IN THE COURT OF APEALS OF THE STATE OF MISSISSIPPI

SAMMIE JOHNSON	APPELLANT
V.	NO. 2009-CP-0486
STATE OF MISSISSIPPI	APPELLEE

REPLY BRIEF OF THE APPELLANT

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THAT THE CIRCUIT COURT DID ERR IN DENYING RELIEF ON THE PRISONER'S MOTION WITHOUT AN EVIDENTIARY HEARING.

ARGUMENT

The standard of review for a trial court's denial of a petitioner's motion for post conviction relief was stated in *Arnold v. State*, 912 So.2d 202 (Miss. Ct. App. 2005). In that case, the Court held that it would not disturb such a denial unless it was clearly erroneous. *Id.* However, the Court held that questions of law were to be reviewed de novo. *Hoskins v. State*, 934 So. 2d 326, 328 (Miss. Ct. App. 2006).

Appellant, herein after referred to as Johnson, would argue that said denial of his initial filing was both clearly erroneous and contrary to the rule of law. While Johnson has filed previous motions for post conviction relief, his current claim is neither time barred nor barred under the success writ doctrine. Furthermore, his claim has merit.

First, Johnson will address the issue of whether his current claim is time barred. Under Mississippi Code Annotated § 99-39-5, a prisoner has only three years to bring certain claims in his post conviction relief motion. However, there are three grounds whereby a prisoner is not subject to a time limitation. Mississippi Code Annotated § 99-39-5(2). That portion of the statute reads as follows:

> "...Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence

> or that he has evidence, not reasonably discoverable 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."

The Court reiterated this in *Johnson v. State*, 2006-CP-00149-COA (Miss. Ct. App. 2007). Since the central argument of Johnson's motion is that he has newly discovered evidence, he is excepted from the three-year time bar. Therefore, it was error for the trial court to make such a determination.

Secondly, Johnson's motion was also denied as being a successive writ. This is likewise an erroneous ruling. Under most circumstances, once a prisoner has been denied relief after filing a motion for post-conviction relief, a subsequent filing may be barred under the Mississippi Uniform Post Conviction Collateral Relief Act § 99-39-23(6). Johnson does not deny this. However, there are exceptions to this rule. In *Freshwater v. State*, 914 So.2d 328, 329 (Miss. Ct. App. 2005), the Court stated:

> "Aside from insanity, (which only applies in death penalty cases), there are *only* two exceptions allowed for a prisoner to defeat the successive[-]writ bar: (1) where there has been an intervening decision by the United States Supreme Court, or the Mississippi Supreme Court, in which the prisoner can show adversely affected the outcome of his conviction or sentence, or that he has newly discovered evidence which if it had been introduced at trial would have caused a different result, and (2) where the prisoner claims that his sentence has expired or his probation, parole, or conditional release has been unlawfully revoked."

Therefore, the same argument applies. The successive writ bar does not apply to a post-conviction relief motion based upon newly discovered evidence. Therefore, it was error for the trial court to make such a ruling.

Next, Johnson turns his attention to the actual merits of his claim. The State, in its brief, has correctly stated the hurdles that Johnson must overcome in showing that a

new trial is warranted. It must appear that the evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered prior to the trial in the exercise of due diligence; (4) is material to the issue; and (5) is not merely cumulative or impeaching. *Witherspoon v. State,* 767 So.2d 1065, 1067 (Miss. Ct. App. 2000). The State would further require Johnson to explain how he received this newly discovered evidence. However, the law does not require Johnson to shoulder this burden. Finally, the State also argues that the affidavit is vague. This is not the case.

To fully understand the ramifications of this evidence, a further understanding of the facts is necessary. Johnson and Swanier (the affiant of the newly discovered evidence) along with a third person were indicted for capital murder under the concept of murder-for-hire. The indictment alleges that Johnson hired Swanier to commit the underlying murder. The newly discovered evidence being offered would probably change the result because Swanier is admitting to the murder while at the same time exonerating Johnson of any involvement. The fact that Swanier is not denying his own involvement gives him some measure of credibility.

