

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CA-01650-COA

CLIFTON GATLIN

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

APPELLANT'S BRIEF

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY  
CAUSE NUMBER CI-2006-0332

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed individuals have an interest in the outcome of this cause. These representations are made in order that the Justices of the Court of Appeals may evaluate possible disqualification or recusal:

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This the 7<sup>th</sup> day of March, 2008.

  
Imhotep Alkebu-lan

## TABLE OF CONTENTS

	PAGE
Certificate of Interested Persons .....	i
Table of Contents .....	ii
Table of Authorities .....	iii - iv
Statement of the Issues on Appeal .....	1
Summary of the Case .....	1
Summary of the Facts .....	1
Summary of the Argument .....	3
Argument:	
I. WHETHER GATLIN'S PETITION FOR POST- CONVICTION RELIEF SHOULD BE DISMISSED AS MOOT? .....	5
II. WHETHER GATLIN'S GUILTY PLEA WAS ENTERED INTO VOLUNTARILY AND INTELLIGENTLY? .....	7
Conclusion .....	12
Certificate of Service .....	12

## TABLE OF AUTHORITIES

CASES	PAGE
<i>Daughtery v. State</i> , 847 So. 2d 284 (¶ 8) Miss. Ct. App. 2003) .....	8
<i>Donally v. State</i> , 841 So. 2d 207, 211 ( ¶ 8) (Miss. Ct. App. 2003) .....	11
<i>Edwards v. State</i> , 916 So. 2d 542 (¶ 3) (Miss. Ct. App. 2005) .....	5, 7
<i>Garlotte v. State</i> , 915 So. 2d 460 ( ¶ 17) (Miss. Ct. App. 2005) .....	8
<i>Gates v. State</i> , 904 (So. 2d 216 (Miss. 2005) .....	5
<i>Hall v. State</i> , 800 So. 2d 1202, 1206 (¶ 13) Miss. Ct. App. 2001) .....	9
<i>Harris v. State</i> , 806 So. 2d 1127 (¶ 11) (Miss. 2002) .....	10
<i>Morris v. State</i> , 917 So. 2d 799 ( ¶ 2) (Miss. Ct. App. 2005) .....	5
<i>Wall v. State</i> , 883 So. 2d 617 (¶ 6) (Miss. Ct. App. 2004). .....	7
<i>Santobello v. New York</i> , 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) .....	8
<i>Strickland v. Washington</i> , 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) .....	11
<i>Thomas v. State</i> , 881 So. 2d 912 (¶ 9) (Miss. Ct. App..2004) .....	8
<i>U.S. ex rel. Wirtz v. Sheehan</i> , D.C. Wis., 319 F.Supp. 146, 147 .....	6
<i>Young v. State</i> , 859 So. 2d 1025 (¶ 5) (Miss. Ct. App. 2003) .....	10
 STATUTES	
U.S.C.A. Const. Amend. 6 .....	9
Miss. Code Ann. § 47-5-139(d) .....	3, 9
Miss. Code Ann. § 47-7-33 .....	2
Miss. Code Ann. § 47-7-34 .....	2

Miss. Code Ann. § 47-7-47 .....	3, 9
Miss. Code Ann. § 97-3-65 (1972), as amended .....	1
Miss. Code Ann. § 99-15-53 (Rev. 2000) .....	7
Miss. Code Ann. § 99-39-5(1) (Rev. 2000) .....	5
<b>RULES</b>	
U.C.C.C.R. 8.04 .....	8

## STATEMENT OF THE ISSUES ON APPEAL

- I. WHETHER GATLIN'S PETITION FOR POST-CONVICTION RELIEF SHOULD BE DISMISSED AS MOOT?
- II. WHETHER GATLIN'S GUILTY PLEA WAS ENTERED INTO VOLUNTARILY AND INTELLIGENTLY?

## SUMMARY OF THE CASE

This case comes before the Court of Appeals from the denial of a petition for post-conviction relief filed pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Mississippi Code Annotated § 99-39-1, et seq.. On November 7, 2005 Clifton Gatlin plead guilty to a one count indictment charging him with statutory rape in violation of Mississippi Code Annotated § 97-3-65 (1972) as amended, in the Circuit Court of Madison County, Mississippi in cause number 2005-0249. Pursuant to M.C.A. § 99-39-23, This matter came on for hearing on Monday, August 20, 2007. The District Attorney announced ready and Gatlin announced ready.

