IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DONALD RAY EDWARDS — APPELLANT

VS. — NO. 2007-CP-0760

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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DONALD RAY EDWARDS **APPELLANT**

VS. **NO. 2007-CP-0760**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This is yet another appeal from summary denial of post-conviction collateral relief. *See* appellee's exhibit A, attached.

Appellant complains in a post-conviction context his conviction and sentence flowing in the wake of his plea of guilty to burglary and recidivism cannot stand because he was originally indicted for robbery and an amendment changing the charge to burglary could only be accomplished by the action of the grand jury.

Specifically, Edwards inquires: "How could a person be indicted for one charge [robbery] and plea[d] guilty to another [burglary] without [having] been re-indicted?"

Edwards laments: "[I] was never indicted for burglary." (Brief of the Appellant at [i]).

The complete answer to Edwards's inquiring mind is that he waived indictment and entered a plea of guilty to a criminal information charging him with burglary as an habitual offender under

Miss. Code Ann. §99-19-81. (C.P. at 49, 77-78)

Regrettably, the record in this case, much like the cupboard of ole mother Hubbard, is excruciatingly bare.

STATEMENT OF FACTS

DONALD RAY EDWARDS, a forty-three (43) year old African-American male and prior convicted felon (C.P. at 77), appeals from an order summarily denying post-conviction collateral relief entered on May 29, 2007, in the Circuit Court of Forrest County, Robert B. Helfrich, Circuit Judge, presiding. *See* appellee's exhibit A, attached.

Edwards's appeal was originally dismissed for nonpayment of costs but was later re-instated by the Supreme Court. (C.P. at 81-83)

The facts surrounding Edwards's plea of guilty on or about January 30, 2006, to burglary of a food mart are incomplete. Neither the petition to enter plea of guilty nor a transcript of the plea-qualification hearing have been made a part of the official record.

In addition to this, papers relied upon by Edwards in support of his claim(s) have been attached to Edwards's brief.

This will not do at all.

The following is what we do know.

On October 14, 2005, Edwards was indicted for robbery and recidivism. (C.P. at 46) He was charged with stealing beer from a food mart by placing the female attendant in fear of immediate injury to her person. (C.P. at 46)

Edwards was also charged as an habitual offender, having a 1989 conviction in Lamar County for burglary of a dwelling house and a second conviction in 1989 in Forrest County for

burglary. (C.P. at 46)

The Forrest County Public Defender, in the person of Ms. Gay Polk-Payton, represented Edwards in this cause . A letter from Polk-Payton mailed to the Mississippi Bar Association in response to a bar complaint filed by Edwards has been attached to Edwards's brief as Edwards's Exhibit E. Although her letter is not a part of the official record and ordinarily would not be considered by a reviewing court, we do not question its authenticity. Ms. Polk-Payton's response provides insight into the facts. *See* appellee's exhibit B, attached.

On January 30, 2006, Edwards, in the presence of a notary public and under the trustworthiness of the official oath, signed a document styled "Waiver of Indictment." (C.P. at 77-78)

Paragraph IV. of the waiver reads as follows:

> That I understand that I am entitled to have this matter presented to a lawfully constituted jury of this county for a determination of whether an indictment should be returned against me herein; that I hereby expressly waive that right and agree to proceed by information on oath of the district Attorney, or his Assistant, instead of by indictment. (C.P. at 78)

What could be more clear?

According to the opinion and order denying post-conviction relief entered by Judge Helfrich, Edwards, also on January 30, 2006, executed a petition to enter plea of guilty. By all appearances, he thereafter entered a voluntary plea of guilty to a criminal information charging him with burglary and recidivism. (C.P. at 74-75)

Only the first page of the information is included in the clerk's papers. (C.P. at 49) Neither a copy of the petition to enter plea of guilty referred to in Judge Helfrich's opinion and order nor a

transcript of the guilty plea hearing has been included in the record.

