Thomas G. Garner — Appellant

vs.

No. 2007-CP-0600

State of Mississippi — Appellee

Appellant's Reply Brief

(Appellant Does Not Request Oral Argument)

By: Thomas Garner
Thomas G. Garner, #56764
E-Zone, S.C.R.C.F.
1420 Ind. Pk. Rd.
Wiggins, Ms 39577

Thomas G. Garner — Appellant

vs. — No. 2007-CP-0600

State of Mississippi — Appellee

Appellant's Reply Brief

This is the Appellant's Reply Brief in response to the Appellee's Brief filed on April 3, 2008 in the above referenced case concerning Thomas G. Garner's appeal from the Forrest County Circuit Court summary dismissal of his claim for Post Conviction Relief.

Response

First and foremost the Appellant would respectfully and also prayfully ask this Honorable Court to recognize "the fact that the Miss. Appellate Courts are obligated to construe pro-se pleadings with some reasonable degree of liberality" Hall v State, 800 So. 2d 1202, 1206 (p14.), Miss. Ct. App. 2001; and that this Court "not allow his meritorious complaint to be defeated because his plea-

this Court his contentions that the State erroneously indicates that; "Garner claimed that the suspension of his sentence was illegal because of his prior felony conviction and that he recieved ineffective assistance of counsel. (CR. 6-15,250) These were the only claims presented to the circuit court, and they are the only issues properly before this Court."

Reply

In the pleading the State refers to (R. 6-15) in support of the aforementioned allegations, Garner unambigiously claimed that his guilty plea had been obtained in violation of Rule 8.04 of the M. U. C. C. C. R. (R. 12-13); that his guilty plea was not voluntarily entered in violation of his state and constitutional rights (R. 13, 14); and the only relief sought was that he be allowed to withdraw his guilty plea on said grounds (R. 15).

As the record before this court undoubtly demonsteates, Garner throughout his amended pleadings sought relief on the grounds his plea was not voluntarily entered as required by Rule 8.04 and the due process clause of our constitution. (R. 100, 105, 184, 193, 201, 202, 208, 211, 238).

Therefore, Garner would argue that this Court should find, based on the record, that the issue of an involuntary guilty plea was presented to the trial court and is now properly before this Court; and thereby Garner would respectfully request this Court to review

28 (A) (3) provides An exception Allowing that 'the court may, At its option notice A plAin error not identified or distinctly specified'. SimilArly, Mississippi Rule of Evidence 103 (d) Authorizes A court to Address 'plAin errors Affecting substAnAl rights Although they were not brought to the Attention of the court.' According to the Mississippi Supreme Court, 'the reviewing court may Address issues As plAin error when the trial court hAs impActed upon A fundAmentAl right of the defendAnt.'" Berry v. State, 728 So. 2d 568, 571 (p6.), Miss. 1999 quoting SAnders v. State, 678 So. 2d 663, 670, Miss 1996 cited in Moore v. State, 755 So. 2d 1276, 1279 (p9.), Miss. Ct. App. 2000 And DAvis v. State, 933 So. 2d 1014, 1022 (p32.) Miss. Ct. App. 2006.

"To meet constitutionAl stAndArds, the United States Supreme Court hAs stAted thAt A guilty plea must be knowingly And voluntArily entered" Boykin v. Ala., cited in Burnett v. State, 831 So. 2d 1216, 1219 (p9.), Miss. Ct. App. 2002.

Therefore, GArner hAd A constitutionAl right to A knowingly, And voluntArily entered guilty plea And As shown in his Opening Brief And will be further shown herein by the Supplemental Record, this right wAs violAted by the trial court.

In the light of justice And fundAmentAl fAirness, GArner would humbly request this Honorable Court to exercise its discretion And to take under consideration his claim of An involuntAry plea And Any

ation of a case on it's merits should not be defeated by reason alowe of any formal rules of pleadings and pratice, if within the legitmate power of a court of conscience to avoid it." Field v. Middlesex Bkg. Co., 77 Miss. 180, 26 So. 365 (1899) in M.R.C.P.

Issue

The State relied on Appellant Court authority and indicated that "the Circuit Court's dismissal of Garner's motion is not subject to reversal absent a finding that it is clearly erroneous. The State submits the court's ruling is supported by the record and applicable case law."

Reply

This Argument fails in that Garner has foreshown, by the record, the issue of the voluntariness of his plea was properly before the trial court. (R. 12-15, 100, 105, 184, 193, 201, 202, 208, 211, 238); but the trial court's order dismissing Garner's pleadings for relief does not Address any of Garner's claims concerning the voluntariness of his plea. (R. 249-53)

Therefore, Garner would Argue that the trial court thereby commited a reversible error warranting an evidentiary hearing in that "A judges findings concluding that a guilty was validly made will not be set aside unless the findings are clearly erroneous." Burnett v State, 831 So. 2d 1216, 1220 (p17.), Miss. Ct. App. 2002 cited in Herbert v State, 864 So. 2d 1041, 1044

the voluntariness of his plea for this Court to set aside and no errors to consider, other than the judges failure to address said issue; and thereby this Court should find that the trial court committed reversible error warranting an evidentiary hearing on said issue.

However, to conserve judicial time and resources and in light of the fact as of 11-08, Garner will have served 3 years day for day, on what this Court should find to be a 3 year sentence; Garner would respectfully request that this Court, in the eyes of fundamental fairness, to please review all of his claims for relief concerning the voluntariness of his guilty plea and to rule upon said claim based upon the record before this Court, the Miss. Uniform Circuit and County Court Rules, and applicable case law as justice so requires pursuant to our U.S. Constitution.

Issue One

Whether the trial court erred in refusing to review the Appellant's Allegations of an improper sentence because he pled guilty.

Argument

Garner would show unto the Court that he has abandoned this issue in favor of having this Court review his claims of due process violations concerning his sentence, even though the State con-

term of p.r.s. when the judge acted without statutory authority pursuant to M.C.A. 47-7-34 rendering the sentence contained in the Order of Conviction to be statutorly unenforceable and thereby plain error in violation of the Appellant's state and federal constitutional right to procedural and fundamental due process of law.

Issue Three

Whether the Appellant's state and federal constitutional rights to procedural and fundamental due process of law were violated when the trial couet indicated it had simultaneously sentenced the Appellant to p.r.s. and supervised probation.

Issue Four

Whether the Appellant's state and federal constitutional rights to procedural and fundamental due process of law were violated at the December 20, 2005 revocation hearing.

Issue Five

Whether the trial court judge violated section 47-7-34; section 177A of the Miss. State Constitution; Cannons 1, 2, 2A, 2B, and 3A(1) of the Code of Judicial Conduct of Miss. Judges; and the Appellant's state and federal constitutional rights to due process of law when the judge improperly applied section 47-7-34 without statutory authority; and thereby failed by statutory law and/or procedure, to retain any jurisdiction to alter or amend his original sentence by entering an order revoking

Whether the trial courts imposition of the 10 year suspended sentence upon revocation of the 3 year term of p.r.s. is statutorily unenforecable pursuant to 47-7-34, 47-7-37 and is theeby plain error in violation of the Appellant's constitutional rights to due process of law and a legal sentence.

Argument - Issues Two thru Six

Garner would stress to this Court that he has not abandoned Issues Two thru Six.

The State erroneously indicates that "Garner claims that the suspension of his sentence was illegal because of his prior felony conviction" and urges this Court not to allow Garner "to complain of having recieved a sentence more lenient than the one to which he was entitled."

All of Garner's claims are concerning the trial court acting without statutory authority, improperly applying statutory law, unauthorized procedures, and judicial jurisdiction to alter or amend the 10 year suspended sentence by entering an order revoking p.r.s.; All supported by recent case law and involve Garner's constitutional rights to due process of law.

