

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

BRIAN KEITH CARREIRO

APPELLANT

VS.

NO. 2007-CA-2280

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. THE CIRCUIT COURT HAD JURISDICTION.
- II. THE APPELLANT'S GUILTY PLEA WAS VALID AND LEGAL.
- III. THE APPELLANT'S BANISHMENT FROM CERTAIN COUNTIES WAS NOT UNLAWFUL AS THE PURPOSE OF THE BANISHMENT DOES NOT VIOLATE THE REQUIREMENTS ESTABLISHED BY *MCCREARY V. STATE*.
- IV. THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

STATEMENT OF THE FACTS

Sheriff Calcote of Lincoln County and his family provided the Appellant, Brian Keith Carriero, with room and board in exchange for his help with the family's kids and other chores. In June of 2004, the family went to Gulf Shores, Alabama for vacation and brought Carriero along. (Exhibit P-2). Before leaving for vacation, Ms. Calcote asked to borrow Carriero's camera to use on vacation. (Exhibit P-2). He agreed. While in Gulf Shores, Ms. Calcote had pictures developed

from film found in Carriero's camera. (Exhibit P-2). Two of the pictures developed were particularly disturbing close up pictures of her seven-year-old daughter, K.C.'s private parts covered only by her swim suit. (Exhibit P-2). The photographs appeared to be taken while her daughter was napping in her bed. (Exhibit P-2). There were also photographs of several children walking down a street in Brookhaven near the elementary school. (Exhibit P-2) Ms. Calcote showed the photographs to her husband who immediately transported Carriero back to Lincoln County. (Exhibit P-2). After being questioned by officers, Carriero gave a written statement which is set forth in pertinent part as follows:

When I took the pictures of the young females: the ones I took when I was on Vivian Merritt, I was thinking about what it would feel like to lay with her (The oldest looking one) in the pictures. . . . Well, for pictures 17 and 18¹, I know how long I had to get a picture or 2 because I know what time she woke up, I also know when her wake up. These pictures took the longest to take, because I would walk in the bedroom where she was and get ready to take a picture then I would turn and walk out of the room. Then I would turn around and go back in, I did this 3 or 4 times. But the urge was so strong. I never actually wanted to take pictures. So when I got ready to take the pictures, I positioned the covers just right so I could get a good look at her butt. When I was taking these pictures, I had thoughts of undressing her and climbing into bed with her. Thinking how it she would feel next to me. Thought about rubbing her all over especially her butt. Wanted to feel her butt against my manhood and mover her up and down against my manhood until I got off. But instead of going off and masterbating I went outside and started to other stuff just anything to make the feelings go away.

(Exhibit P-4).

Carriero was indicted for exploitation of a child under Mississippi Code Annotated §97-5-33(2) and for touching a child for lustful purposes under Mississippi Code Annotated §97-5-23. Gus Sermos was appointed as his counsel. After receiving the State's discovery, Mr. Sermos met with Carriero at the Copiah County Jail and went over the indictment and the discovery, including the

¹ Pictures 17 and 18 are the pictures at issue in this case and are a part of the Record as Exhibit P-3a and P-3b.

pictures and Carriero's written confession. (Transcript p. 13). After discussing the evidence against Carriero with regard to the exploitation of a child charge and the touching a child for lustful purposes charge², Carriero and Mr. Sermos decided that Carriero should plead guilty.

Carriero pleaded guilty to both counts before Judge Mike Smith and was sentenced with regard to the exploitation of a child charge to twenty years with five years to serve in the custody of the Mississippi Department of Corrections and with the remaining fifteen years to be served on post release supervision. With regard to the touching a child for lustful purposes charge, Carriero was sentenced to fifteen years with five years to serve in the custody of the Mississippi Department of Corrections and with the remaining ten years to be served on post release supervision. Judge Smith further ordered that the sentences were to run consecutively and that upon his release from the custody of the Mississippi Department of Corrections, Carriero would be barred from entering Lincoln, Pike and Walthall counties as well as have no contact with the victim or her family.

