

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

**ALBERT JOINER, JR.**

**APPELLANT**

**VS.**

**NO. 2009-CP-0220-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**STATEMENT OF THE CASE**

This appeal proceeds from the denial of a Petition for Post-Conviction Relief and Amendment to Petition for Post-Conviction Collateral Relief from the Circuit Court of Lafayette County, Mississippi, Honorable Andrew K. Howorth presiding.

**STATEMENT OF THE FACTS**

On February 23, 2007, a Lafayette County Grand Jury indicted Albert Joiner, Jr., on one count of robbery with a deadly weapon as a habitual offender under Miss. Code Ann., section 99-19-83, in Circuit Court Cause Number LK07-133. (CP Supp.Vol. 1, page 1). On October 18, 2007, pursuant to a plea agreement, Joiner petitioned the court to enter a plea of guilty to a reduced charge of strong armed robbery as a habitual offender under Section 99-19-81. (CP Supp.Vol.1 pages 4-9).<sup>1</sup>

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<sup>1</sup>On September 24, 2007, Joiner was indicted for felony fleeing and felon in possession of a deadly weapon, in Circuit Court Cause Number LK-399. (CP Supp.Vol. 2, page 1). Pursuant to the same plea agreement as *sub judice*, Joiner entered a guilty plea to felony fleeing as a lesser habitual offender and was sentenced as a habitual to serve fours years to run consecutive with LK07-133.

In exchange for the guilty plea, the State agreed to reduce the armed robbery charge as a habitual offender under Section 99-19-83, and recommend 15 years to serve. (CP Supp. Vol. 1 pages 4-25).

In the petition and during the plea hearing, Joiner acknowledged his guilt of the crimes charged, as well as the constitutional rights he would be waiving by pleading guilty; he further acknowledged that he was pleading guilty as a habitual offender, and that he knew the possible sentences he might receive. (*Id.*; CP. Supp.Vol. 1, page 13-25).

After thorough questioning, the trial court accepted Joiner's pleas and sentenced him to serve fifteen (15) years for the strong armed robbery and a consecutive four (4) years for the felony fleeing, as a habitual offender under Section 99-19-81. (CP Supp.Vol. 1, pages 10, 13-25; Supp.Vol.2, pages 10, 13-25).

On May 21, 2008, Joiner filed a Petition for Post-Conviction Collateral Relief (CP 3-40). On July 9, 2008, Joiner filed an Amendment to Petition for Post-Conviction Collateral Relief. (CP 41-50). The request for relief was summarily denied in an order dated January 15, 2009. (CP 51). Feeling aggrieved, Joiner appealed.

## ISSUES

- I. Whether Albert Joiner, Jr. was properly charged under Mississippi's habitual offender statute;**
- II. Whether Albert Joiner, Jr. was properly sentenced under Mississippi's habitual offender statute;**
- III. Whether Albert Joiner, Jr. was denied effective assistance of counsel.**

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(CP Supp.Vol.2, pages 4-10).

## SUMMARY OF ARGUMENT

The trial court properly denied Joiner's petition for post conviction relief. Joiner's guilty plea waived all non-jurisdictional defects in the indictment. Further, the section of Joiner's indictment charging him as a habitual offender was proper pursuant to the Mississippi Constitution of 1890, Article 6, Section 169.

Joiner was properly sentenced pursuant to Mississippi Code Annotated section 99-19-81; the State's burden of proof was lessened by Joiner's guilty plea. The State provided sufficient evidence, and the court properly sentenced Joiner as a habitual offender.

Joiner was provided effective assistance of counsel; he failed to meet the requirements of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed 2d 674 (1984) in proving his counsel was deficient.

## ARGUMENT

### I. JOINER WAS PROPERLY CHARGED UNDER MISSISSIPPI'S HABITUAL OFFENDER STATUTE.

In his first assignment of error, Joiner contends that the portion of the indictment following the words “against the peace and dignity of the state” violates the provisions of the Mississippi Constitution of 1890, Article 6, Section 169. He relies on *McNeal v. State*, 658 So.2d 1345 (Miss. 1995) to claim that the habitual offender portion of the indictment is invalid and without legal effect because the indictment failed to “conclude” with the phrase “against the peace and dignity of the state” as required by Section 169. (Brief of Appellant at 6-9). In *McNeal*, unlike the case *sub judice*, the defendant objected to his indictment at trial.