After an evidentiary finding and argument of counsel, the court denied the Petition but amended the sentencing order.<sup>1</sup> In part, the trial court reasoned that it did not know any other way to do it. That Gatlin was free to appeal and maybe somebody that know more about this will rule how to do it.<sup>2</sup> Furthermore, the trial court reasoned that the Petition should be dismissed as moot because Gatlin was no longer in custody of the Mississippi

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<sup>1</sup> R.E. 21. In this Brief R.E. refers to the Record Excerpts Page(s). The record page is cited as Volume:Page:Line(s).

<sup>2</sup> 1:7:20-29; 1:8:1-5.

Department of Corrections.<sup>3</sup> A Notice of Appeal was timely filed on September 10, 2007.<sup>4</sup>

### SUMMARY OF THE FACTS

On November 7, 2005 Gatlin entered his Guilty Plea Petition in the Circuit Court of Madison County, Mississippi to statutory rape in violation of M.C.A. § 97-3-65.<sup>5</sup> The guilty plea petition provided that the District Attorney shall make no recommendation to the Court concerning the sentence except that Gatlin's sentence be suspended for 5 years, that he serve time in the Regimented Inmate Discipline Program (RID) and thereafter be placed on 5 years probation.<sup>6</sup>

Pursuant to the Guilty Plea Petition and the State's recommendation, the trial court sentenced Gatlin to serve five (5) years in the custody of the Mississippi Department of Correction (MDOC). Provided, however, pursuant to M.C.A. § 47-7-33 or § 47-7-34, the execution of the last five (5) years of the sentence be stayed and that portion of the sentence be suspended based upon the successful completion of the Regimented Inmate Discipline Program (RID) and the defendant shall be released on supervised probation for a term of five (5) years under the supervision of MDOC.<sup>7</sup>

On December 1, 2006 Gatlin filed his Petition for Post-Conviction Relief.<sup>8</sup> He affirmatively asserted that as an inducement to entering into a guilty plea agreement and

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<sup>3</sup> 1:8:7-14.

<sup>4</sup> R.E. 22-23.

<sup>5</sup> R.E. 06-13.

<sup>6</sup> R.E. 09.

<sup>7</sup> R.E. 14 - 20.

<sup>8</sup> R.E. 02-20.

in exchange for his plea of guilty, the State would recommend he spend six (6) months in the Regimented Inmate Development Program (RID), pursuant to M.C.A. § 47-7-47. Pursuant to M.C.A. § 47-5-139(d), however, Gatlin is not eligible for the earn time allowance (RID) if convicted of a sex crime. In his Petition Gatlin affirmatively plead that he would not have entered a guilty plea if he knew he was not eligible for the RID Program.

At the August 20, 2007 hearing the trial court found that Gatlin successfully completed the RID program and was released from custody on May 4, 2007, which, according to the court's calculations, is a continuous term of incarceration of some 6 months and 11 days.<sup>9</sup> The trial court further found that Gatlin's Motion for Post-Conviction Relief asserted that he would not have entered into a guilty plea agreement if he knew he was not eligible for the RID Program.<sup>10</sup> Furthermore, that the State should not have recommended that Gatlin serve time in the RID Program if he was not eligible. Moreover, and that the court should have known that he was not eligible for the program.<sup>11</sup>

#### SUMMARY OF THE ARGUMENT

Gatlin's Petition for Post-Conviction Relief should not have been dismissed as moot. Gatlin is still under the effects of the conviction he seeks to set aside. In effect, he is still in custody or constructive custody as a result of his guilty plea and resulting judgment of conviction and sentence. He is required, for the rest of his life, to register annually with the Mississippi Department of Public Safety as a sex offender. He is not at liberty to do

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<sup>9</sup> 1:3:17-24.

<sup>10</sup> 1:3:25-29.

<sup>11</sup> 1:6:26-29.



otherwise.

Gatlin's guilty plea to statutory rape was not entered into voluntarily and intelligently. He would not have entered a guilty plea to statutory rape if he knew he was not eligible for the RID Program. The State's deceptive and improper inducement to get him to plead guilty was that in exchange for his guilty plea the State would recommend his placement in the Regimented Inmate Development Program (RID) for six (6) months. The State's recommendation was deceptive and improper because it knew or should have known that pursuant to statute Gatlin was not eligible for the RID Program because he was charged with a sex crime.

