

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIAN CARREIRO

APPELLANT

VS.

CAUSE NO. 2007-CA-00280-COA

STATE OF MISSISSIPPI

APPELLEE

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 the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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STATEMENT OF THE ISSUES

1. The counsel provided to Mr. Carreiro was so deficient and ineffective that Mr. Carreiro's constitutional rights were violated;
2. The trial court was without jurisdiction to impose the sentence;
3. The guilty plea and sentence imposed were unlawful and violated Mr. Carreiro's constitutional rights;
4. The sentence imposed was in violation of the United States Constitution and the Constitution of the State of Mississippi; and

STATEMENT OF THE CASE

On or about August 3, 2004, Brian Keith Carreiro was indicted by the Grand Jury of Lincoln County, Mississippi in a two count indictment which alleged that Mr. Carreiro violated "Section 97-5-33(2) of the Mississippi Code of 1972" and that Mr. Carreiro violated "Section 97-5-23 of the Mississippi Code of 1972, this being count two (2) of the indictment..." (R. 25).

On September 17, 2004, Mr. Carreiro executed a Know Your Rights Before Pleading form. (R. 67).

On September 17, 2004, Mr. Carreiro was taken into the chambers of Judge Smith, wherein he purportedly entered a guilty plea to both counts of the indictment against him as demonstrated by the Transcript of Plea and Sentencing. (R. 69).

On September 17, 2004, the Court entered a Sentencing Order which ordered as follows: as to Count One of the Indictment, the Court sentenced Mr. Carreiro to a term of twenty (20) years in the custody of the Mississippi Department of Corrections with five (5) years to serve and the remaining fifteen (15) years to be served on post release supervision with the first five (5) years to be reporting and the last ten (10) years to be non-reporting. (R. 78). As to Count Two of the Indictment, the Court sentenced Mr. Carreiro to a term of fifteen (15) years with five (5) years to serve in the custody of the Mississippi Department of Corrections with ten (10) years on post release supervision, the first five (5) years to be reporting and the remaining five (5) years to be non-reporting. (R. 78). The sentences were ordered to be served consecutively. (R. 78). The Court ordered the time to serve be day for day. (R. 78). The sentencing order contained a provision stating that "[t]he Defendant is ordered to complete whatever psychiatric counseling is available to him." (R. 78.) The sentencing order also states, inter alia, that "upon his release from incarceration, the Defendant is barred from entering Lincoln, Pike and Walthall counties in

Mississippi.” (R. 78).

On or about May 23, 2006, Mr. Carreiro filed his Petition for Post-Conviction Relief in the Lincoln County Circuit Court pursuant to Miss. Code Ann. § 99-39-1 et. seq. seeking review of his case, revocation of his pleas of guilty, dismissal of the charges against him and an order directing the Mississippi Department of Corrections to immediately release him from custody. (R. 5).

On October 8, 2007, a hearing was had in the Circuit Court of Lincoln County, Mississippi before the Honorable Judge David H. Strong, Jr., on the Motion for Post-Conviction Relief filed by Mr. Carreiro. (RT 10-53)

On or about November 28, 2007, the Lincoln County Circuit Court rendered its Order denying the Motion for Post-Conviction Relief. (R. 112).

On or about December 21, 2007, Brian Carreiro filed his Notice of Appeal herein.

FACTS

On or about August 3, 2004, Brian Keith Carreiro was indicted by the Grand Jury of Lincoln County, Mississippi in a two count indictment which alleged that Mr. Carreiro violated “Section 97-5-33(2) of the Mississippi Code of 1972” and that Mr. Carreiro violated “Section 97-5-23 of the Mississippi Code of 1972, this being count two (2) of the indictment...” (R. 25). The indictment stemmed from an investigation conducted by the Lincoln County Sheriff’s Department in June of 2004. The investigation began after the Sheriff’s wife, Mrs. Wiley Calcote, allegedly found pictures of her seven year old daughter on a camera owned by Mr. Carreiro. The pictures displayed the back and feet of a fully clothed child, lying under a comforter. (R. 27).

The camera and photographs were allegedly discovered in Gulf Shores, Alabama on or

about June 4, 2004, while the Sheriff and his wife were on vacation in Gulf Shores, Alabama according to the Investigator Report. (R. 28). Mr. Carreiro had accompanied the Sheriff, Mrs. Calcote and their daughter to Gulf Shores, Alabama. (R. 28). Mr. Carreiro worked for the Calcotes in a domestic capacity and cleaned their house for them in exchange for room and board. (R. 28). After discovery of the photographs, Sheriff Calcote brought Mr. Carreiro back to Lincoln County, Mississippi where he was interrogated by two deputies of the Lincoln County Sheriff's Department and at which time Mr. Carreiro gave a written statement and was immediately arrested and charged with the aforementioned violations of Mississippi law. (R. 29).

Attorney Gus Sermos was appointed by the Lincoln County Circuit Court to represent Mr. Carreiro after his arrest and indictment. The Lincoln County District Attorney's office provided Mr. Sermos with a copy of the photographs, a copy of the "Investigators Report" and a copy of Mr. Carreiro's alleged hand written confession. Mr. Sermos conducted no more investigations and immediately began attempting to persuade Mr. Carreiro to enter a guilty plea to all charges. (R. 31-38). During the course of his representation, Mr. Sermos failed to properly advise Mr. Carreiro of the elements that make up the charges against Mr. Carreiro and failed to ensure that Mr. Carreiro fully understood the consequences of entering a guilty plea. (R. 31-38). Mr. Carreiro has a functional I.Q. of approximately 76 and has been diagnosed with schizophrenia as demonstrated by Mr. Carreiro's medical records in this case. (R. 39-66). Mr. Sermos failed to fully investigate Mr. Carreiro's capacity to understand the nature of the elements of the charges and failed to properly advise Mr. Carreiro of the elements of the charges.

