IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GEORGE G. MORRIS — APPELLANT

VS. — NO. 2008-CA-1361-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On September 13, 2005 George G. Morris, "Morris" pled guilty to gratification of lust and sexual battery before the Circuit Court of Hinds County, the Honorable Tomie Green presiding. R. 1-25. After advising and questioning Morris, and his counsel, the trial court found that his pleas were voluntarily and intelligently entered. R.10-11.

After a separate sentencing hearing, Morris was given a twenty years with ten years suspended sentence for sexual battery and a concurrent ten year sentence for gratification of lust in the custody of the Mississippi Department of Corrections. R. 23-24.

On May 7, 2007, Morris filed for post conviction relief. C.P. 43-52. The trial court denied relief. C.P. 151-152. Morris appealed to the Mississippi Supreme Court. C.P. 153.

ISSUES ON APPEAL

I.

DID MORRIS RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

II.

WAS SENTENCING PROPERLY CONDUCTED?

III.

DID THE TRIAL COURT ERR IN DENYING A MOTION FOR POST CONVICTION RELIEF?

IV.

WAS MORRIS' PLEA VOLUNTARILY AND KNOWINGLY ENTERED?

STATEMENT OF THE FACTS

On October 15, 2004 , Morris was indicted on two counts of sexual gratification and eleven counts of sexual battery by penile penetration of Ms. Christie Giddings by a Hinds County Grand jury. This was under M. C. A. Sect. 97-3-95(2), penetration of a child under eighteen by a person in a position of trust in her school. C.P. 1-5; 10. Ms. Giddings was a sixteen year old female student at Hillcrest Christian School in Jackson. This was where Morris was employed as a coach and teacher at the time of the alleged charges. These actions occurred between August 2002 and April 30, 2004. C.P. 5.

On September 13, 2005, Morris with the benefit of counsel pled guilty to one count of gratification of lust and one count of sexual battery. This was before the Circuit Court of Hinds County, the Honorable Tomie Green presiding. R. 1-25. The other count of gratification of lust and eleven counts of sexual battery were remanded to the prosecutor's file.

Morris was represented by the Hinds County public defender's office, Mr. Tom Fortner. R. 1.

Morris with the benefit of counsel executed and filed a sworn "Petition To Enter A Guilty Plea." C.P. 16-19. In that Petition, Morris stated that he was pleading guilty to gratification of lust, and sexual battery. C.P. 16. He stated that his attorney had informed him of the "maximum" sentences for these offenses which were "thirty years" for sexual battery, and "fifteen years" for gratification of lust. C.P. 17. He stated that he was entering "an open plea" with sentencing to be determined by the trial court. C.P. 18.

Morris also stated that "in 2002 to 2003 I engaged in sexually touching and penetrating a student while I was a teacher at the school." C.P. 18. Morris' guilty plea counsel, Mr. Fortner, certified that he had discussed "all the contents" of the petition with Morris and that he "was satisfied

that defendant fully understands" the contents as stated in the petition. C.P. 19.

Morris was sworn in by the trial court at his guilty plea hearing. C.P. 2. Morris admitted that he had executed that petition with the benefit of his counsel. He admitted that he had gone over its contents with his counsel. C.P. 2-3.

Morris admitted, as stated in his petition, that he was entering "an open plea." R. 7-8. The prosecution stated that there was no recommended sentence. It had agreed to retire eleven different additional felony counts to their files. C.P. 7. Morris admitted knowing that on an open plea sentencing would be "solely in the discretion of the court." R. 7. He admitted knowing that the court could sentence him to "the maximum on each count" for which he was pleading guilty. C.P. 8.

Morris stated under oath that he had not been promised anything or threatened, and that no one had told him the trial court would be "more lenient" if he pled guilty. C.P. 8.

He admitted that he was "satisfied with his representation." R. 9. This was with the advise, counsel and the negotiations on his behalf by his guilty plea counsel.

