

NO. 2007-CT-00740-SCT

THE SUPREME COURT
FOR THE STATE OF MISSISSIPPI

JOHN ANTHONY MAGYAR, APPELLANT,

V.

STATE OF MISSISSIPPI, APPELLEE

ON WRIT OF CERTIORARI

MAGYAR'S SUPPLEMENTAL BRIEF

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THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

JOHN ANTHONY MAGYAR

VS.

No. 2007-CT-00740-SCT

STATE OF MISSISSIPPI

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Honorable Ashley Hines
Circuit Court Judge, 4th Circuit Court
Post Office Box 1315
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2. District Attorney, 4th Circuit Court District
Post Office Box 426
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3. Honorable Larry Eugene Roberts
Mississippi Court of Appeals
4. John Anthony Magyar
Inmate, Mississippi Department of Corrections
5. James L. Kelly
Post Office Box 1975
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This the 9th day of March, 2009.

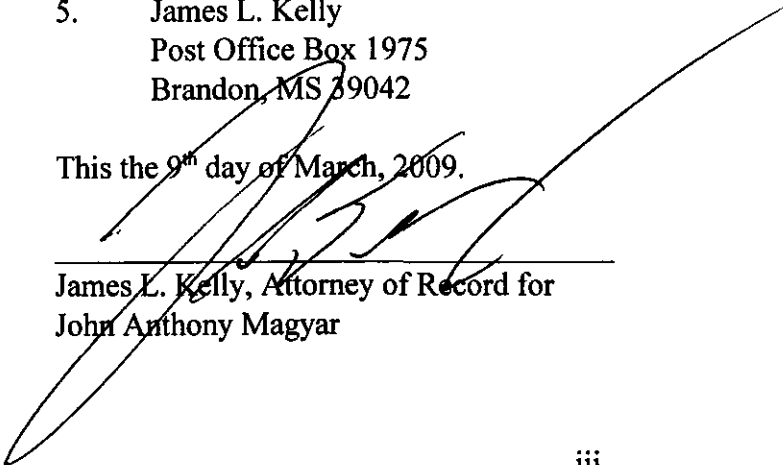

James L. Kelly, Attorney of Record for
John Anthony Magyar

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INTRODUCTION

John Anthony Magyar learned of mandatory lifetime sex offender registration for the first time at sentencing, roughly a month after his guilty plea. After being sentenced to 10 years in prison (though being assured by his legal counsel that he would receive probation only) and learning that his lawyer had grossly mis-advised him that he would not be allowed to confront hearsay testimony of the prosecutrix against him, John Anthony Magyar, Appellant, timely filed a motion for Post Conviction Collateral Relief under the Mississippi Uniform Post Conviction Collateral Relief Act. Though the petition was well and succinctly drafted, being fifteen (15) pages in length and supported by fourteen (14) exhibits, including relevant affidavits of fact and expert opinion, the trial court summarily denied Magyar's petition, without requiring the State of Mississippi to file an answer, thereby denying Magyar a chance to further develop a record at hearing and attempt to establish undue prejudice. There being no appeal from a guilty plea, the trial court summarily, denied Magyar his right of post conviction review.

Attached to Magyar's Motion For Post Conviction Relief are the following exhibits:

- a) Indictment
- b) Plea Petition (does not mention sex offender registration; states that minimum sentence is "N/A")
- c) Plea colloquy transcript (no mention of sex offender registration; court advises Magyar that "there is no minimum" term of incarceration)
- d) Defense initial discovery request (filed 16 days before trial date; shows inadequate preparation by trial counsel)

- e) Defense subpoena stamped “RUSH” (issued 8 days prior to trial date, seeking a critical impeachment witness; subpoena never complied with; shows frantic ill-prepared nature of the defense)
- f) Defense Motion to Continue (issued 3 days after the RUSH subpoena issued; Motion admits inadequate investigation by defense counsel)
- g) State’s Motion to Quash RUSH Subpoena (correctly stating that subpoena not in compliance with rules, being untimely)
- h) Sworn statement of Magyar (re: erroneous advice from counsel effectively denying right of confrontation; spent less than 1 hour with counsel during entire defense; advised by counsel would receive entirely suspended sentence; counsel: failed to discuss evidence, elements and possible defenses with Magyar, failed to show discovery to Magyar; failed to advise Magyar of Mandatory Sex Offender Registration)
- i) Affidavit of Expert Witness, Tommy Mayfield, Esq.
- j) Undersigned counsel’s correspondence to uncooperative trial counsel (shows uncaring attitude of trial counsel)
- j-1) Trial counsel’s unsworn “affidavit” with hand written adjustments of trial counsel (admitting that: the public defender’s office did not have an investigator at the time; that trial counsel does not recall discussing sex offender registration with Magyar; that trial counsel did discuss with Magyar, the video tape of the prosecutrix and the possibility of it’s use at trial)
- k) Statement of facts not within petitioner’s personal knowledge

