IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TAFOREST CHANDLER — APPELLANT

VS. — NO. 2009-CP-1469-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATE OF MISSISSIPPI **APPELLEE**

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STATEMENT OF THE CASE

In this appeal from his quest in a state trial court for time-barred post-conviction relief sought in the wake of his guilty pleas to the sale of cocaine and drive-by shooting, young TAFOREST CHANDLER, proceeding *pro se*, seeks to exempt himself from the time bar based upon "exceptions in §99-39-5 MCA (1992)." *See* Brief for Appellant at unnumbered page 3, ¶5, where Chandler mentions "fundamental rights."

The "fundamental rights" exception relied upon by Chandler involves a single issue targeting allegedly ineffective assistance of counsel. (Brief for Appellant at unnumbered page 3, ¶5)

Chandler seeks vacation of his allegedly "unduly harsh and excessive sentence of 25 years," and imposition of a lesser sentence allowable by law.

Chandler does not assail in any manner the integrity of his convictions via guilty plea.

STATEMENT OF FACTS

TaForest Chandler is a twenty (20) year old African-American male with an 8th grade education and personality disorders diagnosed at the age of ten (10). (C.P. at 9, 20, 54-56)

On August 26, 2002, following his indictments for the sale of cocaine (C.P. at 5) and drive-by shooting (C.P. at 30), Chandler entered in the Circuit Court of Lowndes County, John M. Montgomery, former circuit judge, presiding, pleas of guilty to the sale of cocaine and drive-by shooting. (C.P. at 17-29)

Chandler told Judge Montgomery he was pleading guilty because he committed the offenses. (C.P. at 10, 24-25) Pursuant to the State's recommendation, Chandler was thereafter sentenced to serve in the MDOC fifteen (15) years for the sale of cocaine and ten (10) years for drive-by shooting, said sentences to run consecutively. (C.P. at 26-27, 41)

Three (3) additional cause numbers were thereafter retired to the files ". . . as part of a plea agreement wherein Mr. Chandler pled guilty this day in the drive-by shooting and sale of cocaine charges." (C.P. at 8, 26-28)

Seven (7) years later, on August 10, 2009, Chandler filed in the Circuit Court of Lowndes County a handwritten motion styled "Motion for Reduction of Sentence." (C.P. at 44-56) Attached as an exhibit to that motion was a discharge summary prepared in October of 1992 reflecting that Chandler, at age ten (10), suffered from a severe oppositional defiant disorder, mild attention deficit, and borderline mental retardation. (C.P. at 5-27) Chandler had been admitted to the Laurel Wood Center in Meridian on October 1, 1992, for evaluation and treatment. He was discharged on October 28, 1992. (C.P. at 1-3)

Chandler complains in his appellate brief his court-appointed lawyer was ineffective during Chandler's guilty pleas because Mr. Farrow, in potential mitigation of Chandler's sentence, failed

to point out to Judge Montgomery Chandler's personality defects and mental deficiencies diagnosed at age ten (10).

We note, however, that Judge Montgomery had a presentence report before him at the time of sentencing and was fully capable of evaluating Chandler's mental condition at the time of his guilty pleas. Clearly, the discharge summary does not constitute new evidence requiring a reduction of sentence.

We also note the following colloquy taking place between Chandler and Judge Montgomery during the plea-qualification hearing:

> Q. [BY JUDGE MONTGOMERY:] Are you now under the influence of any drugs or alcohol or undergoing any mental treatment today at this time?
>
> A. [BY CHANDLER:] No sir. (C.P. at 23)

In addition to all this, paragraph 11. of Chandler's petition to enter a guilty plea states, under the trustworthiness of the official oath, the following: "[M]y physical and mental health is presently satisfactory; I am not under the influence of any drugs or intoxicants, nor was I at the time the offense was committed, . . ." (C.P. at 9)

The circuit court, Lee J. Howard, presiding, dismissed summarily Chandler's motion for sentence reduction on the basis of a time bar. (C.P. at 57; appellee's exhibit A, attached) Specifically, he found that Chandler's " . . . Motion is time barred and should be, and hereby is, overruled and denied." (C.P. at 57) *See* appellee's exhibit A, attached.

Judge Howard found as a fact and concluded as a matter of law that " . . . the motion meets none of the exceptions of Section 99-39-5 MCA (1972), since proof of no new evidence has appeared which was not available when the case could have gone to trial, no intervening higher court decision has passed, nor is the Petitioner being detained on an expired sentence." (C.P. at 57;

appellee's exhibit A, attached)

We concur.

