

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT E. HILL

APPELLANT

VS.

NO. 2010-CP-0514-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT E. HILL

APPELLANT

VERSUS

NO. 2010-CP-00514-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

ROBERT E. HILL seeks appellate review of summary denial of his motion for post-conviction collateral relief/writ of habeas corpus filed on November 12, 2009, in the wake of a guilty plea entered on July 30, 2008, to a single count of first degree arson. (C.P. at 41; appellee's exhibit A, attached)

Hill assails the effectiveness of the lawyer representing him during his guilty plea because counsel failed to file a motion to dismiss the charge based upon Hill's alleged denial of his right to a speedy trial.

It is enough to say the circuit judge, in summarily denying post-conviction relief, was neither clearly erroneous nor manifestly wrong in finding as a fact and concluding as a matter of law that "[t]he Petitioner's argument fails because upon entering his guilty plea, he waived his right to a speedy trial." (C.P. at 44; appellee's exhibit A, attached)

STATEMENT OF FACTS

On July 30, 2008, Robert Hill, a forty-nine (49) year old African-American male with a GED (C.P. at 47, 49), entered a voluntary and intelligent plea of guilty in the Circuit Court of Lauderdale County, Robert W. Bailey, Circuit Judge, presiding, to a single count of first degree arson. It seems that Hill, while under the influence of alcohol, set fire to the dwelling house of his brother. (C.P. at 48-50)

Hill, pursuant to a plea bargain agreement (C.P. at 19), was sentenced as a recidivist under Miss.Code Ann. §99-19-81 to eight (8) years, day for day, in the custody of the MDOC. (C.P. at 27, 54)

On November 12, 2009, fourteen (14) months following his voluntary plea of guilty, Hill filed a motion for post-conviction collateral relief/writ of habeas corpus alleging his lawyer was ineffective and suggesting his plea was involuntary. According to Hill his plea of guilty commenced “. . . approximately 367 days from the date of his arrest [on July 28, 2007] to the actual sentencing of petitioner [on July 30, 2008].” (C.P. at 4)

Hill requested an evidentiary hearing in the lower court to resolve these issues. (C.P. at 9)

Circuit Judge Robert Bailey found as a fact and concluded as a matter of law that the petitioner’s motion for post-conviction collateral relief was plainly without merit and should be dismissed summarily for non-support of Hill’s claims. (C.P. at 41-46; appellee’s exhibit A, attached)

Specifically, Judge Bailey found “. . . that by entering his plea of guilty, the Petitioner waived his right to a speedy trial, and his claim that he received ineffective assistance of counsel because his attorney failed to raise this issue is without merit.” (C.P. at 46; appellee’s exhibit A, attached)

In his appeal to this Court, Hill, within the context of allegedly ineffective counsel

representing him during his guilty plea, raises two (2) identifiable issues.

1. Whether Hill received the ineffective assistance of counsel.
2. Whether Hill's plea was voluntary.

Hill's "Petition to Enter Plea of Guilty" is a matter of record at 47-53. A transcript of the plea-qualification hearing conducted before Judge Bailey on July 30, 2008, is included in the record at R. 14-40.

SUMMARY OF THE ARGUMENT

In this appeal from a denial of post-conviction relief, a prisoner, under the trustworthiness of the official oath, (1) swore he was satisfied with the advice and help his lawyer had given him and believed his attorney had done all that anyone could do to counsel and assist him; (2) swore he knew and understood the Constitution guaranteed him the right to a speedy and public trial, (3) placed his initials on the line indicating he waived his right to, *inter alia*, a speedy trial, and renewed his desire to enter a plea of guilty, and (4) swore that his lawyer had advised him of the nature of each charge and on any and all lesser included charges and on all possible defenses. (C.P. at 47-48, ¶¶ 4 and 5)

Hill, within the context of ineffective counsel, now claims his "... trial lawyer did not object or make any other reasonable attempt to challenge the State on its failure to bring appellant to trial within two hundred and seventy (270) days." (Brief of the Appellant at 9)

Hill also complains, *for the first time*, his plea was involuntary because he "... was not informed of the elements of the charge of first degree arson." (Brief of the Appellant at 9)

Hill's post-conviction claim assailing the effectiveness of his lawyer is devoid of merit because counsel's performance was neither deficient nor has it been demonstrated that any deficiency prejudiced Hill. Hill clearly waived his right to a speedy trial, whether of constitutional or statutory origin, as well as his challenge to counsel effectiveness on the ground now asserted, when he entered

his voluntary plea of guilty.