- l) Affidavit of Magyar's Father that **Public Defender admitted** to father that Magyar had received **INADEQUATE** representation

Despite Magyar's well plead complaint with the above mentioned exhibits attached, and the fact that Magyar was given no chance to conduct any discovery, the trial court granted summary judgement if favor of the government, without requiring the government to file an answer.

STANDARD OF REVIEW

The lower court may summarily dismiss a PCR 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." Miss.Code Ann. §§ 99-39-11(2) (Rev.2000). On appellate review of a summary dismissal, **we take the well-pleaded allegations of the PCR as true** and review the record de novo. *Myers v. State*, 583 So.2d 174, 176 (Miss.1991). We will affirm if the petitioner has failed to demonstrate "a claim procedurally alive substantial[ly] showing denial of a state or federal right....*Young v. State*, 731 So. 2d 1120, 1122 (Miss. 1999). We will reverse and remand for a hearing if the movant has "alleged facts which require further inquiry in the expanded setting of an evidentiary hearing"

Jones v. State, 949 So.2d 873 (Miss. Ct. App. 2007) emphasis added.

ARGUMENT

The trial court did not hold to the aforementioned standard. The well pleaded allegations of the PCR were not taken as true. There are numerous factors and factual allegations plead, that if true, would entitle Magyar to relief. They are:

- Failure of the Court and Trial Counsel to advise Magyar of Mandatory Sex Offender Registration, Every 90 days, For the Remainder of Magyar's Natural Life, as Required by M.C.A. 45-33-39(1)(1972)
- Trial Counsel advising Magyar that the Video Tape of the Prosecutrix would be played to

the jury, without the benefit of cross-examining the Prosecutrix

- Trial Counsel’s Inadequate Investigation and Preparation
- Erroneous advise to Magyar by trial counsel that if Magyar would plea guilty, Magyar would be Going Home (on probation)
- Failure of Trial Counsel to Show the Discovery to Magyar and Discuss it with him (counsel and client spending less than 1 hour together during the entire “representation”)
- Failure of counsel to discuss the elements, evidence and possible defenses with Magyar
- Failure of the Court to adequately explain the minimum and maximum sentences to Magyar

This case is most certainly not one where Magyar’s assertions are “belied by unimpeachable evidence” in the record which would justify summary dismissal. The State of Mississippi has not produced or even referenced any part of the record that refute any of Magyar’s core contentions. Due to a combination of errors by the trial court and trial counsel, this guilty plea should be set aside, or at a minimum, remanded to the trial court for an evidentiary hearing, finding of facts and determination of prejudice to Magyar.

Little can be added in legal argument that has not already been submitted in briefing and the petitioner requests that this Court consider his Petition for Post Conviction Relief with exhibits attached, his initial Brief to the Court of Appeals, his reply brief, motion to re-consider and Petition for Writ of Certiorari and all authorities submitted therein. The remainder of this argument will be devoted to the direct, certain and pervasive consequences of pleading guilty to a sex offense.

After conviction of a sex offense, as part of sentencing, the Court may impose fines, and may impose incarceration, and then, the defendant SHALL register as a SEX OFFENDER for the

remainder of his natural life. Prior to sentencing, at the guilty plea, the Court SHALL inform the defendant that if he enters a plea of guilty, he SHALL Register as a Sex Offender, for life. Unlike fines and imprisonment, which are discretionary, and at some point come to an end, sex offender registration is not discretionary. Moreover, in Mississippi, the court must advise the defendant of sex offender registration requirements **IN WRITING**, in the plea petition. M.C.A. 45-33-39(1)(1972).

Magyar is aware that many jurisdictions have ruled that advising a defendant of mandatory sex offender registration is not a pre-requisite to a constitutionally sufficient guilty plea to a sex offense. Most of those jurisdictions rule that sex offender registration is a “collateral” as opposed to a “direct” consequence of the conviction. In Mississippi however, due to legislative mandates discussed above, registration is clearly a direct consequence of the conviction.

