

COPY

**IN THE SUPREME COURT AND THE
COURT OF APPEALS OF THE STATE OF
MISSISSIPPI**

FILED

 **ORIGINAL**

FEB 28 2008

JAMES SPENCER

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

APPELLATE

VERSUS NO. 2007-CP-01667-COA
STATE OF MISSISSIPPI

APPELLEE

Appellant Brief
APPEAL

Comes now Appellate James Spencer , Pro se . in the above style and numbered cause and files this , his Appeal appealing the order of Lownes Circuit Court order on Post Conviction No. 2005 __ 0016 __ CVI .

In support Appellate will show unto this court the following to , to wit .

I

The State asserts Appellate 's claim on Post Conviction , Alleging that he could not have been sentenced or convicted as an habitual offender under a Plea agreement without being indicted under the status of being an habitual offender first , is without merits

Petitioner's Plea hearing is alleged to have taking place during the date of May 17 , 2004 . on the August 17, 2004 the state filed a motion to amend

petitioner's indictment. The motion to amend was filed three (3) months after petitioner's "Plea Agreement" was alleged to have taken place. Rule 7.09 of uniform Rules of circuit and county practice permits an indictment to be amended, true! But the said rule does not allow and establish an amendment of indictment after criminal procedures involving the indictment has already been conducted. An indictment serves to give the accused/defendant fair notice, [Bullock v. State, 391so. 2d 601, 606 (Miss. 1980).] Petitioner had a right to be notified by an indictment that he would be pleading as an habitual offender before he accepted such plea the proper notice is by an indictment, no other vehicle will substitute.

An amendment of an indictment after a plea has been executed is an element of an improper inducement and deception. Such is prohibited by Rule 8.04 of uniform Rules of circuit and county practice.

The State tries to defeat its neglect of neglecting to indict petitioner properly by an indictment, by stating during petitioner's plea hearing he were notified he would be sentenced as an habitual offender. Not considering the fact that a notice alone will not substitute as an indictment, the transcript the State is introducing as valid document(s) are forged document(s). Later in this motion petitioner will address the said matter and will disclose document(s) from attorney Gray Goodwin that will support such claim.

II

This matter being raised in this is an issue which was presented in petitioner's Post conviction. However, the State failed to address this matter in the aforesaid order.

Rule 8.04 (4) (b) of uniform Rules of circuit and county Practice institutes: When the defendant wishes to plead guilty to the offense charged, it is the duty of the trial court to address the defendant personal and to inquire and determine that the accused understand the nature and consequences of the plea, and maximum and minimum penalties provided by law.

The court failed to inform petitioner that his sentence was mandatory. Nowhere in the alleged transcript will this court find the State advising petitioner that his time would be mandatory. The lower court can not say

“ the State advised the defendant that he would be sentenced as an habitual offender .” Such will not justify the neglect of the state to advise petitioner of the maximum and minimum — because there is no proof that petitioner was aware of the fact that an offender being sentenced as an habitual offender would receive a mandatory sentence . (Even if the alleged transcript were valid a violation has occurred here .) Notifying Petitioner that the maximum of his sentence was twenty - five years mandatory was a requirement neglected by the court to fulfill , and a fundamental element of executing a plea neglect .

Here petitioner will cite a case focusing directly on the requirement that the court notify a defendant of the fact of mandatory sentence . Vittitoe v . State , 556 so. 2d 1062 (Miss .1990) , conviction and sentence base on guilty plea must be reversed when defendant was not aware of mandatory sentence , at time of plea . The State can produce no records , documents , papers , etc. That will disclose petitioner was aware of a mandatory sentence .

Alexander v . State 605 so. 2d 1170 (miss . 1992); sander v . State 847 so . 2d 903 , the trial court must make records showing that the defendant is advised of the maximum and minimum of sentence . See also Robert v , State m 820 so . 2d 790 (Miss . 2002). In the above cited case Vittitoe V . State , petitioner has already established that advising a defendant that a sentence is mandatory is a requirement of the maximum and minimum of Rule 8.04 .

III

Petitioner raised the issue on Post Conviction that any transcript the State produced claiming that he attended a plea hearing was a fictitious document. The State did not entertain this issue in the order , petitioner is appealing . The State neglected to answer such matter .

Petitioner will present a supporting document from his attorney disclosing that certain assertions in the alleged transcript are false .

