

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

COPY

JAMIE CHRISTIE

APPELLANT

VS.

FILED

CAUSE NO. 2007-TS-00373

STATE OF MISSISSIPPI

JUL 09 2007

APPELLEE

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SUPREME COURT
COURT OF APPEALS

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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APPELLANT

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CAUSE NO. 2007-TS-00373

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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 this court may evaluate possible disqualification or recusal.

1. Honorable R. I. Prichard, III, Circuit Judge, P. O. Box 1075, Picayune, MS 39466.
2. Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, MS 39205.
3. Honorable Haldon Kittrell, District Attorney, 500 Courthouse Square, Suite 3, Columbia, MS 39429.
4. Mr. Jamie Christie, inmate, MDOC No. 104597 WCCF, P. O. Box 1079, 2999 Hwy. 61 North, Woodville, MS 39669.

This the 4TH day of July 2007.

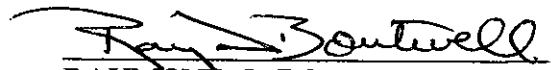

RAYMOND O. BOUTWELL, JR.
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STATEMENT OF THE CASE

On May 25, 2004, Jamie Christie plead guilty to burglary of a dwelling in Case No. K03-0056EP in the Circuit Court of Marion County, Mississippi. Thereafter, on June 4, 2004, Jamie Christie was sentenced by the Circuit Court of Marion County in Case No. 0056 to a term of twenty years in the custody of the Mississippi Department of Corrections with this sentence running consecutive to sentence imposed in Case No. K03-0055EP. He was ordered to pay restitution in this case, and other cases for which he had not plead to together with old fines owed to the City of Columbia and old fines to Marion County.

Petitioner Christie had previously filed a petition for post-conviction relief in Case No. K03-0055EP in the Circuit Court of Marion County. Relief was denied in the Circuit Court of Marion County, Mississippi; and thereafter it was appealed to the Mississippi Supreme Court. The decision of the Circuit Court of Marion County was affirmed on November 15, 2005 in a case styled, "In the Court of Appeals of the State of Mississippi, No. 2005-CP-00065-C0A, Jamie Christie, Jr. v. State of Mississippi". Petitioner is presently serving his ten-year sentence imposed in Cause No. K03-0055EP in the custody of the Mississippi Department of Corrections.

A petition for post-conviction relief was filed on December 29, 2006 requesting relief from order of convictions in Case No. 0056. On January 26, 2007, an order of dismissal was entered by the circuit judge. It is this order of dismissal that the appellant appeals from.

SUMMARY OF ARGUMENT

I. WHETHER OR NOT THE PETITION FOR POST-CONVICTION RELIEF SHOULD HAVE BEEN DISMISSED UNDER SECTIONS 99-39-7 AND 99-39-23(6) AS BEING PROCEDURALLY BARRED.

Petitioner Christie plead guilty under two separate indictments in Case Numbers 0055 and 0056 in the Circuit Court of Marion County. Petitioner Christie plead on May 25, 2004 and was sentenced in each case on June 4, 2004.

Petitioner Christie filed a petition for post-conviction relief in Case No. 0055 in the Circuit Court of Marion County, Mississippi. Relief was denied in the Circuit Court of Marion County, Mississippi and, thereafter, appealed to the Mississippi Supreme Court. The decision of the Circuit Court of Marion County was affirmed on November 15, 2005 in a case styled, “In the Court of Appeals of the State of Mississippi, No. 2005-CP-00065-COA, Jamie Christie, Jr. v. State of Mississippi”. Petitioner is currently serving his ten-year sentence imposed in Case No. 0055 in the custody of the Mississippi Department of Corrections.

On December 29, 2006, Petitioner Christie filed another petition for post-conviction relief collaterally attacking the sentencing order in Case No. 0056. On January 26, 2007, the circuit judge issued an order of dismissal on the grounds that the petition for post-conviction relief was procedurally barred and frivolous.

Petitioner Christie will show that the petition for post-conviction relief is not procedurally barred as it was filed in accordance with Section 99-39-9(2),

Mississippi Code Annotated, 1972 which requires the prisoner desiring to protest the validity of other judgments under which he is in custody shall do so by separate motions.

The first petition for post-conviction relief was denied and appealed. The basis for the appeal was denial of a plea agreement and ineffective counsel.

