

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**GILBERT EWING**

**APPELLANT**

**VS.**

**NO. 2008-CP-0123-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**NO. 2008-CP-0123-COA**

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**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

Gilbert Ewing appeals from the summary denial of his “Motion to Vacate Sentence and Conviction” filed in the Circuit Court of Hinds County, Bobby B. DeLaughter, Circuit Judge, presiding.

Subsequent to a jury verdict of “guilty” of armed robbery returned in June of 2006, but before imposition of sentence and final judgment, Gilbert Ewing, on August 14, 2006, entered a plea of guilty to the same armed robbery. (C.P. at 72-73)

Following his guilty plea, Ewing was sentenced to serve thirty (30) years in the custody of the MDOC with ten years suspended, five (5) years of supervised probation and twenty (20) years to serve. (C.P. at 72-73)

In this *pro se* out-of-time appeal (C.P. at 122) from summary denial of a motion to vacate conviction and sentence, Gilbert Ewing, a/k/a “Nose” (C.P. at 156), claims his indictment was defective, his double jeopardy rights violated, and his plea of guilty entered subsequent to jury

verdict but before imposition of sentence and final judgment, invalid. (Brief of Appellant at 1)

“Taking substance over form,” the circuit judge examined Ewing’s motion and denied it summarily. (C.P. at 108-09; appellee’s exhibit A, attached)

As part of a plea bargain entered into prior to final judgment (Brief of Appellant at 15), four (4) of the five (5) counts contained in Ewing’s indictment were the target of an order of *nolle prosequi* (C.P. at 14-15)

Regrettably, Ewing effectively waived all rights to an appeal. (C.P. at 75-78-A; appellee’s exhibit C, attached)

But even if he did not, a majority of Ewing’s appellate claims are made for the first time in Ewing’s appellate brief. Issues not presented to the trial judge in Ewing’s motion to vacate conviction and sentence are procedurally barred from consideration in the present appeal. **Foster v. State**, 716 So.2d 538, 540 (Miss. 1998), citing **Berdin v. State**, 648 So.2d 73, 80 (Miss. 1994) [“Because Foster did not raise this issue in his petition for post-conviction relief, its consideration is precluded on appeal.”]

## STATEMENT OF FACTS

GILBERT EWING is a twenty-seven (27) year old single African-American male, a high school graduate, and former resident of Jackson. His alias is “Nose.” (C.P. at 75, 104, 156) He appeals from the summary denial of post-conviction relief following his plea of guilty to armed robbery.

On December 13, 2005, Ewing, along with two other men, was indicted in a five count indictment for shooting into an occupied dwelling house (Count 1), dwelling house burglary (Count 2), aggravated assault (Count 3), armed robbery (Count 4), and kidnaping (Count 5). (C.P. at 4-5; 26-30)

The investigative reports and statements found in the clerk's papers reflect that "Nose" was a peripheral accessory to these events which took place in Jackson, Mississippi, on May 10, 2005. (C.P. at 148-55)

Following a trial by jury conducted on June 19-21, 2006, and in the wake of jury instructions defining each offense (C.P. at 26-30), Ewing was found guilty of count 4, armed robbery. (C.P. at 68, 70) The jury was unable to reach a verdict on the other four counts. (C.P. at 64, 68) No mistrial was declared, and no final judgment entered for Ewing's conviction following trial by jury.

Investigative reports and statements found in the clerk's papers reflect that Ewing's involvement and participation in this caper was primarily as either an accessory before the fact or accessory after the fact or both. Ewing was driving the get-a-way car, his personal automobile, on a neighborhood street while Carlos, the primary perpetrator, and Joseph went up to the front door and later entered the house occupied by the victims. (C.P. at 148-155) The gun used by Carlos to shoot through the door was given back to Ewing who was waiting in the car for Carlos. (C.P. at 149, 151)

On June 22, 2006, immediately after the verdict was returned but prior to sentence imposition and final judgment,, an order of *nolle prosequi* as to counts 1, 2, 3, and 5 was entered in Ewing's case. (C.P. at 14-15; appellee's exhibit B, attached) The State decided it was in its best interest to cease further jury deliberations on the guilt or innocence of Ewing as to counts 1, 2, 3, and 5 of the indictment.