Carriero later obtained the services of a new attorney and filed a Motion for Post Conviction Relief alleging among other things that he received ineffective assistance of counsel, that his plea was not knowing and voluntary, that his sentence was illegal and violated the Constitutions of the State of Mississippi and the United States, that he was never adjudicated guilty, that the alleged offenses did not take place within the jurisdiction of the trial court, and that the trial court never established a factual basis for the plea. (Record p. 5 - 8). The State filed a response to the Motion. (Record p. 80 - 88). An evidentiary hearing was held before Judge David Strong during which both Mr. Sermos and Carriero testified. (Transcript p. 2 - 9). At the conclusion of the hearing, Judge

²The record indicates that the evidence regarding the touching a child for lustful purposes charge included a notation in the investigative report indicating that K.C. stated that Carriero rubbed her chest while they were laying on her couch at her home and of expected testimony from Ms. Calcote that she saw Carriero touch K.C. on the butt. (Exhibit P-2 and Transcript p. 34 - 35).

*Touching
evidence*

Strong held that Carriero did not receive ineffective assistance of counsel and that the trial court had jurisdiction. (Transcript p. 50 - 51). He then gave counsel for Carriero and for the State ten days to present authority regarding the failure of the trial judge to accept the guilty plea and “any relevant authority that instructs this Court what it should or has to do with regard to the plea that we all have a copy of taken three years ago.” (Transcript p. 50 - 51). Carriero subsequently filed a supplemental brief in support of his motion for post-conviction relief. (Record p. 103 - 110). Judge Strong then entered an order denying Carriero’s motion for post-conviction relief holding that “based on the totality of the circumstances that Carriero freely, voluntarily, and intelligently pled guilty” and that during the evidentiary hearing Carriero specifically testified that “he was fully aware of his rights as explained to him and was pleading guilty and waiving those rights in an effort to avoid trial.” (Record p. 112 - 114). Carriero now appeals.

SUMMARY OF THE ARGUMENT

The trial court had jurisdiction as there was sufficient evidence that the pictures in question were taken in Lincoln County, Mississippi. Carriero’s plea was valid and legal as it was knowingly and voluntarily given and as there was a factual basis for the plea. Further, the Appellant’s banishment from certain counties was not unlawful as the purpose of the banishment did not violate the requirements established by *McCreary v. State*.

Additionally, Carriero failed to establish both prongs of the *Strickland* analysis. He did not establish that Mr. Sermos was deficient as there was evidence that Mr. Sermos did go over the indictment, discovery, and elements of the crime with Carriero. Further, Carriero failed to show that Mr. Sermos did not consider Carriero’s mental competence and he failed to give specific examples how Mr. Sermos allowed his own feelings to interfere with his representation of Carriero. Additionally, Carriero failed to prove how each of these alleged deficiencies specifically prejudiced

his case by failing to establish how but for these alleged deficiencies, the outcome would have been different.

ARGUMENT

The trial court's denial of a motion for post-conviction relief should not be reversed "absent a finding that the trial court's decision was clearly erroneous." *Crowell v. State*, 801 So.2d 747, 749 (Miss. Ct. App. 2000) (citing *Kirksey v. State*, 728 So.2d 565, 567 (Miss. 1999)).

I. THE CIRCUIT COURT HAD JURISDICTION.

Carriero first argues that "the Circuit Court of Lincoln County, Mississippi did not have jurisdiction of the subject matter in that there was no showing that the pictures which form the basis for Count I of the indictment were taken in Lincoln County, Mississippi." (Appellant's Brief p. 5). Mississippi Code Annotated §97-5-33 states that "for purposes of determining jurisdiction, the offense is committed in this state if all or part of the conduct described in this section occurs in the State of Mississippi or if the transmission that constitutes the offense either originates in this state or is received in this state." In the case at hand, there was sufficient evidence establishing that the pictures in question were taken in Lincoln County, Mississippi. For example, the first pictures found on the roll were taken of children outside an elementary school in Lincoln County, Mississippi. (Exhibit P-2). Also, the investigative report seems to indicate that Ms. Calcote borrowed the camera before going to Gulf Shores and that she took the camera to Gulf Shores. Thus, the pictures would have been taken prior to the trip. (Exhibit P-2). Most importantly, however, is the testimony of Carriero himself set forth below:

- check context*
- Q: And you randomly took that photographs twice in the Calcotes' home?
A: Yes, sir.
Q: I mean, you were in their home, correct?
A: Yes, sir.
Q: And that was in Lincoln County, Mississippi, was it not?
A: Yes, sir.

(Transcript p. 43). Thus, the evidence and testimony presented at the evidentiary hearing clearly established that the pictures were taken in Lincoln County. As such, the trial court had jurisdiction and Judge Strong properly denied Carriero's Motion for Post-Conviction Relief on that ground.

II. THE APPELLANT'S GUILTY PLEA WAS VALID AND LEGAL.

Carriero also argues that "the guilty plea and sentence imposed were unlawful and violated [his] constitutional rights." (Appellant's Brief p. 5). The question of whether a plea was voluntarily and knowingly made is a question of fact. *Davis v. State*, 758 So.2d 463, 466 (Miss. Ct. App. 2000).

The petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to relief. *Id.* (citing *McClendon v. State*, 539 So.2d 1375, 1377 (Miss.1989)). A trial judge's findings at a preliminary hearing "are treated as findings of fact made by a trial judge sitting without a jury as in any other context" and "[a]s long as the trial judge applied the correct legal standards, his decision will not be reversed on appeal unless it is manifestly in error, or is contrary to the overwhelming weight of the evidence." *Payton v. State*, 845 So.2d 713, 716 (Miss. Ct. App. 2003) (quoting *Foster v. State*, 639 So.2d 1263, 1281 (Miss.1994)).

Carriero first asserts that "no factual basis existed to support a finding of guilt in this matter in that the pictures which form the basis for this case do not rise to the level of a crime under the statute and there was no evidence whatsoever that the defendant touched the buttocks of the minor child." (Appellant's Brief p. 5). He also asserts that his "entry of a guilty plea in this case was not freely, knowingly, voluntarily, and intelligently entered in that the Judge did not, and could not have, found a legally factual sufficient for the plea in this matter." (Appellant's Brief p. 5). In order for a guilty plea to be deemed voluntary, the defendant must be advised of the nature of the charges against him and understand the consequences of entering a guilty plea, including the minimum and maximum penalties he faces. *White v. State*, 921 So.2d 402, 405 (¶9) (Miss. Ct. App. 2006) (citing

Alexander v. State, 605 So.2d 1170, 1172 (Miss. 1992); URCCC 8.04(A)(4)(b)). In the case at hand, Carriero was informed of the nature of the charges and their consequences as evidenced from the transcript of the plea hearing:

- Court must still explain?*
- Q: Did [your attorney] go over the indictment with you and the elements of the crime?
- A: Yes, Your Honor.
- Q: Do you understand the elements of the crimes?
- A: Yes, Your Honor.
- Q: Did [your attorney] go over the discovery material, the case reports and what not provided from the district attorney?
- A: Yes, Your Honor.
- Q: Has he answered all of your questions?
- A: Yes, Your Honor.

(Transcript p. 3 - 4).

- Q: Has anyone threatened, abused, or promised you anything to cause you to want to plead guilty?
- A: No, Your Honor.
- Q: Are you pleading guilty because you are guilty and for no other reason?
- A: Yes, Your Honor.
- Q: Are you satisfied that the State can prove beyond a reasonable doubt that you are guilty?
- A: Yes, Your Honor.

(Transcript p. 5 - 6).

Carriero was also told the maximum and minimum sentences for each of the crimes. (Transcript p. 5). Further, Carriero was read a list of each of his rights and it was explained to him that a guilty plea waives those rights. (Transcript p. 4 - 5). Additionally, he signed a Know Your Rights Form which also sets forth the charges against him, his rights, and the minimum and maximum sentences. (Exhibit P-8).

