IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RODGER DALE JORDAN — APPELLANT

VS. — NO. 2008-CA-0914-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

RULES

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PROCEDURAL HISTORY:

On July 27, 2006, Rodger Dale Jordan, "Jordan" plead guilty to the statutory rape of Ms. Meagan Britt on or about October 11-13, 2005. C.P. 23-30. The trial court found that Jordan's plea was voluntarily and intelligently entered. Jordan was sentenced to serve a thirty year sentence with fifteen years suspended. C.P. 185-187.

On May 3, 2007, Jordan filed a motion for post conviction relief. C.P. 4-22. In that motion Jordan claimed ineffective assistance of counsel, alleged newly discovered evidence, and a lack of a voluntary and intelligent plea. C.P. 4-22.

After allowing a response from the state, and providing a hearing for Jordan and his counsel, the trial court denied relief. C.P. 193-194; R. 4-145; C.P. 209-211.

From that denial of relief, Jordan filed notice of appeal. C.P. 213.

ISSUES ON APPEAL

I.

DID JORDAN RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

II.

WAS JORDAN GIVEN DUE PROCESS? WAS THERE EVIDENCE OF MATERIAL FACTS?

III.

WAS JORDAN'S PLEA VOLUNTARILY AND INTELLIGENTLY ENTERED?

IV.

WERE THERE CUMULATIVE ERRORS?

STATEMENT OF THE FACTS

On February 10, 2006, Jordan was indicted for the statutory rape of Ms. Meagan Ann Britt under M. C.A. § 97-3-65(1)(b). C.P. 182-183. This occurred on or about October 11-13, 2005. Ms. Megan Britt was "under the age of fourteen" and was more than thirty six months younger than Jordan. She was not married to him. C.P. 87-134. Jordan was over eighteen, being some thirty years old. Jordan was indicted as a M. C. A. §99-19-81 habitual offender. C.P. 182-183.

Mr. Jordan had prior felony convictions for grand larceny, possession of methamphetamine, and theft of anhydrous ammonia, an ingredient used in manufacturing methamphetamine. C.P. 183-184. He acknowledged having these convictions at his guilty plea hearing. C.P. 23.

On July 26, 2006, a hearing was held on the state's motion under M. R.E. 803(25) tender years hearsay exception and Jordan's motion under M. R. E. 412(b)(2)(a), "source of pregnancy." M.R.E. 412 provides for admission of sexual history of a sex crime victim where relevant. C.P. 31-181.

Mr. Jordan's motion was premised upon the victim being pregnant by a non-white teenager rather then by him. Since Megan Britt's father, Mr. Larry Britt, was allegedly a violent racist, the child victim would be afraid to tell who was the non-white source of the semen at issue. Mr. Jordan and Mr. Britt had previously been in prison together. C.P. 110.

The trial court heard testimony from Ms. Laken Britt, the victim's sister, and Ms. Megan Ann Britt, the alleged victim, with cross examination by Jordan's counsel. C.P. 31-170.

After hearing testimony, the trial court found that Ms. Laken Britt would be allowed to testify. She could testify about what her sister, the child victim, told her about being allegedly raped by Jordan. Jordan was an adult male friend of the child's father and mother. The trial court found that this statement to Laken, her sister, had "indicia of reliability." This was under M. R.E.

803(25).

Ms. Laken Britt, the victim's sister, testified that Megan tested negative for pregnancy. This occurred the same night her sister mentioned possibly being pregnant. R. 118. When questioned by Laken about what happened , Ms. Megan Britt, now deceased from bone cancer, told her of being forced to have sex with Jordan. She knew Jordan as a friend of her father's and as having been previously in prison with him. C.P. 110. Megan was afraid of Jordan.

Ms. Megan Bitt testified at the hearing on the motion. C.P. 87-134. She testified that she was afraid she might be pregnant. This was after being raped by Jordan. He did not use a condom. And after this event, Megan missed her menstrual cycle. R. 97; 102. She knew Jordan had been a fellow inmate with her father. She believed Mr. Jordan was "doing drugs with my dad." R. 105. This was prior to his sexual assault on her in his car.

She testified that she did not initially tell what happened to her because she was afraid of "what he might do to me ..." R. 134.

Jordan's motion was under M. R.E. 412 (b)(2)(a), "source of semen or pregnancy." The motion was based upon the assumption that the victim was possibly pregnant by a non-white teenager, which was shown not to be the case. The premise behind the motion was that an allegedly pregnancy provided a motive for the victim to lie. Since Megan's father was an alleged violent tattooed white racist, Megan would be afraid to reveal the person with whom she had sex. C.P. 144-181.

