IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIE LEE MADDEN, JR. — APPELLANT

VS. — NO. 2009-CP-0620-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

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the ground " . . . Madden does not assert any new grounds for relief . . . he simply reasserts the same issues which were previously addressed in his [first] petition for post-conviction collateral relief." (C.P. at 26-27) *See* appellee's exhibit A, attached.

The salient facts of this case are found in the written opinion from the Court of Appeals issued after consideration of Madden's first direct appeal from the denial of post-conviction collateral relief. *See* **Madden v. State,** 991 So.2d 1231 (Ct.App.Miss. 2008), reh denied, cert denied; appellee's exhibit B, attached. Both rehearing and certiorari were subsequently denied. *See* appellee's exhibit C and D attached.

Much of what was said by Judge Griffis then and there applies here and now to Madden's second and successive quest for post-conviction collateral relief sought in the wake of the same guilty plea.

Madden, under the trustworthiness of the official oath, signed a petition to enter plea of guilty on April 8, 2004. (C.P. at 52-54) A plea-qualification hearing was apparently conducted on June 28, 2004, in the Circuit Court of Harrison County, at which time Madden entered his guilty plea(s).

The petition to enter plea of guilty reflects this was an "open plea" and that the state would recommend dropping the enhancement portion of Madden's indictment. (C.P. at 53) Contrary to Madden's claim reflecting otherwise, he was duly advised of the maximum and minimum penalties as well as the constitutional rights he was giving up by entering his plea(s). (C.P. at 53)

Madden was thereafter sentenced to serve fifteen (15) years, day-to-day, in the custody of the MDOC. *See* appellee's exhibits A and B.

On February 13, 2009, over four and one-half (4½) years following his plea of guilty on June 28, 2004, Madden again sought post-conviction relief in the form of a "Motion for Relief and Evidentiary Hearing" which he initially filed in the Supreme Court of Mississippi. An order entered

on January 7, 2009, by Chief Justice Waller dismissed Madden's motion without prejudice to file same in the trial court which Madden did. (C.P. at 13)

Madden filed his motion for relief in the trial court on February 13, 2009. (C.P. at 4) The relief requested was an evidentiary hearing and eventual release from custody. (C.P. at 24)

On February 26, 2009, Judge Terry, treating Madden's post-plea motion as a second motion for post-conviction collateral relief, summarily denied Madden's motion on the ground " . . . Madden does not assert any new grounds for relief [but] simply reasserts the same issues which were previously addressed in his petition for post-conviction collateral relief." (C.P. at 26-27) Implicit in this language is the idea that Madden's present motion is a successive motion for post-conviction collateral relief and is barred by Miss. Code Ann. §99-39-23(6). *See* appellee's exhibit A, attached.

We concur.

We respectfully submit Judge Terry found no error, plain or otherwise, involving fundamental rights, or any other rights, sufficient to exempt Madden from the statute barring his claims as successive in nature. In this posture, Madden's motion for relief and for an evidentiary hearing was correctly denied by the lower court as successive-writ barred. **Arnold v. State,** 912 So.2d 202 (Ct.App.Miss. 2005).

It was also barred by the doctrine of *res judicata* and was manifestly without merit as well.

Madden filed a motion for rehearing on May 23, 2009 (C.P. at 29-40), which was denied on April 17, 2009. (C.P. at 47; appellee's exhibit C, attached)

Certiorari was denied by the Supreme Court on October 7, 2008. (Appellee's exhibit D, attached)

On May 1, 2009, Judge Terry entered an order denying Madden's motion to supplement and/or amend Madden's motion for rehearing. (C.P. at 57-58; appellee's exhibit E, attached) Judge

Terry found as a fact and concluded as a matter of law that Madden was advised as to the possible sentence, that he was not under the influence of drugs or intoxicants, and that his plea was voluntary.

After reviewing Madden's notice of appeal and designation of record filed on April 13, 2009, Judge Terry, on May 12, 2009, issued yet another order pointing specifically to certain pleadings on file with the Supreme Court which, we submit, this Court can judicially notice. *See* appellee's exhibit F, attached.

On or about September 25, 2009, Madden filed his appellate brief in this Court.

SUMMARY OF ARGUMENT

Madden claims he was entitled to an evidentiary hearing because he was erroneously denied post conviction collateral relief.

It is enough to say that Madden has already been there and done that. *See* **Madden v. State,** *supra*, 991 So.2d 1231 (Ct.App.Miss. 2008), reh denied, cert denied.

If not, his present claims "could [and] should" have been presented during his first quest for post-conviction relief. *Cf.* **Smith v. State,** 434 So.2d 212, 215 (Miss. 1983).

Both the trial court as well as the Court of Appeals on direct appeal have already rejected Madden's claims he was under the influence of heavy medication and severe emotional distress at the time of his plea(s), that he was improperly sentenced as a habitual offender, and that the transcript of the plea hearing will prove many of his post-conviction claims. Sated differently, the Court of Appeals has already determined there was a factual basis for Madden's plea, he was properly sentenced as a habitual offender and, further, that Madden was not denied the effective assistance of counsel during his guilty plea. *See* appellee's exhibit B, attached.

In addition to a successive writ bar, the doctrine of *res judicata* also bars Madden's post-conviction claims as well. *See* Miss.Code Ann. §99-39-21(3) which states that "[t]he doctrine of *res*

judicata shall apply to all issues, both factual and legal, decided at trial and on direct appeal."

"The burden of proving that no procedural bar exists falls squarely on the petitioner." **Crawford v. State,** 867 So.2d 196, 202 (Miss. 2003).

Madden, for the second time, seeks post-conviction relief from the same 2004 guilty plea.

As noted previously, Madden has already been there and done that. *See* appellee's exhibit B, attached.

