COPY

In The Supreme Court Of The State of Mississippi

Alejandro Aguirre Moreno — Appellant

VS.

NO: 2006-FB-01859-COA

FILED
MAR 15 2007
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SUPREME COURT
COURT OF APPEALS

State of Mississippi — Appellee

Brief of Appellant

Prepared By:

x Alejandro Aguirre Moreno
Alejandro Aguirre Moreno # 114415
South MS. Correctional Institution
P.O. Box 1419
Leakesville, MS. 39451

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VS. — NO: 2006-TS-01859-COA

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Certificate of Interested Persons

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

1. Alejandro Aguirre Moreno, Appellant Pro-Se
2. Mr. Ed Pittman, Counsel for Defendant
3. The Honorable Michael Eubanks, Presiding Circuit Court Judge
4. Hon. Kathy Jones, Asst. District Attorney
5. Hon. Jim Hood, Attorney General
   State of Mississippi

Respectfully Submitted

Alejandro Aguirre Moreno

Alejandro Aguirre Moreno #114415
South Ms. Correctional Institution
Bldg C-2, B-Zone
P.O. Box 1419
Leakesville, Ms. 39451

Prepared By:

Eric Forshee #51844
Inmate Legal Assistant

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Statement Of Incarceration

The Appellant is presently incarcerated at South Mississippi Correctional Institution, Bldg C-2, B-202L P.O. Box 1419, Leakesville, Mississippi 39451.

Statement Of Jurisdiction

This Court has jurisdiction under Mississippi Rules of Appellate Procedures to hear a denial of the trial court in a Post-Conviction Collateral Relief. In which the Appellant appealing a denial from the judgment entered on September 20, 2006

Statement Of The Case

1. Nature of the Case.

On September 20, 2006, the lower court's dismissed Appellant's Motion ~~for~~ Post-Conviction Relief pursuant to Miss. Code Ann. § 99-39-11(2).

2. Statement of Proceedings and Disposition in the Court Below.

On March 3, 2005 Appellant was indicted by the Grand Jury of Lamar County for One count of DUI Manslaughter and two counts of DUI Mayhem in violation of Miss. Code Ann. § 63-11-30(5). Appellant was forced to plead guilty to all three counts on August 5, 2005, and, was sentenced to twenty-five (25) years for DUI Manslaughter, with fifteen years

suspended, and ten years to serve in custody of the Ms. Department of Corrections, and on both counts of DUI Mayhem, he was sentenced to twenty-five (25) years each, with twenty (20) years suspended on each count, and five (5) years on both counts to serve run all sentenced consecutive and five years Post-Release Supervision.

3. ## Statement Of Facts

On July 11, 2004, at approximately 02:00 am., Appellant was involved in a two (2) vehicle accident in Hattiesburg, Ms. (Forrest County). Appellant was intoxicated when his vehicle allegedly struck another vehicle occupied by Benjamin Alexander Berry, Katilla Hakimzakeh and Brandon L. Marshall. Benjamin Alexander Berry died as a result of injuries sustained in the accident, and Katilla Hakimzakeh and Brandon L Marshall both received light injuried in the wreck. But, however, Katilla Hakimzakeh, Brandon L Marshall and Benjamin Berry had been drinking and intoxicated. See Victim Statement "Exhibit A). 1, 2, 3 and 4

Summary of the Argument

Appellant was subject to double jeopardy, was not advised of the minimum or maximum sentence, was not advised of the essential elements of DUI Manslaughter or DUI Mayhem, there was no proof submitted

ATTIESBURG POLICE DEPARTME

ORIGINAL	NARRATIVE FORM	INCIDENT NUMBER 2004079899
CONNECTED INCIDENTS	1. TYPE INCIDENT D.U.I. CAUSING DEATH	2. DATE OF THIS REPORT 9/10/04
	3. SUSPECT/VICTIM NAME ARTURO MARENO	4. DATE OF ORIGINAL REPORT 7/11/04

