARING.....	6
II. & III.	
THE TRIAL COURT WAS NOT REQUIRED TO HOLD AN EVIDENTIARY HEARING ON ON RELIEF TO PROCEED IN TRIAL COURT. ....	8
IV. (Second III. In Def. Br.)	
CLAIM OF INEFFECTIVE ASSISTANCE BASED UPON FAILURE TO CLAIM IMPROPER SEARCH AND SEIZURE IS PROCEDURALLY BARRED AND ALTERNATIVELY WITHOUT MERIT.....	10
V. (IV. Def. Br.)	
THE ISSUE OF THE ADMISSIBILITY OF ‘THE PIPE’ WAS ADDRESSED ON DIRECT APPEAL AND IS NOW PROCEDURALLY BARRED. ....	11
CONCLUSION .....	13
CERTIFICATE OF SERVICE .....	14

## TABLE OF AUTHORITIES

### STATE CASES

<b>Cabello v. State, 524 So.2d 313, 320 (Miss.1988) .....</b>	<b>6</b>
<b>Ethridge v. State, 418 So.2d 798 (Miss.1982) .....</b>	<b>11</b>
<b>Evans v. State, 485 So.2d 276 (Miss.1986) .....</b>	<b>6</b>
<b>Franklin v. State, 587 So.2d 905 (Miss. 1991) .....</b>	<b>4, 10</b>
<b>Gilliard v. State, 446 So.2d 590 (Miss.1984) .....</b>	<b>6</b>
<b>Gray v. State, 887 So.2d 158 (Miss. 2004) .....</b>	<b>12</b>
<b>Havard v. State, 988 So.2d 322, 333 (Miss. 2008) .....</b>	<b>7</b>
<b>Irving v. State, 498 So.2d 305 (Miss.1986) .....</b>	<b>6</b>
<b>Lattimore v. State, 958 So.2d 192 (Miss. 2007) .....</b>	<b>1, 3, 11, 12</b>
<b>Lockett v. State, 614 So.2d 888 (Miss.1992) .....</b>	<b>6, 7</b>
<b>Lyons v. State, 990 So.2d 262, 265 (Miss.App. 2008) .....</b>	<b>7</b>
<b>O'Connell v. State, 9334 So.2d 306 (Miss.App. 2005) .....</b>	<b>4, 10</b>
<b>Rankin v. State, 636 So.2d 652 (Miss. 1994) .....</b>	<b>10</b>
<b>Rhodes v. State, 676 So.2d 275, 283 (Miss.1996) .....</b>	<b>11</b>
<b>Rideout v. State, 496 So.2d 667 (Miss.1986) .....</b>	<b>6</b>
<b>Sanders v. State, 846 So.2d 230, 235(¶ 15) (Miss.Ct.App.2002) .....</b>	<b>4</b>
<b>Stokes v. State, 518 So.2d 1224, 1227 (Miss.1988) .....</b>	<b>11</b>

<b>Townsend v. State, 892 So.2d 282, 284 (Miss.App. 2004)</b> .....	<b>8</b>
<b>Williams v. State, 722 So.2d 447, 449 (Miss.1998)</b> .....	<b>11</b>

## STATE STATUTES

<b>Miss. Code Ann. § 99-39-19</b> .....	<b>8</b>
<b>Miss.Code Ann. § 99-39-19(1)</b> .....	<b>4</b>
<b>Miss.Code Ann. § 99-39-11(2)</b> .....	<b>9</b>
<b>Miss.Code Ann. § 99-39-21(1-5)</b> .....	<b>6</b>
<b>Miss.Code Ann. § 99-39-21(3) (1972 &amp; Supp.2003)</b> .....	<b>11</b>
<b>Miss.Code Ann. § 99-39-21(6) (Supp.1991)</b> .....	<b>6</b>
<b>Miss.Code Ann. § 99-39-11(2)</b> .....	<b>8</b>

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**TERRY LEE LATTIMORE**

**APPELLANT**

**VS.**

**NO. 2008-CP-1760-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

Defendant was indicted by the Washington County grand jury for Capital Murder, was found guilty after a jury trial, sentenced to Life imprisonment appealed to the Mississippi Supreme Court and had his conviction affirmed. *Lattimore v. State*, 958 So.2d 192 (Miss. 2007)(Affirmed April 26, 2007. Rehearing Denied June 28, 2007).

