

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii, iii
STATEMENT OF ISSUES.....	iv
STATEMENT OF THE CASE.....	v
STATEMENT OF FACTS.....	vi
SUMMARY OF ARGUMENT.....	vii
ARGUMENT.....	1-9
I. Whether or not Petitioner Aucoin presented a claim procedurally alive, substantially showing denial of a State or Federal right and is entitled to an in court opportunity to prove his claims.....	1
CONCLUSION.....	10
CERTIFICATE	11

TABLE OF AUTHORITIES

CASES:

<u>Boykin v. Alabama</u> , 395 U.S. 238 (1969).....	2, 9
<u>Carnley v. Cochran</u> , 369 U.S. 506 (1962).....	9
<u>Corley v. State</u> , 585 So. 2d 765 (Miss. 1991).....	4
<u>Gaskin v. state</u> , 618 So. 2d 103 (Miss. 1993).....	3
<u>Horton v. State</u> , 584 So. 2d 764 (Miss. 1991).....	1
<u>Hulsey v. U.S.</u> , 369 F. 2d 284 (5 th Cir. 1966)	4
<u>Jackson v. Denno</u> , 378 U.S. 368 (1961).....	9
<u>Kercheval v. U.S.</u> , 274 U. S. 220 (1927)	8
<u>McCarthy v. U.S.</u> , 394 U.S. 459 (1969)	3, 4, 8
<u>McClendon v. State</u> , 539 So. 2d 1375 (Miss. 1989).....	5
<u>Menna v. New York</u> , 423 U.S. 61 (1975).....	4
<u>Monroe v. U.S.</u> , 463 F. 2d 1032 (5 th Cir. 1972)	5, 7
<u>Murphy v. State</u> , 178 So. 2d 692 (Miss. 1965)	6
<u>Neal v. State</u> , 515 So. 2d 1234 (Miss. 1987).....	1
<u>Nelson v. State</u> , 626 So. 2d 121 (Miss. 1993).....	7, 8
<u>Renier v. State</u> , 438 So. 2d 290 (Miss. 1983).....	5
<u>Smith v. O’Grady</u> , 312 U.S. 329 (1941).....	1
<u>Thompson v. City of Louisville</u> , 362 U.S. 199 (1960).....	5
<u>U.S. v. Boatwright</u> , 588 F. 2d 471 (5 th Cir. 1979)	7
<u>U. S. v. Briggs</u> , 920 F. 2d 287 (5 th Cir. 1991).....	4

<u>U.S. V. Coronado</u> , 554 F. 2d 166 (5 th Cir. 1977).....	6
<u>U.S. v. Lincecum</u> , 568 F. 2d 1228 (5 th Cir. 1978).....	4
<u>U.S. O’Berski</u> , 734 F. 2d 1031 (5 th Cir. 1984).....	4
<u>U.S. v. Pena</u> , 314 F. 3 rd 1152 (9 th Cir. 2003).....	5
<u>Vittitoe v. State</u> , 556 So. 2d 1062 (Miss. 1990).....	8
<u>Ward v. State</u> , 708 So. 2d 11 (Miss. 1998).....	8

STATUTES

M.C.A. § 99-35-5 (2).....	1
M.C.A. § 99-39-9.....	1
M.C.A. § 99-39-11 (2).....	1

CONSTITUTIONAL AUTHORITIES

Miss. Constitution Art. 3 §14.....	2
United States Constitution Fifth Amendment	2
United States Constitution Fourteenth Amendment.....	2, 5

RULES AND OTHER AUTHORITIES

URCCCP 8.04	2, 3, 5, 6, 8
FRCP 11.....	3

STATEMENT OF ISSUES

- I. Whether or not Petitioner Aucoin presented a claim procedurally alive, substantially showing denial of a State or Federal right and is entitled to an in Court opportunity to prove his claims.

STATEMENT OF THE CASE

On May 16, 2005 Corey Aucoin pled guilty in the Circuit Court of Lincoln County, Mississippi in Cause No. 04-232. Petitioner Aucoin was charged in the indictment with the possession of less than one-tenth gram of marijuana.

On January 29, 2007 Aucoin filed his petition of post conviction relief in the case styled "In the Circuit Court of Lincoln County, Mississippi, Corey Aucoin vs. State of Mississippi, Cause No. 2007-031-LS". The grounds for relief as stated in the petition was that Petitioner Aucoin's plea was involuntary as a matter of law, in violation of due process of law, guaranteed in of the Fourteenth and Fifth Amendments to the United States Constitution as well as Article 3, Section 14 of the Mississippi Constitution. In support of this petition a complete transcript of the plea (R.,E. 9-21, R. 7-19) and sentencing was presented together with an affidavit from Petitioner Aucoin. (R.E. 7, R. 20)

On October 5, 2007 the Court issued its order summarily dismissing the petition without a hearing. (R.E. 3, R. 26)

It is from this order of dismissal that the Appellant now appeals.

