IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JIMMY DALE MAYHAN — APPELLANT

VS. — NO. 2007-CP-1078-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: BILLY GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JIMMY DALE MAYHAN **APPELLANT**

VS. **NO. 2007-CP-1078-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

Jimmy Dale Mayhan claims his lawyer told him prior to Mayhan's plea of guilty to one count of fondling " . . . that it was a 90 per cent chance of losing and [an **Alford** plea] would be the best way to go." (R. 20)

Mayhan now argues in a post-conviction environment his lawyer was ineffective because the advice given was not within the range of competence demanded of attorneys in criminal cases.

We disagree.

On April 26, 2006, Jimmy Dale Mayhan, proclaiming his innocence in the wake of a four (4) count indictment charging him with fondling four (4) different children under the age of sixteen (16) years (C.P. at 58-59), entered an open **Alford** plea to count 4. (R. 3-29)

Pursuant to a plea-bargain agreement instigated by Mayhan's lawyer (R. 11, 18-19), the three additional counts in the indictment were not prosecuted and presumably dismissed and/or passed to the files. (R. 82) As part of the *quid pro quo*, the State agreed " . . . to remand the other three counts

of the indictment and to agree on a maximum sentence of 10 years to serve as the recommendation of the State with the Defendant being allowed to argue for something less . . ." (R. 18)

After accepting Mayhan's pleas during the plea-qualification hearing conducted on April 26, 2006, the court deferred sentencing until a later date. On May 30, 2006, after hearing facts in extenuation and mitigation of sentence, the court sentenced Mayhan to serve fifteen (15) years in the custody of the MDOC with ten (10) years to serve and five (5) years of PRS. (R. 82) "The Court will also order Counts 1, 2, and 3 remanded by agreement of the parties." (R. 18-19, 82)

Unhappy over this state of affairs Mayhan, eight (8) months following his plea of guilty, filed for post-conviction relief. In this appeal from denial of post-conviction relief, Mayhan claims his lawyer was ineffective and his plea involuntary.

Mayhan also argues his plea was devoid of a factual basis.

JIMMY DALE MAYHAN appeals from the summary denial of his motion for post-conviction collateral relief - essentially a motion to vacate his guilty plea and the sentence imposed in its wake - filed in the Circuit Court of DeSoto County, Andrew C. Baker, Circuit Judge, presiding, substituting for Robert P. Chamberlin who recused himself after taking Mayhan's guilty plea and later imposing sentence. (C.P. at 23-24)

Mayhan, who swore, under the trustworthiness of the official oath, he was satisfied with the services rendered by his lawyer and that his lawyer had been available to Mayhan (R. 20), has changed his mind. (Brief of Appellant at 12-14)

In a five (5) page opinion and order entered by Judge Baker, the court found that Mayhan's post-conviction claims were plainly or manifestly without merit. *See* appellee's exhibit A, attached.

Judge Baker summarily denied Mayhan's motion for post-conviction collateral relief, finding as a fact and concluding as a matter of law that Mayhan had failed to prove ineffective assistance of

counsel based upon the requirements of **Strickland v. Washington** [citation omitted] and further that Mayhan's allegations were belied by the plea dialogue. (C.P. at 25)

Judge Baker found as a fact that Mayhan was given several opportunities by the trial judge to go to trial if he did not desire to enter a guilty plea and that Judge Chamberlin did not err in accepting Mayhan's plea pursuant to **North Carolina v. Alford** [citation omitted].

Judge Baker also found an evidentiary hearing was not required because it appeared beyond doubt that Mayhan could prove no set of facts in support of a claim entitling him to relief. "The Court concludes that it appears beyond doubt that Mayhan can prove no set of facts in support of his claims which would entitle him to relief." (C.P. at 27)

We respectfully submit Judge Baker did not err one whit in finding Mayhan's claims to be manifestly or plainly without merit.

The trial court's fact-finding is neither "clearly erroneous" nor "manifestly wrong"; rather, it is supported by substantial credible evidence found in the record. **Hersick v. State,** 904 So.2d 116, 125 (Miss. 2004); **Brown v. State,** 731 So.2d 595, 598 (Miss. 1999); **Hunt v. State,** 874 So.2d 448, 452 (Ct.App.Miss. 2004).

STATEMENT OF FACTS

At the time of his guilty plea to a single count of fondling, Jimmy Dale Mayhan was a 55-year-old Caucasian male and former truck driver. He had a 6th grade education and could both read and write. (C.P. at 7-8)

On November 4, 2005, Mayhan, in a multi-count indictment, was charged with four (4) counts of fondling, each individual count involving a different child under sixteen (16) years of age. (C.P. at 58-59)

After investigating and reviewing the facts of the case (R. 14, 20-21), James D. Franks,

Mayhan's lawyer, informed Mayhan, who proclaimed his innocence, Mayhan's case was not winnable and apparently advised him to plea guilty in his best interest. (R. 20-21)

A bargain was struck with the district attorney whereby the State, in exchange for Mayhan's open plea of guilty to a single count of fondling, would dismiss the other three charges and recommend to the judge that Mayhan be sentenced to serve ten (10) years with the defendant being allowed to argue to the court for something less than that.

On April 26, 2006, Mayhan, proclaiming his innocence, entered a technically open and best interest plea (R. 19) under the auspices of **North Carolina v. Alford** [citation omitted] to count 4 of the indictment charging him with fondling Syndie Smith, the female child of Byrn Mayhan who was married to the son of the defendant's wife, Kim Mayhan. The child was the product of a previous marriage. (R. 12. 56)

As part of the prosecutor's recommendation, Counts 1, 2, and 3 were not prosecuted, and the prosecutor recommended imprisonment for ten (10) years. (R. 18-19) Sentencing was deferred until May 30, 2006. (R, 23, 30, 55-81)

Shortly thereafter, Mayhan hired new counsel who filed a motion to set aside the plea on various and sundry grounds. A hearing was conducted on May 30, 2006, in Judge Chamberlin's court at which time Mayhan testified he had wanted to go to trial to show his innocence but his lawyer told him he could not win the case. (R. 37)

Judge Chanberlin denied the motion to set aside, and after hearing testimony in extenuation and mitigation of sentence, sentenced Mayhan to serve ten (10) years in the custody of the MDOC followed by five (5) years of PRS. (R. 81-82; C.P. at 61-62)

A petition to enter plea of guilty was read and signed by Mayhan but is not a part and parcel of the official record on appeal. (R. 6-8)

A transcript of the plea-qualification hearing conducted on April 26, 2006, is a matter of record at R. 3-29.