"The essential guarantee of the due process clause is a fundamentally fair procedure for the individual in the resolution of the factual and legal basis for government actions which deprive him of life liberty or property." Wilson v. City of New Orleans 479

prior felony conviction and "knew" that he was not "eligible for a suspended sentence and supervised probation pursuant to M.C.A. section 47-7-33" (Johnson, Miss 2006); and knowing this, the court simply used it's usual format for sentencing a defendant to a 10 year suspended sentence and 3 years supervised probation pursuant to M.C.A. 47-7-33, complete with an Order of Probation and improperly indicated without statutory authority that said procedure was "pursuant to and in conformity with M.C.A. section 47-7-34" (R. 118-21). Garner would point out that the words p.r.s. are used one time incorrectly in the entire judgement.

Therefore, Garner would argue the aforementioned actions committed by the trial court clearly violate M.C.A. 47-7-34 and the concept of fundamental fairness that is the foundation of the due process clause of our state and federal constitutions.

The trial court indicated that the 10 year sentence suspension was contingent upon terms and conditions of probation and attached an Order of probation (R. 119 and R. 121, respectively) after (improperly) indicating Garner had been placed on 3 years p.r.s. pursuant to M.C.A. section 47-7-34. (R. 119)

In Tunstall v. State, 767 So. 2d 167, Miss. 1999; Tunstall argued that "he was not placed on probation in the manner required by M.C.A. section 47-7-33 because the lower court did not

in Wilson v. State, 735 So. 2d 290, Miss. 1999 and Goss v. State, 721 So. 2d 144, Miss. 1998 and held that "Tunstalls probation arises from the judicial act of the trial judge in setting a condition upon his suspended sentence." Id. in Tunstall at (p10.); and thereby ruled; "Although the word 'probation' per-se does not appear in the record, nonetheless, Tunstall was in fact placed on probation in the manner required by M.C.A. 47-7-33." Id. at (p11.)

Therefore, reling upon the language used in Garne's judgement (R.118-21) and the aforeshown Supreme Court decision in Tunstall, Garner would argue that he was "in fact placed on 3 years probation in the manner required by M.C.A. section 47-7-33 by the judicial act of the trial judge in setting a condition upon his suspended sentence", even though the trial court indicated he had been placed on 3 years p.r.s.; and thereby this Court should find that the trial court's imposition of the 10 year suspended sentence contained in the Order revoking the 3 year term of p.r.s (R.159) without statutory or judicial authority and that said Order is in violation of his state and federal constitutional rights to procedural and fundamental due process of law, a legal sentence, and his liberty.

Our Supreme Court does not allow the trial court's to fail to follow statutory procedures, evidenced by rulings such as

2d 738, Miss. 1991; McCreary v. State, 582 So. 2d 425, 427 Miss. 1991.

The Miss. Comm. on Jud. Per. has repeatly repreemanded and/or fined Circuit Court Judges for acting without statutory authority, improperly applying statues of law, and failing to follow statutorly authorized procedurees, even though the defendants greatly benefitted. see Miss. Comm. Jud. Per. v. Byers, 757 So. 2d 961, Miss. 2000; Miss. Comm. Jud. Per. v. Sanders, 708 So. 2d 866, Miss. 1998; Miss. Comm. Jud. Per. v Russell, 691 So. 2d 929, Miss. 1997.

Here, in Garner's case, Judge Helfrich did not have statutory authority, pursuant to M.C.A. section 47-7-34 as indicated in the judgement (R. 118), to omitt a term of incarceration; and thereby failed to follow the stautorly authorized procedure mandated by the legislature as being necessary to establish a valid, legal term of P.R.S in that pursuant to said statue in pertinent part: "'if' the other punishment includes a term of incarceration . . . 'may' impose a term of P.R.S."

The Miss. Supreme Court has supported the finding of the Comm. Jud. Per. by ruling that "A court can only act as specifically authorized by either the constitution or statue" Griffin v. State, 556, So. 2d 545, Miss. 1990 cited in Russell (supra) at [HN-15]; and "there is no indication that circuit court judges have inherent authority to alter sentences after the end of the term of court during which the sentence was

the term of court ends, unless the circuit court has deferred sentence, or placed the defendant upon a suspended sentence and retained jurisdiction for this specific purpose as authorized by statue, the power of the circuit court to alter or amend its sentence is terminated." Miss. Comm. Jud. Per. v. Sanders, 708 so. 2d 866, 874 (p34.) Miss. 1998.

Post Conviction Collateral Relief is "to provide prisoners with a procedure, limited in nature, to review those objections, defenses, claims, 'questions' issues, or errors which could not been or should not have been raised at trial or on direct appeal." M.C.A. 99-39-3 (2) cited in Andrews v. State, 932, so. 2d 61, 62 (p3.), Miss. Ct. App. 2006.

Therefore, in light of the fact this Court has held "the Supreme Court has found that M.C.A. section 47-7-34, P.R.S., is a separate status, uncontrolled by M.C.A. 47-7-33 on suspended sentences and probation." Carter v. State, 754 so. 2d 1207, 1209, Miss 2000 cited in Hunt v State, 874 so. 2d 448, 455 (p27) Miss. Ct. App. 2004; Garner would humbly ask this Court; "What statutory law and procedure allowed Judge Helfrich to retain jurisdiction to alter or amend his original sentence by entering an Order Revoking P.R.S. ...?" (R.159)

With the answer to this question this Court should find that the Order Revoking Post Release Supervision and impos-

ing an order revoking post release supervision; and thereby this Court should find that said order is in violation of Garner's state and federal constitution rights to procedural and fundamental due process of law, a legal sentence and his liberty and that said order should be vacated. (R.159)

Issue Seven

Whether the sentence contained in the Order of Conviction (R.118) exceeds the statutory-maximum punishment for the felon charged and is statutorily unenforceable pursuant to section 97-3-7 (2)(B), Miss. Code 1972, as amended (R0164) and is thereby plain error in violation of Garner's state and federal constitutional rights to procedural and fundamental rights to due process of law and a legal sentence.

Argument

Garner would stress to this Court that he has not abandoned Issue Seven. The State failed to address and/or provide any opposing argument concerning this issue and thereby Garner would argue that the State has conceded this issue has merit. However, Garner has discovered that, pursuant to M.C.A. section 99-19-32 in pertinent part; "Offenses punishable by imprisonment in the State Penitentiary for more than one (1) year and for which no fine is provided elsewhere by statue may be punishable by a fine not in excess of $10,000.00." Gulley v. State, 870 so.

inform him that the maximum punishment for violation of section 97-3-7(2)(B). [R.164] included ANY fine (R.170, line 11) before accepting the plea (R.175, lines 13-18) and imposing the fine (R.176, line 11).

Therefore, there is no indication ANYwhere in the record (R.166-78) the trial court was proceeding under the "catchall" statue, 99-19-32; AND "given the insufficient record, this Court should not presume so AND legitimate said authority." MCCREARY v. State, 582 So. 2d 425, 427, Miss. 1991; AND thereby this Court should find that; the fine portion of the sentence is statutorily unenforceable (plain error) pursuant to section 97-3-7(2)(B); in violation of GARNER's constitutional rights to due process of law, AND A legal sentence; AND should be VACATED.

Furthermore, this Court should find that GARNER was prejudiced by the imposition of said fine in that the M.D.O.C. used "failure to pay fine" AS PART of the grounds for REVOCATION (R.159); AND GARNER has paid $300.00 of the fine (R.159) AND should be reimbursed.

Supplemental Record

ON October 30, 2007 GARNER moved this Court to supplement the record with his Petition To Enter Plea of Guilty, which had been filed in the trial court the day of the plea hearing, to support his claims of ineffective ASSISTANCE of counsel AND involuntarily entered guilty plea.

of this Court (Ser. 144298) the record was supplemented with Garner's Petition To Enter Plea of Guilty on January 16, 2008. For clarity and convience Garner has hereto attached the attested true copy of the supplemental record consisting of said petition marked exhibit A-1 thru A-7. (hereinafter XA.-)

"Even though the form petition was not sworn to and subscribed before a notary public, Garner was under oath when he told the court that he signed the petition and agreed with it's contents (R. 174, lines 19-29) and made said petition part of the plea hearing record (R. 175, lines 1-2). So this incorporation of the assertions in the petition make it effectively sworn." Jones v. State, 936 So.2d 933, (p13.) Miss. Ct. App. 2006; and thereby this Court should recognize said petition as a valid, sworn record of what Garner's attorney told him to convince Garner to enter a plea of guilty.

