

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CR-01078-COA

Timmy Dale Mayhan

vs.

State of Mississippi

FILED

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SUPREME COURT
COURT OF APPEALS

Appellant

Appellee

BRIEF OF APPELLANT

Respectfully Submitted,
Timmy Dale Mayhan
Timmy Dale Mayhan, #121165
Delta Correctional Facility
3800 County Rd. 540
Greenwood, MS. 38930

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2007-CP-01078-CA

Jimmy Dale Mayhan

Appellant

vs.

State of Mississippi

Appellee

CERTIFICATE OF INTERESTED PERSONS

The undersigned pro se Appellant certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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Jimmy Dale Mayhan, pro se

TABLE OF CONTENTS

Certificate of Interested Persons	i
Table of Contents	ii
Table of Authorities	iii
Statement of Issues	1
Statement of Case	2
Summary of The Argument	3
Argument	12
Conclusion	20
Certificate of Service	21

TABLE OF AUTHORITIES

CASE	PAGE
Alexander v. State, 605 So.2d 1170 (Miss. 1992).	14
Baker v. State, 358 So.2d 401 (Miss. 1978).	14
Bell v. State, 759 So.2d 1111 (Miss. 1999).	18
Boykin v. Alabama, 395 U.S. 238 (1969).	14
Brenson v. State, 786 So.2d 1083 (Miss. Ct. App. 2001).	15
Coleman v. State, 483 So.2d 680 (Miss. 1986).	14
Coleman v. Thompson, 501 U.S. 722 (1991).	19
Dillon v. State, 641 So.2d 1223 (Miss. 1994).	19
Ford v. State, 708 So.2d 73 (Miss. 1998).	19
Hill v. Lockhart, 474 U.S. 52 (1985).	12
Hubbard v. State, 628 So.2d 1386 (Miss. 1993).	13
McMann v. Richardson, 397 U.S. 759 (1970).	12
Meyers v. State, 583 So.2d 174 (Miss. 1991).	14, 19
Neal v. State, 525 So.2d 1279 (Miss. 1987).	12
Nelson v. Hargett, 989 F.2d 847 (5th Cir. 1993).	13
North Carolina v. Alford, 400 U.S. 25 (1970).	12, 16
Readus v. State, 837 So.2d 209 (2003).	18
Rowland v. Britt, 867 So.2d 260 (Miss. Ct. App. 2003).	18
Schmitt v. State, 560 So.2d 148 (Miss. 1990).	12
Strickland v. Washington, 466 U.S. 668 (1984).	12
Tollett v. Henderson, 411 U.S. 258 (1973).	15
United States v. Gordon, 156 F.3d 376 (2nd Cir. 1998).	15
United States v. Pilsek, 657 F.2d 920 (7th Cir. 1981).	17
United States v. Weyerlein, 583 F.2d 346 (7th Cir. 1978).	17
United States v. Wild, 92 F.3d 304 (5th Cir. 1996).	16

TABLE OF AUTHORITIES

CASE PAGE

U.A. U. Superintendent, 643 F.2d 167 (4th Cir. 1981)	13
V. White U. State, 556 So.2d 1062 (Miss. 1990)	14
Washington U. State, 620 So.2d 966 (Miss. 1993)	14
Williams U. State, 794 So.2d 181 (Miss. 2000)	19
Wilson U. State, 577 So.2d 394 (Miss. 1991)	13

United States Constitution

Sixth Amendment	13
---------------------------	----

Mississippi Constitution

Article 3, Section 26	13
---------------------------------	----

STATEMENT OF ISSUES

1. INEFFECTIVE ASSISTANCE OF COUNSEL DURING PRE-TRIAL
2. MAYHAN'S PLEA WAS NOT GIVEN VOLUNTARY AND INTELLIGENTLY
3. TRIAL COURT DID ABUSE ITS DISCRETION IN ENTERING A PLEA OF GUILTY IN MAYHAN'S CASE
4. CIRCUIT COURT OF DESOTO COUNTY ABUSED ITS DISCRETION IN THE SUMMARY DISMISSAL OF MAYHAN'S POST-CONVICTION MOTION

STATEMENT OF CASE

During the November Term 2005, the Grand Jury of Desoto County, Mississippi, returned a multi-Count indictment charging Jimmy Dale Mayhan with Four (4) Counts of Fondling of a Child pursuant to Mississippi Code Ann. Section 97-5-23 (1972), being CAUSE NO. CR-2005-1061-C-(D).

Appellant, Jimmy Dale Mayhan appeared before the Honorable Robert P. Chamberlain, Circuit Court Judge of the SEVENTEENTH Judicial District, being represented by the Honorable James D. Franks, Attorney-At-Law AND entered a plea to Count Four of the Multi-Count indictment under the AUSPICES OF NORTH CAROLINA V. ALFORD, 400 U.S. 25, 37-38 (1970).

The trial judge accepted the Alford Plea AND adjudicated Jimmy Dale Mayhan guilty of Count Four of the indictment, AND pursuant to the plea agreement between the prosecution AND defense, did NOLE PROSEQUI Counts ONE, TWO AND THREE of the indictment.