As a result of the State's deceptive and improper consideration and inducement it breached the plea bargain agreement. To his detriment and pursuant to the State's deceptive and improper inducement, Gatlin entered his plea of guilty to statutory rape. The trial court abused its discretion when it accepted the guilty plea and the State's deceptive and improper recommendation and sentenced Gatlin to serve six (6) months in the RID program. The trial court knew or should have known that Gatlin was not eligible for the RID Program because he was charged with a sex crime.

Gatlin was furthered prejudiced when, In spite of the fact he was not eligible for the RID Program, the Mississippi Department of Corrections forced him to serve six months and eleven days in the program.

As a result, his guilty plea, therefore, was not entered into voluntarily and intelligently. His conviction of statutory rape should therefore be reversed and a new trial ordered.

## ARGUMENT

### I. GATLIN'S PETITION FOR POST-CONVICTION RELIEF SHOULD NOT HAVE BEEN DISMISSED AS MOOT.

In reviewing a trial court's decision to deny a motion for post-conviction relief, the standard of review is clear. The trial court's decision denying a motion for post-conviction relief will not be reversed absent a finding that the trial court's decision was clearly erroneous.<sup>12</sup> However, where questions of law are raised the applicable standard of review is de novo.<sup>13</sup>

At the August 20, 2007 post-conviction hearing the trial court found that Gatlin's petition is moot and should be dismissed by reason that Gatlin is no longer in custody of the Mississippi Department of Corrections. The court found that the post-conviction relief remedy is available only to those in custody.<sup>14</sup>

M.C.A. § 99-39-5(1) provides that any prisoner in custody under sentence of a court of record of the State of Mississippi may file a petition for post-conviction relief under a number of enumerated grounds. A post-conviction relief procedure for setting aside a conviction are available while the petitioner is under the effect of the conviction he seek to set aside.<sup>15</sup>

Black's Law Dictionary, 5<sup>th</sup> Edition, 1979, states that the term custody is very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical,

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<sup>12</sup> *Morris v. State*, 917 So. 2d 799 ( ¶ 2) (Miss. Ct. App. 2005).

<sup>13</sup> *Edwards v. State*, 916 So. 2d 542 (¶ 3) (Miss. Ct. App. 2005).

<sup>14</sup> 1:8:7-14.

<sup>15</sup> *Gates v. State*, 904 (So. 2d 216 (Miss. 2005).

of imprisoning, or of taking manual possession. The term "custody" within statute requiring that petitioner be "in custody" to be entitled to federal habeas corpus relief does not necessarily mean actual physical detention in jail or prison but rather is synonymous with restraint on liberty.<sup>16</sup> Accordingly, persons on probation or released on own recognizance have been held to be "in custody" for purposes of habeas corpus proceedings. The 8<sup>th</sup> Edition of the Dictionary, 2004, defines constructive custody as custody of a person (such as a parolee or probationer) whose freedom is controlled by legal authority but who is not under direct physical control.

#### ANALYSIS

As an effect of Gatlin's guilty plea and judgment of conviction and sentence he was required to register as a sex offender with the Mississippi Department of Public Safety and/or the Sheriff of the County of his residence. Furthermore, on the anniversary of his initial registration he must re-register thereafter at the time and place as required by law.<sup>17</sup> He was not at liberty to do otherwise.

Therefore, at the time of the hearing on his petition for post-conviction relief, Gatlin was still under the effect of the conviction he seeks to set aside. In effect, he has to register as a sex offender with the Mississippi Department of Public Safety for the rest of his life. At the very least he was in constructive custody. The trial court's decision denying his petition for post-conviction relief as moot was thereby clearly erroneous

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<sup>16</sup> *U.S. ex rel. Wirtz v. Sheehan*, D.C. Wis., 319 F.Supp. 146, 147.

<sup>17</sup> R.E. 19.