As a matter of public policy, and the myriad of offenses and various situations that qualify as “sex offenses” in this jurisdiction, which would require life-time registration, it would be well to consider just what it means for a person to be placed into the World Wide Web of public records as a SEX OFFENDER for the remainder of his or her life. Then this court should consider whether or not this court and our trial courts are at liberty to ignore the statutory mandate to advise defendants of registration requirements prior to accepting a guilty plea to a sex offense. The temptation of some will be to rule that while courts are not at liberty to ignore the statute, failure to abide by the statute does not invalidate the plea. **We must bear in mind however, that a rule not enforced is no rule at all.** Since we know the rule is there in the statute books, we cannot pretend it is absent, it must be enforced. Moreover, as a matter of public policy and constitutional mandate, citizens must be informed of the direct consequences of a conviction, before a guilty plea may be constitutionally had.

The life sentence consequence of a sex offense conviction is devastating. It becomes a “scarlet letter”.

The Mississippi sex offender registration statute is extremely broad and inclusive with regard to (1) who must register for life and (2) how the registrant is forever limited. It includes minors adjudicated delinquent in Youth Court, and persons found not guilty by reason of insanity. See M.C.A. 45-33-27 (1)(1972). Consider a fifteen (15) year old female child (Sally), without proper parental supervision¹, who is accused of experimenting with oral sex along with her 13 year old friend (male or female). Without being advised of mandatory lifetime sex offender registration, she admits having oral sex and seeks help and guidance from the local well meaning Youth Court counselors who have assured her that admission is the best thing to do. Sally is not told prior to her plea, that due to her admission and mandatory life-time registration requirements, she will never have meaningful employment for as long as she lives; that educated men would not consider marrying her; that she will be pushed to the edges of society wherever she might go, for as long as she lives. Sally will be subject to the following rules, for the remainder of her life, she:

- will submit her address, name, place of employment, date of birth, age, race, sex, height, weight, hair color, place of birth, date and place of Court adjudication and social security number and “any other identifying factors” to the local law enforcement of any community she shall ever live in

- submit DNA samples to law enforcement, to be included in computer data base

- submit her fingerprints to be included in data base

¹A problem all too prevalent in Mississippi.

- submit to law enforcement any online username, screen name or online identity she has ever used
- submit to law enforcement information regarding any anticipated future residence
- may not reside within 1500 feet (500 yards) of any public or private school (or its property)
- may not reside within 1500 feet of any child care facility
- may not reside within 1500 feet of any playground²
- may not reside within 1500 feet of any ball park “or other recreational facility”
- may not be present in a school, or stand within 500 feet of a school without special permission³
- must show proof of domicile and personally appear at the department of public safety 10 days before moving to another residence
- personally appear at the Department of Public safety within 3 days of any change of employment M.C.A. 45-33-29(3)
- personally appear at the Mississippi Department of Public Safety, **every 90 days**, for the remainder of her life, give a new photo, update all information, including residence and employment,⁴ and pay “**any required fees.**”

Her information will be placed on the internet, for the world to see, forever.

Sally will be a target of identity theft, she will be the subject of ridicule and scorn, people will protest

² 2008 amendment to 45-33-25(4)(a). Have we any idea how many swing sets are in the State of Mississippi and where they are located?

³ M.C.A. 45-33-26 (1972) as amended

⁴ M.C.A. 45-33-31 (1972) as amended

if she moves to the neighborhood, parents will not let their children play with her children, she will have extreme difficulty finding employment. Sally, of course, represents thousands of Mississippi citizens, including Magyar, who are subject to the sex offender registration requirements and policy decisions of this honorable Court. As a matter of public policy and/or Constitutional (U.S. and State) or statutory mandate, should not a citizen be advised, at least to some minimum extent, that his or her plea necessarily and directly carries a life sentence?

There is no doubt that legislatures nation wide, including the Mississippi legislature, will continue to restrict the movement and rights of convicted sex offenders, year after year. Each political season provides new opportunity. GPS monitoring is already being discussed if not implemented⁵, and municipalities have banned sex offenders from being present in certain places other than schools, such as parks.⁶ Nearly all such regulations and restrictions are upheld by the Courts. See: *Doe v. Lafayette* , (*Lafayette II*), 377 F.3d 757, 774 (7th. Cir. 2004)(banning from parks permissible); *Brown v. Michigan City*, 462 F.3d 720, 734 (7th Cir. 2006)(banning from parks permissible); *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003)(Conn. Gen. Stat. §§ 54-251, 54-252, 54-254 (2001) (classifying all sex offenders as a group permissible).

