IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KRISTOPHER PEACOCK	**APPELLANT**
VS.	**NO. 2005-KA-02190-COA**
STATE OF MISSISSIPPI	**APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF THE APPELLANT KRISTOPHER PEACOCK

Thomas Powell, MSB# [redacted]
P.O. Box 621
Ridgeland, MS 39158
601-922-2824 Office
601-922-2818 Fax
Thomaspowell45@ yahoo.com

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that this Court may evaluate possible disqualifications or recusal.

Jim Hood, Esq.
Attorney General
P.O. Box 220
Jackson, MS 39205

Honorable W. Swan Yerger
Hinds County Circuit Judge
407 E. Pascagoula Street
Jackson, MS 39225

Eleanor Faye Peterson, Esq.
Hinds County District Attorney
407 E. Pascagoula Street
Jackson, MS 39225

John McNeal, Esq.
Chris Ganner, Esq.
405 Tombigbee Street
Jackson, MS 39225

Kristopher Peacock, #113945
W.G.Y.C.F.
P.O. Box 389
Walnut Grove, MS 39189

This the 21ST day of December, 2006.

Thomas Powell, Esq.

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STATEMENT OF CASE

On the 16th day of August, 2003 is the unfortunate date that the day Robert Clinton Stubbs and Appellant Kristopher Peacock crossed paths ending in tragedy. On that night Mr. Stubbs had been out partying with his friend Jeremy Kimbrough. They were riding in a White Grand Prix owned by Jeremy and driven by Stubbs. While heading north on State Street, they encountered Lowell Leach driving in a purple Ford Probe, with his front seat passenger, Kristopher Peacock, and his back seat passenger, Robert Edwards.

Mr. Stubbs made sarcastic statements about Mr. Leach's car and words were then exchanged between himself and Kristopher Peacock. The parties continued to travel on state street through several lights until they reached the intersection of State street and High street where approximately six (6) shots rang out from a .25 semiautomatic handgun fired by Mr. Peacock. Mr. Stubbs was shot once in the head mortally wounding him.

Eventually, Mr. Peacock was charged on a two (2) count indictment, Cause number 04-1-403 for the murder of Robert Clinton Stubbs and shooting into a motor vehicle occupied by Jeremy Kimbrough. On the 25th day of July, 2005, Senior Hinds County Circuit Judge W. Swan Yerger, conducted a trial on the merits of this case. Before the jury was impaneled and the before the trial began, Kristopher Peacock entered a guilty plea to Count II of the indictment. (Tspt. P4-8) The Trial Court accepted the guilty plea, found the Appellant guilty and sentenced him to five years in the custody of

the Mississippi Department of Corrections.. (Tspt. P8) The Court resumed impaneling the jury and once this was completed, the Defense moved ore tenus for dismissal of Count I of the indictment based upon a double jeopardy violation of the United States Constitution. (Tspt. P170) The Trial Court took said Motion under advisement and on the 26th day of July, 2005 ruled that said indictment was not a violation of the double jeopardy clause. (Tspt. P 294) On the third day of the trial on the 27the day of July, 2005, the Trial Court sua sponte set aside the guilty plea of the Appellant based upon a defect in the indictment. (Tspt. P 508)

The appeal of Appellant Kristopher Peacock is based upon these issues.

ARGUMENT

WHETHER THE TRIAL COURT ERRED WHEN IT SUA SPONTE SET ASIDE A GUILTY PLEA THAT WAS VOLUNTARILY AND INTELLIGENTLY GIVEN; AND HAVING BEEN ACCEPTED BY THE COURT BECAME A WAIVER OF ANY DEFECT IN THE INDICTMENT?

"It is well settled that a guilty plea 'is not binding upon a criminal defendant unless it is entered voluntarily and intelligently.' Tokman v. State of Mississippi, 1998 Miss. Lexis 42 (Miss. 1998), Alexander v. State, 605 So.2d 1170, 1172 (Miss. 1992). (Citing Meyers v. State, 583 So.2d 174, 177 (Miss. 1991). A guilty plea is 'voluntary and intelligent' if the defendant is advised of the nature of the charge against him and the consequences of the plea. Alexander, 605 So.2d at 1172 (Citing Wilson v. State, 577 So.2d 394, 396-97 (Miss. 1991). Among the many rights the defendant must be informed of, **Rule 8.04** of the Uniform Circuit and County Court Rules requires the trial

judge to inquire and determine 'if the defendant understands, among other things, the maximum and minimum penalties to which he may be sentenced. Alexander, 65 So.2d at 1172 (Referring to Rule 3.03 of the Uniform Criminal Rules which is now covered by Rule 8.04). **Rule 8.04(5) of the Uniform Circuit and County Court Practice** allows a Circuit Judge discretion to "permit or deny the withdrawal of a guilty plea." In the case at bar, it was done sua sponte by the Trial Court based upon a defect in an indictment and not by a Motion from the State or the Defendant which is contrary to established case law.