Any non-jurisdictional defect in Joiner’s indictment was waived when Joiner entered his voluntary plea of guilty. *Foster v. State*, 716 So.2d 538, 539 (Miss. 1998), citing *Brandau*, 662 So.2d 1051, 1054-55 (Miss. 1995). In *Foster*, the defendant claimed that his indictment was invalid because the section charging him as a habitual offender came after the conclusion of the indictment. 716 So.2d at 539 (¶5). The court ruled that any challenge to the validity of the indictment was waived when Foster validly pled guilty. *Id.*

*Miller v. State*, 834 So.2d 721, 723 (Miss. 2003) was a case in which the defendant’s indictment listed the words “against the peace and dignity of the State” at the end of each count. The court ruled that the fact that Section 169 language is “found elsewhere in the indictment does not void all words appearing thereafter in the document.” *Id.* The case of *Starling v. State*, 90 Miss. 255, 43 So. 952, 953 (Miss. 1907) held that including the language of Section 169 after each individual count was unnecessary, but the indictment was not void as long as the language was found at the conclusion of the indictment.

Furthermore, in the case *sub judice*, the indictment does, indeed, conclude with the required language of Section 169. The phrase “against the peace and dignity of the State” are found on both pages of the indictment. Even so, in accordance with *Miller* and *Starling*, listing the phrase after each section or count in an indictment does not make it void. Accordingly, this assignment of error is without merit.

## **II. JOINER WAS PROPERLY SENTENCED UNDER MISSISSIPPI'S HABITUAL OFFENDER STATUTE.**

In his second assignment of error, Joiner claims the State failed to prove his habitual offender status for sentencing, as required in Section 99-19-81. Joiner cites *Vince v. State*, 844 So.2d 510 (Miss. Ct. App. 2003), to support the requirement of Section 99-19-81 that the State carries the burden of proof of all elements of a crime and habitual offender status. The court in *Short v. State*, 929 So.2d 420, 426 (Miss. Ct. App. 2006), agreed that a certified copy of the judgment of conviction is the best evidence to establish habitual offender status. *Vince*, 844 So.2d at 517 (¶22). However, the state is not limited to that form of proof of prior convictions. *Short*, 929 So.2d at 426. Habitual offender status may be established by the defendant’s “admission of prior felony convictions.” *Id.* at 426, quoting *Sanders v. State*, 786 So.2d 1078, 1082 (¶ 14) (Miss. Ct. App. 2001); *Jones v. State*, 747 So.2d 249, 252 (Miss. 1999).

In *Evans v. State*, 988 So.2d 404, 405-06 (Miss. Ct. App. 2001), another case cited by Joiner, the defendant relied on *Vince* to support the requirement of Section 99-19-81. The court found that the defendant in *Vince* went to a full trial, whereas the defendant in *Evans*, like Joiner in the present case, pleaded guilty. *Id.* at 405-06. When a defendant pleads guilty, the burden of proof is lessened, and all the trial court needs is “enough [evidence] that the court may say with confidence the



prosecution could prove the accused guilty of the crime charged.” *Id.*, quoting *Corley v. State*, 585 So.2d 765, 767 (Miss. 1991).

During Joiners’ plea colloquy. Judge Howorth asked Joiner the following:

COURT: Mr. Joiner, in Cause Number LK07-133, the Court has before it a petition to enter a plea of guilty as a lesser habitual offender to the crime of strong armed robbery. Is that correct?

DEFENDANT: Yes, sir.

COURT: And in Cause Number LK07-399, which is, of course, also the State of Mississippi versus Albert Joiner, Jr., I have a petition to enter a plea of guilty to the crime of felony fleeing of a law enforcement officer as a lesser habitual offender. Is that also correct?

DEFENDANT: Yes, sir.

(CP 13)

COURT: Did your attorney go over all the elements of the crimes that you’re pleading guilty to with you and are you telling me that you’re guilty of all of those elements?

DEFENDANT: Yes, sir.

COURT: Are you telling me then that you are, in fact, guilty of the crime of felony fleeing of a law enforcement officer, as well as strong armed robbery?

DEFENDANT: Yes, sir.

COURT: And in each of these two cases also are you telling me that you realize and understand that you qualify for habitual offender status and that you’re going to be sentenced, if the Court accepts your guilty plea, as what we call a lesser habitual offender which will mean that the time you receive you will have to serve day-for-day? Do you understand that?

DEFENDANT: Yes, sir.

(CP 17-18).

COURT: Now, if the Court accepts your guilty plea in these two cases, they also will go on your record and they will be added to the felonies you already have on your record. You already qualify as a habitual offender, and you will continue to qualify as a habitual offender. Once you get out of the penitentiary, any other felony you’re charged with, you can take these charges as well as your other prior felonies, and use them against you to make your punishment worse, to enhance it. Do you understand what I’m telling you?

DEFENDANT: Yes, sir.