On or about September 17, 2004, Mr. Carreiro, acting upon advice of counsel signed a Know Your Rights Before Pleading form. (R. 67). Mr. Carreiro was then taken into the **chambers** of Judge Smith, wherein he entered a guilty plea to both counts of the indictment

against him as demonstrated by the Transcript of Plea and Sentencing. (R. 69). As to Count One of the Indictment, the Court sentenced Mr. Carreiro to a term of twenty (20) years in the custody of the Mississippi Department of Corrections with five (5) years to serve and the remaining fifteen (15) years to be served on post release supervision with the first five (5) years to be reporting and the last ten (10) years to be non-reporting. (R. 78). As to Count Two of the Indictment, the Court sentenced Mr. Carreiro to a term of fifteen (15) years with five (5) years to serve in the custody of the Mississippi Department of Corrections with ten (10) years on post release supervision, the first five (5) years to be reporting and the remaining five (5) years to be non-reporting. (R. 78). The sentences were ordered to be served consecutively. (R. 78). The Court ordered the time to serve be day for day. (R. 78). The sentencing order contained a provision stating that “[t]he Defendant is ordered to complete whatever psychiatric counseling is available to him.” (R. 78.) The sentencing order also states, inter alia, that “upon his release from incarceration, the Defendant is barred from entering Lincoln, Pike and Walthall counties in Mississippi.” (R. 78).

On or about May 23, 2006, Mr. Carreiro filed his Petition for Post-Conviction Relief in the Lincoln County Circuit Court pursuant to Miss. Code Ann. § 99-39-1 et. seq. seeking review of his case, revocation of his pleas of guilty, dismissal of the charges against him and an order directing the Mississippi Department of Corrections to immediately release him from custody. (R. 5).

On or about November 28, 2007, the Lincoln County Circuit Court rendered its Order denying the Motion for Post-Conviction Relief. (R. 112).

Aggrieved of this decision, Brian Carreiro appeals to this honorable Court.

SUMMARY OF THE ARGUMENT

I. The Circuit Court of Lincoln County, Mississippi Did Not Have Jurisdiction of the Subject Matter in this Case in that there was no showing that the pictures which form the basis for Count I of the Indictment were taken in Lincoln County, Mississippi. There is no proof whatsoever that the pictures were taken in Lincoln County, Mississippi, and in fact, the facts support the finding that the pictures were taken in Alabama. If the Lincoln County Circuit Court was without jurisdiction in this matter, then the sentence in this case is unlawful and must be vacated.

II. The guilty plea and sentence imposed were unlawful and violated Mr. Carreiro's constitutional rights. First, no factual basis existed to support a finding of guilt in this matter in that the pictures which form the basis for this case do not rise to the level of a crime under the statute and there was no evidence whatsoever that the defendant touched the buttocks of the minor child. Second, Brian Carreiro's entry of a guilty plea in this case was not freely, knowingly, voluntarily and intelligently entered in that the Judge did not, and could not have, found a legally factual sufficient basis for the plea in this matter. Third, Brian Carreiro has never been adjudicated guilty by the circuit court of Lincoln County, Mississippi in that there was never an acceptance of the guilty plea, never an adjudication of guilt and no Order of Conviction was ever entered by the Court.

III. The sentencing order is which banishes Mr. Carreiro from three counties is unlawful and unsupported by a finding from the court. The trial court failed to state any reasons for reaching this decision of banishing the Defendant from Pike, Walthall and Lincoln Counties and therefore, it is unconstitutional and should be dismissed or in the alternative, this matter should be remanded for a hearing to determine the validity of this banishment provision.

IV. Mr. Carreiro was denied effective assistance of counsel in this matter and his counsel's deficiencies severely prejudiced Mr. Carreiro's rights. But for the deficiencies of counsel, the result in Mr. Carreiro's case would have been vastly different. First, Mr. Carreiro's counsel never properly informed him of the elements contained in the count one (1) of the indictment. Moreover, Mr. Carreiro's counsel failed to inform Mr. Carreiro that the State's evidence did not meet the elements in counts one (1) and two (2). Second, Mr. Carreiro suffers from an extremely limited I.Q. which affects his ability to comprehend, assimilate information and make intelligent informed decisions. Third, Mr. Carreiro suffers from schizophrenia and had been deprived of his medication for an extended amount of time prior to entry of his guilty plea. Counsel for Mr. Carreiro never investigated the issue of intelligence and never raised the issue of competency to the Court. (RT. 21-24). Finally, Mr. Carreiro's counsel allowed his own feelings to interfere with his duty to properly investigate, analyze the case and defend his client. All of these errors by defense counsel severely prejudiced Mr. Carreiro.

