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**IN THE COURT OF APPEALS OF MISSISSIPPI**

**No. 2007-CA-0213-COA**

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**PAUL TAYLOR**

**Appellant**

**vs.**

**STATE OF MISSISSIPPI**

**Appellee**

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**FILED**

**AUG 31 2007**

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SUPREME COURT  
COURT OF APPEALS

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**BRIEF OF APPELLEE**

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**ORAL ARGUMENT IS NOT REQUESTED**

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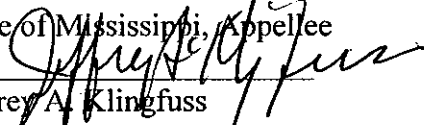
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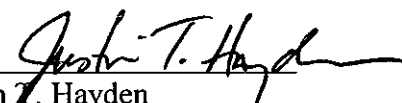
**Paul Taylor, Appellant v. State of Mississippi, Appellee**  
**No. 2007-CA-0213-COA**

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 the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Appellant Paul Taylor;
2. Appellee State of Mississippi, Mississippi Attorney General;
3. Honorable Judge Andrew Baker;
4. Charles E. Miller, Counsel for Appellant;
5. John W. Champion, District Attorney.

This the 31<sup>st</sup> day of August, 2007.

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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**PAUL TAYLOR**

**APPELLANT**

**VS.**

**NO. 2007-CA-0213-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE ISSUES**

- I. WHETHER THE PERFORMANCE OF TAYLOR'S COUNSEL WAS DEFICIENT.
- II. WHETHER THE TRIAL COURT ERRED BY ACCEPTING THE GUILTY PLEA OF TAYLOR.
- III. WHETHER THE TRIAL COURT ERRED BY NOT GRANTING A HEARING ON ACTUAL INNOCENCE.
- IV. WHETHER THE TRIAL COURT ERRED BY NOT GRANTING AN EVIDENTIARY HEARING AS REQUESTED IN TAYLOR'S POST-CONVICTION MOTION.
- V. WHETHER THE SENTENCE WAS EXCESSIVE.

### **STATEMENT OF THE CASE**

Paul Taylor pled guilty to selling a controlled substance. He now petitions this Honorable Court, after his motion for post-conviction relief was denied by the court below, alleging: (1) that his counsel below was ineffective, (2) the court below erred by accepting his guilty plea without factual basis, (3) the court erred by not granting a hearing on actual innocence, (4) the trial court erred by denying his motion for post-conviction relief and (5) his sentence was excessive. Taylor prays that this Honorable Court vacate his conviction, set his sentence aside or grant him an evidentiary hearing.

### **STATEMENT OF FACTS**

Paul Taylor (hereinafter "Taylor") is a fifty-year-old man, who has physical impairments and chronic pain that requires daily morphine treatments. (C.P. 72-73.) On December 17, 2003, Taylor illegally sold to another individual, one hundred dollars (\$100) worth of morphine. (C.P. at 55.) On January 12, 2004, he sold another five hundred dollars (\$500) worth of the same drug, and then an additional seven hundred dollars (\$700) worth of morphine four days later (January 16, 2004). (C.P. at 57, 79.)

Law enforcement officers had been monitoring and maintaining video surveillance each drug transaction. (C.P. at 55-57.) Taylor was arrested shortly thereafter, and indicted on one charge in Tate County on August 17, 2004 (Criminal Cause CR2004-129BT), and three charges in Panola County on August 25th, October 1st, and December 3rd of 2004 (Criminal Cause(s): CR2004-14BP2; CR2004-36LP1; & CR2004-47BP1).

Taylor entered a guilty plea on three counts of selling a controlled substance in violation

of Miss. Code. Ann. § 41-29-139(a)(1).<sup>1</sup> (C.P. at 58, 73.) The Honorable Judge Andrew C. Baker sentenced Taylor to nine (9) years, with ten (10) suspended on all three charges to run concurrent with each other. (C.P. at 97-98.) Taylor then filed a deficient<sup>2</sup> motion for post-conviction relief, which was rejected by the court below in an order dated December 27, 2007, pursuant to Miss. Code Ann. § 99-39-1, et seq. (C.P.18-20.) He comes now, appealing the denial of that motion and raising the issues stated above.

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<sup>1</sup>A fourth indictment was remanded in return for Taylor's guilty plea to the three other charges. (C.P. at 80).

<sup>2</sup>Taylor's motion for post-conviction relief was not sworn, nor accompanied by affidavit in support.