Morris admitted that he understood the Constitutional rights he was waiving by pleading guilty. This included his waiver of his right to a trial with cross examination of witnesses and his own right against self incrimination. R. 8.

He admitted knowing the maximum thirty year sentence for sexual battery, and fifteen year maximum sentence for gratification of lust. R. 8. He acknowledged knowing that sentencing would be left to the trial court's discretion. He admitted that he was guilty of having committed the two crimes, sexual battery and gratification of lust with the female student victim. R. 6-7.

After advising and questioning, Morris and his counsel about his understanding of the nature of the proceedings and the consequences of his pleas, the trial court found that Morris' pleas were

voluntarily and intelligently entered. R. 10-11.

The trial court accepted guilty plea counsel's request for a pre sentence investigation report. R. 11.

At the sentencing hearing, the trial court heard from Morris, his daughter and a sister in law as well as from the victim, Ms. Christie Giddings, and her mother, Mrs. Jeannie Giddings. R. 1-12. The victim and her mother requested a maximum sentence for Morris. They believed Morris was a pedophile who took advantage of his position as a teacher at Hillcrest Christian School to seduce and seriously harm their daughter. R. 23-24.

When guilty plea counsel chose to have two witnesses in addition to Morris speak at the sentencing, Morris did not object. R. 9. Nor did he in any manner indicate that he wanted other witnesses to speak on his behalf. The record also indicates that prior to sentencing the trial court had read letters written on behalf of Morris. R.9.

The trial court sentenced Morris to twenty years with ten suspended for sexual battery, and a concurrent ten year sentence for gratification of lust. R. 24.

On May 7, 2007, Morris filed for post conviction relief with benefit of counsel. He claimed ineffective assistance, an improper sentencing procedure, and an involuntary plea. C.P. 43-52.

On December 14, 2007, the trial court denied relief, finding Morris received effective assistance, and that there was no basis for his other claims for relief. C.P. 151-152.

Morris appealed to the Mississippi Supreme Court. C.P. 153.

SUMMARY OF THE ARGUMENT

1. The record reflects there was neither a showing of deficient performance or of prejudice to Morris' defense to the charge as a result. **Mohr v. State** , 584 So. 2d 426, 430 (Miss. 1991). Morris admitted in his guilty plea petition and under oath at his guilty plea hearing that he was entering "an open plea." This was on two counts with eleven other felony counts dismissed. C.P. 18; R. 7. He stated under oath that he was "satisfied" with his counsel's advise and counsel. R. 9. He also stated that no one had promised him anything, such as "a lenient sentence" should he plead guilty. R. 8. Morris had no affidavit from his guilty plea counsel with his petition. C.P. 43-53.

Therefore, Morris' answers under oath "contradicted" his claim in his affidavit that his guilty plea counsel and family led him to believe he would serve no additional time for his two felonies. C.P. 23. **Mills v. State** 986 So.2d 345, 350 (¶14) (Miss. App. 2008).

2. & 3. The record reflects that this issue was waived. It was waived for lack of a contemporaneous objection. R.1-25. **Farmer v. State** 770 So.2d 953, 959 (Miss. 2000).

The record reflects that the trial court was not requested to hear additional witnesses, and never refused to hear any witness at the sentencing hearing. R. 1-25. **Willie v. State** 585 So. 2d 660, 677 (Miss. 1991).

Rather the trial court heard from Morris as well as two of his witnesses. Morris' testimony included his own admission of guilt and apology for his behavior toward the female victim and her family. R. 1-25.

Morris' argument assumes he was entitled to have additional witnesses. Yet he did not request additional witnesses. R. 1-25. And he did not object at the sentencing hearing as to the number of witnesses. The record reflects that the trial court heard more witnesses for Morris than it did from the victim. In addition, the trial court had the benefit of a pre-sentence investigative

report, as well as letters on Morris' behalf from his friends prior to sentencing. R. 9.