The testimony at the evidentiary hearing further established that Carriero's plea was knowingly and voluntarily given. First, Carriero's attorney testified that he met with Carriero and went over the indictment, discovery, and investigative report. (Transcript p. 13 - 14). He also

testified that he discussed the elements of the crimes with Carriero. (Transcript p. 15). He gave Carriero an honest assessment and explained that if his statement were to come into evidence that he would have a hard time recovering from it. (Transcript p. 18). Carriero's counsel also testified at length about the possible defense strategies that the two discussed. (Transcript p. 24 - 25). He also testified as follows regarding Carriero's knowledge of the charges against him:

- Q: Mr. Sermos, you were sitting in there [in the judge's chambers], was Mr. Brian Carriero informed of the charges against him? *off record*
- A: Yes.
- Q: He was informed by you and the judge, am I correct?
- A: That's correct.

(Transcript p. 31 - 32). He further testified that there were discussions off the record regarding the factual basis for the plea. (Transcript p. 35 - 36).

Carriero's testimony at the evidentiary hearing was perhaps the most persuasive in establishing that his plea was knowingly and voluntarily given. He testified that he went over the case a couple of times with his attorney, that he went over the Know Your Rights Form and signed it, that he had no questions and recognized that he could have asked questions if he had any, that he understood his rights, and that he waived his rights by pleading guilty. (Transcript p. 44 - 46). He then testified as follows:

- Q: Did you know that you waived everything and pled guilty, did you understand that you actually did plead guilty?
- A: I give up my rights too.
- Q: You gave up your rights. Did you voluntarily do that?
- A: Yes, sir.
- Q: Did you understand you were pleading guilty?
- A: I understood I was throwing myself on the mercy of the court.
- Q: That's what you were doing, throwing yourself at the mercy of the court?
- A: Yes, sir.
- Q: And you were doing that of your own free will?
- A: Yes, sir, to avoid trial.
- * * *
- Q: Did you feel at that time that you were entering a guilty plea to two counts?

A: I entered a plea, yes, sir.
 Q: And you knew you entered a plea?
 A: Yes, sir.
 * * *
 Q: Did you understand that you had a constitutional right to a trial by a jury?
 A: Yes, sir.
 Q: Did they go over the fact that you had the right to cross-examination of everyone that was going to testify against you?
 A: He read it to me.
 Q: Do you understand that?
 A: Yes, sir.
 Q: Did you understand it that day?
 A: Yes, sir.
 Q: That Mr. Sermos could ask questions?
 A: I knew my rights, yes, sir.
 Q: You knew your rights?
 A: Yes, sir.

(Transcript p. 46 - 47). Additionally, he admitted that he wrote the statement which is a part of the record as Exhibit P-4 and that he took the photographs made a part of the record as Exhibit P-3.

(Transcript p. 41 - 42). He also testified as follows:

Q: Were you taking that photograph because you were aroused by her genital area? You know what genital area means, correct?
 A: Yes sir.
 Q: Do you know what the genital area is?
 A: Yes sir.

(Transcript p. 43). He also confirmed that his attorney discussed a defense strategy and articulated that strategy. (Transcript p. 40). Thus, the record clearly establishes that Carriero was informed of his rights, the charges against him, and the consequences of pleading guilty.

