IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALEX DURODE JOHNSON, III — APPELLANT

VS. — NO. 2009-CP-0875-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALEX DURODE JOHNSON, III **APPELLANT**

VS. **NO. 2009-CP-0875-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This is an appeal from a second and successive quest in a state trial court for post-conviction relief sought in the wake of a guilty plea to simple possession of cocaine following an indictment for possession with intent.

ALEX JOHNSON, proceeding *pro se*, apparently seeks to exempt himself from a successive writ bar by suggesting he was "convicted and sentence[d] for the wrong charge when the Trial Court dismiss[ed] the greater offense" and improperly sentenced him to twelve (12) years with eight (8) years suspended contingent upon his compliance with four (4) years of post-release supervision. (Brief For Appellant at 3)

Johnson sought in the court below, and he apparently seeks on appeal as well, a clarification of an allegedly "ambiguous" sentence imposed after an allegedly "improper" indictment. (C.P. at 2-3) The trial judge dismissed Johnson's petition summarily on the ground it was a successive motion for post-conviction relief. *See* appellee's exhibit A, attached.

It is enough to say that Johnson has already been there and done that. *See* **Johnson v. State,** No. 2007-CP-01649-COA decided July 29, 2008 [Not Yet Reported], appellee's exhibit B, attached.

If not, his 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).

STATEMENT OF FACTS

ALEX JOHNSON is a forty-one (41) year old male with eleven (11) years of special education. (*See* Exhibit I attached to Brief For Appellant) He appeals from the summary dismissal of his second motion for post-conviction relief filed in the wake of his plea-bargained guilty plea entered in the Circuit Court of Washington County on April 4, 2006, to simple possession of an un-quantified amount of cocaine, Ashley Hines, Circuit Judge, presiding.

Judge Hines dismissed summarily Johnson's motion to clarify sentence on the ground " . . . that the 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.

The salient facts of this case are found in the written opinion from the Court of Appeals issued after consideration of Johnson's first appeal from the denial of post-conviction collateral relief. *See* **Johnson v. State,** *supra,* No. 2007-CP-01649-COA decided July 29, 2008 [Not Yet Reported], appellee's exhibit B, attached. Much of what was said by Judge Griffis then and there applies here and now to Johnson's second and successive quest for post-conviction collateral relief sought in the wake of the same guilty plea.

Johnson's plea-qualification hearing was conducted on April 4, 2006, in the Circuit Court of Washington County. Johnson and his lawyer entered into a plea bargain agreement whereby the State, in exchange for Johnson's plea of guilty to simple possession of cocaine, a lesser included offense of possession with intent charged in his indictment, would recommend a twelve (12) year

sentence with eight (8) years to serve and would agree not to prosecute a pending drug case. *See* Exhibit I to Brief For Appellant. Johnson was duly advised of the maximum and minimum penalties.

Johnson was thereafter sentenced to serve twelve (12) years in the custody of the MDOC with eight (8) years to serve and four (4) years suspended contingent upon his compliance with four (4) years of post-release supervision. *See* appellee's exhibit B at 2.

Johnson was represented at his plea hearing by George Kelly, a practicing attorney in Greenville. The Court of Appeals has already decided that Johnson was not denied the effective assistance of counsel during his guilty plea. *See* appellee's exhibit B, attached.

Supreme Court records, which this Court can judicially notice, will reflect that Johnson filed his first motion for post-conviction relief on August 4, 2007, in lower court cause number C12007-169. It was denied by Judge Hines via an order entered on September 12, 2007. On appeal, the Court of Appeals affirmed on July 29, 2008, in Cause No. 2007-CP-01649-COA. *See* appellee's exhibit B, attached.

On April 30, 2009, three (3) years and twenty-six (26) days following his plea of guilty on April 4, 2006, Johnson again sought post-conviction relief in the form of a "Petition to Clarify Sentence." (C.P. at 2-6) The relief requested was clarification of an allegedly "ambiguous" sentence imposed by an allegedly "improper" indictment. (C.P. at 2-4)

On May 19, 2009, Judge Hines, treating Johnson's post-plea petition as a motion for post-conviction collateral relief, summarily denied Johnson's motion on the ground " . . . that the 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 B, attached.

We concur.

We respectfully submit Judge Hines found no error involving fundamental rights, or any other rights, sufficient to exempt Johnson from the statute barring his claims as successive. In this posture, Johnson's motion or petition for post-conviction relief was correctly denied by the lower court as successive-writ barred. **Arnold v. State,** 912 So.2d 202 (Ct.App.Miss. 2005).