### **SUMMARY OF THE ARGUMENT**

The record and testimony reflect that Taylor was not mentally incompetent when he pled guilty to these charges, thus his counsel was not deficient for not raising that issue. If Taylor's representation at trial was in any way deficient, it did not effect the outcome of the case. The evidence and testimony shown in the record leave no doubt that Taylor is guilty of selling a controlled substance. For that reason, the court had adequate factual basis to accept his guilty plea, and did not err by failing to grant an evidentiary hearing or find actual innocence. Finally, the sentence Taylor received was not excessive, but was an extreme mitigation from the maximum penalties statutorily available.

### **STANDARD OF REVIEW**

"This [C]ourt will not disturb the trial court's decision to deny post-conviction relief, unless the trial court's decision proves to be clearly erroneous." *Johnson v. State*, 2007 WL 2034716 (Miss.App. 2007) *citing* *Arnold v. State*, 912 So.2d 202, 203 (Miss.App. 2005). "Sentencing is within the discretion of the trial court and will not be disturbed on appeal absent a finding of abuse of discretion." *Kirksey v. State*, 728 So.2d 565, 568 (Miss. 1999.) All questions of law presented before the Court shall be reviewed de novo. *Felder v. State*, 876 So.2d 372, 373 (Miss. 2004); *Brown v. State*, 731 So.2d 595, 598 (Miss. 1999).

## ARGUMENT

### **I. TAYLOR DID NOT RECEIVE INEFFECTIVE COUNSEL.**

Petitioner Taylor first argues that he received ineffective counsel, of which did not raise mental competency, jurisdictional, severance or “other” issues.<sup>3</sup> An exquisite overview of the proper analysis of an ineffective counsel claim can be found in *Vandergriff v. State*, 920 So.2d 486, 489-490 (Miss.App. 2006):

The test for ineffective assistance of counsel is stated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984). The defendant bears the burden of establishing ineffective assistance of counsel, and he must show that (1) defense counsel’s performance was deficient when measured by the objective standard of reasonable professional competence, and (2) that the defendant was prejudiced by counsel’s failure to meet that standard. *Please v. State*, 766 So.2d 41, 42 (Miss.App. 2000) (citing *Wiley v. State*, 750 So.2d 1193, 1198 (Miss. 1999)). When as here, the defendant entered a guilty plea, the question is whether “there is a reasonable probability that had counsel’s assistance been effective, he would not have pled guilty, but would have insisted on going to trial.” *Id.* at 43. (citing *Bell v. State*, 751 So.2d 1035, 1038 (Miss. 1999)). “[H]e must specifically alleged facts showing that effective assistance of counsel was not in fact rendered, and his must allege with specificity the fact that but for such purported actions by ineffective counsel, the results of trial court would have been different.” *Roby v. State*, 861 So.2d 368, 370 (Miss.App. 2003) (quoting *Smith v. State*, 434 So.2d 212, 219 (Miss. 1983)).

*Vandergriff v. State*, 920 So.2d 486, 489-490 (Miss.App. 2006).

First, the record in this case, similar to that found in *Vandergriff*, indicates that Taylor was well informed by his representation and the court below of the consequences of his guilty plea, the rights he waived with the plea and the maximum and minimum sentences for his crimes. He acknowledged that he was pleased with the representation of his counsel, and repeatedly assured the court below that he was mentally competent. (C.P. 52-66.) Further, he submitted to the court

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<sup>3</sup>As he claims that he received ineffective counsel of whom did not raise these issues, Taylor’s brief makes no specific allegations as to what his representation below should have been raised with regards to any of the other issues.

below a petition that he knowingly, voluntarily and intelligently made his guilty plea, (C.P. 40-45) and his own wife testified in the proceedings below that Taylor “has always has a stable mind, he’s thinking all the time, he’s at a normal. . .” (C.P. 85 at 3-4.)

Second, this Court has previously held “the circuit courts of this state have subject matter jurisdiction of prosecutions of criminal offenses.” *Edwards v. State*, 749, SO.2d 291, 293 (Miss.App. 1999) *citing Jefferson v. State*, 556 So.2d 1016, 1020 (Miss. 1989). “The circuit court obtains subject matter jurisdiction over a criminal offense when the defendant is served with an indictment issued by the grand jury.” *Caston v. State*, 949 So.2d 852 (Miss.App. 2007) *citing* West’s A.M.C. Const. Art. 3, § 27; West’s A.M.C. § 99-7-81. Jurisdiction was proper in the court below.

