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

DESMOND HYNES

APPELLANT

VS.

NO. 2007-CA-00681-COA

STATE OF MISSISSIPPI

APPELLEE

FILED

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COURT OF APPEALS**

BRIEF OF APPELLANT

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ATTORNEY-AT-LAW
MISS. STATE BAR NO. [REDACTED]**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby certifies that the following listed persons have an interest in the outcome of this Appeal. The representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

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ERIC CHARLES HAWKINS, Attorney for the Appellant

DEWAYNE RICHARDSON, District Attorney of the Fourth Circuit
Judicial District of the State of Mississippi, Attorney for the Appellee

BETTY W. SANDERS, Presiding Circuit Judge

STAN PERKINS, Attorney

JOSH BOGEN, Attorney

ALICIA THOMAS, Attorney

MICKEY MALLETT, Attorney

EDDIE HYNES, Co-Defendant

WALTER MURPHY, Co-Defendant

RESPECTFULLY SUBMITTED,

Desmond Hynes

By: Eric Charles Hawkins
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TABLE OF CONTENTS

| | <u>PAGE(S)</u> |
|--------------------------|----------------|
| STATEMENT OF ISSUES | 1 |
| STATEMENT OF THE CASE | 1-3 |
| SUMMARY OF THE ARGUMENTS | 3-8 |
| ARGUMENTS | 8-12 |
| CONCLUSION | 12 |
| CERTIFICATE OF SERVICE | 13 |

TABLE OF CASES AND AUTHORITIES

| <u>CASES</u> | <u>PAGE(S)</u> |
|--|----------------|
| <u>Alexander v. State</u> , 605 So.2d 1170, 1172 (Miss. 1992) | 11 |
| <u>Boykin v. Alabama</u> , 395 U.S. 238, 89 S.Ct. 1709, (1969) | 11 |
| <u>Cuyler v. Sullivan</u> , 446 U.S. at 345-350 | 10 |
| <u>Garibaldi v. State</u> , 840 So.2d 793 (Miss. 2003) | 4, 9 |
| <u>Hannah v. State</u> , 943 So.2d 20 Miss. 2006) | 11 |
| <u>Strickland v. Washington</u> , 466 U.S. 668 (1984) | 2, 8 |
| <u>Stringer v. Washington</u> , 485 So.2d 274 (Miss. 1984) | 3 |
| <u>Other Authorities</u> | |
| 6 th Amendment U.S. Constitution | 3 |

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STATEMENT OF THE ISSUES

I.

**WHETHER THE DEFENDANT'S CASE WAS PREJUDICED DUE TO THE
INEFFECTIVE ASSISTANCE OF COUNSEL.**

II.

**WHETHER THE DEFENDANT'S PLEA WAS KNOWINGLY AND
VOLUNTARILY ENTERED.**

STATEMENT OF THE CASE

On September 15, 2003, the Appellant, Desmond Hynes, entered a plea of not guilty in the Circuit Court of Sunflower County to the charge of Possession of Marijuana with intent to distribute (more than 1 kilogram) with an enhancement due to the alleged possession of a firearm. The Appellant was also charged in the indictment with the transfer of marijuana and conspiracy to sell cocaine. See Exhibit 1. On February 4

2005, more than a year later, the Appellant, being represented by Aleicia Thomas, pled guilty to one count one of the indictment, and was sentenced by the Circuit Court to 30 years in the Mississippi Department of Corrections. (T. 38, lines 3-5) On February 8, the Appellant was brought back before the court and resentenced to 20 years with 5 years suspended because of a prior mistake made at the previous sentencing hearing. (T. 52, lines 26-29)

On August 28, 2006, the Appellant, represented now by Stan Perkins, filed a Motion For Post Conviction Relief wherein he asserted that the conviction and sentence should be vacated on several grounds. See Motion For Post Conviction Relief, pages 3-6. The Appellant argued three major points of contention including; ineffective assistance of counsel, disparate sentencing among codefendants, and conflict of interest on the part of Appellant's prior attorney, Josh Bogen.

The state, being represented by Assistant District Attorney, Hallie Gail Bridges, alleged that defense counsel, Aleicia Thomas, had not been ineffective because the Appellant's potential exposure was much greater than he actually received, and that it had been prepared to put on evidence at trial that Desmond Hynes was in fact the owner of one of the firearms. She also argued that the defendant understood the ramifications of his plea and that Bogen's representation of other defendants did not prejudiced the case against Hynes. See Answer To Motion For Post Conviction Relief, pages 12-13.

