

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MELISHA HARDING

APPELLANT

V.

CAUSE NO. 2008-CA-01216-COA

STATE OF MISSISSIPPI



APPELLEE

**CERTIFICATE OF INTERESTED PARTIES**

The undersigned counsel of record certifies that the following listed persons have an 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 disqualification or recusal.

1. Melisha Harding, Appellant
2. Hon. Robert Chamberlain  
DeSoto County Circuit Judge
3. Hon. Jim Hood  
Mississippi Attorney General
4. Hon. John Champion  
DeSoto County District Attorney
5. Hon. Celeste Wilson  
Assistant District Attorney

SO CERTIFIED, this the 17 day of November, 2008

  
Nicholas R. Bain  
MSB#   
516 N. Fillmore St.  
Corinth, MS 38834



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### **STATEMENT REGARDING ORAL ARGUMENT**

Appellant does not specifically request oral argument in this case as it is believed that the issues are capable of being adequately briefed by the parties. However, in the event the Court believes oral argument would be helpful or beneficial to the Court then Appellant does not oppose oral argument.



## **STATEMENT OF THE ISSUES**

1. Whether the Trial Court erred in denying the Appellant's Petition for Post-Conviction Relief, because Appellant never indicated that pleading guilty was in her best interests?
2. Whether the trial Court erred in holding that the Appellant was not denied her Sixth Amendment Right to effective assistance of counsel?
3. Whether the Trial Court erred by denying the Petition for Post-Conviction Relief based on cumulative error?



## **STATEMENT OF THE CASE**

### **I. Nature of the Case**

This cause has been appealed to the Mississippi Supreme Court and assigned to the Mississippi Court of Appeals from the Circuit Court of Desoto County, Mississippi. Melisha Harding, Appellant, pursuant to Miss. Code Ann. § 99-39-1 filed a Petition for Post-Conviction Relief in Cause No. CV-2008-89 in the Circuit Court of Desoto County, asserting that her constitutional rights had been violated. The Appellant had previously pled guilty under the auspices of *North Carolina v. Alford*, 400 U.S 25 (1970), to uttering a forgery and was sentenced to four (4) years as a habitual offender followed by six (6) years of post-release supervision, with five (5) years reporting and one (1) year non-reporting.

### **II. Course of Proceedings and Disposition of Lower Court**

Your Appellant filed a Petition for Post-Conviction Relief alleging that her constitutional rights had been violated. Specifically, your Appellant alleged that the trial court erred in accepting her plea of guilty because she never acknowledged that it was in her best interest to plea guilty. She further alleged ineffective assistance of counsel and that her State and Federal due process rights were violated. Your Appellant argued that under *Alford* and its progeny the trial court was required to first find that a factual basis exists for the guilty plea, and that the defendant acknowledges that pleading guilty is in her best interest. *Bush v. State*, 922 So. 2d 802 (Miss. Ct, App. 2002). Furthermore, your Appellant alleged that her counsel was ineffective because he allowed the trial court to proceed without an acknowledgment that the plea was in the best interests of his client. In addition, your Appellant alleged that the trial courts acceptance of her plea and her counsel ineffectiveness was cumulative error which mandated post-conviction relief.



After the Appellant's petition was filed the State of Mississippi was then ordered, pursuant to Miss. Code Ann. § 99-39-11(2)(3), as amended, to file a responsive pleading. In its response the State recognizes that the Appellant never stated that she was pleading because it was in her best interest. Instead the State argued that the Trial Court adequately examined the Appellant and ensured that she felt her decision was in her best interests. The State continued that there is no requirement to state these words expressly and that the questions asked by the judge were sufficient to ensure that the Appellant had voluntarily pleaded guilty. In addition, the State argued that ineffective assistance of counsel had not occurred and that any cumulative error that may have occurred was harmless.

The trial court denied you Appellant's Petition for Post-Conviction Relief and held that she had intelligently, knowingly, and voluntarily pled guilty to the charges against her. The court stated that the Appellant was not required to say she knew her plea was in her best interests, but she simply had to conclude it was in her best interest. The court then stated that the Appellant did not meet the standard of ineffective assistance of counsel and subsequently denied the Petition for Post-Conviction Relief.