Although Madden's most recent motion was labeled as a "motion for relief and evidentiary hearing," it was properly treated by the circuit judge as a motion for post-conviction collateral relief assailing the integrity of the same guilty plea and the sentence imposed in its wake. (C.P. at 15; appellee's exhibit A, attached)

A rose by any other name smells the same. *See* **Sanders v. State,** 440 So.2d 278, 282 (Miss. 1983), note 1 ["We affirm our long-standing rule that *pro se* post-conviction relief efforts will be examined in the light of the substantive claims presented rather than their possible inapt denomination."]

There must at some point in time be an end to seemingly endless litigation.

We agree with the trial judge that Madden's most recent claims were clearly successive-writ barred by virtue of Miss.Code Ann. § 99-39-23(6). **Arnold v. State,** *supra*, 912 So.2d 202, 203 (Ct.App.Miss. 2005). *See also* **Flowers v. State,** 978 So.2d 1281 (Ct.App.Miss. 2008); **Stroud v. State,** 978 So.2d 1280 (Ct.App.Miss. 2008); **Myers v. State,** 976 So.2d 917 (Ct.App.Miss. 2007), reh denied, cert denied 977 So.2d 343 (2008).

The "cause and actual prejudice" factor defined in Miss.Code Ann. §99-39-21(2)(4) and (5) provides no basis for due process relief. We respectfully submit Madden has received all the process he was due.

ARGUMENT

MADDEN'S POST-PLEA MOTION FOR POST-CONVICTION RELIEF WAS BARRED AS A SUCCESSIVE WRIT AND BY THE DOCTRINE OF *RES JUDICATA.*

IT WAS TIME BARRED AND MANIFESTLY WITHOUT MERIT ON THE MERITS AS WELL.

This Court has stated time and again the standard for appellate review of post-conviction cases.

"When reviewing a trial court's decision to deny a petition for post-conviction relief, [an appellate court] will not disturb the trial court's factual findings unless they are found to be clearly erroneous. [citation omitted] However, where questions of law are raised, the applicable standard of review is *de novo*." **Twillie v. State,** 892 So.2d 187, 189 (Miss. 2004). *See also* **Buckhalter v. State,** 912 So.2d 159, 160 (Ct.App.Miss. 2005), reh denied.

"A trial judge's finding will not be reversed unless manifestly wrong." **Hersick v. State,** 904 So.2d 116, 125 (Miss. 2004).

Willie Lee Madden, Jr., proceeding *pro se*, apparently seeks to exempt himself from a successive writ bar by suggesting he has new evidence of material facts that requires vacation of his conviction and sentence in the interest of justice. (C.P. at 15)

We respectfully submit there is nothing new under the sun.

Madden claims he was under the influence of heavy medications at the time of his plea which rendered him incompetent and incapable of entering a voluntary plea. He argues the absence of a transcript of the plea-qualification hearing which admittedly is not included in this record made it impossible for the circuit judge to fairly consider his complaints.

Madden also claimed in his motion for relief his plea was involuntary and his lawyer

ineffective. (C.P. at 24)

The relief sought in the court below, and apparently on appeal as well, is "release from custody." (C.P. at 24)

The trial judge dismissed Madden's motion for relief summarily on the ground it was a successive motion for post-conviction relief. *See* appellee's exhibit A, attached. The trial judge denied Madden's motion for rehearing (C.P. at 47) and a motion to supplement his motion for rehearing as well. (C.P. at 57-58) *See* appellee's exhibits C and E, attached.

Madden has attached to his appellate brief as his Exhibit D a copy of a subsequent order entered by the circuit judge denying Madden's "motion to clarify and for relief."

In this new appeal Madden complains A) there is no guilty plea transcript, and a "boilerplate" petition to enter his plea(s) was insufficient to demonstrate Madden was advised of the rights he was waiving by pleading guilty, B) he was under the influence of medications when he entered his plea(s), C) he was wrongfully sentenced as a habitual offender, and D) he was denied the effective assistance of counsel.

Madden is raising issues that have already been decided adversely to him.

Plea of Guilty Negates Value of New Evidence.

First, there is no new evidence involved in this case. A plea of guilty, by definition, negates any notion there is some undiscovered evidence which could prove a prisoner's claim of innocence.

In the recently decided case of **Bell v. State,** No. 2007-CP-01857-COA decided February 3, 2009 (¶¶ 10-12) [Not Yet Reported], we find the following language addressing this state of affairs:

> A petitioner seeking post-conviction relief based on new evidence must prove that the new evidence has been discovered since the end of trial, and such evidence could not have been discovered through due diligence before the beginning of the trial. **However, "[w]hen a defendant pleads guilty he is admitting that he**

committed the offense. Therefore, by definition, a plea of guilty negates any notion that there is some undiscovered evidence which could prove his innocence." ***Jenkins v. State,*** **986 So.2d 1031, 1034 (¶12) (Miss. Ct.App. 2008).**

> After entering a guilty plea, Bell asserts that new evidence came to light on January 9, 2008, after review of the court transcript that will show that she was wrongfully accused, charged, and sentenced in cause number CR-03-198, and she was ill-advised and misinformed by defense counsel that there was nothing on the recording that would implicate her involvement in the drug buy on April 4, 2003. Although Bell's current sentence is based on guilty pleas to two separate charges, she is requesting that this Court review the evidence and either reverse or dismiss the charge in cause number CR03-198.
>
> The issues of new evidence being available and ineffective assistance of counsel are being raised for the first time in this appeal. "An issue not raised before a trial court in a motion for post-conviction relief is procedurally barred." *Long v. State,* 982 So.2d 1042, 1045 (¶13) (Miss. Ct. App. 2008). Thus, the issues of new evidence and ineffective assistance of counsel are procedurally barred from review by this Court. Even if these issues were not subject to a procedural bar, Bell has failed to specifically identify any new evidence. **Furthermore, Bell's guilty plea in cause number CR03-198 would nullify any belief that new evidence would prove that Bell was wrongfully accused, charged, and sentenced. Considering the dialogue between Bell and the trial judge in her plea colloquy, we are satisfied that Bell received adequate legal service and advice from defense counsel.** We find that this issue is without merit. Therefore, the decision of the trial court is affirmed.

Same here.