There was also ample evidence that a factual basis for the plea was established. In *Coleman v. State*, this Court specifically stated that:

The Uniform Rule of Circuit and County Court Practice 8.14(A)(3) states that, “[b]efore the trial court may accept a plea of guilty, the court must determine that . . . there is a factual basis for the plea.” The Mississippi Supreme Court has defined “factual basis.” The court explained that “[i]n the end there must be enough that the court may say with confidence the prosecution could prove the accused guilty of the

crime charged, 'that the defendant's conduct was within the ambit of that defined as criminal.'" *Corley v. State*, 585 So.2d 765, 767 (Miss. 1991)(quoting *United States v. Broce*, 488 U.S. 563, 570, 109 S.Ct.757, 102 L.Ed.2d 927 (1989)). The court proceeded to give examples of the proof required to show a factual basis, but it emphasized that "[n]one of this is to say that the defendant's admission, standing alone, may not suffice, nor that we may not take the testimony of the accused in conjunction with all else in deciding that there is a factual basis for the plea." *Id.* (*emphasis added*). Furthermore, we have previously held that "if sufficiently specific, an indictment or information can be used as the sole source of the factual basis for a guilty plea." *Drake v. State*, 823 So.2d 593, 594 (Miss. Ct. App. 2002)(*citation omitted*).

979 So.2d 731, 734 (Miss. Ct. App. 2008). Furthermore, this Court has previously held that "a guilty plea by its very nature is an admission of guilt." *Drake v. State*, 823 So.2d 593, 594 (Miss. Ct. App. 2002). Moreover, "the mere fact that the factual basis does not provide all the details which may be produced at trial does not render the guilty plea fatal." *Robinson v. State*, 964 So.2d 609, 613 (Miss. Ct. App. 2007) (citing *Drake v. State*, 823 So.2d at 594)). Additionally, the Mississippi Supreme Court has held that it "is not limited to the transcript of [the appellant's] guilty plea hearing, but [it] is allowed to review the record as a whole." *Boddie v. State*, 875 So.2d 180, 183 (Miss. 2004) (citing *Gaskin v. State*, 618 So.2d 103, 106 (Miss. 1993)) (*emphasis added*).

As noted above, Carriero admitted that he prepared the statement in which he admits moving the covers off the seven-year-old, taking the pictures of her private parts, and being sexually aroused in the process. Furthermore, while Judge Smith did not articulate the factual basis on the record, Mr. Sermos testified at the evidentiary hearing that there were off the record discussions regarding the factual basis for the plea on the day in question. (Transcript p. 35 - 36). Also, Carriero testified, after reviewing the discovery with his attorney, that he was satisfied that the State could prove beyond a reasonable doubt that he was guilty. (Transcript p. 5 - 6). He also testified that his attorney went over the indictment and the elements of the crime with him and that he understood the elements of the crime. (Transcript p. 3 - 4). This Court has previously held that "[g]reat weight is given to

There must be a factual basis for the plea on the record.

statements made under oath and in open court during sentencing.” *Ward v. State*, 879 So.2d 452, 455 (Miss. Ct. App. 2003) (quoting *Gable v. State*, 748 So.2d 703, 706 (Miss. 1999)). *See also* *Hearvey v. State*, 887 So.2d 836, 840 (Miss. Ct. App. 2004) (holding that “where the defendant’s claims are in contradiction with the record, the trial judge may rely heavily on statements which were made under oath.”) and *Pleas v. State*, 766 So.2d 41, 43 (Miss. Ct. App. 2000). Moreover, Mr. Sermos testified that both he and Judge Smith informed Carriero of the nature of the charges against him. (Transcript p. 31 - 32). Accordingly, there can be no doubt that Judge Smith was able to hold with confidence that there was a factual basis for the crimes charged.

Also as part of his argument that no factual basis was established, Carriero asserts that “the evidence in this case is not adequate to obtain a guilty plea.”³ (Appellant’s Brief p. 10). However, as noted by this Court in *Young v. State*, “by entering a guilty plea, [the Appellant] not only confessed to the actions as charged in the indictment but also stipulated that the prosecution did not need to advance evidence of guilt.” 952 So.2d 1031, 1033 (Miss. Ct. App. 2007). *See also Williams v. State*, 752 So.2d 477, 479 (Miss. Ct. App. 1999) (holding that by pleading guilty a defendant admits his guilt and waives proof by the State) and *Vaughn v. State*, 964 So.2d 509, 511 (Miss. Ct. App. 2006) (holding that “it is well settled that a defendant who pleads guilty waives his or her