Hill's claim on appeal his plea was involuntary because he was never informed of the elements of arson was never presented to the trial judge in Hill's motion for post-conviction relief. It is without merit for this reason, if for no other.

The law says that he who enters a voluntary and intelligent plea of guilty to the crime charged waives not only his right to a speedy trial, whether of constitutional or statutory origin, but to all defenses he may have had to that charge. **Fairley v. State**, 834 So.2d 704 (Miss. 2003), rev and rem on other grounds; **Madden v. State**, 991 So.2d 1231, 1237 (Ct.App.Miss. 2008), quoting from **Anderson v. State**, 577 So.2d 390, 391-92 (Miss. 1991); **Goudy v. State**, 996 So.2d 185 (Ct.App.Miss. 2008); **Taylor v. State**, 766 So.2d 830 (Ct.App.Miss. 2000).

Judge Bailey found as a fact and ruled as a matter of law that Hill was a habitual offender having been previously convicted of two felony DUI's. (C.P. at 30, 35) Hill acknowledged that he "... feloniously and maliciously set fire to and burned the dwelling house of Jeffery Hill ..." (C.P. at 33) The court accepted the State's plea bargain agreement (C.P. at 48) and sentenced Hill as a habitual offender to serve eight (8) years, day for day, in the custody of the MDOC without the possibility of said sentence being reduced or suspended. (C.P. at 54) As pointed out by Judge Bailey, Hill's sentence "... is mandatory time." (C.P. at 35)

Hill entered an intelligent and voluntary plea to the crime charged. Therefore, the trial court was neither clearly erroneous nor manifestly wrong in finding as a fact and concluding as a matter of law that any decision by counsel choosing not to pursue a speedy trial violation did not rise to the level of ineffective assistance. Defense counsel cannot be found ineffective because Hill freely and voluntarily waived his rights, including his right to a speedy trial, during the plea-qualification hearing, and Hill got a real meal deal as a result of the plea bargain agreement - eight (8) years as

opposed to twenty (20) years.

“This court reviews the denial of post-conviction relief under an abuse of discretion standard.” **Philips v. State**, 856 So.2d 568, 570 (Ct.App.Miss. 2003).

No abuse of judicial discretion has been demonstrated here where the circuit judge issued a six (6) page order and opinion succinctly addressing the issues raised by Hill.

It is enough to say that a review of the findings of fact and conclusions of law reached by Judge Bailey should result in a finding the trial court did not abuse its judicial discretion in finding that Hill’s post-conviction complaint was plainly without merit.

By entering a voluntary plea of guilty, Hill admitted all the elements of the charge and, at the same time, waived all non-jurisdictional defects incident to trial, including his right to a speedy trial.

“The burden is upon [Hill] to prove by a preponderance of the evidence that 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).

Hill has failed to do so here.

ARGUMENT

ISSUES 1 and 2.

HILL’S VOLUNTARY PLEA OF GUILTY TO ARSON WAIVED AND/OR FORFEITED HIS RIGHT TO ASSAIL IN A POST-CONVICTION ENVIRONMENT ALL NON-JURISDICTIONAL DEFECTS INCIDENT TO TRIAL, INCLUDING HIS RIGHT TO A SPEEDY TRIAL.

HILL WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL’S PERFORMANCE WAS NEITHER DEFICIENT NOR DID ANY DEFICIENCY

PREJUDICE THE DEFENDANT.

When reviewing the 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. **Brown v. State**, 731 So.2d 595, 598 (¶6) (Miss. 1999).