ON May 30th 2006, Jimmy Dale Mayhan appeared in the Circuit Court of Desoto County, Mississippi for sentencing. At that time the court did sentence Jimmy Dale Mayhan to a Term of Fifteen years, TEN years incarceration with FIVE years post-release supervision.

ON December 21st 2006, Appellant Jimmy Dale Mayhan file his Motion for Post-Conviction Relief into the Circuit Court of Desoto County, Mississippi. ON the 29th day of August, 2007, that court did deny the Post-Conviction Motion. This Appeal stems for that court's denial of that motion.

SUMMARY OF THE ARGUMENT

1. INEFFECTIVE ASSISTANCE OF COUNSEL DURING PRE-TRIAL

Attorney James D. Franks, (hereinafter known as trial counsel), was privately retained by Appellant Jimmy Dale Mayhan, (hereinafter known as Mayhan), to represent him at trial on the charges in Cause No. CR-2005-1061-C(0), But prior to trial, trial counsel did become lackadaisical in his desire to defend Mayhan in the up-coming trial and did become hostile toward Mayhan.

On the day before the trial was to begin, Mayhan had met with trial counsel to discuss the case. During this discussion, it did become apparent that trial counsel had made no preparation for the up-coming trial. Trial counsel was adamant that Mayhan should forego a trial by jury and enter a plea. Mayhan did state to trial counsel that he didn't want to enter a plea, but rather that he wanted to have an opportunity to prove his innocence. Trial counsel would not hear of it, and did state that Mayhan's case could not be won.

At this time, Mayhan did ask trial counsel if he would help him if he did decide to go to trial? Trial counsel would not answer this question, and did only glare at Mayhan. When Mayhan insisted on going to trial, trial counsel did stat that Mayhan would lose and the be sentenced to prison for the rest of his life. It was at this time that Mayhan did cease the discussions with trial counsel.

The next day, the day that Mayhan's case was scheduled for trial, he again tried to get some assurance from his attorney that he would help him if he went to trial? But again, trial counsel would not give Mayhan an answer and did remain silent. Mayhan feeling there was no other alternative, did agree to enter a plea.

It is clear that trial counsel was not acting as counsel as guaranteed by Article 3, Section 26 of the Mississippi Constitution, and the Sixth Amendment of the United States Constitution. Trial counsel, being retained by Mayhan to defend him against the charges brought against him, should have put forth an effort that would have put the prosecution to its burden of proof concerning these charges. But it would appear, that because of the nature of the charges, Mayhan's trial counsel had himself did adjudicate his client guilty, and did refuse to represent his client at trial.

It is clear from the plea colloquy, that Mayhan felt that he had no choice but to enter a plea. When the trial court explained to Mayhan the definition of North Carolina v. Alford, 400 U.S. 25 (1970), and did ask Mayhan if this was what he would like to do, Mayhan responded: "No Alternative." (Tr. 6).

When the trial court tried to explain to Mayhan that he did have an alternative, Mayhan's trial counsel did butt in, and the following exchange did take place:

By Mr. FRANKS: "Do you feel like you don't have a good alternative to pleading pursuant to North Carolina vs. Alford?"

By the Defendant: "I didn't--"

By the Court: "You've got to speak up."

By Mr. FRANKS: "Did you say yes?"

By the Defendant: "Yeah. You told me--yes."

By Mr. FRANKS: "Is the reason that you're pleading to this under Alford because you feel like this is in your best interest given the options that you've got?"

By the Defendant: "What you stated to me is what I-- the decision I come up with, yeah."

By Mr. FRANKS: "And you feel like it is your best interest?"

By the Defendant: "From what you've told me."

By Mr. FRANKS: "From what I've told you, from the information I've given you about what the evidence is, you feel like this is in your best interest?"

By the Defendant: "Yes, Sir."

By Mr. FRANKS: "This is what you want to do?"

By the Defendant: "Right."

(Tr. 7, 8) (emphasis supplied)

It is clear from this exchange that trial counsel had necessarily brow-beaten Mayhan into accepting this plea and, in doing so, did deny Mayhan

to his constitutional right to a trial by jury. As it is clear from the plea colloquy that Mayhan really didn't want to enter into this plea, but rather wanted to go to trial. (See, Tr. 17). It is also evident in the plea colloquy of the fatality that Mayhan was experiencing by his trial counsel's deficient performance.

Trial counsel had used subtle threats and coercion by stating to Mayhan that he would be sentenced to life in prison if he chose to go to trial. Also, this was compounded with trial counsel's obstruction in refusing to tell Mayhan whether or not trial counsel would put the prosecution to its test to prove guilt, which did enervate Mayhan's constitution to stand trial, and he agreed to enter into the plea. (See Attached Affidavits and Motion to Set Aside Plea and Sentencing Tr. 6-13).