After a hearing, the court found that there was sufficient evidence for finding that the victim was not pregnant. R. 162. The premise for providing a motive to lie was thus not supported by any factual evidence. The trial court denied a motion to include testimony about the victim's alleged prior sexual involvement with a teenager.

On July 27, 2006, Jordan pled guilty to the statutory rape of Ms. Meagan Britt on or about October 11-13, 2005. C.P. 23-29. He was represented by Mr. Robert S. Laher. C.P. 23.

At the hearing on his plea, Mr. Jordan admitted under oath that he knew the constitutional rights he was waiving by pleading guilty. This included his right to a trial by jury with cross examination, and a right against self incrimination. C.P. 23- 24. Jordan also admitted that he knew he was waiving his right to appeal his conviction if he plead guilty. C.P. 24-25.

Jordan admitted that he had not been promised anything or coerced in any way to plead guilty. C.P. 24. Jordan admitted that he was "satisfied" with the advise and service provided by his guilty plea counsel, Mr. Laher. C.P. 24-25.

Mr. Jordan admitted that he knew the statutory rape of a thirteen year old female with which he was charged. He admitted that he "was guilty" of having committed that felony. C.P. 25. He admitted that he knew the maximum life sentence and the minimum twenty year sentence for which he could be sentenced if his guilty plea was accepted. C.P. 25.

Jordan admitted that he knew the thirty year sentence with fifteen years suspended which the prosecution was recommending. Jordan knew that he was being allowed to plead guilty as an non-habitual offender even thought he admitted that he had three prior convictions. C.P. 23-29.

The trial court , the Honorable Sharon Aycock , found after advising and questioning Jordan, that his guilty plea was freely, voluntarily and intelligently entered. The court found "a factual basis for the entry of the plea." C.P. 26-27.

At a separate sentencing hearing, Jordan was sentenced to serve a thirty year sentence with fifteen years suspended. This was the same as the recommended sentence. C.P. 28; 209.

On May 3, 2007, Jordan filed a motion for post conviction relief. C.P. 4-22. In that motion Jordan claimed ineffective assistance of counsel, newly discovered evidence, and a lack of a

voluntary and intelligent plea. After allowing a response from the state, the trial court granted a hearing on his petition. R. 4-145.

The trial court heard testimony from guilty plea counsel, as well as Jordan and his mother. She also heard from Mr. Jessie Cornejo, and Mr. Jonathan Bolton, both of whom alleged to have sex with the victim. The record reflects that Jordan's mother admitted to having paid Cornejo and Bolton to testify. R. 128; 138-140. The record reflects that a third proposed African American male witness filed an affidavit saying he had no sexual relationship with the victim. C.P. 204.

After providing a hearing on Jordan's petition , the trial court denied relief. C.P. 193-194; R. 4-145; C.P. 209-210.

Guilty plea counsel testified at that hearing along with Jordan. R. 1-145. Mr. Laher testified that he did not advise Jordan that he could appeal from his guilty plea. R. 25. He also testified that in his best opinion, given the facts of the case as know to him by discovery, he believed the chances of Jordan being found guilty by a jury was greater than that of his being acquitted. R. 24. Laher also testified that the motion for admission of the victim's history was premised upon the assumption that the victim was pregnant by a non-white male. However, this was proven not to be the case. R. 31-34.

From that denial of relief, Jordan filed notice of appeal to the Mississippi Supreme Court. C.P. 213.

SUMMARY OF THE ARGUMENT

1. The record reflects that the trial court found a lack of evidence of any ineffective assistance of counsel. C.P. 209-211. There is credible, substantial corroborated in support of the trial court's decision.

The record from the guilty plea hearing and the hearing on Jordan's petition indicates that Jordan received effective assistance of counsel. C.P. 23-29. Jordan's claims are contradicted not only by his guilty plea counsel, but also by his own testimony at the hearing on his motion. R. 25; C.P. 25.

At the hearing on his petition, Mr. Laher, guilty plea counsel, testified he did not advise Jordan he could appeal from his guilty plea conviction. R. 25. Jordan testified that he would lie when convenient. R. 95. This was when he admitted that he was contradicting himself in his testimony at the hearing on his petition.

Mr. Jordan's mother admitted paying witnesses Mr. Conejo and Mr. Bolton prior to and after their testimony at a hearing on Jordan's motion. R. 128; 138; 140. A third proposed witness, Sean Robinson, filed an affidavit stating he never had any sexual relationship with the deceased victim. C.P. 22; 203.