4. The record reflects that Morris' guilty pleas were voluntarily and intelligently entered with a full awareness of the consequences of those pleas. C.P. 16-19; R. 1-12. **Alexander v. State** , 605 So. 2d 1170, 1172 (Miss. 1992).

There is a lack of evidence for finding that Morris was mislead by his guilty plea counsel as to his sentences. R. 1-12. The record reflects that Morris stated under oath that he had not been coerced or promised anything, and that he pled guilty of his own free will knowing he was entering "an open plea." R. 1-12. His PCR Petition in the record included his admission of guilt as well as his acknowledging that he knew the "maximum" sentences for his crimes. C.P. 17-18. **Dennis v. State** 873 So.2d 1045, 1048 (Miss. App. 2004).

Morris was not given a maximum sentence on either count. He was given "concurrent" sentences. And he had eleven other counts dismissed which could have resulted in his remaining in prison for the rest of his life. R. 23-24.

The affidavits from his sister and brother in law are "hearsay." They are also in material part "identical" to each other. C.P. 142-150. In addition, Morris' affidavit does not claim he "relied upon any firm representation" that he would receive a "time served" sentence. Rather, he claims that his relatives "confirmed my belief" that he would receive no additional time. R. 149. Morris and his witnesses did not mention any expectation of a time served sentence in their remarks during his sentencing hearing. **Hurst v. State** 811 So.2d 414, 418 (¶15) (Miss. App. 2001).

ARGUMENT

PROPOSITION I

THE RECORD SUPPORTS THE TRIAL COURT'S DENIAL OF RELIEF ON ALLEGED INEFFECTIVE ASSISTANCE.

Morris argues that he did not receive effective assistance of counsel. His counsel argues that his guilty plea counsel led Morris to believe that should he enter "an open" guilty plea, he would be sentenced to "time served." He believes that Morris and his sister's affidavits were sufficient for showing ineffective assistance on the part of his guilty plea counsel. He also complains of a lack of an objection by counsel to the limit of two witnesses at Morris' sentencing hearing. Appeal brief page 1-12.

To the contrary, the appellee would submit that the record reflects that Morris' guilty plea petition and answers under oath contradict his claims in his petition, and in his affidavit.

In **Wilson v. State** 760 So.2d 862, 864 (¶4-5) (Miss. App. 2000), the Court pointed out that mere assertions about alleged disputed facts is insufficient to warrant an evidentiary hearing. It is necessary "by affidavit or otherwise, to demonstrate that there is, in actuality, competent evidence available tending to establish those facts that would entitle the movant to some form of relief." Miss. Code Ann. § 99-39-5(1)(e)(Supp.1999); **Smith v. State**, 490 So.2d 860 (Miss.1986).

The record reflects that Morris clearly knew that he was entering "an open plea." This would be with sentencing determined by the trial court. This is what is commonly understood as "an open plea." C.P.18 ; R. 7. The record contains no affidavit from Morris' guilty plea counsel who is accused of being ineffective for allegedly having mislead Morris as to his sentences. Brief page 1-12; Petition for post conviction relief, C.P. 43-52.

As stated by the trial court, the record indicates that Morris testified under oath that he was

"satisfied with his representation." He was referring to his guilty plea counsel's efforts on his behalf. R. 9.

Mr. Morris testified under oath that no one had promised him "a more lenient" sentence, which contradicted his assertions to the contrary in his subsequent affidavit. R. 7-8. This would have included no promises from his guilty plea counsel or the trial court.

The trial court's order denying relief stated as follows:

> The court ordered a pretrial investigation and at the sentencing hearing heard testimony from the victim and supporters as well from those who spoke in defendant's favor. The court considered the pre-sentence investigation report as well as all testimony and thereafter sentenced defendant to an appropriate term of 10 years on each count of gratification and sexual battery counts (to run concurrently) in the custody of the Mississippi Department of Corrections. Defendant was also ordered to mandatory sexual counseling and placed on three years of post relief supervision. In May 2007, defendant filed the herein petition to set aside his plea and seeks post conviction relief.
>
> The court finds that defendant, was competently represented by counsel, and did willingly, intelligently, knowingly and voluntarily plead guilty to the charges of gratification and sexual battery, after being thoroughly advised by the court on his waiver of constitutional rights. Defendant also advised that he was satisfied with the representation provided by counsel. R. 151.