It was time barred and manifestly without merit as well.

SUMMARY OF ARGUMENT

Johnson's twelve (12) year sentence, imposed pursuant to a plea bargain, is not ambiguous and is within the limits prescribed by statute for the felonious offense charged.

The issue focusing upon an improper indictment was decided adversely to Johnson's position by the Court of Appeals in Johnson's first motion for post-conviction relief. *See* appellee's exhibit B, attached.

Although the present record is imperfect, we can glean the following from the plea-qualification transcript and papers in Cause No. 2007-CP-01649-COA on file with the Supreme Court in the prior appeal: In exchange for a plea of guilty to simple possession, the State agreed to recommend a sentence of twelve (12) years with eight (8) years to serve and four (4) years suspended contingent upon Johnson's satisfactory compliance with four (4) years of post-release supervision.

The State also agreed "not to prosecute [a] pending drug case."

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

Johnson, for the second time, seeks post-conviction relief from the same 2006 guilty plea.

Johnson has already been there and done that. *See* appellee's exhibits A and B, attached.

Although Johnson's previous motion was labeled as a "petition to clarify sentence," 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 9; 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 Johnson'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 Johnson has received all the process he was due.

ARGUMENT

JOHNSON'S POST-PLEA PETITION FOR POST-CONVICTION RELIEF WAS PROCEDURALLY BARRED AS A SUCCESSIVE WRIT.

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).

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, Johnson's motion was successive-writ barred.

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

> THIS CAUSE came before the Court on Alex Durode Johnson's, III Petition to Clarify Sentence, which this court finds to be a Motion for Post-Conviction Collateral Relief. After due consideration of said motion, this Court [finds] that the present motion is [a] successive motion for post-conviction collateral relief and is barred by Miss.Code Ann. §99-39-23(6). (C.P. at 9; appellee's exhibit A, attached)

"The issue of whether [Johnson'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 April 30th, 2009, petition to clarify sentence was Johnson's second and successive appearance in the Circuit Court of Washington 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 Johnson, he has failed to successfully allege anything that would exempt him from the successive writ bar or, for that matter, a time bar as well.

Time Bar.

Third, Johnson's second motion for post-conviction relief was filed on April 30, 2009, three (3) years and twenty-six (26) days following his plea of guilty on April 4, 2006. It appears that Johnson missed the three (3) year window of opportunity to file his motion by twenty six (26) days. His present claims are devoid of merit for this reason if for no other. *See* Miss.Code Ann. §99-39-5(2).

Manifestly Without Merit.

Fourth, Johnson's claims were manifestly without merit on the merits as well. It was true in **Torrey v. State,** 816 So.2d 452 (Ct.App.Miss. 2002), and it is equally true here, that the indictment against Johnson clearly stated that he feloniously possessed cocaine thus charging Johnson with felony possession. In this posture, the trial court correctly sentenced Johnson under the felony provision of Miss.Code Ann. §41-29-139(c)(1)(A).

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 Johnson's claims successive-writ barred and time barred, they were manifestly without merit as well.

CONCLUSION

The circuit judge did not abuse his judicial discretion in summarily denying Johnson's petition to clarify sentence on the ground Johnson'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.

Johnson is successive-writ barred from bringing his claims here and now because there is no new evidence that would not have caused a different result then and there. Stated differently, Johnson 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 and manifestly without merit as well, should be forthwith affirmed.

Respectfully submitted,

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IN THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI

ALEX DURODE JOHNSON, III	PETITIONER
VS.	CAUSE NO. 2009-0100 CI
STATE OF MISSISSIPPI	RESPONDENT

ORDER

THIS CAUSE came before the Court on Alex Durode Johnson, III's Petition to Clarify Sentence, which this Court finds to be a Motion for Post-Conviction Collateral Relief. After due consideration of said motion, this Court that the present motion is successive motion for post-conviction collateral relief and is barred by Miss. Code Ann. §99-39-23 (6).

It is, therefore:

ORDERED that the relief sought in Alex Durode Johnson, III's Petition to Clarify Sentence, which this Court finds to be a Motion for Post-Conviction Collateral Relief, shall be and is hereby DENIED and this cause shall be and is hereby DISMISSED.

SO ORDERED AND ADJUDGED this the 19th day of May, 2009.

CIRCUIT JUDGE

Received & Filed

MAY 19 2009

Barbara Esters-Parker

By: _____ D.C.