In October, 2007, defendant filed an Application for Leave to Proceed in the Trial Court, which was granted by order of the Mississippi Supreme Court that same month. C.p.133.

Upon filing in the Washington County Circuit Court the State responded and

the Court issued an Order and Opinion with findings of fact and conclusions of law.

C.p. 160-164& 168-172. The trial court denied relief.

Defendant timely noticed this instant appeal.

## STATEMENT OF FACTS

(As reported by the Mississippi Supreme Court).

¶ 2. On the morning of July 16, 2000, James Dycus responded to a knock at his front door. His wife, Virgie, still in bed, heard a “blundering” noise, and then her dog barked, so she went to the front door, which was ajar. Seeing nothing amiss, she went into the kitchen where she could see through the window that her husband was in the yard, talking to a black man. Sensing that something was not right, Virgie Dycus dialed 911 just as a second black man rounded the corner and struck her husband's head from behind with a pipe-like object. The second man continued to beat Dycus, and then took his wallet.

¶ 3. While on the phone with the dispatcher, Virgie Dycus continued to describe the scene as she saw it. She reported that the two men had driven away in a white car. A few minutes later, a neighbor reported a white car traveling at a high rate of speed away from the area. The police found the abandoned getaway vehicle a short distance away, and the vehicle identification number (VIN) showed that it was registered to Terry Lattimore. Dycus died approximately one hour after the assault, and the coroner reported that the cause of death was blunt force trauma to the head.

¶ 4. Gary Brown and Terry Lattimore were both arrested for capital murder. FN1 Although they admitted to being at the scene, each implicated the other for the actual killing and claimed to know nothing of the impending crime before it occurred. In Virgie Dycus's initial statement to the deputy sheriff, she described the assailant as being a light skinned, slender black man. She said he was not wearing a shirt and was in his late twenties or early thirties. She identified the other man as merely a tall black man.

*Lattimore v. State*, 958 So.2d 192 (Miss. 2007).

FN1. The underlying crime was robbery. Evidence was presented that the police found Dycus with his pants pockets turned out, and his wallet, which contained \$500 Dycus had recently received from catfish sales, was missing.

## **SUMMARY OF THE ARGUMENT**

### **I.**

#### **THE TRIAL COURT WAS CORRECT IN DENYING THE POST-CONVICTION MOTION CLAIMING INEFFECTIVE ASSISTANCE WITHOUT AN EVIDENTIARY HEARING.**

The trial court specifically address the issue in the petition and found it to be without merit as having been addressed on direct appeal. Further, such a claim was procedurally barred under as *res judicata*. An evidentiary hearing is not necessarily warranted when the record adequately address the issue and allow the trial court to rule.

### **II. & III.**

#### **THE TRIAL COURT WAS NOT REQUIRED TO HOLD AN EVIDENTIARY HEARING ON RELIEF TO PROCEED IN TRIAL COURT.**

Defendant argues the trial court erred in denying his petition without the benefit of a hearing. Mississippi appellate courts have determined that leave to proceed in the trial court does not automatically grant the petitioner a hearing. *Sanders v. State*, 846 So.2d 230, 235(¶ 15) (Miss.Ct.App.2002). Once under the jurisdiction of the trial court, pursuant to Mississippi Code Annotated Section 99-39-19(1), that court had the authority to render an opinion with or without an evidentiary hearing.

### **IV. (Second III. In Def. Br.)**

#### **CLAIM OF INEFFECTIVE ASSISTANCE BASED UPON FAILURE TO CLAIM IMPROPER SEARCH AND SEIZURE IS PROCEDURALLY BARRED AND ALTERNATIVELY WITHOUT MERIT.**

In the order denying relief the trial court found the issue 'meritless' finding that the search of the car was evidence of a crime. *Franklin v. State*, 587 So.2d 905 (Miss. 1991). Additionally, as legal grounds for denying relief, the trial court found the search was permissible as inventory of an impounded vehicle. *O'Connell v. State*,



9334 So.2d 306 (Miss.App. 2005).

**V. (IV. Def. Br.)**

**THE ISSUE OF THE ADMISSIBILITY OF 'THE PIPE' WAS  
ADDRESSED ON DIRECT APPEAL AND IS NOW  
PROCEDURALLY BARRED.**

The pipe was found to be admissible and relevant on direct appeal. Consequently, you cannot have a claim of ineffective assistance of counsel on an issue found to be without merit on direct appeal.

