IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KRISTI FULGHAM — APPELLANT

VS. — NO. 2009-CP-0971

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KRISTI FULGHAM **APPELLANT**

VS. **NO. 2009-CP-0971**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

PREFACE

During her guilty plea qualification hearing, Kristi Fulgham informed the circuit judge, under the trustworthiness of the official oath, "I had a cell phone in the jail, and I encouraged Ricky West to help me escape." (C.P. at 16)

She also told Judge Kitchens she was pleading guilty "[b]ecause I know that's in my best interest because I'm guilty." (C.P. at 33)

Fulgham now claims her plea should be vacated because the statute forming the basis for her plea to possessing and furnishing to another inmate an "unauthorized electronic device" was unconstitutionally vague at the time of her plea.

STATEMENT OF THE CASE

Kristi Fulgham appeals from the summary denial of her "Motion for Post-Conviction Collateral Relief" filed on November 10, 2008, in the Circuit Court of Oktibbeha County, James T. Kitchens, Circuit Judge, presiding.

On January 24, 2006, Ms Fulgham entered pleas of guilty to attempted escape and furnishing, in violation of Miss.Code Ann. §47-5-193, an "unauthorized electronic device," *viz.*, "a cellular telephone and charger," to an inmate of the Oktibbeha County jail. (C.P. at 11, 27-38) Fulgham was sentenced to four (4) years and eight (8) years, respectively, both to run consecutively. (C.P. at 36)

On November 10, 2008, Fulgham filed her motion for post-conviction relief alleging her rights under the Fifth and Fourteenth Amendments were violated because she pled guilty to a crime for which she could not be convicted and because she suffered ineffective assistance of counsel when the statute used to convict her was amended to include cell phones and chargers *after* entry of her plea of guilty. (C.P. at 2-7)

This motion was denied summarily on May 7, 2009. (C.P. at 41)

On direct appeal Fulgham contends she could not have " . . .knowingly and voluntarily plead guilty to an unconstitutionally vague criminal statute." (Brief of Appellant at 3)

She invites this Court to either vacate her conviction or remand her case to the trial court for consideration of the ineffective assistance of counsel claim. (Brief of Appellant at 3)

We respectfully submit Fulgham's voluntary plea of guilty operated to waive all non-jurisdictional defects or insufficiencies in her indictment as well as all rights or defects which are incident to trial. This includes Fulgham's right to assail the constitutionality of the statute in question on the ground it was void-for-vagueness.

While our post-conviction relief statute, §99-39-5(1)(c), permits Fulgham to assail the constitutionality of the statute forming the basis for her conviction, permission is not automatic where, as here, the defendant pleads guilty.

Judge Kitchens did not err in finding as a fact and concluding as a matter of law that the statute in question was not unconstitutionally vague, but, alternatively, even if it was, her voluntary

plea of guilty waived her right to complain.

We argue that even if the statute was unconstitutionally vague on its face, it was not unconstitutional as applied to Fulgham.

Waiver aside, close scrutiny of Ms Fulgham's motion for post-conviction relief leads to the conclusion that her void-for-vagueness claim is made for the first time on appeal to this Court. Issues not presented to the trial judge in Fulgham's motion for post-conviction relief 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

KRISTI FULGHAM is a twenty-nine (29) year old Caucasian female with an 11th grade education and a GED. (C.P. at 29) She can both read and write. (C.P. at 29)

This is the same Kristi Fulgham, mother of three, inextricably involved in the murder of her husband, Joey Fulgham. *See* (Tyler) **Edmonds v. State**, 955 So.2d 787 (Miss. 2007).