The record reflects that affidavit of Ms. Sappington is identical "word for word" with the affidavit of Jordan's mother, Ms. McGregor. C.P. 20-21.

Instead of serving a possible life sentence, the record reflects Jordan is serving a thirty with fifteen year suspended sentence. R. 209.

The appellee would submit the record reflects credible, substantial record evidence in support of the trial court's denial of relief on grounds of ineffective assistance of counsel. C.P. 209-211.

2. The record from the hearings in the record indicate that Jordan was given "due process." He was

given a hearing with counsel at his guilty plea hearing. He was given a hearing with counsel on his proposed M. R. E. 412 evidence. C.P.31-178. He was also given a hearing with counsel on his PCR petition. R. 4-145.

The record reflects that the trial court found there was no admissible evidence, much less any newly discovered admissible relevant M. R.E. 412 evidence. C.P. 210. The testimony indicated there was no admissible evidence, much less evidence that would have resulted in a different result at Jordan's guilty plea. See M. C. A. § 99-39-5(2).

After hearing testimony, the trial court denied the motion, finding no basis for testimony about the alleged victim's sexual history. C.P. 31-180. The court found that the basis for the motion was flawed. The alleged victim was not pregnant. R. 162.

3. The record from the guilty plea hearing indicates that the trial court found that Jordan's guilty plea was voluntarily and intelligently entered. C.P. 185-187; 209-211. The record from the guilty plea hearing indicates that Jordan and his counsel were questioned about the petitioner's understanding of "the nature of the charges and the consequences of his plea." C.P. 23-29. Jordan admitted knowing the statutory rape charge, the maximum and minimum sentences for a conviction, and the recommended sentence by the prosecution. He admitted that he was guilty of the statutory rape of Ms. Megan Britt. C.P. 25.

He admitted that he knew he was waiving his right to a trial with cross examination and a right against self incrimination. C.P. 25. He also acknowledged that he was waiving his right to direct appeal from a conviction. C.P. 25. He admitted that he was "satisfied" with the advise and counsel of his attorney, Mr. Laher. C.P. 26. He admitted that he was pleading guilty "freely and voluntarily." He had not been promised anything or coerced into pleading guilty. C.P. 24. He admitted that after receiving his counsel's advise, he believed it was in his "best interest" to plead

guilty. C.P. 26.

The appellee would submit that this was sufficient corroborated evidence in support of the trial court's finding that Jordan's plea was voluntarily and intelligently entered. C. P. 211.

4. There were no errors, individual or cumulative, that interfered with or prevented Jordan from pleading guilty intelligently, freely and voluntarily. **Coleman v. State**, 697 So. 2d 777, 787 (Miss. 1997).

ARGUMENT

PROPOSITION I

JORDAN RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Jordan believed, as stated in his motion, that he did not receive effective assistance of counsel prior to and during his guilty plea hearing before the Circuit Court of Pontotoc County. Jordan claimed that his counsel "coerced" him into pleading guilty by advising him if convicted by a jury he could receive a life sentence. He also thinks that he erroneously advised him that he could appeal from his conviction. He thinks his mother's affidavit supporting his claims were not considered by the trial court. Motion for post conviction relief. C.P. 5; 12-15; appellant's brief page 7-16..

Mr. Laher testified at the hearing on Jordan's petition. R. 5-36. He testified that he did not advise Jordan that he could appeal his conviction, as Jordan alleged in his petition.

> Q. **Did you tell Rodger Jordan that he could appeal this plea of guilty in this case?**
>
> A. That's a difficult question. **I mean I didn't tell him he could appeal it. I explained to him his legal rights, what his legal rights are as far as, "if you plead guilty, you cannot–there is no appeal. There's not a direct appeal. The only alternative to that that I know of is, you know, PCRs and people do PCRs. But I didn't tell him to do a PCR or anything like that.** R. 25. (Emphasis by appellee).

The record reflects that Jordan under oath advised the trial court that he was "satisfied" with the advise and counsel provided by Mr. Laher. C.P. 26. This was at his guilty plea hearing.

> Q. **Mr. Jordan, are you satisfied with your legal counsel, Mr. Laher?**
>
> A. **Yes, ma'am.** C.P. 26. (Emphasis by appellee).

When questioned by the trial court while under oath Jordan admitted that he "understood" that by pleading guilty he was "waiving or giving up" his right to appeal from his conviction. C.P. 26. This was at his guilty plea hearing. His statement contradicts his claims in his petition.