As stated in the Order, the trial court found that Morris testified under oath that "he was satisfied with the representation" of his guilty plea counsel. C.P. 9. The trial court found from the record of this cause that Morris was competently represented by his guilty plea counsel. The record reflects that his guilty plea counsel was an experienced trial advocate with many years of experience in the court room.

On page 2 of Morris' "Petition To Enter A Guilty Plea," he stated he understood the following:

> "The punishment which the court may impose for this crime that I am charged with is as follows: gratification of lust, fifteen years maximum, sexual battery thirty years maximum."C.P. 17.

On page 3, Morris' acknowledged that he understood that he was entering "an open plea." This meant that sentencing would be determined by the trial court after a pre-sentence investigation. C.P. 18. He admitted that he was guilty of both touching and penetrating with his penis the vagina of a student while he was in a position of trust as a teacher in her Christian school. C.P. 18.

At his guilty plea hearing, Morris stated under oath that he knew he was entering "an open plea," with sentencing to be determined by the trial court. He understood that some eleven other felony counts would be dismissed. He acknowledged that no one had promised him a "more lenient" sentence.

> Q. **Mr. Morris, is your understanding that the state would not make any recommendation for sentencing; that you're taking an open plea, but that the state would be remanding to the file counts 1,3, and 5 through 13?**
>
> A. **Yes, ma'am.**
>
> Q. **And by taking an open plea, you understand that the sentencing will be solely in the discretion of the court?**
>
> A. **Yes, ma'am.**
>
> Q. **And understanding that. I can sentence you-do you understand that I could sentence you to the maximum on each of the charges, count 2 and count 4?**
>
> A. **Yes, ma'am.**
>
> Q. **Has anyone promised you anything or threatened you in order to get you to plead guilty?**
>
> A. **No, ma'am.**
>
> Q. **Has anyone told you I'd be more lenient if you pled guilty?**
>
> A. **No, ma'am.** C.P. 7-8.
>
> ...
>
> Q. **You're in court this morning with your attorney, Mr. Fortner. Have you been satisfied with his representation?**

A. **Yes, ma'am.** C.P. 9. (Emphasis by appellee).

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 errors of his counsel, the result of Moores 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 we have cited, there is a lack of evidence for holding that there is a reasonable probability that guilty plea counsel erred in advising and assisting Moore. This would be in advising him, executing a petition to enter a guilty plea , and in pleading guilty under oath before the trial court.

It would also include his representation at the sentencing hearing. R. 1-25. Morris was present when his counsel chose to have his daughter and sister in law speak on his behalf. R.9. There was no objection from Morris nor any request on his behalf for any additional witnesses. R. 9.

The record reflects that Morris is not serving a maximum sentence. Rather he is serving two ten year "concurrent" sentences. R. 24. As a result of his counsel's efforts on his behalf he had eleven other counts dismissed for which he could have served additional lengthy prison terms. This could have resulted in the equivalent of a life sentence for Morris.

As stated in **Strickland**: and quoted in **Mohr v. State** , 584 So. 2d 426, 430 (Miss. 1991):

> Under the first prong, the movant 'must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Here there is a strong presumption of competence. Under the second prong, the movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' The defendant must prove both prongs of the test. Id. 698.

In **Hurst v. State** 811 So.2d 414, 418 (¶15) (Miss. App. 2001), the Court found that Hurst was not entitled to relief. While Hurst claimed he "expected" a lesser sentence, there was no record evidence of "any reliance upon a firm representation of a lesser sentence."