NARRATIVE OR INCIDENT

ON SEPTEMBER 3, 2004 AT 1300 HOURS DETECTIVE NOBLES MET AND INTERVIEWED BRANDON MARSHALL, THE REAR SEAT PASSENGER OF THE NISSAN MAXIMA, AT THE HATTISBURG POLICE DEPARTMENT. ACCORDING TO MARSHALL HE WAS THE OWNER OF THE NISSAN MAXIMA. MARSHALL SAID THAT HE DID NOT REMEMBER THE ACCIDENT AT ALL BUT REMEMBERED THAT HIS FRIEND KAHILLA HAKIMAZADEH WAS DRIVING AND HIS FRIEND BENJAMIN BERRY WAS THE FRONT SEAT PASSENGER. ACCORDING TO MARSHALL HE AND HIS FRIENDS WERE HEADED HOME FROM A LOCAL NIGHTCLUB WHEN THE ACCIDENT OCCURRED. MARSHALL'S STATEMENT IS CONTAINED IN THE CASE FILE FOR FUTURE REFERENCE.

ON SEPTEMBER 3, 2004 AT 1500 HOURS DETECTIVE NOBLES MET AND INTERVIEWED KAHILLA HAKIMAZADEH AT THE HATTIEBURG POLICE DEPARTMENT. ACCORDING TO HAKIMAZADEH SHE WAS THE DESIGNATED DRIVER ON THE NIGHT OF THE ACCIDENT AND HAD ONLY HAD A FEW "SIPS OF AN ALCHOLIC" BEVERAGE SEVERAL HOURS BEFORE THE ACCIDENT. HAKIMAZADEH SAID THAT SHE ONLY REMEMBERS ATTEMPTING THE TURN AT WESTOVER AND HARDY AND THEN BEING ATTENDED TO BY AMBULANCE PERSONELL. HAKIMAZADEH'S STATEMENT IS CONTAINED IN THE CASE FILE FOR FUTURE REFERENCE. BOTH HAKIMAZADEH AND MARSHALL CONSENTED TO THE RELEASE OF THEIR MEDICAL RECORDS FOR THE PURPOSE OF THIS INVESTIGATION. THOSE MEDICAL RECORDS ARE PENDING AND WILL BE PROVIDED TO THE LAMAR COUNTY DISTRICT ATTORNEY'S OFFICE AS SOON AS THEY ARE AVAILABLE. THIS

REPORTING OFFICER:	DIVISION:
15389 NOBLES, MICHAEL 15389	DETECTIVES
DISPOSITION DATE: 9/10/04	INCIDENT DISPOSITION: **CLEARED ADULT ARREST**
REVIEWING SUPERVISOR:	ENTERED BY: 15389 NOBLES, MICHAEL 15389

Exhibit (A) p. 1

(14)

DATE SEPTEMBER 3, 2004 PAGE 01

STATEMENT OF:

I AM DETECTIVE NOBLES INTERVIEWING KAHILA HAILIMZADEH REGARDING THE ACCIDENT WHICH OCCURRED ON JULY 11, 2004. PLEASE TELL ME IN YOUR OWN WORDS WHAT HAPPENED.

I remember leaving Mahogany Bar. I was the designated driver. I drove west on Hardy St until I came to the Hardy/Westover intersection where I got into the left turn lane, there are two, I don't remember which one I was in probably the right side. I was watching the light and saw it turn green. I began to go. That is all I remember before the wreck. I woke up in the car sometime later, not being able to remember what happened. I was in pain and saw Ben and Brandon. Brandon was awake and listening to the paramedics. Ben was unconscious and I tried to wake him up by calling his name. I was then pulled from the car and put into the ambulance. I was awake from then on. At that point there was no panic around me, they knew I was stable. In the hospital I was stripped of my clothes and examined and rushed to the cat scan but had to return and was told that Ben and Brandon had to go in first because they were critical. At that point I asked what happened and they told me we were hit and the driver had taken off on foot to escape the police. After begging and pleading to know

Cont.
Exhibit A

DATE _____ PAGE _____

STATEMENT OF:

how Ben and Brandon were with no result, they finally told me that our parents were on their way and the police had apprehended the man who hit us. I was given medicine for the pain and fell asleep.

Being the fiancee of Ben Berry compells me to say that in the weeks following this wreck, no one can imagine the pain his family and I have to go through. The physical pain is nothing in comparision. I personally feel that this was a violent crime commited by a violent man with no regard for human life, and he should be prosecuted to the fullest extent of the law.