Q. **Mr. Jordan, this is very important. Do you understand that today is made final in this sense. If you enter your plea today and I accept your plea, you will have waived or given up your right to appeal this case?**

A. **Yes.** C.P. 25. (Emphasis by Appellee).

At cited above, Mr. Laher testified that he did not misadvise Jordan about any right to appeal after a guilty plea. Rather he told him that he could file "a motion for post conviction relief." This appeal from a denial of Jordan's post conviction relief motion indicates that he exercised his right to review for collateral relief. C.P. 4-22. This was in accordance with Mr Laher's advise.

The record reflects that Jordan admitted that he understood that the maximum sentence for statutory rape was "life" imprisonment if set by a jury. C.P. 25.

The record reflects that as a result of his guilty plea counsel's assistance Jordan pled guilty as a non-habitual offender even though he admitted to having three prior felony convictions. C.P. 23. He was indicted as a M. C. A. § 99-19-81 habitual offender. C.P. 25 ; 182-183.

The record reflects that Jordan, who admitted that he qualified for enhanced punishment as an habitual offender, was sentenced not to a life sentence but to a thirty with fifteen years suspended sentence. This was the recommendation from the prosecution Jordan admitted knowing prior to his pleading guilty. C.P. 25; 28.

For Jordan to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). Jordan must prove: (1) that his counsel's performance was "deficient," and (2) that this supposed deficient performance "prejudiced" his defense. The burden of proving both prongs rests with Jordan. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990).

Finally, Jordan must show that there is "a reasonable probability" that "but for" these alleged

errors , the result of his guilty plea hearing would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

The second prong of the **Strickland v. Washington**, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is "a reasonable probability" that but for the alleged errors of Mr. Laher, the result of Jordan 's guilty plea would have been different. This is to be determined from "the totality of the circumstances" involved in his case.

Appellee would submit that based upon the record cited, there is a lack of evidence for holding that there is "a reasonable probability" that Mr. Laher erred in advising, and assisting Jordan before and during the guilty plea hearing.

As stated in the trial court's order denying relief, Jordan did not meet his burden for establishing his claim of ineffective assistance. C.P. 209-211. His statements under oath at his guilty plea hearing "contradicted" his claims in his motion for post conviction relief. C.P. 25. And his guilty plea counsel who testified at the hearing on his petition, also contradicted Jordan. R. 25.

> The court is of the opinion that none of the arguments provides a basis for any type of relief. Petitioner states that his counsel, Honorable Rob Laher, was ineffective in a number of ways. To establish such a claim petitioner bears the burden of showing that counsel's representation was deficient and that the petitioner suffered prejudice from that deficient performance. ...**Petitioner has wholly failed to meet this burden. The petitioner, while acknowledging difficulties between he and counsel nonetheless stated that he had been adequately represented during the plea... The only other testimony in support of the petitioner's claim in this regard is that of his mother, whose credibility in this matter is somewhat called into question by the payments to another witness, Jonathan Bolton, who testified during the hearing on the motion for post conviction relief.** C.P. 209-210. (Emphasis by Appellee).

At the hearing on Jordan's petition, Jordan's counsel acknowledged that the witnesses presented by Jordan as the hearing on his M. R. E. 412 motion were paid to testify both before and after their testimony. R. 128; 138. The witnesses were Mr. Jonathan Bolton, and Mr. Jessie Cornejo.

R. 60-76. They were paid to testify by Jordan's mother, Ms. McGregor.

> Q. Okay. **But the fact remains that these witnesses, who you acknowledge are known ne'er do wells, got money both prior to and after testifying from Ms. McGregor, did they not?**
>
> A. **It's true and Ms. McGregor will answer for that.** R. 138. (Emphasis by appellee).

Ms. Victoria Foster, the source of information, about the victim's alleged sexual relations with others admitted that she had a grudge against the victim. This was because they had both dated the same young man.

> Q. **So at the time you made these statements about Megan, you and Megan were not friends, were you? You didn't like Megan, did you?**
>
> A. **I didn't--I guess not. I guess that's what you could say.** R. 54. (Emphasis by appellee).

In addition, another of Jordan's proposed witnesses, Mr. Sean Robinson, an African-American, submitted an affidavit stating "we never had sex or any type of sexual contact..." C.P. 22; 204.