On August 14, 2006, Ewing, by and through his counsel of record, Charles Saltzman, signed a document styled "Petition to Waive Appeal." This five (5) page document, carefully drafted, is in the nature of a petition to enter plea of guilty to armed robbery. (C.P. at 75-78-A; appellee's exhibit C, attached) It is also a voluntary and knowing waiver of Ewing's right to appeal all appeal

issues regarding his trial and any post-conviction relief as well. (C.P. at 75-78-A; appellee's exhibit C, attached)

As a *quid pro quo* for the State's decision not to further prosecute counts 1, 2, 3, and 5, Ewing, prior to sentence imposition for the conviction of armed robbery in the wake of trial by jury, entered a plea of guilty to armed robbery on August 14, 2006. (C.P. at 72) Ewing was sentenced to serve thirty (30) years in the custody of the MDOC with ten (10) years suspended, five (5) years of supervised probation, and 20 years to serve. (C.P. at 72)

On March 2, 2007, Ewing, filed, not as a separate civil action but under the circuit court criminal cause number, a "motion to vacate sentence and conviction." He claimed the State failed during trial to prove the charge of armed robbery. (C.P. at 79-92)

On May 22, 2007, Judge DeLaughter summarily denied the motion in a two page opinion and order. (C.P. at 108-09; appellee's exhibit A, attached) Rehearing was denied. (C.P. at 110)

### SUMMARY OF THE ARGUMENT

**First**, Ewing, as part of a plea bargain, signed a voluntary and intelligent waiver of his right to both a direct appeal as well as any appeal in a post-conviction environment. (C.P. at 75-78) This waiver has got to stand for something lest we fall for anything.

*Issues raised by plea*

**Second**, Ewing's appellate claims targeting, *inter alia*, double jeopardy, a defective indictment, waiver of appeal, mis-identification of victim, amendment of indictment by instruction #12, absence of order constructively amending indictment, and involuntary plea were not distinctly raised and presented to the trial judge in Ewing's motion to vacate conviction and sentence. (C.P. at 131-43) Rather, they appear to be raised and discussed for the first time in Ewing's appellate brief. (Brief of Appellant at 1-17, especially 8-13, 4-15, 16-17) Ewing, therefore, is procedurally barred from raising these issues in the present appeal. **Foster v. State**, *supra*, 716 So.2d 538, 540

(Miss. 1998), citing **Berdin v. State**, *supra*, 648 So.2d 73, 80 (Miss. 1994) [“Because Foster did not raise this issue in his petition for post-conviction relief, its consideration is precluded on appeal.”]

**Third**, to the extent Ewing raises issues precipitated by his trial by jury, Ewing’s subsequent plea of guilty rendered those issues meaningless and moot.

In addition, Ewing’s plea of guilty waived any non-jurisdictional defects in his indictment when he entered a voluntary guilty plea.

Also waived by his voluntary plea of guilty was Ewing’s right to have the prosecution prove each element of the offense beyond a reasonable doubt, including his 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).

**Fourth**, the circuit judge did not err in denying post-conviction relief because Ewing’s claims targeting his conviction following trial by jury and the sentence imposed in the wake of his guilty plea were manifestly without merit. Miss. Code Ann. §99-39-11; **Garlotte v. State**, 530 So.2d 693 (Miss. 1988).

Ewing has failed to establish by a preponderance of the evidence he was entitled to any relief resulting from his conviction via an allegedly involuntary plea.

**Fifth** and finally, the official record is imperfect because it contains none of the following: a transcript of the completed trial or the plea-qualification transcript itself. This imperfect record is inadequate to support and/or reinforce the defendant’s post-conviction claims. It is, on the other hand, sufficient to justify, without the necessity of remand, affirmation of the denial of post-conviction relief.