³ Carriero asserts that the pictures in question do not amount to evidence of a crime. Carriero was indicted for “willfully, unlawfully, and feloniously, photograph[ing] K.C., a child under the age of eighteen years, engaging in sexually explicit conduct, to wit: **lascivious exhibition of the genital and/or pubic area of the said K.C.**” (Record p. 25) (*emphasis added*). Carriero’s own definition of “lascivious” is “reflecting or **producing sexual desire** or behavior that is considered **indecent** or **obscene**.” (Appellant’s Brief p. 13) (*emphasis added*). One need only to look at Carriero’s written statement to see that the pictures “produced sexual desire” which would definitely be considered “indecent” and “obscene” when looked at in light of the fact that the pictures were taken of a seven year old child (Exhibit P- 4). While there is nothing indecent or obscene about a child sleeping under the covers in her bathing suit, there certainly is something obscene and indecent about a grown man moving the covers and taking very close photographs of a seven year old child’s genitals covered or not covered especially in light of the disgusting thoughts said grown man reflected having in his written statement.

right that the prosecution prove each element of the offense beyond a reasonable doubt.”⁴ Furthermore, “post-conviction proceedings are for the purpose of bringing to the trial court’s attention facts not known at the time of judgment.” *Foster v. State*, 687 So.2d 1124, 1129 (Miss. 1996).

Finally, Carriero asserts that he was “never adjudicated guilty by the circuit court of Lincoln County, Mississippi in that there was never an acceptance of the guilty plea, never an adjudication of guilt and no Order of Conviction was ever entered by the Court.” (Appellant’s Brief p. 5). As noted in the State’s response to Carriero’s Motion for Post-Conviction Relief, “common sense must prevail” in that “the fact that the court immediately proceeded to sentencing is ample evidence that the court found the defendant guilty and accepted his guilty plea.” (Record p. 82). Further, the State is not aware of any authority which requires that the Court verbalize certain words in order for a guilty plea to be accepted.

Accordingly, Carriero’s plea was valid and legal as it was knowingly and voluntarily given and as there was a factual basis for the plea. Thus, Judge Strong properly denied Carriero’s Motion for Post Conviction Relief on this issue as well.

III. THE APPELLANT’S BANISHMENT FROM CERTAIN COUNTIES WAS NOT UNLAWFUL AS THE PURPOSE OF THE BANISHMENT DOES NOT VIOLATE THE REQUIREMENTS ESTABLISHED BY *MCCREARY V. STATE*.

Carriero also argues that “the sentencing order which banishes Mr. Carriero from three counties is unlawful and unsupported by a finding from the court.” (Appellant’s Brief p. 5). The Sentencing Order reads in pertinent part as follows:

⁴ This also applies to the charge in Count II of the indictment. Carriero alleges that there is no evidence of this crime; however, testimony at the evidentiary hearing established that the State had a witness who would testify that she saw Carriero touch the seven year old child’s buttocks. (Transcript p. 34 - 35).

Upon his release from incarceration the defendant is barred from entering Lincoln, Pike, and Walthall Counties in Mississippi. Further he is to have no contact with the victim or the victim's family.

(Exhibit P-7). Mississippi law is clear that “a banishment must bear a reasonable relationship to the purpose of probation, the ends of justice and the best interest of the defendant and the public must be served, the public policy must not be violated, the rehabilitative purposes of the probation must not be defeated, and the defendant's rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution must not be violated.” *Hamm v. State*, 758 So.2d 1042, 1046 (Miss. Ct. App. 2000) (citing *McCreary v. State*, 582 So.2d 425, 427 (Miss. 1991)). In this case Carriero's banishment clearly passes this test as it certainly has a reasonable relationship to the ends of justice, the best interest of the defendant, and public policy. Certainly, it is the best interest of everyone involved including Carriero that he not be in the counties where this victim and her family live. She and her family do not need the reminders of the events that transpired and he does not need to be tempted to allow the feelings he noted in his written statement to resurface. While Judge Smith did not explicitly state the reasons for the banishment on the record, the sentence in the Order following the sentence ordering the banishment adequately gives his reasons. Judge Smith rightly wanted to keep Carriero from the victim and her family. Thus, the sentence was not unlawful.