Successive Writ.

Second, Madden's motion was successive-writ barred.

Madden's motion was essentially a second and successive request for post-conviction collateral relief targeting the same guilty plea. Judge Terry made the following observations in his order denying relief:

> In his motion, Madden does not assert any new grounds for

> relief. Instead, he simply reasserts the same issues which were previously addressed in his petition for post-conviction collateral relief. This Court as well as the Mississippi Court of Appeals has considered and addressed those issue in previous orders. * * * (C.P. at 26-27; appellee's exhibit A, attached)

"The issue of whether [Madden's] petition is procedurally barred as a second or successive writ is a question of law and is reviewed *de novo*." **Arnold v. State,** 912 So.2d 202, 203 (Ct.App.Miss. 2005).

Miss.Code Ann. §99-39-23 (6) identifies in plain and ordinary English the successive writ limitations on motions for post-conviction collateral relief. We quote:

> (6) The order as provided in subsection (5) of this section or any order dismissing the prisoner's motion or otherwise denying relief under this chapter is a final judgment and shall be conclusive until reversed. It shall be a bar to a second or successive motion under this chapter. * * * * * *

See **Arnold v. State,** *supra*, 912 So.2d 202, 203 (Ct.App.Miss. 2005); **Skinner v. State,** 864 So.2d 298 (Ct.App.Miss. 2003); **Lewis v. State,** 797 So.2d 248 (Ct.App.Miss. 2001); **Clay v. State,** 792 So.2d 302 (Ct.App.Miss. 2001), reh denied.

The February 13, 2009, motion for relief was Madden's second and successive appearance in the Circuit Court of Harrison County in a post-conviction environment. It was a successive writ and was properly denied for this reason, if for no other.

Contrary to the position taken by Madden, he has failed to successfully allege anything that would exempt him from the successive writ bar or, for that matter, a *res judicata* bar as well.

Time Bar.

Third, Madden's second motion for post-conviction relief was filed on February 13, 2009, more than four (4) years following his plea of guilty on June 28, 2004. It appears that Madden missed the three (3) year window of opportunity to file his motion by over a year. His present claims are

devoid of merit for this reason if for no other. *See* Miss.Code Ann. §99-39-5(2).

Res Judicata Bar.

Fourth, in addition to a successive writ and time bar, the doctrine of *res judicata* also bars Madden's post-conviction claims. *See* Miss.Code Ann. §99-39-21(3) which states that "[t]he doctrine of *res judicata* shall apply to all issues, both factual and legal, decided at trial and on direct appeal."

Manifestly Without Merit.

Fifth, Madden's claims were manifestly without merit on the merits.

Miss.Code Ann. § 99-39-11 (Supp. 1999) reads, in its entirety, as follows:

> (1) The original motion together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.
>
> **(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.***
>
> (3) If the motion is not dismissed under subsection 2 of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.
>
> (4) This section shall not be applicable where an application for leave to proceed is granted by the supreme court under section 99-39-27. [emphasis added]

It does. He did. And he was. *See* **Jones v. State,** 976 So.2d 407, 412 (¶11) (Ct.App.Miss. 2008) ["A post-conviction claim for relief is properly dismissed without the benefit of an evidentiary hearing where it is manifestly without merit."]

Not only were Madden's claims successive-writ barred, time barred, and barred by the doctrine of *res judicata,* they were manifestly without merit as well.

CONCLUSION

The circuit judge did not abuse his judicial discretion in summarily denying Madden's motion for relief and evidentiary hearing on the ground, *inter alia,* that Madden's claims were successive-writ barred.

Not every motion for post-conviction relief filed in the trial court must be afforded an adversarial hearing. **Rodolfich v. State,** 858 So.2d 221 (Ct.App.Miss. 2003).

Put another way, the right to an evidentiary hearing is not guaranteed in every case. **Brister v. State,** 858 So.2d 181 (Ct.App.Miss. 2003).

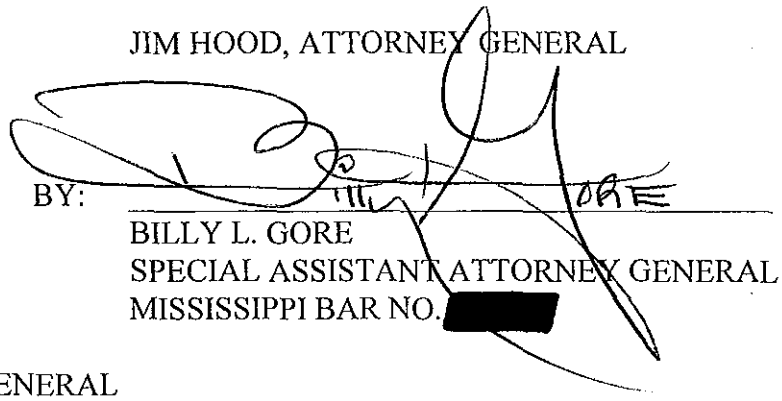
"This Court reviews the denial of post-conviction relief under an abuse of discretion standard." **Phillips v. State,** 856 So.2d 568, 570 (Ct.App.Miss. 2003). No abuse of judicial discretion has been demonstrated here.

Madden is successive-writ barred from bringing his claims here and now. The circuit judge found as a fact there is no new evidence that would not have caused a different result then and there. Stated differently, Madden has failed to make a claim falling under any of the recognized exceptions to the procedural bar that comes into play by the filing of a successive writ.

Appellee respectfully submits this case is devoid of error. Accordingly, summary dismissal, as successive-writ barred, time barred, barred by *res judicata,* and manifestly without merit as well, should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL



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

WILLIE LEE MADDEN, JR.