## ARGUMENT

**EWING WAIVED HIS RIGHT TO A DIRECT APPEAL AS WELL AS ANY APPEAL TO THIS COURT IN A POST-CONVICTION ENVIRONMENT. ACCORDINGLY, HE IS PROCEDURALLY BARRED.**

**EWING IS ALSO PROCEDURALLY BARRED FROM RAISING ON APPEAL CLAIMS OF DOUBLE JEOPARDY, INVALID GUILTY PLEA, WAIVER OF APPEAL, *ET CETERA*, BECAUSE THESE CLAIMS WERE NEVER RAISED IN THE COURT BELOW.**

Several observations are made initially.

**First**, the crime of armed robbery is defined in Miss.Code Ann. §97-3-79 which reads, in its entirety, as follows:

Every person who shall feloniously take *or attempt to take* from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years.

Whether one actually takes or merely attempts to take, the crime is armed robbery, a completed offense.

Ewing was convicted of armed robbery following a trial by jury. Prior to sentencing and final judgment, and apparently in the wake of a plea bargain whereby the other four counts in his indictment would be *nolle prossed*, presumably as a *quid pro quo*, Ewing entered a guilty plea to the same offense.

**Second**, the appellate record is incomplete. There is neither a transcript of the completed

trial nor a transcript of the plea-qualification hearing and the apparent plea bargain. Ewing is well aware that the latter is missing from the official record. (Brief of Appellant at 15)

With all that said, the three claims stated by Ewing in his “motion to vacate sentence and conviction” filed on March 2, 2007, are stated verbatim as follows:

“[T]he State fail[ed] to meet its burden of proof by proving beyond a reasonable doubt that the petitioner committed armed robbery . . .” (C.P. at 133)

“[T]he State’s evidence was insufficient to support a conviction for armed robbery, . . .” (C.P. at 133)

“[Ewing’s] sentence and conviction should be vacated because the State fail[ed] to meet its burden of proof, and that’s proving beyond a reasonable doubt that [Ewing] committed attempted armed robbery.” (C.P. at 133)

Ewing further pinpoints the issues in the headings preceding his arguments one and two. We quote:

“Issue # One. The Court failed to prove the petitioner committed armed robbery.” (C.P. at 135)

Subsumed in that argument are multiple assertions Ewing’s indictment was defective because it failed to more perfectly identify the personal property Ewing attempted to take from the victim. (C.P. at 136-39)

“Issue # Two. The State did not prove its case beyond a reasonable doubt.” (C.P. at 140)

Ewing argues, *inter alia*, under issue two the trial judge should have directed a verdict in his favor because the State failed to prove every element of the offense charged. (C.P. at 141) This is a sufficiency of the evidence argument.

There can be no doubt that Ewing effectively waived his rights to any appeal and entered a guilty plea in exchange for the decision of the prosecutor’s not to prosecute further the other four (4) counts. A defendant has no constitutional right to an appeal. Rather, appeals are a creature of

statutory origin. See Miss.Code Ann. §99-35-101. If one can effectively waive certain constitutional rights he can waive rights created by statute as well.

In any event, Ewing's post-conviction motion to vacate filed in the trial court on March 2, 2007, targets Ewing's trial by jury and not issues related to his post-conviction guilty plea. Stated differently, the conviction that Ewing sought to vacate in his post-conviction motion was the conviction resulting from his trial by jury. The jury trial issues, we respectfully submit, are moot because for reasons not fully developed in the record before us, Ewing, prior to sentencing and final judgment, elected to plea guilty.

Ewing's arguments made in his brief on appeal raise issues not distinctly raised and presented in the motion to vacate, *viz.*, double jeopardy, a defective indictment, waiver of appeal, mis-identification of victim, amendment of indictment by instruction #12, absence of order constructively amending indictment, and an invalid guilty plea to armed robbery.

