

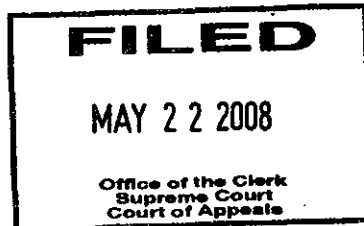
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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ALVIN D. THOMPSON

APPELLANT

VS.



NO. 2007-CP-1329

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. Thompson's assertion that he received ineffective assistance of counsel is without merit, since it is unsupported by the record and Thompson is unable to prove either prong of *Strickland*.
- II. Thompson's argument that the Trial Court did not review the record is without merit.
- III. Thompson's assertion that the verdict was against the manifest weight of the evidence is not properly brought pursuant to the Post Conviction Collateral Relief Statute and should be dismissed.
- IV. Thompson's assertion that the State failed to prove the essential elements of the crime is not properly brought pursuant to the Post Conviction Collateral Relief Statute and should be dismissed.
- V. Thompson's argument that the Trial Court erred in accepting the Jury's verdict of guilty is not properly brought Pursuant to the Post Conviction Collateral Relief Statute and should be dismissed.
- VI. Thompson's argument that the indictment was defective is waived since Thompson waived his right to direct appeal as well as collateral attack of his conviction and sentence.
- VII. Thompson's argument that his due process rights were violated is waived since Thompson waived his right to direct appeal as well as collateral attack of his conviction and sentence.

STATEMENT OF THE CASE

Thompson was indicted November 8, 2005 on the charge of Possession of Cocaine, with Intent to Sell, as an habitual offender pursuant to Mississippi Code Annotated § 99-19-83. Thompson had been previously convicted as an adult of at least three felony offenses in the past. On September 1, 2000, Thompson was convicted of the offence of receiving stolen property in the Circuit Court of Mobile County, Alabama, and was sentenced to serve one (1) year in the custody of the Alabama Department of Corrections. On December 20, 1995, Thompson was convicted of the offense of breaking and entering an automobile in the Circuit Court of Choctaw County, Alabama, and was sentence to serve five (5) years in the custody of the Alabama Department of Corrections. On November 27, 1995, Thompson was convicted of “robbery, second” in the Circuit Court of Sumpter County, Alabama, and was sentence to serve a term of ten (10) years in the custody of the Alabama Department of Corrections. Therefore, Thompson was indicted as an habitual offender pursuant to Mississippi Code Annotated § 99-19-83, and the State sought the enhanced sentencing of life imprisonment without the possibility of parole or pardon.

Thomson was tried on August 9-10, 2006. He was convicted of possession of .08 grams of cocaine with intent on August 10, 2006. At the sentencing hearing on September 29, 2006, the State and Defense announced that they had come to an agreement concerning sentencing. By this agreement, Thompson was sentenced to serve thirty (30) years in the custody of the MDOC, *not as an habitual offender*, and that “he shall file no appeals of any type to include direct or post

conviction relief in this matter” and that the State agreed “to dismiss other pending charges against the Defendant.” The Court accepted the agreement of the parties and an Agreed Sentencing Order was entered and was signed by Thompson, his counsel and the Assistant District Attorney.

On February 26, 2007, Thompson filed a Motion to Vacate Agreed Sentencing Order. (CP 1) On May 7, 2007, Thompson filed a Motion to Amend his Motion to Vacate Agreed Sentencing Order. (CP 10) The Trial Court treated Thompson’s Motion to Vacate Agreed Sentencing Order as a Motion for Post Conviction Collateral Relief pursuant to Mississippi Code Annotated § 99-39-3, and entered its Order Denying Motion for Post Conviction Collateral Relief on September 26, 2007. (CP 34) On October 22, 2007, Thompson filed his Notice of Appeal from that Order. (CP 55)

SUMMARY OF ARGUMENT

The State urges that this appeal be dismissed since Thompson waived his rights to direct appeal and to collateral attack of his conviction and sentence in his sentence agreement with the prosecution. All issues in the instant appeal are waived and were properly dismissed by the trial court. Thompson was facing a sentence of life without parole as an habitual offender. Instead of going ahead with the hearing, in which the State would have certainly proven his habitual status, Thompson chose to take a deal from the State. He chose to be sentenced to thirty (30) years non-habitual, in return for the dismissal of another charge for which he faced sixty (60) years or possibly life imprisonment if convicted. He also chose to waive the right to appeal his conviction and sentence in this case, directly or via collateral attack. The rights Thompson waived are valuable Constitutional rights, but they are rights that can be waived by a Defendant *Ross v. State*, 936 So.2d 983 (Miss.Ct.App. 2006)

Further, Thompson's assertion that he received ineffective assistance of counsel is without merit, since it is unsupported by the record and Thompson is unable to prove either prong of Strickland. Thompson's argument that the Trial Court did not review the record is without merit and should be dismissed.

