IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL WAYNE DAVIS — APPELLANT

VS. — NO. 2007-CP-0264-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL WAYNE DAVIS **APPELLANT**

VS. **NO. 2007-CP-0264-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

On January 29, 2004, Michael Wayne Davis, in the wake of a multi-count indictment, entered open pleas of guilty to manufacture of methamphetamine (Count I), aggravated assault on two police officers (Counts II and III), and recidivism charged under Miss.Code Ann. §99-19-81. (C.P. at 42-43)

Perhaps pursuant to a plea-bargain agreement instigated by Davis's lawyer, a fourth count in Davis's indictment charging possession of methamphetamine was retired to the files. (C.P. at 43)

After accepting Davis's pleas and ascertaining he was a habitual offender, the court sentenced him to serve five (5) years on Count I (manufacture of methamphetamine), thirty (30) years on Count II (aggravated assault), and thirty (30) years on Count III (aggravated assault). The sentences imposed for Counts II and III are to run concurrently. By virtue of Miss.Code Ann. §99-19-81 Davis's sentence is to be served " . . . without hope of parole or probation." (C.P. at 43)

Unhappy over this state of affairs Davis, nearly three years later, filed for post-conviction

relief. In his appeal from denial of post-conviction relief, Davis claims his pleas were involuntary, his indictment defective, and his lawyer ineffective in the constitutional sense.

MICHAEL WAYNE DAVIS appeals from the summary denial of his motion for post-conviction collateral relief - essentially a motion to vacate guilty pleas - filed in the Circuit Court of Harrison County, Jerry O. Terry, Sr. Circuit Judge, presiding.

Davis, who swore, under the trustworthiness of the official oath, he was satisfied with the advice and help his lawyer had given him (C.P. at 37), has changed his mind. (Brief of Appellant at XI-XII)

In a three (3) page order entered by Judge Terry, the court found that Davis's post-conviction claims were plainly or manifestly without merit. Judge Terry summarily denied Davis's motion for post-conviction collateral relief, finding as a matter of fact and concluding as a matter of law that Davis's indictment was proper, that Davis did not receive ineffective assistance of counsel, and that Davis's pleas were freely and voluntarily offered " . . . with full understanding of all the matters set forth in the indictment and in this petition [to enter plea of guilty] and in the certificate of my lawyer . . ." (C.P. at 47)

We respectfully submit Judge Terry did not err in finding Davis's claims to be manifestly or plainly without merit. The trial court's fact-finding is neither "clearly erroneous" nor "manifestly wrong"; rather, it is supported by substantial credible evidence found in the record. **Hersick V State,** 904 So.2d 116, 125 (Miss. 2004); **Brown v. State,** 731 So.2d 595, 598 (Miss. 1999); **Hunt v. State,** 874 So.2d 448, 452 (Ct.App.Miss. 2004).

STATEMENT OF FACTS

Michael Davis. at the time of his guilty plea(s), was a 34-year-old Caucasian male with an 11th grade education. (C.P. at 36-37)

On July 28, 2003, Davis, a recidivist, and two others were indicted for manufacture of methamphetamine (Count I), aggravated assault on peace officers (Counts II and III) and possession of methamphetamine (Count IV). Davis was also charged with recidivism under Miss.Code Ann. §99-19-81, having been twice previously convicted in 1998 of possession of a controlled substance and two counts of uttering a forgery. (C.P. at 28)

On January 29, 2004, Davis entered open guilty pleas to the manufacture of methamphetamine (Count I) and to both counts of aggravated assault on peace officers (Counts II and III). As part of the prosecutor's recommendation, Count IV, possession of methamphetamine, was passed to the files. (C.P. at 36-40, 42-43) Judge Terry thereafter sentenced Davis to serve five (5) years on Count I and thirty (30) years each on Counts II and III, the latter to run concurrently with one another but consecutively with the five (5) year sentence imposed on Count I " . . . for a grand total of thirty-five (35) years to serve . . . without hope of parole or probation . . ." (C.P. at 43)

A copy of the guilty plea transcript is not a matter of record.

A copy of the petition to enter plea of guilty is, on the other hand, a matter of record at C.P. 36-40. In denying post-conviction relief, Judge Terry gave great weight to statements and acknowledgments made by Davis, under the trustworthiness of the official oath, including Davis's assertions he was aware his sentence was up to the Court and he could receive 0 to 90 years, he was satisfied with the advice given by his lawyer, and his guilty pleas were offered freely and voluntarily. (C.P. at 47)

Nearly three (3) years after stating in open court, under the trustworthiness of the official oath, his pleas were both voluntary and intelligent and he was satisfied with the advice and services of his lawyer, Davis changed his mind.