COURT: I expect to receive a recommendation in your case, and that's going to be that the Court sentence to you to habitual time. It's 15 years to serve in one case and 4 years to serve in the other case consecutive for a total of 19 years which will be served as a habitual offender day-for-day. Do you understand that recommendation?

(CP 19).

In *Jones*, 747 So.2d at 250, the defendant pled guilty as a habitual offender and was sentenced in accordance with Section 99-19-81. Jones' sworn guilty plea petition, wherein he accepted the accused charges and admitted awareness of his constitutional rights, listed two previous felony convictions. *Id.* In affirming Jones' sentence as a habitual, the Mississippi Supreme Court held the record showed Jones' admission in the petition of "two previous felonies arising out of two separate incidents" was sufficient; the record showed that the defendant was "aware of his eligibility for sentencing as an habitual offender." *Id.* at 252.

Joiner, like the defendant in *Jones*, signed a petition, acknowledging that he was pleading guilty "with full understanding of all matters set forth in the indictment," and knowing that the District Attorney would recommend a sentence under habitual offender status." (RE 7; signature at RE 9). The Petition also stated that Joiner was informed by his lawyer of the "maximum and minimum punishment which the law provides for the offense charged in the indictment." (RE 7). Joiner listed, or admitted to, his prior felony convictions of grand larceny, simple assault on law enforcement officer, attempted armed robbery, and burglary. (RE 9). This meets the standard applied in *Short*, *Sanders*, and *Jones*.

Joiner pled guilty to the charges and admitted to his prior convictions in the petition, lessening the State's burden of proof. The requirements of Section 99-19-81 were met, and Joiner was properly sentenced. This issue is without merit.

### **III. JOINER WAS AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL.**

Joiner argues that he received ineffective assistance of counsel. Joiner claims that he could not have been sentenced as a habitual offender under the facts in the record had his attorney not allowed the plea to go forward without proof or evidence of prior convictions to support enhanced punishment. The record does not support Joiner's argument.

This is the same attorney who was able to convince the prosecutor to dismiss a separate charge of possession of a deadly weapon by a convicted felon, reduce an armed robbery charge to strong armed robbery and recommend that Joiner receive a total of 19 years as a lesser habitual under Section 99-19-81, instead of life as a habitual offender under Section 99-19-83.

To prevail on an issue of ineffective assistance of counsel, Joiner must demonstrate that his counsel's performance was deficient and the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Both elements of the test must be proven by the defendant. *Brown v. State*, 626 So.2d 114, 115 (Miss. 1993). "There is a strong, yet rebuttable presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Cole v. State*, 666 So.2d 767, 775 (Miss. 1995) (citing *Frierson v. State*, 606 So.2d 604, 608 (Miss. 1992)). 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104

In the context of a guilty plea, Joiner must demonstrate that his counsel's performance fell below the range of competence demanded of attorney's in criminal cases and that but for the attorney's substandard performance, he would not have been sentenced as a habitual offender. See *Alexander v. State*, 605 So.2d 1170, 1173 (Miss.1992). Joiner wholly fails in his burden of proof.

In *Smith v. State*, 636 So.2d 1220 (Miss. 1994), the Mississippi Supreme Court held that when the transcript from court proceedings and the petition for post-conviction relief contradict one another, “the latter is practically rendered a “sham”, thus allowing the summary dismissal of the petition to stand.” In *Ford v. State*, 708 so.2d 73 (Miss.1998), the court held that a post conviction motion “cannot be supported when the record clearly belies every allegation Petitioner makes in his Post-Conviction Relief Motion.”

Joiner was originally represented by a court-appointed attorney and later retained counsel.

During the plea colloquy, Judge Howorth asked Joiner:

COURT:	And you or your family has retained Mr. Wall?
DEFENDANT:	Yes, sir.
COURT:	And you’ve had ample opportunity to meet with him and confer with him about all these charges that you’re pleading guilty to?
DEFENDANT:	Yes, sir.
COURT:	And you’re satisfied that he has spent the time with you to adequately and properly represent you and advise you?
DEFENDANT:	Yes, sir.
COURT:	And you’re satisfied with his services?
DEFENDANT:	Yes, sir.

(CP 25-26).

Joiner then admitted to the court that the factual basis for both charges, as recited by the State, was correct. (CP 27-28). The plea hearing transcript negates Joiner’s assertions of ineffective assistance of counsel. Based upon a review of the record, Joiner failed to meet both prongs of *Strickland*. Under the Supreme Court’s ruling in *Foster v. State*, 716 So.2d 538 (Miss.,1998), this issue is without merit.

## CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the order of the Circuit Court of Lafayette County denying Albert Joiner, Jr.'s motion for post-conviction relief and request to be re-sentenced without the habitual offender status.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**


I, Lisa Blount, 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:

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