Petitioner Christie's second petition for post-conviction relief relates solely to Case No. 0056 and is based on his plea being involuntary and in violation of due process and that the court had no jurisdiction or authority with which to order restitution, court costs, and fines in other cases for which Petitioner Christie had not plead guilty to nor had been convicted of.

Petitioner Christie's proper recourse was as an original action in the Circuit Court of Marion County, Mississippi as there had been no original appeal from the conviction.

Issues raised under Case No. 0056 have not been adjudicated and are not barred by the doctrine of *res adjudicata*.

II. WHETHER OR NOT SANCTIONS SHOULD HAVE BEEN IMPOSED AGAINST PETITIONER'S ATTORNEY.

Petitioner's attorney was sanctioned \$250.00 by the circuit judge for filing the petition for post-conviction relief that, in the judge's opinion, was frivolous and procedurally barred.

The trial judge simply erred in imposing sanctions. Section 99-39-9(2) mandates separate petitions.

III. WHETHER OR NOT PETITIONER'S PETITION FOR POST-CONVICTION RELIEF HAS MERIT.

Petitioner Christie would show that his petition for post-conviction relief is meritorious in that as a matter of law, his plea of guilty in Case No. 0056 was involuntary as the trial judge failed to inform petitioner of the maximum and minimum sentences he might receive in light of his plea to two separate indictments in a joint hearing. The maximum and minimum sentences were misleading as they only advised the petitioner of the minimum and maximum for one case and did not take into account that the sentences may run consecutively. This mandates that either his plea be vacated or that the sentence in Case No. 0056 be modified to make it concurrent with Case No. 0055. A defendant who is

not informed of the maximum and minimum sentences cannot be found to have voluntarily and intelligently entered his plea of guilty.

The judgment in Case No. 0056 is illegal in that it orders repayment of restitution, court costs, and old fines in other cases for which the court had no jurisdiction and was imposed without due process of law.

Petitioner Christie plead guilty to burglary of a dwelling of the residence of Linda Taylor who was due restitution in the amount of \$50.00. He was ordered to pay restitution totally in excess of \$11,000.00 on cases that had been *nolle prossed* in which the court did not have jurisdiction.

The sentence in a criminal case is the action of the court fixing and declaring the legal consequences of a pre-determined guilt of a criminal offense. The court in ordering restitution, court costs and fines in other cases had no legal basis and was a denial of due process.

Further, the court ordered payment of old fines to the City of Columbia and to Marion County. This constituted denial of due process under the United States Constitution and the Constitution of the State of Mississippi as well as being in violation of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.

ARGUMENT

I. WHETHER OR NOT THE PETITION FOR POST-CONVICTION RELIEF SHOULD HAVE BEEN DISMISSED UNDER SECTIONS 99-39-7 AND 99-39-23(6) AS BEING PROCEDURALLY BARRED.

Petitioner Christie's petition for post-conviction relief was dismissed by the circuit judge as being procedurally barred under Sections 99-39-7 and 99-39-23(6) of the Mississippi Code Annotated.

Petitioner Christie clearly set out the identity of previous proceedings as required in Section 99-39-9(1)(f) in his petition (R. 19-20) as follows:

“This Petitioner has previously filed a Petition for Post-Conviction Relief in Cause No. K03-0055EP in the Circuit Court of Marion County, Mississippi. Relief was denied in the Circuit Court of Marion County, Mississippi and, thereafter, appealed to the Mississippi Supreme Court. The decision of the Circuit Court of Marion County was affirmed on November 15, 2005 in a case styled, “In the Court of Appeals of the State of Mississippi, No. 2005-CP-00065-COA, styled Jamie Christie, Jr. v. State of Mississippi.” The Petitioner is presently serving his 10-year sentence imposed in Cause No. K-03-0055EP in the custody of the Mississippi Department of Corrections.”

There was no appeal from the original judgment in 0055. The Petitioner Christie appealed from the circuit judge's order denying post-conviction relief, and the appeal was denied. The Petitioner Christie could not have sought leave from the Mississippi Supreme Court, as there was no basis. Section 99-39-7 requires leave of court when there has been an original appeal from a judgment or order.

The Petitioner Christie now appeals from the circuit judge's denial of post-conviction relief under KO3-0056EP, hereafter referred to as No. 0056.