On or about December 21, 2006, Davis filed a motion for post-conviction collateral relief

assailing, in effect, the integrity of his indictment, the voluntariness of his pleas, and the effectiveness of his lawyer, Frederick Lusk. (C.P. at 5-25)

Attached to his motion were Davis's own affidavit and the unsigned affidavit of one, Carol Redmond. (C.P. at 24-25)

Davis argued in his post-conviction papers his plea was involuntary and his lawyer ineffective. According to Davis, Mr. Lusk coerced him into pleading guilty by misadvising him to take an open plea whereby Davis would not receive any more than five (5) years. Davis was allegedly told that after serving two (2) years Lusk would file an appeal for a reduction of sentence and that all of Davis's "good time" would apply toward reduction of his sentence. (C.P. at 3)

Davis also argued in his motion that the habitual portion of his indictment was defective because "a multi-count indictment is inherently defective" and because Davis never served any time; rather, his sentences were suspended. (C.P. at 6-7)

The specific relief requested by Davis was vacation of his conviction as a habitual offender along with his sentence of 35 years and a remand for trial on the merits where " . . . he can and will prove as provided by law his innocence." (C.P. at 13)

In his appeal to this Court, Davis, in a hefty handwritten brief, reasserts these claims and adds new issues not previously presented to the trial court in Davis's motion for post-conviction relief.

SUMMARY OF THE ARGUMENT

A plea of guilty is binding only if it is entered voluntarily and intelligently. **Myers v. State,** 583 So.2d 174, 177 (Miss. 1991). A plea of guilty is voluntary and intelligent when the defendant is informed of the charges against him and the consequences of his guilty plea. **Alexander v. State,** 605 So.2d 1170, 1172 (Miss. 1992).

He was.

Davis was more than adequately advised of the rights he was waiving or giving up by pleading guilty as well as the minimum and maximum sentence. (C.P. at 36-37)

In paragraph 12. of his petition to enter plea of guilty, Davis expressed complete satisfaction with the advice and help given by his lawyer. Davis also acknowledged that in the event he was told by his lawyer he might receive a light sentence, such was merely his lawyer's prediction which was not binding on the court. (C.P. at 37)

In paragraph 13. of the petition to enter plea of guilty, Davis told Judge Terry the following:

> "I was making crystal when the police came and I ran from the building. I fired two shots during the shootout by the police. I did not aim at anyone. I got shot a number of times." (C.P. at 37)

Thus, there are material contradictions between what Davis swore to then and there, *viz.*, satisfaction with his lawyer and a voluntary plea, and what he claims here and now, *viz.*, dissatisfaction with his lawyer and a coerced plea.

When a defendant's claims on a motion to withdraw guilty plea are in contradiction with the guilty plea record, the trial judge, as Judge Terry obviously did here, is entitled to rely heavily on the record of the proceedings. **Bilbo v. State,** 881 So.2d 966 (Ct.App.Miss. 2004); **Richardson v. State,** 769 So.2d 230 (Ct.App.Miss. 2000). *Cf.* **Taylor v. State,** 682 So.2d 359, 364 (Miss. 1996); **Sherrod v. State,** 784 So.2d 256 (Ct.App.Miss. 2001).

Davis's pleas were both knowing and voluntary.

Davis's indictment was neither defective nor infirm; rather, it properly charged Davis with four individual counts as an habitual offender. (C.P. at 26-28)

Davis's voluntary plea(s) of guilty also waived all non-jurisdictional defects in his criminal indictment.

Also waived was Davis's right to have the prosecution prove each element of the offense

beyond a reasonable doubt, including the right to present any defense(s) he might have had to the charges. **Bishop v. State,** 812 So.2d 934, 945 (Miss. 2002); **Anderson v. State,** 577 So.2d 390, 391 (Miss. 1991); **Jefferson v. State,** 556 So.2d 1016, 1019 (Miss. 1989); **Taylor v. State,** 766 So.2d 830, 835 (Ct.App.Miss. 2000).

Davis was not denied the effective assistance of counsel during his guilty pleas because counsel's performance, contrary to Davis's position, was neither deficient nor did any deficiency prejudice Davis. In ruling on this issue Judge Terry applied the correct legal standard. **Strickland v. Washington,** 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); **Williams v. State,** 819 So.2d 532 (Ct.App.Miss. 2001); **Reynolds v. State,** 736 So.2d 500 (Ct.App.Miss. 1999).

Davis has failed to demonstrate that but for counsel's alleged sins of omission or commission, he would not have entered his pleas of guilty or else the jury would have found him innocent had he gone to trial, i.e., the result would have been different.

Davis was well aware his plea was an open plea and that his sentence was up to the judge. Contrary to his claims suggesting otherwise, Davis has failed to establish by a "preponderance of the evidence" he was entitled to any relief. Miss.Code Ann. §99-39-23(7); **McClendon v. State,** 539 So.2d 1375 (Miss. 1989); **Todd v. State,** 873 So.2d 1040 (Ct.App. Miss. 2004).

ARGUMENT

THE RECORD, CONSTRUED IN A LIGHT MOST FAVORABLE TO DAVIS, REFLECTS DAVIS, IN FACT, ENTERED VOLUNTARY PLEAS OF GUILTY TO THE MANUFACTURE OF METHAMPHETAMINE, TWO COUNTS OF AGGRAVATED ASSAULT ON A PEACE OFFICER AND RECIDIVISM.

DAVIS'S CLAIM OF INEFFECTIVE

COUNSEL IS MATERIALLY CONTRADICTED BY THE GUILTY PLEA RECORD. DAVIS HAS FAILED TO SHOW THAT COUNSEL'S PERFORMANCE WAS DEFICIENT AND THAT THE DEFICIENT PERFORMANCE PREJUDICED HIS DEFENSE.

