IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DOUGLAS JONES — APPELLANT

VS. — NO. 2007-CP-0598-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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DOUGLAS JONES **APPELLANT**

VS. **NO. 2007-CP-0598-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

DOUGLAS JONES appeals from an order denying, on remand, post-conviction relief sought and re-sought in the Circuit Court of Marshall County, Andrew K. Howorth, Circuit Judge, presiding.

After hearing testimony on remand, Judge Howorth declined to vacate Jones's plea of guilty and reimposed Jones's sentence of twenty (20) years with fifteen (15) years suspended and five (5) years to serve. (R. 40-41; C.P. at 13; appellee's exhibit A, attached)

On May 19, 2005, Douglas Jones entered a plea of guilty to sexual battery.

Jones thereafter filed for post-conviction relief which was summarily denied by the lower court.

Jones appealed.

On August 22, 2006, the Court of Appeals, Southwick, P.J., writing for the majority, reversed and remanded the cause for an evidentiary hearing. *See* appellee's exhibit B, attached.

The scope of the remand was a limited one. We quote:

> The motion for relief was denied simply on the pleadings. We reverse and remand for a hearing as to whether Jones actually had the elements of the offense explained to him prior to the time that he pled guilty, and whether there was a factual basis for the plea. (¶23, slip opinion at 9)
>
> The issue of effectiveness of counsel's assistance is raised simply by general allegations of steps that the counsel should have taken for a more thorough investigation. Since we are ordering a hearing on remand, such issues may be addressed at that time. (¶28, slip opinion at 10)

They were.

An evidentiary hearing was conducted on the 23rd day of February 2007. (R. 1-42) Jones was represented by new court-appointed counsel, Thom Beddict and, by all appearances, Al Cutturini. (R. 1; C.P. at 12)

Kent Smith, Public Defender, was Jones's court-appointed trial counsel. Smith, whose effectiveness is an issue on appeal, testified during the court ordered evidentiary hearing that prior to Jones's guilty plea, he advised Jones of the elements of the offense. (R. 18)

Smith also testified in great detail as to the factual basis for Jones's plea of guilty. (R. 18-22)

Jones argues on appeal, his second post-conviction appearance in this Court, he was denied due process of law, i.e., fundamental fairness.

We disagree.

Indeed, the question is not even close.

FACTS IN REVIEW

Douglas Jones is a 31-year-old African/American male, resident of Holly Springs, and the biological father of ten (10) year old Laporsha Roberts. Jones, a high school graduate with 1 ½ years of college, can both read and write.

Two of Jones's sisters, Jennifer and Yolanda, are employed by the Marshall County sheriff's department. (R. 9, 11)

On May 19, 2005, Jones entered a negotiated plea of guilty to sexual battery after attempting to have intercourse with his ten (10) year old daughter.

Judge Howorth accepted the recommendation of the State and sentenced Jones to serve twenty (20) years in the custody of the MDOC with fifteen (15) years suspended, five (5) years to serve and three (3) years on post-release supervision.

Less than a year after acknowledging in open court under the trustworthiness of the official oath his plea was both voluntary and intelligent and that he was satisfied with his lawyer, Jones changed his mind.

On May 13, 2005, Jones filed a motion for post-conviction collateral relief assailing, in effect, the voluntariness of his plea and the effectiveness of his lawyer.

Specifically, Jones argued in his post-conviction papers that his lawyer, Kent Smith, failed to properly investigate the case, failed to move to dismiss the case for want of a speedy trial, coerced Jones to lie at the plea hearing, and gave erroneous advice thereby improperly inducing Jones to plea guilty.

Judge Howorth summarily denied relief, and Jones appealed to this Court. The Court of Appeals reversed and remanded for an evidentiary hearing for the limited purpose of determining whether or not Jones actually had the elements of sexual battery explained to him prior to his plea of guilty and whether there was a factual basis for his plea. *See* appellee's exhibit, B, attached.

The Court added that because it had ordered an evidentiary hearing on remand, the issue of ineffective counsel could also be addressed at that time.

It was.

Following an evidentiary hearing conducted on February 23, 2007, Judge Howorth again denied post-conviction relief after making certain findings of fact and articulating his conclusions of law.

In his appeal to this Court, Jones reasserts his claims that his plea was involuntary and his lawyer ineffective. He also asserts a denial of due process and complains bitterly about prosecutorial and judicial vindictiveness targeting him for having successfully attacked his guilty plea.

SUMMARY OF THE ARGUMENT

On remand, and in the wake of the court ordered evidentiary hearing, Judge Howorth made findings of fact and reached conclusions of law. His fact findings are neither clearly erroneous nor manifestly wrong; rather, they are supported by substantial and credible evidence found in the record of the evidentiary hearing. **Brown v. State,** 731 So.2d 595, 598 (¶6) (Miss. 1999); **Skinner v. State,** 864 So.2d 298 (Ct.App.Miss. 2003).

Jones has failed to demonstrate by a "preponderance of the evidence" he is entitled to any relief. Miss.Code Ann. §99-39-23-7; **McClendon v. State,** 539 So.2d 1375 (Miss. 1989); **Todd v. State,** 873 So.2d 1040 (Ct.App. Miss. 2004).