On July 25, 2005, Fulgham was indicted for her attempted escape on October 7, 2004, from the Oktibbeha County jail (Count #1) and for furnishing on August 16, 2004, "an unauthorized electronic device, to-wit: a cellular telephone and charger" to an inmate of the Oktibbeha County jail. (Count #2) (C.P. at 11)

On the 24th day of January, 2006, Fulgham signed a petition to enter plea of guilty whereby she acknowledged, under the trustworthiness of the official oath, she had a cell phone in the jail; she encouraged Ricky West to help her escape; she was offering her plea of guilty freely and voluntarily, of her own free will and accord, *with full understanding of all the matters set forth in the indictment;* and, further, she was satisfied with the advice and help her attorney had given her. (C.P. at 16, ¶¶

13-15)

That same day, January 24, 2006, Fulgham appeared before James T. Kitchens, Jr., and on the advice of her attorney, Stephanie Mallette, entered a voluntary plea of guilty to both counts in the indictment. (C.P. at 27-38)

The transcript of the plea-qualification hearing reflects, *inter alia*, that Fulgham, again under oath, understood that if she intended to plea guilty, it was with the understanding she would have to admit, under oath, committing the crimes (C.P. at 30); she had discussed with her lawyer any defenses she may have had to the charges; she was satisfied with the advice and help her lawyer had given her, and she was pleading guilty to these two counts "[b]ecause I know that's in my best interest because I'm guilty." (C.P. at 30, 33)

During the plea-qualification hearing the following colloquy took place:

> BY THE COURT: Mrs. Faver, what are the facts that the State would offer in the event of a trial in these two counts?
>
> BY MRS. FAVER: Your Honor, ... [i]n Count Two of the indictment, the State would show that on or about August 16th of 2004, that this defendant did unlawfully, willfully, and feloniously furnish to an inmate of the Oktibbeha County jail an unauthorized electronic device, that being a cellular phone and a charger for said phone.
>
> Your Honor, the State's theory of the case is that Ms. Fulgham was an accessory before the fact to each count.
>
> BY THE COURT: To the Count Two charge?
>
> BY MRS. FAVER: Yes, Your Honor.
>
> BY THE COURT: All right.
>
> BY THE COURT:
>
> Q. Is that what happened, Ms. Fulgham - -

A. Yes, sir.

Q. - - the facts that the State's laid out is what occurred?

A. Yes, sir. (C.P. at 34)

An order signed and entered by Judge Kitchens on January 24, 2006, reflects, *inter alia*, "[t]hat the Defendant fully understood the nature of the charge against [her] and admitted the commission of the offense; . . ." and, further, "[t]hat the Defendant is satisfied with the services of [her] attorney and believes [s]he has represented [her] best interest and advised [her] properly before entering the guilty plea;" . . . (C.P. at 13-14)

On the 4th day of November, 2008, two (2) years and ten (10) months after entering her voluntary plea(s) of guilty, Kristi Fulgham apparently changed her mind.

Fulgham signed a fill-in-the-blank document styled "Motion for Post-Conviction Collateral Relief" wherein she claimed, *inter alia*, the facts she admitted to did not constitute a crime and, therefore, she plead guilty to a crime for which she could not be convicted. (C.P. at 3) Fulgham asked rhetorically: "Why did my attorney advise me to plead to an offence [sic] when the state could not prove my offence [sic]?"

The petition to enter plea was filed for record on November 10, 2008. (C.P. at 6)

In a one page order signed and entered on May 7, 2009, Judge Kitchens, summarily denied Fulgham's motion with the following finding of fact and conclusion of law: "This Court does not find that the statute was unconstitutionally vague and the Court finds that the Petitioner waived her right to question the statute when she pled guilty to the offense." (C.P. at 41; appellee's exhibit A, attached.)

Fulgham filed her notice of appeal on June 12, 2009. (C.P. at 42)

In her appellate brief she frames the issues as follows:

1. "Whether a person, acting on the advice of counsel, can knowingly and voluntarily plead guilty to a criminal statute that is unconstitutionally vague."

2. "Whether an attorney who advises her client to plead guilty to an unconstitutionally vague criminal statute has provided ineffective assistance of counsel."

The answer to the two questions framed craftily by Fulgham is "sometimes" and "not always."

Even if a penal statute is unconstitutionally vague on its face it may not be unconstitutional as applied if, as in the case at bar, the offender understands perfectly the conduct/activities that are unlawful.

