IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

REGINA KRICKBAUM — APPELLANT

VS. — NO. 2007-CP-1421

STATE OF MISSISSIPPI — APPELLEE

MOTION TO DISMISS APPEAL
OR, IN THE ALTERNATIVE,
BRIEF FOR THE APPELLEE ON THE MERITS

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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REGINA KRICKBAUM **APPELLANT**

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COMES NOW appellee, State of Mississippi, through counsel, and respectfully moves this Court for an order dismissing, without prejudice, the present appeal from a denial by the trial court of a motion for production of records and transcripts filed *pro se* by Regina Krickbaum in the above styled and numbered cause.

Krickbaum's appeal should be dismissed due to a lack of appellate jurisdiction. **Shanks v. State,** 906 So.2d 760 (Ct.App.Miss. 2004); **Fleming v. State,** 553 So.2d 505 (Miss. 1989).

In the alternative, we respectfully submit Ms. Krickbaum's appeal is without appeal on appeal because by entering a plea of guilty to armed robbery (C.P. at 6, 12-13; Brief of Appellant at 1), Krickbaum, who apparently had appointed counsel during her guilty plea and was allowed to proceed *in forma pauperis* on appeal (C.P. at 25), forfeited her right to a free transcript.

Moreover, the trial judge was correct when he found " . . . that this is an original action for records, and as such, is barred by *Fleming v. State,* 553 So.2d [505 (Miss. 1989)];and that said Motion should be, and

is hereby overruled and denied." (C.P. at 15; appellee's exhibit A, attached)

We agree with Judge Kitchens that Krickbaum has failed to demonstrate a specific basis or need for the transcript or the documents she seeks.

In **Shanks,** *supra,* we find this language penned by the Court of Appeals:

> Travis Shanks has appealed an order denying his request for free copies of the records and transcripts of his guilty plea entered in the Circuit Court of Claiborne County, Mississippi. In response the State has filed a motion to dismiss the appeal for lack of jurisdiction. The State's motion is hereby granted, and the appeal dismissed without prejudice, since no appellate jurisdiction exists over the transcript request which is not raised as part of the direct appeal from conviction or as part of a motion for post-conviction collateral relief. (906 So.2d at 760)

In the **Fleming** case the Supreme Court stated the following:

> Having instituted an action outside the Post Conviction Relief Act, and having further failed to demonstrate any need other than a desire to pick the bones of his conviction and sentencing proceedings for any possible infirmity, Fleming was not entitled to a free copy of the transcript and other court records. (553 So.2d at 508)

Shanks and **Fleming,** we respectfully submit, control the posture of Krickbaum's appeal.

BRIEF FOR THE APPELLEE IN SUPPORT OF MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, BRIEF FOR THE APPELLEE ON THE MERITS

REGINA KRICKBAUM, a 49-year-old Caucasian female and present resident of the Central Mississippi Correctional facility in Pearl, Mississippi, seeks to appeal directly to this Court from an order entered on July 17, 2007, by the Circuit Court of Clay County, James T. Kitchens, Jr., Circuit Judge, presiding, denying summarily Krickbaum's motion for production of records and transcripts. (C.P. at 15; appellee's exhibit A, attached)

The one page order states, in part, that "[t]he Court having considered same finds that this is an original action for records, and as such, is barred by *Fleming v. State,* 553 So.2d [505 (Miss. 1989)], and that

said Motion should be, and is hereby overruled and denied." (C.P. at 15)

We concur.

Moreover, this matter is not on direct appeal. Therefore, the Petitioner is not entitled to a free transcript." (C.P. at 15; appellee's exhibit A, attached]

On or about April 15, 2006, Krickbaum, apparently under the trustworthiness of the official oath, entered a plea of guilty to armed robbery in the Circuit Court of Clay County. (Brief of Appellant at 1) Krickbaum was thereafter sentenced to serve eighteen (18) mandatory years in the custody of the MDOC. (C.P. at 12)

In July of 2007, Krickbaum filed in the Circuit Court of Clay County a fill-in-the-blank pleading styled "Motion For Records and Transcripts." (C.P. at 12-14)

In her motion for production of records and transcripts, Krickbaum alleged she was seeking post-conviction relief based upon an alleged violation of her due process rights, an involuntary plea, and ineffective counsel. (C.P. at 12-13)

In her appellate brief which consists of six (6) handwritten pages, Krickbaum raises issues that have never been presented to the trial court in any form or fashion. (Brief of Appellant at 1)

Krickbaum's appeal should be dismissed for, *inter alia*, want of appellate jurisdiction.