A plea of guilty is binding only if it is entered voluntarily and intelligently. *Myers v. State*, 583 So.2d 174, 177 (Miss. 1991).

A plea of guilty is voluntary and intelligent when Douglas Jones, the appellant, is informed of the charges against him and the consequences of his guilty plea. *Alexander v. State*, 605 So.2d 1170, 1172 (Miss. 1992).

He was.

Jones claimed his lawyer was ineffective because he failed to adequately investigate the facts of the case. As noted by Judge Southwick in his written opinion, Jones makes "general allegations"

targeting the credibility of the victim, her mother, and her examining physicians. (Slip Opinion at 10)

Jones has failed to tell us how additional investigation would have affected the outcome of his decision to plead guilty. Moreover, the testimony of lawyer Smith, Jones's trial lawyer, lends great credence to the credibility of paragraph 4 of the plea petition which informed Judge Howorth that Jones had told his lawyer *all* of the facts and circumstances known to me and that his lawyer had advised him of the possible defenses he may have to the charge.

Judge Howorth found as a fact and concluded as a matter of law that Jones was not denied the effective assistance of counsel during his guilty plea. Scrutiny of counsel's testimony during the evidentiary hearing supports our position that counsel's performance, contrary to Jones's present claim, was neither deficient nor did any deficiency prejudice Jones. **Strickland v. Washington,** 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); **Williams v. State,** 819 So.2d 532 (Ct.App.Miss. 2001); **Reynolds v. State,** 736 So.2d 500 (Ct.App.Miss. 1999).

ARGUMENT

THE FINDINGS OF FACT MADE BY JUDGE HOWORTH IN THE WAKE OF REMAND WERE NEITHER CLEARLY ERRONEOUS NOR MANIFESTLY WRONG.

JONES HAS FAILED TO DEMONSTRATE THAT COUNSEL'S PERFORMANCE WAS DEFICIENT AND THAT THE DEFICIENT PERFORMANCE PREJUDICED HIS PLEA.

On two occasions during the plea-qualification process, Douglas Jones told Judge Howorth he was guilty of sexual battery and satisfied with counsel. Nevertheless, on direct appeal the Court of Appeals expressed concern over whether or not Jones was aware of the elements of sexual battery

and whether there is a factual basis for Jones's plea.

He was and there is

On remand, the testimony adduced during the evidentiary hearing resolved these questions fully, fairly, and finally,

In a three (3) page order denying post-conviction relief and re-imposing sentence, Judge Howorth found as a fact and concluded as a matter of law the following:

* * * * * *

> 4. That upon hearing all the evidence and proof presented at the defendant's post-conviction hearing the Court is fully satisfied that the defendant was explained the elements of the offense of sexual battery and that the defendant was fully aware of the elements of sexual battery when he entered his guilty plea on May 19th , 2004.
>
> 5. That the Court further finds that there was a factual basis for the defendant's guilty plea to sexual battery as alleged in the indictment.
>
> 6. That any ineffective assistance claim is without merit and should be and hereby is denied. (C.P. at 13)

See also Judge Howorth's ruling voiced *ore tenus* from the bench which states, in part, the following:

> " * * * The Court is of the opinion that the State has established that the defendant - - that there was an adequate, totally adequate factual basis for the plea and that the elements of the offense had been properly explained to the defendant and the Court's initially of the opinion also that the defendant was competently represented in arriving at what culminated in his guilty plea through the entire process by Mr. Smith."

These findings are both judicious and correct. They are neither clearly erroneous nor manifestly wrong; rather, they are supported by substantial and credible evidence found in the record of the evidentiary hearing. **Brown v. State,** *supra*, 731 So.2d 595, 598 (¶6) (Miss. 1999); **Skinner**

v. State, *supra*, 864 So.2d 298 (Ct.App.Miss. 2003).

The transcripts of the plea-qualification hearing and the recent evidentiary hearing should be read and considered together with the advice reflected in the petition to enter plea of guilty which was signed by Jones in the presence of his lawyer.

The petition to enter plea of guilty reflects that Jones was advised of, *inter alia*, the elements of the charge to which he was pleading guilty which, according to Jones, are proven by the true facts (paragraph 14). The testimony of Kent Smith and Jennifer and Yolanda Jones points to the accuracy of paragraph 14.

Jones, who claims he was denied due process and fundamental fairness, complains about alleged "vindictiveness" of the state prosecutor, the trial judge, and his court appointed counsel." (Brief of Appellant at 6)

It is enough to say the official record, including the record of the evidentiary hearing, simply does not support this nonsense.

Jones argues that Kent Smith, his court appointed trial lawyer, was ineffective because he failed to investigate the facts, failed to interview material witnesses, failed to challenge weaknesses in the State's case, failed to file pretrial motions, and provided false information. (Brief of Appellant at 9-11)

He also argues Mr. Beddict, one of his lawyers appointed for the evidentiary hearing, was ineffective because he refused to ask the right questions to Mr. Smith. (Brief of Appellant at 9-11)

During the evidentiary hearing, Kent Smith testified at great length concerning his investigation of the case and possible defenses. (R. 13-22)

> Q. [BY PROSECUTOR:] And one last time did you feel confident and based upon your experience as a well seasoned defense attorney that the State certainly had a factual basis for the case and

then also that Mr. Jones was aware of the specific elements of the crime.