SUMMARY OF THE ARGUMENT

Fulgham has failed to establish by a preponderance of the evidence she was entitled to any relief resulting from her conviction via an allegedly involuntary guilty plea.

Fulgham's voluntary plea of guilty operated to waive or surrender her right to challenge the constitutionality of §47-5-193 on the ground it was void for vagueness.

This is because a valid plea of guilty operates as a waiver of all non-jurisdictional rights or defects which are incident to trial as well as all defects or insufficiencies in an indictment. **Jefferson v. State,** 556 So.2d 1016, 1019 (Miss. 1989); **Anderson v. State,** 577 So.2d 390, 391 (Miss. 1991).

Included in this class of waivable rights are "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." **Anderson v. State,** 577 So.2d 390, 391 (Miss. 1991).

If at the time of Fulgham's plea of guilty, §47-5-193 was unconstitutionally vague, it was a

non-jurisdictional insufficiency and was waived by Fulgham's voluntary plea of guilty. *See* **Colburn v. State,** 431 So.2d 1111 (Miss. 1983), which held that a constitutional attack on the ground the aggravated assault statute was void-for-vagueness was never raised in the trial court. Therefore, it could not be raised for the first time on direct appeal because only matters of jurisdiction may be raised for the first time on appeal. The lesson gleaned from **Colburn** is that even if the aggravated assault statute had been unconstitutionally vague it was a non-jurisdictional insufficiency. A valid guilty plea waived all that.

Assuming, on the other hand there was no waiver and that the statute in question is unconstitutionally vague on its face, it was not unconstitutional as applied to Fulgham who has yet to complain she did not know what conduct was unlawful.

Next, we note that at no place in her motion for post-conviction collateral relief does Fulgham specifically assail the constitutionality of §47-5-193 on the ground it was void-for-vagueness, i.e., that she was a person of ordinary intelligence with no reasonable opportunity to know what was prohibited and, in fact, did not know her conduct was unlawful.

Rather, her complaint at the trial level assailing the performance of her lawyer and application of the statute in question appears to be *ex post facto* in nature. "I suffered [i]naffective [sic] assistance of counsel as Miss.Code Ann. [§]47-5-193 was legislatively amended to include cell phones *after* I entered my plea." (C.P. at 3) [emphasis supplied]

Fulgham asserted in her motion for post-conviction relief that her sentence violated Due Process because the facts she admitted did not constitute a crime. Due Process claims are waivable by a plea of guilty. **Smith v. State,** 806 So.2d 1148 (Ct.App.Miss. 2002).

If, in fact, vagueness was not raised in Fulgham's motion for post-conviction relief, the point should be barred from consideration on direct appeal even though Judge Kitchens addressed the

matter.

In any event, Judge Kitchens was eminently correct in finding that the statute was not unconstitutionally vague and that Fulgham waived her right to question the integrity of the statute when she entered a plea of guilty.

Finally, would it not be logical to conclude that if Fulgham voluntarily plead guilty to furnishing another inmate with an unauthorized cell phone and cell phone charger, the statute declaring this activity unlawful was not vague to her.

ARGUMENT

FULGHAM WAIVED HER RIGHT TO ASSAIL THE CONSTITUTIONALITY OF THE STATUTE COMPLAINED ABOUT WHEN SHE ENTERED HER VOLUNTARY PLEA OF GUILTY.

DEFENSE COUNSEL'S REPRESENTATION WAS NEITHER DEFICIENT NOR DID ANY DEFICIENCY PREJUDICE THE DEFENDANT. RATHER, COUNSEL'S ADVICE WAS WELL WITHIN THE RANGE OF COMPETENCE DEMANDED OF ATTORNEYS IN CRIMINAL CASES.

Kristi Fulgham contends that "[b]ecause [she] could not knowingly plead guilty to an unconstitutionally vague statute, [her] conviction must be vacated. (Brief of Appellant at 3)

She also contends "[a]n attorney's advice to plead guilty to an unconstitutional statute is both ineffective assistance and highly prejudicial to the client." (Brief of Appellant at 3)

Several observations are made initially.