VERSUS

CAUSE NO. A2401-2005-00087
B2401-2002-00722

STATE OF MISSISSIPPI

ORDER

This cause is before the Court on Willie Lee Madden, Jr.'s *pro se* "motion for relief and evidentiary hearing" filed February 13, 2009. On August 26, 2002, Madden was indicted on the charge of transfer of a controlled substance (cocaine) as a habitual offender pursuant to Miss. Code Ann. § 99-19-81. Madden entered a plea of guilty to said charge and on June 28, 2004, was sentenced to serve fifteen years day for day in the custody of the Mississippi Department of Corrections. On or about December13, 2005, Madden filed a petition for post-conviction collateral relief, which was denied by this Court on or about December 30, 2006. Madden appealed to the Mississippi Supreme Court. On February 19, 2008, the Mississippi Court of Appeals affirmed this Court's denial of post-conviction collateral relief. Madden filed a motion for rehearing, which was denied by the Mississippi Court of Appeals on June 24, 2008. Madden then filed a petition for writ of certiorari with the Mississippi Supreme Court. Said petition was denied on October 9, 2008. Subsequently, Madden filed a "motion for relief and evidentiary hearing" with the Mississippi Supreme Court. By order dated January 7, 2009, the Mississippi Supreme Court dismissed the motion without prejudice and instructed Madden to file the motion in the trial court. Subsequently, on February 13, 2009, Madden filed a "motion for relief and evidentiary hearing" in this Court.

In his motion, Madden does not assert any new grounds for relief. Instead, he simply re-asserts the same issues which were previously addressed in his petition for post-conviction collateral

EXHIBIT
A

relief. This Court as well as the Mississippi Court of Appeals has considered and addressed those issues in previous orders. It is therefore,

ORDERED AND ADJUDGED that Willie Lee Madden, Jr.'s *pro se* "motion for relief and evidentiary hearing" filed February 13, 2009 is hereby **DENIED**.

SO ORDERED AND ADJUDGED, this the 26 day of February, 2009.

JERRY O. TERRY
CIRCUIT COURT JUDGE

FILED
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GAYLE PARKER, CIRCUIT CLERK
By

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mon knowledge. The case is within the common knowledge of the Court.

¶ 7. We find that there was no abuse of discretion in the trial court's refusal to allow Braunstein to testify. This issue is without merit.

¶ 8. THE JUDGMENT OF THE WARREN COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

KING, C.J., MYERS, P.J., IRVING, CHANDLER, GRIFFIS, BARNES, ISHEE, ROBERTS AND CARLTON, JJ., CONCUR.

Willie Lee MADDEN, Jr., Appellant,

v.

STATE of Mississippi, Appellee.

No. 2007-CP-00235-COA.

Court of Appeals of Mississippi.

Feb. 19, 2008.

Rehearing Denied June 24, 2008.

Certiorari Denied Oct. 9, 2008.

Background: Motion was filed for post-conviction relief after guilty plea to transfer of controlled substance. The Circuit Court, Harrison County, Kosta N. Vlahos, J., dismissed motion. Movant appealed.

Holdings: The Court of Appeals, Griffis, J., held that:

(1) guilty plea petition signed by defendant and certificate of counsel established voluntary and intelligent plea;

(2) factual basis existed for guilty plea;

(3) state had no obligation to prove prior convictions since defendant admitted them in guilty plea; and

(4) attorney did not render ineffective assistance.

Affirmed.

1. Criminal Law ⇐1134.90

A circuit court's denial of post-conviction relief will not be reversed absent a finding that the circuit court's decision was clearly erroneous.

2. Criminal Law ⇐1669

Movant seeking post-conviction relief was not entitled to free copy of plea hearing transcript; he made no allegation of what a transcript would show except that it was necessary to support post-conviction claims.

3. Criminal Law ⇐273.1(5)

Guilty plea petition signed by defendant and certificate of counsel established voluntary and intelligent plea to transfer of controlled substance, even though defendant claimed that he was under the influence of medication and severe emotional stress caused by sickness and death of family members; petition stated minimum and maximum sentences, defendant indicated that his physical and mental health was satisfactory and that he was not under the influence of any drugs or intoxicants, and attorney explained consequences and had no reason to suspect drugs or intoxicants.

4. Criminal Law ⇐273.1(1)

A plea of guilty is binding only if it is entered voluntarily and intelligently.

5. Criminal Law ⇐273.1(4)

A guilty plea is voluntary and intelligent when the defendant is informed of the charges against him and the consequences of his plea; he must also understand the

maximum and minimum penalties provided by law. Uniform Circuit and County Court Rule 8.04(A)(4)(b).

6. Criminal Law ⇐273.2(2)

Similar to sworn statements made before the court, plea petition signed by defendant may be used to discredit post-plea allegations.

7. Criminal Law ⇐273(4.1)

Factual basis existed for guilty plea to transferring controlled substance; indictment alleged sale or transfer of between 0.1 and two grams of cocaine, and defendant swore in his plea petition that he had been advised of the nature of the charge and that he in fact sold the cocaine to the undercover officer.

8. Criminal Law ⇐1134.6

Court of Appeals looks to the entire record to determine if factual basis exists for guilty plea. Uniform Circuit and County Court Rule 8.04(A)(3).

9. Criminal Law ⇐273(4.1)

The mere fact that the factual basis does not provide all the details which may be produced at trial does not render the guilty plea fatal. Uniform Circuit and County Court Rule 8.04(A)(3).

10. Criminal Law ⇐273.2(2)
Sentencing and Punishment ⇐1380(2)

Defendant's guilty plea admitting convictions for two prior felonies negated state's obligation to prove the prior convictions beyond reasonable doubt in order to obtain sentence as habitual offender.

11. Sentencing and Punishment ⇐1364, 1376

All that is required for sentencing as habitual offender is that the accused be properly indicted as an habitual offender, that the prosecution prove the prior offenses by competent evidence, and that the defendant be given a reasonable opportunity to challenge the prosecution's proof.

12. Criminal Law ⇐273.4(1)

A guilty plea operates to waive the defendant's right that the prosecution prove each element of the offense beyond a reasonable doubt.

13. Criminal Law ⇐273.4(1), 1904

Attorney's failure to raise speedy trial claim challenging 1,030 day delay between arrest and guilt plea was not deficient performance, since the plea waived the speedy trial claim. U.S.C.A. Const. Amend. 6.