Following Edwards's guilty plea, Judge Helfrich sentenced him, as an habitual offender, to serve seven (7) years in the custody of the MDOC without the benefit of probation, parole, or early release. (C.P. at 50, 75)

On October 27, 2006, only nine (9) months after entering his plea of guilty, Edwards, either by his own hand or the hand of a writ writer, filed a *pro se* pleading styled "Petition for Writ of Habeas Corpus for Post-Conviction Relief." This pleading, which was correctly treated by the circuit judge as a motion for post-conviction collateral relief, consisted of thirty-one (31) handwritten pages (C.P. at 8-38) together with several attached exhibits. (C.P. at 46-51)

Also submitted with Edwards's motion was a handwritten memorandum of law consisting of an additional eighteen (18) pages. (C.P. at 52-69)

Edwards claimed in the motion portion of his pleadings that his convictions for burglary and recidivism and his seven (7) year sentence without probation, parole or early release were imposed in violation of the United States and Mississippi Constitutions because he was never indicted for burglary; rather, he was indicted for robbery less than capital. According to Edwards, the court had no authority to amend the indictment from a charge of robbery to a charge of burglary without the action of the grand jury.

In short, Edwards claims he is entitled to discharge because he was convicted of an offense for which he was never charged.

Edwards also claimed his lawyer, Gay Polk-Payton, refused to object to the amendment and that Polk-Payton coerced and/or tricked him into entering a plea of guilty to the charge of burglary. (C.P. at 9)

On appeal Edwards reasserts these same complaints.

SUMMARY OF ARGUMENT

One of the problems, it seems, with Edwards's position is that the appellate record is fact deficient. Neither the petition to enter plea of guilty nor a transcript of the plea-qualification hearing allegedly taking place on or about January 30, 2006, has been made a part of the official record, and neither is before the reviewing court for scrutiny. A reviewing court can rely neither on the facts as stated by the appellant in his brief nor documents/exhibits attached to the appellant's brief. This, we respectfully submit, is fatal to Edwards's complaints.

Given the inadequacy of the appellate record, Edwards has failed to prove by a preponderance of the evidence he is entitled to any relief. It is clear from the imperfect record before this Court that Judge Helfrich did not err in dismissing Edwards's motion on the ground " . . . it is plainly evident that Edwards is not entitled to any relief." (C.P. at 75)

By all appearances Edwards, voluntarily and with an awareness of what he was doing, executed a sworn waiver of indictment and thereafter entered a voluntary plea of guilty to a criminal information charging him with burglary and recidivism.

Judge Helfrich briefly addressed the merits of Edwards's complaint by quoting Article III, §27 of the Mississippi Constitution of 1890. Where, as here, a defendant is represented by counsel, and where, as here, by sworn statement he/she waives indictment, he/she may be proceeded against criminally by information.

Judge Helfrich got it right when he summarily dismissed Edwards's post-conviction motion as plainly or manifestly without merit.

ARGUMENT

EDWARDS HAS FAILED TO DEMONSTRATE BY A PREPONDERANCE OF THE EVIDENCE HE IS ENTITLED TO POST-CONVICTION RELIEF. THE OFFICIAL RECORD IS FACT DEFICIENT. THIS OBSERVATION ALONE IS FATAL TO HIS COMPLAINT.

NEVERTHELESS, EVEN A REVIEW OF AN IMPERFECT RECORD LEADS TO THE INESCAPABLE CONCLUSION THE CIRCUIT JUDGE DID NOT ERR IN FINDING AS A FACT AND CONCLUDING AS A MATTER OF LAW THAT EDWARDS'S CLAIMS WERE MANIFESTLY OR PLAINLY WITHOUT MERIT.

One of the questions posed by Edwards in his motion for post-conviction relief is "[w]hether the court will find that appellant's rights to due process of the law was violated because he were clearly convicted of an offense for which he were not charged, in the charging indictment returned by the grand jury." (C.P. at 15)

The specific relief requested by Edwards was discharge from custody. (C.P. at 15, 37)

The complete answer to Edwards's inquiring mind is that he waived indictment and entered a plea of guilty to a criminal information charging him with burglary as an habitual offender under Miss. Code Ann. §99-19-81. (C.P. at 49, 77-78)

In his opinion and order, Judge Helfrich briefly addressed the merits of Edwards's complaint by quoting Article III, §27 of the Mississippi Constitution of 1890. Where, as here, a defendant is represented by counsel and where, as here, by sworn statement he/she waives indictment, he/she may be proceeded against criminally by information.