STATEMENT OF FACTS

Petitioner Aucoin's plea of guilty was made without his informed consent and thus was involuntary as a matter of law. Petitioner was found guilty without any factual basis being offered and with no understanding of how his actions fit the elements of the crime charged.

SUMMARY OF ARGUMENT

Petitioner Aucoin's petition for post conviction relief meets all necessary pleading requirements and presents a collateral attack on the sentencing order showing a denial of state and federal constitutional rights. Petitioner is entitled to a hearing to prove his claims.

Petitioner's plea of guilty and the judgment following it should be vacated as it was not made voluntarily as a matter of law. The plea was not taken with informed consent and thus denied petitioner due process of law.

ARGUMENT

The issue to be decided by the Appeals Court is whether Petitioner Aucoin has presented a complaint such that he is entitled to an evidentiary hearing in the Circuit Court.

Aucoin's petition for post conviction relief was summarily dismissed without an evidentiary hearing by the Circuit Court on October 3, 2007. (R.E. 3, R. 26)

The trial court upon examination has the authority to dismiss the Petition if it plainly appears from its face, any annexed exhibits and the prior proceedings in the case that the Petitioner is not entitled to any relief §99-39-11(2) M.C.A. 1972.

If the application meets these pleading requirements and presents a claim procedurally alive "substantial[ly] showing denial of a state or federal right" the Petitioner is entitled to an in court opportunity to prove his claims Horton v. State, So.2d 764 (Miss. 1991) Neal v. State, 515 So.2d 1234, 1237 (Miss. 1987), Smith v. O'Grady, 312 U.S. 329 (1941)

The allegations of Aucoin's petition when considered with the exhibits, (including a copy of the plea transcript) meet the pleading requirements of the Post Conviction Collateral Relief Act and present a claim that is procedurally alive, substantially alleging a denial of a state and federal constitutional right. (R.E. 5-7, R. 4-20)

The petition was filed within the three (3) year Statute of Limitations(99-35-5(2)) and in compliance with §99-39-9.

The relief sought was that Aucoin's plea and sentencing be vacated.

The basis for the petition as set out in the petition was Aucoin's plea was involuntary as a matter of law. The judgment of conviction was entered without due process of law in violation of the Fourteenth and Fifth Amendments to the United States Constitution and Article 3, Section 14 of the Mississippi Constitution.

Specifically there was no factual basis for the plea as mandated by Rule 8.04A.3. of the Uniform Rules of Circuit and County Court Practice. (hereafter Rule 8.04) This resulted in Petitioner Aucoin's plea being involuntary.

In 1969 the United States Supreme Court ruled in Boykin v. Alabama, 395 U.S. 238 (1969) that for a guilty plea to be enforceable it must emanate from the accused's informed consent. Where a defendant's plea is coerced or otherwise involuntary any judgment of conviction entered thereon is subject to collateral attack.

The prerequisite for accepting a plea are set forth in Rule 8.04 of the Uniform Rules of Circuit and County Court Practice which states in part:

"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 . . ." (emphasis added)

"It is the duty of the trial court to address the defendant personally and to inquire and determine: . . . that the accused understands the nature and consequences of the plea and maximum and minimum penalties provided by law" (emphasis added)

The purpose of the factual basis rule is to "push the court to delve beyond the admission of guilty 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.”

Gaskin v. State, 618 So.2d 103, 106 (Miss. 1993)

In McCarthy v. U.S., 394 U.S. 459 (1969) the United States Supreme Court in ruling on a similar case as that of the Petitioner reviewed McCarthy's plea in light of Rule 11 of the Federal Rules of Criminal Procedure which is substantially the same as Rule 8.04 of the Uniform Rules of Circuit and County Court Practice as it requires a factual basis for the plea and that the accused understands the nature and consequences of the plea. Under Rule 11 the Court cannot accept a guilty plea without first addressing the defendant personally and determining that the plea is made voluntarily and with understanding of the nature of the charge. The Court has an obligation to make a determination that there is a factual basis for the plea.

The Court went on to say “Rule 11 is designed to assist the district judge in making the constitutionally required determination that a defendant’s guilty plea is truly voluntary. Second, the rule is intended to produce a complete record at that the time that the plea is entered of the factors relevant to the voluntariness determination. McCarthy at 465.”

“If a defendant’s guilty plea is not voluntary and knowing then it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all 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 at 466.