Petitioner Christie styled his first petition for post-conviction relief as follows:

In The Circuit Court of Marion County Mississippi

No. 2004-0331P(PC)

Jamie Christie II

Vs.

Cause No. K03-0055 EP

State of Mississippi

Petitioner Christie's first petition was based on what his perceived as a breach of a plea agreement that necessarily applied to the judgments in 0055 and 0056.

On May 25, 2004, Petitioner Christie plead to two separate indictments, 0055 (R. 30-46) and 0056, (R. 47-51). They were combined apparently for judicial economy and to expedite the plea and sentencing process. They were separate and distinct cases (R. 8-10) and had separate orders of conviction (R. 11-14).

Section 99-39-9(2) requires that:

“(2) A motion shall be limited to the assertion of a claim for relief against one (1) judgment only. If a prisoner desires to attack the validity of other judgments under which he is in custody, he shall do so by separate motions.” (Emphasis added.)

Shall when used in a statute is a mandatory pronouncement. Murphy v. State 178 So. 2nd 692, 693 (Miss. 1965). There is no discretion. By statute, Petitioner Christie's first petition was limited to one judgment.

In McCoy v. State 941 So. 2nd 879, the court of appeals in following a multitude of cases states that, "Where a prisoner seeks post-conviction relief on multiple judgments against him, he must file one post-conviction motion for each of the challenged judgments. Smith v. State, 919 So. 2nd 989, 992 (Miss. Ct. App. 2005); Newsom v. State, 904 So. 2nd 1095, 1098 (Miss. Ct. App. 2004); Readus v. State, 837 So. 2nd 209, 212 (Miss. Ct. App. 2003); Shaw v. State, 803 So. 2nd 1282, 1284-85 (Miss. Ct. App. 2002). While all of the judgments against McCoy were entered on the same date, the judgments were, indeed, separate convictions carrying separate sentences. Thus, McCoy is unable to collaterally attack all of the judgments against him in one petition for post-conviction relief."

With many prisoners filing *pro se*, this issue is often before the court and the court has used various rationale in deciding which judgment the prisoner's petition is attacking. See Thomas v. State, 881 So. 2nd 912 (Miss. 2004), Smith v. State, 919 So. 2nd 989 (Miss. 2004), Garner v. State, 928 So. 2nd 911 (Miss. 2006), Shorter v. State, 2007 So. 2nd (2005-CA-01458-COA), Adams v. State, 2007 So. 2nd (2005-CP-00488-COA), and Hargrove v. State, 937 So. 2nd 29 (Miss. 2006). But, no matter the reasoning, they are always limited to one judgment.

The Court of Appeals (COA) in Christie v. State, 2005-CP-00065 COA, Petitioner Christie's first petition for post-conviction relief, did not address the issue of filing on multiple convictions but referred to petitioner's plea to "two counts of burglary". The COA only addressed the three grounds alleged, to wit: (1) that the trial court erred in failing to honor an oral plea agreement, (2) ineffective assistance of counsel during the plea bargain, and (3) that the trial judge should have recused himself.

These were not two counts of burglary as being in a multiple count indictment. These were two separate indictments, two separate and distinct cases, two separate pleas and two separate sentences (R. 8-10 and 11-16).

Had Petitioner Christie prevailed in his first petition, it would have only applied to the order in 0055, and he would have been compelled to file a second petition under 0056.

Petitioner Christie concedes that the issues raised in his first petition have been decided and *res judicata* applies to those issues as they related to the order of conviction in 0055 and 0056.

The petition now before the court relates solely to 0056, and the grounds for relief relate to that judgment (R. 19-24). There is no duplication of grounds.

Notwithstanding the procedural question, a prisoner may file a motion for post-conviction relief if, among other things, a claim is made that the “conviction or the sentence was imposed in violation of the Constitution of the United States and of the Constitution or laws of Mississippi.” Miss. Code Ann. Section 99-39-5(1)(a) (Rev. 2000). Most motions for post-conviction relief filed after an original motion for post-conviction relief has been denied are barred for being successive. Miss. Code Ann. Section 99-39-23(6) (Rev. 2000). However, “[e]rrors affecting fundamental constitutional rights may be excepted from procedural bars which would otherwise prohibit their consideration. . .” Locket v. State, 582 So. 2nd 428, 430 (Miss. 1991).

