IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SARAH ATTABERRY — APPELLANT

VS. — NO. 2008-CP-0878-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

On March 30, 2007, Sarah Attaberry entered in the Circuit Court of Jones County pleas of guilty to house burglary (lower court cause number 2006-78-KR2) and grand larceny (count I) and burglary (count II) in lower court cause number 2006-268-KR2. (C.P. at 42-43)

Pursuant to a plea-bargain agreement apparently instigated by Attaberry's lawyer, a separate charge of prescription fraud/forgery was not prosecuted. (Brief of Appellant at 4; C.P. at 5, 30-31)

During the plea-qualification hearing, Attaberry, under the trustworthiness of the official oath, told the judge she was satisfied with her lawyer, she was entering her plea(s) "freely, voluntarily, and intelligently," and she had neither consumed alcoholic beverages nor taken drugs within the last 48 hours and was not taking any drugs that would interfere with her decision making. (C.P. at 28, 30-31)

Attaberry thrice told the judge it was still her desire to plead guilty. (C.P. at 27, 29, 30)

Following the plea hearing the trial judge sentenced Ms. Attaberry to serve fifteen (15) years for burglary with ten (10) years to serve and five (5) years of PRS, ten (10) years for grand larceny

(count I), and fifteen (15) years with ten (10) years to serve for burglary (count II). The three sentences were to run concurrently.

According to Attaberry, during the classification process at the MDOC she was told she was parole ineligible. This did not sit well with Ms. Attaberry who claimed in a motion for post-conviction relief she should have been advised of parole ineligibility as a consequence of her guilty pleas.

On April 11, 2008, a year following her pleas of guilty on March 30, 2007, Attaberry sought, *pro se*, post-conviction collateral relief. Ms. Attaberry claimed her guilty pleas were involuntary and her lawyer ineffective. According to Attaberry's post-conviction papers, had she known she would be ineligible for parole she would have never pled guilty. (Brief of Appellant at 11-12)

SARAH ATTABERRY, a forty-three (43) year old Caucasian female with a Masters Degree in English (C.P. at 25), appeals from the summary denial of her motion for post-conviction collateral relief - essentially a motion to vacate her guilty pleas - filed in the Circuit Court of Jones County, Billy Joe Landrum, Circuit Judge, presiding. Attaberry asked the trial judge to vacate her pleas, credit her with time served and release her from incarceration. (C.P. at 12)

Attaberry, under the trustworthiness of the official oath, swore she was satisfied with the advice and representation of her lawyer and that her pleas were entered "freely, voluntarily and intelligently."

She has apparently changed her mind. (Brief of Appellant at 1)

In a three (3) page order entered by Judge Landrum on April 16, 2008, the court found that Attaberry's post-conviction claims were plainly or manifestly without merit. Judge Landrum summarily denied Attaberry's motion for post-conviction collateral relief, finding as a fact and concluding as a matter of law that (1) Attaberry did not receive the ineffective assistance of counsel

because she stated during the plea-qualification hearing she was satisfied with her lawyer's representation and advice, and (2) Attaberry's pleas were freely and voluntarily offered with full understanding of the consequences of those pleas. *See* appellee's exhibit A, attached. Indeed, Attaberry stated so herself during the guilty plea hearing. (C.P. at 30)

We respectfully submit Judge Landrum did not err in finding Attaberry'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 Attaberry argues **(I)** her lawyer's representation fell below a reasonable standard; **[II]** she was improperly indicted for burglary; **[III]** the judge erred in not recusing himself, and **[IV]** parole eligibility was a consequence of her guilty pleas about which she should have been advised.

STATEMENT OF FACTS

At the time of her guilty pleas, Sarah Attaberry was a 43-year-old married (C.P. at 5), Caucasian female with a Master's Degree in English. (C.P. at 24) She weaves a rather bizarre and intriguing web of facts that make interesting reading but have little to do with the integrity of her guilty pleas. (C.P. at 3-5; Brief of Appellant at 1-5)

A copy of the guilty plea transcript is a matter of record at C.P. 22-32.

A copy of the petition to enter plea of guilty, on the other hand, is not a matter of record.