A. [BY MR. SMITH:] Yes, ma'am. (R. 22)

Jennifer Jones, one of the defendant's sisters, testified that Mr. Smith reviewed in great detail what the State's evidence would be. (R. 35) In her opinion, her brother knew what he was charged with and was aware of the specific elements of the offense. (R. 35)

Yolanda Jones, another sister, testified she was also present during meetings with attorney Smith and the defendant. (R. 39) Smith shared and reviewed the State's evidence extensively in their presence. In Yolanda's opinion, Jones was well aware of what he was charged with. (R. 38)

Jones has failed to overcome the presumption his lawyer(s) rendered reasonably effective assistance during his guilty plea.

Jones acknowledged in his petition to enter plea of guilty he believed his lawyer was competent and had done all that anyone could to counsel and assist him and that he " . . . was fully satisfied with [the] advice and help he has given me." (Paragraph 13)

During the plea-qualification hearing itself Jones told Judge Howorth, eyeball to eyeball, he was " . . . satisfied with the services of [his] attorney."

Mr. Smith's testimony during the evidentiary hearing was quite compelling. It convinced Judge Howorth that Smith was not ineffective in the constitutional sense. Without a doubt, the official record supports this finding.

Jones was not denied the effective assistance of counsel during his guilty plea because counsel's performance, contrary to Jones's position, was neither deficient nor did any deficiency actually prejudice Jones. **Strickland v. Washington,** 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); **Williams v. State,** 819 So.2d 532 (Ct.App.Miss. 2001); **Reynolds v. State,** 736 So.2d

500 (Ct.App.Miss. 1999).

"When a convicted defendant challenges his guilty plea on grounds of ineffective assistance of counsel, he must show unprofessional errors of substantial gravity. Beyond that, he must show that those errors proximately resulted in his guilty plea and that but for counsel's errors he would not have entered the plea." **Reynolds v. State,** 521 So.2d 914, 918 (Miss. 1988).

The ground rules applicable here are found in **Brooks v. State,** 573 So.2d 1350, 1353 (Miss. 1990), where this Court said:

> It is clear the two part test articulated in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Leatherwood v. State,* 539 So.2d 1378, 1381 (Miss. 1989) quoting from *Hill v. Lockhart,* 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985).
>
> In order to prevail on his claim of ineffective assistance of counsel, Brooks must show, first of all, "that his counsel's performance was deficient and second, that the deficient performance prejudiced the defense so as to deprive him of a fair trial." *Perkins v. State, supra,* 487 So.2d at 793. The burden is upon the defendant to make "a showing of both." *Wilcher v. State,* 479 So.2d 710, 713 (Miss. 1985) (emphasis supplied). To obtain an evidentiary hearing in the lower court on the merits of an effective assistance of counsel issue, a defendant must state "a claim *prima facie*" in his application to the Court. *Read v. State,* 430 So.2d 832, 841 (Miss. 1983).

See also **Drennan v. State,** 695 So.2d 581 (Miss. 1997), where we find the following language:

> * * * When reviewing claims of ineffective assistance of counsel, this Court utilizes the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Schmitt v. State*, 560 So.2d 148, 154 (Miss. 1990), this Court held "[b]efore counsel can be deemed to have been ineffective, it must be shown (1) that counsel's performance was deficient, and (2) that the defendant was prejudiced by counsel's mistakes." (Citations omitted). One who claims that counsel was ineffective must overcome the presumption that "counsel's performance falls within the range of reasonable professional assistance." *Id.* (Quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068). In order to overcome this presumption, "[t]he defendant must

> show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (695 So.2d at 586)

Counsel's performance was hardly deficient and unprofessional. Had Jones gone to trial before a jury, as opposed to pleading guilty and allowing the trial judge to pronounce a sentence of twenty (20) years with fifteen (15) years suspended and only five (5) years to serve, Jones could have been required to serve the full twenty (20) years. By negotiating a plea bargain agreement, Jones mitigated the time he was to serve.

Jones has failed to demonstrate how counsel's alleged omissions, e.g., his failure to interview certain witnesses, his failure to investigate certain facts, even if corrected, would have altered the outcome of Jones's decision to plead guilty.

In short, Jones has failed to demonstrate his lawyer's performance was deficient and that the deficient performance prejudiced the defendant.

"Trial counsel is presumed to be competent." **Brooks v. State**, *supra*, 573 So.2d 1350, 1353 (Miss. 1990). Jones, of course, must overcome that presumption. Moreover, the burden is on the defendant to demonstrate *both* prongs of the **Strickland** test. **McQuarter v. State**, 574 So.2d 685 (Miss. 1990).