Q. Did you have any alcohol to drink on the night of the accident?

A. Several hours before this accident I had a few sips of a friends drink, but did not drink at all before, I had drank water for the rest of the night.

Q. Do you have anything to add to this statement at this time?

A. not at this time

9-3-04

Kabilla Hakemzadeh 9/3/04

Cont.
Exhibit (A)

DATE September 3, 2004 PAGE 01

STATEMENT OF: Brandon E. Marshall, 2490 Hwy 44, Columbia, Ms. 39429 736-9448
Cell 270-5769

I am Detective Nobles interviewing Brandon Marshall concerning the accident that occurred on July 11, 2004. Please tell me in your own words what occurred.

Kahilla, Ben and I left the Mahogany Bar some time between 1:30 a.m to 2:00 a.m. I remember getting in the rear passenger side of the vehicle, but do not remember traveling west on Hardy Street, nor do I recall at this moment our vehicle turning left on Westover Drive which resulted in us being struck by the individual whom ran the red light. The only thing I remember after leaving the bar is waking up with an oxygen mask being placed around my head and seeing Ben and Kahilla in the front seats. I was in and out of conciousness throughout the rest of the morning, and this state continued through the duration of my being in ICU.

Perhaps the tramatic happening has blocked my memory from remembering the accident. I do know that over the past few weeks my memory has come back in fragments; so, it is likely that one day in the future I may remember the moments leading up to the accident.

Q. Do you anything else to add to your statement at this time?

A. Not at this time.

Brandon E Marshall 09/03/04 D-10

9-3-04

Comth Exhibit (A)

that the other two (2) alleged victims sustained "permanent injuries" as required in 63-11-30(5), Appellant further was not advised by his Counsel of the speedy trial Act Violation, was not advised of the immigration Consequences of his guilty plea by his Counsel, and suffered 5th 6th and 14th Amendments rights violation as well as violation of Article 3, § 26 of the Mississippi Constitution of 1890.

1. Whether or Not Appellant suffered double jeopardy after being indicted and convicted of three (3) separate and distinct crimes as the result of one act of drunk driving?

Appellant's Contends that the double jeopardy clause of the Fifth Amendment of the U.S. Constitution and Article 3 § 22 of the Mississippi Constitution of 1890 provides that no person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution.

Appellant's Contends that the lower Court's erred in denying his Post-Conviction Motion on this issue, because he was indicted three times or in three different Courts deal with the same drunk driving accident.

Appellant further state under Miss. Code Ann. §63-11-30(5), the legislature intended that a single unintentional act committed for multipule injuries could only be charged once. Even though the legislature may have attempted to justify multipule injuries as the result of a single act by the amendments to Miss. Code Ann. §63-11-30 and Subsection (5), the Amendments would make null and void the rulings in such as the cited case law by this Court. See Matlock -v- State, 732 So. 2d 168 (Miss. 1999).

Appellant argued before this Court the double jeopardy Clause which has violated his fifth Amendment right. In which the trial's judge agreed to in his ruling on the Post-Conviction Relief, by stating these quotes "Which the defendant is correct that all three arose out the same incident, Double Jeopardy does not lie. Further, the trial judge applied the United State Supreme Court ruling in Blockburger -v- State, 284 U.S. 299 (1932), to his ruling but, still dismissed Appellant's post-conviction relief. But, the lower's Court erred when it made its ruling. Because, Appellant argued in his Post-Conviction about the two DUI Mayhem arose from the DUI Manslaughter. See PCR pg. 17.

Appellant's argued that the State indicted him with DUI Manslaughter, two (2) counts of DUI Mayhem using the same element, willfully, unlawfully and feloniously drive or operate a vehicle. But in Count Two (2) and Three (3) stated in a negligent manner did cause the mutilation, disfigurement or permanent disability of the tongue, eye, lip, nose or any other limb, organ of the following victims. In the Double Jeopardy Clause, it state the following three separate sub-protections. (1) protection against a second prosecution for the same offense following an acquittal; (2) protection against a second prosecution for the same Criminal Offense or Conviction; and (3) protection against multiple punishments for the same Criminal Offense. In this instant case before the Supreme, Appellant ask the Court to reversed and remanded his case on Double Jeopardy Clause for violation (2) and (3). Because, his indictment charged him with DUI Mayhem twice, with two different punishment. See Matlock-v-State, 732 So. 2d (Miss. 1999); Mayfield -v- State, 612 So. 2d 1126 (Miss 1992).