When the judge inquires into the defendant's understanding of the nature of the charges and consequences of his plea the judge must determine that the conduct which the defendant admits constitutes the offense charged in the indictment. McCarthy at 467.

The fact that Petitioner pled guilty, ostensibly admitting to facts supporting the charge is not itself sufficient to support a conviction. Menna v. New York, U.S. 61, 63 (1975) and U.S. v. Briggs 920 F.2d 287 (5th Cir., 1991). There must be an evidentiary foundation in the record which is sufficiently specific to allow the Court to determine that the defendant's conduct was within the ambit of that defined as criminal. U.S. v. O'Berski, 734 F2d 1031 (5th Cir., 1984)

The purpose of such a rule is to protect "a defendant who may plead with an understanding of the nature of the charge, but without realizing that his conduct does not actually fall within the definition of the crime charges. Briggs at 293.

The failure to adequately explain the charge naturally raises doubts about the inquiry into the defendant's understanding of the charges . . . "routine questions on the subject of understanding are insufficient and the single response by the defendant that he understands the charges gives no assurance or basis for believing that he does." U.S. v. Lincecum, 568 F2d 1228, 1231 (5th Cir., 1978). The Court must "advise the accused fully and not merely perfunctorily as to what acts are necessary to establish guilt". Hulsey v. U.S., 369 F2d 284, 286 (5th Cir., 1966) The record shows that all questions asked were perfunctory, routine and without substance. (R.E.13-16, R. 11-14)

On collateral review the Court is to look to the objective record limited to proof in the accuser's presence. Corley v. State, 585 So.2d 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 So.2d 1062 (Miss. 1990)

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

When it can be shown that the plea was not voluntarily and understandingly entered it must be invalidated. Monroe v. U.S., 463 F2d 1032 (5th Cir., 1972). A sufficient understanding of the charges on the basis of which to make an informed decision concerning a plea is part of the concept of voluntariness. The elements or nature of the charges were not discussed in the record. (RE. 13-16, R. 11-14)

A statement by the defendant and his attorney that they discussed the nature of the charges is insufficient to satisfy the Rule. Vague references to a discussion of the charges and the nature of the charges do not provide a complete record showing compliance with the rule. U.S. v. Pena, 314 F3d 1152, 1155 (9th Cir., 2003).

The record in Corey Aucoin's case is silent as to any proposed factual basis by which the State would have proposed to convict Corey Aucoin. (R.E. 9-21, R. 7-19) This allowed a criminal conviction with no evidence of guilt and therefore deprived Petitioner of due process of law as guaranteed under the Fourteenth Amendment to the United States Constitution. Thompson v. City of Louisville, 362 U. S. 199. The indictment cannot be relied on as the factual basis as it is a mere charging instrument and provides not the slightest evidence of actual guilt. It contains the elements of the crime, but no factual basis to prove the acts of the Petitioner that would prove him guilty. Renier v. State, 438 So.2d 290, 293 (Miss. 1983).

The Court was required under Rule 8.04 to make a finding on the record that there

existed a factual basis for the Petitioner to be found guilty. This is not discretionary, it is mandatory. The word “must” is mandatory, not discretionary. Murphy v. State, 178 So.2d 692 (Miss. 1965). The trial Court did state that there was a factual basis, (R.E. 17, R. 15) but this was without there being any factual basis in the record and is obviously a canned, boilerplate pronouncement perfunctorily and routinely made as a matter of form. The information available to the court when it accepted the plea was inadequate as a matter of law to satisfy it that there was a factual basis for the plea. The trial court failed to afford the Petitioner the presumption of innocence, the basic tenet of due process, without which there can be no justification for accepting the plea.

The Court must address the defendant personally and inquire and determine that the accused understands the nature of the charges and the nature and the consequences of his plea. (Rule 8.04 A.4.6.)

A prerequisite is that the charge or charges be explained with sufficient specificity for the Court to make such a determination. All of the questions asked (R.E. 13-16, R. 11-14) were boilerplate and did not refer to the crime, the charge, the nature of the charge, the consequences of the plea to that charge or to anything specific to the accuser’s particular case. Rule 8.04 requires the judge to explain to the defendant the charge to which he is pleading guilty and to determine whether the defendant understands the charge. U.S. v. Coronado, 554 F2d 166, (5th Cir. 1977).

“The Court should not rely on a routine boilerplate questions to the defendant designed to illicit an acknowledgement of understanding. Nor should the Court rely solely upon statements that it makes to the defendant. In adhering to the rules, the Court should engage in as extensive an interchange as necessary to assure itself and any

subsequent reader of the transcript that the defendant does indeed fully understand the charges. With respect to some points the Court may choose to have the defendant recount his or her understanding of the charges in narrative form and in his or her own language.” Monroe at 1035.