### **III Statement of the Facts**

In June 2006, your Appellant was indicted for willfully, unlawfully, and feloniously, uttering a forgery, as a habitual offender under §99-19-87 of the Miss Code Ann. That on September 17, 2007, in the Circuit Court of DeSoto County before the Honorable Robert P. Chamberlin, your petitioner entered an *Alford* Plea to Count 3 of the amended indictment, that being an uttered forgery pursuant to Miss. Code Ann § 99-19-81 as a habitual offender. That on November 7, 2007 your Appellant was sentenced to ten (10) years in the Custody of the Mississippi Department of Corrections, four years (4) of



incarceration, six (6) years post-release supervision, five (5) of that reporting, one (1) non-reporting, The sentence will be served as a habitual offender pursuant to Mississippi Code 9-19-81. Your Appellant was also fined \$1,000.00.

Your Appellant then filed a Petition for Post-Conviction Relief, which was denied by the Circuit Court of Desoto County, Mississippi. From this denial she appeals.



## SUMMARY OF THE ARGUMENT

The trial court denied and dismissed your Appellant's Petition for Post-Conviction Relief filed in the Circuit Court of Desoto County. The Petitioner has appealed this judgment and states that the trial court was clearly erroneous in dismissing her petition.

The United States Supreme Court held that a defendant has the right to enter a plea of guilty to the charges against her, even if she does not admit guilt. *State of North Carolina v. Alford*, 400 U.S. 25 (1970). Mississippi has expounded on this holding and allows for *Alford* pleas to be accepted as long as the trial court finds a factual basis for the plea, and that defendant acknowledges that pleading guilty is in her best interest. *Bush v. State*, 922 So. 2d 802 (Miss. Ct. App. 2002). Your Appellant concedes that a factual basis existed; however, the trial court should not have accepted her guilty plea, and wrongfully denied her Petition for Post-Conviction Relief, because the defendant never concluded or acknowledged that pleading guilty was in her best interests. Therefore, her guilty plea should not have been accepted, and furthermore her Petition for Post-Conviction Relief should have been granted.

The United States Supreme Court has held that a claim for ineffective assistance will succeed when it is shown that "but for" the counsel's conduct the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). The record is void of any action where your Appellant's counsel informed her that the court can only accept her plea if she acknowledges that it is in her best interest. Furthermore, the counsel never stated to the court that your Appellant was pleading guilty because she believed it was in her best interest. Your appellant submits that "but for" this error by her counsel she would have known what her constitutional rights were and could have determined whether this plea was in her best interest.



The trial court was wrong in denying your Appellant's Petition for Post-Conviction Relief because, the individual errors that occurred during the plea hearing constituted cumulative error. Therefore the cumulative effect of these individual errors denied your Appellant of her fundamental and constitutional rights and she is entitled to relief.

Your Appellant, Melisha Harding, respectfully requests this Honorable Court to reverse the dismissal of the trial court and grant her Post-Conviction Relief, in the form of vacating her sentence and remanding Desoto Co. Cause No. CR-2006-537-C(D) to the trial court for a new trial.



## ARGUMENT

### **I. Whether the Trial Court erred in denying the Appellant's Petition for Post-Conviction Relief, because Appellant never indicated that pleading guilty was in her best interests?**

A trial court's denial of post-conviction relief will not be reversed absent a finding that the trial court's decision was clearly erroneous. *Smith v. State*, 806 So.2d 1148 (Miss.Ct.App.2002). However, when issues of law are raised, the proper standard of review is de novo. *Brown v. State*, 731 So.2d 595 (Miss.1999).

The Mississippi Legislature has given prisoners the opportunity to seek post-conviction relief if his plea of guilty was made involuntarily. Miss. Code Ann. § 99-39-5(f).

Your Appellant did not enter a "standard" guilty plea to the indictment against her in this case. Instead, she pled *Alford* and steadfastly maintained her innocence. The United States Supreme Court held in *North Carolina v. Alford*, that no constitutional error exists "when the defendant knowingly and intelligently concludes that his best interests require entry of the guilty plea and the trial judge makes a determination on the record that there is strong evidence of actual guilt." 400 U.S. 25 (1970).

Mississippi's Court of Appeals has interpreted *Alford* in a number of cases. Specifically, *Bush v. State*, 922 So. 2d. 802 (Miss Ct. App. 2002), in this case, that petitioner sought relief after his *Alford* plea to sexual battery of a ten-year old girl. The petitioner alleged (a) that his plea was essentially a *nolo contendere* plea and therefore void, (b) the counsel was ineffective, and (c) the plea was involuntary. *Id.* The court found no merit in the first two allegations and applied a two-prong test to determine that Bush's plea was voluntary and constitutional. *Id.*



The *Bush* test mandated that a factual basis must be present, and that the defendant must acknowledge that it is in his best interest to plead guilty under the circumstances. *Id.*

The Court further interpreted *Alford* by applying the *Bush* test in *Cougles v. State*, 966 So 2d 827 (Ms. Ct. App. 2007). In *Cougles*, the petitioner, likewise made, a claim that his plea was involuntary and unintelligently made. The court held that, even though he never specifically alleged that the plea was made in his best interest, it was intelligently made, because there was evidence from the record that the petitioner was thoroughly examined by the court and also because he spent considerable time weighing the decision to plead guilty. *Id.* at 831.