> ¶ 15. Though it could be argued that Hurst expected a lesser sentence because Walsh told him that the best he could expect was probation, precedent clearly distinguishes between the mere expectation of a lesser sentence and a reliance upon a firm representation of a lesser sentence. A mere expectation, though reasonable, is generally not sufficient to merit relief. **Myers v. State**, 583 So.2d 174, 177 (Miss.1991). Having reviewed the record, we find that the decision of the trial judge was not manifestly in error or contrary to the weight of the evidence, and we can therefore not reverse on the basis of this issue. **Foster**, 639 So.2d at 1281.

While Morris' sister and brother in law filed affidavits, the appellee does not think they provided any basis for "a reliance on a firm representation of a lesser sentence." There was certainly no objective basis for believing that Morris would be given "time served" based upon his pre- trial detention. C.P. 141-150.

The record also reflects that not only are the affidavits of his sister and brother in law "hearsay," they are "identical" word for word with regard to their statements about alleged telephone conversations with Morris' guilty plea counsel. C.P. 143;146. These conversations were also admitted to have occurred a month before entry of Morris's "open plea."

Further, the record cited above indicates that the allegations by Morris about what he was led to believe were "contradicted" by his own sworn statements under oath.

> My younger sister Deborah Morris-Kern and her husband Glenn confirmed my belief as they had conversed with Thomas Fortner in August of 2005. Those conversations convinced my sister and husband that I would be released soon after entering an open plea of guilty after I had completed serving one year. C. P. 149.

In **Mills v. State** 986 So.2d 345, 350 (¶14) (Miss. App. 2008), the Court found that Mills' answers under oath contradicted his assertions in his petition for post conviction relief. The court affirmed the trial court's denial of relief on a motion for post conviction relief.

> ¶14. We find that the record in today's case contradicts Mills's assertion that his counsel promised him that he would receive a maximum sentence of twenty-four months' imprisonment, but even if such a promise had been made, the trial court, during the plea qualification hearing, made it clear that the court would not be bound by the promise.FN2

The appellee would submit that the record cited supports the trial court's denial of relief as to any ineffective assistance of counsel. There was no affidavit from guilty plea counsel. And there is totally no basis in the record for finding that Morris was provided with any "firm representation" for a lenient sentence. The affidavits by relatives who did not testify at his sentencing did not provide any such support.

This issue is lacking in merit.

PROPOSITION II

THIS ISSUE WAS WAIVED. AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION DURING SENTENCING.

Counsel for Morris argues that Morris did not enter voluntary and intelligent pleas at his guilty plea hearing. He did not do so because in addition to being allegedly mislead as to his possible sentences, the trial court failed to advise him of the maximum sentences for sexual battery and gratification of lust. Additionally, the court did not allow his two additional witnesses to testify on his behalf at his sentencing hearing. Appellant's brief page 8-12.

The record reflects that no contemporaneous objection was made during sentencing by Morris or his counsel. R. 1-25.

In **Farmer v. State** 770 So.2d 953, 959 (¶20) (Miss. 2000), the Supreme Court stated that failure to make a contemporaneous objection during sentencing waived the issue on appeal.

> Farmer further notes that the State made similar hearsay statements regarding Siklas's fear of Farmer. No objection to these statements appears in the record. Failure to make a contemporaneous objection to statements offered during sentencing waives the issue for appeal purposes. **Gatlin v. State**, 724 So.2d 359 (¶ 50) (Miss.1998).

Additionally, the record reflects that Morris and his counsel filed a sworn "Petition To Enter A Guilty Plea" prior to his pleading guilty. C.P. 16-19. In that petition, Morris acknowledged that his guilty plea counsel had informed him of the maximum punishment for his indicted offenses. It clearly stated as seen on page 2 that the maximum sentence for sexual battery was "thirty years," and "fifteen years" was the maximum for gratification of lust. C.P. 17.

> "The punishment which the court may impose for this crime that I am charged with is as follows: gratification of lust, fifteen years maximum, sexual battery thirty years maximum."C.P. 17.

