IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHRISTOPHER WADE ELLIOTT — APPELLANT

VS. — NO. 2008-CA-0948-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 yet another appeal where the circuit judge, in summarily denying post-conviction collateral relief sought in the wake of a guilty plea, comes face to face with material contradictions between statements made, *ore tenus*, in open court under the trustworthiness of the official oath, and assertions made out-of-court three (3) years later in a sworn affidavit attached to a motion for post-conviction relief.

On August 10, 2004, Christopher Elliott, a thirty-two (32) year old resident of Columbia, entered in the Circuit Court of Marion County, R. I. Prichard, III, Circuit Judge, presiding, a plea of guilty to sexual battery. (C.P. at 38, 60-61)

On September 3, 2004, Judge Prichard, during a formal hearing at which Elliott had nothing to say in extenuation or mitigation of the penalty to be imposed, sentenced Elliott to serve twenty (20) years in the custody of the MDOC. (C.P. at 55-58) After imposing sentence, Judge Prichard informed Elliott that " . . . since this is a sex crime it is going to be served without eligibility for parole, probation or early work release." (C.P. at 57)

Three (3) years later, on September 4, 2007, Elliott asked the same judge to set aside his guilty plea and his twenty (20) year mandatory sentence and grant him a trial by jury on the grounds, *inter alia,* his plea was involuntary and his lawyer ineffective. Specifically, Elliott claimed " . . . his attorney deceived him into believing that if he pleaded guilty he would receive no days in jail." (Brief of Appellant at 4) His time would be suspended, and he could go home that day. (C.P. at 17)

We don't believe it!

More importantly, neither did the judge.

An additional ground for relief was that Elliott's guilty plea flunked the test for voluntariness because neither his lawyer nor the trial judge informed him he would have to register as a sex offender upon his release from prison. (C.P. at 12) According to Elliott's post-conviction papers, had he known he would be a sex offender for life, he would have never pled guilty. (Brief of Appellant at 16; C.P. at 13, 18)

STATEMENT OF FACTS

CHRISTOPHER WADE ELLIOTT, a thirty-two (32) year old Caucasian male who completed the 10th grade at West Marion High School and later received his GED (C.P. at 56), appeals 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 Marion County, R. I. Prichard, III, Circuit Judge, presiding. Elliott asked the judge to vacate his plea and his sentence and grant him a trial by jury. (C.P. at 12)

Attached to his post-conviction pleading was Elliott's own affidavit as well as the affidavit of his aunt, Martha Miller.

Elliott claimed in his personal affidavit he was induced to plea guilty by his attorney who promised him that if he " . . . just pleaded guilty, the Judge would suspend [his] sentence and [he] would not have to go to jail." (C.P. at 16)

coerced, intimidated, threatened, **made promises to you,** put pressure on you or done anything to anyone of y'all to try to get you to come over here and enter a plea of guilty?

A. (DEFENDANT CHRISTOPHER ELLIOTT) **No, sir.** (C.P. at 34)

* * * * * *

Q. All right. And is [your guilty plea] going to be entered by each one of you of your own free will and voluntarily entered by you?

A. (ALL DEFENDANTS NODDING IN AGREEMENT). (C.P. at 35) [emphasis ours]

Elliott has apparently changed his mind, claiming at this late date his plea was involuntary because, *inter alia*, ". . . his attorney deceived him into believing that if he pleaded guilty, he would receive no days in jail." (Brief of Appellant at 4)

In a five (5) page amended order of dismissal entered by Judge Prichard on April 18, 2008, the court found that Elliott's post-conviction claims were materially contradicted by statements made in open court under oath and that " . . . trial judges are entitled to place great weight upon the sworn testimony of a defendant given at a plea hearing." (C.P. at 87)

Judge Prichard summarily denied Elliott's motion for post-conviction collateral relief, finding as a fact and concluding as a matter of law that

(1) Elliott did not receive the ineffective assistance of counsel because Elliott acknowledged during the plea-qualification hearing he had "met" with his lawyer, "conferred" with his lawyer, and "thoroughly and completely" discussed his case with his lawyer and was satisfied with his lawyer's representation, services, and advice, and

(2) Elliott's pleas were freely and voluntarily offered with full understanding of the consequences of his plea and that Elliott " . . . had every opportunity to inform the Court of any

perceived belief that he would receive a specific sentence or that he did not understand" the plea process because of the medication he was taking. *See* appellee's exhibit A, attached; C.P. at 86-88.

We respectfully submit Judge Prichard did not err in finding Elliott'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).

On appeal to this Court from the amended order of dismissal Elliott argues

[I.] his plea was involuntary because his lawyer deceived him into believing that if he pleaded guilty he would receive no days in jail;

[II.] he was subjected to ineffective assistance of counsel during both the plea-qualification and sentencing hearings because counsel, *inter alia*, failed to explore possible defenses and failed to offer a scintilla of evidence in extenuation and mitigation of sentence, and

[III.] his plea was involuntary because the judge failed, apparently as a consequence of Elliott's guilty plea, to give Elliott written notification of the registration requirements for convicted sex offenders. (Brief of Appellant at 14-17)

A copy of the guilty plea transcript is a matter of record at C.P. 21-55. A transcript of sentencing is found at C.P. 55-58.