14. Criminal Law ⇐273.4(1)

Defendant waived right to speedy trial upon entering guilty plea.

15. Criminal Law ⇐1955

Attorney's failure to inform circuit court of circumstances of prior convictions did not result in ineffective assistance of counsel in connection with sentencing defendant as habitual offender; even though defendant claimed that he was previously twice convicted for the same crime, he admitted in guilty plea petition two prior felonies for possession of a controlled substance.

16. Criminal Law ⇐1618(10)

Guilty plea petition signed by defendant stating that he was informed of his rights, minimum and maximum sentences, and sentencing as habitual offender refuted post-conviction relief allegations of counsel's deficiency for failing to advise defendant of the consequences of plea agreement. U.S.C.A. Const.Amend. 6.

17. Criminal Law ⇐1580(10)

Unsworn allegations in brief on motion for post-conviction relief alone were not sufficient to show that knowledge of the uninvestigated evidence would have

caused counsel to vary his course and that failure to investigate was ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

18. Criminal Law ⇐1923

Defendant claiming ineffective assistance of counsel from failure to investigate must state with particularity what the investigation would have revealed and how it would have altered the outcome. U.S.C.A. Const.Amend. 6.

19. Criminal Law ⇐1618(10)

Guilty plea petition signed by defendant stating that his mental health was satisfactory and that he was not under the influence of any drugs at the time he signed the petition and at the time he committed the crime refuted post-conviction relief claim of deficient counsel performance by failing to present mitigating factors about health problems, mental condition, and emotional stress caused by sickness and death among family members. U.S.C.A. Const.Amend. 6.

20. Criminal Law ⇐1955

Attorney's allegedly ineffective failure to present mitigating factors about health problems, mental condition, and emotional stress caused by sickness and death among family members did not prejudice defendant who was sentenced to fifteen years of imprisonment, a term well below the maximum sentence of thirty years that could have been imposed for transferring cocaine as habitual offender. U.S.C.A. Const. Amend. 6.

Willie Lee Madden, Jr., pro se.

Office of the Attorney General by Deshun Terrell Martin, attorney for appellee.

Before MYERS, P.J., IRVING, GRIFFIS and ISHEE, JJ.

GRIFFIS, J., for the Court.

¶ 1. Willie Lee Madden, Jr., appeals the denial of his motion for post-conviction collateral relief. He asserts that: (1) he is entitled to receive a free copy of his plea hearing transcript, (2) his guilty plea was not voluntarily or intelligently entered, (3) there was no factual basis upon which the court could accept his plea, (4) he was improperly sentenced as a habitual offender, and (5) he was denied effective assistance of counsel. We find no error and affirm.

FACTS

¶ 2. Madden was indicted in the Harrison County Circuit Court on one count of the transfer of a controlled substance. The indictment alleged that Madden had been convicted of two prior felonies, each with a sentence of three years of imprisonment, and he should be sentenced as a habitual offender under Mississippi Code Annotated section 99-19-81 (Rev.2007). On June 28, 2004, Madden pleaded guilty and was sentenced as a habitual offender to serve fifteen years in the custody of the Mississippi Department of Corrections.

¶ 3. The circuit court denied Madden's motion to receive a free copy of the plea hearing transcript. Madden then filed a motion for post-conviction collateral relief. After a review of the plea petition, the motion for post-conviction collateral relief, and its exhibits, the circuit court found Madden's claims to be without merit and dismissed his motion. We now consider Madden's appeal from that dismissal.

STANDARD OF REVIEW

[1] ¶ 4. A circuit court's denial of post-conviction collateral relief will not be reversed absent a finding that the circuit

court's decision was clearly erroneous. *Smith v. State,* 806 So.2d 1148, 1150(¶ 3) (Miss.Ct.App.2002). However, when reviewing issues of law, this Court's proper standard of review is de novo. *Brown v. State,* 731 So.2d 595, 598(¶ 6) (Miss.1999).

ANALYSIS

1. Is Madden entitled to a free copy of his plea hearing transcript?

[2] ¶ 5. Madden claims that the transcript of the plea hearing will prove many of his post-conviction collateral relief claims, including the involuntariness of his plea, the lack of a factual basis for the plea, and the fact that he was never advised of the minimum and maximum sentences for the crime charged.

¶ 6. The Court addressed this very issue in *Ward v. State,* 879 So.2d 452 (Miss.Ct.App.2003). There, Ward was also denied a free copy of his plea hearing transcript and also argued that his plea was not voluntary. *Id.* at 454(¶ 3). This Court held that "[t]here is no automatic right to a transcript." *Id.* at (¶ 7). Only after a prisoner's motion for post-conviction collateral relief has withstood summary dismissal under Mississippi Code Annotated section 99–39–11(2) may he be entitled to a transcript. *Id.* at 455(¶ 7). The issuance of the transcript is then based upon a showing of good cause and is within the discretion of the trial judge. *Id.*

¶ 7. Here, as in *Ward,* Madden has "made no allegation of what a transcript would show except that it [is] necessary to support the claims made in his motion for post-conviction relief." *Id.* at 454(¶ 7). The circuit court determined that the plea petition was sufficient evidence to rule on the merits of Madden's motion for post-conviction collateral relief. Such motion was summarily dismissed by the court; thus, Madden is not entitled to a copy of the transcript. Because the transcript is not necessary to decide this appeal, we now turn to the record to determine whether the circuit court was clearly erroneous in dismissing the post-conviction collateral relief motion.

2. Was Madden's guilty plea voluntarily and intelligently entered?

[3] ¶ 8. Madden contends that his guilty plea was not knowingly and voluntarily entered because he was under the influence of medication that severely impaired his judgment and also because he was under the severe emotional stress caused by sickness and death of members of his immediate family. Madden further contends that he was not advised of the maximum and minimum sentences nor the nature of the crime for which he was charged. In response, the State argues that the plea petition, which Madden signed, proves that his plea was voluntarily and intelligently entered.