Issue Eight

Whether the Appellant recieved Ineffective Assistance of Counsel during plea proceedings when defense Counsel failed to object to sentence during trial court proceedings and plea colloquy.

Argument

The State erroneously argues that "Garner's challenge to the effectiveness of his counsel is supported by no affidavit

cieved ineffective assistance of counsel; after he aknowledged to the trial court he was satisfied with the services of his attorney.

The record before this Court is crystal clear. If. GARNER had of had the benefit of competent legal counsel who would not have allowed the trial court to repeatly violated the Miss. Uniform Circuit and County Court Rules (hereinafter, M.U.C.C.C.R), this Court can easily see that GARNER would now be serving a 3 year sentence or he would not have entered a plea of guilty.

With regards to Rule 8.04, the Supreme Court has held that "Rule 3.03 (which is identical to Rule 8.04) is a valid rule of law, emanating from a governmental source empowered to enforce it, and that said rule may not be of constitutional status hardly renders it less enforceable." Coleman v. State, 483 so. 2d 680, Miss 1986 cited in Uttitoe v State, 556 so. 2d 1062, 1065 Miss. 1990.

With regards to the record before this Court, the plea petition, which was "effectively sworn" (Jones, supra), demonstrates that GARNER's Attorney advised him that the State had agreed to recommend "All but time served suspended, 3 years post release supervision" (XA.3, hereto attached) which is a legal 3 year suspended sentence pursuant to M.C.A. 47-7-34. GARNER would point out there is no mention of any fine, restitution, or assessments.

The transcript of the guilty plea hearing shows that: ⟶ (P16)

GARNER be sentenced "upon A plea of guilty to 3 years suspended but for time served and be placed on 3 years p.r.s., pay a fine of $1,500.00, a $100.00 assessment and $1,236.00 restitution. (R169, lines 18-29);

(2) - the attorney assures the court, "this is a good plea offer" (R.173, lines 20-21);

(3) - GARNER aknowledges to the court that he is satisfied with the services of his attorney (R.174, lines 6-8); AS argued by the State;

(4) - the guilty plea, induced by the 3 year sentence, was accepted (R.175, lines 13-18);

(5) - the court accepts the recommendation of the State and the judge states "it's 3 years, right" (R.175, 19-21);

(6) - the prosecutor aknowledges "Yes, 3 years p.r.s., what do I have there?" R.175 (lines 22-23);

(7) - the judge answers "Ten" (R.175, line 24); and GARNER would point out that the plea petition had just been made part of the record (R.175, lines 1-2) and said petition should have been the court's only concern;

(8) - the prosecutor then claims mistake, and changes the recommendation from 3 years suspended to 10 years suspended (R. 175, lines 25-27); GARNER would point out, that he was not ask by the Court if he still wanted to plead guilty;

(9) - quite remarkably, the attorney aknowledges that the agreed

years (R.176, lines 6-8); which had been recommended after the plea induced by the 3 year sentence had been accepted (R.175, lines 13-18); Garner would point out that at no time did the court indicate it had rejected the 3 year recommendation. (11) - then, the court imposes the 10 year sentence (R.176 - lines 8-16); Garner would point out that he was never given any opportunity to speak from the time the court accepted the plea induced by the 3 year sentence (R.175, line 12), until the court concluded the proceedings (R.177, line 3).

Therefore, as the record clearly reflects, Garner's claim concerning the effectiveness of his counsel occurred "after" he aknowledged to the Court that he was satisfied with the services of his attorney; and thereby the State's argument "is belied by the unimpeachable documentary evidence, i.e., Garner's own sworn testimony."

"Members of this Court have expressed discomfort with the current state of the law surrounding plea bargains, sentencing recommendations and surprising a defendant with a sentence outside the bargained for recommendation. see Noel v. State, 943 so. 2d 768, (p12-18), Miss. Ct. App. 2006 (Roberts, J con-curring, joined by Lee, P.J., Southwick, Griffis and Barnes, JJ.)" cited in Collins v. State, (p.6.) No. 2005-CP-00071-COA, 2007 Miss. App.

ed the 3 year sentence to induce Garner to plead guilty, Garner was asked if he still wanted to plead guilty (R.170, lines 18-20); but after the plea had been accepted and the State changed the recommendation from 3 years to 10 years (R.176, lines 3-5); Garner never consented to the change and was not ask if he still desired to plead guilty (R.175-77).

Therefore, Garner would argue that for his plea to have been truly voluntarily entered in a constitutional sense, the court should have ask Garner if he still desired to plead guilty after the State changed it's recommendation from 3 years to 10 years; and thereby this Court should find that Garner's constitutional rights under the due process clause of our U.S. Constitution to a voluntarily entered guilty plea were violated as a result of his Attorney's deficient performance.

Also, as the record shows, the State changed the recommendation, (R.176, lines 3-5), after the plea had been accepted (R.175, lines 13-18); which was undoubtly in violation of Rule 8.04 (B)(4) in that pursuant to said rule in pertinent part: "The trial judge shall not participate in any plea discussion... After a recommended disposition on the plea has been reached, it shall be made known to the court, along with the reasons for the recommendation, prior to the acceptance of the plea." The Court shall require disclosure of the recommendation in open court, with the terms of the recommend-

Rule 8.04 (B) (4):

(1)- "A recommended disposition of 3 years on the plea had been reached" evidenced by the plea petition (XA-3); and Garner would argue that the plea petition had been filed with the trial court prior to the hearing and if the State, or the Court, did not agree with the contents of the petition, they had ample time to have made their objections or claimed mistake before the plea hearing even began and thereby this Court should find that the trial court did clearly error by changing its recommendation, after the plea was accepted.

(2)- the 3 year sentence recommendation "was made known to the court prior to the acceptance of the plea" (R.169, lines 18-29);

(3)- the court accepted the plea which had been "properly induced" (8.04(A) (3) by the 3 year sentence (R.175, lines 13-18);

(4)- the court accepted the recommendation of 3 years, which the State assured the Court was correct (R.175, lines 19-23);

(5)- thereafter, Garner would argue that "the trial court judge impermissably participated in the plea discussion"; and evidenced by the plea petition (XA-3), that the attorney was not truthful to the court when he agreed with the judge that the correct recommendation was 10 years. (R.175, lines 28, 29, -)

Therefore, Garner would argue that he fullfilled his part of the plea agreement concerning the 3 year sentence as required by Rule 8.04 and thereby this Court should find that Garner should now be

attorney deficiently allowed the State to violate Rule 8.04(B)(4) by changing it's recommendation, after the plea had been accepted.

Again evidenced by the record, Garner was never given an opportunity to speak after the guilty plea induced by the 3 year sentence had been accepted (R.175-77); and it was Garner's attorney who concluded that the agreed recommendation was 10 years (R.175, lines 28, 29) without conferring with him; which Garner would argue was in violation of Rule 8.04 (B) (3) in that pursuant to said rule in pertinent part: "Defense attorneys shall not conclude any plea bargaining on behalf of the defendant without the defendant's full and complete consent, being certain that the decision to plead is made by defendant."

As Garner has demonstrated, the record is indisputable, Garner never consented to the State changing it recommendation (R.175-77); and it was Garner's attorney who, evidenced by the plea petition (XA.-3), erroneously concluded that the agreed upon recommendation had been 10 years, without Garner's "full and complete consent" (R.175, lines 28-29); and thereby this Court should find that the attorney violated Rule 8.04 (B) (3) in opposition to Garner's constitutional rights to effective assistance of counsel rendering Garner's guilty plea not to be voluntarily entered as required by the due process clause of our state and federal constitutions.

ney erroneously told him via the plea petition that the maximum sentence he could recieve on the charge of Aggravated Assault was "0 to 20 years and/or be fined an amount from 0 to $50,000.00" (XA-1 and XA-2) in that "Anyone convicted of this charge is subject to serve imprisonment in the county jail for not more than one year or in the penitentiary for no more than 20 years. M.C.A. 97-3-7 (2)" Dennis v. State, 873 so. 2d 1045, 1047 (p5.), Miss. Ct. App. 2004. Therefore, there are no provisions providing for any fine for the charge of Aggravated Assault. (R.164) (M.C.A. 97-3-7 (2)).

