IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHRISTOPHER LASHAWN HARRIS — APPELLANT

VS. — NO. 2007-CP-1360-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This is an out-of-time appeal granted by the lower court from summary denial of post-conviction relief. (C.P. at 71)

On April 17, 2006, Christopher Harris, in the wake of a plea bargain agreement (C.P. at 43, 47), entered a plea of guilty to possession of cocaine in an amount greater than 2 grams but less than 10 grams. (C.P. at 37-40)

By virtue of the bargain, charges of recidivism were struck from the indictment and Harris was charged as a second offender. (C.P. at 36)

After accepting Harris's plea and ascertaining he was a second offender, the trial court sentenced him to serve a term of sixteen (16) years in the MDOC with five (5) years of post-release supervision. (C.P. at 38-39) The sentence imposed was consecutive " . . . to the revocation in 2002-344-CR of Oktibbeha County." (C.P. at 40)

Harris swore under the trustworthiness of the official oath in both a petition to enter plea of

guilty and also during the plea-qualification hearing he was satisfied with the "advice and help" rendered by his lawyer and his guilty plea was voluntary. (C.P. at 33, 46-47)

Less than a year later Harris changed his mind.

On March 1, 2007, Harris filed a "Motion for Post-Conviction Relief to Vacate and Set Aside Conviction and Sentence." (C.P. at 2-28) The targets of his claims were the usual suspects, *viz.*, his plea was involuntary, his indictment defective, and his lawyer ineffective in the constitutional sense.

CHRISTOPHER HARRIS, a thirty-two (32) year old African-American male with a 12th grade education (C.P. at 33, 41), appeals, out-of-time, from the summary denial of his motion for post-conviction collateral relief - essentially a motion to vacate his guilty plea - filed in the Circuit Court of Oktibbeha County, Lee J. Howard, Circuit Judge, presiding.

Harris, who swore, under the trustworthiness of the official oath, he was satisfied with the "advice and help" given by his lawyer and that his lawyer had done all that anyone could do to counsel and assist him (C.P. at 33), now claims his lawyer was ineffective because, *inter alia*, he " . . . failed to advise Harris of his adequate defense or investigate the facts prior to advising Harris to enter a plea of guilty." (Brief for Appellant at 17)

Harris also claimed his indictment was defective because it was improperly amended and failed to set forth the judicial district in which it was brought.

Finally, Harris argued the trial judge committed "plain error" by failing to include in the record a factual basis for the plea, and failing to advise Harris of his right to appeal the sentence imposed.

In a two (2) page order entered by Judge Howard, the court found that Harris's post-conviction claims were plainly or manifestly without merit and summarily denied Harris's motion

"without the necessity of a hearing." (C.P. at 52-53; appellee's exhibit A, attached)

Judge Howard found as a fact and concluded as a matter of law that Harris's indictment was not defective; rather, it was simply amended to reflect a change in the quantity of cocaine possessed. Judge Howard also found that Harris was correctly advised there would be no appeal from a guilty plea. (C.P. at 47)

We respectfully submit Judge Howard did not err in finding Harris'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

Christopher Harris was indicted on January 9, 2006, for possession of cocaine in an amount less that .1 gram but less than 2 grams. The indictment, in its original form, also charged Harris as a second offender under Miss.Code Ann. §41-29-147 and as a habitual offender offender under Miss.Code Ann. §99-19-81 by virtue of his prior felony convictions for possession with intent and sale of cocaine in 1997 and 2003, respectively.

On April 17, 2006, following a motion by the State sans objection by the defense, the indictment was amended to correct the quantity of cocaine by striking "greater than .1 grams but less than 2 grams" and inserting in its stead "greater than 2 grams but less than 10 grams." (C.P. at 36)

The amendment continued Harris's status as a second offender but struck Harris's second felony conviction of August 1, 2003. (C.P. at 36)

On April 17, 2006, Harris signed a petition to enter plea of guilty and entered his guilty plea

during a plea-qualification hearing at which he was represented by counsel.

A copy of the petition to enter plea of guilty is a matter of record at C.P. 32-35.

A copy of the guilty plea transcript is a matter of record at C.P. 42-50.

On March 1, 2007, less than a year after stating in open court, under the trustworthiness of the official oath, his plea was both voluntary and intelligent and he was satisfied with the advice and services of his lawyer, Harris changed his mind.

