

**COPY**

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-CP-01483-COA

DAVID BUSBY

**FILED**

APPELLANT

MAY 23 2007

V.

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STATE OF MISSISSIPPI

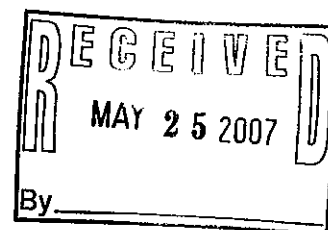
APPELLEE

**BRIEF FOR APPELLANT**

BY: David Busby  
David Busby., #111628  
CMCF 3  
P. O. Box 88550  
Pearl, Ms 39208

**ORAL ARGUMENT NOT REQUESTED**

**PRO SE PRISONER BRIEF**



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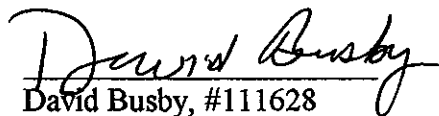
**CERTIFICATE OF INTERESTED PERSONS**

The undersigned Appellant, David Busby., certifies that the following listed persons have an interested in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. David Busby, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable Walter Bailey, Circuit Court Judge.
4. Honorable bilbo Mitchell, Assistant District Attorney.

Respectfully Submitted,

BY:



David Busby, #111628

CMCF 3

P. O. Box 88550

Pearl, Ms 39208

Appellant

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-CP-01483-COA

DAVID BUSBY

APPELLANT

V

STATE OF MISSISSIPPI

APPELLEE

**STATEMENT OF ISSUES**

**ISSUE ONE**

Whether trial court erred in failing to find that Petitioner's claims adequately set forth grounds of cause and prejudice for failing to raise these claims at trial or on direct appeal.

**ISSUE TWO:**

Whether trial court erred in failing to find that Petitioner's conviction must be vacated on the ground that he was denied effective assistance of counsel and was convinced to plead guilty unknowingly and unintelligently.

**ISSUE THREE:**

Whether trial court erred in failing to find that Petitioner is entitled to an evidentiary hearing on these matters.

**STATEMENT OF INCARCERATION**

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections and assigned to the Central Mississippi Correctional Facility in Pearl, Mississippi, in service of the prison term imposed. Appellant has been continuously confined in regards to such sentence since date of conviction and imposition of sentence by trial court.

### **STATEMENT OF CASE**

David Busby was indicted on February 24, 2005, in the Circuit Court of the First Judicial District of Lauderdale County, Mississippi for the offense of sexual battery. (R. 54).

Appellant, while represented by Honorable Eric Tiebauer, entered a plea of guilty to such charge. Pursuant to such plea, the charge was reduced to lustful touching of a minor with the sentence to be imposed by the court and in the blind. The court imposed a sentence of 15 years in each court with 8 years suspended and 7 years to serve. (R. 116) The court also imposed a \$10,000.00 fine on each of the two cases. (R. 117).

### **STANDARD OF REVIEW**

The correct standard of review in this appeal is the direct appeal standard where Appellant has appealed the sentence imposed upon him rather than the plea and conviction.

In the instant case the law dictates that the sentence of law where timeliness of sentence caused it to be fundamentally unfair and clearly an abuse of discretion. Incarceration imposed Miss. Code Ann. 47-7-34(2).

### **SUMMARY OF ARGUMENT**

The plea of guilty entered in this case was an involuntary plea where such was entered by coercion and ill advice of counsel with our Appellant being made fully aware of the consequences of said plea.

### **ARGUMENT**

In order to succeed in a post-conviction motion under Mississippi law, a petitioner must show that the adjudication of a claim in a Mississippi court resulted in a conviction or sentence that was obtained in violation of the Constitution or laws of the United States. Miss. Code

§99-39-1, et seq. The Constitution, as the framework from which all Federal law springs, must not be violated as applied to the Petitioner.

**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.**

The purpose of a post-conviction proceeding is to bring to the trial court's attention material facts not known at the time of judgment. Foster v. State, 687 So.2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S.Ct. 2488 (1997). Other issues which were either presented through direct appeal or at trial may be procedurally barred in a motion for post-conviction relief. In the instant matter, the Petitioner's claims rest upon facts outside of the record, making their inclusion in any trial or appellate motions improper.