Appellant's argued that even though his lawyer had him to plead guilty this Court has stated that in reviewing the double jeopardy argument as an exception to the general rule set

in Menna -v- New York, 423 U.S. 61, 46 L.Ed.2d 195, 96 S. Ct. 241 (1975).

Appellant's asking this Court to reversed and Remanded on this argument violation of his Fifth Amendment right against Double Jeopardy.

Argument II
Ineffective Assistance of Counsel

Appellant's Contends that his plea and sentencing Counsel Mr. Ed Pittman was ineffective assistance of Counsel to him from the beginning of his case. In fact Mr. Ed Pittman given Appellant his bond in Hattiesburg City Court on July 12, 2004 while setting as a judge and on Tuesday July 13, 2004, for another bond hearing for DUI Mayhem two counts. Mr. Pittman then gave to Lamar County Jail and requested that he speak with Appellant on the 17th of December, 2004, about representing the Appellant. Appellant admitted that Mr. Ed Pittman had an interpreter the first day. So, Appellant called his sister and she retained Mr. Pittman. Mr. Pittman advised Appellant on December 17, 2004, that he (Mr. Pittman) knows the case, and for $8,500, he would ~~could~~ (sic)

would be back in Mexico in two weeks. After, Appellant's sister advised Mr. Pittman she had no way to come to his office. Mr. Pittman along with the Bonding Company went out to Appellant's sister house, to talk about the retaining fee and Attorney's fee. Appellant than given Appellant's Attorney Mr. Pittman $4,000.00. And she advised Mr. Pittman he would receive the rest of the money later in the month. Mr. Pittman agreed. That Same the Bail Bordman Company advised Appellant's sister that if she pay $8,500.00 Appellant would be released from jail. Appellant's sister paid the money.

After time passed by, Appellant did not received anything about or know anything about the Attorney, Mr. Pittman nor the Bail Bordman Company. Both never returned back to the Lamar County Jail, after, Mr. Ed Pittman and him received the money. Mr. Pittman never ~~file~~ answer any letters from the Appellant

Appellant's Contends that the lower's court dismissed the ineffective Assistance of Counsel portion on fast and speedy trial, Stating Appellant's waived his rights, and he plead guilty. The lower's Court erred, because, the ~~fas~~

would ~~Could~~ be back in Mexico in two weeks. After Appellant's sister, she advised Mr. Pittman she had no way at the time to come visit him. Appellant further state Mr. Pittman along with the bail bonding company went to Appellant's sister home and she paid Mr. Pittman $4,000.00, and stated he will receive the rest later. At that point Appellant paid the Jackson Bail Bonding $8,500.00, to bail him out. After time past by Mr. Ed Pittman nor the Bail Bonding man came back to the Lamar County Jail. Mr. Pittman never answer any letters by the Appellant.

Appellant's contends that the lower's court dismissed the ineffective assistance of counsel portion of the Post-Conviction Relief by stating Appellant's waived his rights to a fast speedy trial when he plead guilty. Appellant further state that the lower's Court erred in dismissing his Complaint ~~but~~ without hold a hearing.

Appellant's contends that his attorney never objected to anything before the plea and sentencing hearing. Further, Mr. Pittman never spoken with him, until the Asst. District Attorney asked him to come to court. Appellant had

several hearing before the Circuit Court, but, postponed until Mr. Pittman come to court.

Appellant's contends that Mr. Pittman never investigated, never talked to anyone in the Hattiesburg Police Department about his case. Because, if he had then he would have seen or noticed that the victims was driving drunk as well. Mr. Pittman never did anything about the indictment or attacked the indictment that the DUI Mayhem did not meet the element for the crime. It was Mr. Pittman's job to inform the Court that he had told him that the plea was erroneous made, after Appellant's stated to the Court he was not guilty of certain charged in the indictment.

Appellant's counsel don't speak Spanish at all, but, lied at the plea hearing that he went over the indictment and constitutional rights. The Court hired an interpreter for Appellant, so, how could he (Mr. Pittman) advised Appellant of anything when Ms. Karen Austin was the interpreter, and, Mr. Pittman never seen Ms. Austin until the day of Court.