Here and now Chandler invites this Court to reverse the trial judge's summary dismissal and vacate and/or set aside his allegedly "unduly harsh and excessive sentence of twenty-five years and impose a lesser sentence allowable by law." (Brief for Appellant at unnumbered page 3, ¶7; C.P. at 9)

We respectfully submit Judge Howard found, although implicitly, no error involving fundamental rights, or any other rights, sufficient to exempt Chandler from the statute barring his belated claims. In this posture, Chandler's motion for post-conviction relief was correctly denied by the lower court as time-barred. (C.P. at 57; appellee's exhibit A, attached) This ruling was both judicious and correct.

SUMMARY OF ARGUMENT

"The burden of proving that no procedural bar exists falls squarely on the petitioner." **Crawford v. State,** 867 So.2d 196, 202 (Miss. 2003).

Chandler's post-conviction claims were clearly time-barred by virtue of Miss.Code Ann. § 99-39-5(2). **Steward v. State,** 18 So.3d 895 Ct.App.Miss. 2009); **Stroud v. State,** 978 So.2d 1280 (Ct.App.Miss. 2008); **Bester v. State,** 976 So.2d 939 (Ct.App.Miss. 2007), reh denied, cert denied 977 So.2d 343 (2007); **Trotter v. State,** 907 So.2d 397 (Ct.App.Miss. 2005); **Sones v. State,** 828 So.2d 216 (Ct.App.Miss. 2002).

Chandler recognizes this impediment to judicial review but invites this Court to "disregard the time bar and/or grant the requested relief . . ." Brief for Appellant at unnumbered page 3, ¶7.

We, in turn, invite this Court to reject Chandler's invitation.

Claims of ineffective counsel are subject to the time bar. *See* **Luckett v. State,** 582 So.2d

428, 430 (Miss. 1991) [Issue V targeting ineffective assistance of counsel among issues that were time barred.]; **Wicker v. State,** 16 So.3d 706 (Ct.App.Miss. 2009), reh denied, cert denied 17 So.3d 99 (2009).

The fundamental rights exemption provides no basis for any relief grounded upon a denial of due process or upon any other grounds. Chandler received all the process he was due.

ARGUMENT

CHANDLER'S POST-CONVICTION MOTION FOR SENTENCE REDUCTION FILED IN 2009 AND BASED UPON, *INTER ALIA*, AN ALLEGEDLY EXCESSIVE SENTENCE IMPOSED IN 2002, WAS TIME-BARRED BY VIRTUE OF THE THREE (3) YEAR STATUTE OF LIMITATIONS SET FORTH IN SECTION 99-39-5(2).

Appellee notes at the outset that Chandler's motion for sentence reduction filed in the trial court does not contain a claim that Chandler's lawyer was ineffective. Rather, that claim is raised for the first time on appeal. It is devoid of merit for this reason if for no other. **Foster v. State,** 716 So.2d 538, 540 (Miss. 1998), citing **Berdin v. State,** 648 So.2d 73, 80 (Miss. 1994).

We respectfully submit the trial judge was eminently correct in denying the requested relief on the basis of a time bar. Indeed, there should be no legitimate question about it. (C.P. at 57; appellee's exhibit A, attached)

Post-conviction relief claims based on allegedly involuntary guilty pleas are subject to the three (3) year statute of limitations and the time bar. **Luckett v. State,** *supra*, 582 So.2d 428 (Miss. 1991); **Wallace v. State,** 823 So.2d 580 (Ct.App.Miss. 2002). *See also* **Austin v. State,** 863 So.2d 59 (Ct.App.Miss. 2003), reh denied [Claim that defendant's guilty plea to rape was not knowing, intelligent, and voluntary was the type of claim that fell squarely within the three-year statute of limitations governing post-conviction relief.]

The same is true to no less extent when only the sentence imposed is assailed in a post-conviction environment. **Owens v. State,** 17 So.3d 628 (Ct.App.Miss. 2009).

Chandler's complaints are controlled by the following language found in **Trotter v. State,** *supra*, 907 So.2d 397, 402 (Ct.App.Miss. 2005), reh denied, cert denied.