Was it not for trial counsel's deficient performance, Mayhan would have refused to have entered a plea and would have insisted on going to trial. Mayhan was prejudiced by his trial counsel's deficient performance, as he was denied his right to counsel. This was a violation of his Sixth Amendment right to the United States Constitution right to the effective assistance of counsel, and his right to a fair trial, which was also a violation of his comparable rights pursuant to Article 3, Section 26 of the Mississippi Constitution.

Mayhan's plea is unconstitutional because of the denial of effective assistance of counsel, and should be vacated as a matter of law. That he should be given an opportunity to prove his innocence in a jury trial.

2. MAYHAN'S PLEA WAS NOT GIVEN VOLUNTARILY AND INTELLIGENTLY

MAYHAN'S trial counsel did misrepresent the length of the sentence that he would receive if he choose to go to trial AND found guilty. His trial counsel lead him to believe that he would be sentenced to life in prison if found guilty in a jury trial. This misrepresentation did CAUSE him to enter AN involuntary plea.

Trial counsel also lead MAYHAN to believe that, if he would enter a plea pursuant to NORTH CAROLINA V. ALFORD, 400 U.S. 25 (1970), that he would probably be given probation AND A FINE. This conclusion along with trial counsel's prediction of a life sentence if he went to trial, CAUSED MAYHAN AGAINST his better judgment, to enter his plea instead of going to trial.

Pursuant to Rule 8.04(A)(3) of the Uniform Rules of Circuit and County Court Practice, states that "[A] plea of guilty is not voluntary if induced by fear, violence, deception, or improper inducements." (Emphasis supplied). IN the case sub judice, it CANNOT be said that MAYHAN'S plea was voluntarily given, AS, it was the product of fear, deception, AND improper inducements by his trial counsel. So that, MAYHAN WAS NOT FULLY AWARE OF the implications of his plea, NOR OF the true consequences of a trial by a jury.

Also trial counsel did coach MAYHAN to NOT SPEAK OF ANY promises of leniency to the trial court. But rather trial counsel to MAYHAN to state to the court that NO promises had been made, that is, other than what had already BEEN agreed upon.

MAYHAN did NOT feel this advice by trial counsel was not in his best interest, did concede to trial counsel's counseling on this, as he had had no other dealings with the criminal justice system and had to rely on his trial counsel's advice.

BECAUSE OF THESE MISREPRESENTATIONS OF trial counsel in the tendering of MAYHAN's plea, it cannot be said that he did enter his plea voluntarily and intelligently. Trial counsel's deficient performance and the resulting prejudice has caused MAYHAN to be denied his Due Process rights in the plea process.

3. TRIAL COURT DID ABUSE ITS DISCRETION BY ENTERING A PLEA OF GUILTY IN MAYHAN'S CASE

The trial court should not have accepted MAYHAN's plea pursuant to NORTH CAROLINA v. ALFORD, 400 U.S. 25 (1970). The trial court did abuse its discretion in entering a plea of guilty, as it was apparent that MAYHAN did not want to enter this plea.

Also pursuant to Alford, supra, the trial court failed to make the prerequisite factual basis for the plea. The record does not reflect that the trial court have MAYHAN to give even a similitude of a factual basis for the plea.

MAYHAN did state that he did want to go to trial and prove his innocence. (Tr. 6). Also, during the plea hearing itself, MAYHAN was reluctant to enter the plea. (Tr. 11). So that, the trial court in its discretion should have refused

to accept the plea, AND took the case to trial. But the trial court did ignore the obvious, AND did enter a plea of guilty without a factual basis to do so.

It WAS AN ABUSE OF discretion ON the part of the trial court when that court did enter a plea of guilty under the AUSPICES OF North Carolina v. Alford, 400 U.S. 25(1970). Mayhan asserts that because of this abuse of discretion ON the part of the trial court, that, his plea should be vacated AND that he be allowed to return back to the position he was in before he did enter his plea.

4. CIRCUIT COURT OF DESOTO COUNTY ABUSED ITS DISCRETION IN THE SUMMARY DISMISSAL OF MAYHAN'S POST-CONVICTION MOTION

Mayhan asserts that the Post-conviction Court abused its discretion in the summary dismissal of his post-conviction motion without AN EVIDENTIARY hearing pursuant to Mississippi Code Ann. Section 99-39-19 (REV. 2000). This WAS so, EVEN if Mayhan's post-conviction attorney failed to include the proposed affidavits of the people who were willing to testify to Mayhan's trial counsel's ineffective assistance.

Mayhan had included in his post-conviction motion the NAMES of the people who would have testified to the facts surrounding trial counsel's misrepresentation of the sentence Mayhan would receive if he choose to go to trial. Also these people would have been willing to testify to the fact that trial counsel told Mayhan he would only receive probation AND a fine if he would

enter the so-called Alford Plea.

MAYHAN had sworn to AND NOTARIZED AFFIDAVITS FROM THESE WITNESSES, but for REASONS UNBEKNOWING TO MAYHAN the post-conviction ATTORNEY failed to submit these AFFIDAVITS ALONG WITH the post-conviction motion.