Mr. Jordan testified at his hearing, claiming that his counsel coerced him into pleading guilty. R. 76-124. When faced with his sworn statements that contradicted his claims in his petition, he admitted that he was allegedly "committing perjury." R. 90. This was when he stated as shown above that he knew that he was waiving his right to a direct appeal of his conviction. C.P. 25.

On cross examination, he admitted that he could not both be telling the truth at the hearing on his petition and at the hearing on his guilty plea. He also admitted that he would lie if necessary to advance his interest.

> Q... **You'll lie when you have to because you're either lying then or you're lying now. And what the court knows if you feel like you need to, you'll lie. Correct?**

A. **Correct.** R. 95. (Emphasis by appellee).

Appeal counsel argues in his brief that the trial court did not sufficiently consider the affidavits of Jordan's mother, Ms. McGregor or Jordan's girl friend, Ms. Sappington. C.P. 20-21. An examination of those two affidavits indicate they are "word for word" copies of each other. The two different proper names were merely exchanged. C.P. 20-21. They were "word for word" copies filed on the same date.

In addition, as stated in the trial court's order denying relief, there was sufficient evidence for questioning Ms. McGregor's credibility. She made payments to Jordan's witnesses. C.P. 210; R. 128; 138. See cite to record above with admission by post conviction relief counsel that McGregor paid not only Bolton, but also Conejo.

Mr. Conejo admitted that he was awaiting trial on a felony possession of marijuana charge. R. 66. Mr. Bolton admitted that he had been incarcerated for breaking and entering. R. 74. He also admitted that he was a "regular user of marijuana." R. 74.

Mr. Conejo also contradicted an assumption involved in Jordan's M R E 412 claim about the victim's father being a violent tattooed white racist ex-convict. He testified that he was an Hispanic but the victim's father never showed him any disrespect when he was around him or his daughter. He never asked him "to leave the home."R. 64-65.

In **Gable v. State**, 748 So. 2d 703, 706 (Miss. 1999) the court in affirming the trial court's dismissal of Gable's contentions without a hearing quoted **Mowdy v. State**, 638 So. 2d 738, 743 (Miss 1994). The Court found that Gable's statements under oath "contradicted" the claims made in his motion. In the instant cause, Jordan was given a hearing. At the hearing,

not only was Jordan contradicted by his own testimony at his guilty plea hearing but also by his guilty plea hearing counsel at a hearing on his petition for post conviction relief.

> Great weight is given to statements made under oath and in open court during sentencing. **Young**, 731 So. 2d 738, 743 (Miss. 1994). The transcript of Gable's guilty plea hearing belies his current contentions. Furthermore, Gable produced no affidavits other than his own contradicting his earlier sworn statements. Because the only support offered by Gable is his own affidavit which is contradicted by unimpeachable documents in the record, we conclude that an evidentiary hearing was not required. Accordingly, we affirm the trial court's judgment denying Gable post conviction relief.

The appellee would submit that there is more than sufficient corroborated evidence in support of the trial court's finding that Jordan received effective assistance of counsel. Jordan did not meet his burden for proving either that he was misinformed, or mislead by his counsel much less that this alleged misfeasance prejudiced his defense.

While he filed affidavits from his mother, and girl friend, they were identical "word for word." C.P. 20-21. They were contradicted by the testimony of guilty plea counsel testifying under oath. R. 25. The mother admitted to paying two of the witnesses who testified at the hearing on his motion and on his petition. R. 128; 138, 210.

At Jordan's guilty plea hearing, he admitted that he would lie if it were convenient. R. 95.

This issue is lacking in merit.

PROPOSITION II

JORDAN WAS GIVEN DUE PROCESS. AND HIS GUILTY PLEA WAS NOT COERCED.

In his appeal brief, Jordan argues for the first time that his due process rights were allegedly violated. In support of his claim, he mentions that he believes Jordan was manipulated and coerced into pleading guilty. Appellant's brief page 16-19.

Jordan was given a hearing with counsel at his guilty plea hearing. C.P. 23-30. He was given a hearing with counsel and cross examination on his proposed M. R. E. 412 evidence. C.P.31-178. He was also given a hearing with counsel, witnesses, and cross examination on his PCR petition. R. 4-145.

The record reflects that the second issue raised in Jordan's motion was whether there was newly discovered issues of fact requiring dismissal in the interest of justice. C.P. 8; 15-17. There were no issues raised about Jordan's due process rights, to the best of the appellee's knowledge.

Issues that were not raised with the trial court in Jordan's petition were waived.