In Lockett denial of due process in sentencing merited exception from the three-year time limit of Miss. Code Ann., Section 99-39-5.

In Kennedy v. State, 626 So. 2nd 103 (Miss. 1993), the Mississippi Supreme Court in a similar ruling found that:

“Victor Kennedy’s sentence of ninety-nine years exceeds that found unacceptable by this Court in Stewart v. State, 372 So. 2nd 257 (Miss. 1979). The trial court found, and the State argues on appeal, that Kennedy’s claim is barred pursuant to the time and *res judicata* limitations found in the Mississippi Uniform Post-Conviction Collateral Relief Act. See Miss. code Ann. Section 99-39-5(2), Section 99-39-21(3) (Supp. 1992). This Court has repeatedly held that such a claim may be exempt from such procedural bars where it is clear from the record that the circuit court has exceeded its statutory authority in sentencing and fundamental constitutional rights may be involved. Lockett v. State, 582 So. 2nd 428 (Miss. 1991); Grubb v. State, 584 So. 2nd 786 (Miss. 1991). We find that portion of the circuit court’s order which pertains to Victor Kennedy’s armed robbery conviction is reversed, and the matter remanded to the circuit for re-sentencing under the guidelines of Stewart. Because Kennedy’s Motion for Proper Sentence was

partially meritorious, that portion of the trial Page 106 court's order assessing costs against Kennedy is reversed and rendered."

In Smith v. State, 477 So. 2nd 191 (Miss. 1985), the defendant received a life sentence as a habitual offender under the greater of two repeat offender statutes. He did not challenge the constitutionality of his sentencing on appeal but rather on a *pro se* post-conviction motion to correct sentence. Smith, 477 So. 2nd at 195. The State's indictment of the defendant indicated that the State was seeking to convict and sentence him under a statute for which the maximum sentence would be seven years in prison, rather than the statute actually used to sentence him to life imprisonment. *Id* at 196. The Smith Court refused to enforce a procedural bar against a defendant's claim because the facts of the case indicated a clear denial of due process in the sentencing and that" [t]he comparison of a seven-year sentence, as opposed to a life sentence, without probation or parole is too significant a deprivation of liberty to be subjected to a procedural bar." *Id* at 195.

The grounds for relief in this case as set out in the petition are:

1. That petitioner's plea was involuntary, and the judgment of conviction was entered without due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution (R. 21-22) and Article 3, Section 14 of the Mississippi Constitution.
2. The restitution, costs and old fines from other cases were entered without jurisdiction and in violation of due process of the United States and Mississippi

Constitutions and in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article 3, Section 22 of the Mississippi Constitution. (R. 21-22.) The merit of these grounds are outlined in Issue III.

II. WHETHER OR NOT SANCTIONS SHOULD HAVE BEEN IMPOSED AGAINST PETITIONER'S ATTORNEY.

The trial judge imposed sanctions of \$250 against Petitioner Christie's attorney for filing what, in his opinion, was a procedurally barred claim.

The petitioner's proper recourse was in Case No. 0056 as shown in the previous issue. The first petition was denied by the trial judge and affirmed by the Court of Appeals, but procedurally, it could only apply under Section 99-39-9(2) to Case No. 0055.

There was no appeal from the original judgment under Case No. 0055 or Case No. 0056 and no leave of the Supreme Court could be sought. Doss v. State, 757 So. 2nd 1016 (Miss. 2000).

The issues raised under Case No. 0056 have not be adjudicated, thus, barring a separate petition for post-conviction relief or under *res adjudicata*.

The trial judge simply erred in imposing sanctions. Section 99-39-9(2) mandates separate petitions. Petitioner Christie's first petition was based largely on denial of an oral plea agreement that went to both 0055 and 0056. The second petition, as required by statute, collaterally attacks the judgment in 0056 for denial of constitutional rights.

The sanctions imposed should be set aside and all monies returned to petitioner's attorney. See Hundley v. State, 803 So. 2nd 1225 (Miss. 2001).

III. WHETHER OR NOT PETITIONER'S PETITION FOR POST-CONVICTION RELIEF HAS MERIT.

The trial judge has ruled that all claims of the petitioner are frivolous (R. 67-70) and has denied him any relief or a hearing.