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

"However, where questions of law are raised the applicable standard of review is *de novo*," i.e., afresh or anew. *Id.*

Hill has failed to make out a *prima facie* post-conviction showing he was denied the effective assistance of counsel during his guilty plea as a result of counsel's failure to pursue a potential speedy trial violation.

Hill was arrested on July 28, 2007, and entered his plea of guilty 367 days later on July 30, 2008. (C.P. at 36) Hill claimed in the court below and argues on appeal as well that he was denied his statutory right to a speedy trial because he was not brought to trial within the required 270 days. Citing and relying upon **Robinson v. State**, 920 So.2d 1009 (Ct.App.Miss. 2003), Hill says if he had known about a speedy trial defense he never would have entered a guilty plea as his trial attorney advised him to do. (Brief of the Appellant at 9) Hill, however, fails to connect counsel's alleged errors with the voluntariness of Hill's guilty plea.

Counsel's performance, contrary to Hill's position, was neither deficient nor did any deficiency prejudice Hill. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); **Williams v. State**, 819 So.2d 532 (Ct.App.Miss. 2001); **Reynolds v. State**, 736 So.2d 500 (Ct.App.Miss. 1999). It cannot be said that but for counsel's failure to do this or to do that Hill would not have entered his plea of guilty.

In **Fairley v. State**, 834 So.2d 704, 705-06 (¶¶ 2, 4) (Miss. 2003), we find the following language controlling the posture of Hill's present claim:

Fairley raised the following issues in his petition [for post-conviction relief]: * * * (2) Fairley's attorney was ineffective because * * * (b) he ignored a speedy trial violation; * * *

* * * * *

As for a speedy trial claim, this was waived when Fairley pled guilty. * * * * * [emphasis supplied]

In **Goudy v. State**, 996 So.2d 185, 188 (¶¶ 12-15) (Ct.App.Miss. 2008), the Court of Appeals got it right when it stated the following:

Goudy asserts he received ineffective assistance of counsel because his attorney did not sufficiently pursue his constitutional right to a speedy trial.

* * * * *

In the instant case, Goudy pleaded guilty to transfer of a controlled substance. His attorney elected not to pursue the speedy trial issue perhaps as a trial strategy in that it would provide leverage for Goudy to use the speedy trial issue as a fallback position if his plea was adverse. This decision falls within the ambit of trial strategy and cannot give rise to an ineffective assistance of counsel claim. *See Carr v. State*, 873 So.2d 991, 1003 (¶36) (Miss. 2004).

Moreover, "a guilty plea waives the right to a speedy trial, whether that right is of constitutional or statutory origin." *Id.* at 400 (¶3) (citing **Anderson v. State**, 577 So.2d 390, 391-92 (Miss. 1991)). Thus, Goudy cannot assert his counsel was defective because he failed to pursue a speedy trial, as he waived this right when he pleaded guilty to the charge and signed the plea agreement waiving his right to a speedy trial.

In **Madden v. State**, 991 So.2d 1231, 1237 (¶¶ 25-26) (Ct.App.Miss. 2008), "... there was a 1,030 day delay from [Madden's arrest] to the day his plea was entered." In finding no deficiency in defense counsel's performance, the Court stated:

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.

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.

See also Jenkins v. State, 986 So.2d 1031 (Ct.App.Miss. 2008), reh denied, cert denied 987 So.2d 451 (2000) [Where guilty plea to manslaughter was voluntarily, knowingly, and intelligently made, defendant waived any speedy trial violations.]; *Trice v. State*, 992 So.2d 638 (Ct.App.Miss. 2007), reh denied, cert denied 997 So.2d 924 (2008) [Defendant who waived his right to trial by jury when he entered plea of guilty could not prevail on post-conviction claim his right to a speedy trial was violated.]

Hill was told in plain and ordinary English that he had, *inter alia*, “the right to a speedy and public trial by jury.” (C.P. at 48) Hill thereafter placed his initials in the blank underneath the following statement: “Knowing and understanding the Constitutional guarantees set forth in this paragraph, I hereby waive them and renew my desire to enter a plea of ‘GUILTY.’ ” (C.P. at 48) This acknowledgment has got to stand for something else one will fall for anything.