## ARGUMENT

### I.

#### **THE TRIAL COURT WAS CORRECT IN DENYING THE POST-CONVICTION MOTION CLAIMING INEFFECTIVE ASSISTANCE WITHOUT AN EVIDENTIARY HEARING.**

In this initial allegation of trial court error defendant, in sum and substance, asserts the trial court erred in denying (not dismissing as he claims) but denying his claim of ineffective assistance based upon the principle of *res judicata*.

¶ 33. In *Lockett v. State*, 614 So.2d 888 (Miss.1992), this Court considered the post-conviction application of Carl Daniel Lockett, who like Havard, was convicted of capital murder and sentenced to death. When asked to reconsider issues that were discussed on direct appeal, this Court stated:

The procedural bars of waiver, different theories, and *res judicata* and the exception thereto as defined in Miss.Code Ann. § 99-39-21(1-5) are applicable in death penalty PCR Applications. *Irving v. State*, 498 So.2d 305 (Miss.1986); *Evans v. State*, 485 So.2d 276 (Miss.1986). Rephrasing direct appeal issues for post-conviction purposes will not defeat the procedural bar of *res judicata*. *Irving v. State*, 498 So.2d 305 (Miss.1986); *Rideout v. State*, 496 So.2d 667 (Miss.1986); *Gilliard v. State*, 446 So.2d 590 (Miss.1984). The Petitioner carries the burden of demonstrating that his claim is not procedurally barred. Miss.Code Ann. § 99-39-21(6) (Supp.1991); *Cabello v. State*, 524 So.2d 313, 320 (Miss.1988). However, ‘an alleged error should be reviewed, in spite of any procedural bar, only where the claim is so novel that it has not previously been litigated, or, perhaps, where an appellate court has suddenly reversed itself on an issue previously thought settled.’ *Irving v. State*, 498 So.2d 305, 311 (Miss.1986).

Lockett, 614 So.2d at 893.

*Havard v. State*, 988 So.2d 322, 333 (Miss. 2008).

The denial of a motion for post-conviction relief without an evidentiary hearing is within the discretion of the trial court. Especially when the issues are clearly contradicted by the record or already determined on direct appeal based upon *res judicata*.

¶ 16. Not only was Lyons's petition barred as a successive writ, but his claim that his probation was unlawfully revoked is also barred by *res judicata*. Further, Lyons's argument is procedurally barred due to his failure to raise the issue for the trial court to consider. Accordingly, we find that the circuit court properly denied Lyons's second motion for post-conviction relief without an evidentiary hearing. We find Lyons's issues to be without merit, and we affirm the circuit court's order denying relief.

*Lyons v. State*, 990 So.2d 262, 265 (Miss.App. 2008).

Accordingly, based upon the findings of fact conclusion of law and the application of the rationale of *Lockett* on claims of ineffective assistance of counsel the trial court was well within the limits of discretion in denying the petition.

No relief should be granted on this claim of trial court error.

**II. & III.**  
**THE TRIAL COURT WAS NOT REQUIRED TO HOLD AN EVIDENTIARY HEARING ON ON RELIEF TO PROCEED IN TRIAL COURT.**

Defendant argues that having been granted relief to proceed in the trial court by order of the Mississippi Supreme Court entitled him to an evidentiary hearing.

However, such is not an automatic right. In a similar posture the reviewing court's have clearly held:

¶ 5. Townsend contends that the trial court erred in denying his petition without the benefit of a hearing. This Court has determined that leave to proceed in the trial court does not automatically grant the petitioner a hearing. *Sanders v. State*, 846 So.2d 230, 235(¶ 15) (Miss.Ct.App.2002). Once under the jurisdiction of the trial court, pursuant to Mississippi Code Annotated Section 99-39-19(1), that court had the authority to render an opinion with or without an evidentiary hearing. *Id.*

*Townsend v. State*, 892 So.2d 282, 284 (Miss.App. 2004).

It is within the discretion of the circuit court to make the determination if an evidentiary hearing is needed. Implicit in the denial is the presumption the trial court analyzed the evidence and issues presented and determined an evidentiary hearing was not required pursuant to *Miss. Code Ann.* § 99-39-19.