THE INDICTMENT WAS NOT DEFECTIVE. NEVERTHELESS, BY PLEADING GUILTY DAVIS WAIVED ANY NON-JURISDICTIONAL DEFECTS IN THE INDICTMENT.

DAVIS'S VOLUNTARY PLEAS OF GUILTY OPERATED TO WAIVE AND/OR FORFEIT HIS RIGHT TO ASSAIL IN A POST-CONVICTION ENVIRONMENT ALL NON-JURISDICTIONAL RIGHTS OR DEFECTS INCIDENT TO TRIAL, INCLUDING THE RIGHT TO HAVE THE STATE PROVE EACH ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT AND THE RIGHT TO PRESENT ANY DEFENSES TO THE CHARGE.

THE FACT-FINDING MADE BY THE CIRCUIT JUDGE FOLLOWING HIS REVIEW OF DAVIS'S PETITION AND THE RECORD OF HIS PLEAS WAS NEITHER CLEARLY ERRONEOUS NOR MANIFESTLY WRONG.

At the outset we point out that appellant has attached to his brief affidavits that are not found in the official record. (Brief of the Appellant at 59-65) In particular we point to the affidavit of Carol Redmond sworn to and subscribed by Redmond on July 25, 2007, six months *after* Judge Terry had already ruled on Davis's motion for post conviction relief.

This will not do at all. Regrettably, these papers, including Davis's three newly attached

affidavits signed by Davis on August 2, 2007 (C.P. at 59-64), cannot be considered here.

We are told in **Saucier v. State,** 328 So.2d 355, 357 (Miss. 1976), that the Supreme Court can act " . . . only on the basis of the contents of the official record, as filed after approved by counsel for both parties. It may not act upon statements in briefs or arguments of counsel which are not reflected by the record."

The case of **Wortham v. State,** 219 So.2d 923, 926-27 (1969), is particularly applicable. In **Wortham** an affidavit contained in appellant's brief could not be considered on appeal. This court opined:

> * * * * * Appellant attempts to raise this question by including in the brief filed by his counsel a photostatic copy of an affidavit alleged to have been filed in the justice of the peace court. We have always adhered to the rule that we will not consider anything on appeal except what is in the record made in the trial court. **We will not go outside the record to find facts and will not consider a statement of facts attempted to be supplied by counsel in briefs.** The rule is so well settled that it is unnecessary to cite authority to support it, but in spite of this we still get many cases where counsel seek to have us notice facts not in the record. This amounts to an exercise in futility and is a waste of time and effort. It should not be done. [emphasis supplied]

As stated in **Mason v. State,** 440 So.2d 318, 319 (Miss. 1983), this Court " . . . must decide each case by the facts shown in the record, not assertions in the brief, *however sincere counsel may be in those assertions.* Facts asserted to exist must and ought to be definitely proved and placed before [this Court] by a record, certified by law; otherwise, we cannot know them."

In **Genry v. State,** 735 So.2d 186, 200 (Miss. 1999), this Court opined:

> * * * * * * The burden is on the defendant to make a proper record of the proceedings. **Jackson v. State**, 689 So.2d 760, 764 (Miss. 1997); **Russell v. State**, 670 So.2d 816, 822 n. 1 (Miss. 1995); **Lambert v. State**, 574 So.2d 573, 577 (Miss. 1990). This court "cannot decide an issue based on assertions in the brief alone; rather, issues must be proven by the record." **Medina v. State**, 688 So.2d 727, 732 (Miss. 1996); **Robinson v. State**, 662 So.2d 1100, 1104 (Miss. 1995). Accordingly, the matter is not properly before this Court. This assignment of error is without merit.

"We repeat . . . that on direct appeal we are confined to the record before us [and] that record gives us no basis for reversal." **Watson v. State**, 483 So.2d 1326, 1330 (Miss. 1986).

Many of the claims made by Davis in his brief are devoid of merit for this reason alone.

We reiterate!

"The burden is upon the defendant to make a proper record of the proceedings." **Genry v. State,** *supra*, 735 So.2d 186, 200 (Miss. 1999). *See also* **Schuck v. State,** 865 So.2d 1111 (Miss. 2003); **Byrom v. State,** 863 So.2d 836 (Miss. 2003); **Steen v. State,** 873 So.2d 155 (Ct.App.Miss. 2004), reh denied; **Brown v. State,** 875 So.2d 214 (Ct.App.Miss. 2003), reh denied.

Davis also raises issues and makes claims in his brief that were not presented to the trial judge in Davis's motion for post-conviction relief. We point in particular to questions number 1), 2), 4), 5) and 8) of the "Questions Presented" appearing in Davis's brief at pages XI-XII. These issues and claims, raised for the first time in his *pro se* appellate brief, cannot be considered for the first time on appeal. Davis, therefore, is procedurally barred from raising them in the present appeal. **Foster v. State,** 716 So.2d 538, 540 (Miss. 1998), citing **Berdin v.**

State, 648 So.2d 73, 80 (Miss. 1994) ["Because Foster did not raise this issue in his petition for post-conviction relief, its consideration is precluded on appeal."]

Our response in the case at bar addresses those claims raised by Davis in his motion for post-conviction relief and ruled upon by the circuit judge.