IV. THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Lastly, Carriero argues that he “was denied effective assistance of counsel in this matter and his counsel's deficiencies severely prejudiced Mr. Carriero's rights.” (Appellant's Brief p. 6). Carriero specifically argues that his counsel was ineffective in the following ways: (1) his counsel “never properly informed him of the elements contained in count one of the indictment” and “failed to inform Carriero that the State's evidence did not meet the elements in counts one and two”; (2) Carriero's counsel “never investigated the issue of intelligence and never raised the issue of

competency to the court”; (3) Carriero’s counsel “allowed his own feelings to interfere with his duty to properly investigate, analyze the case, and defend his client.” (Appellant’s Brief p. 22 - 23). He then asserts that “all of these errors by defense counsel severely prejudiced Mr. Carriero.” (Appellant’s Brief p. 23).

The standard of review for such claims is as follows:

Claims of ineffective assistance of counsel are judged by the standard in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The two-part test set out in *Strickland* is **whether counsel's performance was deficient** and, if so, **whether the deficiency prejudiced the defendant to the point that "our confidence in the correctness of the outcome is undermined."** *Neal v. State*, 525 So.2d 1279, 1281 (Miss.1987). This standard is also applicable to a guilty plea. *Schmitt v. State*, 560 So.2d 148, 154 (Miss.1990). **A strong but rebuttable presumption exists that "counsel's conduct falls within a broad range of reasonable professional assistance."** *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990). **To overcome this presumption, the defendant must show that "but for" the deficiency a different result would have occurred.** *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

Richardson v. State, 769 So.2d 230, 234 (Miss. Ct. App. 2000) (*emphasis added*). Carriero fails to meet this test.

First, Carriero wholly fails to show that but for his counsel’s alleged deficiencies the outcome would have been different. Carriero merely makes blanket allegations in his brief that “those deficiencies severely prejudiced Mr. Carriero’s rights” and that “but for the deficiencies of counsel, the result in Mr. Carreiro’s case would have been vastly different.” (Appellant’s Brief p. 22). He fails to specify how the alleged deficiencies adversely affected his case and what these alleged different results would have been. For example, Carriero claims in his brief that had Mr. Sermos better explained the elements of the crimes he was charged with that he “could have made an informed choice about declining to plead guilty to count one.” (Appellant’s Brief p. 25). At the evidentiary hearing, he merely asserted, in direct conflict with his testimony at the guilty plea

hearing, that he pleaded guilty to a crime he did not understand. (Transcript p. 41). He never asserted that had he been more “informed” that he would not have pleaded guilty. Furthermore, he testified at the guilty plea hearing that Mr. Sermos answered all of his questions. (Transcript p. 3 - 4).

Also, Carriero did not address the prejudice that Mr. Sermos’ alleged deficiency in failing to “investigate the issue of intelligence” and failing to “raise the issue of competence had on Carriero’s case. The only proof offered at the evidentiary hearing in this regard were the records; however, he offered no evidence whatsoever to show that these records could establish that Carriero was incompetent. Thus, he failed to show that but for Mr. Sermos failing to raise the competency issue, Carriero’s case would have been different.

Lastly, Carriero did not assert exactly how Mr. Sermos’ allowed his feelings to interfere with his duty to properly investigate and defend the case much less assert how this alleged deficiency prejudiced his case. He also did not assert what Mr. Sermos should have done differently if he did not allow his feelings to influence him and how that would have changed the outcome.

