IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TERRANCE CHANDLER — APPELLANT

VS. — NO. 2008-CA-1962-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TERRANCE CHANDLER **APPELLANT**

VS. **NO. 2008-CA-1962-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

TERRANCE CHANDLER appeals from the denial of a motion for post-conviction relief styled "First Amended Motion to Correct Judgement and Sentence" filed on November 1, 2006, in the Circuit Court of Oktibbeha County, James T. Kitchens, Jr., Circuit Judge, presiding.

At the time of his plea of guilty on April 26, 2006, to possessing, within 1500 feet of a church, 473 grams of powder cocaine with the intent to distribute, Chandler was a twenty-seven (27) year old male with a black belt in karate and nearly 3 years of college. (C.P. at 25, 31, 67)

Regrettably, he was also a dealer in cocaine. (C.P. at 10-12)

Upon sentencing Chandler on May 5, 2006, to thirty (30) years in the custody of the MDOC for possessing cocaine within 1500 feet of a house of worship, the circuit judge remarked that since this is now a 25% crime, ". . . whatever sentence I give you, you'll serve 25 percent of that." (C.P. at 13, 16)

Chandler claims the circuit judge committed reversible error in denying his motion to correct

judgment and sentence because there is an ambiguity in the sentence which must be resolved in his favor. According to Chandler, the trial court's intent in sentencing Chandler was that he serve only seven and one-half (7 ½) years in the MDOC. He invites this Court to issue an order declaring that he must be released after serving only 25% of his sentence. (Appellant's Brief at 8)

STATEMENT OF FACTS

Terrance Chandler is a twenty-seven (27) year old male with no previous criminal history. (C.P. at 9, 67) He has completed nearly three (3) years of college and can both read and write. (C.P. at 25)

On April 26, 2006, Chandler entered an "open plea" (C.P. at 22, 33) of guilty to the possession, within 1500 feet of a church, of 423 grams of powder cocaine with the intent to distribute. (C.P. at 21-36)

After taking Chandler's open plea and ascertaining it was knowing, intelligent, and voluntary, Judge Kitchens deferred sentencing pending a presentence investigation and report. (C.P. at 22)

Nine (9) days later, on May 5, 2006, the matter came on for sentencing. After hearing testimony in both mitigation and aggravation, testimony which is not a part of the record (C.P. at 8), Judge Kitchens, prior to actual sentence imposition, made the following observations *ore tenus*:

> BY THE COURT: * * * The legislature has given you some measure of mercy. This used to be an 85 per cent crime. It's now a 25 percent crime. Even if I gave him the maximum, 60 years, he would only be there 15 years.
>
> * * * * * *
>
> As I've said, this is a 7 - - 25 per cent crime, and I've thought about that when I've sentenced, and I've found out - - I've called to check on that, so whatever sentence I give you, you'll serve 25 percent of that.
>
> Accordingly, Mr. Chandler, it is the judgement of this Court

> in this cause number, 2006-0066-CR, that you be sentenced to serve a term of 30 years in the custody of the Mississippi Department of Corrections.
>
> When you complete **whatever part of that 30-year sentence you'll serve**, you'll be on post-release supervision for five years. * * *
>
> The post-release supervision, which is a form of probation that will follow after you complete **whatever part of this sentence you've got to serve** is as follows: * * *
>
> * * * * * *
>
> BY THE COURT: So that any - - both sides will know, I could have given him 60 years. That would have amounted to 15, under the statute. (C.P. at 46-47) [emphasis ours]

On October 26, 2006, Chandler filed a motion to correct judgment and sentence. (C.P. at 2-3) An amended motion was filed on November 1, 2006. (C.P. at 5-6)

According to Chandler's motion to correct judgment and sentence, the intent of the trial judge was that he serve no more than 25% of his 30 year sentence or 7 ½ years. Chandler later learned he would be required to serve 30 years with a tentative/maximum discharge date of 2033. (C.P. at 4; R. 5)