First, Miss.Code Ann. §99-39-5 (1)(c) and (f) of the Mississippi Uniform Post-Conviction Collateral Relief Act read as follows:

> (1) Any prisoner in custody under sentence of a court of record of the state of Mississippi who claims:

* * * * * *

© That the statute under which the conviction and/or sentence was obtained is unconstitutional;

* * * * * *

(f) That his plea was made involuntarily;

* * * * * *

. . . may file a motion to vacate, set aside or correct the judgment or sentence, . . .

Second, Ms Fulgham has filed a motion for post-conviction collateral relief assailing the integrity of her guilty plea. On direct appeal to this Court from summary denial by the trial court, Fulgham alleges for the first time that Miss.Code Ann. §47-5-193, at the time of her indictment and guilty plea, was void for vagueness.

Third, the vagueness complaint was never succinctly raised in the court below. Although Judge Kitchens ruled the statute was not "unconstitutionally vague," close scrutiny of Ms Fulgham's *pro se* motion for post-conviction relief reflects unequivocally she never specifically claimed the statute was void-for-vagueness. (C.P. at 2-7) Rather, Fulgham alleged she was denied Due Process of law because the facts she admitted to did not constitute a crime for which she could be convicted. (C.P. at 3)

Judge Kitchens did not find the statute unconstitutionally vague at the time of Fulgham's indictment and guilty plea. Fulgham, we submit, never specifically claimed that it was, i.e., she never pinpointed the issue in the court below that she seeks to pinpoint on appeal. In this posture, her "void for vagueness" argument should be rejected for this reason alone.

The failure to raise the issue before the trial court in her motion for post-conviction relief

should bar this issue from appellate review. **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."]

Issues and claims raised for the first time in Fulgham's appellate brief, cannot be considered by a reviewing court on direct appeal. Fulgham 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); **Bell v. State,** No. 2007-CP-01857-COA (¶¶ 10, 11, 12, 13) decided February 3, 2009; **Davis v. State,** No. 2007-CP-00264-COA (¶4) decided June 17, 2008; **Wallace v. State,** No.2007-CP-00766-COA (¶27) decided May 27, 2008, and the decisions of the Supreme Court cited therein.

In **Berdin v. State,** *supra,* 648 So.2d 73, 80 (Miss. 1994), we find the following language addressing the posture of Fulgham'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."]

As noted previously, we are aware the trial judge addressed the issue when he ruled that §47-

5-193 was not "unconstitutionally vague" on the ground that " . . . at the time [Fulgham] was indicted [the statute] did not include the exact name of the electronic device that she possessed." (C.P. at 41)

No matter.

Fulgham did not specifically raise this issue. If this is true, the void-for-vagueness issue should be barred from appellate review.

The Waiver Doctrine Attaches to Non-Jurisdictional Defects.

In addition to all this, Ms Fulgham's plea of guilty waived any non-jurisdictional defects or deficiencies in her indictment as well as all rights or defects incident to trial when she entered a voluntary guilty plea.

Putting aside for the moment appellee's position that "vagueness" was not the ground relied upon in Fulgham's motion filed in the trial court, the fact remains that Fulgham plead guilty to the offense charged.

A defendant is allowed to waive many important rights. **Bishop v. State,** 812 So.2d 934 (Miss. 2002), reh denied, cert denied. Lest we forget, "[a] plea of guilty constitutes a waiver of some of the most basic rights of free Americans, those 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). The waiver doctrine extends to Fourth Amendment rights as well. **Burns v. State,** 984 So.2d 1024 (Ct.App.Miss. 2008), reh den. *See also* **Bishop v. State,** 812 So.2d 934, 945 (Miss. 2002) for a list of valuable rights waived.

It is well settled that by entering a guilty plea, a defendant waives all non-jurisdictional defects in the proceedings below. **Reeder v. State,** 783 So.2d 711 (Miss. 2001).