Your Appellant submits that she never acknowledged that the plea was in her best interest. Furthermore the court never made any conclusion, at the plea hearing, that your Appellant was pleading because she believed that pleading was in her best interest. The following are the relevant portions of the plea colloquy, and evidence that Ms. Harding at no time manifested a belief that pleading guilty was in her best interests:

**The Court:** Ms. Harding, it indicates this is an *Alford* plea of guilty. Do you understand what that means?

**By Defendant:** Yes, sir.

**The Court:** Let me go over it with you to make sure that you do understand. Ms. Harding, an *Alford* plea is a plea in which it means you are pleading guilty but not admitting your guilt. Do you understand that?

**By Defendant:** Yes, sir.

**The Court:** It is similar to what you might call a no contest plea. Do you understand that?

**By Defendant:** Yes, sir.



**The Court:** But do you understand that whether we refer to it as an *Alford* or refer to it as a no contest plea, it is a guilty plea nonetheless? Do you understand that?

**By Defendant:** Yes, sir

**The Court:** Is that what you want to do?

**By Defendant:** Yes, sir.

(Plea Hr'g Tr. 12-13.)

The court continued with its colloquy as follows:

**The Court:** Do you understand that by pleading guilty pursuant to *North Carolina versus Alford*, you are asking me to accept everything the State says they can prove true as being true?

**By Defendant:** Yes

**The Court:** Is that what you want to do?

**By Defendant:** Yes:

(Plea Hr'g Tr. 17.)

**The Court:** Ms. Harding are you pleading guilty because pursuant to *North Carolina versus Alford* you're asking me to accept what the State says they can prove as true as being true?

**By Defendant:** Yes.

(Plea Hr'g Tr. 28)

**The Court:** Do you understand that by pleading guilty pursuant to *North Carolina versus Alford* you are asking me to accept those facts as being true and accept those charges as being true? Do you understand that?

**By Defendant:** Yes, Sir.



(Plea Hr'g tr. 30)

Your Appellant submits that the above colloquy meets the first prong of the *Bush* test. The court allowed the State to establish a factual basis and then the Court found that a factual basis existed for the plea. Plea Hr'g Tr. 31.

However, the second prong of *Bush* is never met. The appellant submits the following as the closest the court ever comes in finding that the Appellant was pleading because it was in her best interest is the following:

**The Court:** Ms. Harding, I may have not asked you, but let me make sure that I have. Is it your decision and your decision alone to plead guilty?

**By Defendant:** Yes, Sir.

**The Court:** Are you asking me to accept that plea?

**By Defendant?** Yes, sir.

(Plea Hr'g Tr. 31)

Your Appellant submits that this does not meet the standard of *Alford* or *Bush*, and that her plea should not have been accepted and that her Petition for Post-Conviction Relief should have been granted.

In addition, unlike in *Cogle*, there is no evidence, in your Appellant's case, to suggest that this plea was well-thought out. The lower court based its denial, *inter alia*, on the fact that she was a habitual offender and therefore she *had to* conclude that the plea was in her best interest. However, Ms. Harding was not originally indicted under the Habitual Offender Statute, and in fact the State of Mississippi did not move to amend the indictment until the day of the plea. Plea Hr'g Tr. 15. Your Appellant submits that, unlike the Defendant in *Cogle*, she did not have a "number of days" to consider pleading to the "new" charges as a habitual offender.



Instead, she made a decision that day and never indicated or concluded that pleading guilty was in her best interests.

Furthermore, the trial court erred in stating that the your appellant never produced any affidavits or evidence that she did not believe the plea was in her best interest. Your Appellant concedes that she never produced any affidavit specifically stating that the plea was in not in her best interests; however, she did, pursuant to Miss. Code Ann § 99-39-9(3), submit and attach a verification form. In this form, your appellant swears and affirms that the facts in her petition are true and accurate. Therefore, she submits that at no time during the plea hearing did she conclude or did the trial court find that she was pleading because it was in her best interest.

Your Appellant submits that she never acknowledged or concluded that pleading guilty was in her best interests; consequently, her guilty plea was unconstitutionally accepted by the Trial Court. Therefore, Ms. Harding's guilty plea should not have been accepted, and the Trial Court should have granted her Petition for Post-Conviction Relief.