A copy of Elliott's petition to enter plea of guilty, both sworn and subscribed, is found at C.P. 63-66. It contains additional acknowledgments and assertions made by Elliott at the time of his plea. (C.P. 63-66)

SUMMARY OF THE ARGUMENT

Elliott says his lawyer was ineffective and his plea involuntary. These claims were correctly dismissed summarily because they are substantially and materially contradicted by the guilty plea record. In this posture, they were plainly without merit.

A defendant bears the burden of proving by a preponderance of the evidence he is entitled to post-conviction relief. **Cross v. State,** 954 So.2d 497 (Ct. App.Miss. 2007). Elliott has failed to do so here.

Elliott has failed to prove, or demonstrate he can prove, by a preponderance of the evidence his lawyer's performance was deficient and that the deficiency prejudiced Elliott. **Strickland v. Washington,** 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In denying post-conviction relief, Judge Prichard gave great weight to statements and acknowledgments made by Elliott, under the trustworthiness of the official oath, including Elliott's assurances he had neither been pressured nor promised anything nor "mistreated, abused, coerced, intimidated, [or] threatened" and that his guilty plea was offered freely, intelligently and voluntarily, and he was "totally satisfied" with the services his lawyer had rendered. (C.P. at 26, 34)

Additional assurances of voluntariness and satisfaction with counsel's representation appear in plain and ordinary English within the four corners of Elliott's petition to enter plea of guilty where the following assertions were made, again under oath:

* * * * * *

> **4. I have told my Lawyer all the facts and circumstances known to me about the charges against me. I believe that my lawyer is fully informed of all such matters. My Lawyer has counseled and advised me on the nature of each charge; on any and all lesser included charges; and on all possible defenses that I might have in case.**

* * * * * *

> 7. * * * I also know that the sentence is up to the Court and that the 15th Judicial District does not engage in Plea Bargaining and that there is no understanding made by me and/or my attorney with the District Attorney; and further, that the District Attorney

will take no part, other than providing to the Court Police Reports and other factual information as requested by the Court; and the District Attorney shall make no recommendations to the Court concerning my sentence at all.

* * * * * *

10. I am 31 years of age. I have gone to school up to and including the 10th (Have GED) grade; my physical and mental health is presently satisfactory. **At this time I am not under the influence of any drugs or intoxicants,** (nor was I at the time the crime was committed except: N/A____

* * * * * *

12. I believe that my lawyer has done all that anyone could do to counsel and assist me on this charge. **I am satisfied with the advice and help he has given me; I understand and recognize that if I have been told by my lawyer that I might receive probation or a light sentence, this is merely his prediction and is not binding on the Court.**

13. I plead "GUILTY" and request the Court to accept my plea of "GUILTY" and to have entered my plea of "GUILTY" on the basis of my following involvement in the crime: **"I did commit the act of Sexual Battery as charged."**

14. I OFFER MY PLEA OF "GUILTY" FREELY AND VOLUNTARILY AND OF MY OWN ACCORD AND WITH FULL UNDERSTANDING OF ALL THE MATTERS SET FORTH IN THE INDICTMENT AND IN THIS PETITION AND IN THE CERTIFICATE OF MY LAWYER WHICH FOLLOWS.

15. I certify that no one has predicted or estimated how much time, if any, of any sentence I receive I must serve before becoming eligible for any type of release and I understand such procedures come within the sole discretion of the Department of Corrections and/or the Office of the Governor of the

State of Mississippi, and not within the jurisdiction of the Court System.

AFFIDAVIT

* * * * * *

AFFIANT further states that he/she fully understands everything contained in the above document and that his/her plea of Guilty is made of his/her own free will.

AFFIANT understands that any false statement made by him/her in this document could subject him/her to prosecution for perjury. (C.P. at 63-65) [emphasis ours]

These acknowledgments and assertions, made under oath, have got to stand for something else the trial judge might fall for anything.

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 Prichard obviously did here, is entitled to rely heavily on the record of the proceedings. **Bilbo v. State,** 881 So.2d 966 (Ct.App.Miss. 2004); **Richardson v. State,** 769 So.2d 230 (Ct.App.Miss. 2000). *Cf.* **Taylor v. State,** 682 So.2d 359 (Miss. 1996); **Sherrod v. State,** 784 So.2d 256 (Ct.App.Miss. 2001).

Solemn declarations in open court presented to the judge under the trustworthiness of the official oath carry a strong presumption of verity in a post-conviction proceeding. **Turner v. State,** 961 So.2d 734 (Ct.App.Miss. 2007), reh denied. This presumption has been held to apply to statements made in sworn guilty plea petitions such as the one we have here. **Ward v. State,** 879 So.2d 452, 455 (¶11) (Ct. App. Miss. 2003).

Elliott was not denied the effective assistance of counsel during his guilty plea because counsel's performance, contrary to Elliott's position, was neither deficient nor did any deficiency

prejudice Elliott who admitted in paragraph 13 of his petition to enter plea of guilty that he did " . . . commit the act of Sexual Battery as charged." (C.P. at 65)

In ruling on this issue Judge Prichard applied the correct legal standard. **Strickland v. Washington,** 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); **Williams v. State,** 819 So.2d 532 (Ct.App.Miss. 2001); **Reynolds v. State,** 736 So.2d 500 (Ct.App.Miss. 1999).

Elliott 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. He has also failed to demonstrate the duration of his sentence would have been any different had facts in extenuation and mitigation been presented to Judge Prichard.