Carriero also failed to show that his counsel was deficient. As to Carriero’s assertions on appeal that his counsel did not inform him of the elements of the crime contained in Count I, the transcript of the evidentiary hearing proves otherwise. Mr. Sermos testified that he went over the evidence the State had as well as the elements of the crimes. (Transcript p. 15 - 16). Carriero also testified that Mr. Sermos went over the evidence and indictment (Transcript p. 38) as well as went over the case in general with him several times. (Transcript p. 44). Furthermore, Carriero testified as his plea hearing that Mr. Sermos went over the indictment and the elements of the crime with him. (Transcript p. 3 - 4). Additionally, Mr. Sermos testified that he gave Carriero an honest assessment of his case including letting him know that if his written statement was admitted into evidence that

it would “have a damaging effect on his case.” (Transcript p. 18). “Counsel has a duty to fairly, even if that means pessimistically, inform the client of the likely outcome of a trial based upon the facts of the case.” *Middlebrook v. State*, 964 So.2d 638, 640 (Miss. Ct. App. 2007) (quoting *Daughtery v. State*, 847 So.2d 284, 287 (Miss. Ct. App. 2003)) See also *Parkman v. State*, 953 So.2d 315, 320 (Miss. Ct. App. 2007). However, on the other hand, they also discussed possible defense strategies. (Transcript p. 24 and 40).

Carriero’s allegation that his counsel “never investigated the issue of intelligence and never raised the issue of competency to the court” is meritless not only because he failed to show any actual prejudice, but also because Mr. Sermos testified at length regarding his consideration of Carriero’s mental capacity and in the end decided that he was competent. (Transcript p. 21 - 24 and 34). Moreover, Carriero offers no proof which establishes that had Mr. Sermos raised the issue of competence that he would have been deemed incompetent.

Similarly, Carriero fails to address specific facts which evidence that Mr. Sermos “allowed his own feelings to interfere with his duty to properly investigate, analyze the case, and defend his client.” He also failed to show how this alleged deficiency prejudiced his case.

Arguably the most important evidence with regard to Mr. Sermos’ effectiveness as counsel comes from the guilty plea hearing itself. When asked during his guilty plea whether he was satisfied with his counsel’s representation, he stated that he was. (Transcript p. 3). As noted above, “great weight is given to statements made under oath and in open court during sentencing.” *Ward v. State*, 879 So.2d 452, 455 (Miss. Ct. App. 2003) (quoting *Gable v. State*, 748 So.2d 703, 706 (Miss. 1999)). If Carriero had any misgivings or questions about Mr. Sermos’ representation of him or about his case in general he could have voiced them during this hearing as the Judge Smith gave him opportunities to do so.

Carriero failed to establish both prongs of the *Strickland* analysis in that there was evidence that Mr. Sermos did go over the indictment, discovery, and elements of the crime with Carriero. Further, Carriero failed show that Mr. Sermos did not consider Carriero's mental competence and failed to give specific examples how Mr. Sermos allowed his own feelings to interfere with his representation of Carriero. Additionally, Carriero failed to prove how each of theses alleged deficiencies specifically prejudiced his case by failing to establish how but for these alleged deficiencies, the outcome would have been different.

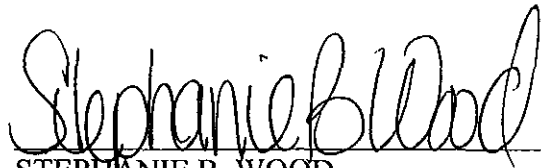
CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the decision of the trial court to deny Carriero's Motion for Post Conviction Relief as the trial court had jurisdiction, the plea was valid and legal, the sentence was legal, and as Carriero was not denied effective assistance of counsel.

Respectfully submitted,

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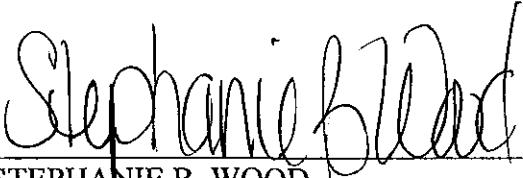
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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Circuit Court Judge
P. O. Drawer 1387
McComb, MS 39649

Honorable Dewitt (Dee) Bates, Jr.
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This the 26th day of August, 2008.


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