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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2006-CP-1483-COA

DAVID CLAUDE BUSBY

FILED

APPELLANT

VS.

JUL 25 2007

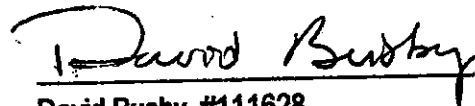
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STATE OF MISSISSIPPI

APPELLEE

REPLY BRIEF FOR APPELLANT

BY:



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APPELLEE

APPELLANT'S REPLY BRIEF

The State of Mississippi has filed its brief in this case and has failed to refute Appellant's claims that

- I. **THE APPELLANT'S CLAIMS ADEQUATELY SET FORTH GROUNDS OF CAUSE AND PREJUDICE FOR FAILING TO RAISE THESE CLAIMS AT TRIAL OR ON DIRECT APPEAL.**
- II. **APPELLANT'S CONVICTION MUST BE VACATED ON THE GROUND THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND WAS CONVINCED TO PLEAD GUILTY UNKNOWNINGLY AND UNINTELLIGENTLY**

The law is clear that before accepting a guilty plea, the trial court must inquire as to the voluntariness of the plea. URCCC 8.04(A). The accused must be advised concerning the nature of the charge and the consequences of the plea. Alexander v. State, 879 So.2d 452, 455 (Miss. 1992). The trial court may assure itself that the accused understands the elements of the crime charged by explaining the elements to the accused or by counsel's representation to the court that the elements of the crime have been explained to the accused. Bradshaw v. Stumpf, 545 U. S. 175, 183 (2005). The court must inform the accused of the maximum and minimum sentences that may be imposed for the charged crime. URCCC 8.04(A)(4)(b). The court must also ascertain that the accused is competent to understand the nature of the charge. URCCC 8.04(A)(4)(a).

Moreover, the accused must be informed that a guilty plea waives certain constitutional rights such as the right to a trial by jury, the right to confront adverse witnesses, and the right to protection against self-incrimination. Alexander, supra. It is clear here that there was not an adequate factual basis for his guilty plea to the charge of sexual battery. In order for a court to accept a guilty plea, the record must contain "enough that the court may say with confidence the prosecution could prove the accused guilty of the crime charged." Gaskin v. State, 618 So.2d 103, 106 (Miss. 1993) (quoting Corley v. State, 585 So.2d 765, 767 (Miss. 1991)). In order to form an adequate factual basis, it is not necessary to flesh out details that would be shown during trial. *Id.* The factual basis must be formed by any evidence before the court, or otherwise in the record before the court. In the instant case the State has not adequately refuted the claims which Appellant presented in his initial brief.

In the Brief filed by the State of Mississippi, the state never touch upon the basic claims of the Brief filed By Appellant, the ruling of the trial court, nor the PCR motion filed in the trial court. Defense counsel's performance at the plea proceedings were inadequate. Defense counsel never even informed Appellant of the terms of the plea. How else would Appellant be expected to know the terms of his plea before appearing before the Court to actually enter the plea of guilty. At page 2, the state argues a cumulative error argument in regards to "Garner" in which Appellant not only is not "Garner" but never raised a cumulative error argument in his brief. This case is not about cumulative error. This Court should acknowledge that the state's brief is not responsive to the claims presented and such brief should be considered as a brief in this case.

This Court should reject the state's presentation and should direct that this conviction and sentence be reversed to the trial court.

III. THE PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON THESE MATTERS.

Appellant would continue to assert to this Court that the Mississippi Supreme Court has held "a post-conviction collateral relief petition which meets basic requirements sufficient to mandate and evidentiary hearing unless it appears beyond a doubt that the petitioner can prove no set of facts in support of his claim which would entitle him to relief." Marshall v. State, 680 So.2d 794, 794 (Miss. 1996). The state has failed again in refuting this point of law. The state's argument on Burch v. State, 929 So.2d 394, 398 (Miss. App. 2006) is not on point. It has no application to a claim of denial of an evidentiary hearing. Other authorities cited by the state also have no application to this claim.

In the instant case, the Appellant asserted that he was deprived the effective assistance of counsel, a claim which can best be supported by the introduction of evidence not currently in the record. If the facts as claimed by the Petitioner are taken as true, there can be little doubt that he is entitled to relief in this matter. Therefore, Appellant requested an evidentiary hearing to review the issues.

CONCLUSION

For the reasons and authority cited herein, Appellant Busby submits that his conviction and sentence should be reversed rendered. In the alternative, Appellant Busby's Conviction and sentence should be remanded to the trial court for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, David Busby, have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United States Postal Service, first class postage prepaid, to: Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, Ms 39205; Honorable Robert Bailey, Circuit Court Judge, P. O. Box 1167, Meridian, Ms 39302; Honorable Bilbo Mitchell, District Attorney, P. O. Box 5172, Meridian, Ms 39302

This, the 25th day July, 2007

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