Petitioner will show that he is entitled to the relief sought as follows:

A. Petitioner's plea under Case No. 0056 was involuntary.

The plea, in Case No. 0056, was taken in a joint hearing with Case No. 0055. (R. 30-51). The actual plea to each separate case was taken separately (R. 30-46 and R. 47-51), but all inquiry as required under Rule 8.04 of the Uniform Circuit and County Court Rules was taken jointly (R. 30-34).

Under Rule 8.04A.4.B., it is stated that it is the duty of the trial court to address the defendant personally and to inquire and determine

“that the accused understand the nature and consequences of the plea and the maximum and minimum penalties provided by law,” (emphasis added).

Petitioner Christie was misled by counsel and the court as to the consequences of his plea. See affidavit of Betty Breeland (R. 58), the copy of the Petition to Enter Plea of Guilty (R. 19-24), and affidavit of Petitioner Christie (R. 64-66). On Page 2 of the petition, it is clearly shown that Petitioner Christie was advised that,

“I know that if I plead “GUILTY” to this charge, the possible sentence is 3 year(s) minimum to 25 years maximum, imprisonment, and/or a fine of \$ _____ (Minimum) to \$10,000.00, (Maximum) and assessments of _____” (R. 62).

There was only one “Petition to Enter Plea of Guilty. It cited Cause No. K030055 E-P and K03-0056 E-P (R. 60). The trial court on Page 7 of the transcript (R. 35) filled in the \$10,000.00 amount as the maximum fine. There was no effort to correct the minimum and maximum sentence range, and the maximum fine was misstated. There was no discussion, warning, or effort by the court or the

attorney to explain the potential consequences of pleading guilty to two separate charges that by statute [Section 99-19-21(1)] could result in consecutive sentences. A consecutive sentence would result in the minimum being six years, the maximum being fifty years, and the maximum fine being \$20,000.00. The record is totally void of any warning to defendant that his plea of guilty on the second charge under 0056 could be held to run consecutive with his previous charge under Case No. 0055, and thus result in a sentence of thirty-five years when he (Petitioner) was advised that the maximum was twenty-five years (R. 25-28 and R. 11-12).

A guilty plea must be made voluntarily in order to satisfy the defendant's constitutional rights. A plea is voluntary if the defendant knows what the elements are of the charge against him including all understanding of the charge and its relation to him, what effect the plea will have, and what the possible sentence might be because of his plea. Schmitt v. State, 560 So. 2nd 184, 153 (Miss. 1990). Where a defendant is not informed of the maximum and minimum sentences he might receive, his guilty plea has not been made either voluntarily or intelligently. Vittitoe v. State, 556 So. 2nd 1062 (Miss. 1990).

Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2nd 274 (1969), stands for the proposition that a complete record should be

made to ensure that the defendant's guilty plea is voluntary. In Boykin, the defendant pled guilty to five indictments for armed robbery but the record was silent concerning any questions which the judge had asked him about his plea. In holding that the case should be reversed since the record did not disclose whether the plea had been voluntarily made, the Supreme Court said,

“What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences. When the judge discharges that function, he leaves a record adequate for any review that may be later sought . . . and forestalls the spin-off of collateral proceedings that seek to probe murky memories.” Boykin, 395 U.S. at 243-244, 89 S. Ct. at 1712, 23 L.Ed.2d at 280.

In Alexander v. State, 226 So. 2nd 905 (Miss. 1969), the Mississippi Supreme Court said that the trial court should not accept the defendant's plea of guilty “without first addressing the defendant personally and determining that the plea is made voluntarily with the understanding of the nature of the charge and the consequences of the plea.” Alexander, 226 So. 2nd at 909 (emphasis added).

The trial judge had statutory authority in Section 99-19-21(1) to impose that the sentence under Case No. 0056 run either concurrent with or consecutive to Case No. 0055.

It is a fundamental principle rooted in considerations of due process, that a guilty plea must be voluntary to be valid. This requires that the petitioner be informed of the direct consequences of his plea.

This necessarily requires that he know that a plea to two separate indictments, Case No. 0055 (R. 8-9) and Case No. 0056 (R.10), could result in the second sentence beginning to commence at the end of the imprisonment for the proceeding conviction as stated in Section 99-19-21(1).

In U.S. v. Neely, 38 F. ed 458, 461 (9th Cir. 1994), the ninth circuit held in a similar case as this that the court's failure to advise petitioner that sentences may run consecutively mandated either vacation of plea or modification of sentence to make it concurrent. These are the consequences of the plea.