STANDARD OF REVIEW:

“A trial court's finding of fact in post-conviction relief cases will not be overturned by an appellate court unless found to be clearly erroneous.” *Jones v. State*, 976 So.2d 407, 410 (Miss. Ct. App. 2008) (citing *Hill v. State*, 940 So.2d 972, 973 (Miss.Ct.App.2006) (citing *Boyd v. State*, 926 So.2d 233, 235 (Miss.Ct.App.2005)). “However, questions of law are reviewed de novo.” *Id.*

ARGUMENT:

I. THE CIRCUIT COURT OF LINCOLN COUNTY, MISSISSIPPI DID NOT HAVE JURISDICTION OF THE SUBJECT MATTER IN THIS CASE.

In a criminal case, venue is jurisdictional, must be proved, and may be raised for the first time on appeal. *Crum v. State*, 216 Miss. 780, 788, 63 So.2d 242, 245 (1953). The venue of a criminal offense is in the county where the crime was committed, unless otherwise provided by law. *Miss. Code Ann. § 99-11-3(1) (Rev.2000)*. Proof of jurisdiction may be shown either by direct or circumstantial evidence. *Smith v. State*, 646 So.2d 538, 541 (Miss.1994). In Mr. Carriero's case, there was no showing that the pictures were taken in Lincoln County, Mississippi. The pictures were of the minor child, K.C. asleep in a swimsuit. The Sheriff's family and Mr. Carreiro were in Gulf Shores, Alabama for a wedding when the pictures were allegedly taken and where the film was developed. (R. 28). As stated in the Investigator Report, the child's father stated that the child's mother “showed him the pictures on 06-04-04 while they were in Gulfshores, Alabama.” (R. 28.) The child's father then left Gulfshores, Alabama and “traveled back to Brookhaven with Brian Carreiro without telling him about the photos.” (R. 28). There is a beach and swimming facilities in Gulf Shores, Alabama, where Mr. Carriero and the Calcotes were staying. There is no proof whatsoever that the pictures were taken in Lincoln County,

Mississippi, and in fact, the facts support the finding that the pictures were taken in Alabama. The trial Court never made a finding that any of the offenses took place in Lincoln County, Mississippi, although, Judge Strong made a finding of jurisdiction in his Order denying Post-Conviction Relief. The State never offered any facts at the hearing regarding the guilty plea that the pictures were taken in Lincoln County, Mississippi and therefore no factual basis for jurisdiction could be found by the trial court. There was no testimony brought forward at the hearing on the Motion for Post-Conviction Relief that the pictures were taken in Lincoln County, Mississippi. As such, the Circuit Court of Lincoln County, Mississippi was without jurisdiction of the subject matter of this criminal case against Mr. Carreiro and the charges against him should be dismissed in toto.

II. THE GUILTY PLEA AND SENTENCE IMPOSED WERE UNLAWFUL AND VIOLATED MR. CARRIERO'S CONSTITUTIONAL RIGHTS.

A. No Factual Basis Existed to Support a Finding of Guilty in this Matter.

“[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.” *Jones v. State*, 976 So.2d 407, 411 (Miss.App.,2008) (*quoting Jones v. State*, 948 So.2d 499, 505(¶ 17) (Miss.Ct.App.2007) (*citing Graham v. State*, 914 So.2d 1256, 1259(¶ 8) (Miss.Ct.App.2005)). “In reviewing a defendant's claim that his guilty plea was not entered knowingly and voluntarily, [an appellate court] must determine if the trial court's finding was clearly erroneous.” *Jones v. State*, 976 So.2d 407, 411 (Miss.App.,2008) (*quoting Hall v. State*, 906 So.2d 34, 36(¶ 5) (Miss.Ct.App.2004) (*citing Swindoll v. State*, 859 So.2d 1063, 1065(¶ 9) (Miss.Ct.App.2003)).

Uniform Rules of Circuit and County Court Practice, Rule 8.04 imposes upon the Court

certain duties and obligations to insure that a plea is knowing, intelligent and voluntary. *See Hodgin v. State*, 702 So.2d 113, (Miss. 1997). The Court failed in its duty to Mr. Carreiro surrounding the plea. Rule 8.04 (A)(3) states

Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is a factual basis for the plea. A plea of guilty is not voluntary if induced by fear, violence, deception, or improper inducements. A showing that the plea of guilty was voluntarily and intelligently made must appear in the record.

Uniform Rules of Circuit and County Court Practice, Rule 8.04 (A)(3). In Mr. Carreiro's case, the Court failed to make a finding that his plea was voluntary. (RT. 1-9). The Court also failed to make an on the record determination that a sufficient factual basis existed for accepting Mr. Carreiro's guilty plea. In fact, the trial Court did not ask the State to explain the factual basis for the charges against Mr. Carreiro during the guilty plea hearing. (RT. 1-9). Had the Court merely inquired into the factual basis for the plea, it would have readily determined that Mr. Carreiro had committed no crime as to count one (1) and no crime as to count two (2).

The United States Supreme Court case of *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), provides the standard for determining whether a guilty plea is knowingly, voluntarily and intelligently made by a defendant. (*See also Vittitoe v. State*, 556 So.2d 1062 (Miss.1990)). "The record must reflect that the trial court thoroughly discussed with the defendant all of the consequences of a guilty plea, including the waiver of rights, satisfaction with one's attorney and advisement on the maximum and minimum penalties one can acquire for the crime committed." *Barnes v. State*, 803 So.2d 1271, 1274 (Miss. 2002) (*citing Alexander v. State*, 605 So.2d 1170 (Miss. 1992); *Gardner v. State*, 531 So.2d 805 (Miss. 1988)).

"A guilty plea may not be accepted where the defendant did not plead of his own volition." *Barnes v. State*, 803 So.2d 1271, 1274 (Miss. 2002) (*citing Boykin v. Alabama*, 395

U.S. 238 (1969)). "Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." *Barnes v. State*, 803 So.2d 1271, 1274 (Miss. 2002) (citing *Kercheval v. United States*, 274 U.S. 220 (1927)). Mr. Carreiro's guilty plea was simply erroneous as to count one. There was no factual basis for finding guilt under any circumstance as to count one. The Court wholly failed to make an inquiry into the factual basis for the plea. The record is devoid of any findings and is devoid of an adjudication of guilt.