Finally, sex offender registration and notification required by our statute, much like parole information, early release, and the enhancing effect on a subsequent sentence, are not consequences of a guilty plea about which a defendant must be informed prior to entering a plea. **Magyar v. State,** No. 2007-CA-00740-COA decided September 23, 2008 [Not Yet Reported]. *See also* **Shanks v. State**, 672 So.2d 1207, 1208 (Miss.1996); **Ware v. State**, 379 So.2d 904, 907 (Miss. 1980); **Robinson v. State,** 964 So.2d 609, 613 (¶16) (Ct.App.Miss. 2007); **Edge v. State,** 962 So.2d 81, 87 (¶25) (Ct.App. Miss. 2007); **Quinn v. State,** 739 So.2d 419, 421 (¶12) (Ct.App.Miss. 1999).

In short, Elliott 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

Three (3) years 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 representation of his lawyer, Elliott changed his mind.

On September 4, 2007, Elliott filed a motion for post-conviction relief assailing, in effect, the voluntariness of his plea and the effectiveness of his lawyer, Morris Sweatt. (C.P. at 5-20)

Elliott also claimed in his motion his plea was involuntary because he was not informed by his lawyer or by the court that upon release from incarceration he must register as a sex offender in his chosen place of residence. (C.P. at 12-14)

The specific relief requested by Elliott was vacation of his plea of guilty and his mandatory sentence and a trial by jury granted. (C.P. at 14)

In his appeal to this Court, Elliott reasserts these claims.

I.

THE RECORD, CONSTRUED IN A LIGHT MOST FAVORABLE TO ELLIOTT, REFLECTS ELLIOTT ENTERED A VOLUNTARY AND INTELLIGENT GUILTY PLEA TO THE CRIME OF SEXUAL BATTERY.

Counsel's Promise of a Suspended Sentence.

Elliott claims his plea was involuntary because his lawyer deceived him by leading him to believe that if he pled guilty to sexual battery Elliott would receive a suspended sentence and wouldn't spend a single day in jail. (Brief of Appellant at 4, 6)

Our response to this claim, once again, is provided by Justice Robertson in **Reynolds v. State,** 521 So.2d 914, 917 (Miss. 1988).

"Horse feathers!" 521 So.2d at 917.

According to Elliott's motion and attached affidavit, the inducement in the form of a suspended sentence was made by counsel during a meeting held in the judge's chambers. The alleged

inducement, says Elliott, was made in the presence of the judge, who had excused Elliott's allegedly inadvertent absence from a docket call, as well as the presence of two prosecutors. (C.P. at 6, 17; Brief of Appellant at 6-7)

In his appellate brief Elliott makes the following statement: "At this meeting were prosecutors, and his defense counsel as well as the judge." (Brief of Appellant at 7)

How, we ask, can this be?

This alleged inducement is not only substantially and materially contradicted by the guilty plea transcript, it is inherently incredible.

Elliott's Equivocation.

Elliott also argues that during the plea qualification hearing he twice informed the trial judge the complaining victim's version of the incident was not the truth, the whole truth, and nothing but the truth, thereby rendering the integrity of his plea in doubt. (Brief of Appellant at 9)

According to the prosecutor's factual basis, the victim was prepared to testify that Elliott forced her to engage in fellatio during which time she bit his penis and got away from him. (C.P. at 53) While it is true that Elliott was equivocal with respect to the truthfulness of her proffered testimony that the act was non-consensual (C.P. at 51, Elliott's appellate brief relates only part of the story.

There's more.

We quote the following plea dialogue between Elliott and Judge Prichard concerning the factual basis for Elliott's plea of guilty and Elliott's response to Judge Prichard's questions and observations:

> Q. [BY THE COURT:] All right. Do you want to go on to trial on this?

A. [BY ELLIOTT:] Well, I was advised to go ahead and plead guilty to it.

Q. Well, I understand that, Christopher, but I mean though I don't want you pleading guilty unless you're satisfied that if we went to trial the jury would most likely believe her because, you know, you don't have to testify. That's your decision. You can testify if you wanted to. And what's going to happen is she's going to get up here and testify, I presume that whatever happened between the two of you she wasn't willfully engaging in that activity. And then you forced it on her. And then the jury has got to determine who they believe. If they believe that she's lying they are going to find you not guilty. It's going to take all twelve of them.

So do you agree that her version of this is the one that would be most believable by the jury.

A. [BY ELLIOTT:] Yes, sir, I do.

> THE COURT: All right. Now, Mr. Sweatt, of course, with . . . Christopher, you've had full discovery from the State of Mississippi and you know what everybody is going to testify to. And I presume that, Christopher, this is one of those where just two people were present and it's one against the other, but do you believe that if the State's evidence is believed the State would have enough proof to prove each of these cases beyond a reasonable doubt?
>
> MR. SWEATT: I do, your Honor.