¶ 15. Lastly, McKinney claims that the circuit court erred when it dismissed his motion for post-conviction relief without conducting an evidentiary hearing. Mississippi Code Annotated section 99-39-11(2) provides that “[i]f it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified.” Mississippi Code Annotated

section 99-39-19(1) (Rev.2007) further provides that it is for the circuit court to determine whether an evidentiary hearing is required. As we have found, the circuit court correctly determined that McKinney's PCR motion did not make a substantial showing of the denial of a state or a federal right and was plainly without merit. Therefore, the circuit court appropriately dismissed the PCR motion without an evidentiary hearing. Miss.Code Ann. § 99-39-11(2). This issue is without merit.

*McKinney v. State*, 7 So.3d 291, 295 (Miss.App. 2008).

Accordingly, the trial court did not abuse his discretion, applied the correct legal analysis.

No relief should be granted based upon this allegation of trial court error.

**IV. (Second III. In Def. Br.)  
CLAIM OF INEFFECTIVE ASSISTANCE BASED UPON  
FAILURE TO CLAIM IMPROPER SEARCH AND SEIZURE IS  
PROCEDURALLY BARRED AND ALTERNATIVELY  
WITHOUT MERIT.**

In this issue, defendant claims the search of his vehicle was illegal and that trial counsel was ineffective for not raising the claim at trial.

The trial court being familiar with the facts of the case and the trial, made specific findings of fact and conclusions of law.

The State will now assert the trial court was correct in denying relief as such a claim is procedurally barred as having been waived.

In the order denying relief the trial court found the issue ‘meritless’ finding that the search of the car was evidence of a crime. *Franklin v. State*, 587 So.2d 905 (Miss. 1991). Additionally, as legal grounds for denying relief, the trial court found the search was permissible as inventory of an impounded vehicle. *O’Connell v. State*, 9334 So.2d 306 (Miss.App. 2005).

These citations and rationales are consistent with the rationale and rulings in *Rankin v. State*, 636 So.2d 652 (Miss. 1994).

Accordingly, the issue is truly without merit.

**V. (IV. Def. Br.)**  
**THE ISSUE OF THE ADMISSIBILITY OF ‘THE PIPE’ WAS**  
**ADDRESSED ON DIRECT APPEAL AND IS NOW**  
**PROCEDURALLY BARRED.**

Lastly, defendant claims ‘ineffective assistance’ based upon objection or lack of same, to the admission of a pipe as evidence against him.

In the direct appeal the appellate court specifically noted:

¶33. It was unnecessary for the state to prove that the lead pipe, found under the van at the crime scene, was the actual weapon used in the commission of the murder. See *Rhodes v. State*, 676 So.2d 275, 283 (Miss.1996). When there is evidence that the weapon could have caused the injury, and some connection between the defendant and the weapon exists, the object is deemed relevant and admissible. *Id.* (citing *Ethridge v. State*, 418 So.2d 798 (Miss.1982) and *Stokes v. State*, 518 So.2d 1224, 1227 (Miss.1988)).

*Lattimore v. State*, 958 So.2d 192, 202 (Miss. 2007)

Consequently, a claim of ‘ineffective assistance’ being raised in post-conviction for an issue that was addressed on direct appeal and found without merit is procedurally barred.

¶ 11. This Court addressed the issue of whether the trial court properly denied the motion to transfer venue on Gray's direct appeal. Thus, Gray is now procedurally barred by res judicata from relitigating this issue through post-conviction relief. Miss.Code Ann. § 99-39-21(3) (1972 & Supp.2003). Furthermore, Gray cannot relitigate this issue in the guise of an ineffective assistance of counsel claim. *Williams v. State*, 722 So.2d 447, 449 (Miss.1998). On the merits, Gray offers as evidence to support his request for post-conviction relief only the motion to transfer venue and attached newspaper articles presented to the trial court. However, Gray does not present new or additional evidence not offered or

unavailable to the trial court regarding the issue of community prejudice and whether he could receive a fair trial in Newton County. Accordingly, this issue is without merit.

*Gray v. State*, 887 So.2d 158 (Miss. 2004).

Not only is this issue procedurally barred it is also without merit in law.

*Lattimore v. State*, 958 So.2d 192, 202 (¶33)(Miss. 2007).

No relief should be granted on this allegation of trial court error.



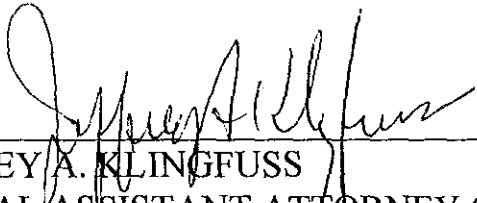
## CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the trial court denial of post-conviction relief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

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## CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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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