In denying post-conviction relief, Judge Landrum gave great weight to statements and acknowledgments made by Attaberry, under the trustworthiness of the official oath, including Attaberry's assurances she had neither been promised anything nor threatened, her guilty pleas were

offered freely, intelligently and voluntarily, and she was satisfied with her lawyer's representation and advice. (C.P. at 28)

A year after stating in open court, under the trustworthiness of the official oath, her pleas were both voluntary and intelligent and she was satisfied with the advice and representation of her lawyer, Attaberry changed her mind.

On April 11, 2008, Attaberry filed a motion for post-conviction collateral relief assailing, in effect, the voluntariness of her pleas, and the effectiveness of her lawyer, Michael Mitchell. (C.P. at 3-17)

Attaberry also claimed in her motion she was denied due process of law because she was not advised of parole ineligibility as a consequence of her pleas. (C.P. at 5-12)

The specific relief requested by Ms. Attaberry was, *inter alia*, credit for time served and release from incarceration. (C.P. at 12)

No affidavits, other than her own, were attached to Attaberry's motion for post-conviction relief which consisted primarily of her own conclusory allegations.

In her appeal to this Court, Attaberry reasserts these claims and injects new issues not previously presented to the trial court in her motion for post-conviction relief, *viz.*, defective burglary indictment and refusal of Judge Landrum to recuse himself.

SUMMARY OF THE ARGUMENT

Ms. Attaberry's actual guilt of the crimes charged is reflected throughout her motion for post-conviction relief as well as her appellate brief. (C.P. at 3-6; Brief of Appellant at 1-4) She claims "[t]he cause of [her] outlandish behavior was a long standing addiction to prescription narcotics." (Brief of Appellant at 2)

In her motion for post-conviction relief Attaberry says she " . . . was undoubtedly under the

influence of mind and mood altering substances in the commission of her crimes [and] at the time of her arrest . . ." (C.P. at 7)

If true, we sympathize and empathize but do not excuse.

Attaberry's claims that her lawyer was ineffective and her plea involuntary were correctly dismissed summarily as being plainly without merit.

"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) [Not Yet Reported], citing **Buck v. State,** 838 So.2d 256, 260 (¶12) (Miss. 2003).

Attaberry has failed to do so here.

A plea of guilty is binding only if it is entered voluntarily and intelligently. **Myers v. State,** 583 So.2d 174, 177 (Miss. 1991). A plea of guilty is voluntary and intelligent when the defendant is informed of the charges against her and the consequences of her guilty plea. **Alexander v. State,** 605 So.2d 1170, 1172 (Miss. 1992).

She was.

There are material contradictions between what Ms. Attaberry swore to then and there and what Attaberry claims here and now, *viz.,* satisfaction with her lawyer's advice and representation, not under the influence of drugs or alcohol at the time of her plea, no promises or threats made, and entry of intelligent and voluntary pleas, *as opposed to* dissatisfaction with her lawyer, coerced and involuntary pleas, and under the influence of mind altering drugs while in court. (C.P. at 7,28, 30).

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 Landrum 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).

Ms. Attaberry's pleas were neither uninformed nor coerced; rather, they were both knowing and voluntary. The case of **Robinson v. State,** 964 So.2d 609 (Ct.App.Miss. 2007), is applicable here in several respects.

Counsel's advice did not rise to the level of coercion. "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).

"Early release and parole are matters of legislative grace and are not consequences of a guilty plea." **Robinson v. State,** *supra*, 964 So.2d 609, 613 (Ct.App.Miss. 2007).

Attaberry's claim on appeal targeting a defective burglary indictment is procedurally barred because it was not presented in her motion for post-conviction relief. **Wallace v. State,** No. 2007-CP-00766-COA (¶27) decided May 27, 2008 [Not Yet Reported].

In any event, the burglary indictment would not have been a nullity even if Attaberry took nothing from the dwelling house she admittedly broke in to and entered. It is the intent to steal versus an actual taking that constitutes the crime.

Moreover, Ms. Attaberry waived any non-jurisdictional defects in her indictment when she entered voluntary guilty pleas.

Also waived was Attaberry's right to have the prosecution prove each element of the offense beyond a reasonable doubt, including her right to present any defense(s) she 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).