In sum, Taylor has made no fact specific allegations of the deficiency of the representation he received, nor has he shown that he was mentally incompetent when he pled guilty, and received ineffective counsel with regards to jurisdiction or any other issues. If Taylor received ineffective representation, there is still nothing in the record to indicate a reasonable probability that had counsel’s assistance been effective, he would not have pled guilty, but would have insisted on going to trial.

## **II. THE COURT PROPERLY ACCEPTED TAYLOR’S GUILTY PLEA.**

In arguing the court erred by accepting his guilty plea, Taylor cites URCC Rule 8.04(a)(3), which requires a factual basis for the guilty plea. Further, he states that there is no evidence he committed the crime of the sale of morphine. (A.B. 4.)

“The factual basis may be presented in several different ways. They include: testimony by an investigator for the prosecution, a brief recitation of facts that state the crime committed, or even live testimony from the defendant or witnesses.” *Brown v. State*, 2007 WL 2245910

(Miss.App. 2007) (*citing Corley v. State*, 585 So.2d 765, 767 (Miss. 1991)). Consequently, the record shows Taylor stated under oath, that he needed money to pay bills, he had been stockpiling the morphine over a period of time, so he sold them. (C.P. 75.) Further, the prosecution was prepared to present at trial, numerous witnesses to the drug transactions (buyers), video surveillance of each incident and crime lab reports indicating that it was morphine that was sold by Taylor to others. (C.P. 55-59.)

In reviewing whether or not there was a factual basis for the guilty plea, this Honorable Court is to look to the entire record. *Corley*, 585 at 768. Here, the entire record makes sufficiently clear that there is an overwhelming amount of evidence against Taylor, and ample factual basis for his guilty plea.

### **III. A HEARING ON ACTUAL INNOCENCE WAS NOT WARRANTED.**

Taylor asserts that he is actually innocent of the crimes to which he has previously pled guilty, and requests an evidentiary hearing. However, “[a] criminal defendant who has entered a guilty plea cannot litigate his actual guilt on appeal from a denial of post-conviction relief, unless the defendant can show that the guilty plea was not knowingly, voluntarily, or intelligently entered. *Peckinpough v. State*, 949 So.2d 86, 89 (Miss.App. 2006); *Graham v. State*, 914 So.2d 1256, 1259 (Miss.App. 2005). “A guilty plea is voluntary and intelligent only if the defendant has been advised ‘concerning the nature of the charge against him and the consequences of the plea.’” *Id.* (*citing Alexander v. State*, 605 So.2d 1170, 1172 (Miss. 1992). “The defendant must prove by a preponderance of the evidence that his guilty plea was made involuntarily.” *Vandergriff v. State*, 920 So.2d 486, 490 (Miss.App. 2006).

Taylor testified that it had been explained to him and he fully understood the charges against him, the maximum and minimum sentences for those crimes, his constitutional rights and

that by pleading guilty, he waived his right to a jury trial, right to confront adverse witnesses, and protection from self-incrimination. (C.P. 52-56.) Taylor also signed a Petition to Enter Plea of Guilty, which also clearly stated the consequences of pleading guilty. (C.P. 40-45.) The Court “accord[s] great weight to statements made by the defendant under oath and in open court.” *Vandergriff*, 920 So.2d at 490. Taylor’s guilty plea was voluntary and intelligent, thus he has waived his right to litigate actual guilt on appeal from the denial of his motion for post-conviction relief.

Even if Taylor could show that his plea was not knowingly, voluntarily, or intelligently entered, the facts and evidence against him proves his guilt. “Actual innocence means factual innocence, not mere legal insufficiency.” *Trotter v. State*, 907 So.2d 397, 401 (Miss.App. 2005); *Sawyer v. Whitley*, 505 U.S. 333, 339, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). “To demonstrate actual innocence, the petitioner must demonstrate that, ‘in light of all the evidence,’ ‘it is more likely than not that no reasonable juror would have convicted him.’” *Id.* (quoting *Bousley v. United States*, 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)). Other than his admission to the illegal sale of morphine, law enforcement officers have video surveillance of each drug transaction and witnesses to testify to each occasion. Taylor’s claim of actual innocence is without merit.