## II. GATLIN'S GUILTY PLEA WAS NOT ENTERED INTO VOLUNTARILY AND INTELLIGENTLY.

Again, in reviewing a trial court's decision to deny a motion for post-conviction relief, the standard of review is clear. The trial court's decision denying a motion for post-conviction relief will not be reversed absent a finding that the trial court's decision was clearly erroneous.<sup>18</sup> However, where questions of law are raised the applicable standard of review is de novo.<sup>19</sup>

A plea agreement is contractual in nature.<sup>20</sup> When a defendant breaches a plea agreement, the agreement is terminated as if it never existed and the State of Mississippi retains all powers of prosecution.<sup>21</sup>

Ordinarily, a trial judge is not bound by the terms of a plea agreement because it is the product of a bargaining process between the defendant and the prosecutor, and the judge is not a party to the agreement.<sup>22</sup> The trial judge's decision to accept or reject a plea is within the exercise of sound judicial discretion.<sup>23</sup>

The United States Supreme Court held that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of

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<sup>18</sup> *Morris v. State*, 917 So. 2d 799 ( ¶ 2) (Miss. Ct. App. 2005).

<sup>19</sup> *Edwards v. State*, 916 So. 2d 542 ( ¶ 3) (Miss. Ct. App. 2005).

<sup>20</sup> *Moore v. State*, 838 So. 2d 1254 ( ¶ 9) (Miss. Ct. App. 2006).

<sup>21</sup> *Id.*

<sup>22</sup> *Wall v. State*, 883 So. 2d 617 ( ¶ 6) (Miss. Ct. App. 2004)..

<sup>23</sup> *Id.* Miss. Code. Ann. § 99-15-53 (Rev. 2000).

the inducement or consideration, such promise must be fulfilled.<sup>24</sup> If the defendant is found to have detrimentally relied on the State's promise made pursuant to his plea, the State is bound by the provision of that plea agreement.<sup>25</sup>

A guilty plea is binding on a defendant only if it is entered voluntarily and intelligently.<sup>26</sup> A plea is involuntary if a defendant is affirmatively misinformed regarding the possibility of parole and pleads guilty in reliance on the misinformation.<sup>27</sup> Even if a defendant receives erroneous advice regarding plea from defense counsel, any misunderstanding created by this advice may be corrected by the court during the voluntariness inquiry.<sup>28</sup>

A plea induced by fear, violence, deception, or improper inducements is not voluntary.<sup>29</sup> Guilty pleas induced by promises or assurances which go unfulfilled may be held involuntary when defendant relies upon such promises.<sup>30</sup>

The Court of Appeals may apply the plain error rule to an error not properly preserved for review if the error affects a prisoner's substantive or fundamental rights. Plain error doctrine requires that there be an error and that the error resulted in a manifest

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<sup>24</sup> *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

<sup>25</sup> *Garlotte v. State*, 915 So. 2d 460 ( ¶ 17) (Miss. Ct. App. 2005).

<sup>26</sup> *Thomas v. State*, 881 So. 2d 912 ( ¶ 9) (Miss. Ct. App..2004).

<sup>27</sup> *Id* at ¶ 10.

<sup>28</sup> *Id.* at ¶ 10; U.C.C.C.R. 8.04.

<sup>29</sup> U.C.C.C.R. 8.04 (a)(3).

<sup>30</sup> *Daughtery v. State*, 847 So. 2d 284 ( ¶ 8) Miss. Ct. App. 2003).

miscarriage of justice.<sup>31</sup>

## ANALYSIS

Herein, the State and Gatlin entered into a plea bargain agreement. The agreement provided that in return for Gatlin entering his plea of guilty, the State would recommend that instead of Gatlin serving five (5) years in the Mississippi Department of Corrections he instead serve 6 months in the Regimented Inmate Development Program (RID), pursuant to M.C.A. § 47-7-47.

However, M.C.A. § 47-5-139(1)(d) Earned Time Allowance, Eligibility; Forfeiture, provides in its pertinent part:

- (1) An inmate shall not be eligible for the earned time allowance
- if: (d) The inmate was convicted of a sex crime.

Therefore, the State's recommendation that by Gatlin's entering his plea of guilty to statutory rape he would be eligible for the RID Program amounted to an deceptive and improper inducement that could not be fulfilled. Had Gatlin known he was not eligible for the RID Program he would not have plead guilty. He would have instead opted for a jury trial.<sup>32</sup>

To his detriment and based on the State's misinformation he was eligible for the Rid Program if he plead guilty, Gatlin entered his plea of guilty to statutory rape. Therefore, his guilty plea was not entered into involuntary and intelligently.<sup>33</sup> To show prejudice, he must

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<sup>31</sup> *Id* at ¶ 14.