This did not sit well with Chandler, a first offender, who laments it was clearly the intent of the circuit judge to impose a sentence tantamount to 25% of 30 years or only 7 ½ years for Chandler to serve. (Appellant's Brief at 7-8)

Specifically, Chandler claimed in his motion that "[i]t was the intent of the Court, through its pronouncement from the bench, that defendant would serve 25% of his sentence [and] that [t]his intent has been defeated by the actions of MDOC." (C.P. at 5)

A post-conviction evidentiary hearing was conducted on August 1, 2008, for the purpose of adjudicating this matter. (R. 1-11)

On November 5, 2008, Judge Kitchens issued a ruling declaring, *inter alia*, that "[m]ost assuredly, this Court did not intend to give just a seven and an half (7 ½) year sentence in the largest possession of cocaine with intent to distribute case that had ever come before this court under the set of facts that this court has set forth above." (C.P. at 54; appellee's exhibit A, attached)

SUMMARY OF THE ARGUMENT

Following an evidentiary hearing Judge Kitchens, the sentencing judge, found as a fact that "[m]ost assuredly, this court did not intend to give just a seven and an half (7 ½) year sentence in the largest possession of cocaine with intent to distribute that had ever come before this court under the set of facts that this Court has set forth above." (C.P. at 54; appellee's exhibit A, attached)

This finding of non-intent was not clearly erroneous. What can be greater evidence of one's non-intent than an explanation from the declarant himself as to what his intent was not?

On two occasions Judge Kitchens mentioned completion of "whatever part of that 30-year sentence you'll serve . . . " (C.P. at 16) Such is not indicative of an intent to impose a maximum sentence of only 7 ½ years.

Chandler's thirty (30) year sentence, which was within the limits prescribed by statute, was the sentence pronounced both *ore tenus* and in the sentencing order itself. (C.P. at 16, 70)

The plea transcript reflects quite clearly that Chandler entered his "open" plea of guilty with a full awareness " . . . the possible sentence is 20 years [minimum] to 60 years [maximum] imprisonment" and that no one had promised him he would receive a lighter sentence, or probation or any other form of leniency in exchange for his plea." (C.P. at 67)

Paragraph 3. of the Certificate of Counsel signed by Chandler's lawyer certifies the following: "I have explained the maximum and minimum penalties for each Count to the Defendant, and consider him competent to understand the charges against him and the effect of his petition to

enter a plea of guilty." (C.P. at 69)

There was no reliance by Chandler on a promise, or even a mild suggestion, that his actual incarceration would not exceed 7 ½ years; rather, Chandler's guilty plea was clearly knowing, intelligent and voluntary. Chandler does not argue otherwise.

The truth of the matter is that Judge Kitchens found as a fact during the evidentiary hearing that " . . . most assuredly, this court did not intend to give just a seven and an half (7 ½) year sentence in the largest possession of cocaine with intent to distribute case that had ever come before this court under the set of facts that this Court has set forth . . ." (C.P. at 54; appellee's exhibit A, attached)

The Court of Appeals will not disturb a trial court's dismissal of a motion for post-conviction relief unless it was clearly erroneous. **Mayhan v. State**, No. 2007-CP-01078-COA decided June 6, 2009 (¶6), slip opinion at 3 citing **Williams v. State**, 872 So.2d 711, 712 (¶2) (Miss.Ct.App. 2004).

Judge Kitchens's finding of fact with respect to intent was not clearly erroneous.

While it is true that issues of law are reviewed *de novo*, it cannot be said as a matter of law that the intent of the trial court was to sentence Chandler to a term of incarceration not greater than 7 ½ years.

We respectfully submit the trial court's post-plea calculations and side comments that Chandler would have to serve 25% of the thirty (30) year sentence imposed, whether right or wrong, carries no greater weight or significance in this case than a prediction by the judge that Chandler would be served steak, potatoes, and mushroom gravy, together with a glass of red wine, every day by the MDOC but was given in their stead a daily ration of water and "pigs in the blanket."