Q. [BY THE COURT:] All right Christopher, do you agree with that?

A. (DEFENDANT CHRISTOPHER ELLIOTT) I do your Honor.

> THE COURT: And , Lauren, do you need to add anything to the record on Christopher's situation where we might better understand what - -
>
> MS. BARNES: Your Honor, I would just add that on the night in question Mr. Elliott stopped by Ms. Trout's house and she did let him in and allow him to

> use the telephone, which he did do. Her testimony would then be that he forced her to perform oral sex on him, that she did bite him and got away from him, ran to the back bedroom where her child was sleeping, locked herself in the bedroom and called 911. When the police arrived on the scene they found one of Mr. Elliott's shoes out in the yard where he had fled the scene and left it there. And, also, a knife was found on the property that had come from Mr. Elliott's person.
>
> A. (DEFENDANT CHRISTOPHER ELLIOTT) I had a knife in my pocket.
>
> MS. BARNES: They then tracked Mr. Elliott back to a friend's house - -
>
> A. (DEFENDANT CHRISTOPHER ELLIOTT) Right around the corner.
>
> MS. BARNES: - - by tracking down numbers on Ms. Trout's cell phone and that's where they apprehended him.
>
> THE COURT: So her testimony if believed by the jury obviously would be sufficient to have the State prove their case beyond a reasonable doubt?
>
> MS. BARNES: Also, Your Honor, Ms Elliott - - I'm sorry, Your Honor, Ms. Trout went to the ER for minor, very minor, injuries that she sustained during the struggle. (C.P. at 51-52)

In describing the incident, Elliott told Judge Prichard he was talking on the telephone when the victim began to "mess" with him. Elliott said that after the victim, who was approximately Elliott's age, bit him he blacked out and hit the victim. (C.P. at 51)

These facts were corroborated, in part, by the prosecutor's proffered factual basis which indicated the victim did let Elliott inside the house to use the telephone; she did, in fact, bite his penis, and she was taken to the emergency room for the treatment of some very minor injuries sustained

during the struggle. (C.P. at 54)

In the end, Elliott told Judge Prichard, eyeball to eyeball, he agreed the victim's version would be the one most believable by the jury and that " . . . if the State's evidence is believed the State would have enough proof to prove each of these cases beyond a reasonable doubt." (C.P. at 52)

BY THE COURT:

Q. All right. Christopher, do you agree with that?

A. (DEFENDANT CHRISTOPHER ELLIOTT) I do, Your Honor.

In addition, Elliott's actual guilt of the crime charged is reflected in paragraph 13 of the petition to enter plea of guilty where the following words appear: "I did commit the act of Sexual Battery as charged." (C.P. at 65) The indictment, of course, charged that Elliott engaged in sexual penetration by placing his penis inside Ms. Trout's mouth "without her consent and against her will." (C.P. at 4)

A post-conviction court is entitled to give great weight to statements made under oath and in open court during sentencing. **Hoyt v. State,** 952 So.2d 1016 (Miss. 2007). It may disregard claims and assertions made by a movant seeking post-conviction relief where, as in the case at bar, they are substantially and materially contradicted by the court record that culminated in the entry of a guilty plea. **Staggs v. State,** 960 So.2d 563 (Ct.App.Miss. 2007), reh denied, cert denied.

"Solemn declarations in open court carry a strong presumption of verity." **McCray v. State,** 785 So.2d 1079, 1081 (¶4) (Ct.App.Miss. 2001), quoting from **Baker v. State,** 358 So.2d 401, 403 (Miss. 1978).

We also find the following additional language in **McCray** where the appellant argued his guilty plea was involuntary because his lawyer promised him he would be sentenced to only three

months probation, not the twelve years he received:

> In *Houston v. State,* 461 So.2d 720, 722 (Miss. 1984), the court held where the record shows that the trial court fully informed the defendant of a mandatory sentence and the defendant acknowledged the sentence, the defendant's claimed expectation of a more lenient sentence is rebutted.

In the case at bar, paragraph 7. of Elliott's petition to enter plea of guilty states as follows: "I know that if I plead "GUILTY" to this charge, the possible sentence is n/a year(s) minimum to 30 years maximum, imprisonment . . ." (C.P. at 64)

"[W]here an affidavit [such as the ones attached to Elliott's motion for post-conviction relief] is overwhelmingly belied by unimpeachable documentary evidence in the record such as, for example, a transcript or written statements of the affiant to the contrary to the extent that the court can conclude that the affidavit is a sham, no hearing is required [in a post-conviction proceeding.] **Mitchener v. State,** 964 So.2d 1188, 1194 (Ct.App.Miss. 2007).

Pain Pills and Other Medications.

Elliott suggests the "only other logical explanation" for his plea of guilty is that he "misheard or misinterpreted" his lawyer's words as a result of the prescribed medications he was taking. (Brief of Appellant at 8)

First, there is no proof in the record, actual or proffered, identifying the side effects of Lorcet, Soma, and Xanax, the drugs that Elliott told Judge Prichard, via his affidavit, he had been taking. (C.P. at 18)

Second, paragraph 10. of Elliott's petition to enter plea of guilty swears, *inter alia,* that "[a]t this time I am not under the influence of any drugs or intoxicants." (C.P. at 64)

Third, Elliott told Judge Prichard he was taking pain pills as prescribed. (C.P. at 36)

> Q. [BY THE COURT:] Do they effect you mentally to where you don't understand?
>
> A. [BY ELLIOTT:] No, sir.
>
> Q. So you're fully understanding what we're going through, what I've asked you and you understand that?
>
> A. Yes, sir. (C.P. at 36)

Miller Time.

Elliott, to his credit, has filed an affidavit in addition to his own. Martha Miller's affidavit, however, was not entitled to a great deal of weight. She was not privy to any conversation between Elliott and his lawyer. Rather, the basis of her knowledge concerning a suspended sentence and no jail time was what Elliott himself allegedly told her. Although he had every opportunity to do so, nothing was said during the plea-qualification hearing about a suspended sentence and no jail time.