A copy of the transcript generated pursuant to Mayhan's motion to withdraw his plea after substituting counsel, as well as a transcript of the sentencing proceeding that immediately followed, is found at R. 30-85.

In denying post-conviction relief, Judge Baker gave great weight to statements and acknowledgments made by Mayhan, under the trustworthiness of the official oath, including Mayhan's assertions he was satisfied with the representation of his lawyer, there had been no threats, coercion, or promises, and upon the advice of his lawyer he was asking the court to accept his guilty plea. (R. 19-20)

Less than a year after stating in open court he was satisfied with his lawyer and he was asking the court to accept his "best interest" plea of guilty, Mayhan, on December 21, 2006, filed his motion for post-conviction relief claiming his plea was involuntary and his lawyer, James D. Franks, ineffective.

There were no supporting affidavits attached to the motion as claimed in Mayhan's post-conviction papers at C.P. 9.

Mayhan argued in his motion his **Alford** plea was involuntary and his lawyer ineffective. According to Mayhan, Mr. Franks improperly induced him into pleading guilty by informing him there was a 90% chance he would lose if he went to trial and by putting forth little or no effort to defend Mayhan from the charges.

Mayhan also claimed Mr. Franks gave him erroneous advice concerning the duration of the sentence he was facing for the crimes charged and that the trial judge did not have a factual basis for his plea of guilty under **Alford**.

The specific relief requested by Mayhan was vacation of his conviction and sentence but, if not, at least a remand for an evidentiary hearing.

In his appeal to this Court, Mayhan reasserts these claims.

SUMMARY OF THE ARGUMENT

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 the defendant 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.

Mayhan was more than adequately advised by the trial judge of the rights he was waiving or giving up by pleading guilty as well as the minimum and maximum sentence. (R. 17-18)

Mayhan told Judge Chamberlin he was satisfied with the services rendered by Mr. Franks and there had been no promises, threats, force or coercion to get him to plead guilty. (R. 20) Mayhan told Judge Chamberlin that he " . . . just decided that [*Alford*] would be the best way to go." (R. 20)

Thus, there are material contradictions between what Mayhan swore to then and there, *viz.*, satisfaction with his lawyer and a voluntary *Alford* plea, and what he claims here and now, *viz.*, dissatisfaction with his lawyer and an improperly induced plea. *See* **Majors v. State,** 946 So.2d 369, 375 (¶17) (Ct.App.Miss. 2006), where the defendant's ineffective assistance of counsel claim was belied by the record in that Majors told the court he was completely satisfied with the services his attorney had rendered him.

When a defendant's claims on a motion to withdraw guilty plea are in contradiction with the guilty plea record, the trial judge, as Judge Baker obviously did here, is entitled to rely heavily on

the record of the proceedings. **Bilbo v. State,** 881 So.2d 966 (Ct.App.Miss. 2004); **Richardson v. State,** 769 So.2d 230 (Ct.App.Miss. 2000). *Cf.* **Taylor v. State,** 682 So.2d 359, 364 (Miss. 1996); **Sherrod v. State,** 784 So.2d 256 (Ct.App.Miss. 2001).

Mayhan's plea was both knowing and voluntary, and Judge Chamberlin correctly advised Mayhan of the minimum and maximum sentence for the crime charged, *viz.*, 15 years in prison and a $5,000 fine versus a mandatory minimum of 2 years with a $1,000 fine. (R. 17-18)

Assuming, as Mayhan claims, Mr. Franks told Mayhan he would be facing a life sentence if convicted of the charges, this information was not erroneous. Mayhan, at the time of his plea, was 55 years old. (R. 7-8) 15 years per count X 4 individual counts = 60 years. Needless to say, in Mayhan's case this is the equivalent of a life sentence.

Mayhan was not denied the effective assistance of counsel during his *Alford* plea because counsel's performance, contrary to Mayhan's motion, was neither deficient nor did any deficiency prejudice Mayhan. In ruling on this issue Judge Baker applied the correct legal standard. **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).

Mayhan has failed to demonstrate that but for counsel's alleged sins of omission or commission, he would not have entered his *Alford* plea of guilty or else the jury would have found him innocent had he gone to trial, i.e., the result would have been different.

Mayhan's plea was not unlawfully induced by counsel's advice as to the realities of the situation. Fear of a harsher sentence does not render a plea involuntary. **Robinson v. State,** 964 So.2d 609, 612 (Ct.App.Miss. 2007) "Counsel has a duty to fairly, even if that means pessimistically,

inform the client of the likely outcome of a trial based upon the facts of the case.;" **Robinson v. State,** *supra,* 964 So.2d 609, 612 (Ct.App.Miss. 2007). *See also* **Daugherty v. State,** 847 So.2d 609, 613 (Ct.App.Miss. 2007).

Mr. Franks told Judge Chamberlin during the plea-qualification hearing that he and Mayhan " . . . have met [and] [w]e have talked [and] [w]e have reviewed all of the evidence." (R. 14)

Mayhan was well aware his plea was an open *Alford* plea and that his sentence was basically up to the judge. (R. 19) Contrary to his claims suggesting otherwise, Mayhan has failed to establish by a "preponderance of the evidence" he was 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).

Finally, the record reflects a factual basis for the *Alford* plea which both the assistant district attorney and Judge Chanberlin addressed in some detail. (R. 11-14) Moreover, counsel for the defendant, while continuing to deny the incidents took place, acknowledged, if not asserted, " . . . that the State has enough evidence to present this to a jury." (R. 13) This admission has got to stand for something.

