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## 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, hereinafter referred to as Petitioner) pled guilty in the Circuit Court of Lincoln County, Mississippi in Cause No. 05-166.

Petitioner was charged on April 13, 2005 in a 3 Count indictment for possession of at least one-tenth gram, but less than two (2) grams of methamphetamine, a controlled substance with intent to distribute, possession of two (2) or more precursor chemicals with the intent to manufacture methamphetamine and for manufacture of methamphetamine.

The sentence was a general sentence wherein Petitioner received thirty (30) years to serve the first six (6) years with the remaining twenty-four (24) years to be served on twenty-four (24) years of post release supervision. He was also ordered to pay cost and restitution.

On January 29, 2007 Petitioner filed his petition for post conviction relief alleging a denial of state and federal constitutional rights supported by an affidavit and the plea and sentencing transcript.

The Circuit Court summarily dismissed the petition without an evidentiary hearing.

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

## STATEMENT OF FACTS

Petitioner Aucoin's plea of guilty 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.

The trial court took a general plea to all 3 Counts of the indictment and issued a general sentence without specifying which count Petitioner was being sentence on.

Petitioner's actions did not fit the elements of each of the counts. The sentence is illegal as a matter of law and his guilty plea should be vacated along with the sentence.

## SUMMARY OF THE 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 should be vacated as it was not made voluntarily and as a matter of law. The plea was not taken with informed consent and thus denied Petitioner due process of law.

The sentence was a general sentence and is illegal as a matter of law and same should be vacated along with Petitioner's plea of guilty.



## 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.

On May 16, 2005 Aucoin pled guilty in Circuit Court of Lincoln County. On January 29, 2007 Aucoin filed his petition for post-conviction relief. Aucoin's petition for post conviction relief was summarily dismissed without an evidentiary hearing by the Circuit Court on October 3, 2007. (R.E. 2-3, R. 31-32)

The Circuit Court upon examination has the authority to dismiss a petition for post conviction relief if it plainly appears from its face, together with any annexed exhibits and the prior proceedings that petitioner is not entitled to any relief. §99-39-11(2) M.C.A. 1972.

On the other hand, 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, 584 So. 2d 764 (Miss. 1991), Neal v. State, 525 So. 2d at 1281 (Miss. ); Billiot v. State, 515 So. 2d 1234, 1237 (Miss. 1987); Smith v. O'Grady, 312 U.S. 329 ()1941)

The allegations of Aucoin's petition (R.E. 4-24, R. 3-22) when considered with the plea transcript (R.E. 11-23, R. 8-20) meet the pleading requirements of the Post Conviction Collateral Relief Act and present a claim that is procedurally alive, substantially alleging a denial of state and federal constitutional rights.

The petition was filed within the three (3) year statute of limitations (99-39-5(2)) and in compliance with §99-39-9. The relief sought was that Aucoin's plea and sentence be vacated and Aucoin be discharged.

In support Aucoin included the sentencing order (R.E. 2-3, R. 6-7) and a transcript of the plea and sentencing hearing held on May 16, 2005. (R.E. 11-23, R. 8-20) The constitutional basis was that the plea of guilty 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. There was no factual basis for the plea as mandated by Rule 8.04A.3. and Rule 8.04A.4b. of the Uniform Rules of Circuit and County Court Practice. There was no determination that the conduct of the petitioner constituted each of the offenses charged.

The sentence imposed was a general sentence rendering it illegal. It is indefinite and cannot be corrected without passing a new sentence. The trial court took a general plea to three counts of the indictment and issued a general sentence not distinguishing between the three counts. (R.E. 2-3, 20, R. 6-7, 17) This was in derogation of § 99-7-2 (3) which makes it mandatory for the Court to impose separate sentences for each conviction. Murphy v. State, 178 So. 2d 692 (Miss. 1965). This is plain error that impacts on Petitioner Aucoin's fundamental rights. Davis v. State, 933 So. 2d 1014 (Miss. 2006)

The taking of a general plea and the imposition of the general sentence is further evidence of the trial court's failure to follow the mandates of Rule 8.04 of the Uniform

Rules of Circuit and County Court Practice (hereafter Rule 8.04).

Petitioner, Aucoin was charged in a three count indictment on April 13, 2005. Count 1 was for possession of at least one-tenth gram, but less than two (2) grams of methamphetamine, a controlled substance with the intent to distribute; Count 2 was for possession of two (2) or more precursor chemicals with the intent to manufacture methamphetamine; Count 3 was for the manufacture of methamphetamine.