We rely upon the following decisions: **Shanks v. State,** *supra*, 906 So.2d 760 (Ct.App.Miss. 2004) and **Fleming v. State,** *supra*, 553 So.2d 505 (Miss. 1989), as either followed or approved implicitly in **Ford v. State,** 708 So.2d 73, 75 (Miss. 1998); **Walker v. State,** 703 So.2d 266, 267 (Miss. 1997); and **Pierce v. State,** 811 So.2d 395 (Ct.App.Miss. 2000).

Copies of the opinions in both **Shanks v. State** (COA) and **Fleming v. State** (SCT) are attached to our brief as appellee's exhibits B. and C., respectively. Both **Fleming** and **Shanks** appear to be directly on

point.

We summarize.

First, this appeal should be dismissed for want of appellate jurisdiction. **Fleming v. State,** *supra*, 553 So.2d at 506; **Shanks v. State,** *supra,* 906 So.2d at 761.

Second, should this Court elect to address the merits of the motion, as done in **Fleming**, we respectfully submit that Krickbaum failed to sufficiently demonstrate to the circuit judge a specific need for records yet to be identified by Krickbaum and for a transcript of her guilty plea proceeding. **Fleming v. State,** *supra*, 553 So.2d at 507.

We surmise that Krickbaum, much like Fleming,

> " . . . desires to attack his conviction and sentence via the Uniform Post-Conviction Collateral Relief Act, and that he needs all transcripts and records therefrom so he can conduct a 'fishing expedition' for grounds upon which to attack the conviction and sentence." **Fleming,** *supra*, 553 So.2d at 507.

We respectfully submit that Regina Krickbaum, much like Travis Shanks and John Fleming,

> " . . . has not shown a specific need, or that the documents sought are necessary to decide a specific issue." **Fleming**, *supra*, 553 So.2d at 507.

Some final thoughts.

By entering a voluntary plea of guilty and bypassing any opportunity for direct appeal, Krickbaum, who apparently had appointed counsel at the time of her plea and appealed to this Court *in forma pauperis,* forfeited her right to a free transcript. **Fleming v. State,** *supra*, 553 So.2d at 508.

Finally, Ms Krickbaum's appellate brief seeks to present for appellate review four (4) individual issues, *viz.*, the denial of her right to counsel during police interrogation, an involuntary confession, denial of discovery, and ineffective assistance of counsel. (Brief of Appellant at 1) Krickbaum did not go to trial; rather, she entered a plea of guilty to armed robbery. Her brief is in the nature of a direct appeal flowing in

the wake of a guilty plea.

Such will not lie. *See* Miss.Code Ann. §99-35-101 which reads as follows:

> Any person convicted of an offense in a circuit court may appeal to the supreme court, provided, however, **an appeal from the circuit court to the supreme court shall not be allowed in any case where the defendant enters a plea of guilty.** [emphasis ours]

This is yet another reason why Krickbaum's appeal should be dismissed without prejudice to properly pursue her claims within the context of our post-conviction statutes and rules of appellate procedure.

CONCLUSION

Krickbaum's appeal from the order of the circuit judge denying a transcript and records of Krickbaum's plea-qualification hearing should be dismissed for want of appellate jurisdiction.

The order is unappealable for the reasons succinctly expressed in **Fleming v. State,** *supra*, 553 So.2d 505 (Miss. 1989), and **Shanks v. State,** *supra.*

In the alternative, Krickbaum's appeal is without merit on the merits because she has failed to demonstrate a specific and compelling need for the transcript, records, and other documents. **Fleming v. State,** *supra*, 553 So.2d 505 (Miss. 1989).