ARGUMENT

THE RECORD, CONSTRUED IN A LIGHT MOST FAVORABLE TO MAYHAN, REFLECTS MAYHAN ENTERED A VOLUNTARY PLEA OF GUILTY UNDER *ALFORD* TO ONE COUNT OF FONDLING.

MAYHAN'S CLAIM OF INEFFECTIVE COUNSEL IS MATERIALLY CONTRADICTED BY THE GUILTY PLEA RECORD. MAYHAN HAS FAILED TO SHOW THAT COUNSEL'S PERFORMANCE WAS DEFICIENT AND THAT THE DEFICIENT PERFORMANCE PREJUDICED HIS DEFENSE.

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRET5ION IN FINDING AS A FACT AND CONCLUDING AS A MATTER OF LAW THERE WAS AN ADEQUATE FACTUAL BASIS FOR MAYHAN'S PLEA OF GUILTY IN HIS BEST INTEREST.

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN SUMMARILY DISMISSING MAYHAN'S MOTION TO VACATE HIS PLEA , CONVICTION AND SENTENCE.

THE FACT-FINDING MADE BY THE CIRCUIT JUDGE FOLLOWING A METICULOUS REVIEW OF MAYHAN'S MOTION TO VACATE, TOGETHER WITH ALL SUPPORTING DOCUMENTS, WAS NEITHER CLEARLY ERRONEOUS NOR MANIFESTLY WRONG. SUMMARY DISMISSAL WAS BOTH EXPEDIENT AND PROPER.

At the outset we point out that appellant has attached to his brief affidavits and letters of recommendation that are not found in the official record. (Brief of Appellant at 59-65) In

particular we point to the affidavits of Kelly Mayhan, Leonard Janiszewski, and Nancy Janiszewski which were never seen by Judge Baker. In note 1 of his opinion and order denying post-conviction relief and again on page 3 (C.P. at 24-25), Judge Baker observed that the absence of the promised affidavits was conspicuous. (C.P. at 23-24; appellee's exhibit A, attached)

Regrettably, these papers, cannot be considered in addressing the issues presented.

We are told in **Saucier v. State,** 328 So.2d 355, 357 (Miss. 1976), that the Supreme Court can act " . . . only on the basis of the contents of the official record, as filed after approved by counsel for both parties. It may not act upon statements in briefs or arguments of counsel which are not reflected by the record."

The case of **Wortham v. State,** 219 So.2d 923, 926-27 (1969), is particularly applicable. In **Wortham** an affidavit contained in appellant's brief could not be considered on appeal. This court opined:

> * * * * * Appellant attempts to raise this question by including in the brief filed by his counsel a photostatic copy of an affidavit alleged to have been filed in the justice of the peace court. We have always adhered to the rule that we will not consider anything on appeal except what is in the record made in the trial court. **We will not go outside the record to find facts and will not consider a statement of facts attempted to be supplied by counsel in briefs.** The rule is so well settled that it is unnecessary to cite authority to support it, but in spite of this we still get many cases where counsel seek to have us notice facts not in the record. This amounts to an exercise in futility and is a waste of time and effort. It should not be done. [emphasis supplied]

As stated in **Mason v. State,** 440 So.2d 318, 319 (Miss. 1983), this Court " . . . must decide each case by the facts shown in the record, not assertions in the brief, *however sincere*

counsel may be in those assertions. Facts asserted to exist must and ought to be definitely proved and placed before [this Court] by a record, certified by law; otherwise, we cannot know them."

In **Genry v. State**, 735 So.2d 186, 200 (Miss. 1999), this Court opined:

> * * * * * * The burden is on the defendant to make a proper record of the proceedings. **Jackson v. State**, 689 So.2d 760, 764 (Miss. 1997); **Russell v. State**, 670 So.2d 816, 822 n. 1 (Miss. 1995); **Lambert v. State**, 574 So.2d 573, 577 (Miss. 1990). This court "cannot decide an issue based on assertions in the brief alone; rather, issues must be proven by the record." **Medina v. State**, 688 So.2d 727, 732 (Miss. 1996); **Robinson v. State**, 662 So.2d 1100, 1104 (Miss. 1995). Accordingly, the matter is not properly before this Court. This assignment of error is without merit.

"We repeat . . . that on direct appeal we are confined to the record before us [and] that record gives us no basis for reversal." **Watson v. State**, 483 So.2d 1326, 1330 (Miss. 1986).

"The burden is upon the defendant to make a proper record of the proceedings." **Genry v. State,** *supra*, 735 So.2d 186, 200 (Miss. 1999). *See also* **Schuck v. State,** 865 So.2d 1111 (Miss. 2003); **Byrom v. State,** 863 So.2d 836 (Miss. 2003); **Steen v. State,** 873 So.2d 155 (Ct.App.Miss. 2004), reh denied; **Brown v. State,** 875 So.2d 214 (Ct.App.Miss. 2003), reh denied.

1. Ineffective Assistance of Counsel.

Jimmy Mayhan argues his lawyer was ineffective because he gave Mayhan erroneous advice concerning the duration of his sentence in the wake of an open **Alford** plea.

Specifically, Mayhan says that Mr. Franks told him he could be sentenced to

imprisonment for life if he chose to go to trial and was convicted of the charges against him. (Brief of Appellant at 14-15) According to Mayhan this was a gross misrepresentation of his sentence.

First, if, as Mayhan claims, Mr. Franks told Mayhan he would be facing a life sentence upon conviction of all charges, this information was not erroneous. Mayhan, at the time of his plea, was 55 years old. (R. 7-8) 15 years/count X 4 individual counts = 60 years. Needless to say, given Mayhan's life expectancy, such is the equivalent of a life sentence. Therefore, Mayhan was neither "misinformed" nor "misled."

Second, Mayhan's claim of potential life imprisonment is inconsistent with a sworn statement contained in the reviewable affidavit of Connie Wages (C.P. at 50) which affirmed, *inter alia,* that "[t]he lawyer told Jimmy that he would get 15 years for each case." (C.P. at 50) That's the equivalent of 60 years which, given Mayhan's life expectancy, is the equivalent of life.