Thompson's assertion that the verdict was against the manifest weight of the evidence is not properly brought pursuant to the Post Conviction Collateral Relief Statute and should be dismissed. Thompson's assertion that the State failed to prove the essential elements of the crime is not properly brought pursuant to the Post Conviction Collateral Relief Statute and should be dismissed. Thompson's argument that the Trial Court erred in accepting the Jury's

verdict of guilty is not properly brought Pursuant to the Post Conviction Collateral Relief Statute and should be dismissed. Ordinarily, these issues would be properly brought in a direct appeal. However, Thompson waived his rights to direct appeal and to collateral attack of his conviction and sentence by entering into the Agreed Order with the State whereby he received a 30 year sentence as a non-habitual for his conviction and other charges against him were dropped. Therefore, these and all other issues in this appeal have been waived.

Thompson's argument that the indictment was defective and that his due process rights were violated fail since Thompson has waived his right to direct appeal or collateral attack pursuant to his sentencing agreement. Further, Mississippi Code Annotated § 99-39-9 requires that the prisoner provide a specific statement of the facts which are not within the prisoner's personal knowledge. The motion must show how or by whom the facts will be proven and must include affidavits of witnesses who will testify and copies of documents or records to support the motion. In order to survive dismissal by the trial court, a defendant must allege "facts which require further inquiry in the expanded setting of an evidentiary hearing." *Myers v. State*, 583 So.2d 174, 175 (Miss.1991). Thompson's Motion before the Trial Court and his Brief before this Court fail to meet this statutory requirement and must therefore be dismissed.

As with all issues in the instant appeal, Thompson has waived this issue and it was properly dismissed by the Trial Court. Mississippi Code Annotated § 99-39-9 requires that the prisoner provide a specific statement of the facts which are not within the prisoner's personal knowledge. The motion must show how or by whom the facts will be proven and must include affidavits of witnesses who will testify and copies of documents or records to support the motion. In order to survive dismissal by the trial court, a defendant must allege "facts which require

further inquiry in the expanded setting of an evidentiary hearing.” *Myers v. State*, 583 So.2d 174, 175 (Miss.1991). Thompson’s Motion before the Trial Court and his Brief before this Court fail to meet this statutory requirement and must therefore be dismissed. However, even if the Court of Appeals were to consider this issue on it’s merits, Thompson fails to prove his due process rights were violated, and the Trial Court’s dismissal should be affirmed.

As with all issues in the instant appeal, Thompson has waived this issue and it was properly dismissed by the Trial Court. Mississippi Code Annotated § 99-39-9 requires that the prisoner provide a specific statement of the facts which are not within the prisoner’s personal knowledge. The motion must show how or by whom the facts will be proven and must include affidavits of witnesses who will testify and copies of documents or records to support the motion. In order to survive dismissal by the trial court, a defendant must allege “facts which require further inquiry in the expanded setting of an evidentiary hearing.” *Myers v. State*, 583 So.2d 174, 175 (Miss.1991). Thompson’s Motion before the Trial Court and his Brief before this Court fail to meet this statutory requirement and must therefore be dismissed. However, even if the Court of Appeals were to consider this issue on it’s merits, Thompson fails to prove that he was in any way prejudiced by the comments of the prosecutor, and the Trial Court’s dismissal should be affirmed.

As with all issues in the instant appeal, Thompson has waived this issue and it was properly dismissed by the Trial Court. Mississippi Code Annotated § 99-39-9 requires that the prisoner provide a specific statement of the facts which are not within the prisoner’s personal knowledge. The motion must show how or by whom the facts will be proven and must include affidavits of witnesses who will testify and copies of documents or records to support the motion.

In order to survive dismissal by the trial court, a defendant must allege “facts which require further inquiry in the expanded setting of an evidentiary hearing.” *Myers v. State*, 583 So.2d 174, 175 (Miss.1991). The Trial Court’s dismissal of Thompson’s Motion to Vacate Agreed Sentencing Order was correct and should be affirmed.

ARGUMENT

I. Thompson’s assertion that he received ineffective assistance of counsel is without merit, since it is unsupported by the record and Thompson is unable to prove either prong of Strickland.