Judge Kitchens, we note, placed the following statement in his order granting Krickbaum permission to file her appeal *in forma pauperis*: "The Circuit [Clerk] is directed to contact the Court Reporter and have her place a copy of the guilty plea hearing in Clay County Criminal Cause Number 8755 in the criminal file and in the Petitioner's post-conviction civil file." (C.P. at 25)

Dismissal of this cause should be without prejudice to Krickbaum who " . . . may seek production of the documents under the discovery provisions provided for by the [post-conviction relief] Act. *See* Miss.Code Ann. § 99-39-15." **Fleming v. State,** *supra*, 553 So.2d at 506.

Respectfully submitted,

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4-45

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSISSIPPI
JULY TERM, 2007

REGINA KRICKBAUM — PETITIONER

VERSUS — CAUSE NO. 2006-0130

STATE OF MISSISSIPPI — RESPONDENT

ORDER

Came on to be heard this day the above styled and numbered cause on Motion for Production of Records filed by the Petitioner herein;

The Court having considered same finds that this is an original action for records, and as such, is barred by *Fleming v. State,* 553 So.2d; and that said Motion should be, and is hereby overruled and denied.

IT IS THEREFORE ORDERED that the Motion for Production of Records filed herein be overruled and denied. Further, the Circuit Clerk is directed to forward a copy of this Order to all parties of record.

SO ORDERED this the 17th day of July, 2007.

James T. Kitchens Jr.
CIRCUIT JUDGE

EXHIBIT
A

FILED CLAY COUNTY
JUL 17 2007
Robert D. Hanna Jr.

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Brantley, 865 So.2d 1126, 1134 (Miss.2004) (where conservator did not join all persons with interests in settlement, chancellor's award must be reversed).

CONCLUSION

¶ 8. We affirm in part and reverse in part the Court of Appeals' judgment. We affirm that part of the Chancery Court of Jackson County's judgment which sets aside the tax sale as to the lienholders' interests only. We reverse the Chancery Court of Jackson County's judgment insofar as it sets aside the entire tax sale and remand this case to that court for further proceedings in accordance with this opinion.

¶ 9. AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

SMITH, C.J., COBB, P.J., CARLSON, DICKINSON AND RANDOLPH, JJ., CONCUR. EASLEY, J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION. GRAVES, J., CONCURS IN PART AND DISSENTS IN PART WITHOUT SEPARATE WRITTEN OPINION. DIAZ, J., NOT PARTICIPATING.

Travis SHANKS, Appellant,

v.

STATE of Mississippi, Appellee.

No. 2004-CP-00763-COA.

Court of Appeals of Mississippi.

Dec. 14, 2004.

Background: Defendant filed a motion for free copies of the records and transcripts of his guilty plea. The Circuit Court, Claiborne County, Lamar Pickard, J., denied the motion. Defendant appealed and the State filed a motion to dismiss the appeal.

Holding: The Court of Appeals, Barnes, J., held that dismissal of defendant's appeal of the denial of his motion for free copies of the records and transcripts from his guilty plea hearing was required.

Appeal dismissed.

1. Criminal Law ⇐1004

A criminal defendant does not have a constitutional or common law right to appeal to the Court of Appeals; instead, his ability to appeal is based entirely on statute.

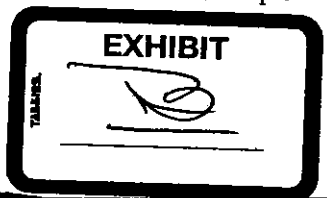
2. Criminal Law ⇐1026, 1407

There are two primary ways a criminal defendant may challenge a trial court proceeding: a direct appeal from conviction or a proceeding under the Post-Conviction Collateral Relief Act. West's A.M.C. §§ 99-35-101, 99-39-1 to 99-39-29.

3. Criminal Law ⇐1026.10(4)

Dismissal of defendant's appeal of the denial of his motion for free copies of the records and transcripts from his guilty plea hearing was required; defendant could challenge a trial court ruling on direct appeal or under the Post-Conviction Collateral Relief Act, defendant's guilty plea prevented defendant from directly appealing the trial court's rulings, and defendant failed to file a proper petition for review under the Act. West's A.M.C. §§ 99-35-101, 99-39-25.