An order denying post conviction relief was entered on March 26, 2007 by Circuit Judge, Betty Sanders. The lower court relying on *Strickland v. Washington*, 466 U.S.

668 (1984), and *Stringer v. State*, 485 So.2d 274 Miss. 1984, rejected both the arguments that counsel, Aelicia Thomas, had been ineffective, and that Bogen's continued representation of the joint defendants had prejudiced the Appellant's case. See Order Denying Post Conviction Relief. The court also failed to reach a finding of disparate sentencing in its order. As a result, the court refused to set aside the Appellant's conviction.

SUMMARY OF ARGUMENTS

The Appellant contends that his guilty plea should be set aside and the sentence vacated because he was entitled to a favorable ruling by the Circuit Court on his Motion for Post Conviction Relief. The present case comes before this court as a result of the Appellant along with codefendants, George "Eddie" Hynes and Walter Murphy, being charged in a multiple count indictment with possession of marijuana with intent to distribute with said charge being enhanced by the alleged possession of a firearm, conspiracy to sell cocaine, and the sale of marijuana.

It is readily apparent that the arguments of whether Appellant's counsel in the Circuit Court was ineffective and whether his plea agreement was knowingly and voluntarily entered are completely intertwined one with the other. Based upon the evidence before the court in this case, there is a close nexus between the ineffective representation of counsel and Appellant's inability to enter a plea knowingly and voluntarily with complete knowledge of the facts.

When examining the issue of the Appellant's Sixth Amendment right to the effective assistance of counsel, each misstep by Mr. Hynes' attorney cannot be looked at in

isolation. While one error of omission may be excusable, the record of counsel's performance is complete with numerous failures. This case should clearly be reexamined based upon a "totality of the circumstances by looking to the evidence in the entire record." Garibaldi v. State, 840 So.2d 793 (Miss. 2003). In support of his Motion for Post Conviction Relief, the Appellant's attorney, Stan Perkins, cited several omissions by prior counsel, Aelicia Thomas:

- a) Failure to move to dismiss the enhanced portion of the indictment since the Petitioner was not in possession of a firearm at the time of his arrest and did not live at the residence where the guns were found.
- b) Failure to move to dismiss all charges for lack of a speedy trial (more than 270 days had transpired between the time of the Petitioner's arraignment and entry of plea;
- c) Failure to move to suppress any and all evidence obtained as a result of a pretextual traffic stop for which law enforcement lacked probable cause; and
- d) Failure to properly advise the Petitioner as to the ramifications of his plea, including a correct statement as to the maximum and minimum that might have been imposed by the Court; and
- e) Failure to object to the continued representation of Attorney Bogen of one of the codefendants.

However, before the Court can reach these issues in determining whether counsel's representation was ineffective, it must first engage in a threshold inquiry; that is, whether counsel engaged in meaningful discovery. It appears from the record that counsel was not aware of any statements which had been made by a codefendant until the date of the sentencing hearing. The record is also ambiguous as to whether the state ever provided this information to counsel for the defense. (T. 33-34) The Assistant District Attorney, Hallie Gail Bridges, does state on the record "We didn't have time to furnish discovery at that point, and there was no need to because they were going to plead guilty."

During the hearing on the defendant's Motion for Post Conviction Relief, counsel Aelicia Thomas, was asked whether she had investigated to see if the state had any evidence to show that a gun was registered to the defendant. Attorney Thomas answered "No, I didn't do any investigation to that." (T. 37, lines 22-25) Attorney Perkins went on to ask whether Thomas knew if the state had any proof that the gun was registered to the Defendant, Desmond Hynes. Once again, Thomas seemed to be without knowledge of what evidence the state possessed in its files. (T. 37, lines 26-29 and T.38, line 1). It is clear from the record that the gun was not found in the Appellant's possession nor were any fingerprints found linking him to the weapon. (T. 39, lines 2-4). It is equally clear that counsel took no affirmative steps to determine ownership or possession of the weapon which would later used to enhance the Appellant's sentence. If counsel had attacked the enhanced portion of the indictment, there is a "reasonable probability that the result would have been different." *Id.* at 795.

Defense counsel, Aelicia Thomas,' performance becomes even more dubious when one examines the issue of the failure to properly advise the Appellant of the mandatory minimum along with her failure to adequately address the element of enhancement. It is apparent from the record that three major parties, the state, the defense, and the Court, didn't understand the maximum and minimum sentence that the charges would carry. Counsel even admitted to her difficulty in calculating the potential sentence. (T. 4, lines 18-28). The Circuit Court's error in sentencing Mr. Hynes to 30 years would later result in the Appellant being brought back before the court for resentencing. Even the original plea petition which was filed by counsel of record failed to state the minimum and

maximum sentence to which the Appellant could be exposed. See Plea Petition, Exhibit P-4.