"Along with the presumption that counsel's conduct is within the wide range of reasonable conduct, there is a presumption that decisions made are strategic." **Leatherwood v. State**, 473 So.2d 964, 969 (Miss. 1985). Courts are reluctant to infer from counsel's silence an absence of trial strategy. ***Id.*** As Jones points out, the filing of pretrial motions falls squarely within the ambit of trial strategy. **Murray v. Maggio,** 736 So.2d 279, 283 (5th Cir. 1984). Courts accord much discretion to attorneys in the areas of defense strategy. **Armstrong v. State**, 573 So.2d 1329 (Miss. 1990). Obviously, the strategy involved in Jones's negotiated plea of guilty was to negate the possibility of

a longer sentence.

Jones has failed to demonstrate that trial counsel's overall performance was deficient. Moreover, none of the alleged acts of commission or omission by counsel, viewed either individually or collectively, amount to a deficient performance. The official record reflects Mr. Smith rendered sound legal advice and performed in a constitutionally competent manner.

Of course, by pleading guilty Jones waived his right to have the prosecution prove each element of the offense beyond a reasonable doubt as well as Jones's right to present any defense(s) he might have had to the charge. **Bishop v. State,** 812 So.2d 934, 945 (Miss. 2002); **Anderson v. State,** *supra,* 577 So.2d 390 (Miss. 1991); **Jefferson v. State,** 556 So.2d 1016, 1019 (Miss. 1989); **Taylor v. State,** 766 So.2d 830, 835 (Ct.App.Miss. 2000).

We summarize.

The testimony adduced during the evidentiary hearing reflects (1) Jones was advised of the essential elements of the offense of sexual battery, (2) there was a factual basis for the plea, and (3) neither trial nor counsel on remand were ineffective in the constitutional sense.

We invite the Court to view the testimony elicited during the evidentiary hearing with the rest of the record. Jones told Judge Howorth during the plea-qualification hearing he had gone over the petition to enter plea of guilty with his lawyer and that his lawyer answered any questions Jones had. Jones also stated, under oath, he had told his lawyer everything about the facts and circumstances giving rise to the charge, that he had not withheld anything from his lawyer and that he was " . . . satisfied with the services of [his] lawyer."

Testimony during the court-ordered evidentiary hearing points unerringly to the voluntariness of Jones's guilty plea and the effectiveness of his lawyers.

CONCLUSION

Judge Howorth's findings of fact and conclusions of law that Jones's claims were without merit are neither clearly erroneous nor manifestly wrong; rather, they are supported by both substantial and credible testimony and evidence found in the record.

Jones's claim that his court-appointed lawyers were in collusion with the prosecution to secure a conviction and that he was a victim of vindictiveness is a conclusory allegation lacking support in the record.

Jones has failed to prove by a preponderance of the evidence the performance of his lawyers was deficient and that any deficiency prejudiced him in his decision to plea guilty. Testimony elicited during the evidentiary hearing points unerringly to the competency of counsel and the effectiveness of their representation.

Appellee respectfully submits this case is devoid of any claims necessitating vacation of Jones's plea of guilty to sexual battery which, by all appearances, was freely and voluntarily entered by Douglas Jones. Accordingly, the judgment entered in the lower court denying Jones's motion for post-conviction collateral relief should be forthwith affirmed.

Respectfully submitted,

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BY: _____

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IN THE CIRCUIT COURT OF MARSHALL COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VERSUS **CAUSE NO. MK~~2002-154~~ 2003-050 M2005-184**

DOUGLAS JONES **DEFENDANT**
DOB:10/06/1972; SS#:425-25-6682; B/M

ORDER DENYING POST-CONVICTION RELIEF AND REIMPOSING SENTENCE

On the 23rd day of February, 2007, into open court came the Office of the District Attorney and the defendant, who was represented by counsel, Thom Bittick and Al Cutturini, on the defendant's Motion for Post-Conviction Relief, on remand from the Mississippi Court of Appeals to determine the issue of whether the defendant had the elements of the offense explained to him prior to the time he pled guilty, and whether there was a factual basis to support the guilty plea, and the Court hereby finds as follows:

1. That the defendant was lawfully indicted and arraigned on the charge(s) of sexual battery pursuant to Miss. Code Ann. §97-3-95(d).

2. That the defendant's petition to plead guilty was entered by the defendant; that he was duly advised of his rights by the Court and Counsel; that the defendant had been advised of the minimum and maximum sentence; that the defendant was competent to offer said plea of guilty; and that said plea was offered voluntarily, knowingly, deliberately, and intelligently by said defendant.

3. That on or about the 19th day of May, 2004 the Court accepted the defendant's petition to plead guilty to sexual battery and sentenced the defendant to serve a

EXHIBIT A

term of incarceration of twenty years with fifteen years suspended upon the defendant's good behavior and three years post-release supervision, and all court costs, fees, and assessments.

4. That upon hearing all the evidence and proof presented at the defendant's post-conviction hearing the Court is fully satisfied that the defendant was explained the elements of the offense of sexual battery and that the defendant was fully aware of the elements of sexual battery when he entered his guilty plea on May, 19th, 2004.

5. That the Court further finds that there was a factual basis for the defendant's guilty plea to sexual battery as alleged in the indictment.