EXHIBIT A

BOOK 28 PAGE # 703

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CP-01649-COA

ALEX DURODE JOHNSON III **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	09/12/2007
TRIAL JUDGE:	HON. W. ASHLEY HINES
COURT FROM WHICH APPEALED:	WASHINGTON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ALEX DURODE JOHNSON III (PRO SE)
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: STEPHANIE BRELAND WOOD
NATURE OF THE CASE:	CIVIL - POST-CONVICTION RELIEF
TRIAL COURT DISPOSITION:	POST-CONVICTION RELIEF DENIED
DISPOSITION:	AFFIRMED: 07/29/2008
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE LEE, P.J., CHANDLER AND GRIFFIS, JJ.

GRIFFIS, J., FOR THE COURT:

¶1. Alex Durode Johnson III appeals the denial of his motion for post-conviction collateral relief. Johnson asserts that: (1) the circuit court failed to inform him of his constitutional right to avoid self-incrimination, (2) the circuit court erred by allowing him to plead guilty to the lesser-included offense of possession of cocaine, (3) he received ineffective assistance of counsel, and (4) he should be granted relief based on the cumulative errors committed at the plea hearing. We find no error and affirm.

FACTS

¶2. Johnson was indicted for possession of cocaine with intent to sell, barter, transfer or deliver the same to another pursuant to Mississippi Code Annotated section 41-29-139 (Rev. 2005). He

appeared before the circuit judge and entered a guilty plea to the lesser-included offense of possession of cocaine. Johnson was sentenced to twelve years in the custody of the Mississippi Department of Corrections, with eight years to serve and four years suspended pursuant to compliance with four years of post-release supervision.

¶3. Johnson filed a motion for post-conviction collateral relief, which was denied by the circuit court. It is from this judgment that Johnson now appeals.

STANDARD OF REVIEW

¶4. A circuit court's denial of post-conviction collateral relief will not be reversed absent a finding that the trial 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. Whether the circuit court erred by failing to inform Johnson of his constitutional right to avoid self-incrimination.

¶5. Johnson claims that his guilty plea was not voluntarily and intelligently entered because he was never advised of his right to avoid self-incrimination. The State responds that Johnson was informed of this right as evidenced by Johnson's signed plea petition and his testimony at the plea hearing.

¶6. Rule 8.04(A)(4)(c) of the Uniform Rules of Circuit and County Court requires the "trial court to address the defendant personally and to inquire and determine . . . [t]hat the accused understands that by pleading guilty (s)he waives his/her constitutional rights of trial by jury, the right to confront and cross-examine adverse witnesses, and the right against self-incrimination." Contrary to Johnson's argument, the record shows that Johnson was informed that his guilty plea would waive these rights.

¶7. Johnson signed and presented to the circuit court a petition to enter a plea of guilty. The petition states, in part:

> By pleading guilty to the charge(s) against me, I give up the following rights guaranteed to me by the Constitution of the United States of America and by the Constitution of the State of Mississippi:
>
> . . . .
>
> (f) the right to testify or not testify and thereby incriminate myself, at my sole option and, if I do not testify, the jury will be instructed that this should not be held against me.

Also, at the plea hearing, the circuit judge specifically asked Johnson if he understood everything in the plea petition, and Johnson replied, "Yes, sir." Further, the circuit judge informed Johnson of his rights at trial, including his "right to testify or the right not to testify." The circuit judge continued by stating that "If you decide not to testify, then I would instruct the jury that they could draw no inference of guilt by the fact that you did not testify." Johnson indicated that he understood those rights and also that he understood he was waiving those rights by entering a guilty plea.

¶8. Johnson's argument that his guilty plea was not voluntarily entered because he was not informed of his right to avoid self-incrimination is contradicted by the record before us. Accordingly, this issue has no merit.

2. *Whether the circuit court erred by allowing Johnson to plead guilty to the lesser-included offense of possession of cocaine.*

¶9. Johnson argues that the circuit court erred when it accepted Johnson's guilty plea to the lesser-included offense of possession of cocaine. Specifically, he says the circuit court allowed the State "to convict [him] of possession of cocaine[,] a[n] offense for which [he] was never indicted."

¶10. However, as the State argues, a defendant may be convicted of an "'inferior offense . . . necessarily included within the more serious offense' charged in the indictment." *Booze v. State*, 964 So. 2d 1218, 1222 (¶17) (Miss. Ct. App. 2007) (quoting *Odom v. State*, 767 So. 2d 242, 246 (¶11) (Miss. Ct. App. 2000)). Here, Johnson was charged with possession of cocaine with intent to

sell, but he pleaded guilty to simple possession of cocaine. This Court has held that "[p]ossession of a controlled substance is a lesser-included-offense of possession of a controlled substance with the intent to distribute." *Torrey v. State*, 816 So. 2d 452, 454 (¶3) (Miss. Ct. App. 2002) (citing *Hicks v. State*, 580 So. 2d 1302, 1306 (Miss. 1991)).