But regardless of the post-conviction ATTORNEY'S FAILURE to submit the supporting AFFIDAVITS, the post-conviction COURT should HAVE held AN EVIDENTIARY HEARING ON MAYHAN'S post-conviction motion. AS the purpose OF AN EVIDENTIARY HEARING ON A petition FOR post-conviction relief IS FOR the COURT to receive EVIDENCE IN ORDER TO MAKE FINDINGS OF FACT. WITH THE NAMES OF the people that WERE willing to testify TO the ALLEGATIONS CONTAINED IN MAYHAN'S post-conviction motion, IT WAS AN ABUSE OF DISCRETION FOR THAT COURT TO fail TO hold AN EVIDENTIARY HEARING.

MAYHAN WAS ENTITLED TO AN IN-COURT opportunity TO prove his CLAIMS, AS the CLAIMS WERE procedurally ALIVE, AND he did MAKE A SUBSTANTIAL showing OF A DENIAL OF A STATE AND FEDERAL right. AS the ISSUE OF the INEFFECTIVE ASSISTANCE OF COUNSEL WAS WHETHER the EVIDENCE ESTABLISHED THAT MAYHAN had relied UPON the ERRONEOUS information supplied by his trial COUNSEL TO him IN ENTERING his plea. SO MAYHAN WAS ENTITLED TO AN EVIDENTIARY HEARING ON this CLAIM.

TRIAL COUNSEL had misrepresented the length OF the SENTENCE THAT he WAS FACING if he CHOOSE TO go TO trial. BECAUSE trial COUNSEL did MISLEAD MAYHAN ON this point, MAYHAN'S plea COULD NOT be considered VOLUNTARILY

And intelligently given. So that, if Mayhan had been correctly informed, he would have not entered his plea. An evidentiary hearing was required to resolve this issue.

Mayhan's motion provided evidentiary facts and conclusory allegations in sworn form that his trial counsel had promised Mayhan that he would probably receive probation and a fine if he would enter the so-called Alford Plea. Mayhan had offered the names of the people who would have been willing to testify to this fact. So that his motion was sufficient on its face to be entitled to an evidentiary hearing.

In the post-conviction court's denial, that court stated that Mayhan's post-conviction attorney had been contacted concerning the proposed affidavits, but had failed to include them in Mayhan's post-conviction motion. But it was an abuse of discretion on the part of that court to summarily dismiss the motion on these grounds. (Court's Opinion p. 3). Thus, a motion for post-conviction relief is not properly denied based solely on the fact that there are no supporting affidavits.

Mayhan understands that he has no Sixth Amendment right to the effective assistance of counsel on collateral review. So, he does not attempt to burden this court with that issue. But rather out of the sense of fundamental fairness, asks that this court to review the affidavits that were excluded by counsel in his post-conviction motion. Said affidavits are included in the excerpts at the close of this Brief.

MAYHAN ASSERTS THAT FOR THE FOREGOING REASONS, THAT THE POST-CONVICTION COURT ABUSED ITS DISCRETION IN FAILING TO HOLD AN EVIDENTIARY HEARING AND IN ITS SUMMARY DISMISSAL OF MAYHAN'S POST-CONVICTION MOTION.

ARGUMENT

1. INEFFECTIVE ASSISTANCE OF COUNSEL DURING PRE-TRIAL

THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS JUDGED BY THE STANDARD IN STRICKLAND V. WASHINGTON, 464 U.S. 668 (1984). THE TWO INQUIRIES WHICH MUST BE MADE UNDER THAT STANDARD ARE "(1) WHETHER COUNSEL'S PERFORMANCE WAS DEFICIENT, AND, IF SO, (2) WHETHER THE DEFICIENT PERFORMANCE WAS PREJUDICIAL TO THE DEFENDANT IN THE SENSE THAT CONFIDENCE IN THE CORRECTNESS OF THE OUTCOME IS UNDERMINED." NEAL V. STATE, 525 So.2d 1279, 1281 (MISS. 1987). THIS STANDARD APPLIES TO THE ENTRY OF A GUILTY PLEA. SEE, SCHMITT V. STATE, 560 So.2d 148, 154 (MISS. 1990).

IN HILL V. LOCKHART, 474 U.S. 52 (1985), THE UNITED STATES SUPREME COURT SAID THAT "WHERE, AS HERE, A DEFENDANT IS REPRESENTED BY COUNSEL DURING THE PLEA PROCESS AND ENTERS HIS PLEA UPON THE ADVICE OF COUNSEL, THE VOLUNTARINESS OF THE PLEA DEPENDS ON WHETHER COUNSEL'S ADVICE 'WAS WITHIN THE RANGE OF COMPETENCE DEMANDED OF ATTORNEYS IN CRIMINAL CASES.'" HILL, 474 U.S. AT 56 (QUOTING McMANN V. RICHARDSON, 397 U.S. 759, 771 (1970)).