¶ 9. To support his allegation, Madden states in his motion for post-conviction collateral relief that he never signed any papers or a plea agreement on April 8, 2004. However, such statement is refuted by the signed plea petition contained in the record. Madden offers no evidence to support his claim; thus, we will decide his appeal based on the record before us which includes the plea petition signed by Madden and presented to the circuit court.

[4, 5] ¶ 10. A plea of guilty is binding only if it is entered voluntarily and intelligently. *Myers v. State,* 583 So.2d 174, 177 (Miss.1991). Such a plea is voluntary and intelligent when the defendant is informed of the charges against him and the consequences of his plea. *Alexander v. State,* 605 So.2d 1170, 1172 (Miss.1992). He must also understand "the maximum and minimum penalties provided by law." URCCC 8.04(A)(4)(b).

¶ 11. Madden signed and presented to the circuit court a petition to enter a plea of guilty. The petition clearly states the minimum and maximum sentences to be zero to thirty years for the transfer of a controlled substance. It also states that Madden will be sentenced as a habitual offender and that the sentence will run day-for-day. Madden indicated in the petition that his physical and mental health was satisfactory and that he was not under the influence of any drugs or intoxicants at the time of the document's signing.

¶ 12. Madden's attorney also signed a certificate of counsel which states that he fully explained to Madden the allegations of the indictment and the maximum and minimum sentences the circuit court could impose. It was the attorney's opinion that the plea was voluntarily made and that the defendant was mentally and physically competent and understood the proceedings. The certificate further states that the attorney had no reason to believe that Madden was presently under the influence of drugs or intoxicants.

[6] ¶ 13. Madden's argument that his plea was involuntary is contradicted by the plea petition. "The plea petition was not an oral statement in open court, but it was a sworn document presumptively prepared with an appreciation of its fateful consequences." *Ward*, 879 So.2d at 455(¶ 11). Similar to sworn statements made before the court, it may be used to discredit post-plea allegations. *Id.* Accordingly, this issue has no merit.

3. Was there a factual basis for Madden's plea?

[7] ¶ 14. Madden next argues that the circuit court failed to establish a factual basis for his guilty plea rendering such plea void as a matter of law. He states that the evidence was not sufficiently specific to allow the circuit court to determine whether his conduct was in fact criminal.

[8, 9] ¶ 15. "Before the trial court may accept a plea of guilty, the court must determine that . . . there is a factual basis for the plea." URCCC 8.04(A)(3). We look to the entire record to determine if such a factual basis exists. *Drake v. State*, 823 So.2d 593, 594(¶ 5) (Miss.Ct.App.2002) (citing *Corley v. State*, 585 So.2d 765, 767–68 (Miss.1991)). The mere fact that the factual basis does not provide all the details which may be produced at trial does not render the guilty plea fatal. *Id.* This Court has held that, " 'if sufficiently specific, an indictment or information can be used as the sole source of the factual basis for the plea.' " *Id.* at (¶ 6) (quoting *U.S. v. Hinojosa–Lopez*, 130 F.3d 691, 695 (5th Cir.1997) (overruled on other grounds)).

¶ 16. The indictment specifically includes the elements of the crime. The indictment alleges that Madden "did knowingly, wilfully, unlawfully and feloniously, sell or transfer 0.1 grams or more but less than 2.0 grams of Cocaine, a Schedule II Controlled Substance, to Venessa Saucier." In his plea petition, Madden swore that he had been advised of the nature of the charge and that he in fact "sold the cocaine to the undercover officer near [his] home." We find that there was a sufficient factual basis to support his conviction for the sale of cocaine. Thus, this issue has no merit.

4. Was Madden improperly sentenced as a habitual offender?

[10] ¶ 17. Madden argues that the State failed to meet its burden of proof because it did not establish his prior convictions beyond a reasonable doubt. Specifically, he contends that he never stipulated to the prior convictions alleged in the indictment, and the judge never asked him about those convictions during the plea hearing. Because Madden claims that he

did not stipulate to the prior convictions, he argues that the prosecution was not relieved of its duty to prove the convictions beyond a reasonable doubt. However, the record before us does not support Madden's allegations.

¶ 18. Madden's plea petition states that he has been convicted of one or more felonies in the past, specifically two convictions for possession of a controlled substance during 1995. Such statement is consistent with the indictment which alleges that he was sentenced to three years for a conviction for possession of a controlled substance and also sentenced to three years for a second conviction for possession of a controlled substance. Further, Madden made the following statement in his plea petition: "I admit my two prior felony convictions as in indictment." The petition states that Madden will be sentenced as a habitual offender and the sentence will be served day-for-day.

¶ 19. After the hearing, the circuit court concluded that "the defendant had been previously convicted twice of felonies upon charges separately brought and arising out of separate incidents at different times and that the defendant was sentenced to separate terms of one year or more in the penitentiary."

[11, 12] ¶ 20. To be sentenced as a habitual offender, "[a]ll that is required is that the accused be properly indicted as an habitual offender, that the prosecution prove the prior offenses by competent evidence, and that the defendant be given a reasonable opportunity to challenge the prosecution's proof." *Keyes v. State*, 549 So.2d 949, 951 (Miss.1989) (citations omitted). While Madden correctly asserts that the prosecution must prove the existence of the prior convictions beyond a reasonable doubt, this requirement was negated by his decision to enter a guilty plea. "A guilty plea operates to waive the defendant's . . . right that the prosecution prove each element of the offense beyond a reasonable doubt." *Jefferson v. State*, 556 So.2d 1016, 1019 (Miss.1989).

¶ 21. Because we conclude from the record that Madden knowingly and voluntarily entered a guilty plea and in his plea petition admitted his convictions for the two prior felonies listed in the indictment, we find that the circuit court properly sentenced him as a habitual offender. Thus, this issue has no merit.