Attaberry's claim on appeal that Judge Landrum erred by not recusing himself is also procedurally barred because it was not raised in her motion for post-conviction relief. Recusal was only mentioned within the context of effective assistance of counsel. (C.P. at 7)

Attaberry was not denied the effective assistance of counsel during her guilty pleas because counsel's performance, contrary to Attaberry's position, was neither deficient nor did any deficiency prejudice Attaberry, who admitted her crimes to her victims as well as to others.

In ruling on this issue Judge Landrum 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).

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

In short, Ms. Attaberry has failed to establish by a "preponderance of the evidence" she was entitled to any relief. Miss.Code Ann. §99-39-23(7); **McClendon v. State,** 539 So.2d 1375 (Miss. 1989); **Todd v. State,** 873 So.2d 1040 (Ct.App. Miss. 2004).

ARGUMENT

THE RECORD, CONSTRUED IN A LIGHT MOST FAVORABLE TO ATTABERRY, REFLECTS ATTABERRY ENTERED VOLUNTARY PLEAS OF GUILTY TO THE CRIMES CHARGED.

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

BY PLEADING GUILTY ATTABERRY WAIVED ANY NON-JURISDICTIONAL DEFECTS IN THE BURGLARY INDICTMENT.

ATTABERRY'S VOLUNTARY PLEAS OF GUILTY OPERATED TO WAIVE AND/OR FORFEIT HER RIGHT TO ASSAIL IN A POST-CONVICTION ENVIRONMENT ALL NON-JURISDICTIONAL RIGHTS OR DEFECTS INCIDENT TO TRIAL, INCLUDING THE RIGHT TO HAVE THE STATE PROVE EACH ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT, AND THE RIGHT TO PRESENT ANY DEFENSES TO THE CHARGE.

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

I. Ineffective Assistance of Counsel.

Ms. Attaberry admits in her papers she met with her court-appointed lawyer on numerous occasions. (C.P. at 7; Brief of Appellant at 3-4, 7) Nevertheless, Attaberry says her lawyer's representation fell below a reasonable standard for various and sundry reasons, none of which

demonstrate a deficiency in counsel's performance or prejudice to the defendant. (Brief of Appellant at 5)

Attaberry claims her lawyer, Michael Mitchell, coerced her into signing a petition to enter plea of guilty by intimidating her with reminders that she had "ticked" off some powerful people and that Judge Landrum had been twice burglarized and had a social history with one of the victims. (Brief of Appellant at 5-6)

She complains, *inter alia*, that Mr. Mitchell failed to request recusal or move for a change of venue, abandoned any plausible defense strategy, failed to examine discovery, and forced her to agree to the plea under "hostile duress."

Finally, Attaberry laments she never had an opportunity to change her mind. (Brief of Appellant at 7)

To the contrary, Ms. Attaberry was given several opportunities by the Court to go to trial if she did not want to enter her pleas. Attaberry apparently signed a plea agreement on Wednesday, March 28, 2007. (Brief of Appellant at 7) The plea-qualification hearing was not held until Friday, March 30, 2007, during which Attaberry thrice told Judge Landrum, in the wake of his inquiries, she still wanted to go forward and plead guilty. (C.P. at 27, 29, 30) Ms. Attaberry certainly could have informed Judge Landrum she had, once again, changed her mind.

Judge Landrum found as a fact this ineffectiveness claim was refuted by Ms. Attaberry's own sworn testimony where Attaberry acknowledged she was satisfied with her lawyer's "representation and advice," (C.P. at 28) Judge Landrum gave great weight to Attaberry's acknowledgments she was satisfied with her 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 Landrum applied the correct legal standard and found as a fact there is no indication Attaberry's counsel's representation fell below an objective standard of reasonableness nor is there evidence that, but for counsel's errors, Attaberry would not have pled guilty. (C.P. at 19-21; appellee's exhibit A, attached.)

Moreover, the benefits from a negotiated plea was the willingness of the State to eschew prosecution of Ms. Attaberry for prescription forgery and the imposition of concurrent sentences as opposed to consecutive terms.