Thompson asserts that his court appointed counsel changed sometime between December, 2005 and January, 2006. He argues that his new counsel did not contact him despite his attempts to reach her and that when she finally met with him on the August 8, 2006, she offered a plea agreement for 10 years. (Appellant’s Brief, p. 3-5) Thompson asserts that his counsel was ineffective because she: (1) only interviewed him on the eve of trial, (2) did not argue his innocence at trial, and (3) failed to discuss a possible defense with him. Coleman also argues that his attorney and the trial judge coerced him to plead guilty because they told him that he had to plea or he was going to trial. (Appellant’s Brief, p. 3-5)

As are all issues in the instant appeal, Thompson has waived this issue and it was properly dismissed by the Trial Court. However, even if the Court of Appeals were to consider this issue on it’s merits, Thompson fails to prove he received ineffective assistance of counsel, and the Trial Court’s dismissal should be affirmed.

To prove ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient and (2) this deficiency prejudiced his defense. *Strickland v.*

Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The burden of proof rests with the defendant. *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990). Under *Strickland*, there is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. To overcome this presumption, "[t]he defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052.

Thompson must allege both prongs of the above test with specific detail. *Brooks v. State*, 573 So.2d 1350, 1354 (Miss.1990). Further, in cases involving post-conviction collateral relief, "where a party offers only his affidavit, then his ineffective assistance claim is without merit." *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995). Thompson presented no affidavits along with his petition. He merely relies on the assertions in his brief. This does not satisfy the requirements of *Vielee*.

Further, Thompson fails to satisfy the two prongs of *Strickland*. Thompson has not come forward with specific proof showing that his counsel was deficient. Even if Thompson could establish prong one of *Strickland*, he could not establish that his counsel's representation prejudiced him under prong two. An attorney cannot manufacture a defense, but there must be evidence to support a defense. Thompson does not provide evidence of any defense his attorney might have put forward on his behalf or any evidence of his innocence she might have asserted on his behalf. While Thompson argues that his attorney should have interviewed him sooner, he cannot say how this prejudiced him. He does not offer any specific benefit that an earlier interview would have given him. Accordingly, this issue is without merit and should be

dismissed.

II. Thompson's argument that the Trial Court erred in stating that the ineffective assistance of counsel argument in Thompson's Motion to Amend did not address sentencing is without merit.

As are all issues in the instant appeal, Thompson has waived this issue and it was properly dismissed by the Trial Court. However, even if the Court of Appeals were to consider this issue on its merits, Thompson fails to prove he received ineffective assistance of counsel, and the Trial Court's dismissal should be affirmed.

Thompson argues that the Trial Court erred in its Final Judgment when it stated that Thompson's claim that he received ineffective assistance of counsel did not address sentencing because he claims that the Trial Court did not take into account his Motion to Amend filed May 7, 2007. (C.P. 10) However, the Motion to Amend addresses alleged violation of sentencing provisions contained in Mississippi Code Annotated § 41-29-139, and the proof the State was required to show at trial, such as proof of knowledge of the nature of the contraband substance, proof of intent to sell the contraband substance and proof of dominion and control of the contraband substance. None of these challenges are linked in any way to his previous claim of ineffective assistance of counsel, and the Trial Court correctly addressed the issue of assistance of counsel. This issue is without merit and should be dismissed. Further, Thompson waived his right to direct appeal or collateral attack of this and all other issues in his brief.

III. Thompson's assertion that the verdict was against the manifest weight of the evidence is waived pursuant to his sentencing agreement and is not properly brought pursuant to the Post Conviction Collateral Relief Statute and should be dismissed.

IV. Thompson's assertion that the State failed to prove the essential elements of the crime is waived pursuant to his sentencing agreement and is not properly brought pursuant to the Post Conviction Collateral Relief Statute and should be dismissed.

V. Thompson's argument that the Trial Court erred in accepting the Jury's verdict of guilty is waived pursuant to his sentencing agreement not properly brought Pursuant to the Post Conviction Collateral Relief Statute and should be dismissed.

Issues III, IV and V are not grounds for relief pursuant to Mississippi Code Annotated § 99-39-5 which provides relief for any prisoner in custody under sentence of a court of record of the State of Mississippi who claims:

- (a) That the conviction or sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of Mississippi;
- (b) That the trial court was without jurisdiction to impose sentence;
- (c) That the statute under which the conviction and/or sentence was obtained is unconstitutional;
- (d) That the sentence exceeds the maximum authorized by law;
- (e) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (f) That his plea was involuntary;
- (g) That his sentence has expired; his probation, parole or conditional release unlawfully revoked; or he is otherwise unlawfully held in custody;
- (h) That he is entitled to an out-of-time appeal; or
- (i) That the conviction or sentence is otherwise subject to collateral attack upon any grounds of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may file a motion to vacate, set aside or correct the judgement or sentence, or for an out-of-time appeal.