Mississippi Code Ann. §99-39-7 (2001) provides that a petition for post-conviction relief is a motion in the original cause, except where the conviction and sentence have been appealed to the Supreme Court of Mississippi and there affirmed or the appeal dismissed. Mississippi has a three year time limitation on filing for post-conviction relief. This petition is properly before the court as the issues presented have not previously been raised at trial or on appeal and have resulted in the deprivation the Petitioner's constitutional rights. This petition is timely filed in that his conviction became final on May 10, 2005.

The Appellant seeks to vacate and set aside his conviction and sentence due to errors of constitutional magnitude occurring during his plea negotiation, plea hearing, and sentencing. These errors were the causative result of the Appellant's denial of effective assistance of counsel. Counsel failed to file an appeal thus meaning that the issues were not preserved and arguable to

the Supreme Court of Mississippi or on direct appeal. As indicated herein, both cause and prejudice are present in this case justifying that the issues be decided upon their merits.

**II. APPELLANT'S CONVICTION MUST BE VACATED ON THE GROUND THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND WAS CONVINCED TO PLEAD GUILTY UNKNOWNLY AND UNINTELLIGENTLY**

The Sixth Amendment to the United States Constitution guarantees that every criminal defendant is entitled to the assistance of counsel in presenting their defense. The Supreme Court has stated, "the right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy of our adversary process." Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). Furthermore, the Supreme Court has recognized that the "right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 (1970). The right to effective assistance of counsel may be violated by even an isolated error of counsel if the error is sufficiently egregious and prejudicial. Murray v. Carrier, 477 U.S. 478 (1986).

To establish ineffective assistance of counsel, a defendant must satisfy a two-prong test set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Osborn v. State, 695 So.2d 570 (Miss. 1997); (Hansen v. State, 649 So.2d 1256, 1259 (Miss. 1994)). Under this two-prong test, the defendant must first show that counsel's performance fell below an objective standard of reasonableness as defined by professional norms. This means that the defendant must show that his attorney made errors "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Strickland, 688 U.S. at 694. Second, once a defendant satisfies the first prong, he must allege, with specificity and detail that counsel's deficient performance so prejudiced his defense so as to deprive him of a fair trial. *Id.* The standard in Mississippi for the second prong of prejudice to

the defense if “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Mohr v. State, 584 So.2d 426, 430 (Miss. 1991).

This means a “probability sufficient to undermine the confidence in the outcome.” Id. A defendant must show “with specificity and detail” both parts of the Strickland test to establish a prima facie case of ineffective assistance of counsel. Cole v. State, 666 So.2d 767, 775 (Miss. 1995) (citing Perkins v. State, 487 So.2d 791, 793 (Miss. 1986)).

In the instant case, counsel failed to properly inform the Petitioner of all the parts of his plea agreement. There can be no question that informing a defendant of their rights and obligations under a proposed plea agreement is a basic and necessary duty of a defense attorney. This clearly meets the first prong of the test in Strickland, as counsel’s performance fell below an objective standard of reasonable as defined by professional norms.

There was confusion in court about whether the Petitioner was going to have to surrender himself to the custody of Mississippi officials as soon as he executed his plea agreement and entered his guilty plea. The Petitioner stated, “It was just my understanding that I would be kept out of jail until my sentencing because I have property and stuff that I have to take care of before I would go to jail.” (Plea Hearing Transcript at 17). The Court responded “Well, that’s what I said earlier. The District Attorney says that is not part of their plea agreement with you and that their plea agreement with you included that you would be put in custody pending your sentencing. And I intend to honor that unless you want to back out of this and go to trial tomorrow, which is your option if you want to.” (Plea Hearing Transcript at 17).

The Appellant at this point did not want to enter into the plea agreement as when he arrived at court he was not planning on surrendering himself that day, but a few months in the future, when he would be sentenced. Because the judge however only gave the Petitioner the



option of accepting the plea or going to trial the next day the Petitioner decided to take the plea agreement. This part of the plea agreement clearly surprised the Petitioner, as he was not made aware of this requirement by his trial counsel. Had counsel properly informed the petitioner about all the facts of the plea agreement, it is more likely than not that the Petitioner would have foregone the plea agreement and gone to trial.