Magyar does not contest that some sex offenders should be monitored for life. Some should never be released from prison. On the other hand, there are many, like Magyar (or the fictitious Sally in the discussion above), who have been accused of committing a sex offense who are not a danger to society at all, but being indigent, caught up in a criminal justice system with a public defender or

⁵ California, North Carolina, Wisconsin

⁶ Lafayette, Indiana; Michigan City Indiana

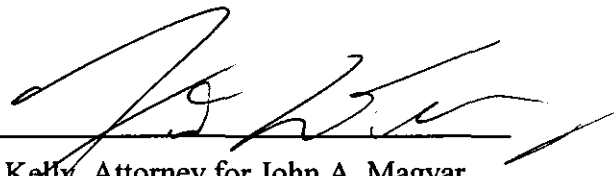
counselor telling him to “just go ahead and get on with your life, you’ll get probation only, they’ll play the tape (without confrontation) and you’ll lose and go to prison for life, we can’t argue any pre-trial motions because it will make the judge mad...etc...and the next thing you know, the accused has entered his or her guilty plea, without ever having been told by anyone that the nightmare is just beginning.

CONCLUSION

The Court will have to side step ample Mississippi precedent in order to affirm what has happened below. See: *State v. Washington*, 620 so. 2d 966 (Miss. 1993)(while parole eligibility might be “a collateral consequence”, defendant must be advised, prior to plea, that certain part of minimum sentence is not parole eligible), M.C.A. Sec. 45-33-39(1) (court SHALL advise defendant, in writing, of mandatory sex offender registration, prior to accepting guilty plea); *Poindexter v. Southern*, 838 So.2d 964 (Miss. 2003)(the word “shall” means “must”), *State v. Santiago*, 773 So.2d 921 (Miss. 2000)(a plea is voluntary if the defendant understands the “effect of the plea, and the possible sentence”), *State v. Mitchener*, 2007 Miss. App. Lexis 956 (2007) and *Jones v. State*, 949 so.2d 872 (2007)(both PCCR cases where attorney had mis-advised client, client had only one witness to corroborate his own affidavit, Magyar has his father’s affidavit, the Court file, plea colloquy and an expert affidavit to corroborate his affidavit and claims), *Young v. State*, 731 So.2d 1120 (Miss. 1999) and *Myers v. State*, 583 So.2d 174 (Miss. 1991)(appeal from summary dismissal of a petition for post conviction relief “is analogous to that when a defendant in a civil action moves to dismiss for failure to state a claim”).

For the forgoing reasons, the petitioner/appellant, John Anthony Magyar, requests that this matter be reversed and remanded to the trial court for trial upon the merits of the indictment, or in the alternative, remanded for an answer to be filed by the government, then limited discovery to be had and then a hearing on the merits of the Petition for Post Conviction Review.

Respectfully submitted, this the 09th day of March, 200~~8~~⁹.



James L. Kelly, Attorney for John A. Magyar

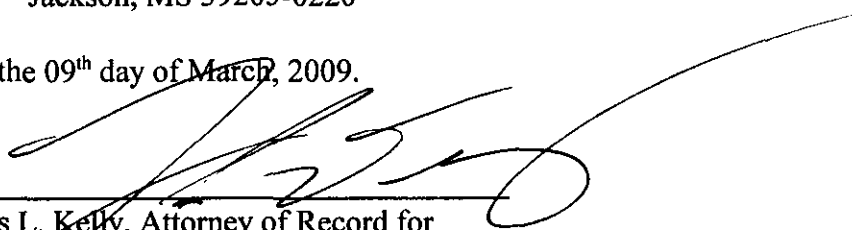
Kelly Law Office, P.C.

CERTIFICATE OF SERVICE

The undersigned counsel of record certifies that the foregoing supplemental brief has been delivered this date by United States mail to the following persons who have an interest in the outcome of this case, including the Circuit Court Judge in the court below and counsel for the State of Mississippi.

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This the 09th day of March, 2009.



James L. Kelly, Attorney of Record for
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