In his order denying post-conviction relief, Judge Bailey quoted the colloquy reflecting Hill’s discussions with counsel concerning possible legal defenses and Hill’s satisfaction with the legal services rendered by his lawyer. (C.P. at 43-44; appellee’s exhibit A, attached)

Hill, citing and relying upon *Robinson v. State*, *supra*, 920 So.2d 1009 (Ct.App. 2003), argues that an ineffective assistance of counsel claim based upon the failure to object to a speedy trial

violation is cognizable on post-conviction relief from a voluntary plea of guilty. We disagree.

The **Robinson** case in this regard is an anomaly indeed. To the extent the holding in that case conflicts with the holdings in **Fairley**, **Goudy**, and **Madden**, it should be overruled within the context of the speedy trial issue.

“A voluntary guilty plea waives all non-jurisdictional defects in the proceedings against the defendant [and] [t]his includes claims of ineffective assistance of counsel except insofar as the ineffectiveness is alleged to have rendered the guilty plea involuntary.” **United States v. Glinsey**, 209 F.3d 386 (5th Cir. 2000), reh and sugg reh denied 216 F.3d 1081, cert denied 121 S.Ct. 282, 148 L.Ed.2d 203 (2000). Such has not been alleged by Hill who has failed to connect counsel’s errors with the voluntariness of his plea. *See also Nelson v. Hargett*, 989 F.2d 847 (5th Cir. 1993) [A defendant waives all non-jurisdictional defects upon entering a plea of guilty, including violations of his right to a speedy trial.]

In the **Robinson** case, 920 So.2d at 1012 (¶10), voluntariness of Robinson’s guilty plea was not an issue. The Court of Appeals held that material contradictions in the plea transcript even rendered Robinson’s assertions “a sham.” It is implicit in **Robinson** that his plea of guilty was voluntary. It is explicit that there was no connection between counsel’s alleged error, *viz.*, failure to pursue a potential speedy trial violation, and Robinson’s guilty plea. Therefore, the **Robinson** court erred in doing a **Barker v. Wingo** [citation omitted] analysis and in failing to hold that Robinson, by pleading guilty, waived his claim that trial counsel was ineffective for failing to pursue Robinson’s claim he was denied his right to a speedy trial. In any event, Hill has not demonstrated there was a reasonable probability his speedy trial claim would have succeeded. In his Petition to Enter Plea of Guilty Hill swore to his belief “. . . that my lawyer has done all that anyone could do to counsel and assist me [and] I AM SATISFIED WITH THE ADVICE AND HELP HE HAS

GIVEN ME.” (C.P. at 47, ¶4) [emphasis ours] There was no complaint then and there that Mr. Evans had botched the potential speedy trial violation. That complaint has been voiced for the first time here and now.

In this posture, all the hullabaloo over counsel’s failure to move to dismiss the indictment for want of a speedy trial is rhetoric hopefully destined for deaf ears.

Although a defendant is entitled to change his mind, solemn declarations made in open court under the trustworthiness of the official oath carry a strong presumption of verity. **Baker v. State**, 358 So.2d 401, 403 (Miss. 1978); **Fairley v. State**, 812 So.2d 259, 263 (¶11) (Ct.App.Miss. 2002), citing **Richardson v. State**, 769 So.2d 230, 235-36 (¶14) (Ct.App.Miss. 2000). That presumption has not been overcome here.

Put another way, the Court places “. . . a strong presumption of validity upon an individual’s statements made under oath.” **Mowdy v. State**, 638 So.2d 738, 743 (Miss. 1994).

In **Taylor v. State**, 766 So.2d 830, 834 (Ct.App.Miss. 2000), the Court of Appeals held that Taylor was not denied the effective assistance of legal counsel during his plea of guilty to robbery and attempted robbery where Taylor stated during the plea-qualification hearing he was satisfied with his lawyer’s representation and his lawyer had not pressured him into pleading guilty. The Court also held that “[b]ecause Taylor pled guilty, he waived any defense he might have had to the charges.” 766 So.2d at 834-35. *See also Elliott v. State*, No. 2008-CA-00948-COA (¶23) decided November 3, 2009 [Not Yet Reported], where “Elliott’s testimony at the plea hearing contradict[ed] his contentions . . . Elliott affirmed that he was ‘totally satisfied’ with his counsel’s legal representation.”