ARGUMENT

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN DENYING POST-CONVICTION RELIEF.

In his appeal to this Court, Chandler claims he received more than his just desserts because when he got to prison he was informed he would have to serve more time than 7 ½ years. Crying "foul," Chandler filed a motion to correct judgment and sentence contending " [i]t was the intent of the Court, through its pronouncement from the bench, that defendant would serve 25% of his sentence, [and] [t]his action has been defeated by the actions of the MDOC." (C.P. at 5-6)

Chandler does not complain his guilty plea was involuntary for this reason. Nor could he. The allegedly ambiguous remarks complained about were uttered on May 5, 2006, during Chandler's sentencing hearing. (C.P. at 7-18) Chandler's open plea of guilty, on the other hand, had been entered a week earlier on April 26, 2006. (C.P. at 21-36) No *quid pro quo* exists in this case.

The posture of Chandler's appeal is controlled, at least in part, by **Taylor v. State,** 766 So.2d 830, 833-34 (Ct.App.Miss. 2000), which held, *inter alia*, that a trial court's ambiguous statement regarding the defendant's sentence did not render his guilty plea involuntary where, as in the case *sub judice*, the overall explanation during the guilty plea was clear. We quote:

> The only possible defect here is that at one point the trial judge literally said that after serving eighty-five percent of twenty years he could be eligible for release. However, instead of seventeen years, Taylor actually had to serve 25.5 years before release under the present statutory restrictions on early release. The rest of the trial judge's lengthy explanation correctly stated that Taylor would receive two fifteen year sentences, totaling thirty years and not twenty, and he would need to serve eighty-five percent of any sentence. We do not find that a defendant who has pled guilty must be allowed to withdraw his plea just because at one stage during the proceedings the trial judge may either have spoken incorrectly or confusingly. It is the overall clarity of what the court informed the accused that is central. The fulcrum on which the right to withdraw a plea pivots is whether

> the accused's plea was involuntary, which in this context would mean that due to an incorrect explanation by the court he was misled about the minimum sentence that he actually would have to serve. *Id.* at 1063-64.

Chandler, unlike Taylor, does not assail the voluntariness of his guilty plea; rather, he assails the duration of his sentence based upon his own interpretation of the trial court's remarks as to the minimum/maximum sentence.

We note with interest the following observations made by Judge Kitchens during the sentencing hearing conducted on May 5, 2006:

> BY THE COURT: * * * The legislature has given you some mercy. This used to be an 85 percent crime. It is now a 25 percent crime. Even if I gave him the maximum, 60 years, he would only be there 15 years.
>
> And I know - - I want - - I want - - I've been thinking about his, and I wanted folks to know, I sentenced a young man the other day, Timothy Gandy, possession of cocaine. He got six years in the custody of the Mississippi Department of Corrections, and he got five years post-release. He had 2.53 grams, and he got six years. 2.53 grams.
>
> Mr. Chandler has 473 grams. What is that, 200 times that? Two-hundred times that.
>
> And Mr. Gandy's was crack cocaine. That pound of powder right there is probably a couple of pounds of crack, if you know what you're doing, at least.
>
> So what do I do with you, Mr. Chandler? What do I do? (C.P. at 13)

Given the quality and quantity of the contraband possessed in Chandler's case, it would not make good sense for the judge to have given Chandler only 7 ½ years.

In his order denying post-conviction relief, Judge Kitchens asserted:

> "Actually, the Court's comments during the sentencing hearing were the Court's concerns that the state parole board would

> allow this Petitioner to serve only 25% of the sentence imposed by this Court." (C.P. at 53)

Judge Kitchens also stated in his order denying post-conviction relief that "[t]he prospect of early release was especially disconcerting in this case due to the surrounding circumstances." (C.P. at 53)

The federal cases cited by Chandler all point to a discernment of the district court's intent in cases where there is a sentence ambiguity. There is no ambiguity here, but even if there was, Judge Kitchens made clear his intent in his order denying post-conviction relief. That intent is worth repeating again here: "Most assuredly, this Court did not intend to give just a seven and an half (7 ½) year sentence in the largest possession of cocaine with intent to distribute case that had ever come before this court under the set of facts that this Court has set forth above." (C.P. at 54)

The circuit judge did not err in denying post-conviction relief because Chandler has failed to establish by a preponderance of the evidence the intent of the judge was to impose a 7 ½ sentence. Indeed, the judge stated in plain and ordinary English this was "most assuredly" not his intent at all. Accordingly, there is no sentence requiring correction or reformation.