Attaberry has failed to overcome the presumption her lawyer rendered reasonably effective assistance during her guilty plea.

There are no affidavits, other than her own, attached to Attaberry's motion for post-conviction relief. It has been said time and again that "[i]f a prisoner's motion for post-conviction relief does not contain any affidavits other than the prisoner's own to support the prisoner's allegation, then the motion may be dismissed." **Brown v. State,** 963 So.2d 577, 579 (¶5) (Ct.App.Miss. 2007) quoting from **Edwards v. State,** 796 So.2d 1040 (¶5) (Ct.App.Miss. 2001).

Ms. Attaberry was not denied the effective assistance of counsel during her guilty pleas because counsel's performance, contrary to Attaberry's position, was neither deficient nor did any deficiency actually prejudice Attaberry. **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, Ms. Attaberry, as stated previously, has admitted her guilt of the crimes charged throughout her motion for post-conviction relief as well as her brief on appeal.

"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. Attaberry has failed to demonstrate by affidavit or otherwise how counsel's alleged errors would have altered the outcome of her decision to plead guilty.

"Trial counsel is presumed to be competent." **Brooks v. State,** *supra*, 573 So.2d 1350, 1353 (Miss. 1990). Attaberry, of course, must overcome that presumption. Moreover, the burden is on the defendant to demonstrate *both* prongs of the **Strickland** test. **McQuarter v. State**, 574 So.2d 685 (Miss. 1990).

"Along with the presumption that counsel's conduct is within the wide range of reasonable conduct, there is a presumption that decisions made are strategic." **Leatherwood v. State,** 473 So.2d 964, 969 (Miss. 1985). Courts are reluctant to infer from counsel's silence an absence of trial strategy. ***Id.*** Courts accord much discretion to attorneys in the areas of defense strategy. **Armstrong v. State**, 573 So.2d 1329 (Miss. 1990). Obviously, the strategy involved in. Attaberry's pleas of guilty was to negate the possibility of consecutive sentences.

Attaberry complains that counsel failed to prepare a reasonable defense yet fails to suggest to us what defenses were available. She says counsel failed to review discovery but fails to tell us what was left undiscovered.

In short, Ms. Attaberry 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. Mitchell rendered sound legal advice and performed in a constitutionally acceptable manner.

II. Improper or Defective Burglary Indictment.

Ms. Attaberry says she was improperly indicted for the burglary of Ms. Havens' dwelling house because Ms. Havens admitted that nothing was taken. Attaberry claims this would negate an indictment for burglary. (C.P. at 6; Brief of Appellant at 7)

Insofar as we can tell, this issue was not adequately raised and presented to the trial judge in Ms. Attaberry's motion for post-conviction relief. (C.P. at 3-12) Issues and claims raised for the first time in her *pro se* appellate brief, cannot be considered for the first time on appeal. Attaberry, therefore, is procedurally barred from raising them 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."]; **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 any event, the fact that nothing was taken from the home of Ms. Havens is immaterial. It is not necessary to prove that something was actually taken so long as the intent to take was successfully demonstrated.

Moreover, assuming her pleas were voluntary, Attaberry waived her right to challenge the indictment as well as the evidence.

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 Attaberry'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, Sarah Attaberry's voluntary pleas of guilty waived and forfeited all rights and non-jurisdictional defects incident to trial, including the right to a trial by jury, the right to subpoena and call witnesses in her own behalf, the right to a fast and speedy public trial, and 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 Atterberry entered voluntary pleas of guilty, she also waived any defenses she might have had to the charge.

III. Involuntary Guilty Plea(s).

Attaberry claims she was coerced into pleading guilty by her lawyer who met her at the jail on March 28, 2007, and told her, *inter alia,* if she did not sign she would be "indicted as a habitual felon" or "put away for life." (C.P. at 9)

First, fear of a "harsher sentence" does not render a plea involuntary. **Robinson v. State,** *supra,* 964 So.2d 609, 612 (Ct App.Miss. 2007).

Second, Attaberry acknowledged in the presence of Judge Landrum, again under the trustworthiness of the official oath, that no one had "promised [her] or threatened [her] in any way to get [her] to plead guilty." (C.P. at 28)

Attaberry complains she agreed to a plea under "hostile duress" and was never given an opportunity to "back out of the plea bargain" or "change her mind." (Brief of Appellant at 9)

We disagree.