In **Gardner v. State**, 531 So. 2d 808-809 (Miss. 1988), this Court found that issues not raised with the trial court in a post conviction relief motion could not be raised for the first time on appeal to this court.

> The issue regarding the constitutionality vel non of Sect. 97-1-1, M.C.A. (1972), was not raised in Gardner's motion for post conviction relief and may not be raise now. **Colburn v. State**, 431 So. 2d 1111, 1114 (Miss. 1983).

Jordan alleged in his petition that there existed new evidence which allegedly provided a motive for lying on the part of the victim. This was a motion under 412(b)(2)(a) , "source of pregnancy." The victim was allegedly fearful of her father. He was, according to Jordan. a tattooed violent white racist. He was also an ex convict who used drugs. If he knew of his daughter having

a sexual relationship with an African-American or a Hispanic, he allegedly would have probably become violent toward her. Appellant's post conviction relief brief page 4-20.

The record reflects that a hearing was held on these allegations in support of a M. R. E. 412(b)(2)(a) "source of pregnancy" claim. This would be a hearing to determine if the sexual history of the victim was relevant for admission under the facts of this case. C.P. 31-180.

After hearing testimony from the cancer patient victim and her sister, the trial court found that the central claim of pregnancy upon which the motion was premised was shown not to be factually correct. C.P. 162.

> **The fact is that she is not pregnant, and I think that there is just great fallacy in the offer of proof as the facts turn out to be what they are.** C.P. 162. (Emphasis by appellee).

At the hearing, the trial court heard testimony from Ms. Laken Brit, as well as the alleged victim, Ms. Megan Brit t and Mr. Laher, Jordan's counsel. Laken testified that Megan identified Jordan as the person who raped her. While Megan mentioned she might be pregnant, her sister, Ms. Laken Britt, had her take a pregnancy test. She was determined not to be pregnant.

> A...**Yeah, I went and got a pregnancy test. We did it all that night. She knew she wasn't pregnant, and then we talked about what happened to her.** R. 118. (Emphasis by appellee).

Mr. Laher also testified at the hearing on Jordan's petition for post conviction relief. On redirect, he admitted that the claim under Rule 412 was based upon the fact that the child "thought" that she was pregnant rather than that she was in fact pregnant. R. 31-34.

At the hearing on this motion, the victim identified Jordan as the person who raped her. She testified that he put his penis "inside" her vagina. C.P. 96-97. He did not use a condom, which was one of the reasons Megan believed she might become pregnant.

> Q...**I need the details. Did he actually stick his penis inside your vagina?**

A. **Yes, ma'am.** C.P. 97. (Emphasis by appellee).

At the time of the hearing, Megan was being treated for bone cancer at a Memphis hospital. C.P. 170. The child victim is now deceased. R. 210.

Finally, the record reflects that the testimony establishing that Ms. Megan Britt was not pregnant was sufficient for eliminating any motive for her to lie. For the testimony established that she was found by test not to be pregnant the same night she revealed what Jordan did to her to her sister.

In **Donnelly v. State** 887 So.2d 833, 835 -836 (Miss.App. 2004), the Court pointed out that the burden was on the petitioner to show that the evidence proposed was not discoverable before trial with the exercise of due diligence.

> It is incumbent upon the prisoner to allege facts and offer proof to show that the alleged "new evidence" was not discoverable at the time of trial. The "proponent must show that evidence has been discovered since trial, that it could not have been discovered before trial by the exercise of due diligence, that it is material to the issue, and that it is not merely cumulative or impeaching." **Williams v. State**, 669 So.2d 44, 55 (Miss.1996). Donnelly does not offer a scintilla of evidence to show why the testimony of these three co-defendants was not reasonably discoverable prior to his guilty plea on January 24, 2000; he simply claims that the evidence was not available to him prior to that time and does not explain why it was previously unavailable to him.

As stated by the trial court in denying relief, the record from the hearing on the motion reflects a lack of evidence for meeting the conditions for allowing the admission of an alleged sexual victim's intimate history admissible.

> Petitioner also claimed that his plea of guilty should be set aside since there existed evidence of material facts not presented and heard, that would require a vacation of his plea in the interest of justice. **The court finds that these alleged facts relating to the sexual history of the now deceased victim in this case were and are immaterial and inadmissible.** C.P. 210. (Emphasis by appellee).

The record reflects that there was no support for finding any new relevant evidence existed.

This would be evidence that would have resulted in a different result than that which was rendered by Jordan's guilty plea.