Third, Judge Chamberlin told Mayhan in plain and ordinary English the maximum sentence for the single count he was pleading guilty to was 15 years with a mandatory minimum of 2 years. (R. 17)

"Where the court correctly explains the potential penalty at a plea hearing, any harm resulting from prior erroneous advice is ameliorated and the error can no longer afford the petitioner post-conviction relief." **Daughtery v. State,** *supra*, 847 So.2d 284, 289 (Ct.App.Miss. 2003). .

Mayhan, despite proclaiming his innocence of the crime charged, elected to plead guilty in his best interest. He succinctly told Judge Chanberlin this is what he wanted to do. (R. 15-16) This type of plea was permitted in the case of **North Carolina v. Alford,** 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162, 167 (1970), which held that Alford's guilty plea to murder,

together with evidence from three witnesses, formed a sufficient factual basis for accepting Alford's plea even though it was accompanied by Alford's protestation of innocence. The Supreme Court found no constitutional error in accepting a guilty plea despite a protestation of innocence when, as in the case *sub judice*, the defendant knowingly and intelligently concludes that his best interest requires entry of the guilty plea, and the trial judge makes a determination on-the-record there is strong evidence of actual guilt.

Mississippi's appellate courts have recognized and addressed the so-called *Alford* plea in the following cases: **Lott v. State,** 597 So.2d 627, 628-29 (Miss. 1992); **Corley v. State,** 585 So.2d 765, 767 (Miss. 1991); **Reynolds v. State,** 521 So.2d 914, 916 (Miss. 1988); **Hull v. State,** 933 So.2d 315, 321 (Ct.App.Miss. 2006); **Bush v. State,** 922 So.2d 802, 805 (Ct.App.Miss. 2005); **Daughtery v. State,** 847 So.2d 284, 287 (Ct.App.Miss. 2003); **Ray v. State,** 876 So.2d 1032 (Ct.App.Miss. 2004); **Reed v. State,** 799 So.2d 92, 94 (Ct.App.Miss. 2001).

Mayhan claims he is entitled to an evidentiary hearing to resolve issues of disputed fact. (Brief of Appellant at 18) We fail to find any material facts that are in dispute.

Fear of a harsher sentence does not render a plea involuntary. **Robinson v. State,** *supra,* 964 So.2d 609, 612 (Ct.App.Miss. 2007) "Counsel has a duty to fairly, even if that means pessimistically, inform the client of the likely outcome of a trial based upon the facts of the case." **Robinson v. State,** *supra,* 964 So.2d 609, 612 (Ct.App.Miss. 2007). *See also* **Daugherty v. State,** *supra,* 847 So.2d 609, 613 (Ct.App.Miss. 2007).

Judge Baker applied the correct legal standard and found as a fact there was no indication Mayhan's counsel's representation fell below an objective standard of reasonableness nor was

there evidence that, but for counsel's errors, Mayhan would not have pled guilty. (C.P. at 25; appellee's exhibit A, attached) Stated differently, "Mayhan has not proven ineffective assistance of counsel based on the requirements of **Strickland v. Washington** [citation omitted]." (C.P. at 25)

Moreover, the benefits from an open **Alford** best interest plea was the remanding to the files of Counts 1, 2, and 3, as well as the imposition of a lesser sentence recommended by the prosecutor, *viz.*, ten (10) years. Mayhan received a sentence totaling only 10 years incarceration as opposed to 60 years which could have been imposed had he gone trial and lost on all four (4) counts.

Mayhan has failed to overcome the presumption his lawyer rendered reasonably effective assistance during his guilty plea.

The affidavits and letters of recommendation supplied by Mayhan to support his claim of ineffectiveness, as stated earlier, cannot be considered here because they are not a part of the appellate record. In any event, they are not of sufficient worth and substance to support a claim of mistaken or erroneous advice and ineffective assistance of counsel. Indeed, the reviewable affidavit of Connie Wagers found in the clerk's papers at 50 reflects that Mayhan's lawyer told Mayhan he would get 15 years for each case. (C.P. at 50)

This is the equivalent of 60 years which, in Mayhan's case, translates to a life sentence.

Mayhan was not denied the effective assistance of counsel during his guilty plea because counsel's performance, contrary to Mayhan's position, was neither deficient nor did any deficiency actually prejudice Mayhan. **Strickland v. Washington,** *supra*, 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).
>
> To get a hearing " . . . he must allege . . . with specificity and detail" that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Perkins v. State, supra,* 487 So.2d at 793; *Knox v. State,* 502 So.2d 672, 676 (Miss. 1987).

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. Mayhan has failed to demonstrate by affidavit or otherwise how counsel's alleged errors, e.g., his alleged mis-advice as to the duration of Mayhan's sentence, would have altered the outcome of Mayhan's decision to plead guilty in his best interest.

"Trial counsel is presumed to be competent." **Brooks v. State**, *supra*, 573 So.2d 1350, 1353 (Miss. 1990). Mayhan, 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.*** 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 Mayhan's open **Alford** plea of guilty was to eliminate the potential for a much harsher sentence in the event Mayhan was found guilty of all four (4) serious felony offenses. *See* **Majors v. State,** *supra,* 946 So.2d 369, 374 (¶15) (Ct.App.Miss. 2006)["Clearly, it was because of his counsel's successful negotiations that Majors was able to escape a possible life sentence."]

Mayhan 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. Franks rendered sound legal advice and performed in a constitutionally acceptable manner.

2. Involuntary Guilty Plea.

Mayhan argues his plea was involuntary because Mr. Franks unlawfully induced him to plead guilty by advising him he could receive a life sentence if he went to trial and was found guilty.

Mayhan also states he was improperly induced by defense counsel's statement " . . . that if he [Mayhan] would enter a plea, that the trial court would probably sentence him to probation and a fine." (Brief of Appellant at 15)

We have already addressed the issue of erroneous advice concerning a life sentence and respectfully decline to plow that ground again.