Ms. Attaberry signed her plea petition on March 28, 2007. (Brief of Appellant at 7) The plea-qualification hearing was not conducted until two days later on March 30, 2007, during which Attaberry thrice told Judge Landrum in the wake of his inquiries she still wanted to go forward and plead guilty. (C.P. at 27, 29, 30) Attaberry had ample opportunity to change her plea to "not guilty."

The record in this case fully supports our position and the position of the circuit judge that Attaberry entered her pleas "with sufficient awareness of the relevant circumstances and likely consequences." **Young v. State,** No. 2006-CP-00114-COA (¶13) decided March 27, 2007 [Not Yet

Reported], citing cases.

Judge Landrum relied heavily on Attaberry's sworn testimony and acknowledgments she was offering her pleas of guilty "freely, voluntarily and intelligently" and with a full understanding of all the matters set forth in her indictment.

Judge Landrum found as a fact Attaberry's testimony under oath materially contradicted her post-conviction claim she was coerced by her attorney into pleading guilty. (C.P. at 20) He placed great weight upon the answers given, under oath, to his inquiries at the plea hearing. (C.P. at 30)

In **Richardson v. State,** 769 So.2d at 230 (Ct.App.Miss. 2000), the Court of Appeals, citing **Roland v. State,** 666 So.2d 747, 751 (Miss. 1995),

> " . . . concluded that an evidentiary hearing is not necessary if the record of the plea hearing reflects that the defendant was advised of the rights which he now claims he was not aware. *Id.* When the record of the plea hearing belies the defendant's claims, an evidentiary hearing is not required. If the defendant's claims are totally contradicted by the record, the trial judge may rely heavily on the statements made under oath. *Simpson v. State*, 678 So.2d 712, 716 (Miss. 1996). In *Mowdy v. State*, 638 So.2d 738, 743 (Miss. 1994), the court stated: "Where the petitioner's version is belied by previous sworn testimony, for example, as to render his affidavit a sham we will allow summary judgment to stand.*** "

See also **Taylor v. State,** 682 So.2d 359, 364 (Miss. 1996) ["There is a great deal of emphasis placed on testimony by a defendant in front of the judge when entering a plea of guilty."]; **Hull v. State,** 933 So.2d 315 (Ct.App.Miss. 2006) ["A trial judge may disregard the assertions made by a post-conviction movant where, as here, they are substantially contradicted by the court record of proceedings that led up to the entry of a judgment of guilty."]; **Dawkins v. State,** 919 So.2d 92 (Ct.App.Miss. 2005).

"Solemn declarations in open court carry a strong presumption of verity." **Richardson v.**

State, *supra*, 769 So.2d at 234. *See also* **Brown v. State,** 926 So.2d 229 (Ct.App.Miss. 2005). reh denied, cert denied.

Same here.

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 Attaberry'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.

Judge Landrum's findings of fact and conclusion of law that Attaberry's pleas were 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).

IV. Advice as to Parole Eligibility.

Attaberry claims she had a right to accurate parole information.

Nothing in the official record supports Attaberry's position she was declared parole ineligible by the MDOC with respect to the sentence imposed in this particular case or in any other case.

"The burden is upon the defendant to make a proper record of the proceedings." **Genry v. State,** 735 So.2d 186, 200 (Miss. 1999). This Court "cannot decide an issue based on assertions in the brief alone; rather, issues must be proven by the record." **Id.** at 200. *See also* **Schuck v. State,** 865 So.2d 1111 (Miss. 2003); **Byrom v. State,** 863 So.2d 836 (Miss. 2003); **Steen v. State,** 873 So.2d 155 (Ct.App.Miss. 2004), reh denied; **Brown v. State,** 875 So.2d 214 (Ct.App.Miss. 2003), reh denied.

Her claims are without merit for this reason if for no other.