In the case of Nelson v. State, 626 so. 2d 121, Miss. 1993; Nelson argued that "his guilty plea was infirm because he was not properly advised by his attorney of the correct maximum punishment that could be imposed upon him if he were convicted. The issue arose because Nelson was informed he faced a potential punishment of life imprisonment and a fine up to $10,000.00, when in fact, no fine was prescribed." Id. at 126

The trial court found that "Nelson's claim regarding the $10,000.00 fine was 'moot' because no fine was imposed." Id. at 126

The Supreme Court then held: "Nelson was led to believe that the potential punishment was more onerous than it was and Nelson accepted a plea bargain based on inaccurate information as to the maximum punishment he faced in violation of Rule 3.03 (which is identical to Rule 8.04). The petition to enter guilty plea

acted upon inaccurate information. Wilson v. State, 557 So. 2d 394, Miss. 1991." Id. at 126 in Nelson.

Therefore, this Court should find, as the Supreme Court did in Nelson, that "Garner was led to believe that the potential punishment he faced if he were convicted, was more onerous than it actually was" and that "Garner accepted a plea bargain based on inaccurate information in violation of Rule 8.04 (B)(3)"; thereby, at the very least, entitling Garner to a full evidentiary hearing to determine whether he, in fact, recieved and acted upon inaccurate information."

This Court has recently held that Garner must show "he was mislead, or the case was misrepresented to him or that he expected to recieve a lesser sentence to show that he recieved ineffective assistance of counsel. Ashby v. State, 695 So. 2d 589, 593, Miss. 1997." cited in Garner v. State, 928 So. 2d 911, 914 (p7.), Miss. Ct. App. 2006

The record before this Court unquestionably meets the requirements established in Ashby in that:
(1)- evidenced by the plea petition; Garner agreed to plead guilty because his attorney advised him that the State would recommend "All but time served suspended and 3 years post release supervision" (XA-3) and as foreshown, the attorney also (2 times) erroneously indicated to Garner the maximum punishment he faced if he were convicted was "0 to 20 years and/or 0 to

room with a 10 year suspended sentence, 3 years p.r.s., $1,500.00 fine, $100.00 assessment fee, and $1,236.00 restitution, all of which were recommended by the State (R.176, lines 3-8) and accepted and imposed by the trial court (R176, lines 8-16).

"This Court has held that "where the defendant was literally misinformed and misled, the defendant's plea was not voluntarily entered." Bronson v. State, 786 so. 2d 1083, 1088 (p14.) Miss. Ct. App. 2001. In Bronson the defendant's Attorney misled him stateing that he could get off without serving any time in prison. Based on this erroneous information, Bronson pled guilty. The judge sentenced Bronson to twenty years. Bronson appealed claiming he pled guilty on this incorrect information. This Couet held that his plea was not knowingly made and he was prejudiced by his counsel's acts. Id. at 786 so. 2d 1089." cited in Burnett v. State, 831 so. 2d 1219, 1220 (p14.), Miss. Ct. App. 2002

Here, in Garner's case, the record speaks for itself; the plea petition, "which was effectively sworn" (Jones, supra), shows that Garner was misled as to what the States recommendation would be regarding the fine, fee, restitution, and sentence (XA:3); the case was misrepresented to him concerning the maximum punishment he faced if he were convicted (XA:1 and XA-2); and he fully expected to recieve a lessee sentence upon the State's recommendation, evidenced by State's recommendation before the

Court in Garner (2006), Ashby (1997), Bronson (2001), Burnett (2002) and the Supreme Court decisions in Wilson (supra) and Nelson (supra), this Court should find that Garner's plea was not knowing made as a result of his attorney's misleading and erroneous advice and that Garner was prejudiced by the deficient and erroneous advice.

The State and the trial court (R.250-51) have admitted that Garner's sentence is illegal and the State, citing prior authority from this Court, have submitted that "Garner could not stand mute when handed an illegal sentence".

The day of the plea hearing Garner had no knowledge of the law, but he did have supposedly competent legal counsel who had been highly paid ($5,000.00 in full, R.230) to speak for him.

According to the Mississippi Rules of Professional Conduct's preamble; a lawyer's responsibilities include inter alia that: "As a negotiator, a lawyer should seek a result advantageous to the client, but consistent with the law. It is a lawyer's duty to challenge the rectitude of offical action and also to uphold legal process." Here, in Garner's case, the attorney has failed to meet these responsibilities in that Garner offers the documented and sworn transcript of the plea hearing as proof that the attorney "stood mute" and failed to object to the State changing it's recommendation from a legal 3 year suspended sentence pursuant to

deficient and that Garner was prejudiced by said deficiency.

"Ineffective assistance of counsel claims are determined under the standard set forth in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Two inquires must be made under the Strickland standard: (1) Whether counsel's performance was deficient; and, if so, (2) Whether the deficient performance was prejudicial to the defendant." Wilson v. State, 577 So. 2d 394, 396, Miss. 1991. That is, Garner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." Schmitt v State, 560 So. 2d 148, 154, Miss. 1990.

With regards to the first prong of Strickland, this Court should find that Garner, evidenced by the sworn documented record of the trial court proceedings, the Miss. Uniform Circuit and County Court Rules and cited case law authority from this Court and our Supreme Court, has established grounds for ineffective assistance of counsel when Garner's attorney deficiently and incompetently:

(1) - failed to object to the State violating Rule 8.04 (B) (4) by changing it's recommendation "after the plea had been accepted";

(2) - violated Rule 8.04 (B) (3) by reaching a recommended disposition on the plea without Garner's "full and complete consent";

(3) - failed to object to the judge violating Rule 8.04 (B) (4) by "im-

faced if he were convicted was more onerous than it actually was" (Nelson, supra) and (Wilson, supra), with regards to the fine; (5)- "misled Garner to believe he would recieve a lesser sentence" (Garner, Ashby, Brownson, Burnett; supra); (6)- failed to object to the sentence imposed, which the State and the trial court have admitted is illegal. (7)- Advised Garner "to accept a plea bargain based on inaccurate information" (Nelson and Wilson, supra) regarding the maximum punishment and what sentence the state would recommend (with regards to fine and restitution).

With regards to the prejudice prong of Strickland; As this Court can see from the record before it, and as Garner has demonstrated herein, "but for" the numerous deficient errors by the attorney, there is a "reasonable probality" that Garner would now be serving a 3 year sentence instead of a 10 year sentence or he would not have entered a guilty plea; and thereby this Court should find that Garner was prejudiced by his attorney's deficient representation and as a result thereof, along with the numerous violations of Rule 8.04; that Garner's guilty plea was not knowingly and voluntarily entered as required by said rule and the due process clause of our U.S. Constitution.

deficient performance regard the attorney's failure to competently pursue a constitutional speedy trial violation in which there was "a reasonable probability" that if the speedy trial violation had been competently pursued would have relieved Garner of all criminal jeopardy.

Argument

Garner would stress to this Court that he has not abandoned this issue or the argument contained in his Opening Brief.

The trial court denied this issue on the grounds that "Garner fails to establish grounds for ineffective assistance of counsel" and the State urges this Court to simply assume that "Garner swore under oath he was satisfied with the services of his attorney."

A lawyer's responsibilities include that "As an advocate, a lawyer should zealously assert the clients position under the rules of the adversary system. In all professional functions a lawyer should be competent, prompt and diligent." see Miss. Rules of Professional Conduct Preamble.