Harris filed a motion for post-conviction relief assailing, in effect, the integrity of his indictment, the voluntariness of his plea, and the effectiveness of his lawyer, Richard Burdine. (C.P. at 29)

There were no affidavits, other than Harris's own, attached to his motion for post-conviction relief.

In his appeal to this Court, Harris reasserts these same claims.

The specific relief requested by Harris appears to be two-pronged: Grant him an evidentiary hearing or dismiss his conviction and sentence. (Brief for Appellant at p. 10, 15)

SUMMARY OF THE ARGUMENT

The posture of Harris's post-conviction complaints is controlled largely by the following decision recently handed down by the Court of Appeals: **Jenkins v. State,** No. 2007-CP-00768-COA decided January 15, 2008 [Not Yet Reported].

The fact-finding made by the circuit judge was neither clearly erroneous nor manifestly wrong.

First, the guilty plea transcript reflects a factual basis for Harris's plea of guilty to the possession of cocaine in the quantity charged. (C.P. at 46-47)

During the plea-qualification hearing defense counsel represented to the trial judge that the elements of the crime had been explained to Harris. (C.P. at 46)

> BY THE COURT: Did you also explain to [Harris] the elements of the crime to which he's pleading guilty?
>
> BY MR. BURDINE: Yes sir, I did.
>
> BY THE COURT: Did he give you any indication or reason to believe that he did not understand his rights or the elements of this crime.
>
> BY MR. BURDINE: No, he did not Judge Howard. (C.P. at 16)

Second, Judge Howard's advice to Harris that "[t]here is no appeal if you plead guilty" was correct by virtue of Miss.Code Ann. §99-35-101. Harris's right to appeal the sentence imposed in the wake of a guilty plea, as opposed to the plea itself, is not a consequence of the guilty plea about which a defendant must be informed.

Third, the amendment to the indictment altering the quantity of the cocaine possessed was one of form as opposed to substance and did not require re-submission of the case to the Grand Jury. The amount of cocaine in Harris's possession was not an essential element of the crime charged. *Cf.* **Elliott v. State,** 939 So.2d 824 (Ct.App.Miss. 2006); **Hammond v. State,** 938 So.2d 375 (Ct.App.Miss. 2006); **Carroll v. State,** 755 So.2d 483 (Ct.App.Miss. 1999).

In any event, any defect created by amending the indictment was non-jurisdictional in nature and waived by Harris's voluntary plea of guilty. Moreover, the amendment made the day of Harris's plea of guilty was a part and parcel of a plea bargain agreement which was acknowledged by Harris with a full awareness of both the amendment and the agreement. The latter allowed Harris to be sentenced as a regular offender as opposed to an habitual offender. (C.P. at 43)

Fourth, Oktibbeha County has only one (1) judicial district. Accordingly, Harris's claim the indictment was defective for failing to set forth the judicial district in which it was brought is way off base. Even if not, the defect would have been waived by a plea of guilty because it also is non-jurisdictional in nature.

Fifth, Harris was not denied the effective assistance of counsel because counsel's representation was neither deficient nor did any deficiency prejudice Harris. Harris has failed to identify any defenses or facts that would have altered the outcome of his plea or trial in the event of trial.

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).

Harris 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 32-33. 44-45)

In paragraph 13. of his petition to enter plea of guilty, Harris expressed complete satisfaction with the advice and help given by his lawyer. (C.P. at 33)

In paragraph 14. of the petition to enter plea of guilty, Harris told Judge Howard the following:

> "I committed the offense as alledged [sic] in the indictment."
> (C.P. at 34)

On page 47 of the plea transcript Harris told the judge, face to face, he was guilty of possessing cocaine as amended in an amount more than 2 grams but less than 10 grams. (C.P. at 47)

It is quite clear there are material contradictions between what Harris 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 an uninformed 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 Howard apparently 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).

Harris's pleas were both knowing and voluntary.

Harris's indictment, in both its original and amended form, was neither defective nor infirm; rather, it properly charged Harris with possession of cocaine. (C.P. at 30, 36)

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

Also waived was Harris'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).

Harris was not denied the effective assistance of counsel during his guilty pleas because counsel's performance, contrary to Harris's position, was neither deficient nor did any deficiency prejudice Harris. **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).

Counsel cannot be faulted for failing to object to an indictment that was not defective.