¶11. Thus, the circuit court did not err by accepting Johnson's voluntary decision to plead guilty to the lesser-included offense. This issue has no merit.

3. Whether Johnson received ineffective assistance of counsel.

¶12. Johnson also contends that he received ineffective assistance of counsel at the plea hearing. To support this claim, he asserts that his attorney failed to: (1) inform him of the elements of the crime and possible defenses, (2) conduct an investigation and interviews, and (3) bring the intimidation complaint to the circuit court's attention.

¶13. 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 (1984). The burden of proof rests with the defendant to demonstrate both prongs. *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. 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. 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).

a. Failure to Inform Johnson of the Elements of the Crime and Possible Defenses

¶14. Johnson provides no more that his own statement to establish that his counsel failed to inform him of the elements of the crime and possible defenses. In fact, this argument is completely contrary to Johnson's sworn testimony at the plea hearing:

Q: And have you and your lawyer talked about the facts of the case?

A: Yes, sir.

Q: Has he explained to you and do you fully understand the nature of the charges against you?

A: Yes, sir.

Q: And have you discussed the way that you would defend yourself in the trial?

A: Yes, sir.

Q: And are you satisfied with the assistance given to you by Mr. Kelly [Johnson's lawyer]?

A: Yes, sir.

Q: And after you and Mr. Kelly have discussed the case, is it your own decision to enter the plea of guilty?

A: Yes, sir.

Johnson has shown no deficiency in counsel's representation and, thus, no resulting prejudice to his defense.

b. Failure to Conduct an Investigation

¶15. First, Johnson contends that his attorney failed to conduct an investigation because his attorney did not interview the five witnesses to the incident. He claims that "when counsel failed to interview these exculpatory witnesses, counsel['s] investigation fell short of what a reasonably competent attorney would have done." This Court has held that in order "[f]or failure to investigate to [rise] to the level of ineffective assistance of counsel, the defendant must state with particularity what the investigation would have revealed and how it would have altered the outcome."

Middlebrook v. State, 964 So. 2d 638, 640 (Miss. Ct. App. 2007) (¶10) (citing *Triplett v. State*, 840 So. 2d 727, 731 (¶11) (Miss. Ct. App. 2002)).

¶16. We note that while Johnson attached affidavits from each of these witnesses to his motion for post-conviction collateral relief, he provides merely his own statement to prove that his counsel did not interview these witnesses. Even so, the testimony contained in the affidavits does not show any evidence that would prove that Johnson did not commit the crime charged; therefore, Johnson fails to show how counsel's deficiency in not interviewing these witnesses resulted in any prejudice or how the witnesses' testimony would have altered the outcome.

¶17. Second, Johnson claims that counsel failed to investigate the case because he did not call DeAndre Gaston as a favorable witness at the plea hearing. In his motion for post-conviction collateral relief and at the plea hearing, Johnson argued that Gaston's testimony would make him a "free man"; thus, his counsel's performance was deficient because Gaston was not called to testify on Johnson's behalf. However, Johnson acknowledges, in his motion, that his counsel advised him that Gaston's testimony had no merit. Further, during the plea hearing, Johnson's counsel stated that he had interviewed Gaston, and while Gaston's testimony might help Johnson, it certainly would not make him a free man. Again, Johnson fails to prove that his attorney's decision not to call Gaston was deficient, or that Gaston's testimony would have changed the outcome of the case.

¶18. Third, Johnson claims that his counsel failed to investigate the police files and did not notice that the statements made by the two police officers were conflicting statements. Both statements clearly noted that Johnson was in possession of a brown bag containing cocaine. The differences referenced by Johnson do not refer to the elements of the crime; thus, Johnson has not shown how he was prejudiced by counsel's failure to notice the differences. Johnson has not shown that his counsel's failure to investigate, if any, resulted in prejudice to his defense.

c. Failure to Bring the Intimidation Complaint to the Circuit Court's Attention

¶19. Johnson argues that his counsel was aware that the State had threatened Gaston in an effort to keep him from testifying on Johnson's behalf. Johnson further states that "[c]ounsel was aware that [Johnson] was being coerced into making the plea," but his counsel failed to bring this matter to the circuit court's attention. However, the record shows that the circuit judge was made aware of this issue.