> There is one judicially-created exception to the three-year time bar imposed on most post-conviction relief motions. "Errors affecting fundamental constitutional rights may be excepted from procedural bars which would otherwise prohibit their consideration." *Smith v. State,* 477 So.2d 191, 195-96 (Miss. 1985). The circuit court dismissed as time-barred Trotter's claim that he was subjected to double jeopardy, his claim that his guilty plea was involuntary, and **his claim that he received ineffective assistance of counsel. In dismissing these claims as time-barred, the court found that these claims affected none of Trotter's fundamental rights.** The court cited *Luckett v. State,* 582 So.2d 428, 430 (Miss. 1991), which dismissed as time-barred the defendant's assignment of errors concerning the validity of the indictment, claims of double jeopardy, claims that his guilty plea was involuntary, and **claims of ineffective assistance of counsel. The judge's application of the law was correct, and we affirm.** [emphasis ours]

Same here.

No fundamental rights have been implicated by Chandler's claim that his sentences, which were well within statutory limits, were excessive or constituted cruel and unusual punishment.

Miss.Code Ann. §99-39-5(2) identifies, in plain and ordinary English, the time limitations for motions to vacate guilty pleas, judgments of conviction obtained other than by plea, and erroneous sentences filed under the Mississippi Uniform Post-Conviction Collateral Relief Act. It reads as follows:

> (2) **A motion for relief under this chapter shall be made** within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the supreme court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or **in case of a guilty plea, within three (3) years after entry of the**

> **judgment of conviction.** 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. Likewise excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. [emphasis supplied]

The post-conviction relief act applies prospectively from its date of enactment, April 17, 1984. Individuals such as TaForest Chandler who entered pleas of guilty or were otherwise convicted *after* April 17, 1984, have three (3) years from the date of the entry of their conviction via guilty plea to file their petition for post-conviction relief. **Lockett v. State,** 656 So.2d 68, 71 (Miss. 1995); **Lockett v. State,** 656 So.2d 76, 78-79 (Miss. 1995); **Freelon v. State,** 569 So.2d 1168, 1169 (Miss. 1990); **Jackson v. State,** 506 So.2d 994, 995 (Miss. 1987); **Odom v. State,** 483 So.2d 343, 344 (Miss. 1986).

In **Odom,** *supra,* we find the following language:

> * * * * * This act applies *prospectively* from its date of enactment, April 17, 1984. Individuals convicted prior to April 17, 1984, have three (3) years from April 17, 1984, to file their petition for post conviction relief. **Those individuals convicted after April 17, 1984, generally have three (3) years in which to file a petition for relief as provided for in the UPCCRA, Miss. Code Ann. §99-39-5(2) (Supp. 1985),** . . . [emphasis supplied]

Young Chandler entered his pleas of guilty to sale of cocaine and drive-by shooting on August 26, 2002, well *after* the enactment on April 17, 1984, of the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA), Miss.Code Ann. §99-39-1 *et seq.* (C.P. at 17-29) Pursuant to a generous recommendation by the State, Chandler was sentenced to serve fifteen (15)

years for the sale of cocaine and ten (10) years for drive-by shooting, said sentences to run consecutively as opposed to concurrently. (C.P. at 26-27)

Upon the State's recommendation, three (3) other cause numbers were passed to the files, *viz.*, an indictment in cause number 2001-0006 for "burglary of a dwelling [house]", "a two-count uttering forgery indictment" in cause number 2001-0338-CR1, and an indictment for "burglary and larceny of a dwelling [house]" in cause number 2001-0277-CR1. (C.P. at 26)

It is no secret that Chandler had three (3) years from August 26, 2002, the date of the entry of the judgments of conviction for sale of cocaine and drive-by shooting, to file in the trial court his motion for sentence reduction or to otherwise seek post-conviction collateral relief.

Consequently, the deadline for filing Chandler's post-conviction papers was on or about August 26, 2005.

Chandler's motion for reduction of sentence was not filed, however, until on or about August 10, 2009, four (4) years after the time for assailing his sentence following guilty pleas had expired. This was excruciatingly tardy and too little too late. The old adage that "it's better late than never," once again, does not apply here.

The post-conviction relief act provided Chandler with a statutory procedure for assailing his sentence within a reasonable time. Chandler, however, missed the window of opportunity by four (4) years.

The three year statute of limitations bars a post-conviction relief motion absent a showing the case falls within any one of the three statutory exceptions. **Phillips v. State,** 856 So.2d 568 (Ct.App.Miss. 2003).