Had the Court fulfilled its duty to make an on the record finding of a knowing, intelligent and voluntary waiver it would have prevented Mr. Carreiro from entering his guilty plea and, thus, Mr. Carreiro would not be incarcerated for the offenses in which he is presently incarcerated. A person cannot be convicted and incarcerated for a behavior that is not criminal. "Criminal statutes must be strictly construed, to avoid ensnaring behavior that is not clearly proscribed." *Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir., 1974). (See *Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952); *United States v. Resnick*, 299 U.S. 207, 209, 57 S.Ct. 126, 81 L.Ed. 127 (1936); *United States v. Edwards*, 458 F.2d 875, 880 (5th Cir., 1972), cert. den., *Huie v. United States*, 409 U.S. 891, 93 S.Ct. 118, 34 L.Ed.2d 148; *United States v. Fisher*, 456 F.2d 1143 (10th Cir., 1972)). The evidence in this case is not adequate to obtain a guilty plea.

As the Supreme Court stated in *Bell v. United States*, 349 U.S. 81, 83 (1955) "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." See also *U. S. v. Box*, 530 F.2d 1258 (5TH Cir. 1976); *U.S. v. Bridges*, 493 F.2d 918, (5th Cir., 1974). Moreover, one "is not to be subjected to a penalty unless the words of the statute plainly impose it." *Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 362 (1905). "When choice has to be made between two readings of what conduct

Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.” *U.S. v. Orellana*, 405 F. 3d 360 (5th Cir. 2005)(citing *Jones v. United States*, 529 U.S. 848, 849-50, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000) (citing *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22, 73 S.Ct. 227, 97 L.Ed. 260 (1952)). The language of the statute is clear and definite. The actions of Mr. Carreiro were not criminal. Clearly, the pictures in this case do not rise to the level of a criminal violation in Mississippi. Brian Carreiro should be absolved of those charges.

In this case the Court failed in its duty to explain the nature of the crime to Mr. Carreiro. In *McCarthy v. United States*, 394 U.S. 459 (1969), the Supreme Court held that counsel's statement that he explained the nature of the charges to defendant did not absolve the judge of his personal obligation to inform the defendant of the nature of those charges. *McCarthy*, 89 S.Ct. at 1173; *Id.* 89 S.Ct. at 1176 (Black, J. concurring). “Although a judge may have the district attorney read the indictment to the defendant in the judge's presence, instead of reading it to the defendant himself, a judge cannot personally assure himself that a defendant understands the nature of the offense with which he is charged without ensuring first-hand that both he and the defendant know what those charges consist of. Where some of the elements of the offense remain unstated, misunderstandings are likely to occur.” *United States v. Roberts*, 570 F.2d 999, 1011 (D.C.Cir.1977). In this case, the trial judge did not even require the district attorney to read the indictment to the defendant and the record in this case does not support a finding that the Judge and the defendant knew what the charges consisted of. “Whenever the Rule 11 disclosure is incomplete, there is a possibility of a misunderstanding; and whenever this possibility is present and the defendant before sentencing claims that it was a reality, the courts should be loathe to deny an accused his right to trial.” *Id.* This Court never advised Mr. Carreiro of the

charges against him. The Court never conducted an inquiry into the elements of the offense.

Under the aforementioned cases, the Court must vacate Mr. Carreiro's sentence.

Count one of the Indictment charged Mr. Carreiro with "willfully, unlawfully and feloniously photograph on K.C., a child under the age of eighteen years, engaging in sexually explicit conduct, to wit: lascivious exhibition of genital and/or pubic area of the said K.C., contrary to and in violation of Section 97-5-33 (2) of the Mississippi Code of 1972, ..." (R. 25). Mississippi Code Section 97-5-33 (2) states "No person shall, by any means including computer, photograph, film, video tape or otherwise depict or record a child engaging in sexually explicit conduct or in the simulation of sexually explicit conduct." If the trial court has inquired into the facts of this case and viewed the photographs, the Court would have known that Mr. Carreiro had committed no crime and could not plead guilty to such. The photographs in this case clearly show the back, the **fully clothed** buttocks, the legs and feet of what appears to be a small child lying under a blanket, presumably asleep. There is absolutely nothing in the photographs to suggest sexually explicit conduct as required by the plain language of the statute. The general rule is that penal statutes must be strictly construed. *Nelson v. City of Natchez*, 19 So.2d 747 (Miss. 1944). Under the plain language of the statute, Mr. Carreiro cannot be factually or legally guilty of the violations contained in count one of the indictment. In the case of *State ex rel District Attorney v. Winslow*, the Court stated that,

"[t]he legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid. If the meaning of a criminal statute cannot be judicially ascertained or if, in defining a criminal offense, it omits certain necessary and essential provisions which go to impress the acts committed as being wrongful and criminal, the courts are not at liberty to supply the deficiency, or undertake to make the statute definite and certain. If a statute uses words of no determinative meaning and the language is so general and indefinite as to embrace not only acts properly and legally punishable, but others

not punishable, it will be declared void for uncertainty. It is axiomatic that statutes creating and defining crimes cannot be extended by intendment. Purely statutory offenses cannot be established by implication. There can be no constructive offenses. Before a man can be punished, his case must be plainly and unmistakably within a statute. A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law."