Here, in the case at bar, Garner knew that he had no knowledge of the law; and thereby, almost simultaneously with his arrest (R.216; R.19), Garner retained (R.223) highly paid (R.230) and sup-

Brief, Garner has determined that his attorney deficiently advised him to waive his constitutional right to a speedy trial, which had already been violated, without first pursuing the possibility that a claim for said violation could have been successfully asserted and relieved Garner of all criminal jeopardy; and this act of incompetence worked to Garner's substantial prejudice.

The Miss. Supreme Court has held: "In Kimmelman v. Morrison, 477 U.S. 365, 378, 91 L. Ed. 2d 305, 106 S. Ct. 2574 (1986), the U.S. Supreme Court stated 'A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance' cf. Powell v Alabama, 287 U.S. 45 at 69, 53 S. Ct. 55 at 64, 77 L. Ed. 158; consequently, a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings" cited in Ashby v. State, 695 So. 2d 589, 592, Miss. 1997; and thereby this Court should find that the State's argument fails.

The trial court denied this issue on the grounds "Garner fails to establish grounds for ineffective assistance of counsel" (R. 250-51)

As shown in his Opening Brief Garner has established by the record that the 25 month delay from his arrest (R 19) until his guilty plea (R. 167) was "preemptively prejudicial under constitutional

"on it's face, presumtively violative of his Sixth Amendment rights to a speedy trial." see McVeay (supra), Id. at 489, (p12.).

This Court in McVeay, relied upon People v. Stanely, 266 Ill. App. 3d 307, 641 N.E. 2d 1224, 1227, 204 Ill. Dec. 605, Ill. App. Ct, 1994 and Nelson v. Hargett, 989 F. 2d 847 (5th Cir. 1993) and determined that "A defense attorney's failure to counsel his client regarding the availability of a potential speedy trial bar to prosecution would constitute ineffective assistance." Id. at 489, (p11.)

Therefore, with regards to the first prong of the Strickland v. Washington (supra) standard; Garner would argue that based upon this Court's opinion in McVeay, that he has established, by the record, that his attorney deficiently failed to pursue the fact his constitutional right to a speedy trial had been violated and advised Garner to wave said right by entering a plea of guilty; and thereby this Court should find that Garner has established grounds for ineffective assistance of counsel contrary to the trial court's ruling.

With regard's to the prejudice prong of the Strickland standard; as was held by this Court in McVeay, "there is no requirement that Garner demonstrate with absolute certainty that his claim for a constitutional speedy trial violation would succeed, only that there is a reasonable probality." Id at 490 (p13).

to assert his constitutional right to a speedy trial, but "even when a defendant fails to assert his right to a speedy trial he does not permanently waive this right" Vickery v. State, 535 So. 2d 1371, 1377, Miss. 1988 cited in Berry v. State, 728 So. 2d 568, 570 (p3.), Miss. 1999

In McVeay, the Court could not determine from the record what portion of the delay was chargeable to McVeay; here, in Garner's case, the record clearly shows that from the date of his arrest (R. 216; note 0 days jail time 7-31-02) until he was indicted (R. 019; 12-29-03), nearly 17 months elasped.

Therefore, in light of our Supreme Court rulings that Garner "was under no duty to bring himself to trial or to demand a trial" Bell v. State, 220 So. 2d 287, Miss 1969; and "the charging authority is under a duty to provide a prompt trial" Dickey v. Florida, 398 U.S. 30, 90 S. Ct. 1564 26 L. Ed. (1970) cited in Perry v. State, 419 So. 2d 194, Miss. 1982; this Court should find that there is a "reasonable probability":

(1) - that the first 17 months of the delay would be charged to the State;

(2) - that the Attorney could have successfully relieved Garner of all criminal jeopardy by competently pursuing a constitutional speed trial violation, and thereby this Court should also find that Garner was prejudiced by his Attorney's erroneous advice concerning the waiver of his constitutional right to a speedy trial by pleading guilty.

right, and a defendant "MAY ONLY" waive his speedy trial right by A knowing and intelligent waiver. Even when a defendant fails to assert his right to a speedy trial he does not permanently waive this right." Vickery v State, 535 So. 2d 1371, 1377, Miss. 1988 cited in Berry v State, 728 So 2d 568, 570 (p3.), Miss. 1999.

The record before this Court is clear, the 25 month delay between Garner's arrest and guilty plea was "presumtively violative" of his Sixth Amendment rights to a speedy trial.

Therefore, in light of the fact the Miss. Supreme Court will "indulge every reasonable presumption against the waiver of a constitational right" Vickery (supra) quoting Aetna Ins. Co. vs. Kennedy, 301 U.S. 389, 393 57 S. Ct. 809, 812 81 L. Ed. 1177, 1180 (1937) cited in Berry (supra); and thereby this Court should find that Garner did not "knowingly and intelligently" waive a constitutional right that the trial court had already violated, a violation which could have relieved him of all criminal jeopardy; and for this reason alone, this Court should allow Garner to withdraw his guilty plea so that he can pursue a speedy trial violation or go to trial on the merits of the indictment.

intelligently made in compliance with Rule 8.04.

Argument

Garner would stress to this Court that he has not abandoned this issue or the argument contained in his Opening Brief.

"The burden remains upon the State to prove the voluntariness of the guilty plea by clear and convincing evidence when the issue of voluntariness is raised by the defendant." Alexander v. State, 605 So. 2d 1170, 1172, Miss 1992 quoting Wilson v. State, 577 So. 2d 394, 397, Miss. 1991; cited in Courtney v State, 704 So. 2d 1352, 1359 (p31.), Miss. Ct. App. 1997.

Here, in Garner's case, this burden has not been met in that as herein shown by the record, the trial court erroneously elected not to address any of the issues raised concerning the voluntariness of his plea and the State thereby erroneously indicated that said issue was not properly before this Court; both of which indicate that this issue has merit and Garner would argue that "the burden to prove the voluntariness of his guilty plea by clear and convincing evidence" has now been passed on to this Court.

"The issue of voluntariness and informed consent are addressed by rule 8.04 (A) (3) and (4) of M.U.C.C.C.R. which states:

(A)(3) Voluntariness - Before the trial court may accept a plea, the court must determine that the plea is voluntarily and intelligently made and there is a factual basis for the plea. A plea of guilty is

(A)(4) - Advice to the Defendant; When the defendant is arrained and wishes to plead guilty to the offense charged, it is the duty of the trial court to address the defendant personally and to inquire and determine:
A. the accused is competent to understand the nature of the charge;
B. the accused "understands" the nature and consequences of the plea, and the maximum and minimum penalties provided by law; and
pursuant to this rule, 'A plea may only be considered as having been voluntarily made if he was properly advised by counsel and had a full understanding of the consequences of his actions.' Johnson v. State 810 so 2d 624, (p6), Miss. Ct. App. 2002" cited in Sutton v. State, 837 so. 2d 120, 123 (p15), Miss. Ct. App. 2004.

Therefore, "as part of it's voluntariness inquiry, the court must determine whether the accused 'understands' the minmum and maximum sentence that may be imposed on the charge to which he is pleading guilty to. Alexander v. State, 605 so. 2d 1170, 1172, Miss. 1992" cited in Hannah v. State, 943 so. 2d 20, 25 (p12.) Miss. 2006

The Fifth Circuit has repeatly held, with respect to guilty pleas;
"The Knowing requirement that a defendant 'understand' the consequences of a guilty plea means that the defendant must "know" the maximum prison term and "fine" for the offense chaeged. U. S. v. Guerra, 94 F. 3d 989, 995 (5th Cir. 1996) citing Barbee v. Ruth, 678 F. 2d 634, 635, (5th Cir. 1982); Ables v. Scott, 73 F. 3d 591, 592-93 n. 2, (5th

GARNER to "knowingly 'understand' if the consequences of his guilty plea included any fine as part of the maximum punishment for the charge of aggravated assault" see U.S. v Hamilton (supra, 2007). The plea petition shows that the attorney 2 times erroneously told GARNER that the maximum sentence he could recieve on said charge was "0 to 20 years and/or be fined an amount from 0 to $50,000.00" (XA-1 and XA-2) and thereby "mis-led GARNER to believe that the potential maximum punishment was more onerous than it actually was" Nelson (supra).