Defective Indictment.

Davis complained in his motion for post-conviction relief his indictment was improper because he had never served any confinement or jail time for the two prior offenses relied upon by the State in charging him as a recidivist under Miss.Code Ann. §99-19-81. (C.P. at 7)

The circuit judge found as a fact and concluded as a matter of law that "[t]he fact that Davis may not have served any time is irrelevant." (C.P. at 48) This finding of fact and conclusion of law was neither clearly erroneous nor manifestly wrong.

Miss.Code Ann. §99-19-83 requires *service* of "separate terms of one (1) year or more." §99-19-81, on the other hand, does not require service. Stated differently, actual "service" is not required for sentencing as a recidivist under §99-19-81. *See* **Feazell v. State,** 761 So.2d 140 (Miss. 2000); **Otis v. State**, 853 So.2d 856 (Ct.App.Miss. 2003).

In **Jackson v. State,** 518 So.2d 1219, 1220 (Miss. 1988), we find the following language applicable to Davis's complaint:

> * * * The appellant contends that concurrent sentences are not "separate terms" required by the statute [§99-19-81] for sentencing as a recidivist. There is no merit to this contention. The language of the statute requires simply sentencing to separate terms, specifically omitting the requirement that they must be served separately, **or that they must be served at all.** [emphasis supplied]

Davis also claimed in his motion for post-conviction relief ". . . that under our state's

criminal jurisprudence a multi-count indictment is inherently defective." (C.P. at 16) This argument is devoid of merit because Rule 7.07 of the Uniform Circuit and County Court Rules specifically authorizes multiple count indictments.

Davis's indictment, therefore, was not flawed one whit.

Moreover, assuming his pleas were voluntary, Davis waived his right to challenge the indictment as well as the evidence.

In **Jefferson v. State**, 556 So.2d 1016, 1019 (Miss. 1989), this Court opined:

> We are concerned here with the legal effect of Jefferson's two 1981 guilty pleas. The institution of the guilty plea is well established in our criminal justice process. **A guilty plea operates to waive the defendant's privilege against self-incrimination/2, the right to confront and cross-examine the prosecution's witnesses/3, the right to a jury trial/4 and the right that the prosecution prove each element of the offense beyond a reasonable doubt./5**
>
> **Outside the constitutional realm, the law is settled that with only two exceptions, the entry of a knowing and voluntary guilty plea waives all other defects or insufficiencies in the indictment. [citations omitted]** A defendant's right to claim that he is not the person named in the indictment may be waived if not timely asserted. *Anselmo v. State*, 312 So.2d 712 (Miss. 1975). The principle exception to the general rule is that the failure of the indictment to charge a criminal offense or, more specifically, to charge an essential element of a criminal offense, is not waived. *See Durr v. State*, 446 So.2d 1016, 1017 (Miss. 1984); *Maxie v. State*, 330 So.2d 277, 278 (Miss. 1976). And, of course, a guilty plea does not waive subject matter jurisdiction. [Text of notes 2-5 omitted; emphasis supplied]]

We find in **Anderson v. State,** *supra*, 577 So.2d 390, 391 (Miss. 1991), the following language also applicable to Young's complaint:

> Moreover, **we have recognized that a valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial.** *Ellzey v. State*, 196 So.2d 889, 892 (Miss. 1967). We have generally included in this class "those

> [rights] secured by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as well as those comparable rights secured by Sections 14 and 26, Article 3, of the Mississippi Constitution of 1890." *Sanders v. State*, 440 So.2d 278, 283 (Miss. 1983); *see also Jefferson v. State*, 556 So.2d 1016, 1019 (Miss. 1989). We take this opportunity to specifically include in that class of waivable or forfeitable rights the right to a speedy trial, whether of constitutional or statutory origin.
>
> This view is in accord with that of our sister states. [citations omitted]
>
> This rule also prevails in the federal arena. [citations omitted; emphasis ours]

Stated differently, Michael Davis's voluntary pleas of guilty waived and forfeited all rights and non-jurisdictional defects incident to trial, including the right to a trial by jury, the right to subpoena and call witnesses in his own behalf, the right to a fast and speedy public trial, and the right to assail non-jurisdictional defects found in an indictment or information. **Drennan v. State,** 695 So.2d 581 (Miss. 1997); **Luckett v. State,** 582 So.2d 428 (Miss. 1991); **Anderson v. State,** *supra*, 577 So.2d 390 (Miss. 1991).

Because Davis entered voluntary pleas of guilty, he also waived any defenses he might have had to the charge, including any claim that when he fired two shots at law enforcement authorities he did not aim at anyone. (C.P. at 37)

Involuntary Plea(s).

Davis argues his pleas were involuntary because his lawyer misadvised him that if he entered an open plea of guilty he would not be sentenced to any term longer than five (5) years. Moreover, after two (2) years of incarceration Mr. Lusk would file a motion for reduction of sentence whereby all of Davis's "good time" would be applied to a reduced sentence. (Brief of Appellant at 7) The record in this case fully supports our position and the position of the

circuit judge that Davis entered his pleas "with sufficient awareness of the relevant circumstances and likely consequences." **Young v. State,** No. 2006-CP-00114-COA (¶13) decided March 27, 2007 [Not Yet Reported], citing cases.