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

In short, Harris 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 HARRIS, REFLECTS HARRIS, IN FACT, ENTERED VOLUNTARY PLEAS OF GUILTY TO THE POSSESSION OF COCAINE .

HARRIS'S CLAIM OF INEFFECTIVE COUNSEL IS MATERIALLY CONTRADICTED BY THE GUILTY PLEA RECORD. HARRIS 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 HARRIS WAIVED ANY NON-JURISDICTIONAL DEFECTS IN THE INDICTMENT.

HARRIS'S VOLUNTARY PLEA 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 HARRIS'S PETITION AND THE RECORD OF HIS PLEA WAS NEITHER CLEARLY ERRONEOUS NOR MANIFESTLY WRONG.

Harris has failed to prove by a preponderance of the evidence" he is 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).

Defective Indictment.

Harris complained in his motion for post-conviction relief, and he claims on appeal as well, that his indictment was defective because it was improperly amended and because it failed to set forth the judicial district in which is was brought.

First, the amendment as to the quantity of cocaine possessed by Harris was one of form as opposed to substance and did not need the approval of the Grand Jury. The amount of cocaine possessed is not an essential element of the crime of cocaine possession

Second, any defect was non-jurisdictional in nature and was waived by Harris's failure to object and his voluntary plea of guilty.

Third, Oktibbeha County has only one judicial district. Even if not, any defect in failing to set forth the judicial district was non-jurisdictional and also waived by Harris's voluntary plea of guilty.

Judge Howard found as a fact and concluded as a matter of law that Harris's " . . . indictment was not faulty as it listed that the indictment was brought in the Circuit Court of Oktibbeha County" and the indictment " . . . was first verbally, then in writing, amended to correct the amount of controlled substance that the Petitioner possessed and also to strike the Petitioner's second conviction to allow him to be sentenced as a second-time offender instead of a habitual offender as part of a plea bargain agreement.

Finally, Judge Howard found as a fact that Harris answered affirmatively when asked if he understood he was now charged with possession of more than two grams of cocaine but less than ten grams as a second drug offender.

These findings of fact were neither clearly erroneous nor manifestly wrong.

Harris's indictment, in neither its original nor amended form, was flawed one whit.

Moreover, assuming his pleas were voluntary, Harris, by pleading guilty, waived his right to challenge the indictment as well as the evidence.

In **Jefferson v. State**, 556 So.2d 1016, 1019 (Miss. 1989), the Supreme 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,** 577 So.2d 390, 391 (Miss. 1991), the following language also applicable to Harris'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, Harris's voluntary plea 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 all technical and 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); **Elliott v. State,** 939 So.2d 824 (Ct.App.Miss. 2006).

Involuntary Plea.

Harris argues his plea was involuntary because Judge Howard failed to advise him he could appeal the sentence imposed. This complaint is without merit because Harris's right to appeal any illegal sentence, much like parole information, is not a consequence of the plea about which a defendant must be informed. *Cf.* **Smith v. State,** 919 So.2d 989 (Ct.App.Miss. 2005).

Judge Howard's advice to Harris that "[t]here is no appeal if you plead guilty" was correct by virtue of Miss.Code Ann. §99-35-101.

Harris argues the record fails to reflect a factual basis for his guilty plea and complains he was not informed of the elements of the offense. We disagree.

> BY THE COURT: Did you also explain to [Harris] the elements of the crime to which he's pleading guilty?
>
> BY MR. BURDINE: Yes sir, I did.
>
> BY THE COURT: Did he give you any indication or reason to believe that he did not understand his rights or the elements of this crime.
>
> BY MR. BURDINE: No, he did not Judge Howard. (C.P. at 16)
>
> * * * * * *
>
> Q. [BY THE COURT:] The indictment alleges that on or about October the 15th of 2005 in Oktibbeha County, you possessed cocaine as amended that's an amount more than two grams but less than ten grams. Are you guilty of doing that? (C.P. at 47)
>
> A. [BY HARRIS:] Yes, sir.

In order to satisfy constitutional prerequisites, " . . . [a] court accepting a guilty plea does not need to explain the crime's elements to the defendant on the record but can satisfy this

constitutional prerequisite by other means, such as counsel's representing to the court that the elements of a crime have been explained to the defendant." **Neal v. State,** 936 So.2d 463, 470 (Ct.App.Miss. 2006) citing **Bradshaw v. Stumpf,** 545 U.S. 175, 125 S.Ct. 2398, 2405, 162 L.Ed.2d 143 (2005). *See also* **Garner v. State,** 944 So.2d 934, 941 (Ct.App.Miss. 2006) ["The trial court may assure itself that the accused understands the elements of the crime charged by explaining the elements to the accused or by counsel's representation to the court that the elements of the crime have been explained to the accused."] Such is precisely what occurred here.