The consequences of petitioner's guilty plea to Case No. 0055 and then to Case No. 0056 would subject him to a maximum sentence of 50 years and a \$20,000.00 fine, not the 25 years and \$10,000.00 fine that petitioner was advised of. A petitioner who pleads guilty must be advised of the nature of charges to which he is pleading guilty to, and the consequences of pleading guilty. Vittitoe.

When petitioner plead guilty to the second charge in Case No. 0056, he had already subjected himself to a potential 25-year sentence in Case No. 0055. He was subjecting himself to an additional 25-year sentence without being advised and warned of the consequences of this second plea. This second plea, in fact, resulted in a total sentencing of 35 years (R. 11-12 and R. 13-16) when he had been told that the maximum was 25 years (R. 35 and R. 61). The combination of the two separate indictments into one plea hearing gives the impression that these charges are being dealt with simultaneously, and the sentences will logically be simultaneous or concurrent. A common sense review of the plea process confirms this (R. 30-51 and R. 60-63).

The judge, in stating the minimum and maximum sentence and fines, states:

“Now, Jamie, do you understand that each one of these cases is burglary of a dwelling. And in Mississippi law the penalty for burglary of a dwelling is not less than three, no more than 25 years and it carries a fine up to \$10,000 or some amount of time and fine. Do you understand that?” (R. 35).

The record is void of any pronouncement that the minimum sentence would be six years, the maximum 50 years, and the maximum fine \$20,000. This is the juncture in the proceedings that the Petitioner Christie should have been advised of the consequence of his to pleas

and that a plea to two separate indictments could be a 50-year sentence and a \$20,000 fine.

The clear impression from the Petition to Enter Plea of Guilty and the court was a maximum of 25 years. The result was a sentence totaling 35 years (R. 11-12 and R. 13-16). This ambiguity should be resolved in favor of the Petitioner Christie.

On June 4, 2004 (after Petitioner Christie had already plead guilty under Case No. 0055 and 0056), the trial judge stated the maximum sentence was 50 years and fines of \$20,000 (R. 53). This was the very least Christie should have been advised of before he plead guilty to the two charges.

In Ward v. State, 708 So. 2nd 11, 16 (Miss. 1998), the court ruled that “Even though the trial court asked Ward, who responded affirmatively, if he had been advised of the maximum and minimum sentences that he could receive for each of the offenses, the record, nevertheless, is devoid of any indication that Ward actually knew what those terms were . . .” (Emphasis added).

As in Ward, there is no indication from the record that Petitioner Christie actually knew and understood the consequences of his plea

to the two charges that he was being required to plea to in one joint hearing. It was not stated to him in express terms, and it certainly could not have been deduced from what was said. The legal consequences of the two pleas were ambiguous.

On collateral review, the court is to look to the objective record limited to proof in the accused's presence. Corley v. State, 585 So. 2nd 765, 767 (Miss. 1991). In determining whether a plea was freely and voluntarily given, the Court is to consider the record from the plea process. Vittitoe v. State, 556 S 2nd 1065 (Miss. 1990).

The standard of proof to be applied is by preponderance of the evidence. McClendon v. State, 539 So. 2nd 1375 (Miss. 1989).

When it can be shown that the pleas was not voluntarily and understandingly entered, it must be invalidated. Monroe v. U. S., 463 F. 2nd 1032 (5th Circ., 1972). Petitioner Christie's plea in 0056 was involuntary as a matter of law.

- B. The judgment in 0056 is illegal as it orders payment of restitution, court costs, and old fines from other cases, (R. 25, 26) for which the court had no jurisdiction and was imposed without due process of law.

The court lacked jurisdiction to impose that the Petitioner, Christie, pay restitution and all costs of court in Cause Nos. K03-055EP, K03-0052EP, K03-0054EP, K03-0057EP, K03-0104E and K00-0298P, as shown in the sentencing order (R. 14). This resulted in an illegal judgment against Petitioner Christie and same should be vacated as in violation of Petitioner Christie's rights under the Due Process Clause of the Fourteen Amendment to The United States Constitution and Article 3, Section 14 of The Mississippi Constitution.

