

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

**LACARLOS MOSS**

**APPELLANT**

**VS.**

**NO. 2009-CP-2027-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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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 plea to attempted armed robbery, young LACARLOS MOSS, proceeding *pro se*, seeks to exempt himself from the time bar based upon “exceptions in §99-39-5 MCA (1992).” *See* Brief of Appellant at 9, where Moss mentions both “plain error” and a violation of a “fundamental right.”

The “fundamental rights” exception relied upon by Moss targets what we perceive to be an involuntary plea to charges made in an allegedly defective indictment and information. Moss also assails a written waiver of indictment which he does not deny signing as well as his plea to an allegedly defective affidavit and criminal information both of which, Moss argues, were never filed with the court. (Brief of Appellant at pp. 4-10)

Moss seeks vacation of his conviction and the sixteen (16) year sentence imposed following his guilty plea. He requests immediate release. (Brief of Appellant at 10)

A revocation of Moss's probation with an additional sentence of four (4) years was also thrown into the mix. (C.P. at 14-15, ¶¶ 7 and 10)

Regrettably, Moss's claims are time barred.

### **STATEMENT OF FACTS**

LaCarlos Moss is a twenty (20) year old African-American male with an 11<sup>th</sup> grade education and a prior conviction for dwelling house burglary. (C.P. at 13, 15)

On January 23, 1998, Moss, after signing a waiver of indictment and agreeing to plead guilty to a criminal information charging him with attempted armed robbery (C.P. at 9-11), entered a plea of guilty in the Circuit Court of Lauderdale County, Robert W. Bailey, circuit judge, presiding, (C.P. at 13-21)

Moss told Judge Bailey in ¶15 of his petition to enter plea of guilty he was pleading guilty because he attempted to rob a man and a woman at a Motel 6. (C.P. at 16)

Pursuant to the State's recommendation, Moss was thereafter sentenced to serve sixteen (16) years in the MDOC consecutive to any other sentence previously imposed. (C.P. at 20)

Fast forward eleven (11) years.

On November 6, 2009, Moss filed in the Circuit Court of Lauderdale County a handwritten motion styled "Petition for Writ of Habeas Corpus" in which he alleged his plea was involuntary because his indictment, waiver of indictment, and criminal information were all defective for various reasons somewhat difficult to decipher. (C.P. at 2-25)

Judge Williamson correctly treated Moss's papers as a motion for post-conviction collateral relief filed under the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss.Code Ann. §§ 99-39-1 *et. seq.* See **Grubb v. State**, 584 So.2d 786 (Miss. 1991).

The circuit court, Lester F. Williamson, Jr. presiding, dismissed summarily Moss's motion

for post-conviction relief on the basis of a time bar. (C.P. at 29-31; appellee's exhibit A, attached) Specifically, he found that Moss's "... post-conviction request for relief is clearly beyond the three year statute of limitations provided for by Miss. Code Ann. §99-39-5(2).

Stated differently, Judge Williamson found "... that Petitioner's post-conviction petition for relief is time-barred." (C.P. at 30)

Judge Williamson also found as a fact and concluded as a matter of law that "... the Petitioner has failed to demonstrate or even allege any exception that would allow him to file a post-conviction petition outside the three year statute of limitations." (C.P. at 30; appellee's exhibit A, attached)

We concur.

Here and now Moss invites this Court to reverse the trial judge's summary dismissal and vacate and/or set aside his sixteen (16) year sentence and release him. (Brief of Appellant at 10)

We respectfully submit Judge Williamson found, although implicitly, no plain error or error involving fundamental rights, or any other rights, sufficient to exempt Moss from the statute barring his belated claims. In this posture, Moss's motion for post-conviction relief was correctly denied by the lower court as time-barred. (C.P. at 29-31; 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).

Moss'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); **Little v. State**, 918 So.2d 97 (Ct.App.Miss. 2006); **Trotter v. State**, 907 So.2d 397 (Ct.App.Miss. 2005); **Sones v. State**, 828 So.2d 216 (Ct.App.Miss. 2002).

Moss may or may not recognize this impediment to judicial review. If the former is true, he would invite this Court to disregard the time bar and/or grant the requested relief based upon “plain error” and/or the denial of “a fundamental right.” (Brief of Appellant at 9)

We, in turn, invite this Court to reject Moss’s invitation.