MAYHAN ASSERTS THAT BY THE ABOVE STANDARD HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRIOR TO ENTERING HIS PLEA PURSUANT TO NORTH CAROLINA V. ALFORD, 400 U.S. 25 (1970). THE MISSISSIPPI SUPREME COURT HAS HELD THAT

Where a defendant pleaded guilty under the mistaken advice of counsel, this would amount to the ineffective assistance of counsel. See, Wilson v. State, 577 So.2d 394 (Miss. 1991).

Mayhan didn't want to plead guilty or otherwise to something that he was innocent of. But because of his trial counsel's ineffectiveness, he felt that he did not have a choice in this matter. It was apparent from the plea transcript that Mayhan was reluctant to plead, and that there were factors outside of his guilt that lead him to enter his plea.

Mayhan's claims demonstrate prejudice by the very fact that "but for his attorney's errors, he would not have pleaded guilty and would have insisted upon going to trial." Nelson v. Hargett, 989 F.2d 847 (5th Cir. 1993); Hubbard v. State, 628 So.2d 1386 (Miss. 1993).

Trial counsel's failure in not putting forth any efforting in defending Mayhan when he would not give Mayhan any guarantee that he would put the prosecution to its burden of proof should Mayhan decide to go to trial. This did frustrate Mayhan's right to a trial pursuant to the Sixth Amendment to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution. See, Via v. Superintendent, Powhatan Correctional Ctr., 643 F.2d 167 (4th Cir. 1981) (right to plead not guilty and go to trial, prejudiced when this right was frustrated because counsel was unprepared to represent client effectively. Id. At 170).

An evidentiary hearing is required for the determination of whether Mayhan has met this two-prong test, and whether his plea and sentence

should be vacated and he be allowed a new trial. See, Myers v. State, 583 So.2d 174 (Miss. 1991).

2. MAYHAN'S PLEA WAS NOT GIVEN VOLUNTARILY AND INTELLIGENTLY

Where a defendant's plea of guilty is coerced or otherwise involuntary, any judgment of conviction entered thereon is subject to collateral attack. See, Boykin v. Alabama, 395 U.S. 238 (1969). The Mississippi Supreme Court has held that to be enforceable, a guilty plea must emanate from the accused's informed consent. See, Vittitoe v. State, 556 So.2d 1062 (Miss. 1990).

In the case sub judice, Mayhan's trial counsel did misrepresent the length of the sentence he was facing if he was convicted in a jury trial. The Mississippi Supreme Court has held that where a defendant has received inaccurate or erroneous information regarding their decision to plead guilty the plea is not given voluntarily or intelligently. See, Alexander v. State, 605 So.2d 1170 (Miss. 1992); Washington v. State, 620 So.2d 966 (Miss. 1993).

The Mississippi Supreme Court has reasoned that such a plea was subject to collateral attack because it would indicate that the defendant was not fully aware of the implications of his plea nor of the true consequences of a trial by jury. See, Baker v. State, 358 So.2d 401, 403 (Miss. 1978); Coleman v. State, 483 So.2d 680, 684 (Miss. 1986).

It has been held that counsel was ineffective, and plea was thus involuntary, when reasonable probability existed that but for counsel's unprofessional error in grossly misrepresenting a defendant's sentence defendant would not have accepted plea if he was correctly informed. Tollett v. Henderson, 411 U.S. 258 (1973); United States v. Gordon, 156 F.3d 376, 380-81 (2nd Cir. 1998).

Mayhan's trial counsel had threatened him with a prison sentence of life if he choose to go to trial by jury. This misrepresentation of the sentence that he would receive if found guilty in a jury trial, weighed heavily on Mayhan's decision to enter his plea, so that it cannot be said that he had entered his plea voluntarily and intelligently.

Mayhan's trial counsel did further improperly induce Mayhan by stating that if he would enter a plea, that the trial court would probably sentence him to probation and a fine. There was no hope for probation for the type of crime that Mayhan had been charged with. For this reason, it cannot be said that Mayhan's plea was given voluntarily and intelligently with an understanding of the true consequences of his plea.

Mayhan was improperly induced to enter into the plea, and it was not a voluntary act on his part. The Mississippi Court of Appeals held in Bronson v. State, 786 So.2d 1083 (Miss. Ct. App. 2001) that "Where the defendant was literally misinformed and misled, ... the defendant's plea to have been involuntary." *Id.* at 1088.

3. TRIAL COURT DID ABUSE ITS DISCRETION IN ENTERING A PLEA OF GUILTY IN MAYHAN'S CASE

The trial court pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), did not have a factual basis to enter a plea of guilty in Mayhan's case. The plea transcript plainly shows that Mayhan did not give the trial court a factual basis to accept his plea and adjudicate Mayhan guilty.

When a defendant enters what has become known as an Alford Plea, there must be given evidence by the prosecution that would give the court a factual basis to enter a guilty verdict against the defendant. The trial court failed to ascertain the required factual basis.