"A sentence in a criminal case is the action of the court fixing and declaring the legal consequences of pre-determined guilt of a criminal offense." Barnes v. U. S., 223 F. 2nd 891, 892 (5th Cir. 1955) (citing 24 C.J.S. Criminal Law, Section 1556) (Emphasis added).

The judgment of restitution, court costs, and fines in other cases for which the court had no jurisdiction is further violation of Rule 8.04 of the Uniform Circuit and County Court Rules that require that the accused understand the nature and consequences of the plea and the maximum and minimum penalties proved by law. (Emphasis added.)

At the sentencing, the judge acknowledged that he was making restitution and court cost on cases that were *nolle prossed* part of the judgment (R. 55). There is no legal basis for this. It is a clear denial of due process.

The only case Petitioner Christie could be held accountable for was 0056. Yet, the order and sentence of the judge ordered that he pay restitution to Helen Cranford Elliott in the amount of \$3, 149.47, Ryan Nolan the amount of \$100.00, Terry Tolar the amount of \$1800.00 and Robert Watts the amount of \$6200.00 (R. 14).

The restitution ordered in addition to being without jurisdiction and a denial of due process exceeds the statutory authority found in Section 99-37-3 which states:

- (1) When a person is convicted of criminal activities which have resulted in pecuniary damages, in addition to any other sentence it may impose, the court may order that the defendant make restitution to the victim. . . (emphasis added).

The victim in Case No. 0056 was Linda Taylor as shown in the indictment (R. 10). The amount of restitution was \$50.00 (R. 14).

If the order of the court is allowed to stand, Petitioner Christie will be subject to have his probation and suspended sentence revoked as required under Section 99-37-5(2) which states:

“ (2) When a defendant is sentenced to pay a fine or costs or ordered to make restitution is also placed on probation or imposition or execution of sentence is suspended, the court may make payment of the fine or costs or the making of restitution a condition of probation or suspension of sentence. Such offenders shall make restitution payments directly to the victim. As an alternative to a contempt proceeding under Sections 99-37-7 through 99-37-13, the intentional refusal to obey the restitution order or a failure by a defendant to make a good faith effort to make such restitution may be considered a violation of the defendant’s probation and may be cause for revocation of his probation or suspension of sentence.” (Emphasis added.)

Sections (3) and (4) of Section 99-37-3 indicate the necessity for a hearing before restitution can be assessed. The type hearing is not specified; but as outlined in Butler v. State, 544 So. 2nd 816, 822 (Miss. 1989) minimum requirements would be:

(1) notice to the defendant that victim restitution was being considered by the court, (2) the nature of such restitution considered, (3) an opportunity to the defendant to be heard and to object, and (4) a finding by the court to afford adequate appellate review.”: . . . (P)ersons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.” Boddie v. Connecticut, 491 U.S. 371, 377, 91 S. Ct. 780, 785, 28 L.Ed.2d 113, 118 (1971). However, the language of Section (4) suggests that there are cases in which restitution would not be appropriate, as when the victim’s loss is difficult to

quantify. *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harvard L. Rev. 931, 933 (1984).

The record is void of any notice to the defendant of the nature of the restitution being considered. The defendant was not afforded an opportunity to be heard or to object. (R. 54-56). In Interest of B.D. 720 So. 2nd 476 (Miss. 1998).

The defendant is only responsible for paying restitution for the conduct underlying the offense for which he was convicted. U.S. v. Mancillas, 172 F. 3rd 341, 343 (5th Cir. 1999), i.e., Linda Taylor (R.10) in the amount of \$50.00 (R.14).

Neither the defendant nor his attorney objected to the restitution, but this would be plain error. See U. S. v. Oland, 507 U.S. 725, 731-732 (1993).

Petition Christie has shown that the restitution, costs from other cases and fines from other courts were imposed in error. The error is plain and the error affects substantial rights.

When these three requirements are met, the U. S. Supreme Court has said that the appellate court should exercise its discretion to correct the error if it “seriously affects the fairness, integrity or public

reputation of judicial proceedings.” U.S. v. Young, 470 U.S. 1, 15 (1985).

- C. That the court lacked jurisdiction to enter judgment against Petitioner Christie requiring him to pay old fines to the City of Columbia Municipal Court in the amount of \$6,437.00 and to pay old fines to Marion County Justice Court in the amount of \$1,184.00. He was also denied his rights guaranteed under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and under Article 3, Section 22 of the Mississippi Constitution. By their own terms, these are prior adjudications and thus barred. Fines are treated the same way as prison sentences for purposes of double jeopardy. See North Carolina v. Pearce, 395 U.S. 711.