Travis Shanks (Pro Se), attorney for appellant.



Office of the Attorney General, by Charles W. Maris, Billy L. Gore, attorney for appellee.

Before BRIDGES, P.J., MYERS and BARNES, JJ.

BARNES, J., for the Court.

¶ 1. Travis Shanks has appealed an order denying his request for free copies of the records and transcripts of his guilty plea entered in the Circuit Court of Claiborne County, Mississippi. In response, the State has filed a motion to dismiss the appeal for lack of jurisdiction. The State's motion is hereby granted, and the appeal dismissed without prejudice, since no appellate jurisdiction exists over the transcript request which is not raised as part of the direct appeal from conviction or as part of a motion for post-conviction collateral relief.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

¶ 2. Travis Shanks was indicted by the Claiborne County Grand Jury at its January, 2003 term on a charge of capital murder. On March 24, 2003, Shanks, represented by counsel, pled guilty to the charge of murder less than capital, and was sentenced to serve the remainder of his life in the custody of the Mississippi Department of Corrections. On January 20, 2004, Shanks filed a motion with the circuit court to compel the clerk to provide a copy of all pertinent records and transcripts; although Shanks's motion did not specifically request "free" copies, he filed an Affidavit of Poverty and represented that he was "unable to afford any cost or security of said records or transcripts." In his motion, Shanks acknowledged that the records and transcripts were desired in order to adduce "any and all ... violations which occurred during the ... guilty plea...." The circuit court determined that Shanks failed to show a basis or need for the information requested and denied his motion. Aggrieved by the denial, Shanks filed his notice of appeal and was granted permission to proceed *in forma pauperis*. In response to Shanks's brief, which for the first time alleged that Shanks's mother had sought to purchase a copy of the records and transcripts on his behalf but was refused by the circuit clerk, the State filed a motion to dismiss the appeal for lack of jurisdiction.

ANALYSIS

[1–3] ¶ 3. Shanks does not have a constitutional or common law right to appeal to this Court; instead, his ability to appeal is based entirely on statute. *See Fleming v. State*, 553 So.2d 505, 506 (Miss.1989). There are two primary ways a criminal defendant may challenge a trial court proceeding: a direct appeal from conviction under Miss.Code Ann. § 99–35–101 (Rev. 2002) or a proceeding under the Post–Conviction Collateral Relief Act, Miss. Code Ann. §§ 99–39–1 to 99–39–29 (Rev. 2000 & Supp.2004). *See Fleming*, 553 So.2d at 506. Since Shanks entered a guilty plea, a direct appeal is not available. Section 99–35–101 specifically provides that "an appeal from the circuit court to the supreme court shall not be allowed in any case where the defendant enters a plea of guilty." Miss.Code Ann. § 99–35–101; *see also Walton v. State*, 752 So.2d 452, 454–55 (Miss.Ct.App.1999) (by pleading guilty, indigent criminal defendant not only bypasses the right to direct appeal but also forfeits the right to a free transcript to which he would have been entitled on direct appeal). Thus, Shanks's only means of appellate review is to follow the procedures set forth in the Post–Conviction Collateral Relief Act. He has not done so.

¶ 4. In *Fleming v. State,* 553 So.2d 505 (Miss.1989), the Mississippi Supreme Court explained:

> A prisoner who has filed a proper motion pursuant to this Act, and whose motion has withstood summary dismissal under § 99–39–11(2), may be entitled to trial transcripts or other relevant documents under the discovery provisions of § 99–39–15, upon good cause shown and in the discretion of the trial judge. If the prisoner's request for transcripts or other documents is denied, and his overall petition is ultimately denied, then he may appeal the denial of his petition for collateral relief pursuant to § 99–39–25, which provides that final judgments entered under the Act may be reviewed by this Court on appeal brought by either the State or the prisoner. Within that appeal, the prisoner may include the claim that the denial of his request for transcripts or other documents was error.... However, *nothing in the Uniform Post–Conviction Collateral Relief Act or elsewhere gives a prisoner the right to institute an independent, original action for a free transcript or other documents, and then if dissatisfied with the trial court's ruling, to directly appeal that ruling to this court as a separate and independent action.* Fleming did not file his request for free transcript and other documents as part of a motion under the Act for post-conviction collateral relief, nor is this claim raised as part of a direct appeal from conviction. Therefore, this appeal should be dismissed due to a lack of jurisdiction.