Mr. Jordan was given his due process rights at his guilty plea hearing, his motion hearing, and the hearing on his petition for post conviction relief.

This issue is also lacking in merit.

PROPOSITION III

THE RECORD REFLECTS THAT JORDAN'S PLEA WAS VOLUNTARILY AND INTELLIGENTLY ENTERED.

Jordan argued that his plea was not intelligently and voluntarily entered. Jordan claimed to have been threatened into pleading guilty by his guilty plea counsel. He also claimed that he was erroneously lead to believe by his counsel that should he plead guilty, he would have the right to a direct appeal from his conviction. Jordan thinks he was "coerced and cajoled" into pleading guilty under threat of a life sentence. Motion, page 4-22, appellant brief page 16-19..

To the contrary, the record from the guilty plea hearing, reflects that Jordan was not pressured to plead guilty, or enticed to do so by misleading or false information. C.P. 23-30. Rather the record indicates corroborated support for the trial court's finding, after the guilty plea hearing, that Jordan's plea was voluntarily and intelligently entered. There was also a factual basis for the plea. Jordan admitted that he was guilty of the statutory rape offense. C.P. 25.

Jordan testified under oath that he had not been promised anything or coerced into pleading guilty. He was pleading guilty freely and voluntarily. This contradicts his claim of being "coerced" as claimed in his appellant brief.

Q. **Has anyone promised you anything, offered you anything, tried to coerce you or threaten you into entering this plea?**

A. **No, ma'am.**

Q. **Is this plea free and voluntary?**

A. **Yes, ma'am.** C.P. 24. (Emphasis by appellee)

Jordan admitted that he was guilty of statutory rape of the victim who was under fourteen years of age. C.P. 25.

Q. **Thank you sir. And do you understand the charge and did you commit the**

crime as amended? (changing the age of the victim from under sixteen to under fourteen)

A. **Yes, ma'am.** C.P. 25. (Emphasis by appellee).

The record reflects that Jordan admitted that he had three prior convictions for which he had served prison terms. They were for grand larceny, possession of methamphetamine, and theft of anhydrous ammonia which is needed for manufacture of meth. C.P. 23.

Jordan therefore would have knowledge about the differences between a direct appeal and a post conviction relief motion. And, of course, this present appeal is the result of his having filed a motion for post conviction relief, challenging his guilty plea conviction. C.P. 4-22.

Jordan admitted that he knew the indicted charge. He admitted that he was guilty of statutory rape. C. P. 25 . Jordan knew the maximum and minimum sentences for statutory rape, as well as the recommendation from the state. That recommendation was for thirty with fifteen years suspended, which was the sentence he received. C.P. 25-26.. He admitted that he was "satisfied" with the services provided by his guilty plea counsel, and that as a result of Mr. Laher's advise and counsel, he believed it was in "his best interest" to plead guilty. C.P. 26. On cross examination, Mr. Laher testified that he did not advise Jordan that he could appeal his conviction, as he alleged in his motion.

Q. **Did you tell Rodger Jordan that he could appeal this plea of guilty in this case?**

A. That's a difficult question. **I mean I didn't tell him he could appeal it. I explained to him his legal rights, what his legal rights are as far as, "if you plead guilty, you cannot–there is no appeal. There's not a direct appeal. The only alternative to that that I know of is, you know, PCRs and people do PCRs. But I didn't tell him to do a PCR or anything like that.** R. 25. (Emphasis by appellee).

In **Alexander v. State** , 605 So. 2d 1170, 1172 (Miss. 1992), this Court found, in accord with **Boykin v. Alabama**, 395 U. S. 238, 242 (1969), that a defendant must be advised and

understand the nature of "the charge against him and the consequences of the plea." This is necessary if the plea is to be accepted on the record as voluntarily and intelligently entered.

> A plea of guilty is not binding upon a criminal defendant unless it is entered voluntarily and intelligently. **Myers v. State**, 583 So. 2d 174, 177(Miss. 1991). A plea is deemed "voluntary and intelligent" only where the defendant is advised concerning the nature of the charge against him and the consequences of the plea. See **Wilson v. State**, 577 So. 2d 394, 396-97(Miss. 1991). Specifically, the defendant must be told that a guilty plea involves a waiver of the right to a trial by jury, the right to confront adverse witnesses, and the right to protection against self incrimination. **Boykin v. Alabama**, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969). Rule 3.03 of the Uniform Criminal Rules of Circuit Court Practice additionally requires, inter alia, that the trial judge "inquire and determine" that the accused understands the maximum and minimum penalties to which he may be sentenced.