6. That any ineffective assistance claim is without merit and should be and hereby is denied.

IT IS THEREFORE ORDERED AND ADJUDGEDthat the defendant's Motion for Post-Conviction Relief be denied. IT IS FURTHER ORDERED that the defendant's sentence previously imposed by this Court is reinstated and therefore the defendant hereby sentenced to serve a term of TWENTY YEARS with FIFTEEN YEARS suspended, leaving FIVE YEARS to serve in an institution to be designated by the Mississippi Department of Corrections. Multiple counts, if any, shall be served CONCURRENTLY. The fifteen year suspended sentence is conditional upon the defendant's good behavior and strict compliance with all of the conditions given by the Court and/or set forth below under section 47-7-35 of the Mississippi Code Annotated of 1972, as amended.

IT IS FURTHER ORDERED that the defendant shall be given credit for days from ____ 04/15/02 04/18/02 02/12/03 to 04/16/02 04/18/02 02/12/03 spent in custody prior to the hearing of this 05/06/04 06/02/04 09/19/06 09/19/06 11/16/06 01/24/07 02/20/07 present

matter. The defendant SHALL NOT receive credit for days from _____ to _____ while the defendant was release on bond pending the hearing of this post-conviction matter.

The defendant is ordered to pay Court cost and fees in the amount of $847.50.

IT IS FURTHER ORDERED AND ADJUDGEDthat a judgment shall be entered upon the judgment rolls against the defendant in the amount of $847.50 in favor of the aforesaid County. Said amount of judgment is to be paid at the rate of 1/36 or more per month after his release from incarceration. If delinquent more than thirty (30) days, the clerk may, with the assistance of the County or District Attorney, institute garnishment proceedings against said defendant in this cause and or move to hold the defendant in contempt or in violation of probation or post-release probation conditions. The judgment shall be satisfied by the clerk when payment in-full has been made into the court.

SO ORDERED AND ADJUDGED, this the 23rd day of February, 2007.

Andrew K Howell

CIRCUIT JUDGE

FILED THIS THE 23rd DAY OF
February, 2007
MINUTE BOOK 86 PAGE 188-190
LUCY CARPENTER, CIRCUIT CLERK
BY Ora Hubbard D.C.

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2005-CP-01702-COA

DOUGLAS JONES **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	6/15/2005
TRIAL JUDGE:	HON. ANDREW K. HOWORTH
COURT FROM WHICH APPEALED:	MARSHALL COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DOUGLAS JONES (PRO SE)
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
NATURE OF THE CASE:	CIVIL - POST-CONVICTION RELIEF
TRIAL COURT DISPOSITION:	RELIEF DENIED
DISPOSITION:	REVERSED AND REMANDED - 08/22/2006
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE LEE, P.J., SOUTHWICK AND ISHEE, JJ.

SOUTHWICK, J., FOR THE COURT:

¶1. Douglas Jones pled guilty to the crime of sexual battery in 2004. The next year he filed for post-conviction relief. He claims that his plea was not voluntarily and knowingly entered. We agree that there is some question as to whether he knowingly entered his plea. We remand for a hearing.

FACTS

¶2. On April 10, 2003, Jones was indicted by a Marshall County grand jury for the crime of sexual battery of a minor under the age of fourteen. The victim was his then-ten-year-old biological daughter. She said that Jones had raped her. The victim's mother took the victim to a physician due to worrisome symptoms. A physician confirmed that the victim had contracted a sexually transmitted disease. Jones suffered from this sexually transmitted disease at the time of the incident.

On May 19, 2004, Jones pled guilty to sexual battery. The circuit court accepted Jones's guilty plea and sentenced Jones in accordance with the recommendation of the prosecution. Jones was sentenced to twenty years imprisonment, fifteen years suspended, three years of post-release supervision, registration as a sex offender, and court costs.

¶3. On May 13, 2005, a little less than a year later, Jones filed for post-conviction relief. His claims concern what he was told at the guilty plea hearing, what he otherwise knew concerning his rights, and the details of the charged crime. The trial judge found that the motion should be disposed of without requiring a response from the State or having a hearing. All relief was denied. Jones's appeal has been deflected to this Court.

DISCUSSION

ISSUE 1: Validity of Guilty Plea

¶4. Jones argues that his guilty plea was not voluntarily, knowingly, and intelligently entered because he was not informed of the elements of the charge. Before we review the evidence, we will seek clarity in understanding what the constitutional requirements for a plea entail.

¶5. A guilty plea is not valid unless it is made "with sufficient awareness of the relevant circumstances and likely consequences." *Bradshaw v. Stumpf*, 545 U.S. 175, 125 S.Ct. 2398, 2405 (2005) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). The "Constitution insists" that a plea be entered in this manner because a defendant, by pleading guilty, foregoes fundamental constitutional guarantees. *United States v. Ruiz*, 536 U.S. 622, 629 (2002).

¶6. The objective of this standard is to satisfy the due process requirement that a defendant receive "real notice of the true nature of the charge against him." *Bousley v. United States*, 523 U.S. 614, 618 (1998) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941). At the hearing accepting a guilty plea, a trial court must assure itself that a defendant understands the nature and elements of

the crime for which he is admitting guilt. *Stumpf*, 125 S.Ct. at 2405 (citing *Henderson v. Morgan*, 426 U.S. 637 (1976)). A court accepting a guilty plea does not have to explain the crime's elements to the defendant on the record, as it is also sufficient if "the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel." *Stumpf*, 125 S.Ct. at 2405.