North Carolina v. Alford, was a murder case where defendant plead guilty on advice of counsel despite protestations of innocence, but the court had the prosecution to present evidence of guilt of the which the court found out to be overwhelming and entered a plea of guilt. This case typifies what is to be done in a nolo contendere context, and the court should find a factual basis to enter a plea of guilty when the defendant claims innocence but enters a plea on advice of counsel. Should there be no direct evidence of guilt, the court should reject the plea. See, e.g., United States v. Wild, 92 F.3d 304, 307 (5th Cir. 1996). See, North Carolina v. Alford, 400 U.S. 25, 37-38 (1970).

IN the case sub judice, 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 guilty. This perfunctory finding of the court does not satisfy the requirements of an Alford plea.

It has been held that where "A defendant does not admit the factual basis of the guilty plea, the court must treat the plea as a plea of not guilty." see, United States v. Pilsek, 657 F.2d 920, 924 (7th Cir. 1981). Mayhan's failure to admit the factual basis of the plea, was the equivalent of a plea of not guilty, and the trial court should not have accepted this plea as a plea of guilty. see, United States v. Weyerlein, 583 F.2d 346, 352-53 (7th Cir. 1978).

Mayhan's Alford Plea should not have been accepted by the trial court without the prerequisite ascertainment by the trial court that there was a factual basis for the court to adjudicate Mayhan guilty. Without this finding, the court should have entered a plea of not guilty.

Mayhan contends that since the trial court did not have a factual basis to accept the Alford Plea and to adjudicate Mayhan guilty, that the plea should be vacated. That he should be returned to the position he had held before he had entered the plea. see, Lanier v. State, 635 So.2d 813, 818-19 (Miss. 1994).

4. CIRCUIT COURT OF DESOTO COUNTY ABUSED ITS DISCRETION IN THE SUMMARY DISMISSAL OF MAYHAN'S POST CONVIC- TION MOTION

The post-conviction Court abused its discretion in the summary dismissal of Mayhan's motion for post-conviction relief without an evidentiary hearing. Mayhan's motion did raise allegations that if proved, would have entitled him to relief. An evidentiary hearing was required for the very purpose of the Court to receive evidence in order to make findings of fact. See ON, ROWLAND v. Britt, 867 So.2d 260 (Miss. Ct. App. 2003).

Mayhan's motion was such that he was entitled to an in-court opportunity to prove his claims as, the claims raised in said motion were procedurally alive and did make a substantial showing of a denial of a state and a federal right. So that an evidentiary hearing should have been held. Bell v. State, 759 So.2d 1111 (Miss. 1999).

Mayhan's motion raised serious questions concerning the deficient performance of counsel in presenting erroneous information regarding Mayhan's decision to enter an Alford Plea. Although incorrect information alone does not render a plea involuntary, but it does raise the question of whether the erroneous information was relied upon by Mayhan in entering his plea. An evidentiary hearing was required to resolve this question. See, Readus v. State, 837 So.2d 209 (2003).

Mayhan's motion also included allegations in sworn form of his trial counsel's erroneous information of the sentence he would receive if he

would enter the Alford Plea. Trial Counsel's information was a total misrepresentation of what he was actually facing by the entry of such a plea. This allegation by Mayhan could not be resolved short of an evidentiary hearing. See ON, MYERS V. STATE, 583 So.2d 174 (Miss. 1991).

Though Mayhan concedes that he has no Sixth Amendment right to the effective assistance of counsel on collateral review. See, Coleman v. Thompson, 501 U.S. 722, 754 (1991). But it would be fundamentally unfair for this Court not to review the proposed Affidavits that he has attached to his Brief, even though his post-conviction attorney did fail to include them in his post-conviction motion. See, Williams v. State, 794 So.2d 181, 187 (Miss. 2001).

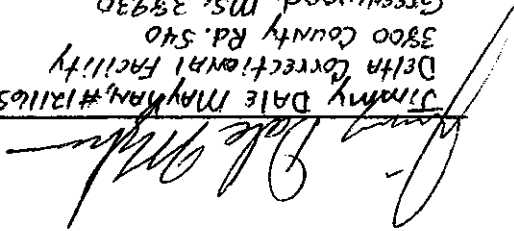
In the post-conviction court's denial, that court did state that since there were no supporting Affidavits, (Court's Opinion, p.3), that Mayhan's motion cannot be said to be able to withstand dismissal without an evidentiary hearing. (Court's Opinion, p.4). This was an improper standard to use by that court to deny Mayhan's motion. The Mississippi Supreme Court has held that a post-conviction relief motion is not properly denied based solely on the fact that there are no supporting Affidavits. See, Ford v. State, 708 So.2d 73, 75 (Miss. 1998); Also Dillon v. State, 641 So.2d 1223, 1225 (Miss. 1994).

For the foregoing reasons, the post-conviction court applied the wrong legal standard in the summary dismissal of Mayhan's post-conviction motion. This was an abuse of discretion by that court.

CONCLUSION

Wherefore Premises considered, Mayhan moves this Court to reverse the ruling of denial of the Circuit Court of Desoto County, Mississippi of Mayhan's post-conviction motion. That this case be remanded back to that Court for an evidentiary hearing on his claim of ineffective assistance of counsel and the voluntariness of his plea. And for what other relief this Court deems just and proper.