We respectfully submit Judge Helfrich got it right when, by virtue of Miss.Code Ann. §99-

39-11(2), he summarily dismissed Edwards's post-conviction motion as plainly or manifestly without merit.

There's more to this story.

Edwards's brief, as well as the official record, is fact-deficient and fatally so. Edwards has failed to provide this Court with a copy of the guilty plea petition and a transcript of the plea-qualification hearing. Moreover, Edwards has attached documents to his brief that are not a part of the record.

The letter from Gay Polk-Payton to the Mississippi Bar on February 15, 2006, is, to be sure, very enlightening and tends to explain the scenario involved here. While the letter cannot be considered in support of Edwards's claims since it is not a part of the official record, we do not doubt its authenticity.

Nevertheless, facts cannot be supplied by assertions and claims made in Edwards's brief alone; rather, issues must be proven by the record generated in the trial court. **Genry v. State,** 735 So.2d 186, 200 (Miss. 1999). *See also* **Pulphus v. State,** 782 so.2d 1220, 1224 (Miss. 2001)["This Court will not consider matters that do not appear in the record, and it must confine its review to what appears in the record."]; **Wortham v. State,** 219 So.2d 923, 926-27 (1969) [Affidavit attached to appellant's brief could not be considered.]

"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.

It was true in **Genry,** *supra,* and it is equally true here, that some of the issues raised by Edwards are not properly before the reviewing court. We point in particular to Edwards's claim he was coerced and or tricked by fear tactics into signing the waiver of indictment and pleading guilty. (Brief of the Appellant at 1-2)

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 arguments made by Edwards in his brief are devoid of merit for this reason alone.

In any event, Edwards's complaints are devoid of merit for the reason expressed by Judge Helfrich. Insofar as this record reflects, Edwards freely and voluntarily, knowingly and intelligently, waived indictment and entered a plea of guilty to burglary and recidivism charged in a criminal information.

In this posture, Edwards's complaint targeting an amendment to his indictment is all for naught. There is nothing in the record suggesting a motion by the district attorney to amend the indictment, and the original indictment was never amended, constructive or otherwise; rather, the indictment was apparently passed to the inactive files. (*See* appellee's exhibit B, attached.)

After Ms. Polk-Payton " . . . negotiated a deal on a lesser charge so that [Edwards] would get

less time," Edwards thereafter waived indictment and agreed to proceed by information on oath of the district attorney. (Appellee's exhibit B, attached) Insofar as this record reflects, Edwards entered a voluntary plea of guilty to burglary.

Edwards also raises several issues in his brief that were not fully presented to the trial judge in Edwards's motion for post-conviction relief.

We point in particular to Edwards's brief at pages i, and (4) where he states he was coerced and/or tricked into signing the waiver and did not understand it to mean he was waiving his right to be indicted.

He also argues Polk-Payton used fear tactics by suggesting he might receive a life sentence as an habitual offender. (Brief of the Appellant at 2)

Moreover, according to Edwards he neither signed a waiver of indictment in the presence of a notary public or his attorney; rather, he signed it in the presence of an investigator with the public defender's office.

Finally, Edwards states in his brief "I did not do a burglary nor robbery. It was a misdemeanor shoplifting." (Brief of the Appellant at (4)).

We cannot find these claims in Edwards's motion for post-conviction relief.