To the contrary, Elliott told Judge Prichard no one had told him that if he pled guilty he was going " . . . to receive a particular sentence, length or sentence or anything like that." (C.P. at 33)

> Q. [BY THE COURT:] All right. So y'all are telling me that nobody has told you anything different than what we've been through here today; is that correct?
>
> * * * * * *
>
> A. (DEFENDANT CHRISTOPHER ELLIOTT) Yes, sir. (C.P. at 33-34)

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 Elliott is

informed of the charges against him and the consequences of his guilty plea. **Alexander v. State,** 605 So.2d 1170, 1172 (Miss. 1992).

He was.

There are material contradictions between what Elliott swore to then and there and what Elliott claims here and now, *viz.*, satisfaction with his lawyer's advice and representation, not under the influence of drugs or alcohol at the time of his plea, no promises or threats made, and entry of intelligent and voluntary pleas (C.P. at 26-27, 33, *as opposed to* dissatisfaction with his lawyer, induced and involuntary pleas, and under the influence of prescription medications while in court. (C.P. at 5-14)

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 Prichard obviously did here, is entitled to rely heavily on the record of the proceedings. **Bilbo v. State,** 881 So.2d 966 (Ct.App.Miss. 2004); **Richardson v. State,** 769 So.2d 230 (Ct.App.Miss. 2000). *Cf.* **Taylor v. State,** 682 So.2d 359, 364 (Miss. 1996); **Sherrod v. State,** 784 So.2d 256 (Ct.App.Miss. 2001).

Elliott's plea was neither uninformed nor induced by deception or promises; rather, it was both knowing and voluntary.

Counsel's advice that Elliott should "go ahead and plead guilty" did not rise to the level of deception or coercion. Presumably, Mr. Sweatt informed Elliott of the realities of the situation. "Counsel has 'a duty to fairly, even if that means pessimistically, inform the client of the likely outcome of a trial based upon the facts of the case.' " **Robinson v. State,** *supra,* 964 So.2d 609, 612 (Ct.App.Miss. 2007). *See also* **Daughtery v. State,** 847 So.2d 284 (Ct.App.Miss. 2003).

Elliott was given several opportunities by the Court to go to trial if he did not want to enter

his plea. Elliott certainly could have informed Judge Prichard he had changed his mind.

Elliott acknowledged in the presence of Judge Prichard, again under the trustworthiness of the official oath, that no one had promised him or threatened him in any way to get him to plead guilty. (C.P. at 33)

Mr. Sweatt in para 7. of the Certificate of Counsel acknowledged, *inter alia*, the following: "I have not promised or stated to the defendant that he/she will receive any particular sentence . . ." (C.P. at 66)

The record in this case fully supports our position and the position of the circuit judge that Elliott entered his pleas "with sufficient awareness of the relevant circumstances and likely consequences." **Young v. State,** 952 So.2d 1031, 1034 (¶13) (Ct.App.Miss. 2007), citing cases.

Judge Prichard relied heavily on Elliott's sworn testimony and acknowledgments Elliott was offering his plea of guilty "freely, voluntarily and intelligently" and with a full understanding of all the matters set forth in his indictment. (C.P. at 65, para. 14)

In denying post-conviction relief, Judge Prichard found as a fact Elliott's testimony under oath materially contradicted his post-conviction claim he was deceived by his attorney and induced to plead guilty. (C.P. at 86-87) He placed great weight upon the answers given, under oath, to his inquiries at the plea hearing. (C.P. at 86-87; appellee's exhibit A, attached)

In **Richardson v. State,** *supra,* 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, 320-21 (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, 97 (Ct.App.Miss. 2005) ["The plea acceptance record completely contradicts Dawkins's claims that he was coerced into pleading guilty [and] [w]hen claims are contradicted by the record of the plea acceptance, they may be labeled as a 'sham' by the court and be disregarded."]

We reiterate. "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.

The same is true here.

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

In the case *sub judice*, the trial judge properly dismissed Elliott's motion 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. Put another way, Elliott failed to present any claims "substantially showing denial of a state or federal right." **Horton v. State,** 584 So.2d 764, 767 (Miss. 1991).

Judge Prichard's findings of fact and conclusion of law that Elliott'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).

II.

ELLIOTT'S CLAIM OF INEFFECTIVE COUNSEL IS MATERIALLY CONTRADICTED BY THE GUILTY PLEA RECORD. ELLIOTT HAS FAILED TO SHOW THAT COUNSEL'S PERFORMANCE WAS DEFICIENT AND THAT THE DEFICIENT PERFORMANCE PREJUDICED ANY DEFENSE.

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

In **Lewis v. State,** 798 So.2d 635, 636 (¶5) (Ct.App.Miss. 2001), we find the following language:

> The sub-issue of whether Lewis's post-conviction relief petition failed to allege facts sufficient to justify an evidentiary hearing is a question of law, and the ultimate issue of whether the trial court properly denied the relief requested in the petition, where the allegation was ineffective assistance of counsel, is perhaps a question of both law and fact, requiring partial *de novo* review.

"The rule regarding ineffective assistance of counsel in the context of a guilty plea is that when a convicted defendant challenges his guilty plea on ground of ineffective assistance of counsel, he must show unprofessional errors of substantial gravity." **Davis v. State,** No. 2007-CP-00264-COA (¶7) decided June 17, 2008 [Not Yet Reported], citing **Buck v. State,** 838 So.2d 256, 260 (¶12) (Miss. 2003).

Elliott has failed to do so here.

Elliott claims he has evidence of material facts, not presented by defense counsel and heard by the court, that requires vacation of his conviction. This sounds like newly discovered evidence to us.