Insofar as we can tell, these issues were not adequately raised and presented to the trial judge in Mr. Ewing's motion for post-conviction relief. (C.P. at 131-143) Issues and claims raised for the first time in his *pro se* appellate brief, cannot be considered for the first time on appeal. Ewing is procedurally barred from raising them in the present context. **Foster v. State**, *supra*, 716 So.2d 538, 540 (Miss. 1998), citing **Berdin v. State**, *supra*, 648 So.2d 73, 80 (Miss. 1994) ["Because Foster did not raise this issue in his petition for post-conviction relief, its consideration is precluded on appeal."]; **Bell v. State**, No. 2007-CP-01857-COA (§§ 10, 11, 12, 13) [Not Yet Reported]; **Davis v. State**, *supra*, No. 2007-CP-00264-COA (§4) decided June 17, 2008 [Not Yet Reported]; **Wallace v. State**, No.2007-CP-00766-COA (§27) decided May 27, 2008 [Not Yet Reported].

In **Berdin v. State**, *supra*, 648 So.2d 73, 80 (Miss. 1994), we find the following language controlling the posture of Ewing's complaint:

Both Berdin and the State raised issues under assignment number II that are procedurally barred. Berdin never raised this issue at the hearing as error for post-conviction relief. **It is assigned as error for the first time in her brief.** An assignment of error may not be raised for the first time on appeal. *Collins v. State*, 594 So.2d 29, 35 (Miss. 1992). Therefore, this issue is not properly before the court. [emphasis ours]

Same here. *See also Cross v. State*, 964 So.2d 535, 538 (Ct.App.Miss. 2007) [Issue of depression as a factor for involuntary guilty plea “procedurally barred” because presented for the first time on appeal]; *Foster v. State*, *supra*, 716 So.2d 538, 540 (Miss. 1998) citing *Berdin v. State*, *supra*. [Because voluntariness of guilty plea was not raised in petition for post-conviction relief, “. . . its consideration is precluded on appeal.”]

The motion to vacate conviction and sentence was treated by the circuit judge as a motion for post-conviction relief and denied summarily on the ground that Ewing’s guilty plea waived non-jurisdictional defects in the indictment and Ewing’s guilty plea rendered moot the claim the State failed to meet its burden of proof at trial. (C.P. at 108; appellee’s exhibit A, attached)

We concur.

Assuming the guilty plea itself was the target of Ewing’s attack as being involuntary, Ewing, by pleading guilty, waived his right to challenge the indictment as well as the evidence.

The trial judge got it right when he observed “[a] valid guilty plea operates as a waiver of all non-jurisdictional defects contained in an indictment against a defendant.” (C.P. at 108; appellee’s exhibit A, attached.)

Judge DeLaughter also got it right when he found that “[p]etitioner’s claim that the State failed to meet its burden of proof at trial is moot because Petitioner subsequently plead guilty to the charges against him, including that of which the jury found him guilty.” (C.P. at 108; appellee’s exhibit A, attached)

In **Jefferson v. State**, 556 So.2d 1016, 1019 (Miss. 1989), this 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 Ewing'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, Gilbert Ewing's voluntary plea of guilty to armed robbery waived and forfeited all rights and non-jurisdictional defects incident to trial, including the right to assail 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).

Because Ewing entered a voluntary plea of guilty, he also waived any defenses he might have had to the charge.

Perhaps more importantly, claims of double jeopardy, defective indictment, waiver of appeal, invalid plea, *et cetera* do not appear as grounds for relief in Ewing's motion to vacate; rather, they have been raised for the first time in his brief on appeal. The trial judge had no opportunity to rule on these claims articulated by Ewing and presented here for the first time.

This is fatal to Ewing's post-conviction complaint.