As for a factual basis, we also rely heavily on Harris's acknowledgment in paragraph 14. of Harris's petition to enter plea of guilty as follows: "I committed the offense as alledged [sic] in the indictment." (C.P. at 34) Harris, we note, acknowledged he was fully aware of the amendment as to the quantity of cocaine possessed. (C.P. at 43)

The petition to enter plea of guilty was signed by Harris 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 34)

The petition reflects in paragraph 15. Harris's acknowledgment, in plain and ordinary, English that his plea was freely and voluntarily given. (C.P. at 34)

These acknowledgments have got to stand for something. This is especially true where, as here, the circuit judge, in denying post-conviction relief, was entitled to give great weight to Harris'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).

Each of Harris's claims are materially contradicted by the petition to enter plea of guilty

as well as by testimony and acknowledgments made at the time of plea qualification.

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.

Harris wants an evidentiary hearing. (Brief for Appellant at 10)

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 addition, the Supreme Court has held that "when the only support offered by a convict is his own affidavit, and his affidavit is contradicted by his own sworn statement, an evidentiary hearing is not required." **Young v. State,** 731 So.2d 1120, 1123 (¶12) (Miss. 1999). *See also* **Edwards v. State,** 796 So.2d 1040 (¶5) (Ct.App.Miss. 2001) ["If a prisoner's motion for post-conviction relief does not contain any affidavits, other than the prisoner's own to support the prisoner's allegations, then the motion may be dismissed."]

In the case *sub judice*, the trial judge properly dismissed Harris'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 Howard's findings of fact and conclusion of law that Harris's plea was 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.

Harris argues his lawyer was ineffective because he failed to object to a defective indictment, failed to object when the trial judge imposed sentence without determining that Harris was advised of the essential elements of the crime and failed to advise Harris of his right

to appeal the sentence imposed.

We counter with the claim the indictment was not flawed; rather, it properly charged Harris with the substantive offense. "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 Harris's claim of ineffectiveness.

We have already addressed Harris's claims concerning the elements of the offense and a factual basis for his plea and respectfully decline to plow that ground again.

There is no indication counsel's representation fell below an objective standard of reasonableness nor is there evidence that, but for counsel's errors, Harris would not have pled guilty.

In the final analysis, Harris was not denied the effective assistance of counsel during his guilty plea because counsel's performance, contrary to Harris's position, was neither deficient nor did any deficiency actually prejudice Harris. **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)

Harris's bare-bone and conclusory allegations focusing upon counsel's alleged failure to advise Harris of an adequate defense or investigate the facts of the case lack the specificity

required.

Counsel's performance was hardly deficient and unprofessional. Rather, counsel worked out a deal whereby Harris would not be sentenced as an habitual offender which would have required a mandatory sentence without parole eligibility. (C.P. at 43) Harris has failed to demonstrate by affidavit or otherwise how counsel's alleged errors, e.g., his mis-advice or his failure to advise at all, would have altered the outcome of Harris's decision to plead guilty.

"Trial counsel is presumed to be competent." **Brooks v. State**, *supra*, 573 So.2d 1350, 1353 (Miss. 1990). Harris, 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 Harris's plea of guilty was to negate the possibility of a longer sentence for Harris as an habitual offender.

Harris 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. Burdine rendered sound legal advice and performed in a constitutionally acceptable manner.

CONCLUSION

The claims made by Harris that his guilty plea was 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 to 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).