The second and third requirements will be discussed jointly. This evidence has been discovered since trial and could not have been discovered prior to trial in the exercise of due diligence because Swanier was a co-defendant. Due to his status as co-defendant Swanier had a Fifth Amendment right against self-incrimination. Furthermore, Johnson was being told by his trial counsel that Swanier was going to testify against him. Johnson's only recourse at the time was to risk a trial and the death penalty in order to

cross-examine and determine what Swanier's actual testimony would be. In other word's had Johnson been in possession of Swanier's affidavit at the time of trial, he never would have pled.

The newly discovered evidence is material to the issue of Johnson's guilt, and is not ambiguous as the State would argue. In his affidavit, Swanier clearly states that he killed the victim, and that he (Swanier) was not hired by Johnson to do it. This is not the case of a defendant saying that neither he nor his co-defendant committed the crime, but rather of a co-defendant accepting the full responsibility of his own actions. Since the basis of the indictment and conviction is that Johnson hired Swanier to murder the victim, the evidence is not only material, but crucial. Finally, the evidence is not merely cumulative or impeaching. It completely exonerates Johnson.

Finally, the State for all intents and purposes argues that the point is moot because Johnson pled guilty instead of going to trial. They would argue that a guilty plea precludes any potential post-conviction relief. The Mississippi Supreme Court has held otherwise. In *Bell v. State,* 759 So.2d 1111 (Miss.1999), the Court granted an evidentiary hearing on the basis of newly discovered evidence even though Bell, who had pled guilty, had not timely filed his PCR petition. In our present case, Johnson has timely filed his motion. Additionally, this Court recognized the newly discovered evidence exception in the context of guilty pleas in the following cases: *Gaston v. State,* 922 So.2d 841 (Miss.Ct.App.2006); *Sykes v. State,* 919 So.2d 1064 (Miss.Ct. App.2005); *Garlotte v. State,* 915 So.2d 460 (Miss.Ct.App.2005); *Freshwater v. State,* 914 So.2d 328 (Miss.Ct.App.2005); *McGriggs v. State,* 877 So.2d 447 (Miss.Ct. App.2003); *Donnelly v.*

State, 841 So.2d 207 (Miss.Ct.App.2003); *Wright v. State*, 821 So.2d 141 (Miss.Ct.App.2000). Therefore, a guilty plea does not prevent Johnson from bringing forth his claim.

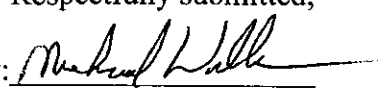
Furthermore, the State would argue that because Johnson pled guilty, he is in fact guilty. What Johnson is actually guilty of is self-preservation. Johnson was on trial for capital murder. By exercising his Constitutional rights and insisting on a trial, he jeopardized his very life. It is common practice in capital cases for the State to make a plea offer of life imprisonment. It is even more common for trial counsel to persuade defendants to take such a plea. A defense attorney will consider it a win if his client avoids the death penalty.

Although counsel for Johnson is without the benefit of the trial court transcripts, it would appear that for all intents and purposes Johnson's plea was a best interest plea. *Harding v. State*, No. 2008-CA-01216-COA (Miss. Ct. App. 2009). While counsel cannot state with certainty and doubts there is an language in the plea colloquy to support said contentions, this Court has stated that it has found "no rule of law that requires a defendant to state on the record at a plea hearing that she is entering the plea because it is in her best interest." *Id.* While Johnson may not have protested his innocence, he did face the death penalty upon trial, had strong evidence of guilt against him in the form of co-defendant testimony (which is now being recanted), and risked the denial of his plea if he did not affirmatively answer the trial court's questions as to guilt. In other words, a capital defendant is unlike any other defendant. The only chance he has to exonerate himself carries the ultimate risk, his life. It is unjust to fault a man for wanting to live.

CONCLUSION

The trial court acted erroneously when it summarily denied Johnson's motion for post-conviction relief. The statutes and case law of the State of Mississippi clearly establish that motions based upon newly discovered evidence are subject to neither time bar limitations nor the prohibition against successive writs. In addition, Johnson's motion clearly has merit in that it presents evidence by an indicted co-defendant which completely exonerates Johnson. At the very least, this matter should be remanded back to the trial court in order to conduct an evidentiary hearing.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I, Michael Williams, counsel for Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of the Appellant to the following:

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