It is elementary "[t]he burden is upon [Mr Ewing] to prove by a preponderance of the evidence that he is entitled to the requested post-conviction relief." **Bilbo v. State**, 881 So.2d 966, 968 (¶3) (Ct. App.Miss. 2004) citing Miss.Code Ann. §99-39-23(7) (Rev.2000).

We respectfully submit the trial judge was neither clearly erroneous nor manifestly wrong in finding that Gilbert Ewing failed to do so here.

Finally, a transcript of the jury trial is not a matter of record. More likely than not, the stenographic notes of the court reporter have not even been transcribed.

Ewing's "Petition to Enter Guilty Plea" is, likewise, not a matter of record although Ewing's petition to waive appeal is in the nature thereof.

Neither is Ewing's guilty plea transcript.

"The burden is on the defendant to make a proper record of the proceedings." **Genry v. State**, 735 So.2d 186, 200 (Miss. 1999). "[T]o the appellant falls the duty of insuring that the record contains sufficient evidence to support his assignments of error on appeal." **Burney v. State**, 515 So.2d 1154, 1160 (Miss. 1987). *See also* **Truitt v. State**, 958 So.2d 299 (Ct.App.Miss. 2007); **Jones v. State**, 962 So.2d 571 (Ct.App.Miss. 2006), reh denied.

Many of the facts asserted in Ewing's appellate brief concerning his alleged invalid conviction, whether a result of trial by jury or guilty plea, are not found or fully developed in the official record. This Court cannot consider those facts here. **Genry v. State**, 735 So.2d 186, 200 (Miss. 1999) ["This Court 'cannot decide an issue based on assertions in the briefs alone; rather, issues must be proven by the record.' "]; **Wortham v. State**, 219 So.2d 923, 926-27 (Miss. 1969) ["We will not go outside the record to find facts and will not consider a statement of facts attempted to be supplied by counsel in briefs."] *See also* **Schuck v. State**, 865 So.2d 1111 (Miss. 2003) [Consideration of matters on appeal is limited strictly to matters contained in the trial record.]

In **Pulphus v. State**, 782 So.2d 1220 (Miss. 2001), this Court stated the following:

There is no record of this guilty plea, and this defendant is not a co-defendant of Pulphus's. This court will not consider matters that do not appear in the record, and it must confine its review to what appears in the record. *Robinson v. State*, 662 So.2d 1100, 1104 (Miss. 1995) (citing *Dillon v. State*, 641 So.2d 1223, 1225 (Miss. 1994)). Issues cannot be decided based on assertions from the briefs alone. The issues must be supported and proved by the record. *Robinson*, 662 So.2d at 1104 (citing *Ross v. State*, 603 So.2d 857, 861 (Miss. 1992)). In *Robinson* this Court stated, "we have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions." *Robinson*, 662 So.2d at 1104 (quoting *Mason v. State*, 440 So.2d 318, 319 (Miss.1983)).

See also **Gross v. State**, 948 So.2d 439 (Ct.App.Miss. 2006).

It is enough to say that Ewing's brief, while strong on law is excruciatingly weak on the application of the law to the facts.

### CONCLUSION

Ewing's claims are barred because he waived his rights to any appeal.

Ewing's claims are also procedurally barred for other reasons as well.

But even if not, his arguments were manifestly without merit.

Miss.Code Ann. § 99-39-11 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.*

\* \* \* \* \*

Apparently, it did, he did, and he was. **Garlotte v. State**, *supra*, 530 So.2d 693 (Miss. 1988)[“This case presents an excellent example of the appropriate use of the summary disposition provision of §99-39-11(2)]; **Falconer v. State**, 832 So.2d 622 (Ct.App.Miss. 2002) [(W)e affirm the dismissal of Falconer's motion for post-conviction relief as manifestly without merit.”].

Summary denial was proper because Ewing's post-conviction claims targeting jury issues were manifestly without merit.