These grounds must be brought on direct appeal. Further, Thompson clearly waived his right to direct appeal and to petition for post-collateral relief in order to receive a much more lenient sentence. As part of the agreement with the State, the Petitioner agreed not to appeal the conviction and sentence in Cause Number 773-05, nor file a Motion for Post Conviction Collateral Relief to collaterally attack said conviction and sentence. The trial court recounted the agreement in its Order Denying Motion for Post Conviction Collateral Relief, as follows:

The Petitioner was found guilty by a jury of the offense of possession of cocaine with intent to sell. When the Court called up this matter for sentencing, the parties presented the Court with an Agreed Sentencing Order, which this Court accepted. Prior to that time, having been convicted by a jury of the offense of possession of cocaine with intent, the Petitioner was facing a possible sentence of life imprisonment, without the possibility of parole, as a habitual offender, during the sentencing hearing. He chose to bargain with the State instead of proceeding to sentencing, where if the State proved his habitual status, such a sentence was not merely likely, but a surety.

The Court presided over the trial of the Petitioner for the offense for which he was convicted. The Court was present when the Petitioner and his attorney and the Assistant District Attorney presented the Agreed Sentencing Order. The Court is well aware that the Petitioner bargained for a sentence of thirty years, not as an habitual offender, and a dismissal of the charge of possession of cocaine with intent within 1500 feet of a playground in Cause Number 089-06, versus the life imprisonment, without parole, that the Court would have had no choice but to impose if the State had proven habitual status. There was no evidence before the Court that the Petitioner was forced, coerced or induced by any action of his counsel during the sentencing hearing. The Court asked the Petitioner if he wanted to accept the agreed sentence instead of having the State proceed with proving habitual status.

Further, the Petition received **more** than a reduced sentence in the bargain. The State also agreed to dismiss Cause Number 089-06, in which the Petitioner had also been indicted for offense of possession of cocaine with intent within 1500 feet of playground in violation of § 41-29-139 and 41-29-142, MCA. That charge carries a maximum sentence of thirty (30) years, without the enhanced sentencing pursuant to § 41-29-142, MCA. However, with the enhancement of being within 1500 feet of a playground under 41-29-142(1), MCA, the prisoner was facing, within this Court's discretion a possible sentence of twice the amount authorized in § 41-29-139(1)(a), MCA, which is sixty (60) years. Therefore, had he proceeded to sentencing, and the State had proven habitual status, the Petition was facing life imprisonment without parole for this one offense, as well as being tried for the offense in Cause Number 089-06, being possibly found guilty and possibly receiving another sixty (60) year sentence. The State agreed to

dismiss this charge in, Cause Number 089-06, if the Defendant would agree to the thirty (30) year sentence, not as a habitual offender, in Cause Number 773-05. The Petitioner agreed to the proposed sentence in return for the dismissal of the other charge. He gained a lesser sentence, a dismissal of the charge in 089-06, and non-habitual status on his conviction.

(C.P.

Thompson was facing a sentence of life without parole as an habitual offender. Instead of going ahead with the hearing, in which the State would have certainly proven his habitual status, Thompson chose to take a deal from the State. He chose to be sentenced to thirty (30) years non-habitual, in return for the dismissal of another charge for which he faced sixty (60) years or possibly life imprisonment if convicted. He also chose to waive the right to appeal his conviction and sentence in this case, directly or via collateral attack. The rights Thompson waived are valuable Constitutional rights, but they are rights that can be waived by a Defendant *Ross v. State*, 936 So.2d 983 (Miss.Ct.App. 2006) (Constitutional rights, including the right to appeal conviction may be waived by entering a guilty plea); *Bell v. State*, 751 So.2d 1035 (Miss. 1999) (A defendant may knowingly and voluntarily waive an *ex post facto* claim in plea negotiations); *Godinez v. Moran*, 509 U.S. 389, 396, 125 L.Ed.2d 321, 113 S.Ct. 2680 (1993) (a criminal defendant may waive the right to counsel if he does so “competently and intelligently.”); *Twillie v. State*, 892 So.2d 187 (Miss. 2004) (“[i]f a defendant in a criminal case can waive the constitutional right to remain silent and give an incriminating confession which eventually places the defendant on death row, it logically follows that a defendant such as Twillie can waive his *ex post facto* rights and knowing enter into an agreement to be sentenced to life without parole in order to avoid the death penalty”); *Pipkins v. State*, 756 So.2d 777 (Miss.Ct.App.1999).