The voluntariness of the Appellant's plea is once again put to the test when he is brought before the Court on February 8, 2005. The record indicates time and again that the Appellant's attorney, Alecia Thomas did not understand the nature of the plea. When discussing the amended plea petition, the Court inquires as to whether the defendant, Hynes is pleading to possession with intent, and whether it is enhanced by the firearm. Defense counsel states explicitly "It is. Possession with intent not enhanced by a firearm." (T. 40, lines 12-15). She is countered by the Assistant District Attorney, Carol White Richard who states "It is enhanced with a firearm." (T. 40, lines 16-17). It is clear from the subsequent discussion that there was a great deal of confusion about the enhanced portion of the plea. When the state's attorney takes the position that the plea is with the enhancement, the defense attorney responds, "My understanding is that the DA agreed to take that part off." (T. 40, lines 18-19). Defense counsel, Alecia Thomas, goes on to state, "My understanding was the firearm was not going to be applied to this defendant, and I assume Mr. Murphy, because Mr. Hynes was getting a better offer than the other two defendants." (T. 41, lines 12-16). This discussion during the sentencing on February 8, 2005 causes great consternation. If defense counsel did not understand the nature of what the defendant was pleading to, than how could she have properly advised the Appellant to enter said plea. It gives the appearance that the Appellant was led like a lamb to the slaughter by an attorney who had not fully understood neither the minimum

or maximum exposure nor the fact that the deal was one which included enhancement. If the attorney whose advice the defendant relies on does not understand or is confused about the nature of the plea that she is advising him to sign, then her representation is clearly rendered ineffective.

Counsel goes on further to state "The only confusion is that we all had an understanding that when she agreed to dismiss the firearm enhancement on Walter, we just assumed that the same was going to be for Mr. Desmond Hynes simply because Ms. Bridges had stated on Friday that Desmond and Walter were in the same boat. Eddie Hynes was getting a better time deal because he turned State's evidence." Defense counsel advice to Appellant may have been built upon assumption and speculation, neither of which is the foundation of effective representation. As a result of this discussion, the Court tendered the amended plea petition to Ms. Thomas and requested that she further amend the petition and initial it. (T. 41, lines 24-28). The Court also requests that the defendant initial the changes made to the petition. (T. 42, line 3). Because the plea petition is changed during the actual sentencing process, the defendant is not afforded the opportunity to be fully informed of the ramifications of this enhanced plea.

The Appellant also argued in the lower court that counsel failed to file motions to suppress any and all evidence obtained as a result of a pretextual traffic stop; that she failed to file a motion to dismiss for lack of a speedy trial; and that she failed to object to the continued representation of Attorney Bogen of one of the other codefendants. The Circuit Court rejected each of these arguments and denied Appellant's Motion for Post Conviction

Relief. The Court signed its order on March 26, and it was entered on March 28, 2007.

ARGUMENTS

I.

WHETHER THE DEFENDANT'S CASE WAS PREJUDICED DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL.

It has long been settled law that inherent in the Sixth Amendment to the United States Constitution is the right of every defendant to the effective assistance of counsel. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the Court seemed to reject the establishment of a rigid test for determining ineffective assistance of counsel, but laid down guidelines which dealt squarely with the issues of deficient performance of defense counsel and resulting prejudice to a defendant. In the present case at bar, the record that defense counsel for Appellant, Desmond Hynes, was both deficient in her performance, and that deficiency resulted in significant prejudice to his defense.

The Court reasoned in Strickland that ineffectiveness is a mixed question of law and fact. The record indicates that counsel for the defendant, Hynes, made no effort to investigate the allegation of the ownership and possession of the very weapon which was used to enhance the Appellant's sentence. In fact, when questioned by the attorney representing the defendant during the hearing on the Motion for Post Conviction Relief, counsel stated "No, I didn't do any investigation into that." (T. 37, lines 22-25). The record also indicated that the gun was not in Appellant's possession at the time of his