Appellee respectfully submits this case is devoid of any claims worthy of an evidentiary hearing or vacation of the sentence imposed following Ewing's voluntary plea of guilty. Accordingly, the judgment entered in the lower court summarily denying Gilbert

Ewing's motion for post-conviction relief should be forthwith affirmed.

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF  
HINDS COUNTY, MISSISSIPPI

GILBERT EWING

PETITIONER

VS.

MAY 22 2007

CAUSE NO. 05-1-109

STATE OF MISSISSIPPI

RESPONDENT

OPINION AND ORDER DISMISSING  
PETITIONER'S MOTION TO VACATE SENTENCE AND CONVICTION

THIS COURT, having considered Petitioner, Gilbert Ewing's *Pro Se*, Motion to Vacate Sentence and Conviction, is of the opinion that the motion should be denied. Specifically the Court finds:

1. It is well settled that Post-Conviction petitions are to be filed as civil actions under the UPCCRA. *See, Sykes v. State*, 757 So. 2d 757 (Miss. 1991). Here, petitioner failed to file his petition as a new civil action, but instead filed his motion under his criminal cause number. However, this Court taking substance over form will examine the petition.

2. Subsequent to a jury verdict of "guilty", but before imposition of sentence thereon, Petitioner entered a plea of guilty to armed robbery 97-3-79 on August 14, 2006. *See, Guilty Plea*.

3. A valid guilty plea operates as a waiver of all non-jurisdictional defects contained in an indictment against a defendant. *See, Matthews v. State*, 76 So. 2d 931 (Miss. 2000). Therefore, petitioner's guilty plea effectively waived any alleged defects resulting from the State's failure to list the personal property in the indictment as he alleges in his petition.

4. Moreover, Petitioner's claim that the State failed to meet its burden of proof at trial is moot because Petitioner subsequently plead guilty to the charges against him, including that of which the jury found him guilty.



**IT IS, THEREFORE, ORDERED AND ADJUDGED** that the Petitioner, Gilbert Ewing's *Pro Se*, Motion to Vacate Sentence and Conviction, pursuant to the Mississippi Uniform Post Conviction Relief Act, Miss. Code Ann. §99-39-1 *et. seq.* (Miss. 2000), as amended, be and the same is hereby **DISMISSED WITH PREJUDICE**.

**SO ORDERED AND ADJUDGED** on this the 22<sup>nd</sup> day of May, 2007.

A handwritten signature in black ink, appearing to be "James B. ...", written over a horizontal line.

**CIRCUIT JUDGE**

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT  
OF HINDS COUNTY, MISSISSIPPI

GILBERT EWING

PETITIONER

VS.

CAUSE NO. 051109

STATE OF MISSISSIPPI

RESPONDENT

**ORDER**

**THIS COURT** having considered Petitioner, Gilbert Ewing's Pro Se, Motion for Rehearing; is of the opinion that the motion should be denied.

**IT IS, THEREFORE, ORDERED AND ADJUDGED** that the Petitioner, Gilbert Ewing's Pro Se, Motion for Rehearing, be and the same is hereby **DENIED**.

**SO ORDERED AND ADJUDGED** on this the 14<sup>th</sup> day of June, 2007



CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF  
HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

RECEIVED

VS.

JUN 23 2006

CAUSE NO. 05-1-109 (CTS 1,2,3 & 5)

GILBERT EWING

BARBARA DUNN  
CIRCUIT CLERK

---

ORDER OF NOLLE PROSEQUI

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THIS DAY into open court comes the Assistant District Attorney who prosecutes for the State of Mississippi,, and move the Court to enter a Nolle Prosequi in the above styled and numbered cause, and the Court, being fully advised in the premises, is of the opinion that said Motion should be sustained, based upon the following to wit:

During the jury trial of this matter in open court on June 19, 2006 through June 21, 2006, the jury deliberated on the facts and law presented and rendered its verdict of GUILTY as to Count 4, Armed Robbery, of the Indictment.