The controlling case law in Mississippi states where a defendant enters a guilty plea, the key question is whether “there is a reasonable probability that had counsel’s assistance been effective, (defendant) would not have plead guilty, but would have insisted on going to trial.” Bell v. State, 751 So.2d 1035, 1038 (P14) (Miss. 1999). As has already been shown the Petitioner would have taken a different route and gone to trial had he known that he was required to surrender himself that same day. Because the judge gave him only the option of agreeing to the plea agreement or going to trial the next day, the Petitioner had no choice but to accept the agreement. Had counsel been effective and apprised the Petitioner of this requirement beforehand, the petitioner would not have entered into the agreement.

Moreover, a guilty plea must be made knowingly, voluntarily, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969). See Bryant v. Cherry, 687 F.2d 48 (4th Cir. 1982), cert. denied 459 U.S. 1073. In order to plead voluntarily, a defendant must know the direct consequences of his plea, including the actual value of an commitments made. Mabry v. Johnson 104 S.Ct. 2543, 2547 (1984).

The U.S. Supreme Court has ruled that a plea must be found to be involuntary if it was based upon promises or threats which deprived it of a voluntary character. Machibroda v. United States, 368 U.S. 487, 493 (1962). “The validity of a guilty plea hinges on whether it was a

voluntary and intelligent choice among alternative courses of action open the defendant.” Banks v. United States, 920 F.Supp. 688 (E.D. Va. 1996).

When looking at whether or not a plea should be set aside, three areas of the plea negotiation should be evaluated. This test was set forth in the case of United States v. Ribas-Dominicci, 50 F.3d 76 (1st Cir. 1995). According to that court, “violations of any of the three core concerns- absence of coercion, understanding of the charges, and knowledge of the consequences of the guilty plea- mandate that the plea be set aside.” Id. at 78.

In the instant case, the Appellant was not absent coercion, as the judge gave him a “do or die” option, either agree to the plea agreement as it was written or go to trial the next day, and the Petitioner was clearly unaware of the consequences of his guilty plea, up until the judge told him he would not be free until sentencing, only seconds before the Petitioner was to plea guilty.

In sum, Petitioner’s plea of guilt to the specific crimes charged in the indictment was not voluntary in character, and was therefore not voluntary. See Machibroda, 368 U.S. at 493. Because the plea was forced and not “a voluntary and intelligent choice among alternative courses of action,” the plea was not constitutionally valid. See Banks, 920 F.Supp. 688. Because the plea was forced and made without knowledge of the consequences, it must be vacated. See Ribas-Dominicci, 50 F.3d at 78. Consequently, Petitioner prays that this court vacate his guilty plea.

As the Appellant received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, the petitioner submits that his conviction and subsequent sentence must be vacated and this matter be set for rehearing consistent with the findings of this court and the constitutional principles of fair play and substantial justice.

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

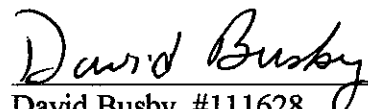
The Mississippi Supreme Court has held “a post-conviction collateral relief petition which meets basic requirements sufficient to mandate an evidentiary hearing unless it appears beyond a doubt that the petitioner can prove no set of facts in support of his claim which would entitle him to relief.” Marshall v. State, 680 So.2d 794, 794 (Miss. 1996).

In the instant case, the Appellant asserts that he was deprived the effective assistance of counsel, a claim that 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, the Petitioner requests an evidentiary hearing to review the issues.

### **CONCLUSION**

Appellant Busby respectfully submits that based on the authorities cited herein and in support of his brief, that this Court should vacate the decision rendered by the trial court and remand this case for an evidentiary hearing or direct that the pleas of guilty and sentencing be vacated and set aside.

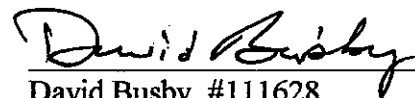
Respectfully submitted:

  
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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 ~~23<sup>rd</sup>~~ day of May, 2007.



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