5. Was Madden denied effective assistance of counsel?

¶ 22. Finally, Madden asserts that he received ineffective assistance of counsel when he entered his guilty plea. Specifically, he argues that his attorney failed to: (1) pursue a speedy trial violation, (2) inform the court about the circumstance of Madden's two prior convictions, (3) advise Madden of the consequences of pleading guilty as a habitual offender, (4) adequately investigate the charge and establish an affirmative defense, and (5) present mitigating factors to the court before sentencing.

¶ 23. To prove ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient and (2) this deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The burden of proof rests with the defendant. *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990). Under *Strickland*, there is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. To overcome this presumption, "[t]he defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the

proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. In cases involving post-conviction collateral relief, "where a party offers only his affidavit, then his ineffective assistance claim is without merit." *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995) (citations omitted).

a. Failure to pursue a speedy trial violation

[13] ¶ 24. Madden first asserts that his representation was deficient because his counsel did not assert that Madden's right to a speedy trial had been violated. He was arrested on August 16, 2001, indicted on August 26, 2002, and pleaded guilty on June 28, 2004. Madden claims that on counsel's advice, he pleaded guilty instead of pursuing a speedy trial violation despite the fact that there was a 1,030 day delay from his arrest to the day his plea was entered.

[14] ¶ 25. Madden fails to prove his representation was deficient because, upon entering a guilty plea, he waived his right to a speedy trial. The supreme court has held that "a valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial [including] the right to a speedy trial, whether of constitutional or statutory origin." *Anderson v. State*, 577 So.2d 390, 391–92 (Miss.1991). Therefore, counsel's failure to raise a speedy trial claim did not constitute ineffective assistance. *Id.* at 392.

¶ 26. Madden signed his plea petition which states that he understood he was waiving his right to a speedy and public trial by jury. Thus, counsel's decision to not pursue a speedy trial violation does not rise to the level of ineffective assistance.

b. Failure to inform the circuit court of the circumstances of Madden's prior convictions

[15] ¶ 27. Madden next contends that his counsel was ineffective because of the failure to inform the court of the circumstances surrounding Madden's prior convictions. He claims that he was previously twice convicted for the same crime and those convictions were used to sentence him as a habitual offender. Madden offers no evidence beyond his own statements to prove this allegation. In fact, in his plea petition, he admitted having been convicted of two prior felonies for possession of a controlled substance. Consequently, we do not find that his counsel's failure to inform the circuit court of this claim resulted in ineffective assistance of counsel.

c. Failure to advise Madden of the mandatory minimum sentence and the consequences of pleading guilty as a habitual offender

[16] ¶ 28. Madden also claims that his counsel was ineffective by failing to advise him of the consequences of a plea agreement. Specifically, he states that he was never informed of the minimum sentence he could receive, and he was not told his sentence would be without parole or probation. He again argues that he never signed any papers on April 8, 2004, and was never advised about his rights or the consequences of pleading guilty.

¶ 29. Again, Madden offers only his allegations and no other proof to show that his counsel was deficient. The record reflects that Madden signed the plea petition that informed him of the rights that he was waiving by entering a guilty plea. It also clearly informed him of the minimum and maximum sentences for the crime charged, that he would be sentenced as a habitual offender, and that the sentence would run day-for-day. The petition further states that Madden was satisfied with the advice and help he received from his counsel. This evidence refutes his allegations of deficiency on the part of his coun-

sel; thus, we find that Madden has not met his burden of proving that his counsel was ineffective.

d. Failure to adequately investigate the charge and establish an affirmative defense

[17] ¶ 30. Next, Madden claims that his counsel was ineffective by failing to adequately investigate the charge against him and establish an affirmative defense. He claims to have informed counsel of multiple witnesses who were at Madden's home at the time of the alleged crime and could testify that Madden never transferred any drugs.

[18] ¶ 31. For failure to investigate to be ineffective assistance of counsel, the defendant must state with particularity what the investigation would have revealed and how it would have altered the outcome. *Triplett v. State*, 840 So.2d 727, 731(¶ 11) (Miss.Ct.App.2002). The only evidence that Madden offers to show what the investigation would have revealed is his own unsworn allegations in his brief. His allegations alone are not sufficient to show that the "knowledge of the uninvestigated evidence would have caused counsel to vary his course." *Thomas v. State*, 881 So.2d 912, 918(¶ 18) (Miss.Ct.App.2004) (quoting *King v. State*, 503 So.2d 271, 275 (Miss.1987)). Thus, Madden has not shown that counsel's failure to investigate resulted in ineffective assistance.

e. Failure to present mitigating factors to the circuit court before sentencing

[19] ¶ 32. Madden's last allegation of ineffective assistance is based on his counsel's failure to present mitigating factors about his health problems, mental condition, and emotional stress caused by sickness and death among his family members. He claims that his sentence would have been reduced had the judge been aware of these circumstances.

[20] ¶ 33. The evidence in the record is contrary to Madden's assertion. The plea petition which he signed and presented to the circuit court stated that his mental health was satisfactory and that he was not under the influence of any drugs at the time he signed the petition and at the time he committed the crime. He offers no other evidence other than his own statement to show that counsel's inaction was deficient. Further, he cannot prove that he was prejudiced in any way by a failure to present mitigating factors. He was sentenced to fifteen years of imprisonment, a term well below the maximum sentence of thirty years that could have been imposed. Madden has shown no proof that the sentence would have been further reduced because of the mitigation factors he now asserts.

¶ 34. Upon review of the record, we find that Madden's claims of ineffective assistance of counsel are without merit.

¶ 35. THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY DENYING POST-CONVICTION COLLATERAL RELIEF IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO HARRISON COUNTY.

KING, C.J., LEE AND MYERS, P.JJ., IRVING, CHANDLER, BARNES, ISHEE, ROBERTS AND CARLTON, JJ., CONCUR.

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

WILLIE LEE MADDEN, JR.