Appellant's Contends that Mr. Ed Pittman failed him on the Sixth Amendment of the United States Constitutional "that every defendent has a right to Counsel every stage of his plea and Sentencing.

Appellant's Contends that Counsel was ineffective for his failure to pursue and then present a speedy trial violation to the lower's court, because Appellant had sit in the Lamar County Jail over 400 days waiting to go to Court. Which this was fault of Appellant.

Appellant would like to turn the Court attention back to when Mr. Pittman sit as a judge then represented him. Mr. Pittman violated Rule 1.12 and Judicial Misconduct.

But, however, An ineffective assistance of counsel claim invokes two fundamental considerations.

> " First, it must be shown that Counsel's performance was deficient. Strickland -v- Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Secondly, it must be shown that Counsel's substandard performance prejudice ~~the defense~~ the defense. The standard for showing prejudice is that, it must be shown that, but for counsel's performance,

the outcome of proceedings would have probably have been different. Id. at 695, 104 S.Ct. 2052."

If Appellant's Counsel, Hon. Ed Pittman, Jr., would have at least moved for a speedy trial violation dismissal, instead of that he allowed the plea to go on without any motion argued. On the record Mr. Pittman stated that "Appellant" did not understand his right, because, it was not read in spanish. See plea transcript pg. 21. But, Mr. Pittman failed to put forced any evidence in which it was in Appellant's discovery. This clearly demonstrates that Counsel Pittman's performance was deficient and a result prejudice Petitioner's right to a fair and speedy trial hearings. Cited Kimmelman -v- Morrison, 477 U.S. 365; 378, 91 L.Ed.2d 305, 106 S.Ct. 2574 (1986), the U.S. Supreme Court stated: "A layman will ordinarily be enable to recognize Counsel's errors and to evaluate Counsel's performance."

Appellant's Contends that his plea was involuntary made, because, Mr. Pittman never did his job. Mr. Pittman never told him about the plea agreement.

Appellant's Contends that Mr. Pittman never advised him on the minimum and maximum pentence, he coved received. The minimum sentence was not mention at all, at the plea hearing.

Appellant's further state that there was contradicted statement made by witnesses, and, his counsel failed to objected to or filing motions for a hearing. These statement made the State act as Appellant was a real criminal. Further, Counsel never read the discovery, because the victim Katilla Makimzaka admitted she had been drinking that night.

Appellant's Plea Was Involuntarily Made

Appellant's Contends that trial Court's erred in dismissing his post-conviction relief on involuntarily plea. When in fact the plea transcripts clearly show that Appellant advised the trial court he was not guilty of the charged. Appellant offer into records before this Court, the following statement he made at his plea hearing.
See transcripts pg 16 line 22 thru pg 17, line 1 as following

Q. All right, then before I make my finding on the record, is there anything you want to change about what we've gone over? (Translated in Spanish to the Defendant By Dr. Karen Austin)

A. (Translated Answered By Dr. Karen Austin) I am just very much -- feel guilty because I really am not guilty of anything. It wasn't my fault, but I'm hoping they send me to jail in Mexico, and I can't explain myself well enough.

Appellant further state that at the end he did not plead guilty, because, his attorney never objected to both charged of DUI Mayhem as he told me or Dr. Karen Austin that he was going to do. So, the trial court factual finding was clearly erroneus.

Appellant's contends that plea was involuntary and unintelligince made before the court. Appellant state that a factual basis is an essential part of the constitutionally valid and enforceable decision to plead guilty. This factual basis that the State used and the trial court accepted was not proof to support DUI Mayhem Count one and two.

Appellant's Contends that his plea unintelligent made, because, the factual basis was given by the State on a defective indictment, and, if the case gone to trial no reasonable minded could have found him guilty for Count two and three. Only the DUI Manslaughter that the factual basis was correct.
There was no evidence put forth that the victims in Count two or three meet the elements of statute Miss. Code Ann. Section 63-11-30(5) which provides in relevant part;

> "... Causes the death of another or mutilates, disfigures, permanently disables or destroys the tongue, eye, lip, nose or any other limb, organ or member of another ...."