The record further reflects that Morris' guilty plea counsel certified that he had "discussed the contents of the petition" with Morris. C. P. 19. Guilty plea counsel also testified under oath at

the guilty plea hearing that he believed that there was nothing preventing Morris from pleading guilty voluntarily and intelligently. C.P. 9-10.

In **Ward v. State**, 879 So. 2d 387, 390 (¶11) (Miss. 1991), the Court found that the a "plea petition" may be used to discredit contradictory statements in an appeal from a denial of relief.

The record reflects that during sentencing, the trial court heard not only from Mr. Morris but also from his daughter and sister in law. This was after the trial court heard from the victim, Ms. Christie Giddings and her mother, Mrs. Jeannine Giddings. R. 1-9. Mr. Giddings, the victim's father, was also present at the hearing. He did not testify. The Giddings who testified requested that Morris be given the maximum sentence for his abuse and mistreatment of the victim. R. 24-25.

There was no objection at the hearing to the number of witnesses speaking on Morris' behalf. R. 1-24. The record reflects that the trial court heard from both Morris, his daughter, and his sister -in-law. R. 1-24. The Court also read letters written on his behalf by friends as well as a pre-sentence investigative report prior to sentencing. R. 9.

In **Skipper v. South Carolina**, 476 U.S. 1, 90 L. Ed 1 (1986), relied upon by Morris, the trial court in a death penalty case refused to hear testimony from two additional witnesses about Skipper's "good adjustment" during his time spent in jail. This was during the separate sentencing phase trial before a South Carolina death penalty jury.

The record reflects that this was not a death penalty case. There was no separate jury trial for sentencing. And the record reflects that the trial court did not deny Morris the right to be heard in support of mitigating factors prior to sentencing. Rather the record reflects no such objection or argument was made to the court at sentencing about his need for additional mitigation testimony. R. 1-25.

The record reflects that the trial court had the benefit of a pre-trial sentencing report requested

by Morris's guilty plea counsel as well as letters from Morris' friends. R. 9.

In **Willie v. State** 585 So. 2d 660, 677 (¶ 34) (Miss. 1991), the court found no reversible error in limiting the number of witnesses under the facts of that case. In that death penalty case, there was no contemporaneous objection, and the record reflected in that case, as it does in the instant cause, that Willie chose the number of witnesses he would call on his behalf.

> In the instant case, the trial judge improperly suggested that he might limit the number of witnesses because he could not have known to what each witness would testify. However, Willie, himself, did the actual limiting. Finding no limitation by the judge as to the number of witnesses, or a contemporaneous objection by Willie to the judge's suggestion, we find that this assignment of error has no merit.

In **Morgan v. State**, 793 So.2d 615, 617 (¶ 9) (Miss. 2001), the Supreme court found that unless there were errors so egregious as to result in a fundamental miscarriage of justice the alleged errors would not be considered "plain error."

> ¶ 9. The plain error rule is codified in Miss. R. Evid. 103(d). It provides that nothing precludes the Court from taking notice of plain errors affecting the substantial rights of a defendant, even though they were not brought to the attention of the trial court. If a party persuades the court of the substantial injustice that would occur if the rule were not invoked, the court may invoke the rule. See **Edwards v. Sears, Roebuck & Co.**, 512 F.2d 276 (5th Cir.1975). "Only an error so fundamental that it generates a miscarriage of justice rises to the level of plain error," however. **Gray v. State**, 549 So.2d 1316, 1321 (Miss.1989); **Kuehne & Nagel** (AG & Co.) **v. Geosource**, Inc., 874 F.2d 283, 292 (5th Cir.1989).

The record from the sentencing hearing does not indicate any procedural or substantive irregularities occurred which could be considered error, much errors serious enough to have resulted in an injustice to Morris. R. 1-25.