In U.S. v. Boatwright, 588 F2d 471 (5th Cir., 1979) the government argued the charges against Boatwright were adequately explained for the reason that the defendant received a copy of the indictment and went over it with his attorney. The 5th Circuit found that a determination that the defendant had gone over the indictment with his attorney is not the determination the Rule requires. The purpose of the rule is to help the trial court determine that the guilty plea is voluntary as the constitution requires. (emphasis added)

In Nelson v. State, 626 So.2d 121, 126 (Miss. 1993) the Court held that the judge must conduct a face to face exchange in order to determine whether the accused knows and understands the rights to which he is entitled. The presumption of innocence attends the accused up until he pleads guilty. Without a factual basis and an understanding of the charge the court is presuming the defendant is guilty and is merely going through the motions in accepting the plea and pronouncing the sentence. This is a clear denial of due process. It is a formality, a matter of course, an assumption. If the trial judge is unable immediately after accepting the plea to recite the factual basis of guilty then the trial judge is not fulfilling his duty to be fair and impartial. From this record it would be impossible for the trial judge to recite the factual basis.

The boilerplate questions as to whether your attorney went over the indictment and the elements of the crime is tantamount to asking an accused whether he has been

advised of his constitutional rights without enumerating those rights. This was a practice that was condemned in Nelson at 126. Also see the case of Ward v. State, 708 So.2d 11 at 16 (Miss. 1998).

In Ward 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”.

As in Ward the record is devoid of any indication that Petitioner, Aucoin actually knew or understood the nature of the charge or charges or the nature of the consequences of his plea to each charge. The Court made a conclusion without a factual determination and without the defendant being advised of the elements of the crime and how the circumstances of his particular situation fit into a determination of his guilt or innocence as to this crime. The record of the plea process totally fails to support this critical finding. There is absolutely no foundation.

The Circuit Court’s failure to observe the mandates of Rule 8.04 during the plea process renders Petitioner, Corey Aucoin’s plea of guilty to be involuntary as a matter of law. McCarthy at 460, Vittitoe v. State, 556 So.2d 1062 (Miss. 1990). If the defendant’s guilty plea is not voluntary and knowing, then it has been obtained in violation of due process and is therefore void. (McCarthy at 466).

A plea of guilty is a confession which admits that the accused did various acts, it is itself a conviction, nothing remains but to give judgment and determine punishment. See Kercheval v. United States, 274 U.S. 220, 223. The admissibility of a confession

must be based on a "reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant." See Jackson v. Denno, 378 U.S. 368, 389 (1961). The requirement that the prosecution spread on the record the prerequisites of a valid waiver is not a constitutional innovation. In Carnley v. Cochran, 369 U.S. 506, 516 (1962) the United States Supreme Court stated in dealing with the problem of a waiver of the right to counsel under the Sixth Amendment stated that "presuming a waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver." In Boykin v. Alabama, 395 U.S. 238 (1969) the United States Supreme Court stated that "we think that the same standard must be applied to determining whether a guilty plea is voluntarily made. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover up of unconstitutionality."

The trial court cites, in its order denying relief, boilerplate questions and answers used by the original trial court to accept the guilty plea. They are each perfunctory, routine and without substance.

The petition together with the transcript meet the pleading requirements and present a claim that is procedurally alive substantially alleging a denial of state and federal constitutional rights entitling the Petitioner Aucoin to the relief sought.

CONCLUSION

The presumption of innocence attends the Petitioner up until the time he is found guilty or a guilty plea is accepted. When an accused pleads guilty it must be with informed consent for it to be voluntarily and understandingly entered into.

The trial court in this case failed to fulfill its obligations under the constitution of the United States and the State of Mississippi to ensure due process of law to Petitioner Aucoin. His plea and judgment should be vacated.

CERTIFICATE

I, Raymond O. Boutwell, Jr., attorney for Appellant Corey Aucoin do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief of Appellant to each of the following:

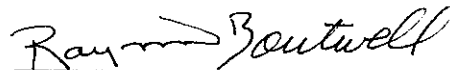
Honorable David Strong
Circuit Court Judge
PO Drawer 1387
McComb, MS 39644

Honorable Jim Hood, Attorney General
PO Box 220
Jackson, MS 39205

Honorable Dewitt Bates, District Attorney
284 E. Bay Street
Magnolia, MS 39652

Mr. Corey Aucoin, Inmate
MDOC No. R3790
South MS Satellite Facility
Magnolia, MS 39652

This the 12TH day of March 2008.



Raymond O. Boutwell, Jr.
Attorney for Appellant, Corey Aucoin