State ex rel. Dist. Atty. v. Winslow, 45 So.2d 574 (Miss. 1950)(quoting 14 Am.Jur., Section 19, Pages 773-774.) The indictment charged Mr. Carreiro with taking a "photograph on K.C., a child under the age of eighteen years, engaging in **sexually explicit conduct, to wit: lascivious exhibition of genital and/or pubic area** of the said K.C., contrary to and in violation of Section 97-5-33 (2) of the Mississippi Code of 1972." (emphasis added). *Merriam-Webster's Dictionary of Law*, © 1996 Merriam-Webster, Inc., defines the word "lascivious" as "reflecting or producing sexual desire or behavior that is considered indecent or obscene." There is nothing remotely indecent or obscene depicted in the photographs that rise to the level of a crime under the laws of the State of Mississippi. The elements of the statute are simply not met. The State produced no evidence of a crime against K.C. by Mr. Carreiro. Moreover, the child is not "engaged" in any "sexually explicit conduct" as required by the statute. The photograph does not in any manner, mode or way display or depict a "lascivious exhibition of the genital and/or pubic area" that the statute requires. No crime existed and no crime was committed. Factually and legally, Mr. Carreiro is innocent of the charge contained in Count One (1) of the Indictment.

Count two of the Indictment charged Mr. Carreiro with "willfully, unlawfully and feloniously, for the purpose of gratifying his lust or indulging licentious sexual desires, touch the buttocks of one K.C., a female child under the age of sixteen years, with his hand, contrary to and in violation of Section 97-5-23 of the Mississippi Code of 1972. . . ." (R. 25). If the trial court has inquired into the facts of this case the Court would have determined that no factual basis for

this existed in that the minor child never stated that Mr. Carreiro touched her buttocks. (R. 28). However, the Court did not inquire into these facts at the guilty plea hearing in chambers and cannot with any reasonableness claim to have based its ruling on a basis in fact.

B. Brian Carreiro's Entry of a Guilty Plea in this Case Was Not Freely, Knowingly, Voluntarily and Intelligently Entered.

For a guilty plea to be valid, the defendant must be instructed on the elements of the charge against him. *Gilliard v. State*, 462 So.2d 710, 712 (Miss.1985). It is clear from the evidence in the case, along with a reading of the transcript of the entry of the guilty plea, that Mr. Carreiro was not informed of the "elements" to support the charges against him. Mr. Carreiro's attorney, Gus Sermos, admitted at the hearing conducted on October 8, 2007, that he did not specifically discuss the elements of the charges with Mr. Carreiro, but instead merely showed Mr. Carreiro the discovery and told him that he thought the prosecution could obtain a conviction. (R. 15). This fact is important, because during the October 8, 2007 hearing, Mr. Sermos could not explain what the word "lascivious" meant. (R. 18-21). Mr. Carreiro was charged with taking pictures of a child engaged in "lascivious" conduct. The trial judge, as evidenced by the transcript of the entry of the guilty plea certainly did not explain it. Thus, Mr. Carreiro's rights could not have been knowingly, voluntarily or intelligently waived and his plea of guilty could not have been knowingly, voluntarily or intelligently entered.

Rule 8.04 of the Uniform Rules of Circuit and County Court Practice states in pertinent part:

"Voluntariness. Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is a factual basis for the plea. A plea of guilty is not voluntary if induced by fear, violence, deception, or improper inducements. A showing that the plea of guilty was voluntarily and intelligently made must appear in the record." URCCC 8.04.

"In order to meet constitutional standards, a guilty plea must be freely and voluntarily

entered.” *Weatherspoon v. State*, 736 So.2d 419 (Miss.Ct.App.1999) (citing *Schmitt v. State*, 560 So.2d 148 (Miss.1990)). “It is essential that an accused have knowledge of the critical elements of the charge against him, that he fully understand the charge, how it involves him, the effects of a guilty plea to the charge, and what might happen to him in the sentencing phase as a result of having entered the plea of guilty.” *Gilliard v. State*, 462 So.2d 710, 712 (Miss.1985) (citing *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976)). *Gilliard* is clear on the point that the defendant must be apprised of the elements of the offense that he is pleading guilty to. *Id.* “Knowledge of the elements is obviously a prerequisite to an intelligent assessment by the defendant of: 1) whether he has in fact done anything wrong under the law, and 2) the likelihood that he stands to be convicted if he exercises his right to a jury trial.” *Gaskin v. State*, 618 So.2d 103, 107 (Miss.1993). A plea is involuntary if the defendant does not know what the elements are in the charge against him, including an understanding of the charge and its relation to him, the effect of the plea, and the possible sentence. *Schmitt v. State*, 560 So.2d 148, 153 (Miss.1990). According to the United States Supreme Court, a complete record should be made of the plea proceeding to ensure that the defendant's plea was entered voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “A plea of guilty is binding only if it is entered voluntarily and intelligently.” *Knight v. State*, 959 So.2d 598, 603-604 (Miss. App. 2007) (citing *Myers v. State*, 583 So.2d 174, 177 (Miss.1991)). “A plea is voluntary and intelligent when the defendant is informed of the charges against him and the consequences of his plea.” *Id.* (quoting *Alexander v. State*, 605 So.2d 1170, 1172 (Miss.1992)). “It is not enough to ask an accused whether counsel has explained his constitutional rights. Nor is a standardized petition ... sufficient standing alone. The court must go further and determine in a face-to-face exchange in open court that the accused knows and understands the rights to which

he is entitled.” *Knight v. State*, 959 So.2d 598, 603-604 (Miss. App. 2007).

In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the U.S. Supreme Court held that the record must contain an “affirmative showing” that the defendant's guilty plea was intelligent and voluntary. *Id.* at 242, 89 S.Ct. 1709. Due to the nature of a guilty plea, which acts as both an admission of every element of the charge and as a verdict, the Court held that the prosecution must “spread on the record the prerequisites of a valid waiver” *Id.* “‘Presuming waiver from a silent record is impermissible.’ ” *Id.* (quoting *Carnley v. Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962)). “Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record.” *Id.* at 243, 89 S.Ct. 1709. In the case of Mr. Carriero, the record is not only silent, it is totally devoid of any information concerning the voluntariness and intelligence of the waiver of his rights. The record is devoid of any real explanation of the elements comprising the offense. In virtually every case that has come before the Mississippi Supreme Court on the issue of voluntariness and intelligent waiver concerning a guilty plea, there was at least some recitation or statement of facts as they related to charges against an accused. In Mr. Carriero's case, even those things are absent.