"Newly discovered evidence is relevant only in situations where a defendant goes to trial and is convicted." **Majors v. State,** 946 So.2d 369, 373 (Ct.App.Miss. 2006).

Elliott pled guilty.

Judge Prichard found as a fact the ineffectiveness claim was refuted by Elliott's own sworn testimony where Elliott acknowledged he was satisfied with his lawyer's representation and advice. (C.P. at 86; appellee's exhibit A, attached) Judge Prichard gave great weight to Elliott's acknowledgments he was satisfied with his lawyer's advice and representation. *See* **Davis v. State,** *supra,* No. 2007-CP-00264 (¶8) decided June 17, 2008, where Davis acknowledged he was satisfied with the performance of his lawyer.

Judge Prichard applied the correct legal standard and found as a fact there is no indication Elliott's counsel's representation fell below an objective standard of reasonableness nor is there evidence that, but for counsel's errors, Elliott would not have pled guilty. (C.P. at 85; appellee's exhibit A, attached.)

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

Elliott says his lawyer failed to discuss the merits of the case.

Paragraph 4. of the petition to enter plea of guilty, on the other hand, declares for all to see that Elliott told his lawyer all the facts and circumstances known to him about the charges and that his lawyer was fully informed. Elliott also swore in paragraph 4 that his lawyer had counseled and advised him on the nature of each charge and on all possible defenses. (C.P. at 63)

Mr. Sweatt's certificate states Elliott's plea of guilty is in full accord with the facts as Elliott related them to counsel and is consistent with counsel's advice to the defendant.

Elliott was not denied the effective assistance of counsel during his guilty plea because counsel's performance, contrary to Elliott's position, was neither deficient nor did any deficiency actually prejudice Elliott. **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). Indeed, Elliott, as stated previously, confessed his guilt of the crime charged in his petition to enter plea of guilty, paragraph 13.

There is no affidavit from the judge or from anyone else that the duration of Elliott's sentence would have been different had Judge Prichard been informed that the victim and Elliott had previously had consensual sexual relations, that the victim had a conviction for DUI, or that the victim was high on methamphetamine and marijuana. Besides, these are bare boned and conclusory observations and allegations. (Brief of Appellant at 3; C.P. at 10) Judge Prichard, citing **Steen v. State,** 868 So.2d 1038, 1041 (Ct.App.Miss. 2004), observed in his amended order of dismissal that a defendant " . . . is required to offer significantly more than mere allegations."

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

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

> It is clear the two part test articulated in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Leatherwood v. State,* 539 So.2d 1378, 1381 (Miss. 1989) quoting from *Hill v. Lockhart,* 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985).
>
> In order to prevail on his claim of ineffective assistance of counsel, Brooks must show, first of all, "that his counsel's performance was deficient and second, that the deficient performance prejudiced the defense so as to deprive him of a fair trial." *Perkins v. State, supra,* 487 So.2d at 793. The burden is upon the defendant to make "a showing of both." *Wilcher v. State,* 479 So.2d 710, 713 (Miss. 1985) (emphasis supplied). To obtain an evidentiary hearing in the lower court on the merits of an effective assistance of counsel issue, a defendant must state "a claim *prima facie*" in his application to the Court. *Read v. State,* 430 So.2d 832, 841 (Miss. 1983).
>
> To get a hearing " . . . he must allege . . . with specificity and detail" that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Perkins v. State, supra,* 487 So.2d at 793; *Knox v. State,* 502 So.2d 672, 676 (Miss. 1987).

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

> * * * When reviewing claims of ineffective assistance of counsel, this Court utilizes the standard set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). In *Schmitt v. State,* 560 So.2d 148, 154 (Miss. 1990), this Court held "[b]efore counsel can be deemed to have been ineffective, it must be shown (1) that counsel's performance was deficient, and (2) that the defendant was prejudiced by counsel's mistakes." (Citations omitted). One who claims that counsel was

> ineffective must overcome the presumption that "counsel's performance falls within the range of reasonable professional assistance." *Id.* (Quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068). In order to overcome this presumption, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (695 So.2d at 586)

Counsel's performance was hardly deficient and unprofessional. Elliott has failed to demonstrate by affidavit or otherwise how counsel's alleged errors would have altered the outcome of his decision to plead guilty or mitigated his sentence.

"Trial counsel is presumed to be competent." **Brooks v. State**, *supra*, 573 So.2d 1350, 1353 (Miss. 1990). Elliott, 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).

Elliott complains that counsel failed to prepare a reasonable defense yet fails to suggest to us what defenses were available other than a "he said/she said" scenario. Mere impeachment evidence suggested by Elliott is not enough to warrant an evidentiary hearing on the question of whether or not Elliott was denied the effective assistance of counsel.

In short, Elliott 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. Sweatt rendered competent legal advice and performed in a constitutionally acceptable manner.

III.

MISSISSIPPI'S SEX OFFENDER REGISTRATION AND NOTIFICATION REQUIREMENTS ARE NOT CONSEQUENCES OF A GUILTY PLEA ABOUT WHICH A

DEFENDANT MUST BE INFORMED BEFORE HE ENTERS HIS PLEA.

Elliott, relying upon Uniform Circuit and County Court Rule 8.04(A)(3) and Miss.Code Ann. §99-39-5(1)(f) claims his plea was neither knowing, intelligent nor voluntary in the constitutional sense because he was never informed by his attorney or by the trial judge entertaining his plea of the registration and notification requirements found in Mississippi's sex offender registration and notification statutes.