Count 1 carries a maximum sentence of eight (8) years. Count 2 carries a maximum sentence of thirty (30) years and Count 3 carries a maximum sentence of thirty (30) years. (R.E. 17-18, R. 14-15)

The sentence was for thirty (30) years, to serve the first six (6) years with the last twenty-four (24) years to be served on post release supervision (R.E. 2, 20, R. 6, 17)

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 is informed consent. Where a defendant's plea is coerced or otherwise involuntary any judgment of conviction entered thereon is subject to collateral attack. (emphasis added)

To aid the court in making a determination of the voluntariness of a plea Rule 8.04 gives the prerequisite for accepting a plea and 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 guilt 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)

A mere plea of guilty is insufficient to support a court finding that there is a factual basis for guilt. Lott v. State, 547 So. 2d 627 (1992) and Reynolds v. State, 521 So. 2d 914, 916 (Miss. 1988)

In McCarthy v. U.S., 394 U.S. (1969) the 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 relates to there being a factual basis for the plea and that the accused understands the nature and consequences of the plea. Rule 11 requires that the Court cannot accept a guilty plea without first addressing the defendant personally and determining that the plea was made voluntarily with an understanding of the nature of the charge and that the Court has made a determination that there is a factual basis for the plea.

That 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.

In addition to directing the judge to inquire into the defendant’s understanding of the nature of the charges and consequences of his plea Rule 11 also requires the judge satisfy himself that there is a factual basis for the plea. The judge must determine that the conduct which the defendant admits constitutes the offense charged in the indictment. McCarthy at 467.

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 crimes charged. U.S. v. Briggs, 920 F. 2d 287, 293 (5<sup>th</sup> Cir. 1991)

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, 423 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 F. 2d 1031 (5th Cir., 1984)

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 F. 2d 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 F. 2d 284, 286 (5th Cir., 1966).

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 1065 (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 F. 2d 1032 (5th Circuit 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 and informed consent. (emphasis added)

“A statement by the defendant and his attorney that they discussed the nature of the charges is insufficient to satisfy Rule 11(c). Vague references to discussion of the charges and the nature of the charges do not provide a complete record showing compliance with Rule 11(c). Quoting U.S. v. Pena, 314 F. 3d 1152, 1155 (9th Cir., 2003)

The record in Aucoin’s case is silent as to any proposed factual basis by which the

State would have proposed to convict Corey Aucoin. (R.E. 11-23, R. 18-20) This allowed a criminal conviction without any evidence of guilt and therefore deprived Petitioner Aucoin due process of law as guaranteed under the 14th Amendment to the United States Constitution. Thompson v. City of Louisville, 362 U.S. 199 (1960)

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. Renier v. State, 438 So. 2d 290, 293 (Miss. 1983). It contains the elements of each crime but does not state facts necessary to show how the acts of the Petitioner would cause him to be convicted. 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. Murphy v. State, 178 So. 2d 692, (Miss. 1965). The Court wholly failed to make such a finding. The Court did state that there was a factual basis, but this was without there being any factual basis (R.E. 19, R. 16) in the record and is obviously a canned, boilerplate pronouncement, made routinely and 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.

In addition to a factual basis being determined 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).

In order to make an informed decision to plead guilty to a criminal offense Rule 8.04 requires that the Court determine "that the accused is competent to understand the nature of the charge". 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 at the plea hearing 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 accused's particular case. (R.E. 15-18, R. 12-15) 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 F. 2d 166, 172 (5th Cir.). "The Court should not rely on a routine boilerplate question 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 F. 2d 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.

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 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 each crime and how the circumstances of his particular situation fit into a determination of his guilt or innocence as to these crimes. 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 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 defendants 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 guilt 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 State, 274 U.S. 220, 223 (1927). 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. 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 6th Amendment states “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. For as we have said a plea of guilty is more than an admission of conduct it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover up of unconstitutionality.”

The general sentence imposed in this case is not referable to any one count. It is “illegal” under the law. U.S. v. Henry, 709 F. 2d 298, 311 (1983) There was no specific sentence, for each count as mandated by § 99-7-2 M.C.A. 1972.