arrest nor were his fingerprints found on the weapon. (T. 39, lines 2-4). Although there was exculpatory evidence pointing away from the Appellant as it related to the possession of the weapon used to enhance the offense, defense counsel made no attempt to file a motion to dismiss the enhanced portion of the indictment. (T. 18, lines 11-20). Yet, the transcript also indicates that counsel felt that the enhancement was not an issue because it should have been dropped as agreed by the parties. When questioned during the hearing Attorney Thomas stated, "So I didn't actually file a motion to dismiss the enhanced portion, but as I said, during the hearing and my understanding of what the plea offer was, that shouldn't have been an issue anyway because we had agreed to drop that portion." (T. 18, lines 25-29). This statement by defense counsel raises a threshold question, why would counsel allow her client to plead to a charge when she knows that to do so violates a prior agreement between her and the state? Counsel should have objected immediately and requested a continuance until such time as the agreement reached between the defense and the state could be clarified. The time for clarification was not when the defendant was standing before the Court in a state of confusion. This error committed by Thomas is so serious that it deprived the defendant of the right to a fair proceeding. Garibaldi v. State, 840 So.2d 793 (Miss. 2003). Under the standard utilized by the Court in Garibaldi, Appellant, Hynes, should not be denied a remedy "that he would otherwise be entitled to as a matter of law had he been afforded representation which fulfilled the minimum requirements of the Sixth Amendment." The fact that Attorney Thomas knew the agreement to be something other than what defendant pled to is a startling admission. The transcript is replete with evidence that defense counsel

never knew what the nature of the final agreement was; that there also was a great deal of discussion and disagreement, in the presence of the Court, between counsels for the defense and the state as to whether the sentence should be enhanced.

Another major error of omission committed by counsel for the defense was her failure to object to a conflict of interest by Attorney Bogen. The record reflects that at some point Attorney Bogen represented all three defendants. Appellant's counsel, Alecia Thomas, admits that she had a "general concern" about the fact that Bogen had represented all three defendants. (T. 25, lines 5-11). Although it was a concern, counsel stated that she took no action with regards to his continued representation of codefendant, Eddie Hynes. (T. 24, lines 16-19), and (T. 25, lines 12-13). The record shows no instance in which counsel made an objection or filed a motion to remove Bogen for conflict of interest. Attorney Bogen's client agreed to turn state's evidence and the record indicates that Mr. Bogen may have been privy to conversation between all three parties. (T. 24, lines 20-25). In Cuyler v. Sullivan, 446 U.S. at 345-350, "the Court held that prejudiced is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties."

II.

WHETHER THE DEFENDANT'S PLEA WAS KNOWINGLY AND
VOLUNTARILY ENTERED.

"Ignorance, incomprehension, coercion, terror or other inducements, both subtle and

blatant, threaten the constitutionality of a guilty plea.” Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709 23 L.Ed.2d 274 (1969). Before the Appellant entered a plea of guilty he had the right to be advised concerning the nature of the charge against him and the of the consequences of his plea including the minimum and maximum sentences that may be imposed. Alexander v. State, 605 So.2d 1170, 1172 (Miss. 1992). The record clearly indicates that the defendant, Desmond Hynes, was incorrectly sentenced, and that the original plea petition contained no maximum or minimum sentences. See Plea Petition, Exhibit P-4. The record also shows that the Amended Plea Petition contained no minimum sentences. See Amended Plea Petitions, Exhibits P-9, and P-10.

Further, the situation which exists in the present case at bar is similar to the plea colloquy which occurred in Hannah v. State, 943 So.2d 20 (Miss. 2006). Just as in Hannah, Hynes’ understanding and awareness is unclear. The record reflects the following:

Q. What is your understanding of what you entered your plea to?

A. Well, at first, the possession of marijuana with intent by a firearm, 20 to 60 years. I got 30 years Friday. When I came back up here yesterday, they said I was going to get it cut in half, 15 years. After talking—well I just heard talking in the hallway that the gun charge was going to get dropped on me and Walter, and we were just going to have marijuana with intent. It wasn’t going to be enhanced with a firearm. But that was just hearsay, didn’t nobody come directly and tell me. My attorney wasn’t here so I couldn’t ask her. But standing here now, I guess it still stands as possession of

marijuana with intent, enhanced with a firearm. I really don't know. (T. 45, lines 15-29), and (T. 46, line 1). The defendant, Hynes, goes on state, "The way I look at it I don't have a choice." (T. 49, line 1). The Appellant contends that this is another ground for setting aside the conviction.

CONCLUSION

For the reasons cited above, the setting aside of the conviction or the rendering of the sentence is required.

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CERTIFICATE OF SERVICE

The undersigned Attorney of Record for the above Appellant does hereby certify that he has this date mailed by regular United States Mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to the following persons:

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CERTIFIED, this the 23 day of November, 2007.



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