Admittedly, the transcript of the plea-qualification hearing is not included in the record filed in this cause.

No matter.

Judge Terry relied heavily on Davis's acknowledgment in paragraph 14. of Davis's petition to enter plea of guilty that Davis offered his plea(s) of guilty "freely and voluntarily and of [his] own accord and with full understanding of all the matters set forth in the indictment and in this petition and the certificate of my lawyer which follows."

The petition to enter plea of guilty was signed by Davis under the trustworthiness of the official oath and with full knowledge that willfully swearing falsely to any material matter under any oath was punishable by imprisonment for 10 years. (C.P. at 38)

The petition reflects in paragraph 7. Davis's awareness that the possible sentence for his crimes was 0 to 90 years and that the duration of the sentence in the wake of an "open plea" was up to the Court. (C.P. at 37) Such materially contradicts Davis's present claims.

The petition reflects in paragraph 14. Davis's acknowledgment in plain and ordinary English that his pleas were freely and voluntarily given. (C.P. at 38) These acknowledgments have got to stand for something. This is especially true where, as here, the circuit judge, in denying post-conviction relief, relied heavily upon Davis's petition to enter plea of guilty and the certificate of his lawyer. *See* **McKenzie v. State,** 856 So.2d 344, 351 (Ct.App.Miss. 2003).

Judge Terry found as a fact Davis's petition to enter plea of guilty materially contradicted Davis's claim that " . . . he was coerced by his attorney to plead guilty and was told he would not

receive more than five years." (C.P. at 47) Judge Terry placed great weight upon the petition to enter plea of guilty signed by Davis as well as the certificate signed by Davis's lawyer. (C.P. at 47)

In **Richardson v. State,** 769 So.2d at 230 (Ct.App.Miss. 2000), the Court of Appeals, citing **Roland v. State,** 666 So.2d 747, 751 (Miss. 1995),

> ". . . concluded that an evidentiary hearing is not necessary if the record of the plea hearing reflects that the defendant was advised of the rights which he now claims he was not aware. *Id.* When the record of the plea hearing belies the defendant's claims, an evidentiary hearing is not required. If the defendant's claims are totally contradicted by the record, the trial judge may rely heavily on the statements made under oath. *Simpson v. State*, 678 So.2d 712, 716 (Miss. 1996). In *Mowdy v. State*, 638 So.2d 738, 743 (Miss. 1994), the court stated: "Where the petitioner's version is belied by previous sworn testimony, for example, as to render his affidavit a sham we will allow summary judgment to stand.*** "

See also **Taylor v. State,** 682 So.2d 359, 364 (Miss. 1996) ["There is a great deal of emphasis placed on testimony by a defendant in front of the judge when entering a plea of guilty."]; **Hull v. State,** 933 So.2d 315 (Ct.App.Miss. 2006) ["A trial judge may disregard the assertions made by a post-conviction movant where, as here, they are substantially contradicted by the court record of proceedings that led up to the entry of a judgment of guilty."]; **Dawkins v. State,** 919 So.2d 92 (Ct.App.Miss. 2005).

"Solemn declarations in open court carry a strong presumption of verity." **Richardson v. State,** *supra*, 769 So.2d at 234. *See also* **Brown v. State,** 926 So.2d 229 (Ct.App.Miss. 2005). reh denied, cert denied.

Same here.

A plea of guilty waives the right of a defendant to a trial by judge or jury and the right

to subpoena and call witnesses in his own behalf. **Anderson v. State,** *supra*, 577 So.2d 390 (Miss. 1991); **Jefferson v. State,** *supra*, 556 So.2d 1016, 1019 (Miss. 1989). *See also* **Bishop v. State,** *supra*, 812 So.2d 934, 945 (Miss. 2002), for a list of other valuable rights waived by a voluntary plea of guilty.

A plea of guilty also waives any defenses a defendant might have to the charge. **Taylor v. State,** *supra*, 766 So.2d 830, 835 (Ct.App.Miss. 2000), citing **Anderson v. State,** *supra*, 577 So.2d 390, 391 (Miss. 1991).

Not every motion for post-conviction relief filed in the trial court must be afforded a full adversarial hearing. **Hebert v. State,** 864 So.2d 1041 (Ct.App.Miss. 2004). *See also* **Rowland v. Britt,** 867 So.2d 260, 262 (Ct.App.Miss. 2003)["(T)he trial court is not required to grant an evidentiary hearing on every petition it entertains."] A defendant is not entitled to a post-conviction evidentiary hearing where, as here, it plainly appears to the judge the defendant is not entitled any relief. **Epps v. State,** 926 So.2d 242 (Ct.App.Miss. 2005).

In the case *sub judice*, the trial judge properly dismissed Davis's claims for post-conviction collateral relief without the benefit of an evidentiary hearing because these claims did not involve sufficient questions of disputed and material fact requiring a hearing, and they were manifestly without merit.

Judge Terry's findings of fact and conclusion of law that Davis's pleas were knowing, intelligent, and voluntary was neither clearly erroneous nor manifestly wrong; rather, they were supported by both substantial and credible testimony and evidence. **Skinner v. State,** 864 So.2d 298 (Ct.App.Miss. 2003).