The record reflects that Jordan knew the statutory rape charge for which he was indicted. He admitted that he was guilty of having committed that felony. C.P. 25. He admitted that he knew the constitutional rights he was waiving by pleading guilty. C.P. 23-24. This included his right to a jury trial with cross examination of witnesses. It also included his right against self incrimination. And crucial for this PCR petition appeal, as shown by a cite to the record, Jordan admitted he knew he was waiving his right to a direct appeal to the Supreme Court. C.P. 25.

Jordan admitted that he had not been promised anything or coerced into pleading guilty. He admitted that he was pleading freely and voluntarily. C.P. 24. This contradicted his claims in his appeal from the denial of his petition.

Jordan admitted that he knew the maximum life if fixed by a jury and the minimum twenty year sentence to which he could be sentenced should his guilty plea be accepted. He also knew the thirty years with fifteen suspended sentence recommended by the prosecution. This was the sentence he was given after his guilty plea was accepted as voluntarily and intelligently entered. C. P . 28.

In addition, Jordan admitted that he was "satisfied" with the services provided by his counsel.

And that he had independently determined that it was in his "best interest" to plead guilty. C.P. 24-25.

In the trial court's order denying relief, it pointed out that there was a lack of evidence for finding that Jordan's plea was involuntarily entered. Informing a defendant of the possible consequences of a jury trial is proper and even required of guilty plea counsel rather than something that should be construed as an improper threat to a petitioner.

> Finally, the petitioner claims that his plea of guilty should be set aside since the plea was made involuntarily. **The petitioner sets forth an argument similar to his contentions regarding the ineffectiveness of his counsel, stating essentially that Mr. Laher threatened him into pleading by stating the likely results at trial coupled with the alleged assertion that trial counsel had advised that an appeal of his guilty plea was possible. The Court notes that the petitioner pled guilty under the same pressure that is exerted in every guilty plea entered in the state of Mississippi, which is the simple fact that he faced a trial failing an entry of his guilty plea. The court finds no merit to this claim.** C.P. 211. (Emphasis by appellee).

The appellee would submit that this issue is also lacking in merit.

IV.
JORDAN'S PLEA WAS VOLUNTARY WITH APPROPRIATE ASSISTANCE OF COUNSEL

In Jordan's appeal brief, he includes alleged cumulative errors that allegedly prevented him from receiving effective assistance of counsel. Appellant's brief page 19.

As stated under the prior propositions, the records from the guilty plea hearing, the hearing on Jordan's motion under M. R. E. 412, and the hearing on his PCR petition indicate that his guilty plea was voluntarily and intelligently entered. C.P. 23-29; 31-178; R. 4-145.

The trial court found that Jordan was not threatened into pleading guilty. He acknowledged knowing that his guilty plea was waiving his right to appeal along with his right to a trial with cross examination and a right against self incrimination. He knew that he had the right to file for post conviction relief, which this appeal indicates he exercised. C.P. 4-22. And there was no evidence indicating the victim had a motive to lie because of an alleged pregnancy by a non-white semen donor. C.P. 209-210.

In **Coleman v. State**, 697 So. 2d 777, 787 (Miss. 1997), the Supreme Court stated that where there no reversible error in any part, there was no reversible error in the whole.

> This court may reverse a conviction and sentence based upon the cumulative effect of errors that independently would not require reversal...However, where there was no reversible error in any part, so there is no reversible error to the whole, quoting **McFee**, 511 So. 2d 130, 136 (Miss 1987)

In **Gardner v. State**, 531 So. 2d 808-809(Miss. 1988), this Court found that issues not raised with the trial court in a post conviction relief motion could not be raised for the first time on appeal to this court.

> The issue regarding the constitutionality vel non of Sect. 97-1-1, M.C.A. (1972), was not raised in Gardner's motion for post conviction relief and may not be raise now. **Colburn v. State**, 431 So. 2d 1111, 1114 (Miss. 1983)

Any issue not previously raised with the trial court in Jordan's petition for post conviction relief was waived. C.P. 4-21. There were no errors individual or cumulative indicating that Jordan's guilty plea counsel was ineffective in his representation. Jordan is enjoying the benefits of a fifteen year sentence as a result of his guilty plea counsel's efforts on his behalf. C.P. 189. There was overwhelming evidence of guilt, as shown in the record of this cause.

The appellee would submit that this issue is also lacking in merit.

CONCLUSION

The trial court's denial of relief on Jordan's petition, after a hearing, should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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:

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