The sentence imposed for cocaine possession is certainly within the limits prescribed by statute. Accordingly, it is neither disproportionate to the severity of the offense nor a product of an abuse of judicial discretion. **Williams v. State,** 757 So.2d 953 (Miss. 1999); **Smith v. State,** 569 So.2d 1203 (Miss. 1990).

It is elementary "[t]he burden is upon [Chandler] to prove by a preponderance of the evidence that he is entitled to the requested post-conviction relief." **Bilbo v. State,** 881 So.2d 966, 968 (¶3) (Ct. App.Miss. 2004) citing Miss.Code Ann. §99-39-23(7) (Rev.2000).

We respectfully submit the trial judge did not abuse his judicial discretion in finding that

Terrance Chandler failed to do so here.

The record reflects that Chandler entered an "open" guilty plea leaving to the discretion of the circuit judge the duration of the sentence to be imposed.

Chandler's "Petition to Enter Guilty Plea" is a matter of record at C.P. 16-23. Under the trustworthiness of the official oath, Chandler told Judge Kitchens in para 8. he knew that if he entered a plea of guilty the possible sentence would be 20 years minimum to 60 years maximum. (C.P. at 67) Thus, Chandler, then and there at the time of his plea, was well aware the minimum sentence was 20 years. This is a far cry from his claim here and now that the intent of the judge was to give him 7 ½ years.

"When the accused's sworn statements at a plea hearing are inconsistent with an affidavit that he files in support of [a] post-conviction petition, a summary dismissal of the petition is justified." **Taylor v. State,** *supra*, 766 So.2d 830, 834 (Ct.App.Miss. 2000). The same logic would apply here where, inconsistency notwithstanding, the post-conviction movant is granted an evidentiary hearing.

In paragraph 12. of his petition to enter plea of guilty, Chandler declared that no one had promised or even suggested he would receive a lighter sentence, or probation, or any other form of leniency if he plead guilty. (C.P. at 67)

The guilty plea transcript is also a matter of record at R. 21-36.

Chandler has attached to his appellate brief a copy of a newspaper article from the Starkville Daily News. It cannot be considered here because it is not a part of the official record. "[T]his Court is limited to the trial court record when reviewing a claim on appeal." **Mayhan v. State,** No. 2007-CP-01078-COA decided June 16, 2009 (¶ 23),slip opinion at 9 [Not Yet Reported].

"The burden is on the defendant to make a proper record of the proceedings." **Genry v. State,** 735 So.2d 186, 200 (Miss. 1987). Ordinarily this Court will not rely upon facts supplied in

the briefs alone. **Genry v. State,** *supra*, 735 So.2d 186, 200 (Miss. 1999); **Wortham v. State,** 219 So.2d 923, 926-27 (Miss. 1969).

As stated in **Mason v. State,** 440 So.2d 318, 319 (Miss. 1983), this Court " . . . must decide each case by the facts shown in the record, not assertions in the brief, *however sincere counsel may be in those assertions.* Facts asserted to exist must and ought to be definitely proved and placed before [this Court] by a record, certified by law; otherwise, we cannot know them."

We invite this Court to reject Chandler's claims targeting the duration of his sentence. The sentence imposed was thirty (30) years, which is within the limits prescribed by statute.

The type and duration of a sentence has always been a matter within the discretion of the trial judge. A sentence will not be reviewed if it is within the limits prescribed by statute. **Reynolds v. State,** 585 So.2d 753 (Miss. 1991; **Moore v. State,** 873 So.2d 129 (Ct.App.Miss. 2004).