Ineffective Assistance of Counsel.

Davis argues his lawyer was ineffective because he gave Davis erroneous advice concerning the duration of his sentence in the wake of an open plea.

Judge Terry found as a fact this claim was refuted by the petition to enter plea of guilty where Davis acknowledged his sentence was up to the court and that he could receive 0 to 90 years. Moreover, Judge Terry gave great weight to Davis's acknowledgment he was satisfied with his lawyer's advice and that any reference to a light sentence by his lawyer " . . . is merely a prediction and is not binding on the Court." (C.P. at 37, 47)

To the extent Davis argues his lawyer allowed him to plead to a defective indictment, we counter with the claim the indictment was not flawed; rather, it properly charged Davis with the substantive offenses as well as recidivism. "An attorney cannot be expected to object to a valid indictment." **Richardson v. State,** *supra*, 769 So.2d 230, 234-35 (Ct.App.Miss. 2000). Thus, there is no merit to this aspect of Davis's claim of ineffectiveness.

Judge Terry applied the correct legal standard and found as a fact that ". . . there is no indication Davis's counsel's representation fell below an objective standard of reasonableness nor is there evidence that, but for counsel's errors, Davis would not have pled guilty." (C.P. at 47; appellee's exhibit A, attached)

Moreover, the benefits from an open plea was the retirement to the files of Count IV of the indictment as well as cause numbers B2401-2003-66 and B2401-2001-987. (C.P. at 43) Davis also received a sentence totaling 35 years without the benefit of parole as opposed to 90 years.

Davis has failed to overcome the presumption his lawyer rendered reasonably effective assistance during his guilty plea.

The affidavits supplied by Davis to support his claim of ineffectiveness are not of

sufficient worth and substance to support a claim of erroneous advice and ineffective assistance of counsel. (C.P. at 24-25) In particular, we note with interest the affidavit of Carol Redmond is not signed by Carol Redmond or by any other affiant. (C.P. at 25) In truth, it is not really an affidavit at all. The trial judge was not required to believe the allegations in Davis's own affidavit or in the proffered affidavit of Redmond when they were substantially contradicted by paragraphs 7. and 13. of the petition to enter plea of guilty.

Davis was not denied the effective assistance of counsel during his guilty pleas because counsel's performance, contrary to Davis's position, was neither deficient nor did any deficiency actually prejudice Davis. **Strickland v. Washington,** *supra*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); **Williams v. State,** 819 So.2d 532 (Ct.App.Miss. 2001); **Reynolds v. State,** 736 So.2d 500 (Ct.App.Miss. 1999).

"When a convicted defendant challenges his guilty plea on grounds of ineffective assistance of counsel, he must show unprofessional errors of substantial gravity. Beyond that, he must show that those errors proximately resulted in his guilty plea and that but for counsel's errors he would not have entered the plea." **Reynolds v. State,** 521 So.2d 914, 918 (Miss. 1988).

The ground rules applicable here are found in **Brooks v. State,** 573 So.2d 1350, 1353 (Miss. 1990), where this Court said:

> It is clear the two part test articulated in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Leatherwood v. State,* 539 So.2d 1378, 1381 (Miss. 1989) quoting from *Hill v. Lockhart,* 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985).
>
> In order to prevail on his claim of ineffective assistance of counsel, Brooks must show, first of all, "that his counsel's performance was deficient and second, that the deficient performance prejudiced the defense so as to deprive him of a fair

> trial." *Perkins v. State, supra,* 487 So.2d at 793. The burden is upon the defendant to make "a showing of both." *Wilcher v. State,* 479 So.2d 710, 713 (Miss. 1985) (emphasis supplied). To obtain an evidentiary hearing in the lower court on the merits of an effective assistance of counsel issue, a defendant must state "a claim *prima facie*" in his application to the Court. *Read v. State,* 430 So.2d 832, 841 (Miss. 1983).
>
> To get a hearing " . . . he must allege . . . with specificity and detail" that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Perkins v. State, supra,* 487 So.2d at 793; *Knox v. State,* 502 So.2d 672, 676 (Miss. 1987).

See also **Drennan v. State,** 695 So.2d 581 (Miss. 1997), where we find the following language:

> * * * When reviewing claims of ineffective assistance of counsel, this Court utilizes the standard set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). In *Schmitt v. State,* 560 So.2d 148, 154 (Miss. 1990), this Court held "[b]efore counsel can be deemed to have been ineffective, it must be shown (1) that counsel's performance was deficient, and (2) that the defendant was prejudiced by counsel's mistakes." (Citations omitted). One who claims that counsel was ineffective must overcome the presumption that "counsel's performance falls within the range of reasonable professional assistance." *Id.* (Quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068). In order to overcome this presumption, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (695 So.2d at 586)

Counsel's performance was hardly deficient and unprofessional. Davis has failed to demonstrate by affidavit or otherwise how counsel's alleged errors, e.g., his misadvice as to the duration of Davis's sentence, would have altered the outcome of Davis's decision to plead guilty.

"Trial counsel is presumed to be competent." **Brooks v. State,** *supra,* 573 So.2d 1350, 1353 (Miss. 1990). Davis, of course, must overcome that presumption. Moreover, the burden is on the defendant to demonstrate *both* prongs of the **Strickland** test. **McQuarter v. State,** 574 So.2d 685 (Miss. 1990).