¶20. During the plea hearing, Johnson told the circuit judge that the State had threatened to charge Gaston if he testified in Johnson's case. The circuit judge responded that he did not think prosecuting someone for a different crime had anything to do with Johnson's guilty plea or was in violation of any law or court rule. Johnson's counsel then clarified the situation on the record:

> DeAndre Gaston is a relative of the sheriff. I think a cousin or nephew. At any rate, I've interviewed DeAndre Gaston before this day, about a week ago, in my office, and he gave me a statement. I wrote down what he said. Now, what he said at that time was not something that would free my client, as he said. That's - - he was going to say that he saw my client throw a bag with a beer bottle in the trash can, which would help him, but wouldn't free him. Now, as I understand it today, he has told my client and my client has told me that DeAndre Gaston has told him that he was willing to testify today that it was somebody else's dope. Now, whether he's been called over to the sheriff's office and talked to - - he said he had, but I don't know that. I'm not sure. But I just want to point out to the Court, and my client knows this to be true because he was there also, when this guy gave me a statement originally, it wasn't anything that would free my client. It would have assisted him but not free him.

Thereafter, Johnson told the circuit judge that he fully understood his rights and that he decided to voluntarily waive those rights and enter a guilty plea. Johnson had the opportunity to tell the circuit judge that he felt he was being coerced, but did not do so. Instead, he stated under oath that it was his voluntary decision to enter a guilty plea. It is clear that Johnson's counsel informed both the circuit judge and Johnson that he had interviewed Gaston and determined that his testimony did not prove that Johnson was innocent of the crime charged. Johnson's counsel was merely fulfilling his "duty to fairly, even if that means pessimistically, inform the client of the likely outcome of a trial

based upon the facts of the case." *Middlebrook*, 964 So. 2d at 640 (¶9) (quoting *Daughtery v. State*, 847 So. 2d 284, 287 (¶6) (Miss. Ct. App. 2003)). Johnson fails to show any deficiency on the part of his counsel as to this allegation of error.

¶21. Johnson's allegations of ineffective assistance of counsel are contradicted by the record. His signed plea petition states the following: "I am satisfied with the services of my attorney, and believe my attorney has acted in my best interest in my case." He has not shown that deficiencies on the part of his counsel, if any, prejudiced his defense or would have resulted in a different outcome. Therefore, his ineffective assistance of counsel argument is without merit.

4. Whether Johnson is entitled to relief based on the cumulative errors committed at the plea hearing.

¶22. Finally, Johnson argues that this Court should grant his requested relief based on the cumulative errors committed at the plea hearing. However, we have found all of Johnson's assignments of error to be without merit. "As there was no reversible error in any part, so there is no reversible error to the whole." *McFee v. State*, 511 So. 2d 130, 136 (Miss. 1987). Accordingly, this issue is also without merit.

¶23. THE JUDGMENT OF THE CIRCUIT COURT OF WASHINGTON COUNTY DENYING THE MOTION FOR POST-CONVICTION COLLATERAL RELIEF IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO WASHINGTON COUNTY.

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

CERTIFICATE OF SERVICE

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

Honorable W. Ashley Hines
Circuit Court Judge, District 4
Post Office Box 1315
Greenville, MS 38702

Honorable Dwayne Richardson
District Attorney, District 4
Post Office Box 426
Greenville, MS 38702

Alex Durode Johnson, III, #76193
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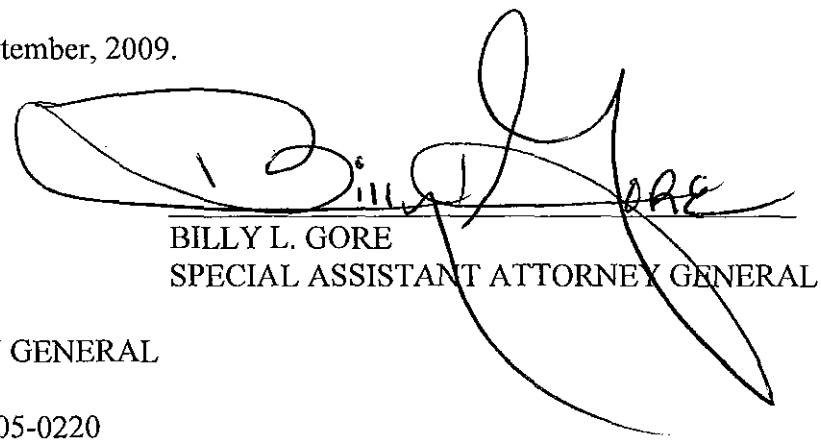
This the 17th day of September, 2009.



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