Fleming, 553 So.2d at 506 (citations omitted) (emphasis added).

¶ 5. In the case at hand, Shanks still has avenues of appellate review. Shanks may seek relief by properly filing a petition with the circuit court under the Post–Conviction Collateral Relief Act. If the circuit court denies his petition for collateral relief, he may then seek relief from this Court pursuant to Mississippi Code Annotated § 99–39–25 (Rev.2000 & Supp.2004). Within that appeal, Shanks may raise the issue of the denial of his request for transcripts as well as any constitutional issues he might have. The trial court will not, however, be found in error for declining to require the State to subsidize a "fishing expedition" by Shanks; the trial court may reasonably require him "to demonstrate some specific need" before requiring the State to furnish free copies of trial records for use in collateral proceedings. *See Fleming,* 553 So.2d at 506; *Kemp v. State,* No.2003–CP–01627–COA, 904 So.2d 1137 (Miss.Ct.App. Oct.19, 2004).

¶ 6. THE APPEAL OF THE JUDGMENT OF THE CIRCUIT COURT OF CLAIBORNE COUNTY IS DISMISSED WITHOUT PREJUDICE DUE TO LACK OF JURISDICTION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO CLAIBORNE COUNTY.

KING, C.J., BRIDGES AND LEE, P.JJ., IRVING, MYERS, CHANDLER, GRIFFIS, AND ISHEE, JJ. CONCUR.

Pierre HAYNES, Appellant,

v.

STATE of Mississippi, Appellee.

No. 2003–CP–02738–COA.

Court of Appeals of Mississippi.

Dec. 14, 2004.

Background: After defendant pled guilty to armed robbery, defendant moved for

"friends of the Court", the language could well have been thought to be offensive.

John T. FLEMING

v.

STATE of Mississippi.

No. 07-KP-59246.

Supreme Court of Mississippi.

Nov. 15, 1989.

Defendant filed original proceeding requesting transcripts of sentencing and other court records related to his guilty plea. The Circuit Court, First Judicial District, Hinds County, William F. Coleman, J., denied motion on grounds that defendant failed to show need. Defendant appealed. The Supreme Court, Prather, J., held that: (1) appellate jurisdiction did not exist over transcript request which was not part of motion for postconviction collateral relief or raised as part of direct appeal from conviction, and (2) defendant did not demonstrate sufficient need to entitle him to free copy of transcripts.

Affirmed.

1. Criminal Law ⇐1023(1)

Defendant is not permitted to appeal from denial of motion for transcript as separate action within context of direct appeal statutes. Code 1972, § 99-35-101.

2. Criminal Law ⇐627.6(2), 1023(1)

Postconviction relief statute did not give defendant right to institute independent action for free transcript or other documents and then appeal trial court's ruling as separate action; defendant could have sought production of documents under discovery provisions if he had brought action under postconviction relief statute. Code 1972, §§ 99-39-1 et seq., 99-39-11(2), 99-39-15, 99-39-17, 99-39-25.

3. Costs ⇐302.1(4)

Defendant's request for trial and sentencing transcripts in order to institute attack on conviction and sentence was brought outside postconviction relief statute and, thus, State was not required to furnish documents free of charge absent demonstrated need beyond mere desire to examine proceedings for any possible infirmities. Code 1972, §§ 99-35-101, 99-39-1 et seq., 99-39-11(2), 99-39-15, 99-39-17, 99-39-25.

4. Constitutional Law ⇐248(2), 268.2(3)

Neither due process nor equal protection rights are violated by requirement that defendant demonstrate specific need before State must furnish defendant with free copies of trial records in postconviction relief proceedings. Code 1972, § 99-39-1 et seq.; U.S.C.A. Const.Amends. 5, 14.

John T. Fleming, Parchman, pro se.