The appellee would submit that the record cited above supports the trial court's denial of relief. C.P. 151-152. Morris presented two witnesses on his behalf as well as spoke on his own behalf. The trial court heard only one witness in addition to the victim during the hearing.

There is no basis for finding guilty plea counsel's failure to object to the number of

witnesses speaking would have in any way altered the outcome of his sentencing hearing.

This issue was not only waived for failure to object, but it is also lacking in merit.

PROPOSITION III

THE TRIAL COURT PROPERLY DENIED MORRIS'S MOTION FOR POST CONVICTION RELIEF.

In Morris' appellate brief he lists four issues in his statement of the issues, but only presented formal argument on three. See appellant's brief page v , and vii.

It would appear to the appellee that the trial court's alleged error in not acknowledging supposed error during sentencing was combined with proposition two on pages 6-7 of appellant's brief.

Therefore, as stated under the previous proposition II, the appellee would submit that this issue was waived for failure to object during sentencing to the number of witnesses who were heard. This would be witnesses asking for a lenient sentence for Morris. As stated above, the record reflects that not only was this issue waived, it was also lacking in merit. The trial court did not refuse to hear additional witnesses for Morris because there was no such request. R. 1-25.

The trial court heard from more witnesses for Morris than it did from the victim. R. 1-24. In addition, the trial court did not give Morris a maximum sentence but rather two "concurrent" ten year sentences. The record reflects that had Morris gone to trial and been found guilty, then he could have received the equivalent of a life sentence for his thirteen different felonies.

In **Branch v. State** , 347 So. 2d 957, 958 (Miss. 1977), this Court state that "[t]here is a presumption that the judgment of the trial court is correct and the burden in on the Appellant to demonstrate some reversible error to this court."

This issue was not only waived, it is also lacking in merit.

PROPOSITION IV

THE RECORD REFLECTS THAT MORRIS' PLEAS WERE VOLUNTARILY AND INTELLIGENTLY ENTERED.

Morris' appeal counsel argues that Morris' pleas were not voluntarily and intelligently entered in the instant cause. He argues that the failure of the trial court to advise Morris of the maximum sentences for his felonies during the guilty plea hearing, and the three affidavits from Morris, his sister and brother in law were sufficient for showing that the trial court's order denying relief was "clearly erroneous." Appellant's brief page 8-11.

The record reflects that there was record evidence in support of the trial court's finding that Morris' plea was voluntarily and intelligently entered. C.P. 151-152. There was evidence for finding that he understood "the nature of the proceedings and the consequences of his plea." **Wilson v. State**, 577 So. 2d 394, 396-397 (Miss. 1991).

As shown under previous propositions, Morris stated in his "Petition To Enter a Guilty Plea" that he understood "the thirty" and "the fifteen year" maximum sentences for sexual battery and gratification of lust respectively. C.P. 17. He also stated under oath that he knew he was entering "an open plea." There was no recommendation for a sentence from the prosecution, and Morris acknowledged under oath knowing that the trial court could sentence him to "the maximum" sentences for his felony convictions. R. 7-8. He acknowledged knowing that eleven other felony charges would be dismissed for which he could have received the equivalent of a life sentence.

Morris stated that he understood that he was waiving his right to a trial with cross examination and a right against self incrimination. R. 8-9.

> Q. **Do you believe he's (guilty plea counsel) advised you of your constitutional rights and what it means to give those rights up and plead guilty?**
>
> A. **Yes.**

Q. **And do you understand what those constitutional rights were and what it means to give them up to the best of your ability?**

A. **To the best of my ability, yes, ma'am.** R. 9. (Emphasis by appellee).

Morris also stated that he had not been promised a "more lenient" sentence should he plead guilty, which contradicted his claim in his affidavit. R. 8. This would include any promise of leniency from his guilty plea counsel.

While Morris and his relatives filed affidavits claiming by implication that he was "mislead" as to his possible sentence, there was never any affidavit from his guilty plea counsel to support this nebulous claim. C.P. 43-53. Yet experienced guilty plea counsel is being accused of misfeasance in the performance of his duties.