We reiterate.

The sentence imposed was definite and within statutory limits and did not constitute an abuse of judicial discretion. **Hart v. State,** 639 So.2d 1313 (Miss. 1994); **Stromas v. State,** 618 So.2d 116 (Miss. 1993); **Moore v. State,** 873 So.2d 129 (Ct.App.Miss. 2004), reh denied; **Brown v. State,** 872 So.2d 96 (Ct.App.Miss. 2004); **Miller v. State,** 870 So.2d 667 (Ct.App.Miss. 2004) [Appellate court reviews a denial of post-conviction relief under an abuse of discretion standard]; **Miles v. State,** 864 So.2d 963, 968 (Ct.App.Miss. 2003), reh denied ["Sentencing is within the complete discretion of the trial court and [is] not subject to appellate review if it is within the limits prescribed by statute."]

Chandler has failed to demonstrate by a preponderance of the evidence his sentence was anything less than 30 years. It was clearly neither excessive or disproportionate to the circumstances

of the offense charged or the character of the offender. *See* **Falconer v. State,** 832 So.2d 622, 623 (Ct.App.Miss. 2002) [Petitioner, a first offender, failed to demonstrate any unconstitutional dimension to his sentence, as it was within the limits of the statutory sentencing scheme.]

CONCLUSION

In entering his open plea of guilty, Chandler did not rely one whit upon any assurances by the prosecutor, the court, or his own lawyer that he would only serve 7 ½ years for his offense. Both the oral pronouncement of the sentence as well as the sentencing order itself reflect the duration of the sentence imposed for the offense - " . . . a term of thirty (30) years in the custody of the Mississippi Department of Corrections." (C.P. at 16, 70-72) This is not a case where the defendant failed to get what he was promised.

Judge Kitchens expressions of his own intent in his order denying post-conviction relief was a finding of fact that will not be disturbed unless clearly erroneous or manifestly wrong. Neither contingency exists here.

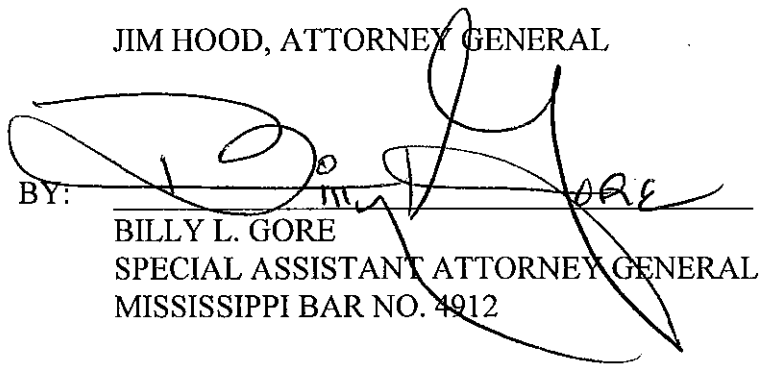
Appellee respectfully submits this case is devoid of any claims worthy of a reversal of the trial court's decision denying Chandler's motion to correct judgement and/or sentence. Chandler's plea of guilty was clearly voluntary and his sentence definite.

Accordingly, the judgment entered in the lower court denying Terrance Chandler's motion for post-conviction relief in the form of a motion to correct judgment and sentence should be

forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL



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IN THE CIRCUIT OF OKTIBBEHA COUNTY, MISSISSIPPI
OCTOBER TERM, 2008

10-5

TERRANCE CHANDLER — PETITIONER

VS. — CAUSE NUMBER 2008-0057-CV

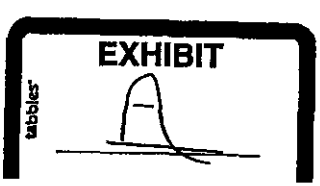
STATE OF MISSISSIPPI — RESPONDENT

ORDER

Came on to be heard this day the above styled and numbered post-conviction matter; and the Court, after having reviewed the record of proceedings in the trial court, the petition to enter guilty plea, the plea colloquy, the sentencing order, and having heard oral argument from counsel; is of the opinion that this petition is not well taken.