Petitioner wrote attorney Gray Goodwin on August 20 ,2007 (Goodwin being petitioner's last attorney). Petitioner inquired of Goodwin as to whether he was provided with a copy of a motion signed by him to enter a plea of guilty . Goodwin answered no and further asserted one does not exist in the court's file . As Goodwin being petitioner's attorney (last advocating for him) he

should possess such motion . Without one he could not have properly provided petitioner with effective counseling .

The State contradicts Goodwin's assertion that there is not a petition in the files . See lines 27- 29 on page 2 . The State asserts : There is a petition . Attorney Goodwin asserts differently . The state goes on to speak on the fictitious petition on page 3 and 5 of the transcript . If one part of the transcript was fabricated the rest is just as invalid .

The personal knowledge in the fictitious transcript disclosing on page 6 that petitioner had once used another last name is a matter which was revealed to the court in prior procedures . Petitioner has been convicted four (4) times before the conviction which is now in question . It is common knowledge that this information would have surfaced before now -- if being placed in the front of a dexterous , professional function or province . Petitioner has been prosecuted by the judge alleged as conducting a plea hearing on the matter at issue at least twice , prior to this cause .

IV

Petitioner raised the issue of insufficient counsel on Post Conviction . The State did not entertain it in the order .

Petitioner's counsel violated Rule 2.1 (Advisor) of Miss. Rules Of Professional Conduct . Counsel did not on petitioner's cause properly advise petitioner . If the alleged transcript of petitioner's are authentic , petitioner's counsel should have advised petitioner that he was not accepting a plea by pleading to twenty- five (25) years . A plea is a procedure and /or action established to give an accused an opportunity to receive a lesser sentence. Petitioner could not receive over twenty -- five (25) years under no circumstances . The statute (97- 17 - 23) does not allow . A SENTINCE under the said statute is prohibited from exceeding over twenty -- five (25) years . Petitioner's attorney failed to properly advise petitioner , by not advising petitioner that he would receive the same sentence the state offered on a plea agreement that he would receive if he entertained a jury trial . Such conduct as the conduct executed by petitioner's counsel further violated Rule 1.3 of Mississippi Rules Of Professional Conduct .

Rule 2.1 institutes in representing a client an attorney shall exercise independent professional judgment and render candid advise . Rule 1.3 institutes

an attorney should act with commitment and dedication to the interest of client and with zeal in advocacy upon client's behalf .

Petitioner's attorney violated rule 1.3 further by not objecting to petitioner being sentenced under an habitual offender sentencing- law , knowing the indictment was not executed until three months after petitioner was alleged to have accepted the plea at issue .

Lockhart v. Hill ,474 U.S. 52 , 56 88 L. Ed 2d at 396 , a defendant who pleads guilty to a crime is "prejudiced" by his counsel's "erroneous advice " if he would have insisted on going to trial -- if he would have been correctly informed . (Common knowledge speaks here : Even if petitioner's alleged plea was valid , petitioner would have never agreed to a plea if his attorney would have correctly advised him that he could only be sentenced to twenty - five (25) years even if he entertained a trial .)

Petitioner in support that his attorney fail to assist him on entertaining a jury trial as he requested , is appending a letter he addressed to the attorney . The same letter was presente on petitioner's Post -Conviction. The letter is labeled exhibit # 1.

A procedural default exist where any right was waived by counsel's lack of knowledge of a know rule of law by a controlling court . Gravley V . Mills , 87 f. 3d 779 . (Petitioner 's attorney was either intentionally ineffective and imprudent or he was illiterate to the law governing the time petitioner could receive if he attended trial . The counsel should have advised petitioned that pleading to a term of twenty - five (25) years was not a plea .)

Gravley V. Mills, 87 F. 3d 779 . further establishes , the most compelling evidence of counsel's incompetence is the failure to object to serious instance of prosecution misconduct. (The attorney failed to object to the misconduct of the prosecution using an order to amend -- an order which was executed three (3) full months after petitioner was alleged to have plead guilty . The order to amend being an order which allow the petitioner to be sentenced as an habitual offender .)

V

The state erred in not giving petitioner an evidentiary hearing . Petitioner should have be allowed an evidentiary hearing to present all claims presented in his Post Conviction. See Alexander v . State , 605 so.2d at 768.