**II. Whether the trial Court erred in holding that the Appellant was not denied her Sixth Amendment Right to effective assistance of counsel?**

The legal test as to effective assistance of counsel was established in *Strickland v. Washington*, 466 U.S. 668 (1984), where the United States Supreme Court held that on a claim of ineffective assistance of counsel, the benchmark is "whether Counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Letherwood v. State*, 473 So.2d 964, 968 (Miss. 1985). The *Strickland* test applies to jury trials as well as guilty pleas. *Hannah v. State*, 943 So.2d 20 (Miss. 2006).



The courts have been consistent in using an outcome determinative approach in the *Strickland* analysis. The Fifth Circuit has held that even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his/her performance in other portions of the trial. *Washington v. Watkins*, 655 F.2d 1346, 1355, rehearing denied with opinion, 622 F.2d 116 (5<sup>th</sup> Cir. 1981), cert. denied, 456 U.S. 949 (1982). Even a single error by counsel may be sufficient to warrant relief. *Nelson v. Estelle*, 642 F.2d 903, 906 (5<sup>th</sup> Cir. 1981) (Counsel may be held to be ineffective due to a single error where the basis of the error is of constitutional dimension); *Nero v. Blackburn*, 597 F.2d 991, 994 (5<sup>th</sup> Cir. 1979) (“sometimes a single error is so substantial that it alone causes the attorney’s assistance to fall below the Sixth Amendment standard”).

Once ineffectiveness of counsel is shown, a violation of the Sixth Amendment is only present if the ineffectiveness has prejudiced the defendant. *Strickland*, 466 U.S. 668. Prejudice is established when there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. *Id.* The inquiry in determining whether counsel’s performance was constitutionally deficient is whether counsel’s assistance was reasonable considering all the circumstances. *Id.* At 687-688.

Honorable William F. Travis, Attorney at Law was your Appellant’s attorney at the trial level and during the plea and sentencing hearing. Mr. Travis made critical errors that seriously prejudiced the outcome of plea hearing. There is no record that at anytime Mr. Travis informed Ms. Harding that she was required to conclude or acknowledge that pleading guilty was in her best interest. Your Appellant submits that Mr. Travis was effective in every other aspect of his representation, but he was ineffective in this one area and because of that the Court unconstitutionally accepted your Appellant’s plea and she was prejudiced by this ineffectiveness



of counsel

As mention above, even a single error by counsel may be sufficient to warrant relief. *Nelson v. Estelle*, 642 F.2d 903, 906 (5<sup>th</sup> Cir. 1981). Therefore, because Mr. Travis was ineffective in this area of his representation, your Appellant is entitled to Post-Conviction relief

**III. Whether the Trial Court erred by denying the Petition for Post-Conviction Relief based on cumulative error?**

In the event the individual errors committed throughout your petitioner's plea hearing are deemed harmless, your Appellant's final claim is that the cumulative effect of these individual errors deprived her of her fundamental rights, requiring reversal of her conviction.

Several of the errors discussed above cannot be harmless. Although your Appellant is entitles to relief on any of the errors standing alone, it is clear that "[w]hen all the errors are taken together, the combined prejudicial effect requires reversal." *Williams v. State*, 445 So.2d 798, 810 (Miss. 1984). In light of the cumulative effect of the errors, your Appellant is entitled to post-conviction relief.



## CONCLUSION

Melisa Harding, Appellant in this cause, would respectfully ask this court to reverse and remand her case to the Circuit Court of Desoto County, Mississippi for a new trial based on the following errors, which have been addressed in the body of her brief:

4. Whether the Trial Court erred in denying the Appellant's Petition for Post-Conviction Relief, because Appellant never indicated that pleading guilty was in her best interests?
5. Whether the trial Court erred in holding that the Appellant was not denied her Sixth Amendment Right to effective assistance of counsel?
6. Whether the Trial Court erred by denying the Petition for Post-Conviction Relief based on cumulative error?

Your Appellant respectfully requests that this Court, upon consideration of the brief presented herein, and consideration of the facts and law relevant to the issues presented, reverse and remand this case to the Circuit Court of Desoto County, Mississippi.



**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that a true and correct copy of the foregoing has been delivered by hand or via United States Mail, postage prepaid to:

Hon. Jim Hood  
Mississippi Attorney General  
P.O. Box 220  
Jackson, MS 3205

This the 17<sup>th</sup> day of November, 2008.



Nicholas R. Bain