The same is true here.

In short, Hill has failed to demonstrate his lawyer’s performance was deficient and that the

deficient performance prejudiced the defendant. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); **Williams v. State**, 819 So.2d 532 (Ct.App.Miss. 2001); **Reynolds v. State**, 736 So.2d 500 (Ct.App.Miss. 1999).

It is well settled that a plea of guilty operates to waive and/or forfeit all non-jurisdictional rights and defects incident to trial. **Rowe v. State**, 735 So.2d 399 (Miss. 1999); **Anderson v. State**, *supra*, 577 So.2d 390, 392 (Miss. 1991); **Dennis v. State**, 873 So.2d 1045 (Ct.App.Miss. 2004).

A valid guilty plea admits all the elements of a formal charge and operates as a waiver of all non-jurisdictional defects in a criminal case. **Edmondson v. State**, 17 So.3d 591 (Ct.App.Miss. 2009); **Swift v. State**, 6 So.3d 1108 (Ct.App.Miss. 2008), reh denied, cert denied 11 So.3d 1250 (2008), cert denied 130 S.Ct. 100 (2009).

Hill, by voluntarily pleading guilty, has failed to demonstrate “a claim that is *procedurally alive which substantially shows that he has been denied a state or federal right.*” **Horton v. State**, 584 So.2d 764, 767 (Miss. 1991).

The trial judge accepted the recommendation made by the State that the court sentence Hill to eight (8) mandatory years. (C.P. at 19, 27, 48)

There was no deficiency in defense counsel’s performance and no prejudice to Hill.

ISSUE 3.

HILL’S CLAIM OF AN INVOLUNTARY GUILTY PLEA IS PROCEDURALLY BARRED, BUT EVEN IF NOT IT IS MATERIALLY CONTRADICTED BY THE RECORD.

Hill argues his guilty plea was involuntary and unintelligent because “. . . he was not informed of the elements of the charge [of arson in the first degree.]” (Brief of the Appellant at 20) Pages 20-23 of Hill’s brief target this claim. Regrettably, this issue is procedurally barred because

it was never raised with the specificity required in Hill's motion for post-conviction relief filed in the trial court. Consequently, the trial judge has never had the opportunity to rule on this matter. (C.P. at 2-12)

On page 5 of Hill's motion for post-conviction relief Hill asserts in points 1 and 2 that counsel was ineffective for failing to object to the State's failure to bring him to trial within 270 days.

Then in his point 3 Hill says "*Further affiant sayth not.*" [emphasis ours]

No argument was presented for the trial judge's consideration concerning alleged non-advice with respect to the elements of arson; rather, this claim is made for the first time on appeal. It is devoid of merit for this reason, if for no other. **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 [of voluntariness of his guilty plea] in his petition for post-conviction relief, its consideration is precluded on appeal."].

But even if not, it is devoid of merit on its merits for the reasons expressed in **Robinson v. State**, *supra*, 920 So.2d 1009, 1012 (¶9) (Ct.App.Miss. 2003), where we find the following:

Robinson also argues that counsel's advice to plead guilty was deficient because counsel never informed him of the elements of rape. A voluntary guilty plea requires that the defendant have knowledge of the elements of the crime with which he is charged. *Gilliard v. State*, 462 So.2d 710, 712 (Miss. 1985). At the plea hearing, Robinson told the court that counsel had explained the nature of the charges against him and that he fully understood the charges and possible defenses. Robinson now contradicts his testimony by alleging that counsel never informed him of the elements of rape.

This court places great emphasis on a defendant's testimony when entering a plea of guilty.

“Solemn declarations in open court carry a strong presumption of verity.” *Baker v. State*, 358 So.2d 401, 403 (Miss. 1978). We find that, in the face of the evidence of the plea hearing transcript, Robinson’s assertions are rendered a sham. *See Ford v. State*, 708 So.2d 73, 76 (¶¶ 16-17) (Miss. 1998). Robinson has failed to overcome the presumption that counsel’s performance was reasonable. *Taylor v. State*, 682 So.2d 359, 363 (Miss. 1996).