#### **IV. THE TRIAL COURT PROPERLY DENIED TAYLOR’S MOTION FOR POST CONVICTION RELIEF.**

It is Taylor’s claim that the lower court erred in its failure to grant an evidentiary hearing when it denied his motion for post-conviction relief. In support of his argument, Taylor cites *Myers v. State*, which held a petitioner is entitled to an evidentiary hearing if he has filed a post-conviction motion which states a claim upon which relief may be granted, if proven. *Myers v.*

*State*, 583 So.2d 174, 176 (Miss. 1991), (relying on *Neal v. State*, 525 So.2d 1279, 1280-1281 (Miss. 1987)). Taylor's motion for post-conviction relief was not sworn, nor accompanied by affidavit in support, thereby rendering it deficient. See Miss. Code Ann. § 99-39-9(1)(d) and (3). As the court below noted, Taylor's "motion should have never been filed." (C.P. 19.) Further, the court instructed Taylor that he could file another petition, but if it was not in compliance with Miss. Code Ann. § 99-39-9, it would be dismissed or returned, unfiled. *Id.* The record shows no attempt by Taylor to cure these gross deficiencies.

#### **V. TAYLOR DID NOT RECEIVE AN EXCESSIVE SENTENCE.**

Last, Taylor contends that his received sentence was excessive. In support of this argument he cites two cases where punishments were grossly disproportionate to the crimes committed.<sup>45</sup> Such, however, is not this case in the present matter.

"Sentencing is within the discretion of the trial court and will not be disturbed on appeal absent a finding of abuse of discretion." *Kirksey v. State*, 728 So.2d 565, 568 (Miss. 1999.) "[T]he general rule in this state is that a sentence cannot be disturbed on appeal so long as it does not exceed the maximum term allowed by statute." *Flemming v. State*, 604 So.2d 280, 302 (Miss. 1992). Upon entering his guilty plea, the Court could have sentenced Taylor to a maximum of thirty (30) years in prison, and a fine of one million dollars (\$1,000,000.00) for each offense. Miss. Code Ann. §§ 41-29-139; (C.P. at 98.) Taylor acknowledged, before he was sentenced, that he knew of the maximum and minimum sentences for his crime. *Id.* Nine (9) years, with ten (10)

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<sup>45</sup>Defendant received forty-year sentence for possessing less than nine ounces of marijuana. *Hutto v. Davis*, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed. 2d 556 (1982).

<sup>5</sup> Life without parole for uttering a \$100 bad check is grossly disproportionate. *Solemn v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed. 2d 637 (1983).

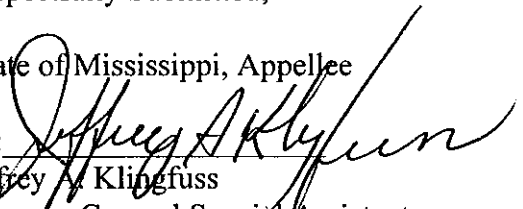
suspended on all three charges to run concurrent with each other is a vast mitigation from the statutorily available maximum sentence and far from excessive. This claim, too, is without merit.

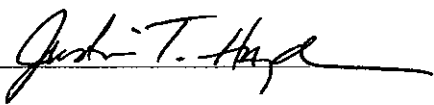
## CONCLUSION

This Honorable Court should find Taylor was not mentally incompetent when he pled guilty to these charges, thus his counsel was not deficient in raising that issue. If Taylor's representation at trial was in any way deficient, it did not effect the outcome of the case. The evidence and testimony shown in the record leave no doubt that Taylor is guilty of selling a controlled substance. For that reason, the court had sufficient factual basis to accept Taylor's guilty plea, and it did not err by failing to grant an evidentiary hearing or find actual innocence. Finally, the sentence Taylor received was not excessive, but was an extreme mitigation from the maximum penalties statutorily available.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

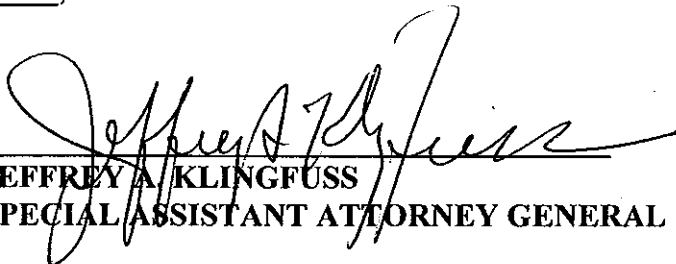
**I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing BRIEF FOR THE APPELLEE to the following:**


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