A valid guilty plea operates as a waiver of all non jurisdictional rights or defects what are incidental to trial. Anderson v. State, 577 So.2d 390,391 (Miss. 1991)(Citing Ellzey v. State, 196 So.2d 889, 892 (Miss. 1967)).

One of the factors that this Court considers in determining the validity of a guilty plea is the colluquy between the trial court and the defendant before the acceptance of the guilty plea. See Roland v. State, 666 So.2d 747, 750 (Miss. 1995)(concluding that the Courts thorough questions to the defendant at the hearing showed that the plea was voluntary); See also Gardner v. State, 531 So.2d 805, 809 (Miss. 1988)(Citing Sanders v. State, 440 So.2d 278, 288 (Miss. 1983) in which [a defendant is] interrogated by the lower court at the time his plea [is] tendered I the most significant evidence of all [on the issue of the validity of a guilty plea]" Additionally, [this court has] held that "solemn declarations in open court [by a defendant] carry a strong presumption of verity." Baker v. State, 358 So.2d 401, 403 (Miss. 1978)(quoting Blackledge v. Allison, 431 U.S. 63, 97S.Ct. 1621, 52 L.Ed. 136 (1976).

In the present case, the colloquy between the Court and Peacock was thorough as the Appellant was advised of the nature of the charges against him and the maximum and minimum penalties to be imposed. The Appellant was charged under **97-25-47 Shooting or throwing at transportation vehicles or facilities** and reads as follows:

"IF any person or person shall willfully shoot any firearms or hurl any missile

At, or into, any train, bus, truck, motor vehicle, depot, station, or any other transportation facility, such person shall, upon conviction, be punished by fine ....."

The indictment read as follows: **COUNT TWO "did willfully and unlawfully shoot a firearm into a motor vehicle, to-wit: Pontiac Grand Prix, then occupied by Jeremy Kimbrough in violation of Section 97-25-47, contrary to the form the statute ..."**

The Court properly instructed the defendant stating:

Q: "Do you understand the minimum sentence for this particular crime is one year in the penitentiary and $100.00 fine, and a maximum of five years and $250.00 fine?

A: "Yes, sir" Tspt. P. 5, ln 13-17

And after hearing the factual basis for the guilty plea, the Court accepted the Appellant's plea of guilty and found him guilty as charged meeting all the requirements of the law. The Court stated as follows:

"The Court finds, then, that there was a factual basis for the plea of guilty, that it's knowingly, intelligently and voluntarily made, and therefore, finds you guilty as

charged." "A guilty plea will only be binding on a criminal defendant if it is voluntarily and intelligently entered. Alexander v. State, 605 So.2d 1170, 1172 (Miss.1992).

"The Court will defer sentencing on this charge until there is a jury verdict in this case on the other charge." Tspt. P. 7, ln 18-24.

At this point, the **guilty plea** was **valid** and **should not** have been **set aside based on a defect in an indictment** without an evidentiary showing of some exceptions to the rule of law.

"Mississippi law dictates only two exceptions in which a voluntary guilty plea does not waive a defect. Jefferson v. State, 556 So.2d 1016, 1019 (Miss. 1989). **If the indictment fails to charge a necessary element of a crime or if there exists no subject matter jurisdiction, then a guilty plea does not constitute a waiver. In** Anderson v. State, this Court recognized "**that a valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial."** Banana v. State, 635 So.2d 851, 853 (Miss. 1994).

In the case at bar, neither exception is satisfied. The indictment charged the element of the crime, "shooting into a motor vehicle" and the Hinds County Circuit Court has jurisdiction of all felony criminal matters within said county.

Additionally, once the **plea was accepted,** the **Appellant detrimentally relied** upon its acceptance the guilty plea as double jeopardy as it relates to count one of the indictment for murder. See Timmons v. State, 735 So.2d 201 (Miss. 1999).

WHETHER A DEFENDANT MAY BE CONVICTED OF SHOOTING INTO A MOTOR VEHCILE AND MURDER OF A PERSON WITHIN AN AUTOMOBILE BY SHOOTING SAID PERSON IN A MULTICOUNT INDICTMENT IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION?