The trial judge got it right when he did " . . . not find that the statute was unconstitutionally vague and . . . that the Petitioner waived her right to question the statute when she pled guilty to the offense." (C.P. at 41; appellee's exhibit A, attached.)

In **Jefferson v. State**, *supra*, 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,** *supra*, 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, Kristi Fulgham's voluntary plea of guilty to furnishing to an inmate an unauthorized electronic device in the form of a cell phone and cell phone charger 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 Fulgham entered a voluntary plea of guilty, she also waived any defenses she might have had to the charge. **Bishop v. State,** 812 So.2d 934, 945 (Miss. 2002); **Taylor v. State,** 766 So.2d 830, 835 (Miss. 2000).

The Carey-McCray Ruling is not Persuasive.

On October 17, 2006, nine (9) months after Fulgham entered her plea(s) of guilty on January 24, 2006, Margaret Carey-McCray, a Circuit Judge in Sunflower County, issued an order in an unrelated case finding as a fact and concluding as a matter of law that §47-5-193 " . . . violated the due process clause of the United States Constitution because of vagueness in that 'it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.' " (C.P. at 19)

Fulgham's awareness and reliance upon the conclusion reached by the learned circuit judge

nine (9) months after Fulgham's guilty plea is commendable. Nevertheless, we respectfully submit Judge Carey-McCray's decision is not persuasive because it is not the law of the land.

At the time of Fulgham's plea of guilty, and even to this day, no appellate court in Mississippi, the Supreme Court in particular, has declared the statute in question unconstitutional. At best we have a one to one split among the learned circuit judges in this state. Judge Carey-McCray finds the statute unconstitutionally vague while Judge Kitchens does not.

"[A]ll presumptions and intendments should be indulged in favor of the validity of a statute, and its unconstitutionality should appear beyond a reasonable doubt before it will be held invalid." **Peterson v. State,** 268 So.2d 335, 337 (Miss. 1973).

The Decision of the Ohio Court of Appeals is Distinguishable.

Fulgham's reliance upon a 1980 decision from an Ohio intermediate court, while interesting, is, in the parlance of the day, misplaced. The facts there reflect that William Holycross entered a plea of guilty to an indictment charging him with "one count of engaging in organized crime." The lower court denied post-conviction relief by concluding the statute was constitutional.

Hollycross appealed to the Ohio Court of Appeals who reversed and vacated Hollycross's conviction of engaging in organized crime. The distinguishing feature is embodied in the following language from the Court's unpublished opinion:

> In his amended petition for post-conviction relief, appellant raised, *inter alia,* the issue of the unconstitutionality of R.C. 2923.04, the organized crime statute. The issue was also argued by counsel during the hearing. In making its ruling, the trial court reviewed all of the current case law on the constitutionality of R.C. 2923.04, and concluded that the statute was constitutional.
>
> Subsequent to that ruling, this court decided the case of *State v. Forbes* (August 9, 1979), No. 40897, unreported. This court in

> *Forbes* affirmed the decision of the trial court that R. C. 2923.04 was unconstitutionally overbroad and vague and affirmed the trial court's dismissal of the indictment relating to R.C. 2923.04. The ruling in *Forbes* was affirmed by the Supreme Court of Ohio in *State v. Young* (1980), 62 Ohio St.2d 370, 406 N.E.2d 499, and is controlling here.

Needless to say, but we say it nevertheless, the unconstitutionality of the Ohio statute was upheld by Ohio's highest court. That did not occur here where our appellate Courts have never addressed the issue.

The distinction here is that Judge Carey-McCray's ruling in the circuit court of Sunflower County does not carry the same weight as that carried by the Supreme Court of the State of Mississippi.

In the case at bar, there has been no declaration by the Supreme Court or, for that matter, by the Court of Appeals, that at the time of Fulgham's indictment and guilty plea Miss.Code Ann. §47-5-193 was unconstitutional on the grounds of vagueness, overbreath, or on any other grounds.