During said jury deliberations, the trial jury submitted certain questions to the Court for clarification of issues of law relating to Counts 1, 2, 3 and 5 of the Indictment, which counts continue to be under jury consideration as to the guilt or innocence of the Defendant.

The jury questions submitted have caused the State of Mississippi to believe that it is in the best interests of the State of Mississippi to cease further jury deliberations on the guilt or innocence of the Defendant as to Counts 1, 2, 3 and 5 of the Indictment.



BOOK 590 PAGE 332

IT IS, THEREFORE, ORDERED AND ADJUDGED that a Nolle Prosequi be  
and the same is hereby entered as to Counts 1, 2, 3 and 5 of the Indictment in  
this cause.

ORDERED AND ADJUDGED this the 22<sup>nd</sup> day of June, 2006.

  
CIRCUIT COURT JUDGE

  
Larry N. McMurtry  
Assistant District Attorney

IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI  
FIRST JUDICIAL DISTRICT

STATE OF MISSISSIPPI

PLAINTIFF

VS.

CAUSE NO.: 05-1-109(4)

**FILED**

AUG 16 2006

GILBERT EWING

BARBARA DUNN, CIRCUIT CLERK  
BY *[Signature]*

DEFENDANT

PETITION TO WAIVE APPEAL

THE DEFENDANT, GILBERT EWING, HEREIN, being duly sworn, states in Open Court under oath that:

1. My full name is GILBERT EWING; RACE- BLACK; SEX-male; DOB- August 6, 1979; SS# 428-67-9262. My last address is 452 Arbor Hill Dr., Jackson, Mississippi. I am twenty seven (27) years old and completed the 12 grade. I can read and write. I am mentally competent to make this Petition.
2. I am represented by Charles R. Saltzman who is **appointed** to represent me.
3. I was found Guilty after a jury trial on June 21, 2006, of the charge(s) of attempted armed robbery in cause number 05-1-109(4), and the State entered a Nolle Prosequi order on the remaining Counts 1,2, 3 and 5 on June 21, 2006.
4. I have told my lawyer all of the facts and circumstances known to me about the charge, trial and verdict in the above named cause. I believe that my lawyer is fully informed on all such matters. My lawyer had advised me of the nature of the charge and the possible appeal issues that I may have to that verdict.
5. I understand that I pleaded "NOT GUILTY" and had a trial in this matter and at that trial the Constitution guaranteed me the following:
  - (a) the right to a speedy and public trial by jury,
  - (b) the right to see, hear and cross examine all witnesses called to testify,

EXHIBIT

*[Handwritten mark]*

11

- (c) the right to use the power and process of the Court to compel the production of evidence, including the attendance of any witnesses in my favor,
- (d) the right to have the presence and assistance of a lawyer at all stages of the trial and any appeal,
- (e) the right to challenge the composition of the Grand Jury, which indicted me,
- (f) the right to testify in my own defense,
- (g) the right to a jury verdict of all twelve jurors before I could be found guilty.

I have now chosen to waive all my appeal rights regarding the issues above, including but not limited to: the verdict being against the overwhelming weight of the evidence, ineffective assistance of counsel, any and all evidentiary issues and Court rulings pertaining to same, the prosecution's decision to Nolle Prosequi the remaining counts in cause number 05-1-109 (1,2,3, & 5), any post conviction relief, and any and all additional appeal issues regarding my trial in this cause number. I waive my appeal voluntarily, willingly, knowingly, and freely of my own accord.

- 6. I understand that I would have absolute right to an appeal to the Mississippi Supreme Court with assistance of counsel, and at no cost to me should I be determined to be financially unable to pay for same. I understand that by waving my appeal I am admitting that I did commit the crime charged in the named cause and that I am waiving all of the rights set forth in paragraph number five (5) of this Petition.
- 7. At the time of the crime referred to herein, I was not suffering from any mental disease and at this time I am not at this time under the influence of drugs, or alcohol, and I am not suffering from any mental disease.
- 8. I declare that no officer or agent of any branch of government, nor any other persons has made

any promise of inducement of any kind to me, or within my knowledge to anyone else, that I will receive a lighter sentence, probation, early release, or any other form of leniency if I waive my appeal. I have not been beaten, threatened, mentally or physically forced, intimidated or coerced in any manner to waive my appeal to the crime charged against me. I offer my waiver of appeal freely and voluntarily and of my own accord and with full understanding of all the matters set forth in the named cause herein and in the Petition, and this waiver is with the advice and consent of my lawyer.