With respect to the probation and a fine, Judge Chamberlin informed Mayhan that as a sex offender he had no assurance of parole or early release. (R. 18) Moreover, Mayhan told Judge Chamberlin that no one had promised him any particular sentence. (R. 19-20)

These complaints are controlled, in part, by the following language found in **Daughtery v. State,** *supra,* 847 So.2d 284, 287 (Ct.App.Miss. 2003):

> Since Daughtery complains of his counsel's advice, we note that a defense attorney has a duty to fairly, even if that means pessimistically, inform the client of the likely outcome of a trial based upon the facts of the case. If, after assessing the case, counsel believes that his client's best interest would be served by accepting a plea, he is obliged to inform the client. *Polk County v. Dodson,* 454 U.S. 312, 318, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981).

> Despite this obligation, defense counsel may only urge a defendant in a particular course. Counsel may not accept a plea on the defendant's behalf. Even if Daughtery accepted the plea entirely because he was afraid of receiving the death penalty, that would not render it involuntary. *North Carolina v. Alford,* 400 U.S. 25, 91 Sct. 160, 27 L.Ed.2d 162 (1970). Counsel in this case made Daughtery aware of the likelihood of success at trial. The fact that the prospects appeared grim does not constitute coercion.

The record in this case fully supports our position and the position of the circuit judge that Mayhan entered his plea "with sufficient awareness of the relevant circumstances and likely consequences." **Young v. State,** No. 2006-CP-00114-COA (¶13) decided March 27, 2007 [Not Yet Reported], citing cases.

Counsel's prediction and advice to Mayhan there was a 90% chance of losing the case and a guilty plea in Mayhan's best interest would be the way to go (R. 20), did not constitute coercion or an improper inducement. After the effects of the **Alford** plea were fully explained to Mayhan (R. 9-10, 15, 20-22), Mayhan told Judge Chamberlin this is what he wanted to do. (R. 11, 15) Pleading guilty in his best interest was what Mayhan wanted to do, and it was Mayhan's decision and his alone. (R. 21-22) Mayhan asserted he was asking the Court to accept his **Alford** plea. (R. 22)

Judge Baker relied heavily on Mayhan's acknowledgment he was satisfied with the representation provided by his lawyer. Although a petition to enter plea of guilty is not included in this record, it is clear that such a petition, together with all of its acknowledgments made under oath, was signed by Mr. Mayhan. (R. 7-9)

Judge Baker found as a fact Mayhan's petition to enter plea of guilty, and his plea testimony as well, materially contradicted Mayhan's claim he was coerced and/or unlawfully induced by his attorney to plead guilty and was told he would not receive more than "probation

and a fine." (C.P. at 47) Judge Baker obviously placed great weight upon the petition to enter plea of guilty signed by Mayhan as well as the testimony given in open court under the trustworthiness of the official oath. (R. 6-29)

In **Richardson v. State,** 769 So.2d at 230 (Ct.App.Miss. 2000), the Court of Appeals, citing **Roland v. State,** 666 So.2d 747, 751 (Miss. 1995),

> " . . . concluded that an evidentiary hearing is not necessary if the record of the plea hearing reflects that the defendant was advised of the rights which he now claims he was not aware. *Id.* When the record of the plea hearing belies the defendant's claims, an evidentiary hearing is not required. If the defendant's claims are totally contradicted by the record, the trial judge may rely heavily on the statements made under oath. *Simpson v. State*, 678 So.2d 712, 716 (Miss. 1996). In *Mowdy v. State*, 638 So.2d 738, 743 (Miss. 1994), the court stated: "Where the petitioner's version is belied by previous sworn testimony, for example, as to render his affidavit a sham we will allow summary judgment to stand.*** "

See also **Taylor v. State,** 682 So.2d 359, 364 (Miss. 1996) ["There is a great deal of emphasis placed on testimony by a defendant in front of the judge when entering a plea of guilty."]; **Hull v. State,** 933 So.2d 315, 321 (Ct.App.Miss. 2006) ["A trial judge may disregard the assertions made by a post-conviction movant where, as here, they are substantially contradicted by the court record of proceedings that led up to the entry of a judgment of guilty."]; **Dawkins v. State,** 919 So.2d 92 (Ct.App.Miss. 2005).

"Solemn declarations in open court carry a strong presumption of verity." **Richardson v. State,** *supra*, 769 So.2d at 234. *See also* **Brown v. State,** 926 So.2d 229 (Ct.App.Miss. 2005). reh denied, cert denied.

Same here.

Not every motion for post-conviction relief filed in the trial court must be afforded a full

adversarial hearing. **Hebert v. State,** 864 So.2d 1041 (Ct.App.Miss. 2004). *See also* **Rowland v. Britt,** 867 So.2d 260, 262 (Ct.App.Miss. 2003)["(T)he trial court is not required to grant an evidentiary hearing on every petition it entertains."] A defendant is not entitled to a post-conviction evidentiary hearing where, as here, it plainly appears to the judge the defendant is not entitled any relief. **Epps v. State,** 926 So.2d 242 (Ct.App.Miss. 2005).

In the case *sub judice*, the trial judge properly dismissed Mayhan's claims for post-conviction collateral relief without the benefit of an evidentiary hearing because these claims did not involve sufficient questions of disputed and material fact requiring a hearing and were manifestly without merit.

Judge Baker's findings of fact and conclusions of law that Mayhan's pleas were knowing, intelligent, and voluntary were neither clearly erroneous nor manifestly wrong; rather, they were supported by both substantial and credible testimony and evidence. **Skinner v. State,** 864 So.2d 298 (Ct.App.Miss. 2003).

3. Sufficient Factual Basis.

Mayhan claims the trial court " . . . did not have a factual basis to enter a plea of guilty in Mayhan's case" and " . . . failed to ascertain the required factual basis." (Brief of Appellant at 16) The gist of this complaint appears to be that since Mayhan himself did not admit to committing the crime charged and did not himself give the trial court a factual basis to accept his plea, there was an insufficient factual basis.