Respectfully submitted this the 12 day of August, 2008.

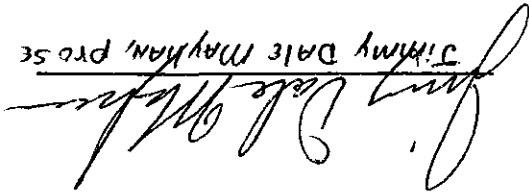

Jimmy Dale Mayhan, #121165
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CERTIFICATE OF SERVICE

This is to Certify, that I, Jimmy Dale Mayhan, Appellant have caused to be delivered this day, via United States Postal Service, postage pre-paid, a true and correct copy of the foregoing Appellant's Brief to the below listed person:

Honorable Tim Hood
Attorney General
P.O. Box 220
Jackson, MS. 39205-0220

This the 12 day of August, 2008


Jimmy Dale Mayhan, prose

October 16, 2007

"Letter of Recommendation"

To: Whom it May Concern:

I am writing this letter on Jimmy Dale Mayhan's behalf. This letter will also contain expressions from other family members and friends, who will sign their names at the closure of this letter. Included in this collective letter contains everyone's thoughts and word's about Jimmy Dale Mayhan.

A lot of us have grown up with him; others have known him over the years. There is not one part of what has happened to him is true or that he is guilty of the charges he has been convicted of. The makeup of his charter would not allow him to hurt anyone. He came from a family of 9 brothers and sisters and they all have children and grandchildren. His extended family is very large. Everyone in contact with him has children and all have felt safe leaving their children with him. Being the oldest child in his family, he has always taken care of his brothers and sisters. When his father died, he then took care of his mother. If anyone needed help, food, clothes, or money then he would always provide it for them. We all have talked among our self's and we feel he is a simple man, who has worked 16 to 18 hours a day, seven days a week. He has done this all his life, in order to provide for his family and also to help his friends. He has children and grandchildren of his own, and all have been safe with him. He truly is not knowledgeable of world's affairs. Jimmy is just a good country man who believes in God and helping others. He takes you at the word, because his word is at his bond. He did not understand everything about the charges that were brought against him. He even missed some of his appointments with his lawyer, because he felt it was more important to work and not lose his job because he knew he was innocent. There are many circumstances you are not aware of.

Jimmy also has temporary custody of his niece's two children, because his mother asked him too, because his niece was unable to care for them herself. Jimmy was blown away by the type of charges brought against him and never believed for a minute that anything would come of these false charges. When he did have to go to court he was scared to death, and was told that if he did not take the plea bargain right then, he would be sentenced 20 to 40 years, but if he took the plea bargain he would get two years probation. He believed the prosecutor and his lawyer, so he took the plea. The judge gave him his sentence; he was handcuffed and was told he would be taken to jail that very day. Jimmy has been in total shock, as for us all. Jimmy has said he has proof of his innocents and he wishes to be able to tell his story before the court.

Thank you for your time from all of the people that believe in Jimmy and who will sign below to these facts. On his behalf intervene and let his voice be heard.

Sincerely yours,

J Geneva M. Phillips - ph# 662-851-3230
Patricia M. Carrington
Stephanie Carpenter
Madison Newbern
Culver Carrington
Betty Vaughn
James Harris
Elizabeth Phillips
Cheryl
Kelly & Carl
Sarah + Richard Moore

“Letter of Recommendation”

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October 16, 2007

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1

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CHARLES TAYLOR

Patricia Taylor

Edely Taylor

Theresa Taylor

Kathryn Taylor

Wendy Brooks

Debbie Hawk

Estelle Harris

Connie Wilson

Scott Taylor

Micki Carmichael

Sincerely yours,

PSALM 71

In you, O Lord, I put my trust. Let me never be put to shame. Deliver me in your righteousness, and cause me to escape. Incline your ear to me, and save me. Be my strong refuge to which I may resort continually. You have given the commandment to save me. For you are my rock and my fortress, deliver me, O my God, out of the hand of the unrighteous and cruel man. For you are my hope, O Lord God, you are my trust from my youth. By you I have been upheld from birth. You are he who took me out of my mother's womb. My praise shall be continually of you. I have become as a wonder to many but you are my strong refuge. Let my mouth be filled with your praise and with your glory all the day. Do not cast me off in the time of old age. Do not forsake me when my strength fails. For my enemies speak against me, and those who lie in wait for my life take counsel together, saying, God has forsaken him; pursue and take him, for there is none to deliver him. O God, do not be far from me. O my God, make haste to help me. Let them be confounded and consumed who are adversaries of my life. Let them be covered with reproach and dishonor who seek my hurt, but I will hope continually. And will praise you yet more and more. My mouth shall tell of your righteousness and your salvation.