No definitive claim of ineffective counsel can be found in Edward's motion for post-conviction relief. (C.P. at 8-38) Rather, we agree with Judge Helfrich who found as a fact that "Edwards whole sixty (60) page petition attacks his indictment." (C.P. at 75)

The only mention of ineffective counsel is found in Edwards's memorandum of law apparently submitted in support of his thirty-one (31) page motion. There he states the following:

> "Edwards raises his ineffective assistance of counsel claim in his petition for a writ of habeas corpus. Edwards contends that his

> attorney were ineffective for two reasons: (1) failing to move to suppress a 'substitute' indictment of the 'grand jury,' a criminal information for 'burglary,' and (2) failing to inform the court of the substituted criminal information for the indictment returned by the grand jury." (C.P. at 67)

Although Judge Helfrich did not address any question involving the effectiveness of trial counsel, it is clear from this record that Edwards failed to prove by a preponderance of the evidence that counsel's performance was deficient and that any deficiency prejudiced Edwards. **Strickland v. Washington,** 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel cannot be faulted for making her client aware of the realities of the situation.

Issues raised and claims made for the first time in his *pro se* appellate brief cannot be considered for the first time on appeal. Stated differently, Edwards, 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."]

In view of the deficient record, the issues presented by Edwards are not properly before the reviewing Court. **Genry v. State,** *supra.*

But even if they are, the circuit judge did not err in summarily denying Edwards's motion for post-conviction relief because his claims were plainly without merit.

It has been said time and again that when reviewing a decision by a trial court denying a petition for post-conviction relief, this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous. **Brown v. State,** 731 So.2d 595, 598 (¶6) (Miss. 1999). On the other hand, where questions of law are raised, the applicable standard of review is *de novo.* Application of neither standard is beneficial to Edwards.

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 made, and he was.

CONCLUSION

The circuit judge, insofar as this record reflects, did not err in finding as a fact and concluding as a matter of law that Edwards's motion for post-conviction relief was plainly without merit.

"A trial court may summarily dismiss a post-conviction petition when it is clear upon the face of the petition itself or the exhibits or material from prior proceedings that there are no facts upon which the petitioner could prevail." **Fairley v. State,** 812 So.2d 259, 262 (Ct.App.Miss. 2002) citing **Robertson v. State**, 669 So.2d 11 (Miss. 1996) and **Taylor v. State,** 782 So.2d 166, 168 (¶ 14) (Ct.App.Miss. 2000).

Material facts cannot be supplied by assertions and claims made in Edwards's brief alone; rather, facts and issues must be proven by the record. **Genry v. State,** *supra*, 735 So.2d 186, 200 (Miss. 1999). To the appellant falls the duty and task of insuring the official record, as opposed to appellant's brief, contains sufficient evidence to support the errors he has assigned. **Schuck v. State,** 865 So.2d 1111 (Miss. 2003). Accordingly, the issues presented are not properly before the reviewing Court, and affirmance of the trial court's ruling is required. **Id.**

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 Edwards, either 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.

Appellee respectfully submits this case is devoid of any claims worthy of an evidentiary hearing or vacation of the guilty plea voluntarily entered by Donald Ray Edwards. Accordingly, the judgment entered in the lower court summarily denying Edwards'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

IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI
TWELFTH JUDICIAL DISTRICT

DONALD RAY EDWARDS, M.D.O.C. #29647 — **PLAINTIFF**

VERSUS — **CAUSE NO. CI06-0230**

STATE OF MISSISSIPPI — **DEFENDANT**

FILED

MAY 29 2007

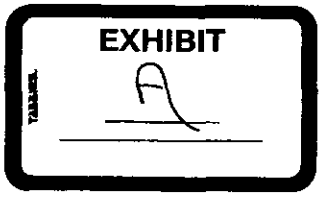
FORREST COUNTY CIRCUIT CLERK

OPINION AND ORDER

BEFORE THE COURT is Plaintiff's, Donald Ray Edwards (hereinafter "Edwards"), Petition for Writ of Habeas Corpus for Post-Conviction Relief which this Court is treating as a Motion for Post-Conviction Collateral Relief. The Court, having reviewed the complete file, all materials proffered by Edwards and all relevant law, finds that it is plainly evident that Edwards is not entitled to any relief. It is, therefore, **SUMMARILY DISMISSED**, pursuant to Miss. Code Ann. §99-39-11(2) (Rev. 2000) for the following reasons, to-wit:

Background

On January 30, 2006, Edwards executed a sworn Wavier of Indictment expressly waiving formal indictment for the crime of Burglary, a copy is hereby attached to this Opinion and Order. Also, on January 30, 2006, Edwards executed a sworn "Petition to Enter Plea of Guilty" wherein he stated that he wished to plead guilty to the crime of Burglary. The Petition also contained the following statement: "I desire to plead guilty to the charge of Burglary and request the Court to accept my plea of guilty to this charge or



charges." On that same date, January 30, 2006, Edwards was sentenced to a term of seven (7) years in the custody of the Mississippi Department of Corrections, with said sentence to be served without the benefit of probation, parole or any form of early release, as required by Miss. Code Ann. §99-19-81 (1972).

Edwards now contends that the sentence imposed was in violation of the Constitution of the United States and the State of Mississippi. He states that the trial court cannot amend an indictment so as to change the charge and criminal statute made in the indictment to another crime, accept by the action of grand jury. Edwards whole sixty (60) page petition attacks his indictment.

Law and Analysis

Mississippi Code Annotated section 99-39-11(2) (Rev. 2000) states: "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." In support of his motion, Edwards only attached as exhibits a copy of his original indictment, Order of Conviction, Criminal Information making Edwards a habitual offender and his Order of Conviction. A guilty plea waives all non-jurisdictional rights or defects. *Anderson v. State*, 577 So.2d 390, 391 (Miss. 1991). Edwards has not offered any evidence via affidavits or transcripts to support any of his allegations that his rights were violated. Therefore, it is plainly evident that Edwards is not entitled to any relief.

However, this Court will address his issue of the indictment briefly.

Exhibit – E

The Office of the

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February 15, 2006

Mr. Adam Kilgore
General Counsel
Mississippi Bar Association
P.O. Box 2168
Jackson, Mississippi 39225-2168

RE: Docket Number: 05-236-2

Dear Mr. Kilgore:

Thank you for your letter of February 10, 2006 regarding Donald Ray Edwards.

When Mr. Edwards was arrested, he was charged with robbery because the victim in the case said that the doors of the store were locked and she was outside near the gas pumps when Mr. Edwards entered the store. She further alleged that there was a confrontation between the two of them when he was in the process of stealing beer from the store and for that reason, he was charged with Robbery. She identified him from a line up and recalled portions of his tag number, leading to his arrest. I have included a copy of his packet of discovery for your review and marked it as Exhibit "A" to this letter. However, because she said that she did not think that he wanted to hurt her and because she said the door was locked when he entered it, I was able to negotiate with the Forrest/Perry County District Attorney's Office to have the charge reduced to Burglary. We proceeded on Criminal Information (Exhibit "B") and the DA entered an order passing the Robbery Indictment to the Inactive Files. I have attached a copy of the Circuit Court Docket showing these event sequences and marked them as Exhibits "C" and "D."

Mr. Edwards is not being truthful when alleges that there was no one present to witness me going over his case with him. To the contrary, the Honorable Rex Jones, my investigator (Derick Minor) and my intern (Christina Maniscalco) were present when I discussed this case with Mr. Edwards and at no time did I coerce him into lying. I did what I do each time I prepare a client for a plea and I explain to them the way the judge will ask the questions because sometimes, they do not understand the questions the way that they are posed to them. E.g. "Do you realize you are waiving any right to object to the composition of the grand jury that indicted you or the petit jury that would try you?" Most of my clients don't know what a petit jury is until I explain it to them

EXHIBIT

NO Where we all talked about my charge been reduced to Burglary

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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 Robert B. Helfrich
Circuit Court Judge, District 12
Post Office Box 309
Hattiesburg, MS 39043

Honorable Jon Mark Weathers
District AttorneyDistrict 12
Post Office Box 166
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Donald Ray Edwards, #29647
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This the 19th day of February, 2008.

BILLY L. GORE
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