According to Mayhan . . . the trial court had the prosecution to read the charge from the indictment, but did not have the prosecution to present any direct evidence that could form a factual basis to adjudicate guilt." (Brief of Appellant at 17)

Mayhan and his writ writer must be reading from a different plea-qualification transcript.

The truth of the matter is found in the following colloquy:

> BY THE COURT: Ms. Brewer, if you would regarding Count IV of the indictment, give a brief statement as to what the State would be able to show at a trial of this case if this case were in fact to go to trial.
>
> BY MS. BREWER: The State is prepared to show by credible and admissible evidence and beyond a reasonable doubt that between the dates of June 1, 2004, and July 30th of 2005, this Defendant fondled Sidney [sic] Smith, a child under the age of 16 years, at a time when he was at least 18 years of age or older and that this incident occurred in Hernando and therefore within this Court's jurisdiction. The testimony in this case would obviously come from Sidney Smith, who was approximately 7 years old at the time of the incident and is now 8 years old. She is the daughter of Brenn (sic) Mayhan. Brenn [sic] Mayhan is married to the Defendant's wife's son. It would be the Defendant's son-in-law's wife's child.
>
> BY MR. FRANKS: So the Court will know, he adopted Brenn's husband.
>
> BY MS. BREWER: Right. But the child was actually Brenn Mayhan's by a previous relationship. Not blood kin to this Defendant.
>
> In any event, the child was kept by Kim Mayhan, the Defendant's wife, over a period of time. The child states that numerous incidences of fondling occurred, some at his house, some in his truck. He is an over-the-road truck driver. She describes one incident that occurred in the back part of his truck where there is a bed, and basically she states that he rubbed on her. On one occasion, he had her rub his private part. She recalls one specific incident which occurred in December of '04 in his truck. She maintains that she told her Mamaw, that is Kim, about the incident. Kim denies that she was told about the

incident, but Jessica Gatlin would testify that Kim called her back in December of '04 and reported it to Jessica as well. So there is corroboration there for what the child says occurred.

The child was interviewed by the Child Advocacy Center in Memphis. We have a forensic interviewer, an expert witness, that would also testify to the statements made by the child.

These incidents occurred in DeSoto County and therefore within the Court's jurisdiction.

BY MR. FRANKS: Just to let the Court know, we continue to deny that those incidents occur[ed.]

BY THE COURT: I understand. Mr. Franks, are you satisfied the District Attorney's office could present credible evidence necessary to meet the applicable burden to get this matter to a jury if this case were in fact to go to trial?

BY MR. FRANKS: I believe that the State has enough evidence to present this to a jury.

BY THE COURT: Are you satisfied they can prove jurisdiction and venue?

BY MR. FRANKS: Yes, sir.

BY THE COURT: Satisfied they could present proof that would prove the age of the alleged victim and the difference of age between the alleged victim and the Defendant?

BY MR. FRANKS: Yes, sir.

BY THE COURT: Have you had ample time to investigate and prepare and discuss this matter with your client?

BY MR. FRANKS: Yes, sir. I've been working on this for, I want to say, eight months,

possibly longer than that, and we have met. We have talked. We have reviewed all of the evidence. (R. 11-14)

The defendant thereafter acknowledged to the judge he was denying these allegations. He did recall the time frame involved.

Additional colloquy is quoted as follows:

Q. [BY THE COURT:] Now, Mr. Mayhan, I'll reiterate for the record again. You're not admitting these allegations; but do you understand that by pleading guilty pursuant to *North Carolina vs. Alford,* that means that I'm going to accept what the District Attorney says she can prove as true as being true? Do you understand that?

A. Yes, sir.

Q. Is that what you want to do?

A. Yes, sir. (R. 15)

Obviously, there was a sufficient factual basis for Mayhan's plea of guilty.

This issue is controlled by the following language found in **Hull v. State,** *supra,* 933 So.2d 315, 321 (Ct.App.Miss. 2006), where we find the following:

In this case, Hull entered a plea in which he did not admit to committing the crime. He contends that the guilty plea should not have been accepted without there being a sufficient factual basis of guilt.

At the plea hearing, the district attorney stated specific facts concerning the homicide - that Hull shot and killed Farnecia Armstrong during a domestic confrontation. As stated in *Ray v. State,* 876 So.2d 1032, 1035 (¶12) (Miss.Ct.App. 2004):

[A] guilty plea may be considered valid even though a 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). In some cases, it is not necessary for a defendant to admit guilt in order for a guilty plea to be accepted by the trial court. *Corley v. State,* 585 So.2d 765, 767 (Miss. 1991). A defendant's guilty plea is sufficient if it is a voluntary and knowledgeable plea with an "independent evidentiary suggestion of guilt." *Reynolds v. State,* 521 So.2d 914, 917 (Miss. 1988). Therefore, a court may accept a plea if the court is satisfied that there is evidence such that the State, if so required, could prove the defendant's guilt of the crime charged. *Corley v. State,* 585 So.2d at 767 . . . .
>
> *See also North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); *Bush v. State,* 922 So.2d 802 (Miss.Ct.App. 2005).
>
> Although Hull did not admit to killing Farnecia Armstrong, he did plead guilty to manslaughter and stated that it was in his best interest to enter the plea. The court had before it sufficient evidence of the crime to accept the plea. There is no merit to the allegation raised.

A defendant's guilty plea is sufficient if it is a voluntary and knowledgeable plea with an independent evidentiary suggestion of guilt. **Hull v. State,** *supra,* 933 So.2d at 321 citing **Reynolds v. State,** 521 So.2d 914, 917 (Miss. 1988). The plea at bar passes this test with flying colors.