“It is not enough to ask an accused whether counsel has explained his constitutional rights. Nor is a standardized petition to enter a plea sufficient standing alone. The court must go further and determine in a face-to-face exchange in open court that the accused knows and understands the rights to which he is entitled....” *Nelson v. State*, 626 So.2d 121, 126

(Miss.1993). A lack of a discussion by the trial judge of the elements of the crime in this case requires that the guilty plea be vacated and the case set over for a new trial or another plea. See *State v. Pittman*, 671 So.2d 62, 65 (Miss.1996); *Wilson v. State*, 577 So.2d 394, 397 (Miss.1991). Cases decided under the previous rules have held that “Rule 3.03 commands that the circuit court assess that there is substantial evidence to support the defendant's guilt in the crime for which he offered his guilty plea.” *Gaskin v State*, 618 So.2d 103, 106. Although the Court in *Gaskin* ruled against him, the *Gaskin* Court’s record included a factual statement about the exact nature of the charges against him. In Mr. Carriero’s case, not even his own attorney could give a working definition of the elements charged in the indictment. The facts that must be proven are “a function of the definition of the crime and its assorted elements.” *Gaskin* at 106. “It is acceptable that the court make its decision according to inferences of guilt on the part of the defendant.” *Id.* In other words, “[a] factual showing does not fail merely because it does not flesh out the details which might be brought forth at trial. Rules of evidence may be relaxed at plea hearings.” *Id.* **“However, the guilty plea itself is not sufficient to establish a factual basis.”**(emphasis added) *Gaskin*, 618 So.2d at 106. “The whole purpose of this Rule 3.03(2)'s ‘factual basis’ requirement is to push the court to delve beyond the admission of guilt lying on the surface and determine for itself whether there is substantial evidence that the petitioner did in fact commit those crimes he is charged with and is not entering the plea for some other reason that the law finds objectionable. *Id.*

In addition to the “factual basis” requirement, it is also essential that the defendant be advised and have knowledge of the crime with which he is charged and the elements of that crime. *Gilliard v. State*, 462 So.2d 710, 712 (Miss.1985). Not only must the defendant be armed with this information, but he must also fully understand the consequences brought about by a

plea of guilty to that charge. *Id.* Mr. Carriero did not understand the “nature” of the charges against him and there is no evidence in the record that he did. There is no evidence in the record to demonstrate that the trial judge even knew what evidence existed. If there had been, certainly the judge could have made the determination that the crimes charged did not meet the acts that Mr. Carriero did. Mr. Carriero certainly would have been in a much better position to plead guilty had the judge informed him of the law and the acts that were necessary to violate that law. In this case, there simply is no evidence to sustain a conviction under Count 1 of the indictment.

It is Mr. Carriero’s position that his due process rights have been violated by the failure of the Court to make an inquiry into the factual basis for the plea. The Federal system has Rule 11 of the Rules of Criminal Procedure. The rule is comparable to Mississippi Uniform Rules of Circuit and County Court Rule 8.04 (A)(3). The federal rule requires that a judge make a specific finding that there is a factual basis for the plea. *See* Federal Rules of Criminal Procedure, Rule 11. The federal courts have held that in order for a waiver of constitutional rights to be valid under the Due Process Clause, it must be “an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). “Consequently, if a defendant’s guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.” *McCarthy v. U.S.*, 394 U.S. 459, 465 (1969). The U.S. Supreme Court went further and stated that “in addition to directing the judge to inquire into the defendant’s understanding of the nature of the charge and the consequences of his plea, Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea. The judge must determine ‘that the conduct

which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to 'protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" *Id.* at 468. The *McCarthy* court also ruled that the effect of the violation mandated that "when the district court does not comply fully with Rule 11 the defendant's guilty plea must be set aside and his case remanded for another hearing at which he may plead anew." *Id.*

The Mississippi Rule of Circuit and County Court practice are virtually identical in the requirement that a judge make a showing on the record that the plea was voluntary and intelligent and that a factual basis exists for the plea. The trial judge in Mr. Carriero's case failed to undertake such an inquiry into the factual basis for the plea. He also failed to place any evidence in the record to indicate that Mr. Carriero actually understood the facts of the case as it relates to the law in his case. Under the *McCarthy* reasoning, Mr. Carriero's plea is involuntary and must be set aside and remanded for another hearing. This is the relief that Mr. Carreiro urges this Court to grant.

In conclusion, Mr. Carriero's due process rights have been clearly violated. His own attorney did not understand the definition of some of the language in the indictment. The trial judge failed to conduct any type of inquiry on the record to indicate that there was a factual basis for the plea. The trial judge failed to make the requisite findings of voluntary and intelligent waiver of Mr. Carreiro's rights. The Mississippi Rules of Circuit and County Court, Rule 8.04 were established to insure that trial court judge determine that a factual basis exists for the plea. This rule plays an important role in protecting an accused due process rights and ensuring that a

plea is knowing, intelligent and voluntary. A record which clearly demonstrates that Rule 8.04 was not complied with violates that due process requirement.

C. Brian Carreiro has Never Been Adjudicated Guilty By the Circuit Court of Lincoln County, Mississippi.

The Court failed to accept Mr. Carreiro's guilty plea and failed to adjudicate him guilty.