Specifically, Elliott suggests this requirement is subsumed and encompassed in the requirement that a defendant must be informed of the minimum and maximum sentence possible as a result of a guilty plea. (Brief of Appellant at 16)

The complete answer to this question is found in the recent case of **Magyar v. State,** No. 2007-CA-00740-COA decided September 23, 2008 [Not Yet Reported], where the Court of Appeals stated the issue as follows: "We, therefore, must determine if failure to advise Magyar of the requirement to register as a sex offender equates to a failure to advise Magyar of the maximum or minimum penalty for the crime of sexual assault or a waiver of his rights."

The Court held " . . . that the fact that Magyar must register as a sex offender is merely a collateral consequence of his guilty plea." (¶11, slip opinion at 5) Put another way, sex offender registration and notification as required by our statute, much like parole information and the enhancing effect on a subsequent sentence, are not consequences of a guilty plea about which a defendant must be informed prior to entering a plea. *Cf.* **Shanks v. State**, 672 So.2d 1207, 1208 (Miss.1996); **Ware v. State,** 379 So.2d 904, 907 (Miss. 1980); **Robinson v. State,** 964 So.2d 609, 613 (¶16) (Ct.App.Miss. 2007); **Edge v. State,** 962 So.2d 81, 87 (¶25) (Ct.App. Miss. 2007); **Quinn v. State,** 739 So.2d 419, 421 (¶12) (Ct.App.Miss. 1999).

The Court of Appeals held in **Magyar** that §45-33-39(1) " . . . does not supplement the requirements for a guilty plea to be knowing, intelligent, and voluntary, which are found in Uniform Rule of Circuit and County Court 8.04 (3) and (4) [and further that] [s]ection 45-33-39(1) merely requires that various authorities inform criminal defendants of their post-release obligations to society." (¶10, slip opinion at 5)

The registration requirements levied against sex offenders have nothing whatever to do with the duration of a defendant's sentence and are not an integral part of the sentencing process. Rather, their purpose is simply to inform the offender of his obligation to the neighborhood and to society as a whole. Mothers with children and females in general want to know where these guys are found so they can keep the kids as well as themselves out of harms way.

Try as he might, Elliott cannot distinguish the facts in his case from the facts in **Magyar** which controls the posture of Elliott's post-conviction complaint.

CONCLUSION

The post-conviction claims made by Elliott that his guilty plea was involuntary and his court-appointed lawyer ineffective were manifestly without merit because they are materially and substantially contradicted by the guilty plea record. The trial judge so found. 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,** 926 So.2d 242 (Ct.App.Miss. 2005).

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

Although Elliott has put forth a noble effort, the case at bar exists in this posture.

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

* * * * * *

> (2) *If it plainly appears* from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, *the judge may make an order* for its dismissal and *cause the prisoner to be notified.*

* * * * * *

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

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

voluntariness of his guilty plea, the effectiveness of his lawyer, and the adequacy of his advice 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 Christopher Wade Elliott. Accordingly, the judgment entered in the lower court summarily denying Elliott'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 MARION COUNTY, MISSISSIPPI

CHRISTOPHER WADE ELLIOTT — PETITIONER

VS

CRIMINAL CAUSE NO. K03-282P
CIVIL CAUSE NO. 2007-0260

STATE OF MISSISSIPPI — RESPONDENT

FILED
APR 18 2008
JESSE LOFTIN, CIRCUIT CLERK
By_____D.C.

AMENDED ORDER OF DISMISSAL

BEFORE THIS COURT is Petitioner Christopher Wade Elliot's Motion for Post-Conviction Collateral Relief, filed on September 4, 2007. In rendering its decision, the Court has reviewed the Petitioner's motion, together with all files, records, transcripts, and correspondence relating to the judgment under attack. (*See also, Marion County Criminal File K03-282P*) Accordingly, the Court is of the opinion that Petitioner's motion claiming ineffective assistance of counsel and involuntary guilty plea should be DISMISSED. Specifically, the Court finds the following to-wit:

INEFFECTIVE ASSISTANCE OF COUNSEL

To prove a claim of ineffective assistance of counsel, a petitioner must show (1) deficiency of counsel's performance (2) sufficient to constitute prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Moody v. State*, 644 So.2d 451, 456 (Miss.1994). The burden of proving that both prongs of *Strickland* have been met is on the defendant, who faces a "rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance." *Moody*, 644 So.2d at 456; *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990). The *Strickland* test " 'applies to challenges to guilty pleas based on ineffective assistance of counsel.' " *Brooks v. State*, 573 So.2d 1350, 1353 (Miss.1990) (*quoting Leatherwood v. State*, 539 So.2d 1378, 1381 (Miss.1989)).

EXHIBIT A

CIRCUIT COURT MARION COUNTY MISSISSIPPI

This is a True Copy
July 28, 2008
JESSE LOFTIN
CIRCUIT CLERK
D.C.