¶7. In *Stumpf*, the defendant's attorneys made a representation on the record that they explained the elements of the crime to the defendant. *Id.* The defendant then confirmed that what the attorneys had said was true. *Id.* The Supreme Court opinion is not explicit that this was done in open court instead of in writing, but the district court opinion described the plea hearing in detail. The district judge "engaged petitioner and his attorneys in a colloquy" that evoked assurances by the attorneys that they had informed the accused of the elements of the offense and his defenses. *Stumpf v. Anderson*, No.C-1-96-668, 2001 WL 242585, at *15 (S.D. Ohio Feb. 7, 2001). The Court of Appeals opinion determined that these assurances were inadequate:

> [The defendant's] attorneys represented to the court that they had explained to Stumpf the elements of the crime, their own arguments to the court during the plea colloquy and the evidentiary hearing to establish a factual basis for the plea refute the typical presumption that defense counsel have fully and adequately explained all elements of a crime to a client before he pleads guilty. Indeed, defense counsel's representations to the court either betray their own ignorance of the intent element of aggravated murder, or represent a woefully inadequate understanding of the meaning of a guilty plea. Finally, the plea colloquy itself, along with Stumpf's statements to the court through all stages of the proceedings, demonstrates Stumpf's unwillingness to admit to intent.

Stumpf v. Mitchell, 367 F. 3d 594, 601 (6th Cir. 2004), rev'd sub nom. *Stumpf v. Bradshaw*, 545 U.S. 175 (2005). The circuit court found that despite the assurances by counsel that their client knew the nature and elements of the charge, other comments by them "betrayed" those assurances.

¶8. With this background, the Supreme Court in *Stumpf* made these relevant comments:

> In Stumpf's plea hearing, his attorneys represented on the record that they had explained to their client the elements of the aggravated murder charge; Stumpf himself then confirmed that this representation was true. . . . While the court taking a defendant's plea is responsible for ensuring "a record adequate for any review that may be later sought," *Boykin v. Alabama,* 395 U.S. 238, 244, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), we have never held that the judge must himself explain the elements of each charge to the defendant on the record. Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel. Cf. *Henderson, supra,* at 647, 96 S.Ct. 2253 (granting relief to a defendant unaware of the elements of his crime, but distinguishing that case from others where "the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused"). Where a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty.

Stumpf, 125 S.Ct. at 2405-06.

¶9. *Stumpf* requires an affirmative showing on the record that either counsel or the trial judge explained the elements of the crime to the defendant. The trial judge's explanation will naturally appear in any transcript of the hearing. In *Stumpf* itself, counsel's assertions that the crime was explained to the accused were also orally made at the hearing and transcribed. As we will explain, our issue is whether other means of making an affirmative representation will suffice.

¶10. At Jones's guilty plea hearing, the trial judge did not explain the elements of the offense. The prosecutor was not asked to summarize the evidence that would be shown or otherwise give a factual basis for the offense. The indictment specifies the victim, the date the incident took place, the elements of the indicted charge, and the minimum and maximum penalties for the crime.

¶11. The petition Jones filed to enter his guilty plea contains the following relevant language:

> I plead guilty to the charge(s) of Sexual Battery as set forth in the indictment in this cause number.
>
> My lawyer had advised me of the nature of the charge(s) and the possible defenses that I may have to the charges(s).

> I understand that by pleading guilty I am admitting that I did commit the crime charged in the indictment. . . .
>
> My lawyer has advised me of the elements of the charge to which I am pleading. I submit that all the elements are proven by [the] true facts. Therefore, I am guilty and ask the Court to accept my plea of guilty.

¶12. The judge when accepting the plea examined Jones to ensure that he had reviewed the petition to plead guilty with his attorney and that the signature on the petition was authentic. The court neither referred to the elements of the crime nor asked counsel whether he had explained the elements to Jones. The court made reference to the petition and the petition made reference to the indictment, but there was never any specific assurance that the elements of the crime were explained to Jones. The petition does not summarize the elements of the crime.

¶13. The last page of the petition Jones filed was signed by Jones and his counsel. The signature of Jones appears below the phrase, "Signed by me in the presence of my lawyer, this the ____ day of May, 2004." The signature of counsel appears after the following statement :

> As attorney for this Defendant, I certify that I have on the above date discussed all the contents of the foregoing petition with said defendant and I am satisfied that the defendant fully understands the same and that the defendant executes said petition knowingly and voluntarily.

Though the form petition was not sworn to and subscribed before a notary public, Jones was under oath when he told the court that he signed the petition and agreed with its contents. So this incorporation of the assertions in the petition into Jones's sworn statements at the hearing makes the petition effectively sworn. The plea petition is the only evidence in this record that Jones received an explanation of the nature and elements of the charge, but it does not list the elements.

¶14. Our question then is whether this "record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel." *Stumpf*, 125 S.Ct at 2405. More specifically, may "counsel's assurance that the defendant has been properly

informed of the nature and elements of the charge to which he is pleading guilty" (*id.* at 2406) be shown by form language in a plea petition, that is not confirmed by questioning in the hearing and appears on a petition in which the elements of the offense are not stated?