All The day. For I do not know Their limits, I will go
In The Strength OF The Lord God, I Will make mention
OF Your Righteousness, OF Your only, O God You have
Taught me From my youth, and To This day I declare
Your Wondrous Works, now also When I am old and
Grayheaded, O God, do not Forsake me, until I declare
Your Strength To This generation, Your power To everyone
Who is To come, also Your Righteousness O God, is
Very high, You who have done great Things, O God,
Who is like You, You who have Shown me great and
Severe Troubles, Shall revive me again, and bring me
Up again From the depths OF The earth, You Shall
Increase my greatness, and Comfort me on every side,
Also with The lute I will praise You and Your Faithfulness,
O my God! To You I will sing With The harp, O holy
One OF Israel, my lips Shall greatly rejoice When I sing
To You, and my Soul, which You have redeemed, my
Tongue also shall ~~talk~~ OF Your Righteousness all the day
Long, For They are confounded, For They are brought
To Shame Who seek my hurt.

EXCERPTS

"A" AFFIDAVIT OF KELLY E. MAYHAN

"B" AFFIDAVIT OF LEONARD JANISZEWSKI

"C" AFFIDAVIT OF NANCY (MAYHAN) JANISZEWSKI

State of Mississippi }

County of Desoto }

Affidavit of Kelly E. Mayhan

My NAME is Kelly E. Mayhan, I am the wife of Jimmy Dale Mayhan. Jimmy didn't want to enter a plea of guilty to the charges against him. But his Attorney, James Franks, told Jimmy that he couldn't win the case, and if Jimmy went to trial he would be found guilty and be given a life sentence in prison.

Jimmy stated to Attorney Franks that he wanted to go to trial and asked Attorney Franks if he choose to go to trial would Attorney Franks help him defend himself against these charges. Attorney Franks did not answer this question and only stated at Jimmy.

I witnessed this exchange between Jimmy and Attorney Franks, Jimmy did not want to plead guilty to the charges against him, but felt helpless in the face of Attorney Franks' refusal to state that he would help Jimmy if he went to trial.

Jimmy and I both felt that Jimmy's only chance was to enter a plea rather than take a chance of receiving a life sentence in prison.

Kelly E. Mayhan
Kelly E. Mayhan

Sworn to and Subscribed before me this the 2 day of November, 2006.

Constance M. Brown-Baker
NOTARY PUBLIC
NOTARY PUBLIC STATE OF MISSISSIPPI AT LARGE
MY COMMISSION EXPIRES: June 14, 2008
BONDED THRU NOTARY PUBLIC UNDERWRITERS

"A"

State of Mississippi }
County of Desoto }

Affidavit

My NAME is ^{BROTHER IN-LAW} ~~LEONARD E. JANISZEWSKI~~ of Jimmy Dale Mayhan. Jimmy did relate to me a conversation he had with his Attorney, James Franks. Jimmy stated that Attorney Franks told him that he couldn't win the case, and that if Jimmy choose to go to trial, he would be given a life sentence in prison.

Jimmy stated to me that he wanted to go to trial, but did not think that Attorney Franks would help in his defense. Also Jimmy was worried about what Attorney Franks stated about him receiving a life sentence in prison, this weighed heavy on Jimmy's final decision to enter a plea instead of going to trial.

I know for a fact that Jimmy is innocent, and that he wanted to go to trial. But, because Mr Frank stated that if he plead Guilty He would only get probation so plea vs life Jimmy took The Plea

Leonard E. Janiszevski

Sworn to AND Subscribed before me this the 2nd day of Nov, 2006.

Debra J. Vance
NOTARY PUBLIC

State of Mississippi }
County of DeSoto }



Affidavit

My name is Nancy M. Janiszewski, sister of Jimmy Dale Mayhan. Jimmy did relate to me a conversation he had with his Attorney, James Franks. Jimmy stated that Attorney Franks told him that he couldn't win the case, and that if Jimmy choose to go to trial, he would be given a life sentence in prison.

Jimmy stated to me that he wanted to go to trial, but did not think that Attorney Franks would help in his defense. Also Jimmy was worried about what Attorney Franks stated about him receiving a life sentence in prison, this weighed heavy on Jimmy's final decision to enter a plea instead of going to trial.

I know for a fact that Jimmy is innocent, and that he wanted to go to trial. But, because we were all afraid Jimmy would be sent to prison for the rest of his life, we told Jimmy to plead guilty.

Nancy Mayhan Janiszewski

Sworn to and Subscribed before me this ~~3rd~~ day of ~~Nov~~, 2006.

Shirley D. Darn
NOTARY PUBLIC

Timmy Dale Mayhan, #121165
Delta Correctional Facility
3800 County Rd. 540
Greenwood, MS. 38930
Beth W. Sephton, Clerk
Supreme Court/Court of Appeals
P.O. Box 249
Jackson, MS. 39205-0249
RE: Timmy Dale Mayhan v. State of Mississippi
NO. 2007-CF-01078-COA

Mrs. Sephton:

Please find enclosed the original and two copies of the Brief of Appellant to be filed in the above-styled and numbered cause. Please file the same. By cover of this letter I have delivered a copy of the same to Honorable Jim Hood, Attorney General of Mississippi.
Thank you for your time and consideration in this matter.

Respectfully,
Timmy Dale Mayhan