Mike C. Moore, Atty. Gen., Jack B. Lacy, Jr., Sp. Asst. Atty. Gen., Jackson, for appellee.

Before DAN M. LEE, P.J., and PRATHER and BLASS, JJ.

PRATHER, Justice, for the Court:

Fleming was indicted by the Hinds county Grand Jury at its January, 1987 term on a charge of possession of a controlled substance and also as an habitual offender under Miss.Code Ann. § 99-19-81 (1972), as amended. On August 12, 1987, Fleming, at the time represented by counsel, entered a plea of guilty and was sentenced to a term of three (3) years in the custody of the Mississippi Department of Corrections as an habitual offender. He was also ordered to pay a fine of thirty thousand dollars ($30,000.00).

I.

On May 20, 1988, in an original proceeding, Fleming filed a "Motion for Transcripts of Sentencing and Other Court Records" in the Hinds County Circuit

Court. In an order signed May 25, 1988, the circuit court, William F. Coleman presiding, denied Fleming's motion for the reason that Fleming "failed to show a basis or need."

Feeling aggrieved by that decision, Fleming appeals to this Court *in forma pauperis.*

II.

Preliminarily, there are two primary ways in which a criminal defendant may challenge a trial court proceeding: (1) a direct appeal from a conviction, or (2) a proceeding under the Post Conviction Relief Act. An appeal is a matter of statutory right and not based on any inherent common law or constitutional right. *See Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 3312-3313, 77 L.Ed.2d 987, 993 (1983); *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *McKane v. Durston,* 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867 (1894); *Bennett v. State,* 293 So.2d 1 (Miss.1974); *State v. Ridinger,* 279 So.2d 618 (Miss.1973); *State v. Warren,* 197 Miss. 13, 19 So.2d 491 (1944).

[1] Under Miss.Code Ann. § 99-35-101 (1972) "any person convicted of an offense in a circuit court may appeal to the supreme court, provided, however, an appeal from the circuit court to the supreme court shall not be allowed in any case where the defendant enters a plea of guilty." This statute provides the avenue for direct appeal of a criminal conviction, but it does not permit an appeal from the denial of a motion for a transcript or other records as a separate action in and of itself. A defendant may raise such a claim within the context of a direct appeal under this section, as was the case in *Fisher v. State,* 532 So.2d 992 (Miss.1988). However, Fleming pled guilty, did not directly appeal, and consequently was prevented from raising this claim within the context of a direct appeal.

[2] The other avenue of appellate review available to Fleming is via the Uniform Post-Conviction Collateral Relief Act, Miss.Code Ann. § 99-39-1 et seq. (Supp. 1989). A prisoner who has filed a proper motion pursuant to this Act, and whose motion has withstood summary dismissal under § 99-39-11(2), may be entitled to trial transcripts or other relevant documents under the discovery provisions of § 99-39-15, upon good cause shown and in the discretion of the trial judge. *See also* Miss.Code Ann. § 99-39-17 (Supp.1989). If the prisoner's request for transcripts or other documents is denied, and his overall petition is ultimately denied, then he may appeal the denial of his petition for collateral relief pursuant to § 99-39-25 which provides that final judgments entered under the Act may be reviewed by this Court on appeal brought by either the State or the prisoner. Within that appeal, the prisoner may include the claim that the denial of his request for transcripts or other documents was error, just as was done on direct appeal in *Fisher, supra,* and *Ruffin v. State,* 481 So.2d 312 (Miss.1985).

However, nothing in the Uniform Post-Conviction Collateral Relief Act or elsewhere gives a prisoner the right to institute an independent, original action for a free transcript or other documents, and then if dissatisfied with the trial court's ruling, to directly appeal that ruling to this court as a separate and independent action. Fleming did not file his request for free transcript and other documents as part of a motion under the Act for post-conviction collateral relief, nor is this claim raised as part of a direct appeal from conviction.

Therefore, this appeal should be dismissed due to a lack of jurisdiction. *See* Miss.Code Ann. § 99-39-7 (Supp.1989); *McDonall v. State,* 465 So.2d 1077, 1078 (Miss.1985). (having pled guilty, Fleming must resort first to the trial court). Fleming may seek production of the documents under the discovery provisions provided for by the Act. *See* Miss.Code Ann. § 99-39-15 (Supp.1989).