See M. C. A. Sect. 99-39-9 (1)(d) and (e) for pleading requirements under "the UPCCRA". This requires a "separate statement of the specific facts" which Morris has in support of his claims for relief. It also includes affidavits of the witnesses "who will testify" in support of "the specific facts" material to Morris' claims for relief. If no affidavit is included for a witness knowledgeable about the claim for relief, then there is a need for a statement of "good cause why" his or her sworn statement could not be obtained.

As stated previously, there is neither an affidavit from trial counsel, or a statement of "good cause why" it could not be obtained included in the instant cause. M. C.A. Sect. 99-39-9(1)(e).

As shown under proposition II, this claim of being mislead as to his sentence contradicted Morris statements under oath in the record. Morris stated he knew sentencing could be "the maximum on each of the charges." R. 7-8. He also clearly stated that no one had promised him a lighter or "more lenient" sentence. R.8.

Q. **Has anyone promised you anything or threatened you in order to get you to plead guilty?**

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

Q. **Has anyone told you I'd be more lenient if you pled guilty?**

A. **No, ma'am.** R. 8. (Emphasis by appellee).

In addition, the affidavit from Mr. Morris does not state or imply that he relied upon "a firm representation" of a lenient sentence. This would be for pleading guilty on an "open plea." Rather his affidavit is about what he was led to believe by his relatives. They, in turn, based their alleged belief upon alleged conversations with Morris' guilty plea counsel. Morris has never claimed to have participated in those alleged conversations. And even if he had , the California relatives affidavits indicate these alleged conversations occurred a month prior to the entry of Morris' "open plea." C.P. 141-150.

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 which includes a petition to enter a guilty plea as well as a transcript from the guilty plea hearing indicates that Morris' plea was voluntarily and intelligently entered. There is

sufficient record evidence in support of the trial court's finding that Morris' pleas were validly entered without any evidence of deception by anyone as to his possible post conviction sentence. C.P. 151-152.

In **Dennis v. State** 873 So.2d 1045, 1048 (¶ 6-7) (Miss. App. 2004), the court found that the petitioner's plea petition was sufficient for establishing the he knew the maximum sentence for his convictions. This was in spite of the fact that the trial court did not explicitly state this during his guilty plea hearing.

> ¶ 7. Since Dennis was informed in his plea petition of the maximum and minimum sentences for burglary and arson, the trial judge's failure to verbally state the possible sentencing range during the plea hearing was harmless. **Thompson**, 724 So.2d at 1073 (¶ 14).

The Supreme Court found that the presumption of correctness to the trial court's finding applied in Ward's case. This was where there was documentary evidence in Ward's "Petition To Enter A Guilty Plea" indicating that he had been informed and understood the maximum sentence which could apply should he plead guilty.

Finally, the record indicates that this case could have possible unforeseen consequences for the appellant.

In **Myers v. State**, 583 So. 2d 174, 178 (Miss. 1991), this Court stated that if Myers should succeed in having his sentence invalidated that the State could try him on the charges. Should he be tried, then Myers could possibly receive the maximum sentence he had previously avoided as a result of his guilty plea with his counsel's assistance.

In Morris's case as previously state, should he be retried, and found guilty on all counts his sentence could greatly exceed "the concurrent" sentences he currently is serving.

> Secondly, should Myers prevail in the end, all of the substantive relief he could possibly receive on remand is vacation of his conviction and reinstatement of his not

guilty plea. The prosecution would then be free to put Myers to trial on the aggravated assault indictment and, upon conviction, demand the maximum sentence. M. C.A. Sect. 97-3-7(2) (Supp. 1987). That sentence, of course, could well exceed not only twelve years but sixteen years as well. Third, nothing said here precludes the possibility that Myers may have committed perjury, and should be prosecuted therefor.

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

CONCLUSION

The trial court's denial of relief 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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