We concur with the finding made implicitly by the trial judge that the case at bar clearly does not exist in this posture. *See* appellee's exhibit A, attached.

In the final analysis, none of the exceptions, statutory or judicially created, to the time bar, which is alive and well, apply to this case. The findings and conclusions made by the trial judge in his order denying relief were eminently correct and not clearly erroneous.

Because Chandler entered a plea of guilty, he also waived any defenses he might have had to the charges. **Taylor v. State,** 766 So.2d 830, 835 (Ct.App.Miss. 2000). This includes the lack of criminal responsibility, if any, because of mental defects. (C.P. at 48)

Miss.Code Ann. § 99-39-11 (Supp. 1999) reads, in its entirety, as follows:

> (1) The original motion together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.
>
> **(2) *If 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.***
>
> (3) If the motion is not dismissed under subsection 2 of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.
>
> (4) This section shall not be applicable where an application for leave to proceed is granted by the supreme court under section 99-39-27. [emphasis added]

It does. He did. And he was.

Chandler's belated claims were time-barred. They were manifestly without merit as well.

CONCLUSION

"This Court reviews the denial of post-conviction relief under an abuse of discretion standard." **Phillips v. State,** 856 So.2d 568, 570 (Ct.App.Miss. 2003). No abuse of judicial discretion has been demonstrated here.

Chandler is time barred from bringing his post-conviction claim at this late date. He failed

to file his motion for post-conviction relief within the three-year time frame prescribed by Miss.Code Ann. §99-39-5(2), and he fails to make a claim falling under any of the recognized exceptions to the statutory time bar.

Appellee respectfully submits this case is devoid of error. Accordingly, summary dismissal, as time-barred, of Chandler's post-conviction motion for Reduction of Sentence should be forthwith affirmed.

Respectfully
submitted,

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IN THE CIRCUIT COURT OF LOWNDES COUNTY, MISSISSIPPI
JULY TERM, 2009

TAFOREST D. CHANDLER — PETITIONER

VERSUS — CAUSE NO. 2003-0022-CV1

STATE OF MISSISSIPPI — RESPONDENT

ORDER

Came on to be heard this day the above styled and numbered post conviction matter on Motion for Post Conviction Relief filed by the Petitioner herein on August 10, 2009, concerning Lowndes County Criminal Cause Numbers 2001-0231-CR1 and 2001-0663-CR1 in which the Petitioner pled guilty and was sentenced on August 26, 2002.

The Court, after having considered same finds that said Motion is filed past the statute of limitations provided in Section 99-39-5 MCA (1972), which allows for a post-conviction motion to be filed three years after a conviction following a plea of guilty or three years following a ruling on direct appeal following trial. Further, the motion meets none of the exceptions of Section 99-39-5 MCA (1972), since proof of no new evidence has appeared which was not available when the case could have gone to trial, no intervening higher court decision has passed, nor is the Petitioner being detained on an expired sentence. The Court is therefore of the opinion that said Motion is time barred and should be, and hereby is, overruled and denied.

IT IS THEREFORE ORDERED that the Post-Conviction Motion filed by the Petitioner herein be overruled and denied. Further, the Circuit Clerk is directed to send a copy of this Order to all parties.

SO ORDERED, this the 21st day of August, 2009.

CIRCUIT JUDGE

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EXHIBIT
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CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Lee J. Howard
Circuit Court Judge, District 16
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Honorable Forrest Allgood
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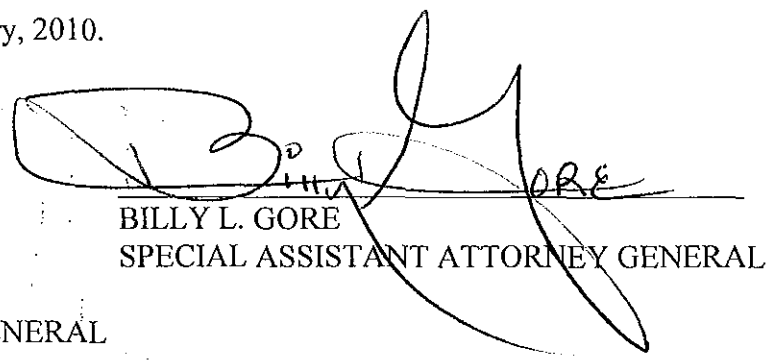
This the 16th day of February, 2010.



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