Petitioner claims his attorney never discussed the merits of the case with him and had he done so it is likely that information obtained could have been raised as a defense. However, sworn under oath, Petitioner stated he had met with, conferred with, and discussed his case thoroughly with his attorney. *See* Transcript of Defendant's Plea of Guilty, page 6. Elliot also made it aware that he was satisfied with the services rendered by his attorney. *See* Transcript of Defendant's Plea of Guilty, page 6-7. This Court is of the opinion that it gave Petitioner every opportunity to air any grievances he might have had against his counsel. Petitioner was further notified, understood, and agreed that he was under oath and that failure to provide true and correct answers would avail him to the penalty of perjury. *See* Transcript of Defendant's Plea of Guilty, page 6. It is established case law in Mississippi that trial judges are entitled to place great weight upon the sworn testimony of a defendant given during a plea hearing, and that more is required to disregard the testimony than mere assertions. *Calvert v. State*, 726 So. 2d 228 (Miss. Ct. App. 1998); *Templeton v. State*, 725 So.2d 764 (Miss. 1998). Therefore, this Court is of the opinion that Petitioner's claim of ineffective assistance of counsel is without merit and should be dismissed.

INVOLUNTARY GUILTY PLEA

Pursuant to Rule 8.04(A)(3) of the Uniform Circuit and County Court Rules,

> "Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntary and intelligently made and that there is a factual basis for the plea. A plea of guilty is not voluntary if induced by fear, violence, deception or improper inducement. A showing that the plea of guilty was voluntarily and intelligently made must appear in the record."

When a defendant asserts that a guilty plea was involuntarily made, it is his duty to produce evidence to contradict the statement made under oath. "He is required to offer significantly more than mere allegations." *Steen v. State*, 868 So.2d 1038, 1041 (Miss. Ct. App. 2004), *citing White*

v. State, 818 So.2d 369 (Miss. Ct. App. 2002).

Petitioner claims his guilty plea should be set aside because it was not intelligently made and was either induced by deception from his attorney or it was the result of taking prescribed medications, which caused confusion. Before accepting Petitioner's guilty plea, this Court conducted an exhaustive examination of Christopher Elliot in the presence of his attorney and the Assistant District Attorney concerning the voluntariness of the guilty plea. Sworn under oath, Petitioner was informed and agreed that he fully understood the minimum and maximum sentence available, any and all constitutional rights he was giving up by pleading guilty, and the plea bargaining process particularly this Court's stance that there will not be any sentence recommendations made. *See* Transcript of Defendant's Plea of Guilty, page 7-8, 12-13.

As stated previously, trial judges are entitled to place great weight upon the sworn testimony of a defendant given at a plea hearing. *Templeton v. State*, 725 So.2d 764 (Miss. 1998). The Court specifically asked Petitioner if anyone told him he would receive a particular sentence if he pled guilty, his sworn response was "No, sir." *See* Transcript of Defendant's Plea of Guilty, page 13. Petitioner now makes the allegation that he plead guilty to sexual battery, because his attorney promised him a suspended sentence and "no days in jail." *See* Petitioner's Motion for Post-Conviction Relief page 2. While Petitioner has presented evidence in the form of an Affidavit of his aunt, Martha Miller, to try to establish this allegation, he has failed to produce evidence to establish its truth. Martha Miller was not a witness to any interactions of Elliot and his attorney, and her only knowledge of the alleged suspended sentence are the statements made to her by the Petitioner himself. Petitioner has provided no evidence to corroborate his allegation.

Petitioner was also specifically asked under oath about what if any medication he was

taking, and responded he was taking pain pills. When asked if they affected his mental ability to understand, he stated "No, sir." *See* Transcript of Defendant's Plea of Guilty, page 16. He also stated that he fully understood the process in which he was going through and everything the Judge had previously asked. *See* Transcript of Defendant's Plea of Guilty, page 16. The Court is entitled to place great weight upon the sworn testimony of a defendant given at a plea hearing.

The Petitioner had every opportunity to inform the Court of any perceived belief that he would receive a specific sentence or that he did not understand. However, petitioner failed to do either. Therefore, this Court is of the opinion that the Petitioner's guilty plea was made voluntarily and should not be set aside.

It is this Court's opinion that not only should Petitioner's claims be dismissed, but the District Attorney's Office should prosecute Christopher Elliot for perjury.

IT IS THEREFORE ORDERED AND ADJUDGED that Petitioner's motion should be DISMISSED for the reasons discussed, herein.

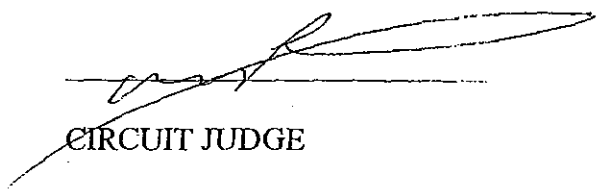
ORDERED AND ADJUDGED that the Circuit Clerk of Marion County, Mississippi, be and is hereby directed to notify the Petitioner, by certified mail, return receipt requested, by sending to the Petitioner a certified copy of this Order.

ORDERED AND ADJUDGED that the Circuit Clerk of Marion County, Mississippi, be and is hereby directed to notify the Petitioner's Attorney, by certified mail, by sending to the Petitioner's Attorney a certified copy of this Order.

ORDERED AND ADJUDGED that the Circuit Clerk of Marion County, Mississippi, be

and is hereby directed to notify the District Attorney's Office, by certified mail, by sending to the District Attorney a certified copy of this Order.

SO ORDERED AND ADJUDGED this the 17 day of April, 2008.



CIRCUIT JUDGE

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 R. I. Prichard, III
Circuit Court Judge, District 15
Post Office Box 1075
Picayune, MS 39466

Honorable Haldon J. Kittrell
District Attorney, District 15
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This the 22nd day of January, 2009.

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