¶15. The Mississippi Supreme Court has yet to consider the effect of *Stumpf*. The Court has analyzed the authority on which *Stumpf* relied, *Henderson v. Morgan*, in holding that before a guilty plea can be valid, the defendant must know the elements of the crime. There are expert commentators on criminal procedure who found *Henderson* lacking in clarity in resolving the twin issues of which elements were critical and the necessary manner of notifying a defendant of these critical elements. WHITEBREAD & SLOBOGIN, CRIMINAL PROCEDURE, 641-42 (1993). *Stumpf* may have sought to remove some of the ambiguities.

¶16. Shortly after *Henderson*, the Mississippi Supreme Court held that in order for a guilty plea to be valid, it is essential "that an accused have knowledge of the critical elements of the charge. . . ." *Gillard v. State*, 462 So. 2d 710, 712 (Miss. 1985) (citing *Henderson*, 426 U.S. 637). In *Gillard*, the defendant entered a guilty plea and the trial court orally reiterated all of the elements of the crime to ensure the defendant understood the crime for which he was admitting guilt. *Gillard*, 462 So. 2d at 712-13. That sort of compliance with the requirements did not occur here.

¶17. The Mississippi Supreme Court has also upheld a guilty plea when the information that was filed specified the elements of the crime and the defendant signed a petition that restated the charges in the information and certified that the defendant received a copy of the information. *Gaskin v. State*, 618 So. 2d 103, 107 (Miss. 1993). The Court, after quoting language in *Gillard* which relied on *Henderson*, stated that the objective of ensuring a defendant is explained the elements of a crime prior to entering a guilty plea is to ensure "an intelligent assessment by the defendant of: (1) whether he has in fact done anything wrong under the law, and (2) the likelihood that he stands to be

convicted if he exercises his right to a jury trial." *Gaskin*, 618 So. 2d at 107. The Court held that failure of the trial court to advise the defendant of the elements was harmless error where the defendant was advised by other sources about the critical elements of the crime. *Id.* at 108. These facts are similar to those at Jones's guilty plea hearing, but the *Gaskin* decision did not have the benefit of the *Stumpf* requirement that the "record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant" by his counsel or by the court. *Stumpf*, 125 S.Ct. at 2405-06.

¶18. The Court has followed a rule that "the failure of the trial court to advise the defendant of the elements of the charge may be harmless error if it can be shown that prior to the plea the defendant had been advised through other sources of the critical elements of the crime with which he is charged." *Carter v. State*, 775 So. 2d 91, 97 (Miss. 1999) (citing *Gaskin v. State*, 618 So. 2d 103, 107 (Miss. 1993). In *Carter*, a guilty plea was accepted and Carter appealed his conviction arguing ineffective assistance of counsel and that there was not a sufficient factual basis to support the crime. The Court found that Carter understood the charges against him and relied on the facts that the original indictment and subsequent information outlined the elements of the crime. *Carter*, 775 So. 2d at 91. Carter testified that he and his attorney, William Bambach, had fully discussed the situation, and Bambach himself testified that he had fully discussed all of the factors of the case with Carter. *Id.* at 97-98. The Court also noted that "in some case, the charging papers may be sufficient to inform the defendant of the elements of the crime with which he is charged." *Id.*

¶19. We find these precedents, all of which predate *Stumpf*, to be of limited application to the issue before us. We cannot conclude, based on the emphasis in *Stumpf* that the record should affirmatively reflect the defendant's knowledge, that it is sufficient that the boilerplate language in a plea petition include a statement that the elements of the offense were explained to the accused,

especially when the elements are not set out on the petition and the assurance is just one of many on the form. The United States Supreme Court was not adding a requirement of notice of the elements of the offense to a meaningless checklist, compliance to be noted in any manner no matter how subjectively uncertain. *Stumpf* requires a reliable indication that the defendant has had the elements of his offense explained. To the extent standard forms are used for guilty pleas, the trial judges who take the pleas should assure that the record at the hearing reveals the accuracy of a form statement that the elements were explained. The forms to some extent are a back-up to matters that a trial judge might overlook. *Stumpf* is not the first judicial precedent to imply that the judge taking the guilty plea also needs a checklist to assist in questioning the accused. On that checklist should be assurances on the elements of the offense.

¶20. Our view of the importance of *Stumpf* suggests that we are finding two tiers to the requirements of notice at a guilty plea hearing. Certain knowledge must be clearly explained at the hearing – the record must "accurately reflect" the accused's knowledge. Other matters such as the minimum and maximum sentences for an offense might be proved in lesser ways. We do not find it advisable to address all the implications of our interpretation of *Stumpf*. The state supreme court will make the binding interpretations, so restraint at this intermediate court is always in order. We are holding that since the United States Supreme Court has focused on the accuracy of the record in the explanations given a defendant on the specific elements of what the State has accused him or her of doing, that we will require the same heightened focus by the trial judge.