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.' "]

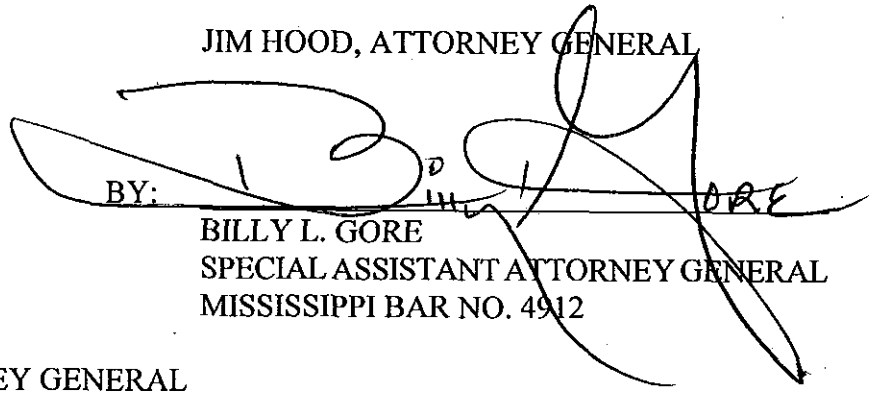
Summary denial was proper because Harris's post-conviction claims targeting the voluntariness of his guilty plea, the integrity of his indictment, and the effectiveness of his

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 plea voluntarily entered by Chris Harris. Accordingly, the judgment entered in the lower court summarily denying Harris's motion for post-conviction collateral relief should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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IN THE CIRCUIT COURT OF OKTIBBEHA COUNTY, MISSISSIPPI
IN VACATION, 2007

CHRISTOPHER HARRIS — PETITIONER

VS. — CAUSE NO. 2007-0090-CV

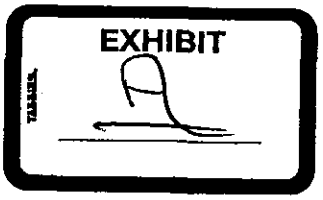
STATE OF MISSISSIPPI — RESPONDENT

ORDER

Came on to be considered this day the above styled and numbered post conviction matter; and the Court, after having reviewed the record of proceedings in the trial court, the petition to enter guilty plea, the plea colloquy, the sentencing order and the pleadings herein; is of the opinion that Petitioner's Motion for Post-Conviction Collateral Relief is without merit and not well-taken.

The Petitioner has filed a motion alleging ineffective assistance of counsel based on his counsel's failure to 1) object to his defective indictment; 2) the State's last minute amendment of his indictment; and 3) the Court's failure to tell the Petitioner that he could appeal his guilty plea.

The Court finds these allegations to be without merit since: 1) The Petitioner's indictment was not faulty as it listed that the indictment was brought in the Circuit Court of Oktibbeha County; 2) The Petitioner's indictment was first verbally, then in writing, amended to correct the amount of controlled substance that the Petitioner possessed and also to strike the Petitioner's second conviction to allow him to be sentenced as a second-time offender instead of a habitual offender as part of a plea bargain agreement. Further, the Court asked the Petitioner during the guilty plea hearing: "Now, Mr. Harris, you understand that you're charged now by the indictment based on the event of possession of cocaine more than two grams but less than ten grams as a



CERTIFICATE OF SERVICE

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

Honorable Lee J. Howard
Circuit Court Judge, District 16
Post Office Box 1344
Starkville, MS 39760

Honorable Forrest Allgood
District Attorney, District 16
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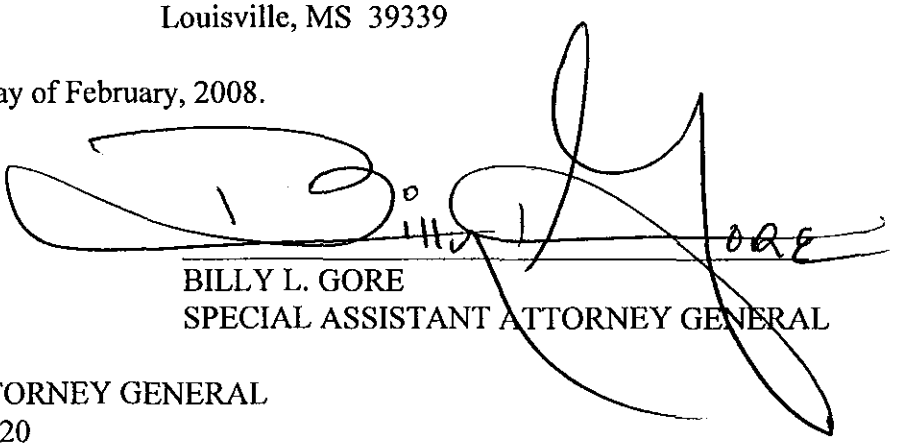
Columbus, MS 39703

Christopher LaShawn Harris, #67477
WCCF
Post Office Drawer 958
Louisville, MS 39339

This the 13th day of February, 2008.



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