4. Summary Dismissal.

Finally, Mayhan argues the trial judge abused his judicial discretion when he did not find that erroneous sentencing information warranted an evidentiary hearing as opposed to summary dismissal of his claims. Mayhan opines the trial judge utilized the wrong evidentiary standard when he observed, *inter alia,* that "[n]o affidavits have been provided by Mayhan or the State which would necessitate a full-blown evidentiary hearing." (C.P. at 26; appellee's exhibit A, attached)

An evidentiary hearing was not required to resolve erroneous sentencing information because such did not involve a question of disputed fact. Stated differently, there was no erroneous sentencing information. Mayhan was neither misinformed nor misled.

CONCLUSION

The claims made by Mayhan that his lawyer was ineffective and his guilty plea involuntary were properly dismissed summarily because they were manifestly without merit. A defendant is not entitled to a post-conviction evidentiary hearing where, as here, it plainly appears to the judge the defendant is not entitled to any relief. **Epps v. State,** *supra*, 926 So.2d 242 (Ct.App.Miss. 2005).

Summary dismissal is appropriate where "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." **Culbert v. State,** 800 So.2d 546, 550 (Ct.App.Miss. 2001), quoting from **Turner v. State,** 590 So.2d 871, 874 (Miss. 1991).

Although Mayhan, by his own hand or the hand of his writ-writer, has put forth his best effort, the case at bar exists in the above posture.

Miss.Code Ann. § 99-39-11 (Supp. 1998) reads, in its pertinent parts, as follows:

> * * * * * *
>
> (2) *If it plainly appears* from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, *the judge may make an order* for its dismissal and *cause the prisoner to be notified.*
>
> * * * * * *

It did, he did, and he was. **Falconer v. State,** 832 So.2d 622, 623 (Ct.App.Miss. 2002) ["(W)e affirm the dismissal of Falconer's motion for post-conviction relief as manifestly without

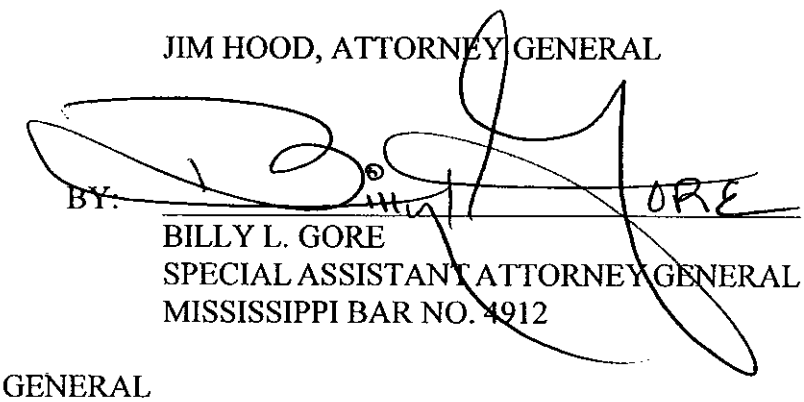
merit."]; **Culbert v. State,** *supra*, 800 So.2d 546, 550 (Ct.App.Miss. 2001) ["(D)ismissal is appropriate where 'it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief.' "]

No further fact-finding was required in this case, and relief was properly denied without the benefit of an evidentiary hearing.

Appellee respectfully submits this case is devoid of any claims worthy of an evidentiary hearing or vacation of the guilty plea voluntarily entered by Jimmy Dale Mayhan. Accordingly, the judgment entered in the lower court summarily denying Mayhan's motion to vacate judgment and sentence should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 4912

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

200

IN THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI

JIMMY DALE MAYHAN — PETITIONER

VS. — CAUSE NO. CV2006-0303BD

STATE OF MISSISSIPPI — RESPONDENT

OPINION

This cause is before the Court on the Motion for Relief under the Mississippi Uniform Post-Conviction Collateral Relief Act/Motion to Vacate Judgment and Sentence filed by the Petitioner, Jimmy Dale Mayhan ("Mayhan"), by and through counsel, Joe Morgan Wilson. The Court has examined the motion and the contents of the court files in this cause and criminal cause number CR2005-1061CD, and, for the reasons hereinafter stated, the relief requested in Mayhan's PCR motion is denied.

1.

Mayhan was indicted in CR2005-1061CD for four (4) counts of fondling in November of 2005. Mayhan entered a plea of guilty pursuant to *North Carolina v. Alford* to one count of the indictment on April 26, 2006. After Mayhan obtained new counsel, on May 30, 2006, a hearing was conducted on Mayhan's Motion to Set the Plea of Guilty Aside. After the Court denied the motion, and after conducting a sentencing hearing, the Court sentenced Mayhan on May 30, 2006, to ten (10) years in the Mississippi Department of Corrections, followed by five (5) years of post-release supervision. The remaining counts were remanded. On December 21, 2006, Mayhan filed this motion.[1]

FILED 31st DAY OF Aug 2007
DALE K. THOMPSON, CIRCUIT CLERK
DESOTO COUNTY, MISSISSIPPI
MINUTE BOOK 231 PAGE 23 - 204

[1]On the same date, Mayhan filed a "Motion for Circuit Judge to Recuse Himself" in the criminal file. In March of 2007, Mayhan's counsel was contacted regarding affidavits

DALE K. THOMPSON, CIRCUIT CLERK
DESOTO COUNTY, MISSISSIPPI

EXHIBIT
A

Mayhan asserted in his motion that his plea was involuntary and he received ineffective assistance of counsel. He also claimed the court abused its discretion in accepting the plea of guilty. Regarding his plea being involuntary, Mayhan asserted that his attorney misrepresented the length of the sentence had he gone to trial and found guilty. He asserted his attorney led him to believe he would have been sentenced to life in prison and if he entered the plea he would probably be given probation and a fine. He claimed his attorney told him not to speak of any leniency and to state that no promises had been made.

The Court of Appeals in ***Daughtery v. State***, 847 So. 2d 284 (Miss. App. 2003), said a defense attorney has a duty to fairly, even if that means pessimistically, inform the client of the likely outcome of a trial based upon the facts of the case. If, after assessing the case, counsel believes that his client's best interest would be served by accepting a plea, he is obliged to inform the client citing ***Polk County v. Dodson***, 454 U.S. 312, 318, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981). The Court finds that is exactly what Mayhan's attorney did in this case.