In this case, it is apparent that Petitioner Christie’s plea of guilty in Case No. 0056 subjected him to multiple punishments beyond the statutory maximum set out in Section 97-17-23 of the Mississippi Code Annotated 1972 as amended and stated as follows:

“Every person who shall be convicted of breaking and entering the dwelling house or inner door of such dwelling house of another, whether armed with a deadly weapon or not, and whether there shall be at the time some human being in such dwelling house or not, with intent to commit some crime therein, shall be punished by imprisonment in the penitentiary not less than three (3) years nor more than twenty-five (25) years.” (Emphasis added.)

No court may adjudge and sentence a defendant beyond its statutory authority to do so. See Lockett v. State, 582 So. 2d 428 (Miss. 1991) (stating that a sentence beyond the statutory prescription is a fundamental violation of due process); Lanier v. State, 635 So. 2d 813, 816 (Miss. 1994) (noting that a sentence beyond the statutory prescription is unenforceable as it violates public policy).

This sentencing error buttresses Christie's argument that his guilty plea was not knowingly given, as there was no way he could have known that he would be subjected to a sentence that was not even authorized for the crime he plead to. Ward v. State, 708 So. 2nd 11 (Miss. 1998).

D. The sentence is indefinite.

The sentence imposed in Case No. 0056 seeks to allow the Mississippi Department of Corrections to suspend ten years of the 20-year sentence after having served the first ten years (R.14). This is in contradiction to Section 47-7-33:

"A court must elect at the time of imposition of sentence to simultaneously suspend imposition or execution of the sentence. But a trial court is without authority to suspend a term after the defendant has begun serving the sentence." Payne v. State 462 So. 2nd 902 (Miss. 1984) (emphasis added).

The sentence in Case No. 0056 is indefinite. Whether or not the second 10 years of the sentence is suspended is not to be determined until Petitioner Christie has served the 10 year sentence in Case No. 0055 (R. 54) and then the first 10 years of the twenty year sentence in Case No. 0056. Then it is subject to whether or not the Mississippi Department of Corrections suspends it (R.55).

Thus the sentence imposed is indefinite as a matter of law. This sentence results in a denial of due process in sentencing. See Smith v. State, 477 So. 2nd 191, 195-96 (Miss. 1984).

Errors affecting fundamental constitutional rights may be excepted from procedural bars which would otherwise prohibit their consideration (Lockett v. State, 582 So. 2nd 428 (Miss. 1991).

CONCLUSION

Petitioner Christie's petition for post-conviction relief should not have been dismissed as being frivolous and procedurally barred.

Petitioner Christie was convicted under two separate cases in the Circuit Court of Marion County, Mississippi. He filed an original petition for post-conviction relief under the first conviction which was denied. He, thereafter, appealed to the Mississippi Supreme Court, and the court repeats affirmed the denial of the first petition for post-conviction relief.

In accordance with Section 99-39-9(2), Petitioner Christie's petition for post-conviction relief under Case No. 0056 was meritorious in that petitioner's plea was involuntary as a matter of law, as the court failed to advise petitioner of the consequences of his pleas to two separate charges and is, therefore, constitutionally defective.

The judgment in Case No. 0056 was illegal as being beyond the jurisdiction of the court, in violation of due process, and in violation of double jeopardy.

WHEREFORE, PREMISES CONSIDERED, the court should set aside Petitioner Christie's plea of guilty and vacate the judgment against him in Case No. 0056 in the Circuit Court of Marion County, Mississippi.

RESPECTFULLY SUBMITTED,
JAMIE CHRISTIE BY HIS ATTORNEY


RAYMOND O. BOUTWELL, JR.

CERTIFICATE OF SERVICE

I, Raymond O. Boutwell, Jr., do hereby certify that I have this day forwarded via United States mail, postage prepaid, a true and correct copy of the Appellant's Brief and Record Excerpts to the following parties:

1. Honorable R. I. Prichard, III
Circuit Judge
P. O. Box 1075
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2. Honorable Jim Hood
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3. Honorable Haldon Kittrell
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This the 9th day of July 2007.


RAYMOND O. BOUTWELL, JR.