III.

[3, 4] We also address the merits of the motion in order to express this Court's opinion that the lower court did not err. Fleming's motion filed in the trial court

basically states that Fleming desires to attack his conviction and sentence via the Uniform Post-Conviction Collateral Relief Act, and that he needs all transcripts and records therefrom so he can conduct a "fishing expedition" for grounds upon which to attack the conviction and sentence. Fleming has not shown a specific need, or that the documents sought are necessary to decide a specific issue.

The law does not require the state to furnish these documents free of charge under these circumstances. *U.S. v. MacCollom*, 426 U.S. 317, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976); *Campbell v. U.S.*, 538 F.2d 692, 693 (5th Cir.1976); *U.S. v. Herrera*, 474 F.2d 1049 (5th Cir.1973), *cert. denied* 414 U.S. 861, 94 S.Ct. 77, 38 L.Ed.2d 111 (1973); *Cf. Fisher v. State*, 532 So.2d 992, 999 (Miss.1988); *Ruffin v. State*, 481 So.2d 312, 315 (Miss.1985). *MacCollom* presented the question of whether 28 U.S.C. § 753 governing the availability to an indigent of a free transcript violated the constitution in the post-conviction collateral relief context. The prisoner in *MacCollom* was convicted, did not appeal, and two years later sought a free transcript of his trial so that he could prepare a petition for collateral relief. 426 U.S. at 319, 96 S.Ct. at 2089, 48 L.Ed.2d at 671.

Under 28 U.S.C. § 753, an indigent prisoner is entitled to a free transcript in pursuit of post-conviction collateral relief if a judge certifies that the claim is "not frivolous" and that the transcript is "needed to decide the issue presented." The United States Supreme Court held that requiring the prisoner to satisfy these conditions at the collateral review stage did not violate either the due process or equal protection guarantees of the U.S. Constitution. 426 U.S. at 325, 96 S.Ct. at 2091–92, 48 L.Ed.2d at 675. The court reasoned as follows:

> Respondent in this case had an opportunity for direct appeal, and had he chosen to pursue it he would have been furnished a free transcript of the trial proceedings. But having foregone that right, and instead some years later having sought to obtain a free transcript in order to make the best case he could in a [collateral] proceeding, respondent stands in a different position.
>
> * * * * *
>
> We think the formula devised by Congress satisfies the equal protection component of the Fifth Amendment. Respondent chose to forego his opportunity for direct appeal with its attendant unconditional free transcript. This choice affects his later equal protection claim as well as his due process claim. Equal protection does not require the Government to furnish to the indigent a delayed duplicate of a right of appeal with attendant free transcript which it offered in the first instance, although a criminal defendant of means might well decide to purchase such a transcript in pursuit of [collateral relief]. The basic question is one of adequacy of respondent's access to procedures for review of his conviction, [citation omitted], and it must be decided in the light of avenues which respondent chose not to follow as well as those he now seeks to widen. We think it enough at the collateral-relief stage that Congress has provided that the transcript be paid for by public funds if one demonstrates to a district judge that his ... claim is not frivolous, and that the transcript is needed to decide the issue presented.

426 U.S. at 324–26, 96 S.Ct. at 2091–92, 48 L.Ed.2d at 675.

In *MacCollom*, the prisoner "made only a naked allegation of ineffective assistance of counsel" and this was held insufficient to justify the awarding of a free copy of his trial transcript. 426 U.S. at 327, 96 S.Ct. at 2092, 48 L.Ed.2d at 676. Further, the court quoted Judge Haynsworth of the Fourth Circuit, who said that "[t]he usual grounds for successful collateral attacks upon convictions arise out of occurrences outside the courtroom or of events in the courtroom of which the defendant was aware and can recall without the need of having his memory refreshed by reading a transcript. He may well have a need of transcript [to support his claim], but rarely, if ever, ... to become aware of the events or occurrences which constitute a ground for

collateral attack." *See U.S. v. Shoaf*, 341 F.2d 832, 835 (4th Cir.1964). Moreover, a petitioner is not required to prove his claim, only to demonstrate that his claims is not frivolous. 426 U.S. at 326, 96 S.Ct. at 2092, 48 L.Ed.2d at 675.