The Subsequent Amendments to §47-5-193 are Immaterial.

Fulgham points out that since her plea of guilty to the crimes charged, §47-5-193 has twice been amended, first to include the addition of "cell phone" as a separate prohibited "unauthorized electronic device" and later to add the word "chargers"as an unauthorized item. Fulgham suggests this is an indication the Legislature recognized the constitutional shortcoming of the statute in its original form and sought to cure the defect. (Brief of Appellant at 3, 7-8)

Far from acknowledging the vagueness of the statute as originally written, the amendments could have just as well been added to bolster the Legislature's original intent to make more certain that which was already certain.

The Misdemeanor Feature of §47-5-192 is not Favorable to Fulgham.

Miss.CodeAnn. §47-5-192 authorizes the Commissioner of Corrections to enact rules prohibiting the possession by employees, officers or *any person allowed upon the premises* of a correctional facility, of any item, the possession of which by offenders is prohibited or regulated. A violation of this statute is punished as a misdemeanor.

It is obvious to us the "any person" found in 47-5-192 applies to visitors and not to incarcerated offenders who can be charged with a felony for the same conduct under §47-5-193. Incarcerated offenders would naturally be treated more harshly than other violators.

The Advice Given by Defense Counsel was not Deficient.

We concur with Fulgham that Judge Kitchens did not address directly Fulgham's claim that because her lawyer gave Fulgham either misleading advice or no advice, counsel was ineffective in the constitutional sense. (Brief of Appellant at 10-11)

A finding that trial counsel was neither ineffective nor deficient for failing to advise Fulgham of the possible unconstitutionality of the statute in question is implicit, is it not, in Judge Kitchens's finding that §47-5-193 was not unconstitutionally vague.

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

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

To prove ineffective assistance of counsel, the defendant must show that counsel's

performance was deficient and this deficiency prejudiced her defense. **Liddell v. State,** 7 So.3d 217, 219 (¶6) (Miss. 2009) quoting **Strickland v. Washington,** 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The rule regarding ineffective assistance of counsel within the context of a guilty plea is that "when a convicted defendant challenges his guilty plea on the ground 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." **Elliott v. State,** No. 2008-CA-00948-COA (¶21) decided November 3, 2009 [Not Yet Reported], citing **Buck v. State,** 838 So.2d 256, 260 (¶12) (Miss. 2003)(quoting **Reynolds v. State,** 521 So.2d 914, 918 (Miss. 1988).

Ms Fulgham has failed to do so here.

During her plea-qualification hearing Kristi Fulgham told Judge Kitchens she was pleading guilty "[b]ecause I know that's in my best interest because I'm guilty." (C.P. at 33) While this admission may have the aroma of a so-called *Alford* plea, Fulgham has never once proclaimed her innocence.

The selection of a defense falls within the amorphous zone of trial and litigation strategy. Whether or not advice that it's in one's best interest to plead guilty should be no different. We invite the attention of the Court to the penalty authorized by statute and the penalty actually recommended by the prosecutor and accepted and imposed by the circuit judge. (C.P. at 31-32, 35, 36-37)

"[T]here is a presumption that decisions made are strategic." **Leatherwood v. State,** 473 So.2d 964, 969 (Miss. 1985). There is also a strong, yet rebuttable, presumption that counsel's conduct falls within the wide range of reasonable professional assistance. **Frierson v. State,** 606

So.2d 604, 608 (Miss. 1992). These presumptions have not been overcome here.

"Judicial scrutiny of counsel's performance [is] highly deferential. **Osborn v. State,** 695 So.2d 570, 575 (Miss. 1997) quoting **Strickland v. Washington**, 466 U.S. at 689, 104 S.Ct. at 2065.

Ms Mallette, Fulgham's lawyer, could not have been ineffective in the constitutional sense for failing to recognize that §47-5-193 was unconstitutionally vague when a circuit judge in Oktibbeha County ruled that it was not. We respectfully submit that any advice given to Fulgham was well within the range of competence demanded of attorneys in criminal cases.