We respectfully submit the same is equally true here. *See* Petition to Enter Plea of Guilty, ¶¶ 4-5, as well as the certificate of counsel. (C.P. at 47, 53) Hill swore, *inter alia*, he was entering his plea with a full understanding of all matters set forth in the indictment . . .” (C.P. at 48-48) Hill acknowledged during the plea-qualification hearing his lawyer told him what the State would have to prove at trial and that he understood “those essential elements.” (C.P. at 22)

In paragraph 2. of his order accepting Hill’s plea of guilty, Judge Bailey found as a fact and concluded as a matter of law that “[t]he defendant knows the elements of the crime to which he/she is pleading and their relationship to his/her situation.” Moreover, Judge Bailey concluded that “[t]he defendant has received effective assistance of counsel.” (C.P. at 54)

Judge Bailey was neither clearly erroneous nor manifestly wrong when he found that “[p]etitioner waived his right to a speedy trial, and his claim that he received ineffective assistance of counsel because his attorney failed to raise this issue is without merit.” (C.P. at 46)

CONCLUSION

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*.

* * * * *

It does, he did, and he was. **Garlotte v. State**, 530 So.2d 693 (Miss. 1988) ["This case presents an excellent example of the appropriate use of the summary disposition provision of §99-39-11(2)]; **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 the guilty plea voluntarily and intelligently entered by Robert Hill . Accordingly, the judgment entered in the lower court summarily denying Hill's motion for post-conviction collateral relief should be affirmed.

Respectfully submitted,

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IN THE CIRCUIT COURT OF LAUDERDALE COUNTY, MISSISSIPPI

ROBERT HILL

PETITIONER

VS.

STATE OF MISSISSIPPI

RESPONDENT

2010 APR 19 12:51:46

attn: J. Hill, Jr.
CLERK

CAUSE NO.: 09-CV-145(B)

**JUDGMENT DENYING MOTION FOR POST-CONVICTION
COLLATERAL RELIEF / WRIT OF HABEAS CORPUS**

THIS cause having come before this Court on the Petitioner's Motion for Post-Conviction Collateral Relief / Write of Habeas Corpus, and the Court having considered the motion, the entire record in this cause and in Cause No. 128-08, the transcript and applicable authority, does hereby find the following:

FACTS

On July 30, 2008, the Petitioner pled guilty to the offense of first degree arson in violation of Miss. Code Ann. § 97-17-1 as a habitual offender pursuant to Miss. Code Ann. § 99-19-81 in Lauderdale County Circuit Court Cause No. 128-08. The Petitioner was sentenced to serve eight (8) years in the custody of the Mississippi Department of Corrections (hereinafter referred to as "MDOC") without the possibility of such sentence being reduced or suspended nor to eligible for early release under Miss. Code Ann. § 99-19-81.

The Petitioner filed this Motion for Post-Conviction Collateral Relief / Writ of Habeas Corpus on November 12, 2009 arguing that he was denied his right to speedy trial because it was approximately 367 days from the date of his arrest to the date that Petitioner entered his guilty plea and was sentenced by this Court.

MOTION FOR WRIT OF HABEAS CORPUS

Miss. Code Ann. § 99-39-3 abolished post-conviction habeas corpus, as well as statutory habeas corpus. Post-conviction habeas corpus petitions are considered motions for post-



conviction relief under the Uniform Post-Conviction Collateral Relief Act. *Ivory v. State*, 999 So.2d 420, 424 (P10) (Miss. Ct. App. 2008), *McLamb v. State*, 974 So.2d 935, 938 (P9) (Miss. Ct. App. 2008), *Putnam v. Epps*, 963 So.2d 1232, 1234 (P5) (Miss. Ct. App. 2007), *Bynum v. State*, 916 So.2d 534, 536 (P7) (Miss. Ct. App. 2005). This Court is required to treat the present Motion as a petition for post-conviction relief under the Uniform Post-Conviction Collateral Relief Act.