“A sentence in a criminal case, according to the usual understanding, is the action of the court fixing and declaring the legal consequences of predetermined guilt of a

criminal offense”. Barnes v. U.S., 223 F. 2d 891, 892 (5th Cir. 1955) and (24 CJS Criminal Law Section 1556)

The error began because the recommendation of the State did not refer to the charge or count. (R.E. 19, R. 16) It continued because the court did not refer to a charge or count. R,E, 19-20, R. 16-17 The sentence was “thirty (30) years to serve the first six (6) years, the remaining twenty-four (24) years to be served on twenty-four (24) post release supervision, the first five (5) of which will be reporting as supervised and the remaining nineteen (19) unreporting and unsupervised . . .” (R.E. 2, 20, R. 6-17) There was no distinction between the charges or counts. It is void as a matter of law, and is clear evidence that the plea could not have been constitutionally voluntary.

A criminal sentence should be plain, unequivocal and free from doubt so that those concerned, being the accused, sentencing court, reviewing court and prison authorities will know precisely what the punishment is. See U.S. v. Daugherty, 269 U.S. 360 (1925). The leading case on the meaning of “sentence is Benson v. U.S., 232 F. 2d 288, 291 (5th Cir. 1964). “A sentence . . . is the law’s punishment for specific transgressions of it’s formalized standards. It seems to us that everything points to the importance of an articulate, identifiable sentence being imposed. If that is what the law reasonably requires and prefers, then a sentence varying from that standard is . . . “illegal” (emphasis added) Also see Payne v. State, 462 So. 2d 902 (Miss. 1984) and § 99-7-2 M.C.A. 1972.

The recommendation assumed a plea to one charge, but no one, being the accused, reviewing court, prison authorities or the sentencing court knows what the real sentence

is. Was Petitioner Aucoin sentenced to 30 years for Count 1; 30 years for Count 2 or 30 years for Count 3. In the alternative did he receive an aggregate 30 years for all three. There is no way to know. Again, the record is silent. Had the court complied with Rules 8.04 and § 99-7-2 there would be no need for such speculation.

The 5th Circuit in vacating a general sentence in Benson at 292 stated:

“All recognize that one of the most important functions to be performed by criminal law and its integral component, the prison system, is rehabilitation of the offender. Viewed in this context, the general sentence is undesirable because it does not clearly indicate to the offender what sentence has been imposed for what conviction. We can appreciate fully the likelihood that those experienced in this field have found that a clear understanding by the prisoner of the sentence imposed for the particular offense involved is most helpful in the rehabilitation process.”

An additional denial of due process and another illegal part of the sentence in this case is the restitution ordered in the amount of \$54.00 to SMINEU, \$100.05 to the Lincoln County Sheriff's office and \$600.00 to the crime lab. (R.E. 2, 20, R. 6, 17) Section 99-37-3 of the Mississippi Code Annotated 1972 governs the imposition and amount of restitution and states that “the defendant make restitution to the victim”. The “victim” is defined under Section 99-41-5(k) as a person who suffers personal injury or death as a result of criminally injurious conduct. The record is void of any explanation or attempt to explain how any of these constitute the “victim” described in § 99-37-3. (R.E. 20, R. 17)

A defendant may be taxed with the costs, but the expenses of criminal prosecutions are the responsibility of the county. Art. 14 Sec. 261 Miss. Constitution.

The government can only be a “victim” when it has passively suffered harm , as from fraud and embezzlement. The government is not a “victim” and may not be awarded restitution when it incurs costs in the clandestine prevention of crime, that if carried to fruition under ordinary circumstances would not harm the government.

Cases from federal courts have addressed this issue. In Gall v. U.S., 21 F. 3d 107, 111 (6th Cir. 1994). The Court held that drug buy money advanced by the government is not recoverable. U.S. v. Salcedo-Lopez, 907 F. 2d 97, 98 (9th Cir. 1990) held that money used by undercover agents to purchase false identification documents is not recoverable. All of these cases rely on the generality that investigatory costs do not constitute a “loss”. Such costs are best conceived as voluntary outlays for the procurement of evidence.

A sentence beyond that authorized by statute has no more validity than a sentence imposed by an ordinary citizen. Mitchell v. State, 561 So. 2d 1037 (Miss. 1990)

Restitution is statutory and all restitution awarded beyond the statute would be illegal and should be struck from the judgment.

## CONCLUSION

Petitioner Aucoin's petition for post conviction relief meets all necessary pleading requirements and presents a valid collateral attack on the sentencing order showing a denial of State and Federal rights.

Petitioner's plea of guilty and the judgment following should be vacated as it was not made voluntarily with informed consent.

Petitioner was denied due process of law. The general sentence and restitution is illegal and should be set aside.

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  
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Honorable Jim Hood, Attorney General  
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Mr. Corey Aucoin, Inmate  
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This the 19<sup>TH</sup> day of March 2008.



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