The State put nothing into record at plea hearing on "permanent disabilities" of victims Katilla Hakimzadeh or Brandon E Marshall. However, no factual basis was otherwise established upon which the Court could place the Appellant's Conduct within the ambit of that defined as Criminal. That's why Appellant plea was unintelligent and involuntary made to the Court. See Haskin -v- State, 118 So. 3d at 106.

Appellant further state it is clear from the record that the trial Court failed to inform him of the elements of Miss. Code Ann. Section 63-11-30(5) and the minimum and maximum sentence, the elements of DUI Mayhem specifically lack the elements described in the Mayhem, one requiring "permanent" injury. As a matter of fact, the trial court's erred because it never mention neither charged. Citing Austin -v- State, 734 So.2d 234 (Miss. 1999).

Appellant's contends that the trial Court erred or failed to inform him of the Maximum and minimum Sentence during the plea and Sentencing proceedings. The Uniform Rules of Circuit Court, Rule 8:04 provides; (A)(4)(E); It is the duty of the trial Court to address the defendant personally and to inquire and determine ... that the accused understands ... the maximum and minimum penalties provided by law."

Appellant further state that this was not done at all. So, therefore, this Court should reversed and remanded. See Hall-v-State, 800So.2d at 1204-05 (Miss. 2001).

Throughout the entire plea colloquy Appellant is never advised of any of the above information

or argument before this Court there has been many cases law that this Court reversed on this issue.

Appellant's Miranda Rights was Violated

Appellant's contends that he should have argued under ineffective assistance of Counsel about his miranda rights was violated. There is nothing in the discovery papers or trial Court about how Hattiesburg Police Department violated Appellant's miranda right, before him. Appellant's further state that his miranda rights was not read when he was arrested and question. Mr. Pittman only brought to the Court's attention about the intoxilyzer, that appellant did not understand his rights. Appellant's contends that he told Dr. Karen Austin to inform the Asst. District Attorney before Court that his Constitutional rights has been violated, because, he did not understand his miranda and intoxilyzer rights. Even the Court erred before he never entertained the issue at plea or sentencing hearing. This issue is more than ineffective assistance of Counsel, it a violation of 5th, 6th and

14th Amendments of the United States Constitutional. If these Constitutional is violated, than Appellant has a right to a new trial. Should this Court reversed and remanded Appellant's case for this violation?

Appellant's Rights TO Speedy Trial Was Violated

Appellant's Contends that the trial Court's erred in not grant his Post-Conviction Relief on the Speedy Trial when filed under ineffective assistance of Counsel. Appellant's further state that he have a Constitutional right under the 4pth and Sexth Amendments of the United States Constitutional to a speedy trial.

The trial's Court issued in the dismissing part of the speedy trial, that Appellant's waived his right when pleading guilty. Appellant state that a plea was involuntary made on.

Appellant further state that he had an "iron clad" Constitutional speedy trial challenge. Appellant speak no english, an "illegal alien" in this State, but, still deserved the right to a speedy trial. But, the State held him in jail for 480 days without any hearing, knowing that Appellant could not

bond out of jail, because he is an illegal alien. So, all the time delay in Appellant's Case was the fault of the State and the Counsel not the Appellant. See McVeay -v- State, 754 So. 2d at 489 (Miss. Ct. App. 1999). "The rule in Mississippi is that a delay of more than "eight months' from arrest to trial is presumptively prejudicial under constitutional consideration." See Jenkins -v- State, 607 So. 2d. 1138-39 (Miss. 1992); Smith -v- State 550 So. 2d 406, 408 (Miss. 989) quoting McVeay -v- State, 754 So. 2d. at 489 (Miss. Ct. App. 1999). The Court of Appeals of this State asserted that 424 days in McVeay from the date of arrest to the date of his 'plea' violated his Sixth Amendment right to a speedy trial.

Appellant was arrested July 11, 2004 and the date of his plea was August 16, 2005. This case falls under McVeay supra.
Appellant further state that his plea of guilty should be vacated and should not be dismissed by this Court for any reasons, because it is a violation of Appellant statutory and constitutional rights under the Fifth and especially his Sixth Amendment.

Appellant is an 'illegal alien' a Citizen of Mexico and did not know the laws of this state or the United States and depended on Counsel to protect his rights, which included his right to a fast and speedy trial among others. It is not like the trial Court did not know how long Appellant had been in jail. (T. 5/L. 13-21).
Q. For how long? A. A year and a month."
But, the trial Court never dismissed the case nor issued any ruling at the plea hearing.
In other words, the trial Court judge after he asked the Questioned but did nothing to correct it.