INEFFECTIVE ASSISTANCE OF COUNSEL

The Petitioner claims that he received ineffective assistance of counsel when he entered his guilty plea because his attorney failed to file a motion to dismiss indictment for lack of speedy trial. *See* Motion, p. 2, ¶ III.

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 is on the defendant. *McQuarter v. State*, 574 So.2d 685, 687 (Miss. 1990). 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 that presumption, the defendant must show that 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 seeking post-conviction collateral relief, where the petitioner officers only his own affidavit in support of his claim, his ineffective assistance of counsel claim is without merit. *Vielee v. State*, 653 So.2d 920, 922 (Miss. 1995).

During the plea hearing, the Court questioned the Petitioner regarding legal services rendered by his attorney, and the Petitioner indicated he was satisfied with the legal services he had received.

Q. Have you discussed with your attorney any possible legal defenses to your felony that you might have, if you have any legal defenses? Not that you have any necessarily, just have you discussed those possibilities with your attorney?

BY DEFENDANT HILL: Yes, sir.

Q. Are you satisfied with the legal services rendered to you and on your behalf by your attorney?

BY DEFENDANT HILL: Yes, sir.

Q. Do you feel like your attorney has done all that any attorney could do in representing you and defending you in your case?

BY DEFENDANT HILL: Yes, sir.

Transcript, pp. 7 – 8.

Q. Have you gone over your petition with your attorney paragraph by paragraph?

BY DEFENDANT HILL: Yes, sir.

Q. Did your attorney explain each paragraph to you and answer any questions you might have had?

BY DEFENDANT HILL: Yes, sir.

Q. So if I understand what you are telling the Court, you are entering your plea of guilty freely, voluntarily, and knowingly with a full understanding of all matters that are set forth not only in your indictment that charges you with your felony, but in your petition to plead guilty as well; is that correct?

BY DEFENDANT HILL: Yes, sir.

Transcript, pp. 9 – 10. In raising his ineffective assistance of counsel claim, the Petitioner offers

only his unsworn allegations that he received ineffective assistance of counsel. He has provided absolutely no proof to support his claim, and the record clearly refutes the assertions the Petitioner is now making in his Petition for Post-Conviction Collateral Relief.

FAILURE TO RAISE SPEEDY TRIAL VIOLATION

The Petitioner asserts that his representation was deficient because his counsel did not argue that his right to a speedy trial had been violated. The Petitioner argues that it was approximately 367 days from the date of his arrest for the crime of arson to the date that he entered his guilty plea, and that his “counsel should have objected on the basis that the petitioner was not brought to trial within a reasonable amount of time.” *See* Motion, p. 3, ¶ IV.

The Petitioner’s argument fails because upon entering his guilty plea, he waived his right to a speedy trial. *Madden v. State*, 991 So.2d 1231, 1237 (Miss. Ct. App. 2008). The Court is required to make the defendant aware that he is waiving certain constitutional rights when entering a guilty plea. *Epps v. State*, 9267 So.2d 242, 245 (Miss. Ct. App. 2006). Paragraph 5 of the Petition to Enter Plea of Guilty filed in Cause No. 128-08 states:

I understand that I may plead “NOT GUILTY” to any offense charged against me. If I choose to plead “NOT GUILTY” the Constitution guarantees me:

(a) the right to a speedy and public trial by jury;

Knowing and understanding the Constitutional guarantees set forth in this paragraph, I hereby waive them and renew my desire to enter a plea of “GUILTY.”

The Petitioner acknowledged his agreement and understanding of this paragraph by placing his initials at the end. *See* Exhibit “A.” The Petition to Enter Plea of Guilty was signed by the Petitioner and presented to this Court as his sworn declaration of his understanding of the contents and desire to enter his guilty plea. The only evidence the Petitioner presents now is his own unsworn allegations in his Petition.

During the plea hearing, the Court addressed the Petitioner directly and made him aware that by entering his guilty plea, he was waiving certain constitutional rights.