VERSUS

CAUSE NO. A2401-2005-00087
B2401-2002-00722

STATE OF MISSISSIPPI

ORDER

This cause is before the Court on Willie Lee Madden, Jr.'s *pro se* "motion for rehearing and objection to order filed by this Court on February 26, 2009" filed March 23, 2009. The Court, having considered the motion and the applicable law, finds the motion is not well taken and should be denied. It is, therefore,

ORDERED AND ADJUDGED that Willie Lee Madden, Jr.'s *pro se* "motion for rehearing and objection to order filed by this Court on February 26, 2009" filed March 23, 2009 is hereby **DENIED.**

SO ORDERED AND ADJUDGED, this the 17th day of April, 2009.

JERRY O. TERRY
CIRCUIT COURT JUDGE

EXHIBIT
C

Serial: 150667

IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-CT-00235-SCT

WILLIE LEE MADDEN, JR. ***Appellant***

v.

STATE OF MISSISSIPPI ***Appellee***

ORDER

This matter came before the Court on the Petition for Writ of Certiorari filed by Willie Lee Madden, Jr., pro se. The Court has considered the petition and finds that it should be denied.

IT IS THEREFORE ORDERED that the Petition for Writ of Certiorari filed by Willie Lee Madden, Jr., is hereby denied.

SO ORDERED, this the 7th day of October, 2008.

JAMES W. SMITH, JR., CHIEF JUSTICE

2007-CT-00235-SCT

Jim Hood

2007-CT-00235-SCT

Charles W. Maris Jr.

2007-CT-00235-SCT

Deshun Terrell Martin
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TO DENY: ALL JUSTICES

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

WILLIE LEE MADDEN, JR.

VERSUS **CAUSE NO. A2401-2005-00087**
B2401-2002-00722

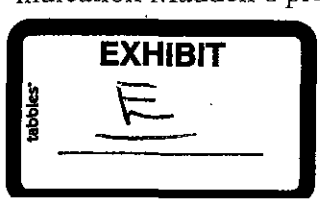
STATE OF MISSISSIPPI

ORDER

This cause is before the Court on Willie Lee Madden, Jr.'s *pro se* "motion to supplement amend to Petitioner's motion for rehearing filed March 23, 2009" filed April 20, 2009. On August 26, 2002, Madden was indicted on the charge of transfer of a controlled substance (cocaine) as a habitual offender pursuant to Miss. Code Ann. § 99-19-81. Madden entered a plea of guilty to said charge and, on June 28, 2004, was sentenced to serve fifteen years day for day in the custody of the Mississippi Department of Corrections. In his motion before the Court, Madden argues his guilty plea was involuntarily entered since he was "misled and misinformed as to the possible minimum sentence." Madden asserts "no one advised [him] that he was facing a minimum mandatory sentence of (30) years" and claims had he been advised of such he would have never entered a plea of guilty.

It is important to note that Madden did not file an appeal of his conviction or sentence. Instead, he filed a petition for post-conviction collateral relief, which was denied by this Court on December 30, 2006. The Mississippi Court of Appeals subsequently affirmed this Court's denial of post-conviction collateral relief.

The petition to enter plea of guilty indicates Madden was advised as to the possible sentence, specifically a minimum of zero years and a maximum of thirty years. Moreover, Madden stated in his petition that he was not under the influence of any drugs or intoxicants. Thus, there is no indication Madden's plea of guilty was involuntary. It is, therefore,



ORDERED AND ADJUDGED that Willie Lee Madden, Jr.'s *pro se* "motion to supplement amend to Petitioner's motion for rehearing filed March 23, 2009" filed April 20, 2009 is hereby **DENIED**.

SO ORDERED AND ADJUDGED, this the 1st day of ~~April~~ May, 2009.

JERRY O. TERRY
CIRCUIT COURT JUDGE

FILED
MAY 01 2009
GAYLE PARKER, CIRCUIT CLERK
By: Priscilla Crockett

491/530-531

and Evidentiary Hearing"

- "Motion for Rehearing and Objection to Order filed by this Court on February 26, 2009" filed *pro se* by Madden March 23, 2009 in Cause No. A2401-2005-00087
- Order filed April 17, 2009 in Cause No. A2401-2005-00087 denying "Motion for Rehearing and Objection to Order filed by this Court on February 26, 2009"
- "Motion to Supplement Amend to Petitioner's Motion for Rehearing filed March 23, 2009" filed *pro se* by Madden April 20, 2009 in Cause No. A2401-2005-00087
- Order filed May 1, 2009 in Cause No. A2401-2005-00087 denying "Motion to Supplement Amend to Petitioner's Motion for Rehearing filed March 23, 2009"

SO ORDERED AND ADJUDGED, this the 12th day of May, 2009.

JERRY O. TERRY
CIRCUIT COURT JUDGE

FILED
MAY 12 2009
GAYLE PARKER, CIRCUIT CLERK
By Priscilla Rocha

492/305-306

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:

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Circuit Court Judge, District 2
421 Linda Dr.
Biloxi, MS 39531

Honorable Cono Caranna
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Willie Lee Madden, #95559
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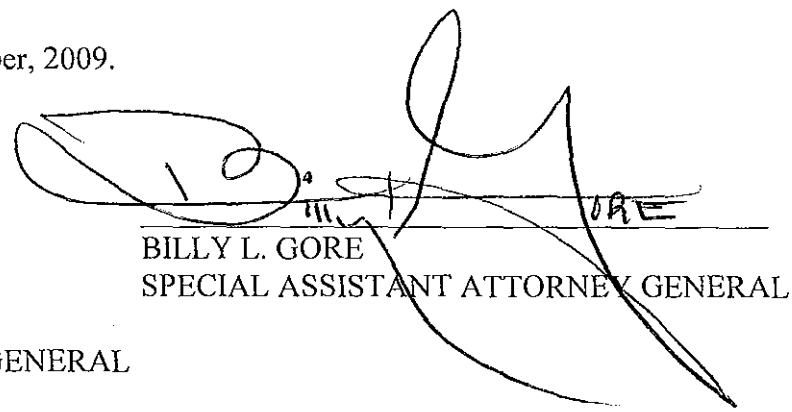
This the 15th day of October, 2009.



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