As the transcript of the plea hearing shows;

(1) - the State recommended that GARNER pay a fine of $1,500.00 (R.169);

(2) - then, the Court aknowledged to GARNER that "the maximum and minimum sentence that could be enrolled on his plea was up to 20 years" (R.170), with no mention of any fine;

(3) - thereafter, the court accepted the plea and the State's recommendation, and imposed a fine of $1,500.00 (R.175-76).

Therefore, under the aforeshown circumstances which are supported by the record, this Court can see there was no concievable way for GARNER to "know" if the maximum sentence for the charge of aggravated assault included any fine; and GARNER "was prejudiced by this insufficient knowledge concerning the maximum punishment in that the court did impose a fine" Sykes v. State, 624 so. 2d 500, (miss. 1993) cited in Nelson (supra) Id. At 126;

that the State "would not" recommend that he pay any fine, (XA.-3); therefore, "it cannot be said beyond a reasonable doubt that Garner's insufficient knowledge concerning the imposition of the $1,500.00 fine played no role in his decision to plead guilty" Sykes (supra) Id at 503

Furthermore, as herein Issue Seven (page 12) shown, there are no provisions providing for any fine for the charge of Aggravated Assault (R.164); but pursuant to M.C.A. Section 99-19-32, the trial court was authorized to impose a fine of up to $10,000.00, but there is no indication in the record that the trial court was proceeding under this statue. Therefore, as of this writing without a ruling from this Court concerning Issue Seven, Garner still does not "know" if the consequences of his guilty plea included any fine as part of the maximum punishment for the charge of Aggravated Assault; and thereby this Court should find that Garner's guilty plea was not knowingly and voluntarily entered as required by Rule 8.04(A)(4) and the due process clause of our U.S. Constitution.

In light of the State's Argument that the issue of the voluntariness of Garner's guilty plea was not properly before this Court; Garner would point out that in his pleadings for relief before the trial court, he specifically raised this exact same claim (R.288) and the trial court never addressed said issue (R250-51); and thereby this Court should find that the trial court committed reversible er-

untarily and intelligently entered if he was informed of the consequences of the plea. M.U.C.C.C.R. 804(A)(4)" Alexander (supra) Id. at 1172 cited in Thomas v. State, 881 So. 2d 912, 916 (P9.), Miss. Ct. App. 2004.

With regards to Rule 8.04(A)(4) and the consequence requirement; Garner would bring to this Court's attention the trial court was authorized under M.C.A. Section 99-37-3 to require that Garner pay restitution to the alledged victim and did require Garner to pay restitution in the amount of $1,263.00. (R.176, lines 11-16)

Therefore, the consequences of pleading guilty to the charge of aggravated assault, as provided by Miss. law, included that the trial court was authorized to require Garner to pay restitution; but as the record before this Court clearly reflects, Garner was never informed of the possibility of restitution as a consequence of his plea.

As shown in Garner's plea petition, his attorney never informed him that the consequences of entering a guilty plea to the charge of aggravated assault included the possibility that he could be required to pay restitution to the alledged victim (XA.-1 and XA.-2); nor did the attorney indicate to Garner that the State was going to recommend that he pay restitution. (XA.-3)

As shown in the transcript of the plea hearing, the only consequences aknowledged to Garner was that the maximum sentence "that could be enrolled on his plea was up to 20 years" with no mention of any fine, or restitution (R.170)

sufficient knowledge in that the trial court did require him to pay $1263.00 restitution and also when the trial court used failure to pay said restitution as part of the grounds for revocation (R.159).

With regards to failure to disclose the possibility of restitution, the Fifth Circuit has stated "the defendant is not prejudiced so long as his liability does not exceed the maximum amount that the court informed him could be imposed as a fine." U.S. v. Glinsey, 209 F. 3d 386, 395, (5th Cir. 2000).

The Fifth Circuit also held that "failure to disclose the possibility of restitution could be harmful error when the quantum of the restitution exceeds the liability amount used by the court in notifying the defendant as to the consequences of his guilty plea. U.S. v. Powell, 354 F. 3d 362, 370, (5th Cir. 2003)" cited in U.S. v. Maharaj, No. 04-20990, 176 Fed. App. 536 (5th Cir. 2006).

Therefore, based upon the record and the aforeshown recent rulings by the Fifth Circuit, this Court should find that Garner "was prejudiced by the trial court's failure to disclose the possibility of restitution since the quantum of the imposed restitution exceeded the liability amount used by the judge in notifying Garner of the maximum amount that could be imposed as a fine as a consequence of his guilty plea"; and thereby this Court should also find that Garner's guilty plea was not knowingly, voluntarily, and intelligently entered as required by Rule 8.04 (A)(4) and by the due process

tary if induced by fear, violence, deception, or improper inducements."

As the record before this Court shows, GARNER was "decieved" by his attorney as to what sentence the State would recommend (RA-3); evidenced by the sentence the State recommended before the plea was accepted (R.169, lines 20-29); and further evidenced by the State's recommendation after the plea was accepted (R.176, lines 6-16).

This Court has held that "the recommendation of the sentence the defendant would recieve upon entering a plea of guilty, made by the State, is an inducement to plead guilty even though the trial court is not obligated to follow the State's recommendation." Berry v. State, 800 so. 2d 1233, (p11.), Miss. Ct. App. 2001.

The transcript of the plea hearing unambigiously shows that before the guilty plea was accepted, the State induced GARNER to plead guilty by recommending a 3 year sentence (R.169, lines 20-29); and after the plea had been accepted [and in violation of Rule 8.04 (B)(4)] the State changed the recommendation from 3 years to 10 years.

Therefore, this Court should find that GARNER's guilty plea was obtained by deception and improper inducements in violation of Rule 8.04 (A)(3) and that his constitutional rights under the due process clause of U.S. Constitution to a volcuntarily entered guilty plea were violated.

plea, "A trial court must assure itself that a defendant 'understands' the nature and elements of the crime for which he is admitting guilt. Stumph 125 S. Ct. at 2405 citing Henderson v. Morgan, 426 U.S. 637, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976). A court accepting a guilty plea does not have to explain the crimes elements to the defendant on the record, as it is also sufficient if the record accuratley reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel. Stumph, 125 S. Ct. at 2405; cited in Jones v. State, 936 so. 2d 993, 995 (p6.) Miss. Ct. App. 2006.

As shown in the transcript, the trial court judge informed Garner; "You realize the burden is on the State of Miss. to prove you guilty beyond a reasonable doubt when you have a jury trial; however, when you enter a plea of guilty, you waive this requirement, and the State is not required to prove anything" (R. 171, lines 25-29); but no one ever explained to Garner that the charge of Aggravated Assault had multiple elements and that he was "waiving the right that the prosecution prove each element of the offense beyond a reasonable doubt; King v. State, 738 so. 2d 240, (p4-5), Miss 1999; Jefferson v. State, 556 so. 2d 1016, 1019, Miss. 1989"; cited in Ealy v. State, No. 2006-CP-00552-COA, (p22), (2007).

Therefore, "this right is secured as a function of the due process clause of both the federal and state constitutions. see Wood v.

535, So.2d 1371, 1377, Miss. 1988; and as will be herein shown, evidenced by the record, Garner was never informed of said right, and if he had he would not have entered a guilty plea.

Garner's case is identical to that of Jones (supra) in that at the plea hearing the judge did not explain that the charge of aggravated assault had multiple elements; the judge simply ask the prosecutor "what they'd 'expect' to prove in Garner's case" (R.168, lines 25-27). The prosecutor was not ask to summarize the evidence that would be shown or otherwise give a factual basis for the offense. The prosecutor only recited the information contained in the indictment which specified the location and date the incident took place, the victim's name, and the elements of the indicated charge (R.168-69); and thereby Garner would argue that the prosecutor reciting the information contained in the indictment did not give him sufficient knowledge to "understand" that the charge of aggravated assault had multiple elements and that he was "waiving his constitutional right that the State prove each of the elements beyond a reasonable doubt." Garner would also argue that the aforeshown recitation by the prosecutor did not establish a factual basis for the plea.