Q. All right. Now [Paragraph 5 of your petition] sets out certain constitutional rights or guarantees that you and every defendant are entitled to receive if you were to plead not guilty and you went to trial. But by pleading guilty this morning, you will be giving up each of these rights under Paragraph 5 because you will not have a trial. Do you understand that?

BY DEFENDANT HILL: Yes, sir.

Q. All right. Have you read Paragraph 5 in its entirety?

BY DEFENDANT HILL: Yes, sir.

Q. Did your attorney explain each of these rights to you and answer any questions that you might have had?

BY DEFENDANT HILL: Yes, sir.

Q. All right. Do you now understand each of these rights under Paragraph 5 that you are giving up right now by pleading guilty?

BY DEFENDANT HILL: Yes, sir.

Q. And is that what you want to do?

BY DEFENDANT HILL: Yes, sir.

Q. All right. And that's acknowledged by your initials at the end of Paragraph 5 of your petition, [Mr. Hill]?

BY DEFENDANT HILL: Yes, sir.

Transcript, pp. 10 – 12. Furthermore, paragraph 1 of the Order Accepting Guilty Plea and Sentencing, which is signed by the Petitioner and his attorney at the plea hearing, states:

Having done this the Court finds beyond a reasonable doubt that:

(1) The Defendant has intelligently, voluntarily, and knowingly waived the Constitutional rights as set out in paragraph # 5 of the petition.

See Exhibit "B."

The Petitioner was asked if he understand that he was waiving certain constitutional rights, including the right to a speedy trial, and he responded that he understood and that it was his desire to enter his guilty plea. The Court finds that by entering his plea of guilty, the Petitioner waived his right to a speedy trial, and his claim that he received ineffective assistance of counsel because his attorney failed to raise this issue is without merit. *Epps*, 926 So.2d at 245 (citing *Anderson v. State*, 577 So.2d 390, 391-92 (Miss. 1991)).

IT IS THEREFORE ORDERED AND ADJUDGED, that the Motion for Post-Conviction Collateral Relief/Writ of Habeas Corpus is hereby denied as frivolous. This is a final judgment within the meaning of Miss. Code Ann. § 47-5-138, and MDOC shall forfeit sixty (60) days of the Petitioner's accrued earned time allowance, if any. The law clerk shall mail a copy of this Judgment to the Petitioner Robert E. Hill, # R6644, L.C.C.F., 399 C.O. Brooks Street, Carthage, MS 39051.

SO ORDERED AND ADJUDGED, this the 12th day of April, 2010.


ROBERT W. BAILEY, CIRCUIT JUDGE

CERTIFICATE OF SERVICE

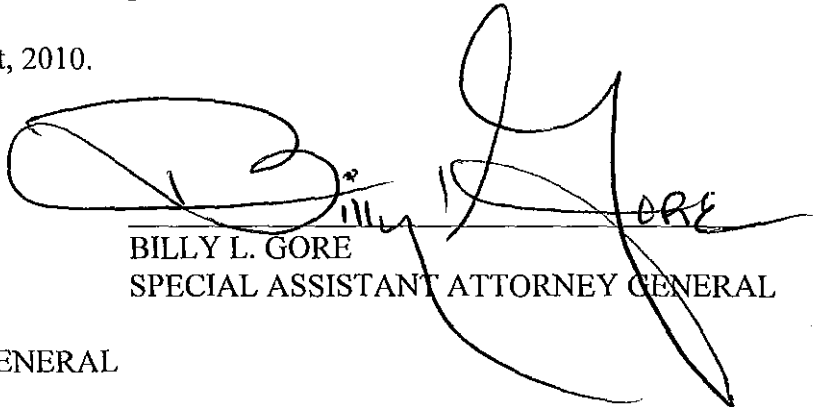
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Robert W. Bailey
Circuit Court Judge, District 10
Post Office Box 1167
Meridian, MS 39302

Honorable Bilbo Mitchell
District Attorney, District 10
Post Office Box 5172
Meridian, MS 39302

Robert E. Hill, #R6644
LCCF, C-10, Bed 9
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Carthage, MS 39051

This the 13th day of August, 2010.



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