"Along with the presumption that counsel's conduct is within the wide range of reasonable conduct, there is a presumption that decisions made are strategic." **Leatherwood v. State**, 473 So.2d 964, 969 (Miss. 1985). Courts are reluctant to infer from counsel's silence an absence of trial strategy. ***Id.*** Courts accord much discretion to attorneys in the areas of defense strategy. **Armstrong v. State**, 573 So.2d 1329 (Miss. 1990). Obviously, the strategy involved in Davis's open pleas of guilty was to negate the possibility of a much longer sentence for Davis's serious felony offenses.

Davis has failed to demonstrate that trial counsel's overall performance was deficient. Moreover, none of the alleged acts of commission or omission by counsel, viewed either individually or collectively, amount to a deficient performance. The official record reflects Mr. Lusk rendered sound legal advice and performed in a constitutionally acceptable manner.

CONCLUSION

The claims made by Davis that his guilty pleas were involuntary, his indictment defective, and his lawyer ineffective were manifestly without merit. A defendant is not entitled to a post-conviction evidentiary hearing where, as here, it plainly appears to the judge the defendant is not entitled any relief. **Epps v. State,** *supra*, 926 So.2d 242 (Ct.App.Miss. 2005).

Summary dismissal is appropriate where "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." **Culbert v. State,** 800 So.2d 546, 550 (Ct.App.Miss. 2001), quoting from **Turner v. State,** 590 So.2d 871, 874 (Miss. 1991).

Although Davis, by his own hand or the hand of his writ-writer, has put forth his best effort, the case at bar exists in the above posture.

Miss.Code Ann. § 99-39-11 (Supp. 1998) reads, in its pertinent parts, as follows:

* * * * * *

> (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.*

* * * * * *

It did, he did, and he was. **Falconer v. State,** 832 So.2d 622, 623 (Ct.App.Miss. 2002) ["(W)e affirm the dismissal of Falconer's motion for post-conviction relief as manifestly without merit."]; **Culbert v. State,** *supra*, 800 So.2d 546, 550 (Ct.App.Miss. 2001) ["(D)ismissal is appropriate where 'it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief.' "]

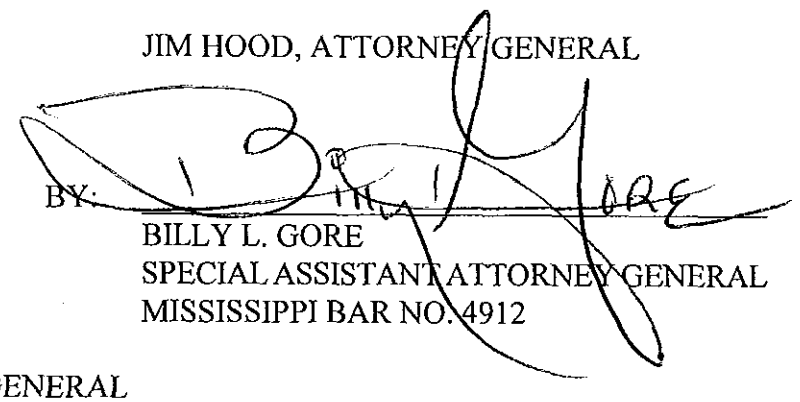
Summary denial was proper because Davis's post-conviction claims targeting the

voluntariness of his guilty pleas, the integrity of his indictment, and the effectiveness of his lawyer were manifestly without merit. No further fact-finding was required, and relief was properly denied without the benefit of an evidentiary hearing.

Appellee respectfully submits this case is devoid of any claims worthy of an evidentiary hearing or vacation of the guilty pleas voluntarily entered by Michael Wayne Davis. Accordingly, the judgment entered in the lower court summarily denying Davis's motion for post-conviction collateral relief should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL



BY:

BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 4912

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

MICHAEL WAYNE DAVIS

VERSUS **CAUSE NO. A2401-2006-00478**

STATE OF MISSISSIPPI

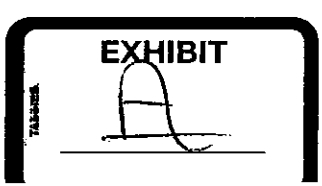
ORDER

This cause is before the Court on Michael Wayne Davis' *pro se* Petition for Post-Conviction Collateral Relief. This Court, having reviewed the petition as well as the applicable law, finds the petition is not well taken and should be denied.

Michael Wayne Davis was indicted July 28, 2003 in a multi-count indictment charging him with Count I - manufacture of a controlled substance (methamphetamine), Counts II and III - aggravated assault on police officers and Count IV - possession of a controlled substance (methamphetamine). Davis was charged as a habitual offender based upon the 1998 felony convictions of possession of a controlled substance and two counts of uttering forgery. On January 29, 2004, Davis filed a petition to enter an open plea of guilty to Counts I, II and III, in exchange for the State passing to the files Count IV. The Court accepted Davis' guilty plea, ascertained that he was a habitual offender and sentenced him to five years in Count I, thirty years in Count II and thirty years in Count III, with Counts II and III to run concurrently with one another but consecutive with Count I, for a total of thirty-five years to serve as a habitual offender in the custody of the Mississippi Department of Corrections. Davis now files a petition for post-conviction collateral relief and argues he received ineffective assistance of counsel, his guilty plea was involuntary and the indictment was improper.

I. Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court adopted a two-



prong standard for evaluating claims of ineffective assistance of counsel. First, the convicted defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Second, the defendant must show there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. This test applies with equal validity to challenges to guilty pleas. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). As applied to the plea process, the focus of the first prong remains the same, while the second prong focuses on whether counsel's unprofessional performance affected the outcome. *Id.*

Davis first argues he was coerced by his attorney to plead guilty and was told he would not receive more than five years. However, in the petition to enter plea of guilty, Davis clearly acknowledged that his sentence was up to the Court and that he could receive zero to ninety years imprisonment. Moreover, Davis indicated his satisfaction with his attorney's advice and recognized that if he had been told by his lawyer that he might receive a lighter sentence this was merely a prediction and not binding on the Court. Upon review, there is no indication Davis' counsel's representation fell below an objective standard of reasonableness nor is there evidence that, but for counsel's errors, Davis would not have pled guilty. Thus, this issue is without merit.

II. Involuntary Plea

Davis next argues his plea was not voluntary since he was coerced by his attorney to plead guilty. As discussed above, there is no evidence of coercion and no indication that Davis' plea was involuntary. Additionally, in his petition to enter plea of guilty, Davis indicated he was not under the influence of any drugs or intoxicants and stated, "I offer my plea of guilty freely and voluntarily and of my own accord and with full understanding of all the matters set forth in the indictment and in this petition and in the certificate of my lawyer which follows." Upon review, this Court finds Davis' plea was voluntarily entered.

III. Improper Indictment

Davis last argues the portion of the indictment charging him as a habitual offender is improper since he "has never served any confined time." The indictment states as follows:

> And we, the aforesaid GRAND JURORS, upon our oaths do further present, that he, the said Michael Wayne Davis, is a habitual criminal who is subject to being sentenced as such pursuant to Section 99-19-81, Miss. Code of 1972, as amended, in that he, the said Michael Wayne Davis, has been convicted at least twice previously of felonies or federal crimes upon charges separately brought and arising out of separate incidents at different times and **has been sentenced thereon to separate terms of imprisonment of one year or more**, to-wit:"

(Emphasis added).

The indictment states Davis was convicted of possession of a controlled substance and sentenced to three years in cause number B2401-1996-01146. The indictment further states Davis was convicted of two counts of uttering forgery and sentenced to serve seven years for each count in cause number B2401-1997-00532. Thus, Davis "has been convicted at least twice previously of felonies or federal crimes upon charges separately brought and arising out of separate incidents at different times and has been sentenced thereon to separate terms of imprisonment of one year or more" as stated in the indictment. The fact that Davis may not have served any time is irrelevant. Upon review, this Court finds the indictment was proper. It is therefore,

ORDERED AND ADJUDGED that Michael Wayne Davis' *pro se* Petition for Post-Conviction Collateral Relief is hereby **DENIED**.

ORDERED AND ADJUDGED this the 11th day of January, 2007.

JERRY O. TERRY
CIRCUIT COURT JUDGE

FILED
JAN 11 2007
GAYLE PARKER
CIRCUIT CLERK
By Priscilla McCord D.C.

446/156-158

CERTIFICATE OF SERVICE

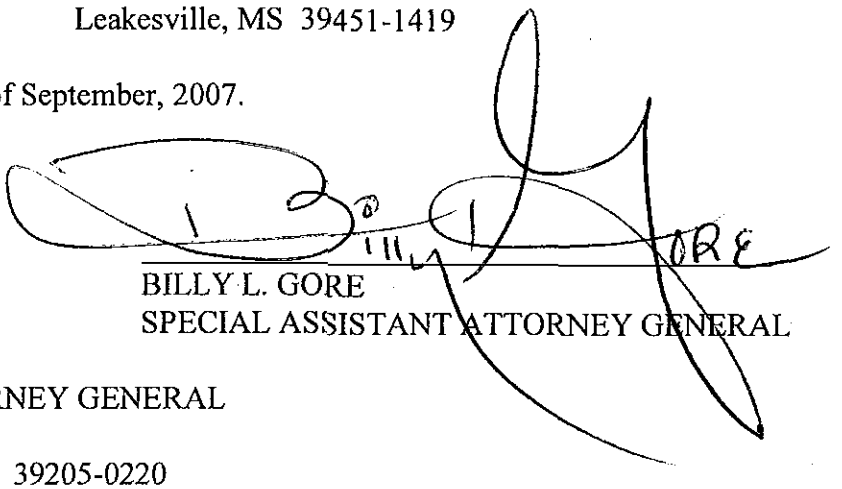
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Jerry O. Terry, Sr.
Circuit Court Judge, District 2
421 Linda Drive
Biloxi, MS 39531

Honorable Cono Caranna
District Attorney, District 2
Post Office Drawer 1180
Gulfport, MS 39502

Michael W. Davis, #234372
S.M.C.I. II D-2-A-18
Post Office Box 1419
Leakesville, MS 39451-1419

This the 21st day of September, 2007.



BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680