As shown in the transcript, when accepting the plea, the judge examined Garner to insure that he had reviewed the

counsel whether he had explained the elements to Garner. The court made reference to the petition and the petition made reference to the indictment, but the trial court never had any specific assurance that the multiple elements of the charge had been "explained" to Garner and the plea petition does not summarize the elements of the charge (XA.1-A-7)

Therefore, the plea petition is the only evidence in the record before this Court that anyone ever explained to Garner that the charge of aggravated assault had multiple elements and that if he went to trial, the prosecution would have to prove each element beyond a reasonable doubt.

"In Stumph, 125 S.Ct. 2398, 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" cited in Jones (supra, p7. A995)

Garner would bring to this Court's attention that his attorney aknowledged to the trial court several quite questionable reasons why the court should Accept Garner's guilty plea including inter alia that "Garner aknowledges some thing happened, that he could have been wrong" and "I (the attorney) just want to let the court know that Garner understands that the situation happened and that this individual got hurt" (R.173-74)

did in Stumph, to consider the aforeshown testimony of his attorney describing the alledged crime as "a situtation in which Garner could have been wrong and a individual got hurt" as evidence that the attorney never explained to Garner that if he chose to go to trial on the charge of aggravated assault the State would have to prove beyond a reasonable doubt that: (1) Garner's actions on July 30, 2002 were done "willfully and purposely"; (2) the alledged victim recieved "bodily injury" as a result of his action; (3) A Chev. truck could be considered a "deadly weapon" and was used as such to strike the victim; as indicated in the indictment (R.19); Also see Powell v. State, 536 so. 2d 13, 15, Miss. 1998.

So the question here, in Garner's case, 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." Stumph, 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 be shown by form language in a plea petition, that is not confirmed by direct questioning in the hearing and appears on a petition in which the elements of the offense are not stated?" Jones, (supra, (p14.) at 997)

on the emphasis in 'Stumph', 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 in the petition and the assurance is just one of many on the form. 'Stumph' requires a reliable indication that the defendant has had the elements of his offense explained." Id. at 998, (p19.)

This Court in Jones (supra) then held: "Our view of the importance of 'Stumph' suggest 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' and 'the record must accurately reflect the accused's knowledge' 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." Id. at 998, (p20.)

Therefore, based on it's recent decision in Jones, this Court should find that "the record does not accurately reflect" that the nature and the multiple elements of the charge of aggravated assault were explained to Garner before he entered a plea of guilty; and that Garner did not knowingly and intelligently waive his "constitutional right that the State prove each element of the offense be-

to a voluntarily entered guilty plea guaranteed by the due process clause of our state and federal constitutions was violated.

Also, relating to the preceding principles and with regards to Rule 8.04 (A)(3); Prior to accepting a plea of guilty, "unless the courts are satisfied that a factual basis for the plea, they are admonished not to enter a judgement" U.S. v. Briggs, 920 F. 2d 287, 293, (5th Cir. 1991) and "A factual basis is an essential part of the constitutionally valid and enforceable decision to plead guilty" Reynolds v State, 521 so. 2d 914, 915, Miss. 1988.

Here, in Garner's case, "the facts required to be shown are determined by the elements of the crime charged" Corley v. State, 585 so. 2d 765, 767, Miss. 1991 cited in Faley (supra); and "each esstential element of the charge must have a factual basis" U.S. v. Montoya-Comacho, 644 F. 2d 480, 485, (5th Cir. 1981) cited in Lott v. State, 597 so. 2d 627, 632, Miss 1992; cited in Faley (supra)

As the transcript clearly shows, the plea hearing did not include any explanation by anyone as to the facts underlying the crime. While it is true Garner admitted to committing the crime (R.171); "but the admission must contain factual statements constituting a crime or be accompanied by independant evidence of guilt" Reynolds, (supra, at 917) cited in Hannah v State, 943 so. 2d 20, 26-27, Miss. 2006; and as the plea petition shows, Garner never ad-

connection with a guilty plea are entitled to great evidentiary weight." U.S. v. Abero, 30 F. 3d 29, 32, (5th Cir. 1994) cited in U.S. v. Hamilton, No. 06-60017, U.S. Dist. 2007, Id. at 12.

In Jones (supra), this Court elaborated on it's understanding of the "factual basis" requirement and held: "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 there is "substantial evidence" that the defendant actually committed the crime charged. Gaskin v. State, 618 So. 2d 103, 106, Miss. 1993. In order for a plea to be accepted, "the record must contain enough evidence 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" Id. at 998-99, (p. 20-21).

As this Court can see from the record, the trial court judge accepted Garner's guilty plea without asking the State to proffer one drop of factual evidence that could have been used to convince a jury that Garner had committed the crime of Aggravated Assault; and thereby → (p. 46)

guilty plea without "determining that there was a factual basis for the plea" in violation of Rule 8.04 (A)(3) and his state and federal constitutional rights to a voluntarily entered guilty plea.

Conclusion

For all the aforeshown errors and constitutional violations set forth herein, the Appellant prays this Honorable Court will vacate the Order Revoking Post Release Supervision and restore the Appellant's constitutional rights to his liberty; or vacate the Appellant's guilty plea and allow him to proceed appropriately with a defense to the merits of the indictment.

As an alternative, Garner would ask this Court to find that he should now be serving a 3 year sentence; or remand this case to the Forrest County Circuit Court for proceedings consistent with the opinion of this Court as justice so requires pursuant to the laws of Miss. and our state and federal constitutions.

Respectfully Submitted this the 25th day of April 2008.

Thomas Garner

I, Thomas Garner, Appellant pro-se, do hereby certify that I have this day mailed via U.S. mail, postage prepaid, a true and correct copy of this Appellant's Reply Brief to:

Hon. Deidee McCory
Asst. Attorney General
P.O. Box 220
Jackson, Ms 39205-0220

Hon. Judge Robert B. Helfrich
Forrest Co. Cir. Ct. Judge
P.O. Box 309
Hattiesburg, Ms 39403-0309

Hon. Jon Mark Weathers
Forrest Co. District Att.
P.O. Box 166
Hattiesburg, Ms 39403-0166

This the 25th day of April 2008.

Thomas Garner

Thomas Garner, #56764, pro-se

IN THE SUPREME COURT OF MISSISSIPPI

PAGES NUMBERED 1-8

Supplemental VOLUME ___ of ___

EXHIBIT _____

ELECTRONIC DISK _____

Case #2007-CP-00600-COA

COURT APPEALED FROM : Circuit Court

COUNTY : Forrest

TRIAL JUDGE : Robert B. Helfrich

Thomas Glen Garner v. State of Mississippi

Betty W. Sephton, Clerk

TRIAL COURT # : C106-0183

ATTEST
A True Copy
This the 16th day of
June 2008
Office of the Clerk
Supreme Court and Court of Appeals
State of Mississippi
By: D.C.

STATE OF MISSISSIPPI

VS.

THOMAS GARNER

PLAINTIFF

CAUSE NO. 03-558 CR

DEFENDANT

FILED

OCT 1 2 2004

Lynn Ellen Adams
FORREST COUNTY CIRCUIT CLERK

Race: White
Gender: Male
SSN: 587-18-7059
DOB: 7-5-56

PETITION TO ENTER PLEA OF GUILTY

The Defendant, after having been first duly sworn, on oath represents and states unto the Court as follows:

1. My full name is Thomas Garner and I am also known as JuJu. I request that all proceedings against me be conducted in my true name.

2. I am represented by attorney Ed Pittman, Jr., Esquire.

3. In the above-referenced indictment, I have been charged with committing the crime of Ags Assault. If convicted of that charge, I can be sentenced to a term of from 0 years (minimum) to 20 years (maximum) and/or be fined an amount from $ 0 (minimum) to $ Space (maximum).