The Petitioner has filed a Motion to Correct Judgment and Sentence seeking to have the Court reduce his sentence based on statements made by the Court during the sentencing phase of his guilty plea. After reviewing the transcript of the sentencing hearing and listening to oral argument, the Court finds that the Petitioner misinterpreted certain of the Court's comments concerning the percentage of time the Petitioner would have to serve on his sentence. The Petitioner contends that the court gave him an excessive sentence because the Court had calculated that the Petitioner would only have to serve a lesser percentage of that time.

Actually, the Court's comments during the sentencing hearing were the Court's concerns that the state parole board would allow this Petitioner to serve only 25% of the sentence imposed by this Court. The prospect of early release was especially disconcerting in this case due to the surrounding circumstances. Specifically, this court notes that the Petitioner possessed one (1) pound of cocaine with the intent to distribute; he possessed electronic scales, and he had a ledger of sorts that contained the names of a number of local street level drug dealers with numerical



amounts written by their names. Further, one of the dealers on the Petitioner's list was tried and convicted as an habitual offender on two (2) sale of cocaine charges; this dealer was subsequently sentenced by Judge Lee Howard to serve one hundred twenty (120) years in the custody of the Mississippi Department of Corrections.

The Petitioner pled guilty in an open plea. Pleading open leaves the sentence to the discretion of this Court. The Court did not engage in plea negotiations and did not promise the Petitioner any sentence to get him to plead guilty. Given the very large amount of cocaine, one pound, along with the court's belief that the Petitioner was supplying most of Starkville's street level dealers with cocaine to re-sell, this Court believes that the Petitioner should serve most, if not all, of the thirty (30) year sentence imposed upon him.

Be that as it may, the Legislative branch of government has entrusted to the Executive branch, e.g. the State Parole Board, the decision as to what a thirty (30) year sentence imposed by the Judicial branch of government actually means in terms of real time to serve. Most assuredly, this Court did not intend to give just a seven and an half (7 ½) year sentence in the largest possession of cocaine with intent to distribute case that had ever come before this court under the set of facts that this Court has set forth above.

THEREFORE, for the reasons herein given, the Petitioner's post-conviction motion to correct his sentence is hereby denied.

The Circuit Clerk is directed to send a copy of this order to all counsel of record.

SO ORDERED, this the 5th day of November, 2008.

OKTIBBEHA COUNTY
NOV 05 2008
Angie McClinnis
CIRCUIT CLERK

James T. Kitchens
CIRCUIT JUDGE

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CERTIFICATE OF SERVICE

I, Billy L. Gore, 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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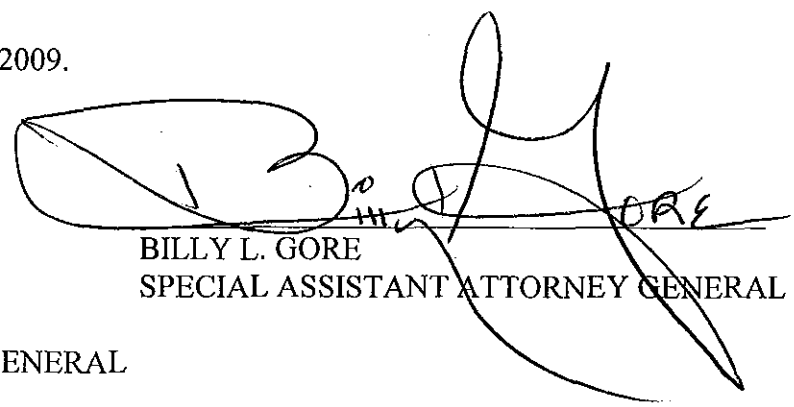
This the 26th day of June, 2009.



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