<sup>32</sup> U.S.C.A. Const. Amend. 6.

<sup>33</sup> *Hall v. State*, 800 So. 2d 1202, 1206 (¶ 13) Miss. Ct. App. 2001).

prove that he would not have pled guilty but for the deceptive or improper inducement.<sup>34</sup> The burden of proving that a guilty plea was involuntary is on the defendant and involuntariness must be proven by a preponderance of the evidence.<sup>35</sup>

Subsequent to the entry of his guilty plea, Gatlin learned that pursuant to M.C.A. § 47-3-139(1)(d) he was not eligible for the RID Program because of his status as a convicted sex offender. Per statute, he was plainly ineligible for the RID program when the State improperly recommended he plead guilty. Based on the State's misinformation detrimentally relied upon, Gatlin plead guilty. The State's recommendation was an improper and deceptive inducement for the guilty plea.

Gatlin's guilty plea was induced by the State's improper promise and assurance. When he entered his plea of guilty he detrimentally relied upon the written agreement with the State. His guilty plea rested in significant degree on the State's promise and agreement. He fulfilled his obligation of the plea agreement by entering his plea of guilty. The State is bound by the provision of the agreement and must fulfill its obligation. By law, the State is prohibited from fulfilling its obligation. The agreement should therefore be declared null and void.

Since Gatlin's plea was induced by misinformation it is not made intelligently. Since the guilty plea was induced by promises or assurances which could not be fulfilled the plea was not entered into intelligently. This contention is grounds for showing prejudice unless

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<sup>34</sup> *Harris v. State*, 806 So. 2d 1127 (¶ 11) (Miss. 2002).

<sup>35</sup> *Young v. State*, 859 So. 2d 1025 (¶ 5) (Miss. Ct. App. 2003).

the record reveals that Gatlin received correct advice from some other source.<sup>36</sup> The record fails to do so disclose.

The State breached the plea bargain agreement. The trial court abused its discretion when it accepted the State's improper recommendation and failed to inform Gatlin that by accepting his plea he was ineligible by law to participate in the RID Program because of the nature of the charges. Gatlin was further prejudiced when he was sentence to serve six (6) months in the Regimented Inmate Development program (RID) pursuant to M.C.A. § 47-7-47 to which he was ineligible.

Just as when a defendant breaches a plea agreement, the agreement is terminated as if it never existed and the State of Mississippi retains all powers of prosecution. Conversely, when the State breaches the plea agreement, the agreement should be terminated as if it never existed and Gatlin retains all powers he had before he entered into the agreement including the power to plead not guilty.

Gatlin affirmatively asserted and the trial court found that he would not have plead guilty if he knew he was not eligible for the RID Program. The State did not refute the affirmative assertion or the court's finding. He has therefore proved by a preponderance of the evidence that his plea was involuntary. He is therefore entitled to withdraw his guilty plea when it was based on the State's misinformation which was detrimentally relied upon. The plea agreement could not be enforced by law because of the nature of the charge. Moreover, since he could never have been given the benefit of the plea agreement he should be permitted to withdraw his plea.

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<sup>36</sup> Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Donally*, 841 So. 2d 211 (¶ 8) (Miss. Ct. App. 2003).



Though the plea agreement was invalid, the trial court did not properly address the error by amending the sentence. The proper procedure was to grant Gatlin a new trial.

### CONCLUSION

Gatlin's pleas must be set aside as being involuntary. This court must remand this cause ~~for a new trial~~ for a new trial.

Respectfully submitted,

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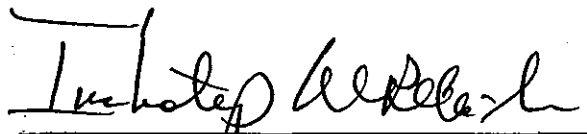
### CERTIFICATE OF SERVICE

This is to certify that on the below date a true and correct copy of the foregoing was mailed first class, postage prepaid, to the following individuals:

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This the 7<sup>th</sup> day of March, 2008.

  
Imhotep Alkebu-lan