However, in a case involving a Mississippi prisoner, the Fifth Circuit held that an issue of ineffective assistance of counsel existed where the defendant had plead guilty, after being told by defense Counsel that there was no legitimate purpose in pursuing a speedy trial Claim because the defendant had failed to affirmatively assert his right to be tried promptly. Cite Nelson -v- Hargett, 989 F.2d 847 (5th Cir. 1993).

> "Among the basic duties which defense counsel owes his client is the duty of loyalty and the duty to consult with the defendant on important decisions." Strickland -v- Washington, 466 U.S. at 690, 104 S.Ct. at 2064 (1984).

Appellant asking this Court to reversed and remanded his case on this important issue for a trial Court review.

Whether the trial's Court Erred in Sentencing Appellant's Without Counsel

Appellant's Contends that the trial court failed to entertained his post-Conviction relief argument on his defense counsel was not presented at his sentencing phase. Should this be an issue to reversed the trial's Court? When the Circuit Court Judge Know or should have known that Appellant's Counsel was not presented at the sentencing hearing. This Court can review the Court Reporter, Mr. Albert B. Singley, CSR#1119 certified copy of the sentencing transcripts conducted on August 16, 2005, and the record reflect that Counsel was not there, and Mr. Karen Austin is not a lawyer. But, the Circuit Judge Hon. M. Eubanks tried to protect

Mr. Ed Pittman by stating this part (Court Paper 130) See Exhibit (B) pg 2 line 1) In Open Court, August 5, 2005.
The trial Judge Hon. Lubonka knows that Mr. Pittman was not there. Because in previously plea transcript shows that sentencing was defurred to a later date. Once again Dr. Karen Austin 'is not an attorney' and the date was not August 5, 2005 is clearly indicated by the Certificate of Court Reporter dated "this is the 16th day of August, 2005.

Appellant's further state that the trial court was in error as well as his attorney for not being present in court. But since Appellant an "illegal alien" than the judicial system failed him for being fair and impartial.

Mississippi Code Annotated § 99-15-15(1994) declares: "When any person shall be charged with a felony, misdemeanor punishment or punishable by confinement for 90 days, or more, or commisson of an act of delinquency, the Court or the judge in vacation, being satisfied that such person is an indigent person and is unable to employ counsel, may, in the discretion of the Court, appoint counsel to defend him. Such appointed counsel shall have such representation available at every critical stage of the proceedings against him where a substantial right may be effected."

Appellant's contends that Mr. Pittman had advised him after the plea hearing by Dr. Karen Austin interpreting for Mr. Pittman that at sentencing Appellant would received a concurrent sentences. In which Appellant did not what "Concurrent or Consecutive" mean, and Dr. Karen Austin not an attorney that could have objected to it at sentencing render Mr. Pittman

ineffective assistance of Counsel. And Hon. Eubanks failed as a sworn official to follow the law.

Appellant state once again that sentencing is a 'critical stage' and appointed of Counsel or representation of Counsel is needed. And if this law is not followed than his sentenced is invalid by the Court.

Appellant's contends that this Court must reversed the trial Court's dismissed of the Post-Conviction Relief, and remanded it with instruction back to the lower Court for correction.

Conclusion

Appellant pray that this Court reversed and remanded his post-conviction relief back to the lower's Court. For Appellant pray that this Court vacate the DUI Mayhem Conviction and Sentenced.

Respectfully Submitted this 15th day of March, 2007.

Alejandro Aguirre Moreno
Alejandro Aguirre Moreno #114415
SMCI-II, C-2 Bldg. B-Zone
P.O. Box 1419
Leakesville, MS. 39341

Certificate of Service

I, Alejandra Aguirre Moreno, certify that today, March —, 2007, a copy of the Brief for Appellant, a copy of the Record Excerpts, has been mailed to the Clerk of the Court, with a true and correct copy to the following:

Hon. Jim Hood, Attorney General
Mississippi State Attorney General Office
P.O. Box 220
Jackson, Ms. 39205

Alejandro Aguirre Moreno
Alejandro Aguirre Moreno #114415