In any event, a defendant who enters a plea of guilty is not entitled to full parole information because parole is not a consequence of a guilty plea. **Shanks v. State**, 672 So.2d 1207 (Miss.1996); **Ware v. State**, 379 So.2d 904 (Miss. 1980); **Robinson v. State,** *supra,* 964 So.2d 609, 613 (Ct.App.Miss. 2007); **Edge v. State,** 962 So.2d 81, 87 (Ct.App. Miss. 2007).

In **Shanks**, *supra*, we find the following language applicable here:

> * * * Jurisdiction over the parole decision is vested in the parole board once the trial court has properly accepted a plea of guilty. * * *
>
> This Court, in *Ware*, specifically held that a trial judge was not required to inform a defendant of his ineligibility for parole. 379 So.2d at 907. Trial courts are not required to provide parole information because eligibility or ineligibility for parole is not a "consequence" of a plea of guilty, but a "matter of legislative grace." *Smith v. United States*, 324 F.2d 436, 441 (D.C.,Cir. 1963), cert. denied, 376 U.S. 957, 84 S.Ct. 978, 11 L.Ed.2d 975 (1964); *see also Fernandez v. United States*, 492 F.2d 771 (5th Cir. 1974) (trial court not required to divulge parole eligibility information before accepting plea). **There is no merit to this issue and we must affirm the trial**

court. [emphasis ours]

"Ditto!"

CONCLUSION

Given the fact that as part of the *quid pro quo*, the charge of prescription fraud was dismissed, Ms. Attaberry's lawyer is entitled to an "atta boy" and not to a misdirected attack on his legal representation.

The claims made by Ms. Attaberry that her guilty plea(s) were involuntary, her indictment defective, and her court-appointed lawyer ineffective were manifestly without merit. A defendant is not entitled to a post-conviction evidentiary hearing where, as here, it plainly appears to the judge the defendant is not entitled any relief. **Epps v. State,** *supra*, 926 So.2d 242 (Ct.App.Miss. 2005).

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

Although Attaberry, by either her own hand or the hand of her writ-writer, has put forth her best 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 she 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 Attaberry's post-conviction claims targeting the voluntariness of her guilty plea(s), the integrity of her burglary indictment, and the effectiveness of her lawyer were manifestly without merit. No further fact-finding was required, and relief was properly denied without the benefit of an evidentiary hearing.

Appellee respectfully submits this case is devoid of any claims worthy of an evidentiary hearing or vacation of the guilty plea(s) voluntarily entered by Sarah Attaberry. Accordingly, the judgment entered in the lower court summarily denying Attaberry'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 JONES COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

SARAH ATTABERRY — PETITIONER

VERSUS — CIVIL ACTION NO. 2008-879-CV4

STATE OF MISSISSIPPI — RESPONDENT

ORDER DENYING MOTION FOR POST-CONVICTION COLLATERAL RELIEF

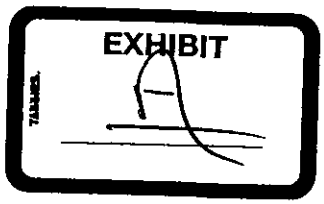
Sarah Attaberry seeks relief from conviction in Jones County Circuit Court, Second Judicial District, Nos. 2006-78-KR2 and 2006-268-KR2, and the Court, having fully reviewed her Motion for Post-Conviction Collateral Relief, the above-mentioned court file and plea petition, as well as a transcript of the plea, and being fully and maturely advised in the premises does find and adjudicate as follows, to-wit:

1.

The Court has jurisdiction over Movant and subject matter and finds that under Miss. Code of 1972, Annotated, Section 99-39-5, Movant timely filed for Post-Conviction Collateral Relief on the 14th day of February, 2008, being within three (3) years of the entry of her guilty plea on the 30th day of March, 2007, to the indictments against her in Cause Nos. 2006-78-KR2 and 2006-268-KR2, being burglary and count one of grand larceny and count two of burglary, respectively.

2.