Mississippi Rules of Circuit and County Court Practice, Rule 11.01 states

Where the defendant is **adjudged guilty** of the offense charged, sentence must be imposed without unreasonable delay. A defendant is adjudged guilty when the defendant has been found guilty by a verdict of the jury, **found guilty by the court sitting as the trier of fact, on the acceptance of a plea of guilty**, or on acceptance of a plea of nolo contendere.

The sentence shall be pronounced in open court at any time after conviction, in the presence of the defendant

Mississippi Rules of Circuit and County Court Practice, Rule 11.01 (Emphasis added). The record is devoid of any findings. (RT. 1-9). The record is devoid of a finding of guilt by the Court. (RT. 1-9). The record is devoid of a finding of acceptance of a guilty plea. (RT. 1-9) Therefore, the sentence imposed in this case is illegal due to the fact that no court has accepted Mr. Carreiro's guilty plea let alone adjudged him guilty of any crime. In fact, the Court file in this case does not even contain a "Judgment of Conviction." Mr. Carreiro has not yet been convicted of any offense. Therefore, the Court should dismiss the cases and/or the sentence imposed in this case against Mr. Carreiro.

III. THE SENTENCING ORDER IS WHICH BANISHES MR. CARREIRO FROM THREE COUNTIES IS UNLAWFUL AND UNSUPPORTED BY A FINDING FROM THE COURT.

As part of Mr. Carreiro's sentence, the Court ordered that "[w]hen he (Mr. Carreiro) is released he'll be barred from Pike, Lincoln or Walthall County." (R. 78). That provision in the sentencing for Mr. Carreiro is unconstitutional. In the 2005 case of *Willis v. State*, the

Mississippi Court of Appeals reversed and remanded the sentencing of Willis, who was “banished” from Marion County, Mississippi due to the fact that the trial court did not state any reasons for reaching this decision. *See Willis v. State*, 904 So. 2d 200 (Miss. 2005). “In *Cobb v. State*, 437 So.2d 1218 (Miss.1983), the banishment provision was upheld because the trial court made an on-the-record finding of the benefits of banishing Cobb from a particular area.” *Willis v. State*, 904 So. 2d 200, 202 (Miss. 2005). “However, in *Weaver v. State*, 764 So.2d 479 (¶ 8) (Miss.Ct.App.2000), this Court reversed and remanded for the trial court to articulate on the record the benefits of Weaver’s banishment. *Id.* In the instant case, the sentencing Court made no on the record findings of the benefits of banishment as part of Mr. Carreiro’s sentence. Just as in *Willis*, the trial court failed to state any reasons for reaching this decision of banishing the Defendant from Pike, Walthall and Lincoln Counties. Additionally, the court’s order denying the Defendant’s Petition for Post-conviction Relief made no finding that the banishment provision in this Sentencing Order was warranted, reasonable, or with any merit. Therefore, it is unconstitutional and should be dismissed or in the alternative, this matter should be remanded for a hearing to determine the validity of this banishment provision.

IV. MR. CARREIRO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Carreiro was clearly prejudiced by his counsel’s ineffectiveness. In order to demonstrate ineffective assistance of counsel, Mr. Carreiro must pass the two prong test set forth affirmed by the Supreme Court. “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment to the United States Constitution. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the

defendant of a fair trial, a trial whose result is reliable. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To demonstrate that counsel was ineffective, a petitioner must establish that counsel's representation fell below an objective standard of reasonableness. *See Id.* To show prejudice, he must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *See Id.* at 1511-12. Ineffective assistance of counsel claims are judged by the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, in order to prevail on his ineffective assistance claim, Mr. Carreiro must show that (1) his counsel's performance was deficient, and (2) that the deficient performance prejudiced his defense. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Knox v. State*, 901 So.2d 1257, 1261(¶ 11) (Miss.2005) (quoting *Stringer v. State*, 454 So.2d 468, 477 (Miss.1984)). In the instant case, Mr. Carreiro clearly demonstrated that his sentence resulted from a breakdown in the adversary process. The evidence of his offenses do not meet even the criteria for probable cause, much less conviction.

Mr. Carreiro clearly meets the elements of standards set forth above. Mr. Carreiro's counsel was deficient in four distinct ways. Those deficiencies severely prejudiced Mr. Carreiro's rights. But for the deficiencies of counsel, the result in Mr. Carreiro's case would have been vastly different. First, Mr. Carreiro's counsel never properly informed him of the elements contained in the count one (1) of the indictment. Moreover, Mr. Carreiro's counsel failed to inform Mr. Carreiro that the State's evidence did not meet the elements in counts one (1) and two (2). Second, Mr. Carreiro suffers from an extremely limited I.Q. which affects his

ability to comprehend, assimilate information and make intelligent informed decisions. Third, Mr. Carreiro suffers from schizophrenia and had been deprived of his medication for an extended amount of time prior to entry of his guilty plea. Counsel for Mr. Carreiro never investigated the issue of intelligence and never raised the issue of competency to the Court. (RT. 21-24). Finally, Mr. Carreiro's counsel allowed his own feelings to interfere with his duty to properly investigate, analyze the case and defend his client. All of these errors by defense counsel severely prejudiced Mr. Carreiro.