I DESIRE TO PLEAD GUILTY TO THE CHARGE OR CHARGES OF:

Ags Assault

AND REQUEST THE COURT TO ACCEPT MY PLEA OF GUILTY TO THIS CHARGE OR CHARGES.

4. I have told my attorney all of the facts and circumstances known to me about the charge(s) against me. I believe that my attorney is fully informed on all such matters. My attorney has counseled and advised me (a) on the nature of each charge, (b) on any and all lesser included charge(s), and (c) on all possible defenses I might have to these charge(s).

5. I understand that I may plead "NOT GUILTY" to any charge against me and that if I choose to plead "NOT GUILTY" the Constitution guarantees me the following rights:

(c) the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in my favor;

(d) the right to have the assistance of any attorney at all stages of the proceeding;

(e) the presumption of innocence, i.e., the State must prove beyond a reasonable doubt that I am guilty;

(f) the right to take the witness stand at my sole option and, if I do not take the witness stand, I understand that the jury may be told that this shall not be held against me; and

(g) the right to appeal my case to the Mississippi Supreme Court if I am convicted at a trial on the charge(s) in the indictment.

Knowing and understanding the Constitutional guarantees set forth in this paragraph, I hereby waive all of them and renew my desire to enter a plea of "GUILTY". J.A. (initials of the Defendant)

6. I also understand that if I plead "GUILTY," the Court may impose the same punishment as if I had pled "NOT GUILTY," stood trial and was convicted by a jury.

7. I know that if I plead "GUILTY" to the charge(s) of Agg. Assault, the possible sentence which may be imposed on me is a term of from 0 years (minimum) to 20 years (maximum) and/or be fined an amount from $ 0 (minimum) to $ 50,000 (maximum).

I also know that the sentence is up to the Court, that the Court is not required to carry out any understanding made by me and my attorney with the District Attorney, and further, that the Court is not required to follow the recommendations, if any, of the District Attorney.

8. There are other unresolved charges pending against me in None County, Mississippi, for which I have either been arrested or indicted. The District Attorney has agreed to take the following action with regard to these charges:

_____

_____

_____

9. I have (✓) have not ( ) been convicted of one or more felonies in the past. If applicable, place the offense, the year, and the location in the following spaces:

1984 - Rankin Co. Vehicular manslaughter

10. I am ( ) am not (✓) presently on probation or parole. I understand that pleading guilty to this indictment may cause a revocation of my probation or parole, and that this could result in a sentence of _____ years being imposed on me in my prior case. I further understand that if my parole or probation is revoked, my sentence in this present case may be imposed consecutively to or in addition to any sentence I may get in my prior case if revoked.

11. I am 48 years of age and have gone to school up to and including 12th grade 2yrs Vo-tech. My physical and mental health are presently satisfactory. At this time, I am not under the influence of any drugs, alcohol, or other intoxicants (nor was I at the time the offense was committed) except:

12. I do not claim to be suffering, nor have I ever suffered, from any type of mental disease or disorder, except:

None

13. Other than the information stated in paragraph No. 7 and 8 hereinabove, I declare that no officer or agent of any branch of government (federal, state, and local) or any judge has made any promise or suggestion of any kind to me or, to my knowledge, anyone else that I will receive a lighter sentence or probation or any form of leniency if I plead "GUILTY" except:

All but time Served suspend 3yr post-release supervision

14. I further understand that if I plead "GUILTY," I waive my right to appeal on any issue concerning the charge(s) in the indictment in this case.

15. I hereby plead "GUILTY" on the basis of my involvement in the offense charged in

I understand that the information required for registration is the following and I hereby submit the required information to the Court on Exhibit "A" which is attached to this sworn petition and which is incorporated fully herein by this reference. The required information is name, address, place of employment, crime for which convicted, date and place of conviction, adjudication or acquittal by reason of insanity, aliases used, social security number, date of birth, age, race, sex, height, weight, hair color, eye color, a brief description of the offense or offenses for which registration is required, identifying factors anticipating future residents, offense history and, for sexual predators, documentation of any treatment received for any mental abnormality or personality disorder. I further understand, as part of the registration, my photograph, fingerprints, and blood sample will be taken to be sent, along with the registration information, to the Department of Public Safety. I also understand that, if I change my address, I have a duty to register my new address with the Department of Public Safety and with the designated law enforcement agency in the new state not later than ten (10) days after establishing residence in the new state if it has a registration requirement and also a duty to cooperate with the Department of Public Safety by returning all address verification within the required time.

I further understand that the continuing registration requirements in Section 45-33-1 are (check and initial one of the following):

1. On the anniversary of a registrant's initial registration during the period in which a person is not found to be a sexual predator is not relieved of the duty to register:

a. The Department of Public Safety shall mail a non-forwardable verification form to my last reported address;
b. That I must mail the verification form to the Department of Public Safety within ten (10) days after receipt of the form, stating whether I still reside at the address last reported; and
c. That if I do not mail the verification form to the Department of Public Safety within ten (10) days after receipt of the form, I will be in violation of Section 45-33-1 unless I proved that I have not changed my residence address. _____ (initials of the Defendant)

2. A registrant who is found to be a sexual predator shall re-register every ninety (90) days:

a. The Department of Public Safety shall mail a non-forwardable verification form to my last reported address;
b. That I must mail the verification form to the Department of Public Safety within ten (10) days after receipt of the form, stating whether I still reside at the address

c. That if I do not mail the verification form to the Department of Public Safety within ten (10) days after receipt of the form, I will be in violation of Section 45-33-1 unless I proved that I have not changed my residence address. _____ (initials of the Defendant)

ACKNOWLEDGMENT

The Defendant in this cause, hereby acknowledge that I have received a certified, filed copy of the Petition to Enter Guilty Plea and that these duties to register have been fully and clearly explained to me.

X _____
DEFENDANT

(e) ( ) Neither set of items a, b, and c of Paragraph 16 are applicable to me.

17. I hereby certify that I am entitled to a credit on my sentence imposed herein for the time which I spent in jail prior to being convicted. _____ (initials of the Defendant)

THIS PETITION IS SIGNED AND SWORN BY ME on the _____ day of _____, 2004, with the full knowledge that every person who shall willfully and corruptly swear, testify or affirm falsely to any material matter under oath, affirmation or declaration legally administered in any matter, cause or proceeding pending in any Court of law or equity shall, upon conviction, be punished by imprisonment in the penitentiary for a term not to exceed ten (10) years.

X _____
DEFENDANT

_____
ATTORNEY FOR DEFENDANT
AS WITNESS

SWORN TO AND SUBSCRIBED BEFORE ME on this, the _____ day of _____, 2004.

_____
NOTARY PUBLIC

My Commission Expires:

CERTIFICATE OF COUNSEL

The undersigned, as Attorney and Counselor for the above-named Defendant, certifies:

1. I have read and fully explained to the Defendant the allegations contained in the indictment in this cause.

2. To the best of my knowledge and belief, the statements, declarations, and representations made by the Defendant in the foregoing petition are, in all respects, true and accurate.

3. I have explained the maximum and minimum penalties for each count in the indictment to the Defendant and consider the Defendant competent to understand the charge(s) against the Defendant and the effect of the Defendant's petition to enter a plea of guilty.

4. The plea of "GUILTY" offered by the Defendant in this petition accords with my understanding of the facts the Defendant related to me and the facts alleged by the State; the plea is consistent with those facts and the law.

5. In my opinion, the plea of "GUILTY," as offered by the Defendant, is voluntarily and understandingly made.

6. Having discussed this matter carefully with the Defendant, I am satisfied, and I hereby certify in my opinion, that the Defendant is mentally and physically competent and that there is no mental or physical condition which would affect the Defendant's understanding of those proceedings. Further, I state that I have no reason to believe that the Defendant is presently operating under the influence of drugs or intoxicants. (Any exceptions to this statement would be stated in detail on record by the Attorney.)

SIGNED BY ME in the presence of the above-named Defendant after a full discussion of the contents of this petition with the Defendant on this, the 12 day of October, 2004.

ATTORNEY FOR THE DEFENDANT