Consequently, if this Court finds that the Plea Bargain was valid, then the issue becomes whether or not **Double Jeopardy** attaches to the **multicount indictment** charging the Appellant with two (2) crimes arising out of one incident.

"**Double Jeopardy** consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717, 23 L.Ed. 2d 656, 89 S.Ct. 2072 (1969) (footnotes omitted). This Court addressed the issue of double jeopardy in Cook v. State, 671 So.2d 1327 (Miss. 1996): The Double Jeopardy Clause of the Fifth Amendment reads as follows, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This proscription "has been applied to the states through the Due Process Clause of the Fourteenth Amendment." McNeal v. Hollowell, 481 F.2d 1145, 1149 (5th Cir. 1973), cert. denied, 415 U.S. 951, 94 S.Ct. 1476, 39 L.Ed. 2d 567 (1974) citations omitted. Double Jeopardy applies to successive prosecutions for the same criminal offense. United States v. Dixon, 509 U.S. 688, 694, 113 S.Ct. 2849, 2855, 125 L.Ed. 2d 556 (1993). The Supreme Court has also held that:

> "In both multiple punishment and multiple prosecution contexts, this Court has concluded that where both the two offenses for which the defendant is punished or tried cannot survive the same

> elements test, sometimes referred to as the "Blockburger" test, inquires whether each offense contains an element not contained in the other; if not, they are the same offense and double jeopardy bars additional punishment and successive prosecution."

Dixon, 509 at 696, 113 S.Ct. at 2856 (citations omitted). In Dixon, the Court recognized that in Grady V. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed. 2d 548 (1990), it adopted an additional test that "a subsequent prosecution must satisfy a 'same conduct' test to avoid the double jeopardy bar."Id. At 697, 113 S. Ct. at 2853. However, the Court concluded that "Grady must be overruled... Grady lacks constitutional roots. The 'same conduct; rule it announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy." Dixon, 509 U.S. at 704, 113 S.Ct. at 2860. Thus, as the Supreme Court has articulate, the rule is again the "Blockburger" or "same-elements" test. Applying the "Blockburger" or "same-elements" test to the case at bar appears that double jeopardy does apply and prohibit a second prosecution for murder by shooting a handgun into a motor vehicle in **Count I** of the indictment in violation of **97-3-19(1)** once the defendant pled guilty to shooting into a motor vehicle in **Count II** of the **indictment.** It is apparent that the Appellant was charged twice for the same conduct. Shooting into a vehicle causing the death of a human being and shooting into a motor vehicle are part of the same offense. The State must choose which crime to charge, with shooting into the motor vehicle a lesser included offense. The act of shooting into the motor vehicle in Count I is the same element or act that is the basis for Count I which is killing a human being, .. .by shooting [into a motor vehicle].

In Woodward v. State, 533 So.2d 418, 422-23 (Miss. 1988) the Court visited the question of whether a defendant "may be convicted of both felony murder and other felony or felonies which were not used as a basis for the felony murder charge in a multi-count indictment arising out of the same transaction or occurrence." Id. Relying on Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182 76 L.Ed. 306 (1932). In that case the Court found that the defendant could be charged with multiple felony charges based on one transaction or occurrence. This case is distinguishable because the capital murder charge was based upon a robbery and a murder. The defendant was also charged with kidnapping which was a separate felony arising out of the same event." However, in the case at bar, it appears that the multi-count indictment constitutes double jeopardy in that Count II of the indictment "shooting into a motor vehicle" is the basis for the felony murder charge in Count I. Common sense says it should be murder or shooting into an automobile, not both. The multi-counts are not separate acts but one act causing a tragic outcome.

CONCLUSION

The Trial Court erred by sua spontae setting aside a guilty plea that was knowingly, voluntarily and intelligently given and accepted by the Court in which the Appellant has detrimentally relied upon in resolving his criminal matter. Appellant respectfully submits that the guilty plea should be reinstated and Appellant's conviction on Count I of the indictment should be overturned as a violation of the double jeopardy clause.

CERTIFICATE OF SERVICE

I, Thomas Powell, Attorney do hereby certify that I have this day mailed, by U.S. mail, postage pre-paid, a true and correct copy of the above and foregoing instrument to:

Jim Hood, Esq.
Attorney General
P.O. Box 220
Jackson, MS 39205

Honorable W. Swan Yerger
Hinds County Circuit Judge
407 E. Pascagoula Street
Jackson, MS 39225

Eleanor Faye Peterson, Esq.
Hinds County District Attorney
407 E. Pascagoula Street
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