In ***Bush v. State***, 922 So. 2d 802 (Miss. App. 2005), the Court of Appeals said that before it may accept the plea, the trial court must have before it substantial evidence that the accused did commit the legally defined offense to which he is offering the plea. ***Alford*** requires that the plea to have been made after the defendant has "knowingly and intelligently concluded that his best interests

---

which were supposedly attached to the motion but were not. Mayhan's counsel requested time to submit the affidavits. On June 19, 2007, Judge Chamberlin recused himself and the case was reassigned to the undersigned. On June 27, 2007, Mayhan filed a Petition for Writ of Mandamus with the Supreme Court. After being informed there were no transcripts in the criminal file, the Court reporter filed the transcript of the plea on August 14, 2007. The sentencing transcript was filed on August 16, 2007.

202

require entry of the guilty plea."

The Court finds after a review of this file and the file in the criminal cause which is the basis of this petition, CR2005-1061CD, Mayhan has not proven ineffective assistance of counsel based on the requirements of ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); and ***Moody v. State***, 644 So.2d 451, 456 (Miss.1994). The Court also does not find that Mayhan's plea was involuntary. Although Mayhan asserts that three affidavits are attached to his petition, none have been submitted at this time even after the Court contacted his attorney. The allegations of Mayhan are belied by the plea dialogue, wherein the court explained the ***Alford*** plea, and Mayhan admitted that his lawyer had explained everything to him and he understood what he was doing. The Court explained the maximum and minimum sentence. Mayhan denied being coerced into entering his plea. Mayhan was given several opportunities by the Court to go to trial if he did not want to enter his plea. The Court finds that Judge Chamberlin did not abuse his discretion by accepting Mayhan's plea pursuant to ***North Carolina v. Alford***.

3.

In considering this PCR motion and ruling adversely to Mayhan without the benefit of an evidentiary hearing, the Court is ever mindful of its solemn responsibility as clearly pronounced in ***Reeder v. State***, 783 So.2d 711 (Miss. 2001), in which the Supreme Court of Mississippi stated:

> ¶7. §Miss.Code Ann. 99-39-11 (2000) sets out the proper procedure for summary dismissal of a petition seeking post-conviction relief. The trial judge must promptly examine "the original motion, together with all the files, records, transcripts and correspondence relating to the judgment under attack." Id. If, after conducting such an examination, "it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not

> entitled to any relief ... the judge may make an order for its dismissal and cause the prisoner to be notified." Id. Should the trial judge choose not to dismiss the petition, he "shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate." Id.
>
> ¶8. If the trial judge goes beyond the materials enumerated in § 99-39-11 and receives affidavits or other evidence from the State, he may enter summary judgment against the petitioner under §Miss.Code Ann. 99-39-19 (2000). It provides "[i]f the motion is not dismissed at a previous stage of the proceeding, the judge, after the answer is filed and discovery, if any, is completed, shall, upon a review of the record, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice shall require." Id. Finally, "[t]he court may grant a motion by either party for summary judgment when it appears from the record that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Id.

Reeder v. State, 783 So.2d at 714.

A "[p]ost-conviction relief petition which meets basic pleading requirement is sufficient to mandate an evidentiary hearing unless it appears beyond doubt that petitioner can prove no set of facts in support of claim which would entitle him to relief." ***Robertson v. State***, 669 So.2d 11, 13 (Miss.1996). No affidavits have been provided by Mayhan or the State which would necessitate a full-blown evidentiary hearing. See ***Taylor v. State***, 782 So.2d 166 (Miss. App. 2000).

4.

In sum, this Court, consistent with case law, has considered Mayhan's PCR motion pursuant to MRCP 56. Mayhan has been given the benefit of every reasonable doubt concerning the existence of any material fact issue. In considering the entire court files in this cause and cause number CR2005-1061CD, which include, *inter alia*, Mayhan's PCR pleadings, annexed exhibits, all records, correspondence, and transcripts of hearings, and also considering all prior proceedings had and conducted in the criminal cause, the Court concludes that it appears beyond

204

doubt that Mayhan can prove no set of facts in support of his claims which would entitle him to relief. Accordingly, the relief requested in Mayhan's PCR motion will be denied and the motion dismissed with prejudice.

5.

This Opinion shall this day be submitted to the Clerk of this Court for entry and at the same time, the Court shall, consistent with this Opinion, submit for entry a Final Order of Dismissal.

DATED this the 29th day of August, 2007.

ANDREW C. BAKER
CIRCUIT COURT JUDGE

CERTIFICATE OF SERVICE

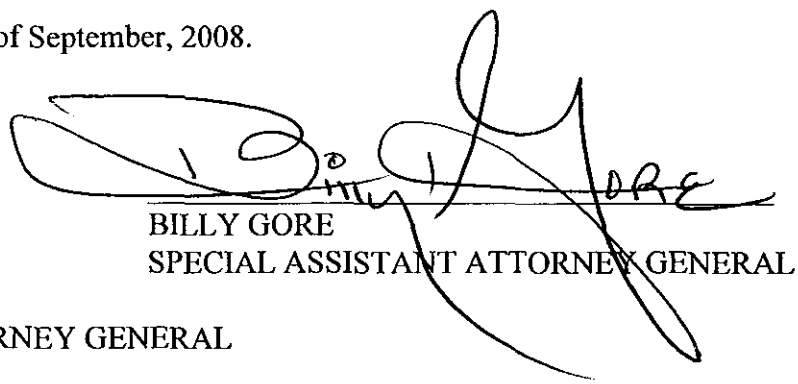
I, Billy Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Andrew C. Baker
Circuit Court Judge, District 17
Post Office Drawer 368
Charleston, MS 38921

Honorable John W. Champion
District Attorney, District 17
365 Losher Street, Ste. 210
Hernando, MS 38632

Jimmy Dale Mayhan, #121165
SMCI
Post Office Box 1419
Leakesville, MS 39451

This the 12th day of September, 2008.



BILLY GORE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680