Alexander further establishes ,an evidentiary hearing is warranted when a question of fact exists concerning whether the defendant was prejudiced , whether he would not have entered a guilty plea had he been properly advised . (Petitioner raised in his Post - Conviction that he was not properly advise.)

RELIEF REQUESTED

Appellant request this court order that the mandatory sentence under the habitual offender's statute be removed ,if this court find merits in part I of this petition . (The claim that an amendment of his indictment three (3) months after he was alleged to take and/or accept a pled was illegal.)

The appellant request this court remove the mandatory from his sentence if this court find that the state violated Rule 8.04 a (4) (b) of uniform Rules of circuit and county practice (as described in part II of this petition) by failing to inform the appellate of the maximum and minimum penalty.

Appellate request this court reverse his sentence and conviction if this court find the claim in part III this petition (claiming that the transcript of this cause are not authentic) to possess merits.

Appellate ask that if this court find that part IV of this motion possess merits that appellate's counsel was ineffective this court reverse his conviction .

Appellate request this court grant him an evidentiary hearing to present his claims presented in Post conviction ,if this court find merits in part V of this petition .

James Spencer

FEB. 28, 2008

Certificat of Service

This is to certify that Appellate James
Spencer has via United States Postage
sent copies of the Appointed Appell-
ate Brief to the below listed person
(s) this date: 2/28/08

James Spencer
JAMES SPENCER

Supreme Court of Appeals, Beth W.
Stephens, Clerk of the Court, P.O. Box
244, Jackson, MS 39205

Jim Hood, Attorney General, P.O. Box 220
Jackson, MS 39205

Subscribed and sworn to before me in my
presence, this 28 day of Feb,
2008
County of Holmes State of Miss,
Augusta R. Anderson
(signature)
Notary Public
My Commission Expires 9/9/11, 20 11



Augusta R. Anderson
Notary Public

Mail
to me

James Spencer #15233

Delta Correctional Facility

3800 County Rd 540

Greenwood, MS. 38930

Cary Goodwin, Attorney at Law

Please assist me on the following

Did the Court upon appointing you to represent me (James

Earl Spencer) in Cause No. 2003-064-CR1 provide you with

a copy of the alleged petition filed in Lumbard County Cir-

cuit Court for me (James Earl Spencer) to enter a plea

of guilty. Please answer and/or check Yes ☐ or No ☐.

If the answer is yes please provide me (James Earl

Spencer) with a copy of the alleged petition to enter a plea.

Please provide me (James Earl Spencer) with a copy of

EXHIBIT #A

August 20th, 2007

AUG 30 2007

of the transcripts to the hearing for me (James Earl

Spencer) to withdraw the plea I (James Earl Spencer) was

alleged to have accepted, which was held on August 17, 2007,

a hearing in which you (Gary Goodwin) represented me (James Earl Spencer) in. *any hearing*
The Court entered an order without holding

Also Please forward a copy of the transcripts to

my (James Earl Spencer's) Sentencing Hearing held on the
same said date (August 17, 2007), in which you (Gary Good-

win represented me (James Earl Spencer) in.
I do not have such and
one does not appear in
the Court file
3415 Gary Goodwin #1826
Flood MS. 39232
Reporter at your sentencing
Jan Harris over the Court
The requested documents requested and the questions in-

quired are essential for the filing of petitions to aid
me in my endeavor to obtain freedom.

Please answer back as soon as possible, time is
of an essence - further time is not on my side.

Thanks in advance for any assistance you are able to
grant me in the matter hereof.

10-21-03

To: Michael Farrows

518 2nd Ave. N

Columbus, MS 39401

Dear Mr. Farrows

I, James Spence, would like to address you at this time concerning the charge that I am currently being held on and cause no. 203-0004-021. That I am innocent of this charge of Burglary of a residence and would like for a hearing on this charge. My best work said that if I can clear this up with a short period of time that I will be able to hold on to my job. That is, Mr. Farrow I am requesting for a first and specially trial. I will be accepting a plea regarding on this said charge. That is, I am asking you Mr. Farrow to file the necessary paperwork to the court for a first and special trial so that I may get back to work as soon as possible. I thank you in advance for your concern in this matter. I am looking forward to your timely response to this matter.

Yours truly
James Spence

EXHIBIT #1