The merits of her motion entitle her to no relief and no hearing on the motion. In particular, she raises no argument, theory, alleged error or other rationale showing that she is entitled to relief. Movant first argues ineffective assistance of counsel. The Court finds this argument is without merit. The Supreme Court has held that in order to



"establish an ineffective assistance of counsel claim, [a defendant] must show (1) a deficiency in counsel's performance that is (2) sufficient to constitute prejudice to his defense." A review of the plea hearing shows that Attaberry was asked questions about the adequacy of her counsel by Judge Landrum and that she did not voice any objection to the representation she received and that she stated that she was satisfied with her lawyer's representation. (See plea hearing transcript attached hereto as Exhibit "A"). Therefore, the Court finds Attaberry's assertion that she had ineffective counsel to be without merit.

2.

Movant's second argument is that her plea was entered involuntarily. The Court also finds this argument to be without merit. **Buckhalter v. State**, CHECK CITE (Miss. 2005) reiterated the holding of many cases that "[t]he law is well settled in Mississippi jurisprudence that '[a] valid guilty plea admits all elements of a formal criminal charge and operates as a waiver of all non-jurisdictional defects contained in an indictment against a defendant.'" The question, therefore, presented by Attaberry is whether or not her guilty plea was valid as required by **Buckhalter**. A thorough review of the transcript of the hearing where Attaberry's guilty plea was accepted by this Court indicates that her plea was entered freely, voluntarily and intelligently. (See plea hearing transcript attached hereto as Exhibit "A"). Specifically, the Movant answered that she has a master's degree in English, and when asked whether she was entering her plea voluntarily and intelligently, she answered, "Yes, sir." She also stated that she was not taking any drugs that would keep her from being to plea voluntarily and intelligently. (See plea hearing transcript attached hereto as Exhibit "A").

Movant's third argument is a due process argument. However, after reading her Motion, she states the same ineffective assistance of counsel and involuntary guilty plea argument. Therefore, the Court finds that the argument continues to be without merit. The record is clear that her plea was entered freely, voluntarily and intelligently. (See plea hearing transcript attached hereto as Exhibit "A").

IT IS, THEREFORE, ORDERED that the Motion for Post-Conviction Collateral Relief filed herein by Sarah Attaberry is dismissed (1) for lack of any showing that the Movant is entitled to any relief whatsoever and (2) that Movant is not entitled to an evidentiary hearing and that request is denied.

The Clerk of the Court is ordered to mail a copy of the Order to the Movant at her last mailing address shown of record. All costs herein are assessed to Jones County.

SO ORDERED AND ADJUDGED this the 16th day of April, 2008.

CIRCUIT COURT JUDGE

MIN 157 313

CERTIFICATE OF SERVICE

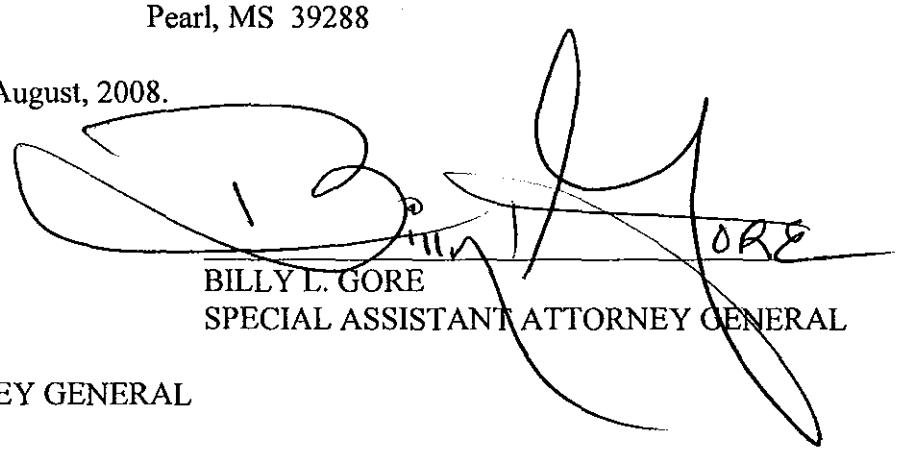
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Billy Joe Landrum
Circuit Court Judge, District 18
Post Office Box 685
Laurel, MS 39441

Honorable Tony Buckley
District Attorney, District 18
Post Office Box 313
Laurel, MS 39441

Sarah Attaberry, #128447
CMCF - 1A-D-106
Post Office Box 88550
Pearl, MS 39288

This the 27th day of August, 2008.



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