¶21. Not addressed directly by the motion but which we raise as a simple matter of the due process requirements related to the preceding principles is that, a factual basis for the crime must be presented in some manner at a guilty plea hearing. This hearing did not include any explanation by anyone as to the facts underlying the crime. In order for a plea to be accepted, the record must

contain "enough that the court may say with confidence the prosecution could prove the accused guilty of the crime charged." *Corley v. State*, 585 So. 2d 765, 767 (Miss. 1991).

¶22. We elaborated on our understanding of the "factual basis" requirement:

> Uniform Circuit and County Court Rule 8.04(A)(3) requires that a court determine that "there is a factual basis for the plea." Mississippi case law does not require that a defendant admit every aspect of a charge against him. Instead, a guilty plea may be considered valid even though the defendant makes only a "bare admission of guilt," so long as the trial court delves beyond that admission and determines for itself that there is substantial evidence that the defendant actually committed the crimes charged. *Gaskin v. State*, 618 So. 2d 103, 106 (Miss. 1993).

Ray v. State, 876 So. 2d 1032, 1035 (Miss. Ct. App. 2004). The factual basis can come from an "independent evidentiary suggestion of guilt." *Id.*

¶23. The motion for relief was denied simply on the pleadings. We reverse and remand for a hearing as to whether Jones actually had the elements of the offense explained to him prior to the time that he pled guilty, and whether there was a factual basis for the plea.

ISSUE 2: Proper Indictment

¶24. Jones challenges the indictment as not properly establishing the elements of his offense. Jones was indicted for the crime of sexual battery. Miss. Code Ann. § 97-3-95(1)(d) (Rev. 2000). A person is guilty under this section if he engages in sexual penetration with a child under the age of fourteen, if the accused person is twenty-four or more months older than the child. *Id.* Jones argues that the indictment should have stated that the penetration was knowingly or intentionally committed. Sexual battery is not a specific intent crime and thus the indictment need not refer to a specific intent. *Johnson v. State*, 626 So. 2d 631, 632 (Miss. 1993). The indictment is valid.

ISSUE 3: Other alleged defects in guilty plea

¶25. Jones alleges that his counsel was ineffective, that parole eligibility was misdescribed, and he was not told the sentence range for the offense and of his right against self-incrimination.

¶26. The record better reflects that Jones was notified of the minimum and maximum sentence for the indicted charge than it does that he knew the elements of the offense. Unlike the conclusory statement in the petition that "my lawyer has advised me of the elements of the charge," the petition stated that the maximum punishment for the offense was life imprisonment and the minimum was twenty years. Jones, at the guilty plea hearing, was told by the trial judge that if he went to trial he had the right not to testify; if he instead pled guilty, the right against self-incrimination would be one of the rights that he would be waiving. Jones stated that he understood.

¶27. There is no indication at the guilty plea hearing nor in the motion filed for post-conviction relief that Jones was misguided regarding his eligibility for parole. The plea petition makes generic references to parole, and sets out that depending on the crime and the dates of the offense, parole may not be available. The plea petition states that "if I am sentenced for a sex crime, I will not be released on parole until I have been examined by a psychiatrist." Moreover, we do not find that he made this argument below. Jones may not raise on appeal an issue not presented to the trial court. *Foster v. State*, 716 So. 2d 538, 540 (Miss. 1998).

¶28. The issue of effectiveness of counsel's assistance is raised simply by general allegations of steps that the counsel should have taken for a more thorough investigation. Since we are ordering a hearing on remand, such issues may be addressed at that time.

¶29. THE JUDGMENT OF THE CIRCUIT COURT OF MARSHALL COUNTY IS REVERSED AND THE CAUSE IS REMANDED FOR A HEARING. ALL COSTS OF THIS APPEAL ARE ASSESSED TO MARSHALL COUNTY.

LEE AND MYERS, P.JJ., CHANDLER, GRIFFIS, ISHEE AND ROBERTS, JJ., CONCUR. KING, C.J., CONCURS IN RESULT ONLY. IRVING AND BARNES, JJ., DISSENT WITHOUT SEPARATE WRITTEN OPINION.

CERTIFICATE OF SERVICE

I, Billy L. Gore, 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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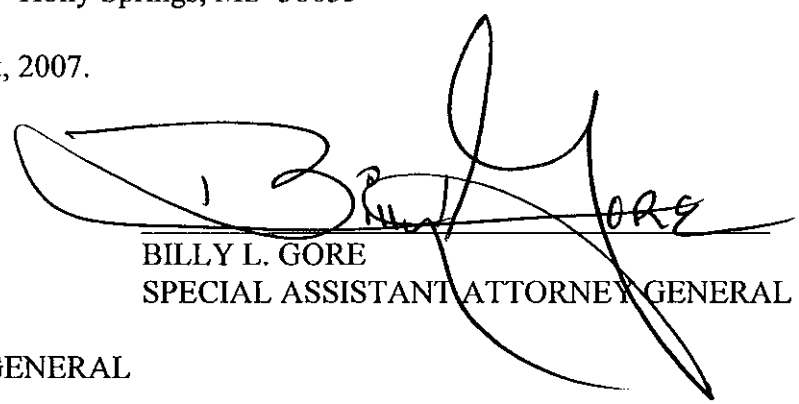
This the 3rd day of August, 2007.



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