CONCLUSION

It is elementary "[t]he burden is upon [Ms Fulgham] to prove by a preponderance of the evidence that [s]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 Kristi Fulgham has failed to do so here.

Fulgham, by and through her Jackson lawyers, has researched the issues and filed a well written and interesting brief. Nevertheless, her constitutional claim is barred but, if not, it was manifestly or plainly without merit.

Judge Kitchens denied post-conviction relief summarily. He was eminently correct when he found as a fact and concluded as a matter of law " . . . that the Petitioner waived her right to question the statute when she pled guilty to the offense." (C.P. at 41; appellee's exhibit A, attached)

Stated differently, Judge Kitchens found Fulgham's complaint to be manifestly without merit.

There can be no doubt cell phones and especially cell phone chargers are electronic devices. Fulgham has yet to claim in plain and ordinary English she did not know her conduct was unlawful.

It seems obvious to us that if Fulgham voluntarily, knowingly, and intelligently plead guilty to possessing and/or furnishing another inmate with an unauthorized cell phone and cell phone charger, the statute forbidding this activity was certainly not vague to her and the statute was not vague as applied.

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 she was. **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."].

Appellee respectfully submits this case is devoid of any claims worthy of an evidentiary hearing or vacation of her conviction via guilty plea. Accordingly, the judgment entered in the lower court summarily denying Kristi Fulgham's motion for post-conviction collateral relief should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

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IN THE CIRCUIT COURT OF OKTIBBEHA COUNTY, MISSISSIPPI
APRIL TERM, 2009

KRISTI FULGHAM — PETITIONER

VS. — CAUSE NO. 2008-0547-CV

STATE OF MISSISSIPPI — RESPONDENT

ORDER

Came on to be heard this day the above styled and numbered post conviction matter; and the Court, after having reviewed the record of proceedings in the trial court, the sentencing order, and the pleadings contained within the Petitioner's post-conviction civil file; the Court finds as follows.

The Petitioner has filed a Motion for Post-Conviction Relief alleging that the statute she was charged under, § 47-5-193, was unconstitutionally vague, and at the time she was indicted, did not include the exact name of the electronic device that she possessed. The Court finds this argument to be without merit. This Court does not find that the statute was unconstitutionally vague, and the Court further finds that the Petitioner waived her right to question the statute when she pled guilty to the offense.

IT IS THEREFORE ORDERED, that this petition be, and the same is hereby dismissed without the necessity of a hearing. Further, the Circuit Clerk is directed to send a copy of this Order to all parties.

SO ORDERED, this the 7th day of May, 2009.

OKTIBBEHA COUNTY
MAY 07 2009
CLERK

James T. Kitchens
CIRCUIT JUDGE

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EXHIBIT
A
tabbies

CERTIFICATE OF SERVICE

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

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

Honorable Forrest Allgood
District Attorney, District 16
Post Office Box 1044
Columbus, MS 39703

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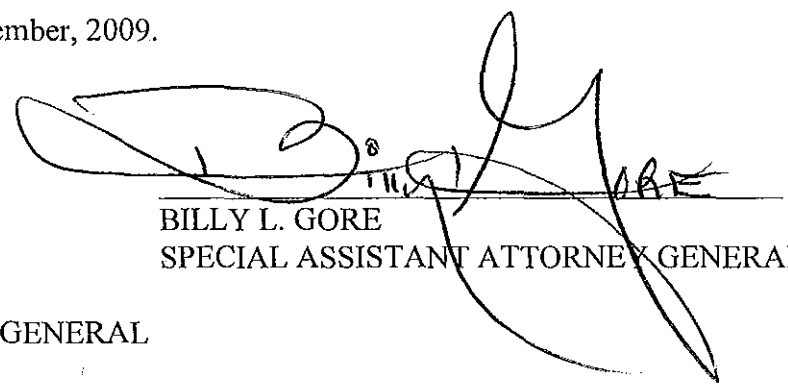
This the 21st day of December, 2009.



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