Count one of the Indictment charged Mr. Carreiro with "willfully, unlawfully and feloniously photograph on K.C., a child under the age of eighteen years, engaging in sexually explicit conduct, to wit: lascivious exhibition of genital and/or pubic area of the said K.C., contrary to and in violation of Section 97-5-33 (2) of the Mississippi Code of 1972, ..." Mississippi Code Section 97-5-33 (2) states " No person shall, by any means including computer, photograph, film, video tape or otherwise depict or record a child engaging in sexually explicit conduct or in the simulation of sexually explicit conduct." If counsel for Mr. Carreiro had merely read the elements of the charge and viewed the photographs contained in his own file, he would have known that Mr. Carreiro had committed no crime. (R. 27). The photographs clearly show the back, the **fully clothed** buttocks, the legs and feet of what appears to be a small child lying under a blanket, presumably asleep. There is absolutely nothing in the photographs to suggest sexually explicit conduct as required by the plain language of the statute. The general rule is that penal statutes must be strictly construed. *Nelson v. City of Natchez*, 19 So.2d 747 (Miss. 1944). Thus, Mr. Carreiro's counsel clearly demonstrated his ineffectiveness by advising Mr. Carreiro to plead guilty to an offense where no evidence of a state law violation even existed. The advice given to Mr. Carreiro was so legally and factually deficient that Mr. Carreiro would have been

better off without his advice. Had defense counsel merely forced the State to prove its case beyond a reasonable doubt, Mr. Carreiro should have been acquitted of this charge, or the charge should have been dismissed *ab initio*.

Under the plain language of the statute, Mr. Carreiro cannot be factually or legally guilty of the violations contained in count one of the indictment. In the case of *State ex rel District Attorney v. Winslow*, the Court stated that,

“[t]he legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid. If the meaning of a criminal statute cannot be judicially ascertained or if, in defining a criminal offense, it omits certain necessary and essential provisions which go to impress the acts committed as being wrongful and criminal, the courts are not at liberty to supply the deficiency, or undertake to make the statute definite and certain. If a statute uses words of no determinative meaning and the language is so general and indefinite as to embrace not only acts properly and legally punishable, but others not punishable, it will be declared void for uncertainty. It is axiomatic that statutes creating and defining crimes cannot be extended by intendment. Purely statutory offenses cannot be established by implication. There can be no constructive offenses. Before a man can be punished, his case must be plainly and unmistakably within a statute. A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law.”

State ex rel. Dist. Atty. v. Winslow, 45 So.2d 574 (Miss. 1950)(quoting 14 Am.Jur., Section 19, Pages 773-774.) The indictment charged Mr. Carreiro with taking a “photograph on K.C., a child under the age of eighteen years, engaging in **sexually explicit conduct, to wit: lascivious exhibition of genital and/or pubic area** of the said K.C., contrary to and in violation of Section 97-5-33 (2) of the Mississippi Code of 1972.” (emphasis added). *Merriam-Webster's Dictionary of Law*, © 1996 Merriam-Webster, Inc., defines the word “lascivious” as “reflecting or producing sexual desire or behavior that is considered indecent or obscene.” There is nothing remotely indecent or obscene depicted in the photographs used to produce a guilty plea from Mr. Carreiro.

The elements of the statute are simply not met. The State produced no evidence of a crime against K.C. by Mr. Carreiro. Moreover, the child is not "engaged" in any "sexually explicit conduct" as required by the statute. The photograph does not in any manner, mode or way display or depict a "lascivious exhibition of the genital and/or pubic area" that the statute requires. No crime existed and no crime was committed. Factually and legally, Mr. Carreiro is innocent of the charge contained in Count One (1) of the Indictment.

The fact that Mr. Carreiro had taken a photograph of the Sheriff's child in a bathing suit is not a criminal act. His counsel should have advised him of such. Defense counsel's failure in this instance clearly fell below what is objectively reasonable. Defense counsel's failures combined with the failures of the Court severely prejudiced Mr. Carreiro. Ineffective assistance of counsel may include instances where a defendant's attorney misrepresents information regarding the plea to the defendant, thereby inducing him to plead guilty. *Myers v. State*, 583 So.2d 174, 177 (Miss.1991). Similarly, counsel would be defective if defense counsel purposefully lies to the defendant or asks the defendant to lie in court proceedings regarding his plea. *Id.* In such situations, it is likely that the plea could be successfully attacked by the defendant as involuntary. *Id.* If Defense counsel had properly advised Mr. Carreiro, Mr. Carreiro could have made an informed choice about declining to plead guilty to count one.

As to count two (2), since Mr. Carreiro's attorney was de facto ineffective as to count one (1), count two (2) must also be dismissed, or Mr. Carreiro must be allowed to withdraw his guilty plea to count two (2), as well. In order to induce Mr. Carreiro to plead guilty to count two (2), Defense counsel presented him with a copy of Mr. Carreiro's hand written statement. (R. 29-30). The hand written statement was taken from Mr. Carreiro on June 5, 2004, the date of his arrest. The statement alone contains nothing to indicate that Mr. Carreiro committed any offense. Mr.

Carriero was advised that his statement was damning. (R. 31-38).


CONCLUSION


For all of the above and foregoing reasons, Appellant requests that this Honorable Court reverse the November 30, 2007 Order denying the Defendant's Motion for Post-Conviction Relief and grant the Defendant's Motion for Post-Conviction Relief on the grounds herein argued.

Respectfully submitted, this the 2nd day of June, 2008.

BRIAN KEITH CARREIRO

BY: 

DEREK L. HALL (MSB # )

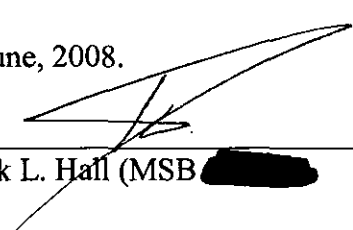
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CERTIFICATE OF SERVICE

I, Derek L. Hall, do hereby certify that I have this day caused one (1) true and correct copy of the Brief for the Appellant to be forwarded, via United States Mail, postage prepaid, and addressed as indicated below to the following:

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P.O. Box 88550
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This service effective this, the 2nd day of June, 2008.



Derek L. Hall (MSB )