Claims of defective indictments are subject to the time bar. *See Lockett v. State*, 582 So.2d 428, 430 (Miss. 1991) [Issue II targeting defective indictment among issues that were time barred.]

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

## ARGUMENT

### **MOSS’S POST-PLEA MOTION FOR POST-CONVICTION RELIEF FILED IN 2009 AND BASED UPON, *INTER ALIA*, AN INVOLUNTARY GUILTY PLEA ENTERED IN 1998, WAS TIME-BARRED BY VIRTUE OF THE THREE (3) YEAR STATUTE OF LIMITATIONS SET FORTH IN SECTION 99-39-5(2).**

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 29-31; 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. **Lockett 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).

Moss appears to argue, *inter alia*, that the trial court was without jurisdiction to entertain his plea because neither the criminal affidavit (C.P. at 11) nor the proposed indictment substituted as an information (C.P. at 12) were ever filed with the court. (Brief of Appellant at 4-6)

The waiver of indictment, however, is clearly marked filed on January 23, 1998, and paragraph 1. of the waiver incorporates by reference thereto the affidavit as “attached exhibit “A.” (C.P. at 9)

Paragraph 4. of the waiver refers to the “proposed indictment attached hereto” and states that Moss “ . . . agrees to proceed on the basis of it and the attached information and/or affidavit regarding the facts surrounding the charge in the indictment.” (C.P. at 9)

Time bar notwithstanding there is no merit to Moss’s claims which are without merit on their face.

Moss’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 Moss's claim his proposed indictment, waiver of indictment, and criminal information were so inadequate and defective as to render his guilty plea involuntary.

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 LaCarlos Moss 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 Moss entered his plea of guilty to attempted armed robbery on January 23, 1998, 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 13-21) Pursuant to a recommendation by the State, Moss was sentenced to serve sixteen (16) years for the attempted robbery with a firearm, said sentence to run consecutively to any other sentence previously imposed. (C.P. at 20)

It is no secret that Moss had three (3) years from January 23, 1998, the date of the entry of the judgment of conviction for attempted armed robbery, to file in the trial court his motion for post-conviction collateral relief.

Consequently, the deadline for filing Moss's post-conviction papers was on or about January 23, 2001.

Moss's motion for post-conviction relief was not filed, however, until on or about November 6, 2009, over eight (8) years after the time for assailing his conviction and sentence following guilty plea 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 Moss with a statutory procedure for assailing his conviction and sentence within a reasonable time. Moss, however, missed the window of opportunity by eight (8) 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 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 Judge Williamson in his order denying relief were eminently correct and not clearly erroneous.

Because Moss entered a valid plea of guilty, he also waived any non-jurisdictional defects in his indictment or information. **Drennan v. State**, 695 So.2d 581, 584 (Miss. 1997) (“[A] valid guilty plea . . . admits all elements of a formal charge and operates as a waiver of all non-jurisdictional defects contained in an indictment [or information] against a defendant.”), citing various cases; **Hunt v. State**, 11 So.3d 764 (Ct.App.Miss. 2009); **Swift v. State**, 6 So.3d 1108 (Ct.App.Miss. 2008), reh denied, cert denied 11 So.3d 1250 (2009), cert denied 130 S.Ct. 100 (2009).

Although there are two exceptions where a guilty plea does not waive a defect in an indictment, neither one of those exceptions apply here.

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.

Moss'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.

Moss 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 Moss's post-conviction motion for post-conviction relief should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

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FILED  
IN THE CIRCUIT COURT OF LAUDERDALE COUNTY  
THE STATE OF MISSISSIPPI SEP 19 AM 10:18

LACARLOS MOSS

*Anna Grace Johnson* PETITIONER  
CIRCUIT CLERK

VS.

CAUSE NO. 09-144(W)

STATE OF MISSISSIPPI

RESPONDENT

**ORDER DENYING MOTION FOR POST-CONVICTION COLLATERAL RELIEF**

THIS DAY came to be heard a Petition For Writ of Habeas Corpus filed by Petitioner, and the Court having made a full examination of the Motion, together with all the files, records and applicable authority, is of the opinion that said Motion is not well-taken and that Petitioner is not entitled to the relief requested in his Motion for the following reasons:

1.