Further, Mississippi Code Annotated § 99-39-9 requires that the prisoner provide a specific statement of the facts which are not within the prisoner's personal knowledge. The motion must show how or by whom the facts will be proven and must include affidavits of witnesses who will testify and copies of documents or records to support the motion. In order to survive dismissal by the trial court, a defendant must allege "facts which require further inquiry in the expanded setting of an evidentiary hearing." *Myers v. State*, 583 So.2d 174, 175 (Miss.1991). Thompson's Motion before the Trial Court and his Brief before this Court fail to meet this statutory requirement and must therefore be dismissed.

Thompson clearly waived his rights to direct appeal and collateral attack of his conviction and sentence. This issue is without merit and the decision of the Trial Court should be affirmed.

VI. Thompson's argument that the indictment was defective is waived and was properly dismissed by the trial court.

As with all issues in the instant appeal, Thompson has waived this issue and it was properly dismissed by the Trial Court. Mississippi Code Annotated § 99-39-9 requires that the prisoner provide a specific statement of the facts which are not within the prisoner's personal knowledge. The motion must show how or by whom the facts will be proven and must include affidavits of witnesses who will testify and copies of documents or records to support the motion. In order to survive dismissal by the trial court, a defendant must allege "facts which require further inquiry in the expanded setting of an evidentiary hearing." *Myers v. State*, 583 So.2d 174, 175 (Miss.1991). Thompson's Motion before the Trial Court and his Brief before this Court fail to meet this statutory requirement and must therefore be dismissed. However, even if the Court of Appeals were to consider this issue on its merits, Thompson fails to prove his indictment was

in any way defective, and the Trial Court's dismissal should be affirmed.

VII. Thompson's argument that his due process rights were violated is waived and was properly dismissed by the Trial Court.

As with all issues in the instant appeal, Thompson has waived this issue and it was properly dismissed by the Trial Court. Mississippi Code Annotated § 99-39-9 requires that the prisoner provide a specific statement of the facts which are not within the prisoner's personal knowledge. The motion must show how or by whom the facts will be proven and must include affidavits of witnesses who will testify and copies of documents or records to support the motion. In order to survive dismissal by the trial court, a defendant must allege "facts which require further inquiry in the expanded setting of an evidentiary hearing." *Myers v. State*, 583 So.2d 174, 175 (Miss.1991). Thompson's Motion before the Trial Court and his Brief before this Court fail to meet this statutory requirement and must therefore be dismissed. However, even if the Court of Appeals were to consider this issue on its merits, Thompson fails to prove his due process rights were violated, and the Trial Court's dismissal should be affirmed.

VIII. Thompson's argument that the trial court erred in not granting a mis-trial due to an improper comment by the prosecutor is waived and was properly dismissed by the Trial Court.

As with all issues in the instant appeal, Thompson has waived this issue and it was properly dismissed by the Trial Court. Mississippi Code Annotated § 99-39-9 requires that the prisoner provide a specific statement of the facts which are not within the prisoner's personal knowledge. The motion must show how or by whom the facts will be proven and must include affidavits of witnesses who will testify and copies of documents or records to support the motion. In order to survive dismissal by the trial court, a defendant must allege "facts which require

further inquiry in the expanded setting of an evidentiary hearing.” *Myers v. State*, 583 So.2d 174, 175 (Miss.1991). Thompson’s Motion before the Trial Court and his Brief before this Court fail to meet this statutory requirement and must therefore be dismissed. However, even if the Court of Appeals were to consider this issue on it’s merits, Thompson fails to prove that he was in any way prejudiced by the comments of the prosecutor, and the Trial Court’s dismissal should be affirmed.

VIII. Thompson’s argument that he has shown evidence of his innocence is without merit and was properly dismissed by the Trial Court.

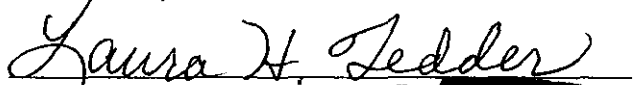
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CONCLUSION

Thompson waived his right to appeal and to make collateral attack on his conviction and sentence. Further, his assignments of error are without substantive merit. The Trial Court correction dismissed Thompson's Motion to Vacate Sentencing Agreement and this Court should affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

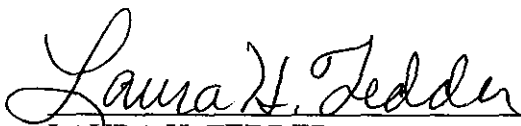
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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Honorable E. J. (Bilbo) Mitchell
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This the 22nd day of May, 2008.



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