The same things can be said about Fleming in the present case. By pleading guilty, and bypassing the opportunity for direct appeal, he forfeited his right to a free transcript, assuming he was indigent at the time. Having done so, it is not unreasonable, and certainly not unconstitutional, to require him to demonstrate some specific need before requiring the State or county to furnish him with free copies of trial records at this stage. The State is not required to subsidize "fishing expeditions" at the collateral review stage merely because the petitioner is indigent. *See Campbell v. U.S., supra; Bonner v. Henderson*, 517 F.2d 135, 136 (5th Cir. 1975); *U.S. v. Herrera, supra; Cf. Fisher v. State, supra.*

Having instituted an action outside the Post Conviction Relief Act, and having further failed to demonstrate any need other than a desire to pick the bones of his conviction and sentencing proceedings for any possible infirmity, Fleming was not entitled to a free copy of the transcript and other court records.

IV.

This Court dismisses this appeal on jurisdiction grounds for the reasons previously stated. The Court notes en route that the trial court's ruling denying Fleming's request was proper under the cases herein cited.

AFFIRMED.

ROY NOBLE LEE, C.J., HAWKINS and DAN M. LEE, P.JJ., and ROBERTSON, SULLIVAN, ANDERSON, PITTMAN and BLASS, JJ., concur.

Carlton BARNES

v.

BOARD OF SUPERVISORS, DeSOTO COUNTY, Mississippi.

No. 07-58712.

Supreme Court of Mississippi.

Nov. 15, 1989.

Landowner appealed county board of supervisors' decision to grant conditional use permit for mining gravel and relocating wash plant on nearby land. The Circuit Court, DeSoto County, Andrew C. Baker, J., upheld decision to grant permit. Landowner appealed. The Supreme Court, Roy Noble Lee, C.J., held that substantial evidence supported board's decision.

Affirmed.

1. Zoning and Planning ⇐703

County board of supervisors' decision whether to grant conditional use permit is binding upon circuit court and Supreme Court if founded upon substantial evidence.

2. Zoning and Planning ⇐435

Applicants for conditional use permit have burden to prove by preponderance of evidence that they have met elements or factors essential to obtaining permit.

3. Zoning and Planning ⇐435

Evidence supported county board of supervisors' decision to grant conditional use permit for mining gravel from tract adjacent to subdivision, for relocating wash plant, and for extending time to mine another tract near subdivision; board imposed 15 restrictive conditions.

4. Zoning and Planning ⇐439

County board of supervisors that granted conditional use permit should have made specific findings of fact on issues contained in zoning ordinance.

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 James T. Kitchens, Jr.
Circuit Court Judge, District 16
Post Office Box 1387
Columbus, MS 39703

Honorable Forrest Allgood
District Attorney, District 16
Post Office Box 1044
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Regina Krickbaum, #29064
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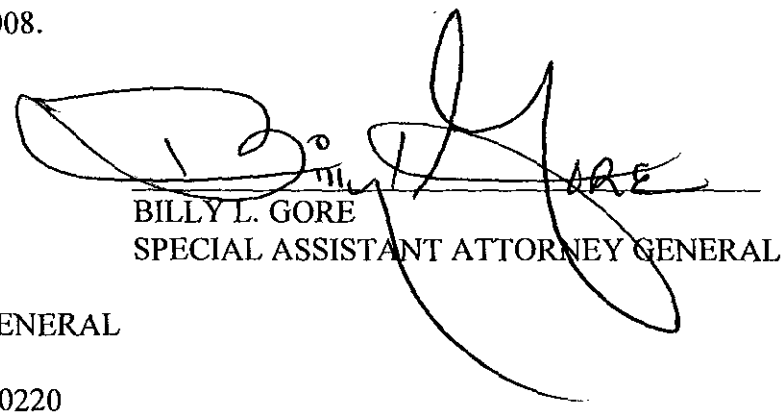
This the 1st day of May, 2008.



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