Miss. Code Ann. § 99-39-3 abolished post-conviction habeas corpus, as well as statutory post-conviction habeas corpus. Post-conviction habeas corpus petitions are considered motions for post-conviction relief under the Uniform Post-Conviction Collateral Relief Act. *Ivory v. State*, 999 So.2d 420, 424 (P10) (Miss. Ct. App. 2008), *McLamb v. State*, 974 So.2d 935, 938 (P9) (Miss. Ct. App. 2008), *Putnam v. Epps*, 963 So.2d 1232, 1234 (P5) (Miss. Ct. App. 2007), *Bynum v. State*, 916 So.2d 534, 536 (P7) (Miss. Ct. App. 2005).

In the case of a guilty plea, a motion for post-conviction relief must be made within three (3) years after the entry of the judgment of conviction. Miss. Code Ann. § 99-39-5(2), *Melton v. State*, 930 So.2d 452, 455 (P9) (Miss. Ct. App. 2006). A petition may be filed after the three year statute of limitations if the prisoner can demonstrate (1) an intervening decision of either the U.S. Supreme Court or the Mississippi Supreme Court which would have adversely affected the



outcome of the conviction or sentence, (2) that he has newly discovered evidence of such a nature that it would have caused a different result in the conviction or sentence, or (3) that the sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Miss. Code Ann. § 99-39-5(2).

The Petitioner filed a Waiver of Indictment on or about January 23, 1998 for the charge of robbery by use of a deadly weapon. He then filed a Petition to Enter a Plea of Guilty for the offense of attempted robbery by use of a deadly weapon on or about January 23, 1998 in Lauderdale County Circuit Court Cause No. 98-001(R). The Lauderdale County Circuit Court accepted the Petition on January 23, 1998, and entered its order adjudicating the Petitioner guilty of the crime of attempted armed robbery by use of a deadly weapon in violation of Miss. Code Ann. §97-3-79. He was sentenced to serve a term of sixteen (16) years, consecutive to any other sentence, with the Mississippi Department of Corrections, and pay costs of \$245.50.

The Petitioner filed the petition now before the Court on or about November 6, 2009, eleven (11) years after the judgment of conviction. Therefore, the Petitioner's post-conviction request for relief is clearly beyond the three year statute of limitations provided for by Miss. Code Ann. §99-39-5(2). *Melton v. State*, 930 So.2d 452,455 (Miss. Ct. App. 2006). (Where judgment of conviction was entered on April 29, 2003 and PCR was filed March 31, 2005, PCR was not time-barred.) Further, the Petitioner has failed to demonstrate or even allege any exception that would allow him to file a post-conviction petition outside the three year statute of limitations. The Court, therefore, finds that Petitioner's post-conviction petition for relief is time-barred.

**IT IS THEREFORE ORDERED AND ADJUDGED** that the Motion for Post Conviction Collateral Relief be and hereby is dismissed. The Law Clerk is directed to mail a



copy of this Order to the Petitioner Lacarlos Moss, and to Honorable Bilbo Mitchell, District Attorney.

**SO ORDERED AND ADJUDGED** this the 19 day of November, 2009.

  
\_\_\_\_\_  
LESTER F. WILLIAMSON, JR., CIRCUIT JUDGE

## 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 Lester F. Williamson, Jr.**

Circuit Court Judge, District 10  
Post Office Box 86  
Meridian, MS 39302

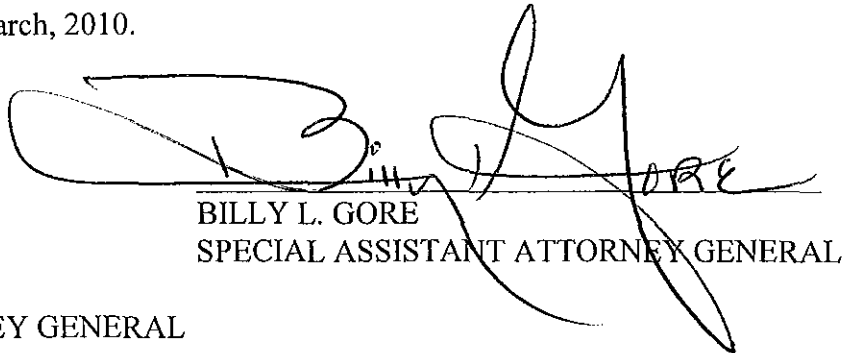
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This the 4th day of March, 2010.



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