9. My lawyer has informed me as to the maximum and minimum punishment which the law provides of the offense charged in the named cause. The punishment which the Court may impose for this crime for which I am entering a plea is as follows:

	<u>MINIMUM</u>	<u>MAXIMUM</u>
COUNT #4:	3 years	Life

10. If no agreement has been reached with regard to a recommended sentence as a result of so called "plea bargaining", I understand neither my attorney nor any other person can represent to me that I will receive any particular sentence if I waive this appeal. The final decision as to the sentence rests with the Court.

11. If as a result of plea bargaining, my attorney and I have reached an agreement with the District Attorney's Office concerning my offer to waive my appeal to the charge(s) listed in paragraph (3), it is my understanding that the District Attorney will recommend to the Court that I receive a sentence as follows:

- (a) 30 years in the Mississippi Department of Corrections; with 10 years suspended; 20 years to serve
- (b) 5 years of Post Release Supervision;
- (c) receive credit for time served;

12. My lawyer has counseled and assisted me, and I am satisfied with the advice and help he has given me.

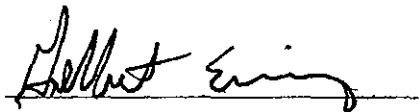
13. My lawyer advises me that the elements of the charge to which I am waiving my appeal are as follows:

Did willfully, unlawfully, and feloniously attempt to take the personal property of Erica Scott, from her person, against her will by violence to her person by the use of a deadly weapon and by putting her in fear of immediate bodily injury by the exhibition of a deadly weapon.

14. I submit the following facts which I state to be true, and feel that all of the above elements are proven by these facts and reflective in the verdict of the jury.

15. I understand that I am presenting this Petition under Oath and under penalty of perjury for any false statements contained herein. I have not been encouraged by any person to answer falsely any question in this Petition in order to have this plea accepted.

Signed by me in the presence of my lawyer, this the 14<sup>th</sup> day of August, 2006.



GILBERT EWING

## **CERTIFICATE OF SERVICE**

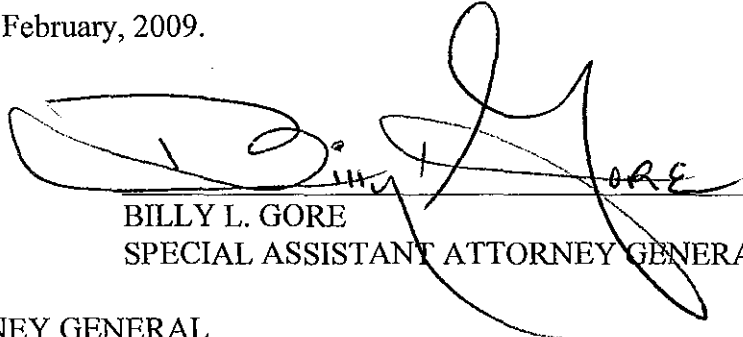
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

**Honorable W. Swan Yerger**  
Senior Circuit Judge, District 7  
Post Office Box 327  
Jackson, MS 39205

**Honorable Robert Shuler Smith**  
District Attorney  
Post Office Box 22747  
Jackson, MS 39225-2747

**Gilbert Ewing, #122848**  
Unit 29-F  
Post Office Box 1057  
Parchman, MS 38738

This the 27th day of February, 2009.



BILLY L. GORE  
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL  
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JACKSON, MISSISSIPPI 39205-0220  
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